INDIA AND THE CHALLENGE OF STATELESSNESS

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A Review of the Legal Framework relating to Nationality

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A Review of the Legal Framework relating to Nationality

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Report submitted to

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New Delhi

॥ न्यायस्तत्र प्रमाणं स्यात् ॥

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FOREWORD

December 2, 2014

The issues that have a bearing on human rights and public policy have always been at the heart of National Law University, Delhi's work in the area of public law. I was therefore very happy for the opportunity and initiative that emerged through a dialogue between NLU, Delhi and the UNHCR Delhi office, which eventually became the current research study. With rapidly changing times and increasing mobility the issue of citizenship is both transforming from its conventional meaning and scope as well as making it simultaneously more vulnerable than ever before in human history. I hope this study report, though normative in its approach, will highlight and open up key issues upon which more in-depth socio-legal analysis could begin.

NLU, Delhi always engaged with national as well as inter-governmental institutions with great pride and enthusiasm. I am deeply pleased that the engagement with UNHCR began with a grant for conducting this study and I extend my sincere thanks to the UNHCR Delhi office. I do hope that this mutual institutional engagement and collaboration will grow further from strength to strength and contribute positively to the cause of better understanding of human rights in general and rights of those that of people who are in the nebulous state of statelessness in particular. NLU Delhi could benefit from these kinds of studies by bringing them into the classroom as specialist courses and special clinics. I am very hopeful of that possibility. Let me also congratulate the research team for conducting a serious study.

Prof. (Dr.) Ranbir Singh
Vice-Chancellor, National Law University, Delhi

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I wish to thank UNHCR for considering the study proposal and providing generous support, without which this study could not have been possible. The unbroken communication, patient feedback whenever required by the researchers, and generous time in extended conversations by the UNHCR regional office, Delhi, need special mention, for they made a qualitative difference to the final form of the report. I am also grateful to Prof. Ranbir Singh, Vice-Chancellor, NLUD, Prof. Krishna Deva Rao, Vice-Chancellor, NLUO, and Prof. G. S. Bajpai, Registrar, NLUD, for their unrelenting support all through the process of the research. A note of thanks is due to Ms. Diksha Munjal-Shankar for coordinating in the final stages of the publication. Finally, I would also like to thank the researchers for making this report a success.

Sitharamam Kakarala

LIST OF ACRONYMS

AAGSP	All Assam Gana Sangam Parishad
AASU	All Assam Students' Union
CEDAW	Convention to Eliminate Discrimination against Women
CHT	Chittagong Hill Tracts
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Cultural and Social Rights
MEA	Ministry of External Affairs
MHA	Ministry of Home Affairs
NCT	National Capital Territory
NGO	Non-Governmental Organization
NHRC	National Human Rights Commission
NPR	National Population Register
NRIC	National Register of Indian Citizens
PIL	Public Interest Litigation
UDHR	Universal Declaration of Human Rights
UIDAI	Unique Identification Authority of India
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees

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EXECUTIVE SUMMARY

The present report is a legal study attempting to analyse the core issues that interplay between nationality and statelessness in the Indian context. The study attempts at referring to all the relevant legal texts relating to nationality, published works relating to the issue of statelessness, and the available official reports of NGO organizations and UNHCR, for substantial examination of the issue at hand. Judicial decisions of the higher courts in India have also been referred. The study has sought to conduct a comprehensive analysis of legal framework concerning nationality in India, from the perspective of statelessness, based on a desk review of available material. In the study the term 'stateless' is as per the definition under Convention relating to the Status of Stateless Persons, 1954.

Nationality serves as a legal bond between an individual and the State, and brings along with itself a sense of identity and a set of rights. The commitment of the international community to prevent statelessness is reflected in the Universal Declaration of Human Rights, which affirms in Article 15 that “everyone has the right to a nationality”. The cornerstone for combating statelessness around the world is the 1954 Convention relating to the Status of Stateless Persons, and the 1961 Convention on the Reduction of Statelessness. However the prevention and reduction of statelessness would require a combined effort from all the States, as determination of a person's nationality is quintessentially a prerogative of State sovereignty.

Persons become stateless by falling in the gaps created by inconsistency between domestic nationality laws and the international framework. As a first step toward addressing this deprivation in the Indian context, this study has taken up a review of laws pertaining to nationality in the Indian legal framework, from the common structure put forth mainly by the 1954 and 1961 Conventions. While India has not yet acceded to the aforementioned Conventions of 1954 and 1961, there are several international instruments which India is party to, that are of further importance in protecting and promoting human rights, as well as for efforts to combating statelessness.

Who is a citizen of India?

Constitution of India is the primary legal instrument that lays down who is deemed to be a citizen of India. Article 5 of the Constitution of India, titled as 'Citizenship at the Commencement of Constitution of India', provides that any such person, who was or either of whose parents was, born in the territory of India, or who has been ordinarily resident in India for at least five years before the commencement of the Constitution, shall be deemed to be a citizen of India, if he had domicile in territory of India at such commencement. The Article is however silent on the definition of 'domicile' and has left the matter for Courts to interpret. By power under Article 11 of the Constitution of India to make laws for acquisition and termination of citizenship, the Citizenship Act was enacted in the year 1955. This Act, along with the Constitution, forms the epicentre for question of acquiring citizenship in India.

Citizenship of a child

One of the ways of acquiring citizenship under Citizenship Act, 1955 is by birth in India, if one of the parents is a citizen of India, while the other is not an illegal migrant. The Citizenship Act falls short of encompassing the position of a child born in the territory of India, where both parents may not be citizens of India or either of the parents may be without a nationality. The present provisions of the Citizenship Act do not provide nationality to children born in India who would otherwise be stateless, as given in Article 1 of the 1961 Convention on the Reduction of Statelessness. Further the term 'parent' has not been explained anywhere in the Citizenship Act to clarify whether it includes different sets of parents of a child, like 'unmarried parent', or 'adoptive parents', or 'biological parents' or 'surrogate parents', all of which are very much important in the scenario of conflict of nationality laws of different countries.

Further the citizenship of such children in India who are foundlings of unknown parentage poses a challenge in the light of existing provisions of Citizenship Act. The 1961 Convention on Reduction of Statelessness has laid down in Article 2 that in case of no proof to the contrary, a foundling found in the territory of a Contracting State shall be considered to be born in that country, to parents with nationality of that country. Citizenship Act does not cover such children who are found in India. As there are, in most of such cases, no ways in

which parentage as well as their nationality may be ascertained, the question of how nationality must be conferred to such children remains unanswered by the Citizenship Act.

Citizenship and Marriage

The report further analysis Sec 5 which makes provision for the persons who wish to acquire Indian citizenship on account of being married to an Indian citizen. According to Section 5 it is mandatory for such persons to be residing continuously in India for at least a period of seven years including twelve months immediately preceding the application for such registration. However, the Act is silent on position of such spouse of Indian citizen, where the marriage may have been dissolved before the stated period of seven years and the person may be left without any nationality. Further, the precondition for registration under this provision is that the person must not be an illegal migrant. It excludes, in effect, a person who may not have any documents to prove her/his nationality, and even after fulfilling all other criteria under this provision cannot get citizenship by registration under this provision.

Citizenship by Registration

The Citizenship Act provides for registration as Indian citizens, to such persons who are not citizens by any other provision of this Act or the Constitution of India, including a minor, a spouse of an Indian citizen, and a person generally. Such registration has to conform to the requirements laid down in this respect in Section 5 of the Citizenship Act. One such requirement is that the applicant should not be an illegal migrant. The report finds that this very condition erects an obstacle to assimilate those persons who may fulfil all other conditions under the provision, but may lack a previous nationality.

The registration of a minor as citizen of India requires that the parents of such minor must be Indian citizens. The Rules in this behalf given in the Citizenship Rules, 2009 require a declaration from the parent of such minor child stating that s/he is the legal guardian of the minor. However, the term 'parent' has not been explained to clarify the inclusion of a biological parent and an adoptive parent alike. This leaves a gap in understanding whether an adopted child can obtain registration as citizen under this provision or not. The provision also does not

clarify position of such a minor child in India, only one of whose parents is an Indian citizen, and the other may be stateless, or of unknown nationality.

Citizenship by naturalization

Citizenship by naturalization is envisaged under Section 6 of the Act. It puts forth that a person who is not an illegal migrant and has attained majority, may apply for naturalization in the prescribed form. However the Act as well as the Rules is silent on whether a stateless person may have the option of applying for the naturalization process under the Act so that s/he may become a citizen. The mention of 'illegal migrant' in this Section also practically rules out the probability of allowing a stateless person to apply for naturalization.

Renunciation of citizenship

The report also analyses the provisions relating to voluntary renouncement of citizenship by an Indian citizen of full age and capacity. Once such declaration renouncing the citizenship is registered, such a person ceases to be a citizen of India. The entire process happens notwithstanding that the person may or may not have acquired nationality of another nation. This creates a likelihood of statelessness and the current provision requires reconsideration bearing in mind Article 7 of the 1961 Convention. Further such renunciation under Section 8 of the Citizenship Act has a direct consequence on the citizenship of the minor child of such person which under the law also comes to an end. This provision appears to be skewed considering cases where one of the parents retains the India nationality and the other renounces, the benefit of retention of the Indian nationality through the other parent has not been indicated in the provisions.

Deprivation of citizenship

Section 10 of the Citizenship Act mentions circumstances under which the Central Government may deprive a person of Indian citizenship. These include fraud to obtain citizenship certificate or citizenship registration, disloyalty to the Constitution of India, imprisonment in any country within five years of registration or naturalization as Indian citizen, and residing outside India for seven years. The section further provides that before depriving a citizen of his citizenship a notice shall be served upon him, and that the Central Government shall refer the case to an Inquiry Committee. The report finds that neither the Act

nor the supplementing rules lay down any procedure or provision for ensuring that persons who are deprived of their nationality do not become stateless. This gap poses a risk for creation of statelessness, in respect of a person who is being deprived of his nationality under this section. Article 8 of the 1961 Convention is a reference point to be incorporated in the Indian Citizenship Act to prevent statelessness.

Identification of stateless persons

The protection of human rights of a stateless person, and the standard of treatment to which they may be entitled, is spelled out in the 1954 Convention relating to Status of Stateless Persons. For meting out the rights to a stateless person as per the international legal framework, as well as to devise legal and policy solutions for prevention and reduction of statelessness, a first step is to make identification of stateless persons possible.

The census in India, which is carried out under the Census Act, 1948, along with the Census Rules, 1990, is the only framework for creating a social, economic, demographic and numerical profile of India. However, this framework omits to take into consideration such population that may be without a nationality, or having unknown nationality.

An important step that may assist in identifying a newborn in India as stateless is registration of birth. In India the registration of birth of any child is governed by the Registration of Births and Deaths Act, 1969. While the Act makes the registration of all births in India mandatory, there is no mention in the Act about ascertaining the nationality of parents of a child, or even about the effect of nationality of parent(s) on the registration of birth of a child.

In India the Foreigners Act, 1946 is the primary law to regulate the entry, presence and departure of foreigners from India. Section 2(3)(a) of the Foreigners Act defines a foreigner as- “a person who is not a citizen of India”. The report finds this definition to not be clear about inclusion of stateless persons within it. A person who may be in possession of nationality of another nation but is present in India is as much a foreigner under this definition as is a person with no proof of identity on him to prove his nationality. The Foreigners

Act lays out the procedure for determination of nationality of a foreigner, in case a foreigner is recognized as a national of more than one foreign country, or his/her nationality is uncertain. The provision is silent about categorizing such a foreigner as stateless, even if s/he appears to be having no nationality after the determination process is over.

In India the Passports Act, 1967 governs the issuance and withdrawal of passports to Indian citizens as well as 'other persons'. While the Preamble to the Act mentions the term 'other persons', yet the Act does not explain it. Further, under the Passports Rules, 1980, a 'Certificate of Identity' may be issued to a stateless person residing in India, or a foreigner whose country is not represented in India, or a person whose national status is in doubt. In India the Passports Act and framework of Rules under it, is the only law which recognizes a category of persons by the term 'stateless' for issuing of certificate of identity. This is the only Act which caters to an extent, to the needs of the stateless person to have a record of their identity.

Assam Accord, 1985

In addition to the above legal provisions, the report attempts to understand, from the available literature, in the Indian perspective the position of persons covered under the Assam Accord, 1985. Sec 6A of the Citizenship Act has been inserted especially as a consequence of, and a supplement to, the Assam Accord. Under subsections (4), (5) and (6) of the Section, a person who has been detected to be a foreigner shall have the same rights and obligations as an Indian citizen for ten years from the date of detection, except for inclusion of his name in any electoral roll. After the said expiry of the ten years s/he was deemed to be a citizen of India for all purposes, unless s/he does not wish to be a citizen of India and makes such declaration under the Citizenship Act. The provision further states that the name of such person was to be re-enrolled in the respective electoral list. This appears a welcome provision, to facilitate prevention and reduction of statelessness on a large scale in India.

The Accord as well as the Citizenship Act leaves in limbo the nationality of persons who were found to have entered India after 25th march, 1971. Such 'foreigners' were to continue to be detected, deleted from electoral roll and expelled. The provisions governing such persons also does not provide for

determination of nationality of such persons, before deporting them to a country which may or may not accept them or naturalize them as citizens, thus putting them at the risk of becoming stateless.

Indo-Ceylon Pact, 1964

India shares its border with various countries, but the only bilateral treaty between India and a neighbouring nation on the issue of nationality, is the Indo-Ceylon Pact of 1964. This Pact was signed to ameliorate the conditions of a large number of persons who have been living without nationality in India as well as in Sri Lanka (Indian Tamils). The terms of the pact sought to give nationality to such people by either India or Sri Lanka, but the criteria for granting Indian or Sri Lankan citizenships to persons covered under the Pact was not stated clearly. Even after the abrogation of the Pact there have been a large number of such people applying for Indian citizenship but have not been granted the same. After demonstrating an affirmative approach to reduce statelessness through the Indo-Ceylon Pact, the actual effective implementation of the Pact in addressing the question of nationality of such persons is still in question .The follow up mechanism of the Pact on the question of repatriation has been slow and requires deeper deliberation on both sides of the border to amicably reduce statelessness.

Judicial trends in the approach towards statelessness

Even as glaring gaps exist in Indian nationality laws that pose a risk of creating statelessness or failing to prevent it, yet the Indian courts have witnessed fewer cases that discuss the potential of Indian nationality laws *vis-à-vis* statelessness. The report has traced the judicial approach on the question of nationality in certain cases where the potential creation of statelessness has been discussed. However the courts have refrained from defining or explaining the concept of statelessness in the cases. It is also pertinent to note that the 1954 and 1961 Conventions have not been used as a reference point for understanding statelessness, or the principles laid down in them have not been incorporated in any guidelines for subsequent cases where lack of nationality may lead to statelessness. The Courts have, however, taken a proactive and different approach to avoid the occurrence of statelessness by applying principles of equity and justice.

After attempting a comprehensive review of the legal framework that is in place on the issue of nationality, it seems that India is lacking the legal framework that would protect rights of stateless persons, though upholding of human rights has been an essential facet of India's commitment to international law. India still lacks a policy regime aimed at preventing and reducing statelessness, in line with the international framework. The two major gaps in the Indian legislative framework, reflected from the analysis of Indian laws from perspective of preventing and reducing statelessness, are (a) determination and identification of stateless persons, and (b) legislative provisions to further reduce and prevent statelessness.

The positive steps that have been taken in this respect may lack direction, as India is yet to accede to the 1954 and 1961 Conventions that form the backbone of the existing international framework on this issue. For ameliorating the conditions of stateless persons, the legislative framework has to take specific steps, directed at reducing statelessness, by adopting changes to assimilate stateless persons in mainstream community. In addition to that, specific legislations need to be introduced with the aim to prevent any further situations of statelessness. It must be reiterated that creation of positive obligations on India under international framework, by accession of the two Conventions, would be beneficial to this cause.

Based on the analysis of the legal framework relating to nationality in that have a bearing upon existing stateless persons and future statelessness, the report makes focused recommendations for adoption of suitable changes in India's legal and policy framework, so as detection, reduction and prevention of statelessness may be made possible. The recommendations proposed have been located as short-term and long-term initiatives, for amendments in the Indian legislative fabric relating to citizenship, as well as for laying groundwork for streamlined policy objectives on combating statelessness.

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SCOPE, OBJECT, AND METHODOLOGY

The problem of statelessness has gained attention at an international level in recent years, yet it broadly remains a blind spot in many a national regulatory framework. In this context, a closer scrutiny of the nationality laws of different countries, and attempts at harmonizing them vis-à-vis the international legal framework, could potentially pave the way for overcoming or mitigating the problem of statelessness. The current study aims to contribute to such a body of literature by attempting a comprehensive understanding and review of constitutional, legal and administrative provisions in India.

The Indian laws will be evaluated under the following thematic headings from the perspective of statelessness:

1. **Who is a citizen of India**– The primary and most pertinent question to consider is to know who is a citizen of India under the present constitutional and legal framework? This theme forms a starting point for discussions on citizenship in India.

2. **Citizenship of a child**– Citizenship, as a right, comes into the picture the moment a child is born. Creation of child statelessness, therefore, will be analyzed from the following angles:-
    a. Child born in the territory of India;
    b. Child born to Indian parents, outside the territory of India;
    c. Registration of minors as citizens;
    d. Children born aboard a ship, an aircraft or in transit; and
    e. Child found in India.

    Under this theme, the citizenship rights of a child will be analyzed within the Indian legal framework, with special emphasis given to lacunae in law that may lead to potential statelessness.

3. **Citizenship and marriage**– Marriage can have a direct effect on the nationality of persons in certain circumstances. The following are the primary issues on the basis of which the position in Indian nationality will be analyzed:
    a. The non-citizen spouse of an Indian citizen; and

b. The gender neutral right to acquire and pass on citizenship.

4. **Citizenship by registration and naturalization**– For those persons who do not obtain nationality at birth or by descent, the legal framework permits naturalization and registration of citizenship. In addition to understanding the provisions in this regard, this theme will examine whether these provisions house any gaps that can result in statelessness.

5. **Renunciation of nationality**–There may be circumstances where a person gives up or renounces her/his nationality. The law in this regard will be analyzed from the following points:
   a. Whether the person becomes stateless; and
   b. The effects of such renunciation on her/his children.

6. **Termination of nationality** – There are situations in which withdrawal of nationality is done automatically by the operation of law. In such a circumstance, the provisions have been analyzed from the perspective of:
   a. Whether the person becomes stateless on such termination; and
   b. The effect of such termination on his/her children.

7. **Deprivation of nationality**– There are circumstances under which a citizen may lose her/his nationality due to its withdrawal by the authorities of the state. In such a position, there are at least two aspects to be analyzed:
   a. Ascertaining that a person does not become stateless due to deprivation of nationality; and
   b. Recognizing the effects of loss of nationality on the children of such a person.

8. **Identification of stateless persons**– An important step in analyzing nationality laws vis-à-vis statelessness is to gauge whether the national legal framework allows a person to be categorized as 'stateless'. If the answer is in the affirmative, then one must identify what are the key

markers that help determine such categorization, and whether they are sufficient in law. In this context, the theme will examine relevant laws within the Indian legal framework.

9. **Persons covered under the Assam Accord, 1985**– In 1985, India made an internal agreement wherein and special provisions relating to certain persons under this agreement were inserted into the Citizenship Act, under Section 6A. Under this theme, the said provisions and the agreement have been examined, to see the extent to which they accommodate the concerns of reduction and prevention of statelessness.

10. **India's bilateral treaties**– The question of nationality in India for some persons may be understood better by examining bilateral agreements that India may have signed with any of its neighbouring countries. There is only one bilateral agreement, signed by India, which includes questions of citizenship:
    a. Persons covered under Indo-Ceylon Pact, 1964.

    Under this theme, the above-mentioned bilateral treaty will be examined from the vantage point of reduction and prevention of statelessness only in India.

Methodology

As a black letter law research, this report follows its established tradition by focusing on the explication of pertinent legal doctrines and their evolved normative and jurisprudential dimensions. Basic study of legal texts will be conducted to derive a logical and coherent structure, and then the nuances of relations of one set of rules to another will be analyzed. In this pursuit the study keeps the jurisprudence of the 1954 and 1961 UN Conventions on Statelessness in particular and the international law on human rights in general, as the normative foundation upon which the relevant Indian laws will be examined.

This study will investigate the nature and scope of India's present obligations under international law relating to or having implications for the concept of citizenship. These will include Conventions acceded to by India, as well as

India's bilateral agreements. The international legal instruments that India is party to, and which are of significance for analysis of the Indian nationality laws from the vantage point of statelessness, have also been briefly discussed. Furthermore, the study also reviews all the decisions of the higher judiciary in India that have a bearing on issues of citizenship and statelessness.

