

THE RIGHTS OF STATELESS CHILDREN IN INDIA: ISSUE OF NATIONALITY

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ABSTRACT

The issue of statelessness has been traditionally perceived as a mere ‘technical problem’ and the protection of stateless people has long been understood as a challenge for the international community yet statelessness is indeed a broad human rights issue, even as it retains a distinct technical dimension. The paper is a legal analysis of the core issues of statelessness with respect to citizenship of children in the national and international context. This article analyses and examines the significance and nature of nationality with respect to the children of the stateless community and the challenges faced by the International Community in providing recognition and protection to stateless persons. The focus is on expansion of human rights law, key initiatives and methods to reduce statelessness

Keywords: Statelessness, Citizenship, Nationality

INTRODUCTION

Statelessness is a widespread phenomenon receiving lack of adequate attention. People and especially children belonging to the stateless community face many challenges associated with statelessness which includes inadequate protection, lack of well-functioning statelessness determination procedures, inadequate rights, lack of identification and deficiencies in prevention and reduction of statelessness are some of the many problems associated with statelessness. ¹Despite advances in international law regarding the protection of stateless persons, India has been reluctant to include them into national legislation. Indian nationality laws have become even more restrictive since independence in 1947 and grounds for recognizing citizenship are based on relevant statutory provisions.

Background

The modern framework of nationality emerged through a series of treaties from the League of Nations following World War I, among them was the 1930 Hague Conventions relating to conflict in nationality laws, which granted states full sovereignty in determining citizenship, with the dismay of World War II Nationality laws and state sovereignty changed forever, the war magnified the problem of displacement and statelessness giving rise to Article 15 of the Universal Declaration of Human Rights(UDHR) which guarantees to everyone the right to nationality and prohibits arbitrary deprivation of nationality.

In India decolonization following the partition of British India resulting in the creation of two sovereign states: India and Pakistan caused a large mass migration of 14 million people who became displaced, moving to either Pakistan or to India². The decolonization also affected the status of Indians who were sent to Sri Lanka during the British rule and were rendered stateless upon independence, the people are still facing the effects of the partition and British governance to this day³. Though India as a history of hosting refugees and stateless person, it does not legally recognize these persons. Furthermore years of illegal migration, thousands of refugees including stateless refugees feeling persecution such as Rohingyas and Tibetans and vast

¹ Blitz, B. K., Lynch, M., 'Statelessness and the deprivation of nationality', *Statelessness and Citizenship*: EE July 5 (2011).

²Pillai, R.S, 'Indo-Sri Lankan Pact of 1964 and the Problem of Statelessness - A Critique, *Afro Asian Journal of Social Sciences* 31 ISSN .1-14 (2012)

³ Mohanty,,& R. Tandon, R, 'Participatory Citizenship: Identity, Exclusion, Inclusion, Sage Publications, 15- 17 Sep(2006).

number of people Assam and other states are rendered stateless and stripped of their nationality⁴.

LEGAL FRAMEWORK REGULATING STATELESSNESS

International framework

The two main conventions with regard to prevent and reduce statelessness are the 1954 and 1961 conventions which lay out specific provision and a legal framework to prevent statelessness from occurring and to protect people who are already stateless. The 1954 Convention relating to the Status of Stateless Persons and 1961 Convention on the Reduction of Statelessness set global standards and provide a legal international foundation for addressing the causes and consequences of statelessness.

*The 1954 Convention relating to the Status of Stateless Persons*⁵ address the prevention of statelessness and reducing statelessness over time. The convention seeks to ensure status for stateless persons to enjoy minimum rights and standard of treatment. It seeks to ensure basic fundamental right and freedom from discrimination against stateless people and regulate the status of stateless people through international accord. The convention plays a pivotal role in providing state parties a frame work that ensures human rights

*1961 Convention on the Reduction of Statelessness*⁶ lays down provisions to which states must grant nationality to children to avoid children becoming stateless by birth. The convention states that states should grant nationality to child born in its territory or by operation of law. The conventions also lays down provisions to children born in its territory whose mother is a national of the state, also children who are not born its territory but at the time of birth one of his parents was a national of that state party.