In order to present a substantial analysis of Indian legal framework from point of view of statelessness, efforts have been made to refer to as many relevant legal texts as possible that relate to nationality, scholarly works relating to the issue of statelessness, and available official reports of NGO organizations and UNHCR. Judicial decisions of the higher courts in India have been referred to, in order to trace the judicial approach in dealing with questions of nationality *vis-à-vis* statelessness. Relevant government reports, administrative orders, notifications, rules and policies referred to in this study are those that are available in the public domain. The scope of the study is a comprehensive analysis of the legal framework in India concerning nationality, from the perspective of statelessness, and is based on a desk review of available material. In the study, the term 'citizenship' and 'nationality' have been used interchangeably. The study only analyzes persons who are termed 'stateless' as per the 1954 Convention Relating to the Status of Stateless persons.

1. INTRODUCTION

'For many of us, citizenship only really matters when we travel abroad, when the Olympic Games are on, or when we vote in national elections. We do not think about our citizenship on a daily basis. For others, citizenship is an ever present issue, and often an obstacle. Because recognition of nationality serves as a key to a host of other rights, such as education, healthcare, employment, and equality before the law, people without citizenship- those who are 'stateless'-are some of the most vulnerable in the world.'[1]

Today's world requires us to 'belong' to one nation or another. The dynamics of the relationship between a State and an individual has evolved over the years, which has brought in a positive change by bringing in more rights and respective duties to people possessing a nationality. On the other hand it has also resulted in people falling through the cracks between domestic nationality laws that States enact, thereby leaving them bereft of any country's citizenship. They are, without doubt, one of the world's most invisible and under-represented communities— economically, socially, politically and culturally.[2] International human rights law has played a vital role in bridging this gap by creating a network of conventions that State parties may refer to in order to protect the fundamental rights of such people.

Being unaccounted for and invisible means that it is difficult to gauge how many stateless persons are there the world over, however, according to the latest UNHCR report, at least 10 million people are stateless worldwide.[3] In the absence of concerted efforts to ameliorate their conditions, stateless people in many countries may have very limited access to birth registration, identity documentation, education, healthcare, legal employment, property ownership, political participation and freedom of movement.

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[1] Goris, I., Harrington, J & Kohn, S. (2009). Statelessness: What It Is and Why It Matters. *Forced Migration Review* (32). Retrieved from http://www.fmreview.org/FMRpdfs/FMR32/04-06.pdf

[2] *Ibid.*

[3] UNHCR. (2014). *Global Trends Report 2014*. Retrieved from http://www.unhcr.org/5399a14f9.html

1.1. CONCEPT AND IMPORTANCE OF NATIONALITY

Nationality serves as a legal bond between an individual and the State.[4] It brings with itself not only a sense of identity but also a set of rights. The importance of nationality is that without it, people are generally excluded from the political process, especially the right to vote. Statelessness prevents people from fulfilling their potential and may have a severe knock-on effect for social cohesion and stability; it may even lead to communal tension and displacement.[5]

The Universal Declaration of Human Rights (1948), in its Article 15 affirms that 'everyone has the right to a nationality'. These words confirm the commitment of the international community to secure a legal link of nationality with a particular State to each and every person. This commitment also indicates that statelessness must be avoided, in all cases, through the possession of nationality. All sovereign states have in place their own procedure to grant nationality at the domestic level. Determining whether a person is a citizen is quintessentially a prerogative of state sovereignty. Therefore, to prevent and reduce cases of statelessness across the world, a combined effort from all states is required.

In general, States have in place a mixture of automatic and non-automatic modes for the acquisition of nationality.[6] Automatic acquisition refers to nationality that is automatically acquired at birth, based on *jus sanguinis* (i.e. birth to a national) or *jus soli* (i.e. birth on the territory). Automatic modes are those where a change in nationality status takes place by operation of law (*ex lege*). In contrast, non-automatic acquisition of nationality is one wherein an act of an individual or a State authority is required before a change in nationality status can take place, such as obtaining nationality through the process of naturalization.

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[4] UNHCR. (2014). *Protecting the Rights of Stateless Persons.* Retrieved from http://unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=519e20989&query=protecting%20the%20rights%20of%20stateless%20persons

[5] UNHCR. (2014). *Preventing and Reducing Statelessness*. Retrieved from http://unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=519e210a9&query=preventing%20and%20reducing%20statelessness

[6] UNHCR. (2014). *Handbook on Protection of Stateless Persons*. Retrieved from http://www.refworld.org/docid/53b676aa4.html

India has been facing the issue of statelessness since it became an independent nation. There is no official data available which accounts for the number of stateless persons or even stateless children in India. Few academic/research institutions as well as NGOs in India are the only places where stateless persons have been mapped and their paralyzed legal and human rights issues have been highlighted.

The cornerstone for combating statelessness in international law is two conventions i.e. the Convention on Status of Stateless Persons, 1954 and the Convention on Reduction of Statelessness, 1961. Till date about eighty States are party to the 1954 Convention, with number of accessions in the past three years prompted by UNHCR's Statelessness Campaign.[7] India has not acceded to either of the Conventions till date. Along with the two conventions, there are many other international instruments which are of vital importance in removing the inequality and marginalization of the stateless men, women as well as children, some of which India has acceded to. The International human rights law has played a pivotal role in the prevention of Statelessness through various provisions in international instruments, which have dealt with the right to nationality like Convention on the Rights of Child and International Covenant on Civil and Political Rights, etc.

1.2. UNDERSTANDING STATELESSNESS

Article 1 of the 1954 Convention Relating to the Status of Stateless Persons defines a 'stateless person' as a person who is not considered 'a national by any nation under the operation of its laws[8]. This definition, according to the International Law Commission, is now part of customary international law. The definition was deliberated upon in an expert meeting organized by UNHCR in Prato, Italy in 2010.[9] Article 1(1) of the 1954 Convention applies to persons who have no nationality at all, rather than to persons who have no 'effective' nationality. It must be understood that the concept, as well as the protection, of a 'stateless person' is different from that of a 'refugee', who is covered under the Convention Relating to the Status of Refugees, 1951. If a stateless person is also

[7] *Ibid.*
[8] UNHCR. (2010). *Expert Meeting - The Concept of Stateless Persons under International Law.* Retrieved from http://www.refworld.org/docid/4ca1ae002.html
See also *Supra* note 6
[9] *Ibid.*

a refugee, then s/he will be protected primarily under the Refugee convention.

This provision entails that being a national of a country depends on the laws of the nation concerned. However, for ascertaining citizenship or statelessness, it is usually sufficient to look at whether the individual concerned has legal links with a particular state, such being the country of her/his birth, country of nationality of parents, country of habitual residence, or country of nationality of the person's spouse.[10] If, after examination by the competent state authority, it is found that the person has no nationality, then s/he should be considered to satisfy the definition of a stateless person under Article 1(1) of the 1954 Convention. The Prato Conclusions also made a distinction between 'under the operation of its law' and 'by operation of law'. Under operation of its laws, both non-automatic and automatic methods of acquiring nationality, as well as deprivation of nationality, have been considered.

1.2.1. Statelessness and *de facto* statelessness

Statelessness is generally understood in two senses—*de jure* and *de facto.* Article 1(1) of the 1954 Convention establishes the generally accepted definition of a 'stateless person'. This definition is internationally understood to mean *de jure* statelessness, though the term has not *per se* been mentioned in both the 1954 and 1961 Conventions. The term *de facto,* on the other hand, has been referred to in the Final Act of the 1961 Convention.

It was agreed upon by the participants of the Expert Meeting at Prato that the term refers to persons who are outside the country of their nationality and are unable or unwilling to avail themselves of the protection of that country.[11] By the term '*unable* to avail oneself of protection', it implies circumstances that are beyond the will/control of the person concerned. Such inability according to the participants of the Expert Meeting, may be caused either by the country of nationality refusing its protection, or by the country of nationality being unable to provide such protection because, for example, it is in a state of war and/or does not have diplomatic or consular relations with the host country. Such persons do not qualify for protection under the 1954 Statelessness Convention. No regimes exist at the moment with regard to *de facto* stateless persons, who

[10] *Ibid*.
[11] *Ibid.*

are, therefore, covered under general international human rights law.

1.3. RELEVANT INTERNATIONAL INSTRUMENTS

The international community has put in place a common framework for countries to prevent and reduce statelessness within their domestic populations. The two main conventions in this regard are the 1954 and 1961 Conventions, which lay out positive obligations on contracting states. A discussion on statelessness and an analysis of domestic laws would require a brief overview of the two conventions, along with certain other relevant legal instruments and international human rights documents that form a critical part of the framework to prevent and reduce statelessness as a worldwide phenomenon.

1.3.1. 1954 Convention relating to the Status of Stateless Persons

The Convention relating to the Status of Stateless Persons was adopted on 28 September 1954 and entered into force on 6 June 1960. It establishes a framework for the international protection of stateless persons and is the most comprehensive codification of the rights of stateless persons yet attempted at the international level.[12] It seeks to provide basic fundamental rights and freedom from discrimination against stateless persons. In the long term, it seeks to improve and regulate the status of stateless persons through international agreements.

> 'The 1954 Convention does not establish a right for stateless persons to acquire the nationality of a specific State. However, because stateless persons have no State to protect them, the Convention requires States Parties to facilitate the integration and naturalization of stateless persons as far as possible, for example by expediting and reducing the costs of naturalization proceedings for stateless persons. At a more general level, human rights law recognizes the right to a nationality– set out, for example, in the Universal Declaration of Human Rights. States therefore must strive to avoid statelessness. Moreover, the 1961 Convention on the Reduction of Statelessness provides common, global safeguards against statelessness thereby helping States to ensure the right to a nationality.'[13]

[12] UNHCR. (2014). *Introductory Note to the 1954 Convention relating to the Status of Stateless Persons*. Retrieved from http://www.unhcr.org/3bbb25729.html

[13] *Supra* note 4.

The most significant aspect of the 1954 Convention is the definition of a stateless person. The Convention, after establishing who 'stateless persons' are, then stipulates that those who qualify as such are provided, under the Convention, certain minimum rights and treatments such as:

- Right to non-discrimination (Article 3),
- Right to religion (Article 4),
- Right to acquisition of movable and immovable property (Article 13),
- Artistic rights (Article 14),
- Right of association with non-political and non-profit making organizations (Article 15),
- Access to courts of the contracting state of which s/he is habitual resident, including legal assistance,
- Right to have gainful employment (Articles 17, 18 and 19), and
- Freedom of movement, subject to any regulations that are applicable to aliens generally. They are also entitled to certain welfare rights by the contracting states on par with those enjoyed by nationals of that state, such as rations, housing, public education, and public relief and assistance (Articles 20-23).

Identity papers

Under Article 27 of the Convention, Contracting States shall issue identity papers to any stateless person who is within their territory and does not possess a valid travel document. Through this, the stateless person will be able to enjoy freedom of movement.

Travel documents

Under Article 28, Contracting States shall issue to stateless persons lawfully staying in their territory travel documents for the purposes of travel outside their territory, unless compelling reasons of national security or public order otherwise require. The provisions of this Schedule to the Convention shall apply with respect to such documents. Contracting States may issue such a travel document to any other stateless person in their territory; they shall, in particular, give sympathetic consideration to the issue of such a travel document to stateless persons in their territory who are unable to obtain a travel document

from the country of their lawful residence. The Convention also has a Schedule attached giving further details regarding issuance of identity cards and travel documents.

The Convention also creates a positive obligation on the part of contracting States to not expel a stateless person from their territory save on certain grounds such as national security and public order (Article 31).The Convention further lays down provisions regarding assimilation and naturalization of stateless persons with the mainstream nationals of the contracting States under Article 32. The Contracting States as per this Article shall make every effort to expedite naturalization proceedings and to reduce, as far as possible, the charges/costs associated with such proceedings. Hence, this Article is of immense importance for facilitating reduction of statelessness.

In short, the Convention has played a pivotal role in providing member states a framework within which stateless persons can be regularized as nationals entitled to basic human rights. Considering the benefits it brings, ratification to the Convention must be encouraged in the long run in order to strengthen states' commitments towards identifying, preventing, and reducing the injustice of statelessness.

1.3.2. 1961 Convention on the Reduction of Statelessness

The Convention on Reduction of Statelessness was adopted by the United Nations General Assembly on August 30, 1961. This is the second international instrument that directly deals with the issue of statelessness. While the 1954 Convention provides for acknowledgment of stateless persons as a category in itself, the Convention of 1961 provides a directive to countries for preventing and reducing statelessness itself.[14]

The 1961 Convention provides nation states a framework of common rules that may be incorporated for the issuance of citizenship within their domestic legislative framework in a manner that mitigates statelessness. The Convention also acts as a yardstick for the countries that have not acceded to it, for amending such loopholes in their legislative framework that may allow a person to become

[14] United Nations. (1961). *International Convention on Reduction of Statelessness*. Retrieved from http://www.unhcr.org/3bbb286d8.html

stateless. The UNHCR publication 'Prevention and Reduction of Statelessness' (2014) states that:

> 'The 1961 Convention sets out rules for the conferral or non-withdrawal of nationality *only* where the person in question would be left stateless. In other words, the provisions of the 1961 Convention offer carefully detailed safeguards against statelessness that should be implemented through a State's nationality law, without specifying any further parameters of that law. Beyond these few, simple safeguards, States are free to elaborate the content of their nationality legislation. However, these rules must be consistent with other international standards relating to nationality.'[15]

The important provisions of the Convention are discussed below:

Article 1 of the Convention states that the contracting state shall grant its nationality to a person born on its territory, either at birth or on registration, who would otherwise be stateless. The conditions stipulated for such grant of nationality, if not automatic, is that the person must have applied for such nationality within the stipulated age limit and to the concerned authority. Article 1 also gives equal significance to the nationality of a man and a woman, for the nationality of their child, by providing as follows:

> 'Notwithstanding the provisions of paragraphs 1 (b) and 2 of this Article, a child born in wedlock in the territory of a Contracting State, whose mother has the nationality of that State, shall acquire at birth that nationality if it otherwise would be stateless.'[16]

This provision caters to a scenario where a child may be left stateless due to the operation of domestic laws wherein a mother's nationality is not considered of consequence to her child's. Article 1 further obliges Contracting States to grant nationality to a person who would otherwise be stateless and is unable to secure the nationality of either of his/her parents (provided s/he has not exceeded the age limitation). However, under the Article, provisions of law prevailing in the

[15] *Supra* note 5.
[16] *Ibid*.

concerned nation enjoy sovereignty in determination of citizenship and grant or refusal thereof.

Article 2 of the Convention deals with children of unknown parentage found in the territory of a Contracting State. It stipulates that such foundlings shall be deemed to be born in that nation itself and to parents having the nationality thereof, if there is no proof to the contrary. Article 3 states that in case of a child being born aboard a ship or aircraft, the birth shall be deemed to have taken place in the territory of the nation whose flag the ship flies or in which the aircraft is registered. Article 4 obligates a state party to grant its nationality in case a person, who is otherwise stateless, is not born on the territory of that State but one of whose parents possesses nationality of that State.

Article 5 is an important provision that deals with potential loss of nationality on change of a person's personal status, such as through marriage, termination of marriage, legitimating, recognition or adoption. This Article states that where the law of a Contracting State may lead to loss of nationality, such termination must be approved only if an alternate nationality is available to the person. Thus, the loss of nationality must be conditional upon possession or acquisition of another nationality. On similar lines, Article 6 states that where the law of a Contracting State facilitates loss of nationality to a person's spouse or children as a result of loss of nationality of that person, then such loss of nationality must be conditional upon possession or acquisition of another nationality.

Article 7 states that where a person renounces nationality of a Contracting State, such renunciation must be facilitated on the condition that the person possesses or shall acquire another nationality. It also states that a national of a Contracting State who seeks naturalization in a foreign country shall not lose his/her nationality unless s/he acquires or has been accorded assurance of acquiring the nationality of that foreign country. Article 7 further states that a national of a Contracting State shall not lose his/her nationality, so as to become stateless, on the grounds of departure, residence abroad, failure to register, or on any similar conditions. Article 7 also includes an overriding provision that reads as:

> 'Except in the circumstances mentioned in this Article, a person shall not lose the nationality of a Contracting State, if such loss would render

him stateless, notwithstanding that such loss is not expressly prohibited by any other provision of this Convention.'[17]

Article 8 prohibits a nation-State, except according to the conditions mentioned in this Article, to deprive a person of his/her nationality if such deprivation would render him/her stateless. Article 9 prohibits a nation-State to deprive a person of nationality specifically on racial, ethnic, religious or political grounds. Article 10 deals with cases where persons may become stateless owing to transfer or acquisition of territory, wherein it states that such treaty providing for transfer or acquisition of territory must include provision whereby no person is left stateless in that transfer.

On reading the provisions of the 1954 and 1961 Conventions, the fundamental principles reflected in the Conventions are:

1. **Avoidance of Statelessness.** Incorporating such provisions in the domestic legislative frameworks of nations that prevent a person from becoming stateless.

2. **Reduction of statelessness.** Encouraging such changes in domestic legal frameworks that allow a person to embrace the nationality of a nation, if otherwise the person would have been stateless.

3. **Prevention of statelessness amongst children.** Preventing statelessness of a child by adapting requisite legislative amendments and administrative procedures to secure a child against becoming stateless.

These Conventions form a significant set of legal mechanisms which work towards identifying and reducing statelessness. They also aim at regularizing the status of stateless persons, which contributes not only to the economic and social development of the member states, but also to garner broader respect for the rule of law in all societies.[18]

[17] *Ibid*.

[18] UNHCR Rule of Law Unit. (2011). *Panel in the Context of Dialogue with Member States on Rule of Law at the International Level* . Retrieved from http://unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=4ddd1a3c9&query=preventing%20and%20reducing%20statelessness

1.4. INTERNATIONAL LEGAL FRAMEWORK APPLICABLE TO INDIA

The following is a brief overview of the international legal instruments that India is party to. These are significant towards understanding India's commitment to protecting and promoting human rights, as well as its efforts so far in combating the issue of statelessness.

1.4.1. Universal Declaration of Human Rights, 1948

The Universal Declaration of Human Rights (UDHR) remains the cornerstone of international human rights law. It was adopted by the UN General Assembly on December 10, 1948 as a 'common standard of achievement for all peoples and all nations'.[19] The UDHR comprises 30 articles that contain a comprehensive listing of key civil, political, economic, social, and cultural rights. The Convention is non-binding in status, thus making it an inherently flexible document. It offers ample room for new strategies to promote human rights, and served as a springboard for the development of numerous legislative initiatives in international human rights law, including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both of which were adopted in 1966. Over the years, it has become part of customary international law.

From the perspective of statelessness, the most relevant article of the UDHR is Article 15, which states that:

1. Everyone has the right to a nationality.

2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

This article, however, does not make clear as to upon whom the right to grant nationality rests. Nor does it state categorically that the positive duty of granting nationality lies with States. Yet the article goes on to create a 'negative duty on the state to not create statelessness', so that any deprivation must be

[19] United Nations. (1948). *The Universal Declaration of Human Rights*. Retrieved from http://www.un.org/en/documents/udhr/

accompanied by strict rules of procedure and should not result in statelessness.[20] It can thus be said that the UDHR forms an integral part of the umbrella of international legal instruments that deal with the issue of nationality and reduction/prevention of statelessness.[21]

1.4.2. International Covenant on Civil and Political Rights (ICCPR), 1966

The ICCPR was adopted by the UN General Assembly on December 16, 1966 and was brought into force on 23 March, 1976. It states the commitment of state parties to uphold civil and political rights, and has 52 Articles that form part of the core International Bill of Human Rights. India acceded to the Convention on 10 April, 1979. Although the entire Covenant is helpful in ascertaining the civil and political rights to which every person is entitled, Articles 2 and 24 of the Covenant are of special significance while addressing the issue of stateless persons.[22]

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:
   (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

[20] Chan, J.M.M. (1991). Nationality as a Human Right. *Human Rights Law Journal*. Vol. 12 (1-2). (pp. 1-14).

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

The effect of the above Articles is that the Covenant obliges the State parties to legislate on the matters which give effect to the rights under the Covenant without any form of discrimination based on race, color, sex, language, religion etc. Article 24 further highlights the commitment of the international community towards guaranteeing right to nationality to a child. Those rendered stateless, especially children, within nations not yet signatory to the Stateless Conventions of 1954 and 1961 may find a way out through this Covenant.

1.4.3. International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966

The ICESCR was adopted by the UN General Assembly on December 16, 1966. It seeks 'the ideal of free human beings enjoying freedom from fear and want'[23]

[21] *Ibid*.
[22] United Nations. (1966). *International Covenant on Civil and Political Rights*. Retrieved from https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf
[23] United Nations (1966). *International Covenant on Economic, Social and Cultural Rights* (Preamble). Retrieved from http://www.ohchr.org/en/professionalinterest/pages/cescr.aspx

by laying down conditions 'whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights'.[24] The Covenant lays down the body of rights that normatively flow from the human rights scheme guaranteed to every person under the UDHR. The body of the Covenant is spread across five parts containing 31 Articles, wherein the first three parts spell out essential rights due to every person, and the last two deal with the implementation of this Covenant. These rights that are categorized under the Covenant as being 'Economic, Social and Cultural' rights are not only vital to, but are directly inherent for, the dignity of every human being.[25]

While it does not mention in any way about granting nationality to a person, nor does it touch upon the issue of statelessness, the importance of this Covenant to statelessness lies in the fact that:

1. India has acceded to the Covenant (1979).

2. The framework of the Covenant seeks to secure, amongst the State parties, economic, social and cultural rights to all persons.

3. By being denied citizenship or nationality, these rights are effectively denied to a stateless person, thus excluding him from the loop of human rights itself.

Though the provisions of the ICESCR are not directly obligating India to address statelessness, efforts on part of India to prevent and reduce statelessness will pave a way for realization of India's commitment towards the Covenant.

1.4.4. The Convention on the Rights of Child (CRC), 1990

Of the entire stateless population, stateless children are the most vulnerable and exploited population. Denial of nationality from their very birth often subjects them to a life of extreme poverty and hardship, without any basic human rights or opportunities. The CRC is exceptionally important when it comes to the particular protection of children's right to nationality— not least because nearly every country has ratified it.[26] India acceded to this convention on December 11,

[24] *Ibid.*
[25] *Ibid.*
[26] Open Society Justice Initiative. (2011). *Fact Sheet: Children's Right to a Nationality.*

1992. The major provisions of CRC[27] to consider from the perspective of statelessness are discussed below.

Under Article 7, the state parties should ensure that:

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Hence, one of the most important stands that CRC takes is in obliging State parties to accord to *every child* 'the right to acquire a nationality' in his or her country of birth if they do not acquire another nationality from birth.

Alongside, Article 8 states:

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

The importance of these provisions is with respect to the right of every child to acquire a nationality. In the Global Action Plan to End Statelessness, a publication by UNHCR,[28] it has been elaborated that:

> States are not required to grant nationality to all children born in their territories, but only to those who cannot acquire any other nationality.

Retrieved from http://www2.ohchr.org/english/issues/women/docs/OtherEntities/OSJIChildrenNationalityFactsheet.pdf

[27] United Nations. (1989). *Convention on Rights of Child*. Retrieved from https://treaties.un.org/doc/publication/mtdsg/volume%20i/chapter%20iv/iv-11.en.pdf

[28] UHNCR. (2014). *Global Action Plan to End Statelessness*. Retrieved from http://www.unhcr.org/statelesscampaign2014/Global-Action-Plan-eng.pdf

> To implement this safeguard, States need to take steps to ascertain whether a child born in the territory whose nationality is unclear, has acquired the nationality of another State. If not, the State in which the child is born is required to grant its nationality so that the child is not left stateless. In accordance with the principle of the best interests of the child, it is recommended that States automatically grant their nationality to children in such situations.

It goes on further to state that:

> Nationality laws also require a safeguard to grant nationality to children born to nationals abroad and who would otherwise be stateless. Another important provision to be included in nationality laws is the rule that foundlings (found children of unknown parentage) are to be presumed to be nationals of the State in which they are found.

1.4.5. Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), 1979

The Convention on the Elimination of Discrimination against Women aims at reducing/preventing gender discrimination in all its forms and manifestations. The Convention draws attention to the fact that:

> Discrimination against women violates the principles of equality of rights and respect for human dignity, and is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity.[29]

The Convention also iterates that discrimination against women continues to exist, despite the existence of various international instruments such as the UDHR, the ICCPR, the ICESCR, various UN resolutions, declarations and recommendations, and the work of specialized agencies promoting gender equality. India signed the CEDAW on 30 July, 1980 and ratified it on 9 July 1993.

[29] United Nations. (1979). *Convention on the Elimination of All Forms of Discrimination against Women.* Retrieved from http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm

Statelessness not only marginalizes a person but banishes him/her to a half-existence effectively stripped of human rights. In the light of discrimination that women are generally subject to the world over, a woman who is also stateless is susceptible to being relegated to the farthest and almost invisible end of human rights actualization. The 1961 Convention on Reduction of Statelessness asserts in Article 1(3) that a child born in wedlock may acquire nationality of his/her mother, if such child would otherwise be stateless. This provision is in effect a beacon of anti-discriminatory provision. A streamlined scheme to specifically address discrimination against women in matters of statelessness and conferment of nationality is also seen in the CEDAW. The CEDAW provisions relating to the issue of statelessness are discussed as follows.

Article 9 of the Convention reads:

1. State Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

2. State Parties shall grant women equal rights with men with respect to the nationality of their children.

Furthermore, Article 15 of the Convention states: 'State Parties shall accord to women equality with men before the law.'[30] This Convention is an all-encompassing instrument that seeks to strike at every form and manifestation of discrimination against women. The Committee on the Elimination of Discrimination against Women has, in particular, recognized that human rights are binding upon states parties in respect of all women within their jurisdictions, including displaced and stateless persons.[31] The above-mentioned provisions are of much significance to efforts made to reduce statelessness, as the equality between men and women in matters of granting of nationality shall not only

[30] *Ibid*.
[31] Committee on Elimination of All forms of Discrimination against Women. (2008). *General Recommendation No. 26: Women Migrant Workers* CEDAW/C/2009/WP.1/R. Retrieved from http://www2.ohchr.org/english/bodies/cedaw/docs/GR_26_on_women_migrant_workers_en.pdf

affect women's right to nationality, but also their right to pass on their nationality to children. The CEDAW General recommendations No. 32 also reemphasizes the necessity for state parties to assimilate such changes in their legislative systems that would facilitate compliance with provisions of CEDAW relating to right to nationality.[32]

1.4.6. Convention on the Nationality of Married Women, 1957

The Preamble to the 1957 Convention on the Nationality of Married Women echoes the UDHR by stipulating the right to a nationality and the right to not be deprived of a nationality. It also upholds the beacon of equality in matters of enjoyment of human rights since it promotes observance of human rights without discrimination as to sex. This Convention holds the foreground in advocating the rights of women in matters of obtaining, retaining and passing on nationality.

Article 1 of the Convention enunciates that neither marriage nor its dissolution between two people having different nationalities, nor the change of nationality by the husband during marriage, shall automatically affect the nationality of the wife. Thus, marriage or its dissolution or change of nationality by the husband shall not be the reason for change or deprivation of nationality of the wife.[33]

Article 2 of the Convention prohibits the loss of nationality of the wife of a person who voluntarily acquires nationality of another nation, or renounces his nationality. This provision puts forth that voluntary acquisition of nationality of another State or renunciation of nationality of a State by one of its nationals shall not affect the retention of its nationality by the wife of such a national. Article 3 creates obligation on the State parties to ensure that their nationality laws give rights to an alien wife of a national of that State, to apply for privileged naturalization being the wife of such national, if the wife cannot become naturalized as a matter of right otherwise under the legal framework of that State.

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[32] Committee on Elimination of All forms of Discrimination against Women. (2014). *General Recommendation No. 32: Gender-related dimensions of refugee status, asylum, nationality and statelessness of women*. Retrieved from http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx

[33] United Nations. (1957). *Convention on the Nationality of Married Women*. Retrieved from https://treaties.un.org/doc/Treaties/1958/08/19580811%2001-34%20AM/Ch_XVI_2p.pdf

The provisions of this Convention encourage State parties to provide equality in acquisition of nationality by a woman as an individual and not just a married appendage to a national. India has been party to the Convention since 1957. Coupled with CEDAW, this Convention is certainly a cornerstone in preventing statelessness as a direct result of gender-based discrimination in bestowal of nationality.

1.4.7. International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, 1990

A number of people who are migrants are stateless world over. Such people are deprived of very basic human rights and amenities. They often survive in deplorable conditions with little or no scope of hoping for a better life and gaining recognized citizenry. The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families was adopted by the UN General Assembly (Resolution 45/158) on December 18, 1990. The objectives of this Convention are to protect the interests of workers who are employed in countries other than their own, bearing in mind the expertise and experience of that organization in matters related to migrant workers and members of their families. India has not, as yet, acceded to this Convention.

From the viewpoint of statelessness, the following articles of the Convention are worth examining:

Article 3 of the Convention states the conditions in which it does not apply. Under clause (d), the Convention does not apply to refugees and stateless persons unless such application is provided for in the relevant national legislation of or in the international instrument in force for, the state party concerned. Hence, the Convention states clearly that it does not apply to refugees and stateless persons unless the concerned state has signed or enacted a specific legislation or instrument regarding their treatment.[34]

In view of a migrant worker's child, Article 29 states that each child of a migrant worker shall have the right to a name, to registration of birth, and to a nationality. The Convention does not apply to refugees and stateless unless the State has put

[34] United Nations. (1990) *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*. Retrieved from http://www2.ohchr.org/english/bodies/cmw/cmw.htm

in place legislation at the domestic level regarding the same, or is party to an international instrument on this issue.

1.4.8. Convention on the Rights of Persons with Disabilities (CRPD), 2006

Recognizing disability as an evolving concept of attitudinal and environmental barriers that hinders the full and effective participation in society of persons with disabilities on an equal basis with others, the UN adopted the Convention on the Rights of Persons with Disabilities in 2006. This Convention highlights the need for promoting respect for, and protecting the human rights of, all persons with disabilities. India acceded to the Convention on October 1, 2007.

Article 18 of the Convention underlines prohibition of discrimination against persons with disabilities in matters related to nationality and the freedom of movement that is entailed therewith. The relevant Article is reproduced as follows.

Article 18: Liberty of movement and nationality

1. State Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities:

   (a) Have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability;

   (b) Are not deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, or to utilize relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement;

   (c) Are free to leave any country, including their own;

   (d) Are not deprived, arbitrarily or on the basis of disability, of the right

to enter their country.

2. Children with disabilities shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by their parents.[35]

[35] United Nations (2006). *Convention on the Rights of Persons with Disabilities*. Retrieved from http://www.un.org/disabilities/convention/conventionfull.shtml

2. INDIA AND STATELESSNESS

2.1. WHO IS A CITIZEN OF INDIA?

Constitution of India is the first legal instrument that lays down who is deemed to be a citizen of India. Article 5 of the Constitution of India is titled as 'Citizenship at the Commencement of Constitution of India'. Although the Constitution does not define 'citizenship',[36] Articles 5 of the Constitution lays down an overarching provision for deciding who is a citizen of India. It provides that any such person, who was or either of whose parents was, born in the territory of India, or who has been ordinarily resident in India for at least five years before the commencement of the Constitution, shall be deemed to be a citizen of India, if he had domicile in the territory of India at such commencement.[36]

This Article covers the issue of citizenship of those persons who had a domicile in India at the time of commencement[38] of the Constitution. The Article is however silent on the definition of 'domicile' and has left the matter for Courts to interpret.[39] The term 'domicile' has not been defined in any Parliamentary statute for the purposes of citizenship;[40] though some statutes in India have defined the term for other purposes, as per the statute.[41] The Supreme Court has interpreted the term 'domicile' in the following manner- "By domicile is meant a permanent home. Domicile means the place which a person has fixed as a habitation of himself and his family not for a mere special and temporary purpose, but with a present intention of making it his permanent home."[42]

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[36] Brill Academic Publisher. (1990). *Nationality and International Law in Asian Perspective.* The Netherlands: Sik, K. S.

[37] Article 5 of the Constitution of India. Retrieved from http://lawmin.nic.in/coi/coiason29july08.pdf

[38] According to Article 394, the Constitution is deemed to have commenced on January 26, 1950.

[39] See as well the discussion on Citizenship and Domicile, in the section Judicial Trends in the Approach towards Statelessness, in this Report.

[40] *Supra* note 36.

[41] See the Indian Succession Act, 1925, and Estate Duty Act, 1953.

[42] See *K. Mohammad Ahmed v. State of Kerala and others* 1983 SCC OnLine Ker 181 : AIR 1984 Ker 146; *Abdus Samad v State of West Bengal* (1973) 1 SCC 451; *In Re Aga Begum* (1971) 1 MLJ 18; *Mohd. Raza Dabstani v. State of Bombay and Others* (1966) 3 SCR 441; *Habatullah Haji Fazale Hussain v. The State* 1963 SCC OnLine Guj 7: AIR 1964 Guj 128; *Mangal Sain v. Shanno Devi* AIR 1959 P H 175.

To substantiate the Constitutional provisions relating to citizenship, Article 11 empowers the Parliament to make laws for acquisition and termination of citizenship. Accordingly, the Citizenship Act was enacted by the Parliament in 1955. The objective behind passing this law, as mentioned in the Act is to "provide for the acquisition and determination of citizenship of India". This Act, along with the Constitution of India, forms the epicentre for question of acquiring citizenship in India.

The Citizenship Act lays down five ways of acquiring citizenship:

1. By Birth[43]
2. By descent[44]
3. By registration[45]
4. By naturalization[46]
5. By incorporation of new territory.[47]

These provisions have been discussed and analyzed from the point of statelessness in the subsequent discussion. In addition to acquiring citizenship through these provisions in Citizenship Act, Section 13 of the Act is a supplemental provision that deals with issuance of certificate of citizenship, in case of doubt as to a person's citizenship of India.[48] This provision lays the power with the Central government to issue a certificate of citizenship to such person in respect of whom a doubt exists about his/her citizenship of India. The format of such certificate of citizenship is given, as per Rule 37 of Citizenship Rules, 2009, in Form XXXIII. The certificate of citizenship issued under Section 13 of Citizenship Act is signed by an officer not below the rank of Under Secretary to the Government of India. Thus, in India a 'citizen' is a person who is so deemed under the Constitution of India, or in case of doubt of his/her citizenship of India, s/he may be given a certificate of citizenship by the Central government, or citizenship may be primarily acquired by any of the modes given in Citizenship Act, discussed ahead.

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[43] Section 3 of The Citizenship Act, 1955. Retrieved from http://mha1.nic.in/pdfs/ic_act55.pdf
[44] Section 4 , *Id.*
[45] Section 5 , *Id.*
[46] Section 6 , *Id.*
[47] Section 7, *Id.*
[48] Section 13, *Id.*

2.2. CITIZENSHIP OF A CHILD

In this section, the Indian Citizenship Act has been analyzed under the following headings:

a. Child born in the territory of India (Section 3)
b. Child born to Indian parent(s), outside the territory of India (Section 4)
c. Registration of minors as citizens (Section 5(d))
d. Child born aboard a ship, an aircraft or in transit (Section 2(2))
e. Child found in India (no provision in Indian law)

2.2.1. Child born in the territory of India

Section 3 of the Citizenship Act provides for automatic acquisition of citizenship, which in India is referred to as 'citizenship at birth'. This provision confers citizenship *jus soli*, i.e. on the basis of birth in the territory. Section 3(1)(c) of the Citizenship Act provides that a person born in India is a citizen of India if both the parents are citizens of India at the time of his/her birth or, if only one of the parents is a citizen, then the other is not an illegal migrant. The term 'illegal migrant' has been defined under the Act as a foreigner who has entered into India without prescribed travel documents or who has stayed in India beyond the permitted date provided in such a travel document.[49] This provision was inserted in the Citizenship Act by the Citizenship (Amendment) Act, 2003.

For persons born before the Citizenship (Amendment) Act, 2003, Section 3(1)(a) lays down that if a person was born in India on or after January 26, 1950, and before 1 July, 1987, s/he shall be a citizen of India.[50] Furthermore, Section 3(1)(b) states that if a person was born in India on or after 1 July, 1987 but before the commencement of the Citizenship (Amendment) Act, 2003, s/he shall be a citizen if either of his parents was a citizen of India at the time of his/her birth.

On an analysis of these provisions from the perspective of statelessness, it may be concluded that Section 3(1)(b) of the Citizenship Act considers the situation in which at least one of the parents is a citizen of India, but fails to consider a position in which both parents may not be citizens of India or may be without a

[49] Section 2(1)(b), The Citizenship Act, 1955, *Id.* See as well Section 2(3)(a) (definition of 'foreigner') of The Foreigners Act, 1946. Retrieved from http://mha.nic.in/sites/upload_files/mha/files/pdf/TheForeignersAct1946.pdf

[50] See also *Namgyal Dolkar v. Government of India* 2011 IAD (Delhi) 201, discussed in 'Judicial Trends in the Approach towards Statelessness' in this report.

nationality. Further the provision under Section 3(1)(c) puts strict limitations on execution of the doctrine of *jus soli*, by necessitating that for conferral of citizenship at birth at least one parent of such a child should be an Indian citizen as long as the other parent is not an illegal migrant. The scope of this definition has the potential to create statelessness by operation of law, because even if one parent of a child may be an illegal migrant, such a child is deprived of right to automatically acquire the nationality through the other parent (whether by birth or by descent).

The proviso clause to Section 3 states that in case a birth takes place in the territory then under the occupation of an enemy nation, and either or both of the parents of such child born are an enemy alien, such child will not be given citizenship of India by birth. This provision does not mention a scenario in which either or both the parents may be enemy aliens but the birth takes place in the territory of India. The Act is also silent on the definition of 'enemy alien'.

In the present context, it may be concluded that the Indian Citizenship Act does not provide for nationality to children born in the territory of India who would otherwise be stateless. Article 1 of the 1961 Convention on the Reduction of Statelessness gives the right to acquire nationality to a child born on a territory of a Contracting State, where such child would otherwise be stateless. The UNHCR's *Guidelines on Statelessness No. 4* have discussed that the determination whether a child 'would otherwise be stateless' requires verification whether such child has acquired any other nationality, either by operation of the principles of *jus sanguinis* or *jus soli*.[51] The *Guidelines* further state that children are often stateless if their parents are stateless; such perpetuation can be ended if a country in which a child is born grants its nationality to such child, even if the parent(s) of such a child may be stateless.[52] Interestingly, that was the provision in operation in India before 1987, whereby any person born in India on or after the commencement of the Constitution was considered a citizen of India by birth. However, with the introduction of amendments to the Citizenship Act (discussed above), the law has been made stricter and less accommodating.

[51] UNHCR. (2012). *Guidelines on Statelessness No.4: Ensuring Every Child's Right to Acquire a Nationality through Article 1-4 of the 1961 Convention on the Reduction of Statelessness.* Retrieved from http://refworld.org/docid/50d460c72.html

India is a signatory to various international instruments that address the rights of a child to a nationality from the time of birth. Under Article 7, the CRC gives a child the right to be registered immediately after birth, and to have the right to acquire a nationality at birth. Article 8 of the CRC further asserts the right of a child to preserve his/her identity, including nationality. Article 24 of the ICCPR[53] gives the right to every child to be registered immediately after birth, and the right to acquire a nationality. The CRPD[54] gives the right to children with disabilities, under Article 18, to be registered immediately after birth, and the right to acquire a nationality at birth. The Convention on the Protection of the Rights of All Migrant Workers and Members of their Families states under Article 29 that each child of a migrant worker shall have the right to registration of birth, and to a nationality. This Article should be read in conjunction with Article 3 of the same Convention, which states that the Convention does not apply to stateless persons, unless such application is provided for in the relevant national legislation of the state party concerned.

Having analyzed the position of law relating to conferment of citizenship as it currently stands, from July 1, 1987 the provisions are not in line with the country's international obligations as the provision requires that at least one of the parents must be an Indian citizen, while the other parent must not be an illegal migrant. It indicates, in effect, that a child born to stateless parent(s), is barred from acquiring Indian citizenship at birth, from July 1987 onwards. This is a major drawback under the Indian citizenship law, from the perspective of child statelessness.

It may be further noted that neither in Section 3 of the Citizenship Act nor anywhere in the text of the Act has the meaning of the term 'parent' been ascertained, even though the section requires one parent to be a citizen of India. There appears to be no clarity regarding whether this may include different sets of parents of a child, an 'unmarried couple', 'adoptive parents', 'biological parents', or 'surrogate parents', all of which are very important in the scenario of conflict that may arise due to the interaction of different countries' nationality laws. The law in India is silent about the nationality of children born out of

[52] *Ibid*.
[53] *Supra* note 22.
[54] *Supra* note 35.

wedlock.[55] The absence of the term 'parent' also highlights a gap in the law relating to the nationality of a child whose parents may have unknown or no nationality.

Even though the 1961 Convention on Reduction on Statelessness does not define the term 'parent', it takes into consideration a situation in which a child may be born out of wedlock,[56] or where the nationality of a child may be affected by a change in the marital status of the parents. Article 1(3) of the 1961 Convention also provides safeguards by giving to children born on a territory of which the mother is a national, the right to acquire nationality. Such children must acquire the nationality of their State of birth by operation of law immediately at birth.[57] In contrast, the nationality law in India falls short of encompassing every kind of situation relating to the citizenship of a child born in India.

One step taken by the Indian government in the direction of resolving conflict of laws that affect children's nationalities is demonstrated in the guidelines issued by the Indian Ministry of Home Affairs in July 2012. These guidelines were laid down with reference to the visas of foreign nationals who intend to visit India for the commissioning of surrogacy. Under these guidelines, when such foreign individuals/couples apply for an Indian visa, they have to attach along with their application a letter from their country's foreign ministry (or their country's embassy in India) stating that:

a) The country of the intended parent(s) recognizes surrogacy, and
b) The child/children to be born to the commissioning couple, through the Indian surrogate mother, will be permitted entry into the former's country as the biological child/children of the couple commissioning surrogacy.[58]

Though these guidelines have been put in place to bring forth some clarity on the issue of surrogate children, the Citizenship Act has not yet made appropriate

[55] See Section on Citizenship and Marriage in this report.
[56] Paragraph 2 of Article 5 of 1961 Convention. *Supra* note 14.
[57] *Ibid*.
[58] Government of India, Ministry of Home Affairs. (2013). *Guidelines issued by the Ministry of Home Affairs vide letter no. 25022/74/2011-F.I dated 9th July 2012 regarding foreign nationals intending to visit India for commissioning surrogacy.* Retrieved from http://mha1.nic.in/pdfs/Surrogacy-111013.pdf

amendments/clarifications to the present provisions on nationality by birth regarding children born out of surrogacy in India to a foreign couple. Hence, the nationality of such surrogate children, who are born in India but whose parents may be foreigners, continues to remain ambiguous.[59]

2.2.2. Children born to Indian parents outside the territory of India

Section 4 of the Citizenship Act is titled 'Citizenship by descent', and provides for non-automatic acquisition of citizenship to persons born outside the territory of India, by following the procedure laid down in this regard. This provision is based upon the principle of *jus sanguinis*, i.e. a person acquires nationality from his/her parents. Even though the nationality is acquired from the parent(s) automatically by virtue of being their child, this is a non-automatic acquisition of acquiring nationality because it is acquired at the instance of the party. As a result of amendments carried out in this Section of the Act at various times, Section 4(1) covers citizenship by descent in three phases:

1. The first phase is wherein a child born outside India between 26 January 1950 and before 10 December 1992, is considered an Indian citizen if her/his father is an Indian citizen. If such father is an Indian citizen by descent only, then for claiming Indian citizenship, the child's birth should be registered within one year at the respective Indian consulate.

2. The second phase covers the situation of a child born outside India between 10 December 1992 and 7 January 2004, when either of his/her parents is an Indian citizen. In case such parent is an Indian citizen by descent only, then such child is considered an Indian citizen only if the birth is registered at an Indian consulate within one year.

3. The third phase provided for in this Section covers children born after 7 January 2004; the operation of this section is the same as discussed with respect to the second phase. A proviso that has been added to the situation covered after 7 January, 2004 is that the birth registration of the child (in respect of whom this Section is being evoked) will be

[59] See also the following law cases: *Jan Balaz v. Anand Municipality and others* AIR 2010 Guj 21; *Baby Manji Yamada v. Union of India* AIR 2009 SC 84; and *Lakshmi Kant Pandey v. Union of India* AIR 1984 SC 469.

carried out only if a declaration in the prescribed format is made by the parent(s) that the child does not hold any other passport.

The procedure for applying for registration of birth under this Section is given in Rule 3 of the Indian Citizenship Rules, 2009. Rule 3 states that under Section 4(1) a parent may apply for registration of birth of her/his minor child to the Indian Consulate in the country of such child's birth, by submitting Form I[60] along with a declaration that the child does not hold the passport of any other country.[61]

The 1961 Convention on Reduction of Statelessness, under Article 4, has given a child born outside the country of her/his parent(s)' nationality the right to acquire their nationality. As per the Article, the Contracting State shall grant the nationality to a person not born in the territory of the Contracting State, who would otherwise be stateless in case the nationality of either of her/his parent at the child's birth was of that Contracting State. In circumstances where both the parents possess different nationality at the time of the child's birth then the question of whether the father or the mother's nationality must be conferred on the child is to be determined by the national law of such Contracting States. The said Article in the 1961 Convention further lays down certain common conditions to be met out by the person applying for nationality by descent in the respective nationality laws of the Contacting Parties.

The Citizenship Act gives this right to a minor child under Section 4. Also, Article 9 of CEDAW asserts that women shall have equal rights as men to pass their nationality on to children. Until 1992, the provisions of the Citizenship Act required that only the father could pass on his nationality to his child born outside India. After amendment in the provision, the Citizenship Act has now become gender-neutral; both mother and father can pass on their nationality to their children, in accordance with CEDAW.[62] This is a welcome provision in light of such situations where a child may be deemed otherwise stateless if not entitled to inherit the nationality of either of his/her parents, irrespective of

[60] The *Citizenship Rules, 2009*. Retrieved from http://mha1.nic.in/pdfs/Citi_Rule-2009.pdf
[61] See as well The Citizens (Registration At Indian Consulates) Rules, 1956. Referenced in Singh, G. (2011) *Law of Foreigners , Citizenship & Passports in India.* New Delhi: Universal Law Publisher Co Pvt Ltd.
[62] Article 9 of CEDAW. *Supra* note 29.

gender.

Thus, it may be seen that regarding a child being born to an Indian citizen outside the territory of India, the Indian Citizenship Act has undergone a positive change since its commencement. Until 1992, the Act stipulated that a person born outside India may acquire nationality only from his father. Post-1992, the provision was amended whereby a child may acquire Indian citizenship from either of his/her parents. Another stipulation added since the commencement of the Citizenship (Amendment) Act, 2003 is that for a child to acquire nationality through descent under this Section, his/her parents must declare that the minor does not hold the passport of any other country. This Section provides that in case the birth is not registered within a year at the respective consulate, then the same may be done by obtaining the permission of the Central Government. The legislative position in India relating to citizenship by descent is in conformity with international standards as mentioned.

2.2.3. Registration of minors as citizens

Section 5(1)(d) of the Citizenship Act makes provision for the registration of minor children as citizens of India. This is a non-automatic mode of acquiring nationality, as it comes into operation on instance of a party. Section 5(1)(d) is applicable to minor children of persons who are citizens of India. Under this Section, citizenship may be granted to such minors who do not fall under other provisions of this Act to acquire citizenship. The precondition for registration under this provision is that such a minor shall not be an illegal migrant and the parents of such a minor must be citizens of India.

Section 5 further lays down the conditions for such registration.[63] Rule 6 of the Citizenship Rules 2009, specifies that the application for registration of a minor under Section 5(1)(d) has to be made in Form IV of the same (Citizenship Rules, 2009).[64] Registration under Section 5(1)(d) further requires a declaration from the parent of such a minor child stating that s/he is the legal guardian of the minor. However, the use of the term 'parent' has not been clarified to include a biological parent and an adoptive parent alike. This leaves a gap in understanding whether, under this provision, an adopted child can obtain

[63] See Section 5, sub-sections (2) to (6), *The Citizenship Act*, 1955, *Supra* note 43.
[64] *The Citizenship Rules*, 2009, *Supra note 60.*

registration as an Indian citizen or not. An elaboration of the term 'parent' used in this provision would offer clarity to both the provision under the Act as well as the Citizenship Rules.

In the 1961 Convention on Reduction of Statelessness, paragraph 1(b) of Article 1 gives a child the right to acquire nationality of the country s/he may be born in, by an application lodged in this regard. The Article further leaves it to a Contracting State to make laws governing age limit and other conditions for such applications. While India is not a signatory to this Convention, it is imperative to look at the existing international framework relating to the non-automatic mode of acquiring nationality. Article 1 further affirms that a child may acquire the nationality of his/her mother, if such child would otherwise be stateless.[65] This provision reiterates the commitment of the international community to uphold right of either parent equally, to pass on their nationality to their child. In addition to this, Article 2 of the 1961 Convention may be seen that asserts the right to nationality to foundlings.[66]

The CRC, to which India is a party, has asserted the right of every child to preserve her/his identity including nationality. This provision is also useful in underlining the right of a minor child in India to its nationality. In addition, it is important to read the provision in Article 9 (2) of CEDAW, which asserts equal rights to women with men with respect to passing nationality on to their children. The provision under Section 5(1)(d) is in line with the principle of gender neutrality, as it uses the term 'parent', instead of qualifying the parent as 'father' or 'mother'.

Against the backdrop of the international legal framework for granting nationality to children after birth, the provision in India does not clarify the position of a minor child in India who has only one parent as an Indian citizen. Further, the Act fails to provide for registration of minor children in case the parent who is not an Indian citizen may be stateless or with unknown nationality. Additionally, as discussed above, the scope of the term 'parent' may be elaborated upon to offer clarity to the provision. Section 5, sub-section 4 states that the Central government may give permission to register any minor if it is

[65] Paragraph 3 of Article I, *1961 Convention on Reduction of Statelessness*. *Supra* note 14.
[66] See the section Child found in India, in this report.

satisfied that special circumstances exist for such registration. However, both the Citizenship Act as well as the Citizenship Rules remains silent about the explanation of the term 'special circumstances'.[67]

2.2.4. Children born aboard a ship or a plane or in transit

The question of nationality may come into play in the case where a child is born aboard a ship or an aircraft, or an unregistered ship or aircraft. Under the Indian Citizenship Act, Section 2(2) states that such a child is deemed to have been born under the government of the country where the ship or the aircraft has been registered, or in the country where the ship or aircraft was present at the time of birth of such a child. This provision appears ambiguous as it does not clarify whether it is in supplement to the provisions regarding acquisition of birth under Section 3 (citizenship by birth) and Section 4 (citizenship by descent) of the Act. Further, the sub-section does not clarify whether the term 'government of any country' includes India.

The international framework in this regard can be seen in the 1961 Convention on Reduction of Statelessness, wherein Article 3 states that in case of a birth aboard a ship or an aircraft, the birth is deemed to have taken place on the territory of the State whose flag the ship flies, or the State where the aircraft is registered. In this regard, the above-mentioned provision in the Citizenship Act requires detailed clarification to prevent statelessness from occurring.

2.2.5. Children found in India

In the light of existing provisions of the Citizenship Act, children who are foundlings of unknown parentage pose a challenge, with regard to granting of citizenship. The 1961 Convention on Reduction of Statelessness has laid down, in Article 2, that in case of no proof to the contrary, a foundling found in the territory of a Contracting State shall be considered to be born in that country, to parents with nationality of that country. Even though the Convention is silent about the age till which a child may be considered as a 'foundling', the 2012 *UNHCR Guidelines on Statelessness No. 4* state that a minimum safeguard for granting nationality to foundlings is to apply the provision to all young children who may not be able to furnish accurate information about their parents'

[67] UNHCR. (2012). *Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness.* Retrieved from http://www.refworld.org/docid/50d460c72.html

identities or their place of birth: 'This flows from the object and purpose of the 1961 Convention and also from the right of every child to acquire a nationality. A contrary interpretation would leave some children stateless.'

The Indian nationality law is silent on the application of nationality law to foundlings. It may be noted that the CRC to which India is a party, states in Article 7 that every child shall be registered immediately after birth and shall have the right, from birth to have a name, to acquire a nationality, and to know and be cared for by parents. Further Article 8 requires the State Parties shall respect every child's right to preserve her/his identity, including nationality. In light of India's obligations as a State party to the CRC, the Citizenship Act fails to cover such children who are found in India. As there are, in most such cases, no way of ascertaining parentage let alone their nationality, the question of how nationality must be conferred upon such children remains unanswered by the Citizenship Act. Thus, it may be said that in light of the international framework in this regard, India's nationality law is not in conformity with international standards.

2.3. CITIZENSHIP AND MARRIAGE

In certain circumstances, a change in marital status may have direct consequences upon the nationality of the spouse(s), and may also affect the nationality of their children. The effect of marriage on questions of nationality will be discussed in this section of the report. It is examined under the following headings, which require deliberation under the Indian Citizenship Act:

a. The non-citizen spouse of an Indian citizen
b. Gender neutrality to acquire and pass citizenship

2.3.1. The non-citizen spouse of an Indian citizen

In circumstances where a non-Indian citizen is married to an Indian citizen and resides in India, such a person may apply for Indian nationality through registration under Section 5 of the Citizenship Act. Section 5(1)(c) provides that such a non-citizen spouse may apply for registration if s/he has been an 'ordinary resident' of India for seven years preceding the date of making an application for registration. Under this section, 'ordinary residence'[68] is defined as a timeframe

[68] Explanation 1 to Section 5(1) of *The Citizenship Act*, 1955, *Supra* note 43.

of nine years immediately before the date of application. The applicant has to have been continuously residing in India for twelve months immediately preceding the date of application, and should have resided in India during the eight years immediately preceding the said twelve months for a period not less than six years.

Section 5 further lays down the conditions for such registration.[69] The procedure for registration under this Section is governed by Rule 5 of the Citizenship Rules, 2009.[70] However, a precondition for registration under this section is that the person must not be an 'illegal migrant' as defined in Section 2(1)(b). The provision, in effect, excludes a person who may not have any documents to prove his/her nationality, and even after fulfilling all other criteria under this provision such person cannot be registered as a citizen of India. The Citizenship Act is silent on the position of a stateless person marrying an Indian citizen.

The UDHR declares that everyone has the right to a nationality, and no one shall be arbitrarily deprived of his/her nationality, or the right to change nationality.[71] The CEDAW, to which India is a signatory, asserts that women have equal rights as men to acquire, retain, or change their nationality.[72] The 1961 Convention on Reduction of Statelessness, to which India has not acceded, also provides the right against loss of nationality as a consequence of change in personal status (such as marriage). The provision in Section 5(1)(c) of the Citizenship Act, discussed above, reflects this position of the international legal framework relating to marriage and citizenship, from the perspective of gender-neutrality.

The text of the provision in the Citizenship Act allows for registration as a citizen to a spouse 'who is married to a citizen of India'. However, both the Act as well as the Rules does not address a situation where the marriage may be dissolved during the stipulated period of seven years. Under the Citizenship Rules, 2009, Form III[73]– which is to be filled out for the application of citizenship through registration – does make an inquiry about whether the marriage subsists or not; however, the effect of a divorce on the application

[69] See Section 5, Sub-sections (2) to (6), *Id.*
[70] The Citizenship Rules, 2009, *Supra* note 60.
[71] UDHR, Article 15, *supra* note 19.
[72] CEDAW, Article 9, *supra* note 29.
[73] *The Citizenship Rules*, 2009, *Supra* note 60.

(whether it may render the person applying for citizenship stateless, during pendency of application) has neither been mentioned in the Citizenship Act nor in the Citizenship Rules. It may be seen that the Act leaves this point unattended as to whether a stateless person can be registered as a citizen of India by marriage, or a person having a previous nationality may become stateless by operation of law under this provision.

2.3.2. Gender neutrality to acquire and pass citizenship

The CEDAW confers equal rights to women and men to attain, change, or retain their nationality. This Convention also declares that State parties shall ensure that marriage to an alien, or change in nationality of the husband, shall not automatically change the nationality of the wife, render her stateless, or force upon her the nationality of the husband.[74] Against the backdrop of the CEDAW, the acquisition of citizenship under the Citizenship Act is gender-neutral, as the term 'person' has been used to address the issue of citizenship in the provision relating to marriage. In all the provisions relating to acquisition of citizenship, the Citizenship Act does not differentiate between men and women for such conferral. The change of nationality after marriage also considers a male or female spouse on an equal footing, under Section 5(1)(c), as discussed above.

Under Section 3 of the Citizenship Act, citizenship is granted at birth to a child if either parent is an Indian citizen while the other is not an illegal migrant.[75] The term 'parent', although not defined, does not discriminate between men and women. Furthermore, the Citizenship Act does not discriminate between the father and mother of a child in applying for registration of a minor child as a citizen of India, under Section 4 (by descent) or Section 5(1)(d) (by registration). Thus, on the lines of principles of gender equality, the nationality law of India conforms to international standards in this regard.

With respect to passing nationality to one's children, Article 9(2) of CEDAW asserts equal such rights for women with men. Although the provisions of the Citizenship Act do not discriminate on the basis of gender, a digression from the principle of gender equality is seen in Rule 17 of the Citizenship Rules, 2009,

[74] CEDAW, Article 9(1), *supra* note 29.
[75] See also discussion on Citizenship of a Child in this report.

which deals with the maintenance of registers of persons registered as citizens of India. Under this Rule, Form XV[76] mentions only the 'father's name' in respect of such minors that are registered under Section 5(1)(d). It neglects to consider a position where the mother may be the applicant/guardian/single parent. The absence of assimilating the mother's information in the register maintained for minors poses a significant question mark in an otherwise gender-neutral framework, and thus, may be amended accordingly.

Through this analysis of the Indian legal framework relating to conferring nationality, it may be concluded that the Citizenship Act, and the Citizenship Rules made under it, do not discriminate on the basis of gender to obtain nationality. Also, under the Act, the gender of a parent is not the criteria for passing on nationality to a child. Under the international legal framework regarding gender neutrality in obtaining nationality and passing it on, India's laws are in consonance with the various conventions it is party to.

2.4. CITIZENSHIP BY REGISTRATION AND NATURALISATION

Acquisition of nationality by a stateless person can pave the way for reducing statelessness. In addition to gaining nationality at the time of birth or by descent, nationality may also be acquired by way of registration or by naturalization. This report has already discussed conferral of citizenship on children and when there is a change in marital status. The following section will evaluate further provisions of the Citizenship Act that govern bestowal of citizenship on a person, thereby providing an insight into whether these provisions assimilate stateless persons or do not state their position at all.

2.4.1. Citizenship by registration

Under the provisions of Section 5 of the Citizenship Act, the following categories of persons may make an application for Indian citizenship by registration:[77]

1. A person of Indian origin, ordinarily residing in India for seven years before making the application for registration;
2. A person of Indian origin who is an ordinary resident of any country that

[76] *The Citizenship Rules*, 2009, *Supra* note 60.
[77] See *The Citizenship Act, 1955, Supra* note 43.

was outside undivided India;

3. A person who has attained full age and capacity, and whose parents, being persons of Indian origin, have been registered as citizens of India already as per the procedure under the Act;
4. A person if either parent was earlier a citizen of independent India, can make an application if s/he has been residing in India for one year preceding the application for registration; and
5. An overseas citizen of India (at least for five years) who has been residing in India for one year immediately before submission of the application.

As per the provisions of the Citizenship Act a person may be granted citizenship by means of registration if s/he fulfils any of the above-mentioned requirements. The person has to apply as per the appropriate forms given under the Citizenship Rules, 2009, as well as comply with the time period of residence and fees.[78] It must be noted here that the Section 5 of Citizenship Act allows an application for registration to be made only by a person who is 'not an illegal migrant'.[79] This creates an encumbrance on those persons who are illegal migrants and who make a citizenship application via this method. Such persons remain stateless.

Reference here to the 1961 Convention is pertinent from the perspective that it provides a guiding light on the procedures for obtaining nationality. Article 1 of the Convention provides that two instances exist wherein a member state shall grant nationality to a person born on its territory who would otherwise be stateless:

1. At birth, by operation of law, or
2. Upon an application being lodged with the concerned state authority by, or on behalf of, the person concerned as per the manner prescribed in domestic law. Article 1 provides detailed conditions regarding the procedure for obtaining nationality under the same.

Further Article 4(2) of the Convention provides that the Contracting State may

[78] See the Rules given under Part-II of the Citizenship Rules, 2009, *Supra* note 60.
[79] Section 5 of *The Citizenship Act, 1955. Supra* note 43.

grant its nationality subject to one or more of the following conditions:

(a) That the application is lodged before the applicant reaches an age, being not less than twenty-three years, fixed by the Contracting State;
(b) That the person concerned has habitually resided in the territory of the Contracting State for such period immediately preceding the lodging of the application, not exceeding three years, as may be fixed by that State;
(c) That the person concerned has not been convicted of an offence against national security;
(d) That the person concerned has always been stateless.

Although India is not a party to this Convention, the provisions serve as a reference point for Indian nationality laws for citizenship by registration, and may be incorporated for prevention of statelessness .[80]

2.4.2. Citizenship by naturalization

Section 6 of the Indian Citizenship Act envisages granting of citizenship by way of naturalization. It puts forth that a person who is not an illegal migrant, and is of full age and capacity, may apply for naturalization in the prescribed form. If all the conditions laid down by the Central Government, as well as those mentioned in the Third Schedule of the Act, are fulfilled, the person may be granted a certificate of naturalization. The Third Schedule states that during the fourteen years immediately preceding the said period of twelve months (immediately preceding the date of application); he has either resided in India or has been in the service of a Government in India, or partly the one and partly the other, for periods amounting in the aggregate to not less than eleven years.[81]

Putting it simply, the required time of residence in India, for being eligible for naturalization under Section 6 of Citizenship Act is minimum period of eleven years in aggregate, excluding the twelve months immediately preceding the date of application. The required time period of residence in India shall be

[80] See also *NHRC v. State of Arunachal Pradesh and Another* : AIR 1996 SC 1234 , discussed in the section 'Judicial trends in the approaches towards statelessness' in this report.
[81] See Third Schedule, *The Citizenship Act*, *1955, Supra* note 43.

calculated from fourteen years preceding these said twelve months. A further requirement is that such an applicant must not have previously renounced or been deprived of Indian citizenship. S/he is also required to declare that s/he intends to make India her/his permanent home, and must undertake renunciation of the country of which s/he is a citizen in case her/his application for naturalization in India is accepted.

The proviso to Section 6 states that such conditions may be waived if the person has rendered distinguished service to the causes of science, philosophy, art, literature, world peace, or general human progress. However, the discretion to decide whether a person has rendered such distinguished service lies solely with the Central Government. It is evident that this section is silent on whether a stateless person may have the option of applying for the naturalization process under the Citizenship Act in order to become a citizen. The mention of 'illegal migrant' in this Section also practically rules out the probability of allowing a such a stateless person to apply for naturalization.

Rule No. 10 of the Citizenship Rules, 2009 provides the procedure for naturalization: under it, a naturalization application from a person to become a citizen of India under Sub-section (1) of section 6 shall not be entertained unless:

a) The application is made in Form VIII given in the Citizenship Rules;
b) S/he gives an undertaking in writing that s/he shall renounce the citizenship of his/her country in the event of his/her application being sanctioned; and
c) The application is accompanied by
    1. A duly stamped affidavit verifying the correctness of the statements made in the application, along with two affidavits from Indian citizens testifying to the character of the applicant; and
    2. A certificate depicting that the applicant has adequate knowledge of one of the languages specified in the Eighth Schedule to the Constitution of India.

The term 'adequate knowledge' above means that the applicant should be able to speak, read, or write in that language and that this certificate may either be

issued by a recognized educational institution or a recognized public organization, or by two persons (Indian citizens) from the locality or district of the applicant.[82]

Article 32 of the 1954 Convention Relating to the Status of Stateless Persons provides a broad guideline for Contracting States from the perspective of provisions on naturalization in their respective nationality laws. This Article states that Contracting States shall, as far as possible, facilitate the assimilation and naturalization of stateless persons. They shall, in particular, make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.[83]

Naturalization is the gateway to assimilating stateless persons who cannot acquire citizenship through automatic modes within the citizenry of the country. However, the provisions whereby Indian citizenship may be granted to a person – without a nationality – living in India have been made too tight to fit them. Even though these domestic provisions do not pose the risk of creating statelessness, they do block the path for granting nationality to stateless persons in India, thereby not really reducing situations of statelessness. It is recommended that the provisions relating to naturalization in the Indian nationality laws are amended, incorporating guidelines given in the 1954 and 1961 UN Conventions.

2.5. RENUNCIATION OF CITIZENSHIP

The right to change one's nationality is set out in Article 15 of the UDHR. Most States provide for the right to renounce one's nationality, an action that may result in statelessness unless safeguards are adopted to avoid it. Under Section 8 of the Citizenship Act, when a citizen of India who is of full age[84] and capacity makes a declaration (via Form XXII) that s/he wishes to renounce their Indian citizenship, and this declaration is attested as well as registered by the prescribed authority, then such a person ceases to be a citizen of India. It is significant to note that Rule No. 23 of the Citizenship Rules, 2009 provides further elaboration of what constitutes the declaration. In it, the citizen

[82] See Rule 10 of the Citizenship Rules, 2009, *Supra* note 60.
[83] United Nations (1954) *The Convention Relating to the Status of Stateless Persons*. Retrieved from http://www.refworld.org/docid/3ae6b3840.html
[84] Section 2(4), *The Citizenship Act*, 1955, *Supra* note 43.

renouncing his/her citizenship must state firstly under which provision of the Act s/he is an Indian citizen and, secondly, the circumstances within which the applicant 'intends to acquire foreign citizenship'. On the receipt of the declaration of renunciation of citizenship, an acknowledgement in Form XXIII is issued by the designated officer. This declaration is then registered with the Ministry of Home Affairs, Government of India.

In cases where citizenship renunciation is registered before the person has officially acquired the nationality of another state, this person is then laid susceptible to the possibility of statelessness. In this case, the only path available to him/her under the Citizenship Act appears to be through the long process of acquiring nationality through naturalization.

The consequences of a person renouncing citizenship can go on to have a direct effect on the nationality of his/her minor child, under Section 8(2) of the Citizenship Act. This Section provides that when a person ceases to be a citizen of India by renouncing her/his citizenship, the minor child of such a person also automatically ceases to be a citizen of India. Such a minor may, within one year of attaining full age and capacity, apply for citizenship by registration under Section 5 of the Act. It is interesting to note that Form XXIV (which provides the format for maintenance of the register by the Central Government in the Ministry of Home Affairs of those people who have renounced their citizenship) makes no mention, nor asks for any information, of the minor child of such a person. Another valid question that needs deliberation is that in such circumstances where one parent of a minor child renounces Indian nationality and the other retains it, why is the benefit of nationality of the latter parent not given to the minor child? This distinction appears to be arbitrary and without reasonable justification. The provision appears to harbour the latent likelihood of making such minor children stateless in case the child does not attain the nationality of another state.

It is important to draw attention here to the relevant Articles in the 1961 Convention on the Reduction of Statelessness, which provides a common framework for Contracting States regarding making provisions in their domestic laws to prevent and reduce statelessness. Article 7 of the Convention

lays down that Contracting States must not permit a person to renounce his/her nationality, unless s/he possesses, or has acquired another nationality. However, this provision shall not apply in cases where their application would be inconsistent with the principles stated in Articles 13 and 14 of the UDHR.

An UNHCR expert meeting in Tunis in 2013 concluded that States could ensure that renunciation of citizenship did not result in statelessness if they provided for a lapse of the renunciation in case the individual concerned failed to acquire the foreign nationality within a fixed period of time (e.g. one year).[85] Consequently, the renunciation is deemed never to have taken place and the person is therefore not rendered stateless. The higher likelihood of a woman renouncing her nationality upon marriage to a foreign man (than vice-versa) makes this provision particularly important to prevent statelessness among women.[86]

The conclusions of this expert meeting further considered that some Contracting States require applicants for naturalization to have renounced their former nationality and give for that purpose an assurance that the naturalization will be granted upon submission of proof of renunciation of the foreign nationality.[87] It was agreed upon in the expert meeting that under the 1961 Convention there is an implicit obligation that assurances, once issued, may not be retracted on the grounds that conditions of naturalization are not met, thereby rendering the person stateless. As an alternative to issuance of an assurance, some States provide that naturalization is granted against a pledge by the individual to renounce his/her foreign nationality, and set a fixed period for submitting proof of such renunciation. In the event the proof is not submitted, the naturalization decision is declared null and void.[88]

After looking into the provision on renunciation in the Citizenship Act, 1955 as well as relevant provisions in the 1961 Convention, it may be concluded that Indian provisions are not in line with the international legal framework set in place to prevent and reduce statelessness. It is imperative that the relevant

[85] UNHCR (2013) *Expert Meeting Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality: Summary Conclusions*. Retrieved from http://www.refworld.org/pdfid/533a754b4.pdf
[86] *Ibid*.
[87] *Ibid*.
[88] *Ibid*.

Indian authorities confirm the possession or assurance of foreign nationality before registering the renunciation of citizenship by the applicant.

2.6. WITHDRAWAL OF NATIONALITY

The Tunis Conclusions[89] also discussed the understanding of the terms 'loss' and 'deprivation' of nationality, under the broader term 'withdrawal of nationality'. The term 'deprivation' has been explained to describe situations where the withdrawal of citizenship is initiated by State authorities. The term 'loss of nationality' is described as withdrawal of nationality that is automatic by the operation of law ('*ex lege*'). Articles 5 to 9 of the 1961 Convention address all situations wherein individuals who were considered nationals of a State under the operation of its law are no longer so considered, due to automatic loss of nationality or a decision by official authorities.

Loss of nationality under the Indian Citizenship Act, 1955 has been elaborated upon in two provisions: Section 9 titled 'termination of citizenship' and Section 10 titled 'deprivation of citizenship'. Although the two provisions have different titles, the consequence that follows is the same—the person ceases to be a citizen of India. The only distinguishing factor between the two ways of withdrawal of nationality is that the 'termination' of nationality occurs automatically by operation of law, while 'deprivation' is initiated by an action on part of the Government. The following is a discussion of these provisions and whether they, in any way, create, prevent, or reduce statelessness.

2.6.1. Termination of citizenship

Section 9 of the Citizenship Act lays down provisions for termination of a person's Indian citizenship in case s/he has, by naturalization, registration, or otherwise, voluntarily acquired citizenship of another country.[90] This automatic termination of citizenship is governed by procedures laid down in Rule 40 of the Citizenship Rules, 2009.[91] Rule 40 states that the Central Government shall decide upon the termination of a person's citizenship under the Citizenship Act, with due regard given to the rules of procedure specified in Schedule III of the

[89] *Supra* note 85.
[90] *The Citizenship Act , 1955, Supra* note 43.
[91] *The Citizenship Rules*, 1955,*Supra* note 60.

Citizenship Rules, 2009. The Citizenship Rules stipulate that, for the exercise of this Section, the government may require such a person to prove that s/he has not acquired the nationality of any other country. Furthermore, the burden of proof will lie with this person.

For the purposes of determining an Indian citizen's acquisition of another country's citizenship, the Citizenship Rules state that the Central Government may question/make reference to any issues relating to the same. It may make reference as it deems fit, in respect to such questions or any matter relating thereto, to its Embassy in that country or to that country's government, and act upon any report of information received in the pursuance of such reference.[92] The Citizenship Rules also explain that if a citizen of India has obtained, on any date, a passport from the government of any other country, it will be a conclusive proof of his/her having voluntarily acquired the citizenship of that country before that date.

The Citizenship Rules further lay down the circumstances that should be taken into consideration when determining whether a person has voluntarily acquired the citizenship of another country or not. These are:

(a) Whether the person has migrated to that country with the intention of making it her/his permanent home;
(b) Whether s/he has, in fact, taken up permanent residence in that country; and
(c) Any other circumstances relevant to the purpose.[93]

The Citizenship Rules, 2009 also state how Indian authorities deal with a citizen who leaves or has left India without a travel document issued by the Central Government. If such a person resides outside India for a period exceeding three years, s/he shall be deemed to have voluntarily acquired the citizenship of the country of his/her residence.[94]

An important point to note regarding the Citizenship Rules' position vis-à-vis

[92] Schedule III of *The Citizenship Rules, 2009, Supra* note 60.
[93] *Ibid*.
[94] *Ibid*.

termination of Indian citizenship is that, unlike Section 8[95] of the Citizenship Act, the provision relating to termination does not affect the nationality of a minor child of the person whose citizenship has been terminated.

2.6.2. Deprivation of citizenship

Section 10 of the Citizenship Act mentions the circumstances in which the Central Government may deprive a person of Indian citizenship. This Section applies only to those persons who have acquired Indian citizenship by virtue of naturalization or registration. This provision states the circumstances which warrant deprivation of citizenship, including using fraudulent means to obtain a citizenship certificate or citizenship registration, disloyalty to the Constitution of India, assisting, communicating or trading with an enemy during war, imprisonment in any country within five years of registration or naturalization, and residing outside India continuously for seven years.[96] The section further provides that before depriving a citizen of his citizenship, a notice shall be served upon him/her, and also stipulates that the Central Government shall refer the case to an Inquiry Committee.[97] The rules governing such inquiry are contained in Rules 25, 26, 27, 28 and Schedule II of Citizenship Rules, 2009.[98]

Under it, a notice is required to be given to the person before depriving him/her of their citizenship. In cases where the person's whereabouts are known, the notice is to be delivered to him personally or sent via post; in cases where the person's whereabouts are not known, the notice should be sent to his last-known address.

The person receiving this notice may then make an application for referring his/her case to a Committee of Inquiry. This application must be made within three months from the date of notice in case the person is in India, and not less than three months in any other case, as specified by the Central Government.[99] In special circumstances, the Central Government may extend the time period as well. Once the application is received, the Central Government shall refer the

[95] *Renunciation of Citizenship*. Section 8 of The Citizenship Act, 1955, *Supra* note 43.
[96] See the conditions that the Central Government may consider for deprivation of citizenship under Sub sec 2 of Section 10 of *The Citizenship Act, 1955, Supra* note 43.
[97] Sub-section 4 of Section 10. *Id.*
[98] *The Citizenship Rules*, 2009, *Supra* note 60
[99] *Ibid*.

case to a Committee of Inquiry for its decision. The order of the Committee depriving a person of Indian citizenship must be then published in the Official Gazette.

The provisions relating to deprivation of Indian citizenship seem exhaustive; however, neither the Citizenship Act nor the supplementing Citizenship Rules lay down any procedure or provision for ensuring that such a person does not become stateless on deprivation of his/her Indian nationality. With respect to a person deprived of his/her nationality under this section, the gap in Indian citizenship law poses a significant risk for the creation of statelessness. Article 8 of the 1961 Convention lays down the basic rule that a Contracting State shall not deprive a person of his/her nationality if such deprivation renders him/her stateless.[100] The exceptions to this basic rule are set out in paragraphs (2) and (3) of Article 8. While States may provide for deprivation of nationality on grounds other than the 12 set out in the 1961 Convention, they may not apply such provisions to individuals who would thereby be left stateless.

Article 8 of the 1961 Convention read alongside Article 7, makes provisions to reduce instances of deprivation of citizenship of a naturalized person. However, if s/he stays abroad for a period of not less than seven consecutive years and fails to declare to the appropriate authorities his intention to retain his nationality, s/he may be subject to the national law of the Contracting State. Under the Convention, deprivation of citizenship is also permitted if the nationality has been obtained by misrepresentation or fraud.

Article 8(3) also allows States to retain the right to deprive persons of their nationality on the grounds listed exhaustively in the paragraph, even if these may result in statelessness. Specifically, these exceptions include where a national behaves inconsistently with his/her duty of loyalty to the State concerned, or has taken an oath, made a formal declaration, or otherwise given definite evidence of allegiance to another State. A State may use one or more of these exceptions if a declaration is made to that end at the time of signature, ratification or accession. In addition, the ground(s) concerned must already exist(s) at that time in the nationality legislation of the State; legislation may not be amended to introduce a new possibility at the time of ratification or thereafter

[100] *1961 Convention on Reduction of Statelessness*. *Supra* note 83.

(*stand still clause*).[101] Article 8(3)(a)(i) further lays down provisions for permitting deprivation of citizenship on the basis of services rendered to, or emoluments received, from foreign States. Article 8(3)(a)(ii) allows deprivation of citizenship on the basis of conduct seriously prejudicial to the vital interests of the State.

The provisions relating to deprivation under the Citizenship Act read along with the Rules are detailed and provide an opportunity to such a person of representation as well as being heard by the Inquiry Committee. However, such deprivation, will eventually lead him to become a stateless person especially when he does not possess another nationality. Such a deprivation of nationality will make him unable to actualize any of his rights subsequently.

2.7. IDENTIFICATION OF STATELESS PERSONS

Although an international legal regime is in place for the prevention and reduction of statelessness, there are still millions of stateless persons around the world today, according to UNHCR. The protection of the human rights of stateless persons, and the standards of treatment to which stateless persons may be entitled, is outlined in the 1954 UN Convention relating to the Status of Stateless Persons. This Convention establishes the international legal definition of a 'stateless person'. It does not, however, prescribe any mechanism for identifying the same. In order to protect the rights of stateless persons, then, it is imperative that Contracting States identify stateless persons within their jurisdictions, thereby upholding the spirit of the Convention and their commitments under it.[102]

There are various points at which the identification of a person as a national is useful. However, when a person has no nationality, s/he remains unaccounted for in all matters of legal documentation. Identification of stateless persons is useful not only for actualization of basic human rights that a stateless person is entitled to under the international legal framework, but also for assisting the creation of legal and policy solutions for the prevention and reduction of statelessness. The first desirable step towards addressing the problem of statelessness is thus to identify stateless persons as a category in itself.

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[101] *Expert Meeting (Tunis)*, *supra* note 85.
[102] UNHCR. (2014). *Nationality and Statelessness: Handbook for Parliamentarians N° 22*. Retrieved from http://www.refworld.org/docid/53d0a0974.html

As already mentioned, the acquisition of Indian citizenship is governed by the Citizenship Act, 1955. This report has already discussed how the Citizenship Act falls short of acknowledging or assimilating stateless persons in citizenship considerations. In addition to the Citizenship Act, identification of stateless persons in India may be discussed by looking at the following vantage points and their concerned domestic laws:

a. Census in India (Census Act, 1948)
b. Regulation of foreigners in India (Foreigners Act, 1946)
c. Regulation of passports in India (Passport Act, 1967)
d. Birth registration of child born in India (Registration of Births and Deaths Act, 1969)

2.7.1. Census in India

Census in India is carried out by the Office of the Registrar General and Census Commissioner, which falls under the Ministry of Home Affairs, Government of India. It is governed by the Census Act of 1948 and the Rules of 1990 that were formed under it. The Census Act lays down administrative procedure for conducting the census, for maintenance of records, and delegation of authority for execution of the provisions of the Act. The Rules of 1990 made under the Act spell out the format to be followed in conducting the census.

The Census Act provides organizational detail about the census administration; however, it fails to provide basic clarifications regarding who are to be counted under census exercises, and the grounds required in order to be counted as part of the population, (i.e. being a citizen or a non-citizen). The Act does not address the question of whether such persons – who may not possess nationality documents but who reside in India – should be counted in the census or not. While this Act governs the process of data collection regarding the existing population in India, it omits to take into consideration such populations that may lack nationality or have unknown nationality.

As previously discussed, persons distinguishable from the citizens of a country are entitled to rights of their own as a separate category within the international legal framework. By including non-citizen residents in the census, without determining their nationality status, the census may actually deprive them of

their right to protection and assistance under international law. On the other hand, exclusion of such persons from census data also poses the risk of ignoring the existence of such persons or how their conditions may be ameliorated. Additional information on citizenship should be collected in census exercises, so as to permit the classification of the population into (a) citizens by birth, (b) citizens by naturalization (whether by declaration, choice, marriage or other means), and (c) foreigners (citizens of another country).[103]

2.7.1.1. National Register of Indian Citizens

An additional mapping of citizens has been introduced by Section 14A of Citizenship Act, 1955. This provision was inserted by amending the Citizenship Act in 2004. Section 14A of Citizenship Act authorizes the Central Government to compulsorily register every citizen of India, and issue national identity cards to every citizen of India. For this purpose the Central Government may maintain a National Register of Indian Citizens, and establish a National Registration Authority. The Registrar General of India, who is appointed under the Registration of Births and Deaths Act, 1969, acts as the National Registration Authority, and functions as the Registrar General of Citizen Registration.[104] In furtherance of the provision under Section 14A, the Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003 were passed by the Ministry of Home Affairs. These Rules lay out the procedure to be followed for preparation and maintenance of the National Register of Indian Citizens, issue of National Identity Cards, among other things. The Rules also house that verification of citizenship status of individuals whose citizenship is in doubt shall be taken up, before entering their names in the Register.[105] However, the Rules are silent on the status of such persons whose citizenship remains doubtful even after verification.

While the National Register of Indian Citizens shall be a database of only citizens of India, there is another initiative from the government to maintain a National Population Register. The creation of the National Population Register

[103] UN Department of Economic and Social Affairs, Statistics Division. (2008). *Principles and Recommendations for Population and Housing Censuses, Revision 2 Series M, No. 67/Rev.2.* Retrieved from http://unstats.un.org/unsd/publication/seriesM/seriesm_67Rev2e.pdf

[104] Sub-section 3 of Section 14A of The *Citizenship Act, 1955*, *Supra* note 43.

[105] Rule 4 of Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003. Retrieved from http://mha.nic.in/sites/upload_files/mha/files/pdf/citizenship_rules2003.pdf

(NPR) is the first step towards preparation of the National Register of Indian Citizens, and shall be maintained by Registrar General and Census Commissioner of India, Ministry of Home Affairs.[106] This process of enumerating "usual residents"[107] is still underway, in association with Aadhaar number.[108] As these projects of National Population Register (NPR) and Unique Identification Number (also called Aadhaar number) are in progress in India, a useful step in the direction of identification of stateless persons may be to have a separate category of stateless persons during data collection for these two projects.

Census Act and the Rules made under it is the only framework in India, for creating a social, economic, demographic and numerical profile of India. A proposed on-going additive initiative in that direction is the NPR and Aadhar Projects. The inclusion of stateless persons as a category during such nation-level mapping may be helpful for the purpose of:

- Categorizing such persons who do not have a nationality as stateless;
- Mapping of stateless persons in India;
- Determining causes of statelessness;
- Providing insight into the socio-economic conditions of stateless persons; and
- Devising a legal and policy framework to address the particular issues faced by stateless persons.

2.7.2. Regulation of foreigners in India

Stateless persons present in any country are considered non-nationals. As there non-nationals may be of different kinds, India has in place a legislative scheme for the detection of foreigners. In this respect, the Foreigners Act, 1946 is the primary law. Together with the Passport Act, 1967, it forms the framework for immigration law in India. The Foreigners Act empowers the Central Government to regulate the entry, presence and departure of foreigners in India. Other important laws that comprise this scheme are the Registration of Foreigners Act, 1939, the Registration of Foreigners Rules 1992, the Foreigners (Tribunal) Order, 1964, and the Foreigners (Internment) Order, 1962.

[106] Department Of Information Technology, Government of India. *National Population Register*. *Retrieved from* http://ditnpr.nic.in/FAQs.aspx

2.7.2.1. Determination of nationality

In the Foreigners Act, a foreigner is defined as 'a person who is not a citizen of India'.[109] This definition, however, is not inclusive and does not state whether stateless persons are recognized as foreigners in India. Thus, a person who may possess the nationality of another country but is present in India is considered as much a foreigner under this definition as a person with no proof of his/her nationality. Assuming that all citizens come under an umbrella definition, the lack of a clear definition of 'foreigner' in this Act can result in rights violations of stateless persons as a separate category.

Section 8 of the Foreigners Act lays down the mode of determination of nationality in the case of two types of people:

a) A foreigner who is recognized as a national of more than one foreign country, and
b) A foreigner whose nationality is uncertain.[110]

This provision states that such a foreigner may, for the purposes of determination, be treated as the national of the country with which s/he appears – to the prescribed authority – to have the closest connection (for the time being), in the interests of sympathy. In case the foreigner's nationality is unknown or cannot be ascribed, then the country s/he was last connected to may be considered to be his/her country of nationality. However, if the foreigner has nationality by birth, s/he shall be assumed to have retained the nationality of the country where s/he was born. This is unless the Central Government directs otherwise or if the foreigner proves, to the satisfaction of the prescribed

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[107] Archive, Government of India. *National Population Register: My Identity My Pride*. Retrieved from http://www.archive.india.gov.in/spotlight/spotlight_archive.php?id=96#npr5

[108] The process of allotting Aadhar numbers by the Planning Commission of India is under way.
See *About UIDAI*. Retrieved from http://uidai.gov.in/legislations-guidelines.html
The bill is under question in the Supreme Court of India. As a result of limited official data available on this subject, and as the Bill is not yet enacted as a law by the Parliament of India, this Report has omitted it from purview of analysis of legal framework.
See also *National Identification Authority of India Bill*. Retrieved from http://164.100.24.219/BillsTexts/RSBillTexts/asintroduced/national%20ident.pdf

[109] Sub-section 3(a) of Section 2, The Foreigners Act, 1946, *Supra* note 49.

[110] Sub-section 1 of Section 8, *Id.*

authority, that s/he had subsequently acquired the nationality of another country via naturalization.

Section 8 of the Foreigners Act appears to be based on the presumption that during the time the determination process of nationality (under this Section) is conducted, the foreigner is 'treated' as the national of the country s/he appears to be most closely connected to. It is of concern that this section of the Act does not address the risk of statelessness for a foreigner appearing to have no nationality once the nationality determination process is over.

With respect to the identity papers of stateless persons, the 1954 Convention Relating to the Status of Stateless Persons avers, in Article 27, that Contracting States shall issue identity papers to such persons who do not possess a valid travel document.[111] Along these lines, it may be seen that although the Foreigners Act deals with various aspects of foreigners' entry into, movements during and exit from India, it does not, from the very outset, either incorporate stateless persons as a category of foreigners, or provide for their regulation as a separate category. Even in cases involving persons whose nationalities may remain unknown or questionable after the determination process, the Foreigners Act does not engage with the idea of procedures for their regulation.

2.7.3. Regulation of passports in India

The right to freedom of movement is a basic human right, one that is addressed and embraced within the international human rights framework.[112] This right highlights the importance of passports, as it is impossible for persons not possessing the nationality of any country to travel to another without this document. In other words, a passport acts as a document that facilitates inter-country travel. It also confers identity upon a person, thereby linking her/him to the country whose passport s/he holds.

In India, the issuance and withdrawal of passports to Indian citizens, as well as 'other persons',[113] is governed by the Indian Passports Act, 1967. Neither the Preamble nor the interpretation clause of the Act elaborate upon who are to be

[111] *1954 Convention Relating to the Status of Stateless Persons*, *supra* note 82.
[112] See Article 14, UDHR, *supra* note 19.
[113] The Preamble of the The Passports Act, 1967, Retrieved from http://passportindia.gov.in/AppOnlineProject/pdf/passports_act.pdf

included under the term 'other persons'. From the perspective of identifying stateless persons, the Passport Act provides a certificate of identity. The provisions relating to this certificate of identity are discussed below.

2.7.3.1. Certificate of identity

Under section 1 of the Passports Act, 1967 three types of documents can be issued:

1. Passports
2. Travel Documents
3. Certificates of identity

Under Schedule II Part II of the Passport Rules, 1980, a Certificate of Identity is issued to stateless persons residing in India or foreigners whose countries are not represented in India, or whose national status is in doubt. Hence, under the Passport Act, a stateless person may travel to and from India with travel documents issued by the appropriate authority that certify their identity. Furthermore, the Passport Rules provide, in Schedule III Part I, the form whereby a travel document application may be made by stateless persons.[114] This form also takes into consideration the spouse of such a person, along with any children they have below the age of 15. While the Passport Rules mention stateless persons on one hand, neither it nor the Passports Act explains the meaning attached to the term, in this context.

The application form for an identity certificate makes it mandatory to submit a 'residential permit' as well. However, the provision does not specify the procedure and eligibility for obtaining such a residential permit. There is no clarity as to the provision that governs obtaining residential permits and whether a stateless person is eligible for it. Further, the application form requires information as to the applicant's 'last permanent address abroad'.[115] This provision presumes that a person applying for an identity certificate is a migrant from abroad; it fails to encompass a situation where a person may not have left the territory of the country and would still be eligible for an identity certificate.

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[114] Form EA (P)5 (Application for the Issue of Certificate of Identity). The Passport Rules, 1980. Retrieved from http://passportindia.gov.in/AppOnlineProject/pdf/Passport_Rules_1980.pdf

[115] *Ibid*.

The Passport Act spearheads all Indian laws relating to nationality, for it is the only law that recognizes a category of persons by the term 'stateless', for the issuance of certificates of identity. This is the only Indian Act that caters, to some extent, to the needs of a stateless person to have a record of his/her identity. By issuing a certificate of identity, a positive step is taken towards recognizing that a stateless person can be one who either resides in India and is stateless/without a nationality, or one who is a foreigner whose nationality is doubtful. The certificate of identity would also help such persons to exercise their human right to travel. The recognition of statelessness, through this certificate, is a significant step towards redressing the problem. The 1954 Convention Relating to the Status of Stateless Persons awards the right to a stateless person lawfully staying in the state to be given travel documents for the purpose of travelling outside the territory of such country of lawful residence.[116] Although India is not a signatory to this Convention, Article 28 is reflected in the Passports Act in the form of issuance of identity certificates.

2.7.4. Birth registration of children born in India

The registration of the birth of any child in India is governed by the Registration of Births and Deaths Act, 1969. Both the preamble of the Act and the definition clause do not mention to whom the Act is applicable. It may be presumed that under the Act, births and deaths of both citizens and non-citizens may be registered. The Act makes the registration of all births in India mandatory, and for that the Act creates a national- and state-level authority to regulate the registrations. Upon the birth of a child, Sections 8, 9 and 10 of the Registration of Births and Deaths Act place the responsibility of officially submitting this information upon those individuals who are based in the place of occurrence of birth, or who are in charge of such a place, or are heads of family, or in similar positions.

An effective tool to prevent statelessness is to ensure that a child's birth is officially recorded at the time of his/her birth and to see to it that no newborn is born stateless. Under Article 7 of the CRC, every child has the right to be registered immediately after birth, and to have the right to acquire a nationality at birth. '[R]egistration of the birth provides proof of descent and of place of

[116] See Article 28 of the *1954 Convention Relating to the Status of Stateless Persons*. *Supra* note 111.

birth and therefore underpins implementation of the 1961 Convention and related human rights norms.'[117] However, the mechanism of registration of births in India does not explicitly provide for birth registration of children irrespective of nationality of their parents or their marital status.[118] The registration of birth of a child may not in itself be an instrument that ensures a child's acquisition of nationality, but it acts as proof of a link between a person and the State of birth. Hence it is an important mechanism in helping prevent statelessness.[119]

Registration of birth is the first step in assisting the process of identification of a newborn, although there is no mention in the Registration of Births and Deaths Act about the nationality of a child's parent(s) and about its effect on the registration of a child's birth. Further, the Act gives power to each state in India to frame its own Rules, for purposes of carrying out provisions of this Act.[120] However, the Act does not prescribe any guiding structure for bringing about uniformity in the administrative procedures, technicalities, and requisites for birth registration in different states. There also seem to be ambiguities regarding what documents, if any, are required in for registration. The inconsistencies between the provisions governing registration of births in different states results in the creation of gaps within the framework, within which statelessness can occur.

Through the analysis of points in the Indian legal framework that highlight the pertinence of a person's identity –whether for civil documentation or for establishing one's nationality –it may be concluded that the laws in India are non-committal towards the identification of stateless persons. While on one hand the Passport Rules provide for issuance of identity certificates to 'stateless persons', on the other hand the Foreigners Act shies away from classifying as 'stateless' such persons whose nationality may remain unknown even after the nationality verification procedure laid down by the Act. The Registration of Births and Deaths Act, which governs the registration of all births in India is

[117] UNHCR. (2013). *Child Protection Issue Brief: Birth Registration*. Retrieved from http://www.refworld.org/docid/523fe9214.html
[118] *Ibid.*
[119] UNHCR. (2010). *Birth Registration: A Topic Proposed for an Executive Committee Conclusion on International Protection. Retrieved from* http://www.refworld.org/docid/4b97a3242.html
[120] Section 30 of The Registration of Births and Deaths Act, 1969. Retrieved from http://mha.nic.in/sites/upload_files/mha/files/pdf/rbd_act_1969.pdf

silent on ascertaining nationality of a child at birth, or her/his parents, which further closes doors for identifying such persons who may not be having any nationality. Furthermore, the only law regulating census data collection for the entire population of India (the Census Act) fails to address the question of determining stateless persons residing within the territory of India. In respect of processes of identification of stateless persons in India, the relevant existing provisions of Indian law are inadequate, and do not address the determination of stateless persons.

2.8. PERSONS COVERED UNDER THE ASSAM ACCORD[121]

The influx of people from neighbouring countries via India's eastern border had started with partition of India. In 1966, India experienced a large number of East Pakistani citizens entering and settling in Assam and other parts of eastern India due to the construction of the Kaptai Dam.[122] This population inflow continued even after East Pakistan became the sovereign state of Bangladesh in 1971. As a result, Assam has become, over the years, a centre of internal tension and agitation on the issue of such immigrants. In the absence of concrete data on the demographic and other impacts of this immigration, the issue has significant political, social and legal implications.

Anti-foreigner agitation started in Assam in 1978, calling for striking such foreigners off voters' records and deporting them from Assam. In order to find an amicable solution, the Government of India held dialogues with the All Assam Students Union (AASU) and the All Assam Gana Sangram Parishad (AAGSP), which led to the signing of the Assam Accord in 1985. Under the terms of the Accord, all persons who came to Assam prior to 1 January, 1966 were to be regularized as Indian citizens under the Citizenship Act, 1955.[123] Those persons who immigrated to India after January 1966, and up to March 24,

[121] It may be noted here that the observations drawn in this section, have been derived exclusively from the available literature, and are read strictly in the Indian context. While the nationality laws of both concerned states require assessment for a better understanding of the situation, the paucity of academic literature on discussions of the other side have compelled us to analyze the Assam Accord only from the perspective of identifying gaps in Indian nationality law.

[122] The Kaptai Dam, in the Chittagong Hill Tracts, is the only hydro-electric power project in Bangladesh, and was created without consulting indigenous communities, many of whom were displaced.
See International Rivers website. *Bangladesh*. Retrieved from http://www.internationalrivers.org/campaigns/bangladesh

[123] Section 6A (Special Provisions as to Citizenship of Persons covered under the Assam Accord) of Citizenship Act, 1955, *Supra* note 43.

1971, were to be detected and registered as 'foreigners' as per the provisions under the Foreigners Act, 1946 and the Foreigners (Tribunals) Order, 1964.[124] This provision was also extended to people whose name were already present on the electoral rolls in Assam or other place, and called for deletion of their names from the same.[125]

The question of nationality of those people covered under the Assam Accord is provided in Section 6A of the Citizenship Act, 1955. Under this Section, sub-sections (4), (5) and (6) state that a person who has been detected to be a foreigner (defined as such under Section 2(3)(a) of the Foreigners Act, 1946[126] and the Foreigners (Tribunals) Order, 1964) shall have the same rights and obligations as an Indian citizen for ten years from the date of detection, except for inclusion of their name in any electoral roll. After the said expiry of the ten years, s/he would be deemed to be a citizen of India for all purposes, unless s/he did not wish to be a citizen of India and made such a declaration under the Citizenship Act.[127] The provision further states that the name of such a person was to be re-enrolled in the respective electoral list. This appears to be a welcome provision, as it attempts to prevent instances of statelessness in a situation that might otherwise have harboured potential for large-scale there was a huge risk of creating statelessness on a large scale.

However, the Assam Accord does not address the position of those persons who were found to have entered India after March 25, 1971. Such 'foreigners' continued to be detected, deleted from electoral rolls, and expelled. The provisions governing such persons also does not take into account determining their nationality before deporting them to a country that might also not accept them or naturalize them as citizens. The Citizenship Act is thus silent about the nationality question of such persons who have come to India and been here since 1971.

The cumulative effects of the Assam Accord and corresponding provisions in

[124] Paragraphs 5.1 to 5.4 of the Assam Accord, 1985. Retrieved from http://peacemaker.un.org/sites/peacemaker.un.org/files/IN_850815_Assam%20Accord.pdf
[125] Paragraph 5.4 of the Assam Accord, 1985. See as well Section 6A of the *Citizenship Act*. *Ibid.*
[126] See Section 2(3) (definition of a foreigner) of *The Foreigners Act*, *Supra* note 49.
[127] Sub-section 6 of Section 6A, Citizenship Act, 1955, *Supra* note 43.

the Citizenship Act neglect to provide safeguards against creation of statelessness in the future generations of those persons who may find themselves stateless as a result of the operation of these provisions. Such persons though residing in India become stateless as they neither possess an Indian nationality nor are recognized citizens of any other nation. On analyzing the legal provisions, relating to nationality in the Citizenship Act, 1955 as well as under the Assam Accord, due consideration appears to have been accorded to resolving issues related to illegal immigrants. However, not enough attention seems to have been given to questions of nationality with regards to stateless persons, or to procedures to reduce and prevent statelessness.

2.9. INDIA'S BILATERAL TREATY: INDO-CEYLON PACT, 1964[128]

Since colonial times, many Tamil Indians migrated to Sri Lanka to work on tea plantations and eventually settle there. The Government of Sri Lanka, however, did not welcome the Tamil immigrants, believing their Indian ancestry negated their declared Sri Lankan identity. Accordingly, the Sri Lankan Government passed the Ceylon[129] Citizenship Act, 1948 as well as the Indian and Pakistani Resident Citizenship Act No. 3, 1949. These Acts effectively deprived a large population of Indian Tamil residents in Sri Lanka of their citizenship rights and franchises.[130]

To ameliorate the conditions of such persons who now found themselves with neither Indian nor Sri Lankan nationality, the 'Indo-Ceylon Pact'[131] was reached between the-then Prime Ministers of India and Ceylon, Lal Bahadur Shastri and Sirimavo Bandaranaike. The agreement was actually an exchange of letters between the two premiers in 1964, and addressed the status of Indian Tamils in Sri Lanka. According to the agreement, an estimated population of 975,000 were stateless between both countries. India agreed to give citizenship and to

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[128] It may be noted here that the observations drawn in this section, have been derived exclusively from the available literature, and are read strictly in the Indian context. While the nationality laws of both concerned states require assessment for a better understanding of the situation, the paucity of academic literature on discussions of the other side have compelled us to analyze these only from the perspective of identifying gaps in Indian nationality law.

[129] Prior to 1972, Sri Lanka was known as 'Ceylon'.

[130] De Selva, K. M. (1999). *A History of Sri Lanka*. New Delhi: Oxford University Press, p. 493.

[131] For full text of the Indo-Ceylon Pact, See Government of India, Ministry of External Affairs. (1965). *Annual Report, 1964-65 (Appendix IV)*. Retrieved from http://mealib.nic.in/?pdf2491?00o

accept for repatriation of 525,000 of these persons (with their natural increase), while Sri Lanka agreed to grant citizenship to 300,000 persons (and their natural increase). It was further agreed that this process would be spread over a period of fifteen years, and that the two processes of citizenship and repatriation would keep pace with each other. The two governments agreed that further negotiation was required regarding the status of the remaining population of 150,000. This remaining population was finally covered by a bilateral agreement in 1974, whereby it was agreed that 75,000 people of the 150,000 would be given citizenship by Sri Lanka, and the remaining 75,000 would be accepted by India for repatriation.[132]

2.9.1. Present Status

The terms of the pact sought to grant nationality on the sides of both parties, but clarification was lacking regarding the criteria required for granting of Indian or Sri Lankan citizenships to such persons.[133] In fulfilment of the terms of the pact, the Indian government began extensive campaigns in 1968 to encourage the process of repatriation of 'Tamil Indians'[134] to India. The question of nationality of those stateless Tamils not addressed in the 1964 pact was resolved following subsequent negotiations between India and Sri Lanka in 1974. However, in 1982, India abrogated the two pacts of 1964 and 1974; during this time, 90,000 Indian Tamils already granted Indian citizenship were still physically in Sri Lanka, and another 86,000 were in the process of applying for Indian citizenship.[135] After the annulment of the pacts, India refused to entertain any further applications for Indian citizenship, while Sri Lanka believed that the pact of 1964 would continue to be in force until all cases of citizenship and permanent residence concerning Indian Tamils covered by the pact were settled.[136] Pursuant to further negotiations in 1985, India granted citizenship to

[132] Government of India, Ministry of External Affairs. (1974). *Annual Report, 1973-74.* (pp. 26-27). Retrieved from http://mealib.nic.in/?pdf2501?00o

[133] Pillai, R.S. (2012). Indo-Sri Lankan Pact of 1964 and the Problem of Statelessness – A Critique. *Afro-Asian Journal of Social Sciences, 3.* Retrieved from http://www.onlineresearchjournals.com/aajoss/art/82.pdf

[134] Indians residing in Ceylon were referred to as this.

[135] Goud, R.S. & Mukherjee, M. (Eds.). (2013). *India-Sri Lanka Relations: Strengthening SAARC*. Hyderabad: Allied Publishers Pvt. Ltd. (p. 46).

[136] Research Directorate, Immigration and Refugee Board of Canada (1997) 'Sri Lanka: Information on the Srimavo-Shastri Pact between India and Sri Lanka in the early 1960s, including how it was implemented, whether it granted citizenship to Indian Tamils living in Sri Lanka and if so, on who was eligible, and the residency and documentary requirements to be considered eligible' LKA27872.E, *Refworld.* Retrieved from http://www.refworld.org/docid/3ae6acf314.html

600,000 people, while Sri Lanka agreed to accept the remaining 469,000 as citizens.[137]

After demonstrating an affirmative approach towards reducing statelessness, via the Indo-Ceylon Pact, the non-implementation of this agreement has meant that the Indian government has yet to address the legal status of those people living in India without a nationality. In its 2012-2013 Annual Report, the Indian Ministry of Home Affairs makes mention of 'Sri Lankan citizens or those who did not apply for Indian citizenship and have not been given Sri Lankan citizenship either'[138] as being 'refugees'.[139] It is uncertain whether such persons should be understood as 'refugees' or 'stateless' within the present Indian legal framework.

The number of such stateless persons does not appear to be mentioned in official records of the Indian government. Furthermore, the follow-up mechanism of the pact – which aims at preventing the potential stateless position of future generations of present-day stateless persons – is also missing. Under similar conditions, the Sri Lankan government[140] has been more active in establishing initiatives to register Indian Tamils for citizenship.[141]

[137] *Ibid.*
[138] Government of India, Ministry of Home Affairs. (2013). *Annual Report, 2012-13*. Retrieved from http://www.mha.nic.in/sites/upload_files/mha/files/AR%28E%291213.pdf
[139] *Ibid*.
[140] For a detailed discussion, see Grover, V. (ed.). (2000). *Sri Lanka: Government and Politics.* Delhi: Dev Publishers & Distributors.
[141] UNHCR. (2003). *UNHCR Applauds Sri Lanka's move to Recognize Stateless Tamils*. UNHCR News Stories (3 December). Retrieved from http://www.unhcr.org/3fcf59c62.html

3. JUDICIAL TRENDS IN THE APPROACH TOWARDS STATELESSNESS

An anomaly, statelessness not only seriously jeopardizes a person's very identity, but it also reduces – to almost nil – the chances for such a person to redress his/her grievances. India has been, and still is, a host to a variety of persons whose nationality is in question. While the Indian legislative fora may not be adequately equipped to deal with the varied issues of nationality and statelessness, the Indian judiciary has taken initiative in this area. It has witnessed first-hand the dynamics between the acquisition of citizenship and its denial when asked to apply nationality law to the cases brought before it. As the judiciary is a key player in affecting situations of statelessness in India, the following section will elaborate on its stance in such cases as filed before the higher courts in India. This will enhance the report's overall discourse on nationality vis-à-vis issues of statelessness.

3.1. CITIZENSHIP AND DOMICILE

The issue of granting citizenship on the basis of domicile was considered in 1958 by the High Court of Punjab and Haryana. In *Mangal Sain v.Shanno Devi*, the court deliberated upon the citizenship of the appellant.[142] This appeal was against the decision of the Election Tribunal in Rohtak, which held that the appellant was not qualified to be elected to the Punjab Legislative Assembly and that therefore, his election was void as per the Representation of the People's Act, 1950.[143] The main issue before the Court, in the appeal, was whether the appellant was a citizen of India at the time when he was enrolled as a voter, or when his nomination papers were accepted, or even at the time when he was elected. To determine his citizenship, the Court had to decide whether the appellant had his domicile in India after migrating from his hometown, which had become part of Pakistan after independence.

The appellant, Mangal Sain, claimed citizenship under Article 5(c) of the Indian Constitution, wherein the conditions for citizenship were that a person must have domicile in the territory of India at the time of the Constitution's

[142] *Mangal Sain v.Shanno Devi. Supra* note 42.
[143] Section 5(c) of the Representation of the People Act, 1951. Retrieved from http://lawmin.nic.in/legislative/election/volume%201/representation%20of%20the%20people%20act,%201951.pdf

commencement, and that s/he must ordinarily have been resident in India at least five years before this commencement.[144] Additionally, under Article 6 of the Constitution, the three conditions for acquiring Indian citizenship are that:

1. A person must have migrated from territory included in Pakistan after independence,
2. The person must have been born in pre-independence India, and
3. The person must have been ordinarily residing India if s/he has migrated before July 1948.

According to the facts of the case, the appellant was born in 1927 in a village that became part of Pakistan following Indian independence. The appellant was employed in the Military Accounts Office in Jullundur, Punjab, in 1944. His place of residence kept shifting during this period and the enactment of the Constitution (i.e. 1944-1950). However, the Court concluded from the facts of the case that the appellant – who had moved from his home village to Jullundur– had, after August 15, 1947 'no other intention than of making the Dominion of India as his place of abode.'[145]

Expatiating on the term 'domicile', the Court observed:

> To place a narrow and strict construction on this word, as the learned Tribunal has done, would result in making persons, similarly placed as the appellant, (and there may be quite a large number of such persons) stateless. I am extremely doubtful if such consequences were intended or countenanced by the Constitution makers, and I have not been able to persuade myself to impute to them such an intention.[146]

The Court further held that the term 'migrate' used in Article 6 of the Constitution should not be construed to debar a person, who may not be in India at the time of detection of his/her citizenship, from being considered as having the intention of settling here. The liberal interpretation applied by this Court to the relevant provisions did save the appellant from being rendered stateless; as he did not possess any other nationality had he been declared as not having Indian nationality. By reversing the order of the Election Tribunal with respect

[144] *The Constitution of India commenced on January 26, 1950*. *Supra* note 37.
[145] *Mangal Sain v. Shanno Devi, supra* note 141.
[146] *Ibid*.

to nationality of the appellant Mangal Sain, the High Court declared him to be an Indian national.

The Court judiciously decided the question of 'domicile' and 'citizenship' in another interesting case, *In re Aga Begum*[147] where the petitioner was a child born in India in 1921 to a father of Iranian nationality and a mother of Indian nationality. Since birth, she never left India, but was called upon by the competent authority to be registered as a foreign national. She was asked to acquire an Iranian passport till such time as she acquired Indian nationality. The petitioner maintained that she was an Indian citizen and that there was no need for her to be registered as a foreigner. The respondent informed the petitioner that she need not be compelled to obtain an Iranian passport, but that subject to good behaviour she would be allowed to stay in India on the basis of her residential permit without declaring her a stateless person. When the petitioner failed to re-register herself as a foreigner, she was charged with violating the Foreigners Act. The question that came before the consideration of the Court was whether the petitioner was a citizen of India under Article 5[148] of the Indian Constitution. Since she was born in India and had never left India, the Court strived to consider the 'domicile' of the petitioner. The Court observed:

> 'That place is properly the domicile of a person in which he was voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or the happening of which is uncertain) shall occur to induce him to adopt some other permanent home.'[149]

The Court held that the petitioner had made India her permanent home, and that she satisfied the legal elements required to have domicile. The Court further decided, unequivocally, that at the commencement of the Constitution of India, the petitioner was a citizen of India and hence had been charged wrongly under the Foreigners Act.

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[147] *In Re Aga Begum*. *Supra* note 42.
[148] Article 5 (Citizenship at the Commencement of the Constitution), the Constitution of India. *Supra* note 37. See as well the discussion under "Who is a citizen of India?"
[149] *In Re Aga Begum. Supra* note 146.

The above two cases are an illustration of how the higher judiciary in India has – without being able to refer to an existing framework regarding the prevention of statelessness in India – decided the question of nationality without rendering any of the aggrieved parties stateless.

3.2. DENIAL OF APPLICATION FOR CITIZENSHIP

In 1996, the National Human Rights Commission (NHRC) filed a Public Interest Litigation (PIL)[150] in the Supreme Court, to enforce – under the Indian Constitution – the fundamental human rights of the Chakma tribe who were displaced by the Kaptai Hydro Power Project in 1964, and who now lived in Arunachal Pradesh. The persecution of Chakmas at the hands of local tribes was not only increasing but the former were also receiving threatening notices from locals urging them to quit the state. The Arunachal Pradesh state government considered them 'foreigners' and not entitled to protection of any rights except under Article 21 of the Constitution (protection of life and personal liberty). The state government also claimed the right to ask the Chakmas to move or quit the state at any time. According to the Union of India, they had considered (from time to time) the issue of conferring Indian citizenship on the Chakmas. However, by not forwarding the applications submitted by Chakmas along with their reports for granting of citizenship, as required by Rule 9 of the Citizenship Rules, 1956,[151] the officers of the State were preventing the Union of India from considering the issue of citizenship of the Chakmas.

The Supreme Court upheld that notices to the Chakmas to quit the state amounted to a violation of Article 21 of the Indian Constitution, and that no person can be deprived of his/her right to life and liberty except according to procedure established by law. It was the duty of the state government to protect the Chakmas from such threats to their lives and liberty, as well to bring to book those who had threatened to violate these rights. It was further held that by not forwarding the Chakmas' citizenship applications to the concerned department within the Union government, their constitutional and statutory right to be considered for citizenship was being denied to them. The decision of the

[150] *NHRC v. State of Arunachal Pradesh and Another*. *Supra* note 79.

[151] The Citizenship Rules, 1956, that are now repealed after enactment of Citizenship Rules of 2009, state in Rule No. 9 that a Collector was to transmit all registration applications to the Central Government, along with a report. Government of India. *Citizenship Rules, 1956.* Retrieved from http://admis.hp.nic.in/himpol/Citizen/LawLib/Amendments/citizen_ship_rules/MAIN.htm

Supreme Court in this case was a landmark in the legal fate of the Chakmas. Pursuant to the constant interventions of various NGOs, the NHRC and the Supreme Court of India, about 65,000 Chakmas living in Arunachal Pradesh have since been given citizenship by the Government of India.[152]

The text of this judgment is the bedrock of many important future observations by the Court pertaining to citizenship directly, and to statelessness indirectly. The Court upheld that the failure of the state government officials in forwarding applications by the Chakmas to the Central government amounted to denial of being considered for citizenship of India. It observed:

> The District Collector has merely to receive the application and forward it to the Central Government. It is only the authority constituted under Rule 8 of Citizenship Rules 1956, which is empowered to register a person as a citizen of India. It follows that only that authority can refuse to entertain an application made under Section 5 of the Act.[153]

This observation by the Court reiterates the legislative position in India with respect to the authority that decides the granting of citizenship. The importance of this observation lies in the instance of this case itself, wherein a person – finding him/herself to be eligible for citizenship – files for the same but is rejected by administrative officials at the ground level, who choose not to forward it to the concerned higher authority. While upholding the undeniable right of every person to not be persecuted or not live in fear of persecution, the Supreme Court also rightly observed:

> We are a country governed by the Rule of Law. Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also no person can be deprived of his life or personal liberty except according to procedure established by law. Thus, the State is bound to protect the life and liberty of every human

[152] Mahanirban Calcutta Research Group. (2009). *The State of being Stateless: A Case Study on Chakmas in Arunachal Pradesh.* Retrieved from http://www.mcrg.ac.in/Statelessness/Statelessness_Concept.asp

[153] *NHRC v. State of Arunachal Pradesh and Another, supra* note 149.

being, be he a citizen or otherwise.[154]

Through this case, the Supreme Court was able to establish the Chakmas' right to get an opportunity to apply for the grant of Indian citizenship without which they would have been rendered stateless.

3.3. CITIZENSHIP BY BIRTH, TO A TIBETAN GIRL

A judgment[155] by the Delhi High Court in 2011 brought with it a fresh wave of hope for those mired in legal issues of nationality and statelessness in India. This case provides an insight into the approach of the administrative authorities toward citizenship and the issuance of passports. The Delhi High Court has taken a decisive stance in providing those people who face circumstances similar to that of the petitioner, a chance to not only be recognized as an Indian citizen but to also enjoy the rights that accompany it. In this case, the petitioner, Namgyal Dolkar, was born in 1986 in Himachal Pradesh, India. Her parents were both Tibetan refugees. In 2005, she had obtained an identity certificate under the Passports Act,[156] after submitting a formal application for the same.

Later on, while trying to submit an application for an Indian passport, she was refused by the Passport Office. The reason cited was that her parents were Tibetan; she was again directed to be issued an identity certificate. The Union of India invoked Section 6(2) of the Passports Act, whereby a passport application can be rejected if the applicant is not a citizen of India, citing the reason that Namgyal Dolkar had identified herself as a 'Tibetan national' as she was in possession of the identity certificate. On this point, the Court rightly observed that the concept of a 'national' is not recognized or defined under the Citizenship Act; thus, the petitioner's description of herself as a 'Tibetan national', in her application for granting of an identity certificate, is of no legal consequence under the Citizenship Act. She is an Indian citizen by birth, under Section 3(1)(a) of the Citizenship Act,[157] and her statement cannot be treated as a renunciation of Indian citizenship. This renunciation could only occur, as envisaged under Section 8 of the Citizenship Act; also, Section 9 of the Citizenship Act made it clear that Namgyal Dolkar's citizenship was not

[154] *Ibid*.
[155] *Namgyal Dolkar v. Government of India*, *supra* note 50.
[156] See as well the section Identification of stateless persons, in this report.
[157] See as well the section Citizenship of a child, in this report.

terminated either.[158]

Additionally, the Court held that there is no need for an Indian citizen, who is a citizen 'by birth' under Section 3 of Citizenship Act, to apply for citizenship of India. The grounds for refusal to issue a passport have to be in accordance with the law. In this case, the Court did not need to apply interpretation to any provision of law; rather, it applied the law verbatim. The administrative authorities, on the other hand, were erroneous in citing unfair grounds that have not been reflected in Indian law. Ideally, the aim of the administrative authorities should be minimize the possibilities of making a person stateless. In pursuance of the Court's decision, the Regional Passport Office was directed to process Namgyal Dolkar's application for a passport. With this landmark judgment delivered by the Delhi High Court, Namgyal Dolkar became the first Tibetan to be considered an Indian citizen and to be issued a passport.[159]

Through this case, the Delhi High Court declared a person who was born in India before July 1987 to be an Indian national, even after she was rejected for a passport by the issuing authorities. It is to be noted that since the amendment to the provisions of Section 3 of the Citizenship Act took place, children born from July 1987 onwards to parents who are both illegal migrants (or one parent is an illegal migrant and the other is an Indian citizen) will not be considered Indian nationals, thereby making them effectively stateless. In India, many persons may, and do, suffer similar fates. Namgyal Dolkar is a positive case where, upon being faced with her situation, the Indian courts provided respite even though there is no framework in India to regulate statelessness.

3.4. NATIONALITY TO SURROGATE CHILDREN

An interesting case that came before the Gujarat High Court in 2009 questioned the pace of growth of Indian law alongside changes in social set-ups. In the case of *Jan Balaz v. Anand Municipality and Ors,*[160] the petitioner was a German residing in the United Kingdom. He and his wife opted for surrogacy in India. The petitioner was the biological father in the surrogacy. The couple had two

[158] See as well the section Renunciation of nationality, in this report.
[159] Bodh, A. (2011). *25-yr-old first Tibetan to be Indian citizen*. The Times of India [20 January]. Retrieved from http://timesofindia.indiatimes.com/india/25-yr-old-first-Tibetan-to-be-Indian-citizen/articleshow/7323090.cms
[160] *Jan Balaz v. Anand Municipality and Ors*, *supra* note 59.

surrogate boys, born in India, to a surrogate mother who was also an Indian citizen. When the surrogate parents applied for passports for their sons, the passport authorities refuses to provide them. This was a unique situation, one for which the Indian judiciary had no precedents. The main issue before the court was whether a child born in India to a surrogate mother, who was herself an Indian national, and a biological father, who was a foreign national, would get Indian citizenship by birth?

In this case, the Court delivered a liberal interpretation towards the nationality of the children born of surrogate parents, so that they were not left stateless. As the Citizenship Act does not address the issue of nationality in the case of surrogate children of foreigners, the Court justified its decision to grant nationality on the basis that the children were born to a surrogate mother who was an Indian national. The court ruled that the fact of the father being a foreigner did not take away right of the children to Indian citizenship[161] and to possess Indian passports under Section 3 of the Passports Act, 1967. In 2012, the Ministry of Home Affairs issued specific mandatory guidelines for foreigners choosing to commission surrogacy in India; from the perspective of protection to such children, these guidelines are along the same lines as the case discussed here.[162] This would bring much-needed clarity to the legal status of such surrogate children.

3.5. DENIAL OF CITIZENSHIP, IN SPITE OF RESIDENCE IN INDIA

In a recent decision (the case is unreported as of date), the High Court of Meghalaya struck down the decision of the Deputy Commissioner, Ri Bhoi District, Meghalaya.[163] The petition was brought forward by Nityananda Malik and others against seizure of their citizenship certificates – issued by the Central Government – by the Deputy Commissioner. The petition also sought the inclusion of their names in the electoral rolls. The Meghalaya state government contended that the forefathers of the petitioners had been given only temporary rehabilitation in Meghalaya, not permanent residence. However, they were unsuccessful in proving that the forefathers of the petitioners had come to India

[161] Clause (ii) of Section 3(1)(c) of the Citizenship Act, 1955, *Supra* note 43.
[162] *Guidelines issued by the Ministry of Home Affairs vide letter no. 25022/74/2011-F.I dated 9th July 2012 regarding foreign nationals intending to visit India for commissioning surrogacy. Supra* note 58.
[163] *Nityananda Malik and others v. State of Meghalaya*, Megh. 107, 2014.

after 24 March 1971. In accordance with the Assam Accord, the people who had migrated from Bangladesh, but had been residing in India on or before 24 March 1971, could not be removed from India on the basis of not being Indian citizens.[164] Therefore, the Court directed the respondents to hand back the citizenship certificates, issued by the Central Government to the petitioners, and to also include their names in the electoral rolls in Ri Bhoi district, Meghalaya. The Court observed:

> In accordance with the settlement between India and Bangladesh, the people who were found to be residing in India on or before 24 March 1971 could not be removed from India on the basis of not being Indian citizens.[165]

This case demonstrates that, in effect, the petitioners (whose forefathers came from Bangladesh) and who have been living in India since then, have been considered Indian citizens. However, this case also reflects the negative attitude of administrative authorities at the local level. They are willing to deny recognition as citizens to those people who have been residing in India for long periods of time. This is in contravention of the existing Indian framework of law governing them. The Court took a welcome stand in this case, thereby paving the way for a positive resolution of other or future such cases.

3.6. DECLARING A PERSON AS STATELESS

Another Writ Petition that requires attention is of *Sheikh Abdul Aziz v. NCT of Delhi*.[166] The Delhi High Court addressed question of nationality of the petitioner, Sheikh Abdul Aziz, who was a 'foreigner'[167] in India. Since 2005, he was in detention in Kashmir, where he had been stopped for entering the country illegally. After serving one year of imprisonment, he was shifted to Tihar Central Jail in Delhi, so that the Ministry of External Affairs could initiate his deportation proceedings. The deportation proceedings, however, were not executed for many years. In April 2014, the Delhi High Court directed the Central Government to determine the nationality of the person within a two-week deadline. In a first of its kind, the Ministry of External Affairs declared the

[164] *Section 6A of the Citizenship Act*, *Supra* note 43.
[165] *Supra* note 162.
[166] *Sheikh Abdul Aziz v. NCT of Delhi,* W.P.(CRL) 1426/2013. This case is under trail as of date.
[167] Clause (a) of Section 2(3) of the *Foreigners Act, 1946*, *Supra* note 49.

petitioner to be a 'stateless' person. They went on to state that the petitioner could approach the passport office to get identification papers, which could assist him in obtaining a long-term visa later on.[168]

This has set a very optimistic trend towards the interpretations assigned to cases – where statelessness is evident – brought before the Indian higher judiciary. However, the point to be noted through all the cases discussed above is the fact that the courts have not defined or explained statelessness anywhere. The 1954 and 1961 Conventions have also not been used as reference points, nor have their principles been incorporated in any guidelines for subsequent cases where lack of nationality may lead to statelessness. Yet the Courts have tried to avoid statelessness of the petitioner, by applying principles of equality and justice. Judicial prowess and activeness in these few cases provide hope that the principles and rights enunciated in the two UN Conventions on statelessness will become part of the Indian legal framework soon, as they have already attained the position of customary international law.

[168] Mathur, A. (2014). *"Stateless man" to get visa, ID to stay in India.* IndianExpress [29 May]. Retrieved from http://indianexpress.com/article/cities/delhi/stateless-man-to-get-visa-id-to-stay-in-india/

4. THE WAY FORWARD

The key issue considered in the present report is whether the Indian legal framework granting citizenship is in line with growing concerns of statelessness or not, and whether it incorporates steps to prevent and reduce the same. At present, the current framework of nationality laws reflects an inconclusive and ambiguous stand regarding the meaning of citizens and non-citizens. It is important for the purpose of the report to look into the MHA's Annual Report (2012/13) and its chapter on 'Foreigners', Freedom Fighters' Pensions and Rehabilitation'; this chapter makes no mention of persons without nationality or citizenship as a category.[169] While the report includes data regarding refugees from Sri Lanka and Tibet in India, it does not mention whether stateless persons have been accounted as well. Furthermore, the term 'stateless' in this report is used only with reference to Sri Lankan refugees. To quote:

> 'Refugees are of the following two categories:
>
> (i) Stateless persons who had not applied for Indian citizenship or those not yet conferred Sri Lankan citizenship; and
>
> (ii) Sri Lankan citizens.'[170]

Here, the term 'stateless' has been used without providing a reference as to what is meant by it in the report, and which category of people fall under it. This demonstrates that the Indian governmental framework is yet to fully assimilate the phenomenon of statelessness in its machinery, and to find ways to redress it.

As stated in the Introduction, India has hosted a large population of stateless persons ever since colonial times, yet the State does not cater for, or recognize. Out of all the Indian laws, the Passports Act alone appears to be the only piece of legislation that actually makes some attempt to address statelessness: by providing a certificate of identity to stateless persons residing in India and to foreigners whose countries are not represented in India or whose national status is in doubt. However, this certificate is to be issued only on application, and is mostly for the purposes of facilitating travel. Absence of *suo motu* action by the government defeats the purposes of this provision, as most stateless persons

[169] Ministry of Home Affairs. *Annual Report 2012-13*. *supra* note 137. (pp. 176-186).
[170] *Id*, p. 183.

may not even be aware of its existence and may be inadvertently excluded from its benefits.

The Citizenship Act is the primary legislation regulating citizenship in India. The trajectory of its growth reflects the legislature's intention to limit the scope for granting Indian citizenship. Over the years, amendments to the Act point to a strict interpretation of the stringent conditions laid down for citizenship in India. A consequence has been that the law fails to give due consideration to huge numbers of people who may be stateless and residing in India for a long time.

The Indian legislature has been slow in assimilating and incorporating changes that would mirror the international recognition and protection of stateless persons. However, over the years the higher judiciary has – through the delivery of various judgements – upheld the rights of stateless persons in India. In light of absence of any official record of stateless population in India, significant steps in that direction are needed. It is critical that the Indian legislative and executive machinery earnestly adopt necessary measures, first to provide recognition to the stateless, second to uphold their rights, and finally, to make subsequent provisions for the further prevention and reduction of statelessness in India.

5. RECOMMENDATIONS

In the contemporary context of sovereignty-dynamics in the international political arena, the right to nationality is an indispensable human right that facilitates the actualization of all other basic rights. One's nationality is separate from one's ethnic origin, and must be so distinguished when ascertaining one's citizenship. Statelessness– the condition of having no nationality– is caused due to a number of reasons. The report has indicated that statelessness, as a phenomenon, has a percolating effect in that it can be passed down through generations. While the causes of statelessness may last for only a certain amount of time, its effects on the nationality of particular peoples during that same time period can carry forward, onto the next generation and beyond. In light of the international legal framework,[171] India can take specific steps addressing the following concerns:

a. Identifying the stateless persons;
b. Protection of their rights against human rights violations;
c. Adopting such changes in the domestic legal framework aimed at reducing statelessness, and most importantly, prevent further instances of statelessness; and
d. Collaborating with neighbouring states to understand this phenomenon as an international crisis, and deal with it accordingly.

Upholding human rights has been an essential facet of India's commitment to international law. However, this analysis of the Indian legislative regime[172] has shown that India needs a legal framework directed at protection of the human rights of stateless persons. Further, it has been seen that the legal framework in India requires a mechanism to address the issue of statelessness. In spite of deficiency in India's legal and policy regime for prevention and reduction of statelessness in line with the international framework, the higher judiciary in India is paving the way and trying to fill the lacuna by reading into the legislative provisions.[173]

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[171] The *1954 Convention relating to the Status of Stateless Persons*, and the*1961 Convention on Reduction of Statelessness*, *supra* notes 111 and 100 respectively.
[172] See chapter India and Statelessness, in this report.
[173] See chapter Judicial Trends in Approach towards Statelessness, in this report.

The positive steps that have been taken in this respect, however, may lack direction, as India is yet to accede to the 1954 and 1961 Conventions on statelessness. To ameliorate the conditions of stateless persons, the Indian legislative framework has to adopt changes that assist the assimilation of stateless persons into the mainstream community, and has to take specific steps directed at reducing statelessness. In addition, specific legislative amendments need to be introduced that aim at preventing further situations of statelessness from arising. It must be reiterated that India's accession to the two conventions would be greatly beneficial to the cause, as it would create positive obligations on India's part under the international rights framework.

Through this report's analysis of Indian nationality law and related legislations that have a bearing upon the situation of both existing stateless persons and potentially stateless persons in the future, the following recommendations are hereby suggested to enhance India's legal and policy framework. The recommendations have been categorized as short-term and long-term initiatives, including suggestions to introduce amendments in India's legislative framework, as well as such suggestions that could lay the groundwork for policy objectives. These recommended goals propose the changes and adaptations required in India in order to meet international standards for tackling statelessness by- addressing the detection of stateless persons, reduction and prevention of statelessness, and international cooperation for the same.

6.1. SHORT-TERM INITIATIVES

This section outlines some of the immediate/short-term efforts that India can take to address the issue of statelessness in the country.

6.1.1. Accession to the Conventions

For India to achieve reduction and prevention of statelessness, the accession to the 1954 and 1961 Conventions on statelessness may be a starting point. Such accession would require India to bring its law in line with the obligations in the Conventions, by making such changes in the national framework that aim at preventing statelessness amongst children born in India. Further such changes can be adopted that identify stateless persons, and take steps to provide them with a nationality. In the long-term, this would help regularize such persons as

Indian nationals, and entitle them to the rights and duties equivalent to those of other Indian citizens.

6.1.2. Definitions under the Citizenship Act, 1955

In the whole gamut of issues related to statelessness in this report, a pertinent question remains: who is identified as a stateless person? Since the jurisprudence on statelessness is still in its nascent stages in India, the definition of the term 'stateless person' requires further deliberation and explanation. Further the meanings of 'citizen' and 'non-citizen' are also not clear in the Citizenship Act, 1955. It is suggested that the Act could incorporate 'stateless persons' in its provisions and define the contours of it. The Citizenship Act also mentions the term 'parent' however does not explain who may be included under the term.[174] It is suggested that a meaning of the word 'parent' must be added to the Act which could include parents of children born out of a wedding lock, adopting parents as well as child born out of surrogacy.

6.1.3. Reduction of statelessness through naturalization

Naturalization refers to the method of acquisition of citizenship by a person who has been habitually residing in a country but is not a citizen of the same. It is an effective way of assimilating stateless persons within the citizenry of the country that they are residing in, if such persons cannot obtain citizenship by automatic modes of acquiring citizenship under the law of that country. Under the Citizenship Act, India has a pre-condition that a person applying for naturalization must not be an illegal migrant. Such a condition may prevent stateless persons from being regularized, in spite of fulfilling other conditions laid down in this respect. A desirable step, and one that may facilitate the assimilation of stateless persons as Indian citizens via naturalization, is by amending the corresponding legislative provisions.[175] This would make the law governing naturalization for citizenship, more facilitative and accommodative for those persons who do not possess any nationality.

It is recommended that the criteria for granting citizenship by way of naturalization may be relaxed in such cases wherein statelessness is redressed.

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[174] See section Citizenship of a child, in this report.
[175] See the discussion on Citizenship by Naturalization, in this report.

The criterion of residency may be taken as a pre-condition; however, criteria such as language, furnishing of identity documents, or documents of last-held nationality, and details of nationality of parents, could be avoided. It is imperative to relax the procedural impediments existing in naturalization proceedings considering stateless persons and, wherever possible, government could facilitate its assistance to stateless persons who are eligible to acquire Indian nationality.

6.1.4. Retrospective nationality

Retrospective conferment of nationality is generally a lesser known phenomenon from the perspective of reduction of statelessness. In 2007, Brazil exemplified this action by introducing a constitutional amendment that replaced residence requirements with consular registration as a precondition for the acquisition of citizenship in cases of children born overseas to Brazilian parents. Under a previous amendment in 1994, it was stipulated that children born overseas to Brazilian parents could not obtain Brazilian citizenship unless they returned to live in Brazil. Civil society groups estimated that within a dozen years, 200,000 children had been made stateless. After Brazil acceded to the 1961 Convention, a retrospectively applicable amendment in 2007 was passed, which helped many stateless children acquire Brazilian citizenship.[176] Remarkable examples are also put forth by other countries like Kyrgyzstan, which recognized all stateless former USSR citizens, who have resided in the country for more than five years, to be it nationals, by the new Citizenship Law adopted in 2007.[177] In Iraq, nationality legislation adopted in 2005 and 2006 overturned a 1980 decree that stripped the Faili Kurds of Iraqi citizenship. Reportedly more than 100,000 have taken advantage of this opportunity to apply for restoring their citizenship.[178]

In the context of India, the growth of the Citizenship Act suggests that the rules have been made tighter over the years. An illustration of this is the amendments carried out in Section 3 of Citizenship Act, which have made the acquisition of citizenship by birth subject to either of the parents being an Indian citizen as

[176] *Handbook for Parliamentarians*. *Supra* note 102.
[177] UNHCR. (2014). *Addressing Statelessness- Global Appeal 2014-15.* Retrieved from http://www.unhcr.org/528a0a1316.pdf
[178] *Ibid.*

long as the other parent is not an illegal migrant. Even naturalisation, granted under Section 5, is subject to not being an illegal migrant after an amendment was carried out to this provision in 2003. In the interest of reducing statelessness, it is desirable that such past amendments in nationality law that may have led to a person becoming stateless be amended, to include retrospective applicability.

6.1.5. Citizenship to children

The Indian legal framework relating to nationality requires suitable amendments in order to protect and give citizenship, especially to children who would otherwise be stateless.[179] In light of the international framework governing right to nationality of a child, it is desirable that the grant of nationality to a child is a government priority, and steps may be taken to ensure that the chances of a child being stateless are minimal. India is a party to the CRC, which upholds the right of every child to possess a nationality. This right is also an integral part of the major international legal instruments concerning stateless persons. It is important to incorporate this spirit of the accepted international standards relating to the nationality of a child into the corresponding legislative provisions in India.

A major condition in Indian nationality law that can lead to statelessness is that the legislation requires that in order for a child to be granted Indian nationality, whether at birth or later, the nationality of his/her parents must be Indian. Under the international legal framework, a child is entitled to a nationality irrespective of the nationality status of his/her parents. Therefore, in the interest of preventing statelessness the nationality of a child's parents may not be made a pre-condition for granting citizenship to him/her. The continued existence of statelessness cannot be stopped if a parent's statelessness is passed on to the child. Furthermore, the Indian government could aspire to prevent discrimination on the grounds of race, disability, religion, language, or ethnic origin, as espoused by the Conventions.

In addition to the above, it is recommended that the definition of a 'child' may be clearly stated in Central legislation, in order to cover children of all categories such as those who are orphans and under the guardianship of a social or child-

[179] See as well the section Citizenship of a child, in this Report.

care centre, juvenile offenders with unknown nationality in prison, children born out of wedlock, adopted children, children born out of surrogacy, where the child may not have any nationality, and children found on Indian territory (foundlings) having unknown parentage and nationality. A citizenship application on behalf of a child may also be permitted to be made by either of the biological parents, adopting parent(s), commissioning parents in cases of surrogacy, or a person who acts as the guardian of the child at that time. It is recommended that Indian Parliament make provision for assisting the processing of such applications, and for the expedient disposal of children's citizenship application, especially in cases where the child may be stateless or have stateless parents.

Articles 1 to 4 of the 1961 Convention principally concern the acquisition of nationality by children. The cornerstone in international efforts to prevent statelessness amongst children is the safeguard contained in Article 1 of this Convention. Article 1 declares that a child who would otherwise be stateless has the right to acquire the nationality of his or her state of birth through one of two means (at birth through operation of law, and via an official application).[180] From the perspective of prevention and reduction of child statelessness, a desirable effort on part of India could be to make suitable amendments in the national law according to the provisions of the 1961 Convention.[181]

6.1.6. Renunciation, termination, deprivation of nationality

The Indian Citizenship Act houses provisions regarding renunciation of citizenship by a person, termination of citizenship by operation of law, and deprivation of citizenship by the State.[182] These provisions could be amended in tune with the common framework for Contracting States provided for under Articles 5 to 8 of the 1961 Convention, as these provide greater protection from statelessness in such cases. It is recommended, in the interests of preventing statelessness and in light of the 1961 Convention, that loss of nationality by any of the methods specified under Indian law may be made conditional on the acquisition or assurance of another nationality.

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[180] *1961 Convention on the Reduction of Statelessness*, *supra* note 170.
[181] See as well the section Citizenship of a child, in this Report.
[182] See the section Renunciation and withdrawal of nationality, in this Report.

It is in the interest of fair principles of justice that deprivation of nationality is not arbitrary and ensures compliance with the principles of non-discrimination under international law. It is also recommended that such provisions to prevent the automatic revocation of the nationality of such a person's spouse or child may be incorporated. For example, Section 8 of the Citizenship Act provides that where a person voluntarily renounces his/her citizenship, the citizenship of such a person's minor child shall also automatically cease. Every individual has the right to a nationality, and the provisions for granting or revoking the same must work so as not to affect the nationality of a minor child, especially where it may render him/her stateless.

6.1.7. Registration of birth

The birth of a child is the point at which another member may join the list of stateless persons, or the State where s/he is born may bestow upon him/her its nationality, thereby, preventing such a child from becoming stateless. Registration at birth is, thus, a critical tool in the hands of nation-states in preventing the further proliferation of statelessness. Both the 1954 and 1961 Conventions, as well as the CRC, specify and highlight the importance of registration of birth of a child, and to bestow upon him/her the nationality of that country if otherwise the child would become stateless.

As has been discussed in this report, the registration of births in India is governed by the Registration of Births and Deaths Act, 1969. The execution of Act has been delegated to officials in a hierarchical manner. Training and capacity-building of state birth registration officials could help to improve their motivation and competence, and reduce the possibility of mistakes, fraud, and corruption within the registration system.[183] The Indian state could also develop strict policies to facilitate registration of all births irrespective of the place of birth (i.e., at the hospital, at home, aboard a moving vessel on the sea or in the air, during transit, etc.).To prevent further statelessness, it is imperative that the nationality status of the parents, (i.e., the nationality they possess or whether they are stateless) is not an impediment to their child's registration of birth.

[183] In Cameroon, for instance, civil registrars have received training and been supplied with the basic administrative materials they require in order to carry out their roles effectively. In Sri Lanka, a toolkit has been developed to assist officials in carrying out mobile registration. Referenced in *Stateless : What it is and Why it Matters ?*. *Supra* note 1.

The Indian legislature could attempt to put in place a uniform policy governing the actions of all officers at the district and *taluka*[184] levels who may be in charge of the registration of births in that area. Policy decisions in this regard could include provisions for raising awareness amongst people about the importance of registering the births of their children. Monitoring the systems that are party to this procedure is crucial in ensuring that birth registration in India meets accepted international standards. Hundred percent birth registrations in India might be getting hampered by bureaucratic obstacles and technical complexities. This process may also be facilitated by partnering with organizations such as UNHCR or with NGO with similar mandate. Goris *et al*. give an example:

An Indian NGO network on birth registration, working in 15 districts of Orissa since 2002, has collected birth registration information for over 3.2 million children and has secured an overall increase in birth registration levels from 33 per cent to 83 per cent. In Colombia, UNHCR works closely with the government and Plan International on birth registration, and Xi'an University in China and the Inter-American Children's Institute in Central America have been valuable academic partners.[185]

6.2. LONG-TERM INITIATIVES

6.2.1. At the national Level

The following are some long-term initiatives that may be taken by India, at the national and state levels, for the effective and systematic redressal of statelessness.

6.2.1.2. Centralized status determination authority and procedures

Nearly 80 countries have acceded to the 1954 UN Convention on the Status of Stateless Persons. Many of them have additionally set up national determination procedures for citizenship. For example, France implemented such a system for determination as early as in the 1950s. Other states that have followed its lead are Italy, Spain, Latvia, Hungary, Mexico, Moldova, Georgia and the UK.[186]

[184] A sub-division of a district; a group of villages so organized for official government purposes.
[185] Goris *et al*., *supra* note 183.
[186] European Network on Statelessness. (2013). *Statelessness: determination and the protection*

Taking these instances as good practices,[187] it is recommended that India may create a set up a central authority for the purpose of identification and determination of statelessness. This authority could then also create a centralized procedure for carrying out the determination of nationality status. This procedure may have provisions that pre-empt the problem of statelessness in various parts of India (such as in the frontier states) and take necessary measures to ensure that further statelessness is avoided. Technical assistance, such as information technology, infrastructure and human resources could also be provided by the Central Government to set up a database on stateless persons in the country.

As the Indian government currently has the on-going projects of Aadhar[188] and the NPR,[189] it is recommended that a separate category of 'stateless persons' be added to the data collection involved in these two projects. This may further facilitate the central authority on gaining qualitative and quantitative data on statelessness, as well as help in further research on the conditions of stateless persons. This central authority could then perhaps also be in a position to assist asylum seekers and refugees, alongside stateless persons. The authority could base itself in various states in order to manage the determination procedure at the grassroots level.

It is recommended that the procedures for status determination in India try to incorporate the unique legal and humanitarian circumstances faced by such stateless persons. Bureaucratic difficulties, high costs, lack of access, language blocks, etc., need to be addressed with an eye kept on protection needs. For example, the similar regulations in both Hungary and Moldova serve as examples of good practice—claims for stateless status in these two countries can be submitted both in written and oral form, and in any language.[190] Such useful measures can be adopted by India as well. The UNHCR *Handbook for*

status of stateless persons. Retrieved from http://www.refworld.org/pdfid/53162a2f4.pdf

[187] *Ibid*.

[188] Press Information Bureau, Government of India. (2013). *National Identification Authority of India Bill, 2013 to be introduced in the winter session of Parliament*. Retrieved from http://pib.nic.in/newsite/erelease.aspx?relid=100438

[189] See the discussion on NPR on the website of Department of Information Technology, Government of India. *Supra* note 106.

[190] Government of Hungary. (2007). *Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals and the Government Decree 114/2007 (24)*. Retrieved from http://www.refworld.org/docid/4979cae12.html

Parliamentarians on nationality and statelessness aptly states:

A central authority responsible for such determinations would reduce the risk of inconsistent decisions, would be more effective in obtaining and disseminating information on countries of origin, and would, by its focused work, be better able to develop its expertise in matters related to statelessness. The determination of statelessness status requires the collection and analysis of laws, regulations and the practices of other States. Even without a central authority, decision-makers benefit from collaborating with colleagues knowledgeable about nationality legislation and the issue of statelessness, both within the government and in other States.[191]

6.2.1.3. Awareness campaigns

Another step that India may take in the direction of redressing statelessness is to hold nationality campaigns or nationality verification camps so that more people become aware of and determine their citizenship.[192] Through implementation of an identification process, the first step may be taken towards alleviating the difficult conditions of stateless persons. This may be done by providing stateless persons so identified a certificate declaring them to be without nationality, and then subsequently they may be officially permitted to regularize themselves as Indian nationals.

6.2.1.4. Right to status determination

At the policy level, it is recommended that India devise a status determination system that is accessible to all persons residing in the country. Under such a system, all persons may have the right to undergo status determination after submitting an application to the concerned authority. Focused attempts may be made to process such applications within reasonable timeframes, as laid down in the rules made by the government authority. While the application of the person is under review, s/he could be issued an official certificate or letter so that s/he is protected against detention or deportation up till such time as their status

See as well Government of the Republic of Moldova. (2012). *Law on Amendment and Completion of Certain Legislative Documents*. Retrieved from http://www.refworld.org/docid/4fbdf6662.html
Both referenced in *Statelessness: determination and the protection status of stateless persons*, *supra* note 186. (pp. 6-7).

[191] *Nationality and Statelessness Handbook for Parliamentarians*, *supra* note 176, p. 22.

[192] *Ibid.*

is decided. Once the deliberation ends, and if the person is declared to be stateless, s/he may be accorded the rights that have been enshrined within the international legal instruments that India has signed as reflected under national law. Those who lack sufficient resources, or are illiterate, or are unaccompanied minors, etc., could be given free representation as well as legal aid if required. In situations such as these, organizations like UNHCR can provide cooperative assistance.

6.2.1.5. Establishing the burden of proof

The application for status determination that is submitted to the central authority requires examination and a decision based on evidence and facts. The Indian authority delegated with this responsibility could adopt the concept of 'shared burden of proof' in the case of stateless persons, asylum seekers and refugees. Since establishing the identity of such persons would require information from the applicant as well as from, perhaps, other countries, cooperation may be requested as well from UNHCR and other international and domestic agencies in acquiring the desired information. The delegated authority must endeavour to lay down concrete guidelines for the entire process.

Hungary,[193] Slovakia[194] and the Philippines[195] provide a good example of such guidance on evidence assessment: these regulations emphasize that potential nationality ties should only (Slovakia, Philippines) or in particular (Hungary) be examined with states with which the applicant has a relevant link, namely birth, previous residence or family links.[196]

6.2.1.6. Appeal system

It is recommended that the mechanism for the identification and determination

[193] Government of Hungary. (2007). *Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals.* [Section 79 (1)].
Referenced in '*Statelessness: determination and the protection status of stateless persons*', *supra* note 186.
[194] Government of the National Republic of Slovakia. (2011). *Act No. 404/2011 on Residence of Aliens and Amendment and Supplementation of Certain Acts' [Section 46 (3)]*. Retrieved from http://www.refworld.org/docid/4fe08a7a2.html
Referenced in *ibid*.
[195] Government of the Republic of the Philippines. (2012). *Department Circular No. 058 – Establishing the Refugees and Stateless Status Determination Procedure, Section 9*. Retrieved from http://www.refworld.org/docid/5086932e2.html
Referenced in *ibid*.
[196] *Statelessness: Determination and the Protection Status of Stateless Persons*. *Supra* note 186. (p. 29).

of stateless persons have in place a system of appeal against the decisions of the central authority. The appeals system could be by way of a judicial review by the Courts (as per the hierarchy of courts already in place in India) or by a special court.

6.2.1.7. Vigilance of the identification process

To ensure efficiency and transparency within the system responsible for the identification of stateless persons, it is suggested that a vigilance officer is also appointed. S/he may ensure that uniformity and fairness is observed in all applications made to the central authority

6.2.1.8. Easy accessibility and affordability

The rules, procedures, forms, as well as other required information (such as updates on one's application) could be made easily available to applicants. As stateless persons usually have limited or no means, and are often illiterate and ill-informed, it is suggested that an awareness programme be established for such people. They could get their nationality or status verified through official documents; in cases where nationality is in doubt, official certificates declaring them to be stateless persons could also be given.

6.2.2. At the international level

The following section looks at some of the steps India may strive to undertake, in collaboration with other states, to address the issue of statelessness.

6.2.2.1. Mainstreaming and monitoring statelessness

On the international front, facilitation is required for a deeper understanding of statelessness, its forms, and its consequences. With its jurisprudential and pedagogic aspects, statelessness as a concept requires attention on the international stage. A uniform procedure may be established to monitor statelessness, which can then be incorporated into states' respective domestic systems. This may be done through bilateral and multilateral cooperation between states and existing international development agencies. The data so collected can then also be used in various international as well national reports to better manage statelessness issues.

6.2.2.2. Advocacy for statelessness standards

It is important that a uniform set of standards is developed by the international community for stronger and clearly articulated rules regarding identification, reduction, and eventually prevention, of statelessness. This could be in addition to the existing 1954 and 1961 Conventions.

6.2.2.3. Bilateral agreements on statelessness

In the context of current inadequate consensus on international principles and/or the specific and acute local nature of the problem between state parties, a more feasible solution might be that neighbouring states enter into agreements on the procedures, standards and treatment of such stateless persons. Such agreements could help reduce conflict as well as foster greater understanding and supervision of the process.

6.2.2.4. Strengthening support to prevent statelessness

Efforts may be taken at the national as well as the international level to coordinate and develop a support system. This could be done by partnering with various international organizations around the world so that issues such as child statelessness, discrimination, and denial of nationality may be eradicated systematically.

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