⁴UN General Assembly, Convention Relating to the Status of Stateless Persons, Sept 28 1954, U.N.T.S 360

⁵ UN General Assembly, Convention on the Reduction of Statelessness, Aug 30 1961, U.N.T.S 989.

⁶Available at

<http://unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=4ddd1a3c9&query=preventing%20and%20reducing%20statelessness>

The conventions set global standards and help resolve conflict of law issues and enables individuals to establish procedural requirements for citizenship. These conventions form a significant legal mechanism to identify and regulate statelessness, accession to the conventions authorizes increased legal transparency and socio-economic development⁷.

NATIONAL FRAMEWORK: NATIONALITY IN INDIA

Constitution of India 1950

The constitution of India lays down provisions to regulate Citizenship in India. Article 5⁸ of the constitution states that any person, who was or either of the parents was born in the territory of India or who has been ordinarily resident of India for at least five years before the commencement of the constitution shall be deemed to be a citizen of India.

Citizenship act 1955

The citizenship act enacted by the parliament in 1955⁹ regulates the acquisition and termination of citizenship in India. As per the act, citizenship could be acquired by birth¹⁰, descent¹¹, registration¹², naturalization¹³, and by incorporation of territory¹⁴. In addition to acquiring citizenship through these provisions Section 13¹⁵ of the act is a supplementary provision that deals with issuance of certificate citizenship, thus the Act aims to provide for the acquisition, determination and regulation of citizenship in India along with the Constitution of India forms the epicenter for acquiring citizenship in India.

⁷Available at

<http://unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=4ddd1a3c9&query=preventing%20and%20reducing%20statelessness>

⁸ INDIA CONST. art. 5.

⁹ The Citizenship Act, 1955, No. 57 Acts of Parliament 1955 (India)

¹⁰ Section 3, *Id.*

¹¹ Section 4, *Id.*

¹² Section 5, *Id.*

¹³ Section 6, *Id.*

¹⁴ Section , *Id.*

¹⁵ Section 13, *Id.*

Statelessness in India

Article 1 of the 1954 Convention relating to the status of Stateless Persons defines stateless person as ‘who is not considered as a national by any state under operation of its law’¹⁶. In India the right to grant or determine citizenship exits with the state, any person who is rendered a non-national by citizenship law has the status of ‘de jure’ stateless which is purely a legal description whereas any person whose nationality is disputed or ineffective and is unable to establish their nationality but have not formally lost their legal ties to their country as considered as ‘de facto’ stateless¹⁷.

The primary responsibility of a state is prevention and reduction of statelessness, in India people lack effective nationality due to effects of partition, decolonization, internal politics, and illegal migration. Security issues in India negative legislative intent, civil war in Sri Lanka, Bhutan and Myanmar and Indo-China relationships, etc. together with the lack of measures in the Indian citizenship laws worsens the condition of the stateless community and the children of stateless persons are the worse affected in such situations¹⁸.

Status of Stateless Children under Indian Law

Citizenship of a Child

The act focuses on citizenship of children in different categories which include¹⁹:

- a. Child born in 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. Children born aboard a ship, an air craft or in transit (section 2(2))
- e. Child found in India

This section analyses the status of children found in India and Children Born in the Territory of India. Section 3 of Citizenship Act provides for acquisition of citizenship by birth. This provision confers citizenship *jus soli* on the basis of birth in the territory According to the

¹⁶ *Supra* note 4

¹⁷ Massey, Hugh. “ UNHCR and De Facto Statelessness”, LEGAL AND PROTECTION POLICY RESEARCH SERIES LPPR 8-11, Jan (2010)

¹⁸ Asha Bangar, Statelessness in India, 2 ISI 2-4, Jun (2017).

¹⁹ *Id.* at 9

provision, a child acquires citizenship by birth, if one parent is a citizen of India while the other is not an illegal migrant'. The term illegal migrant was inserted in the Citizenship Act by the Citizenship (Amendment) Act 2003 and has been defined as a foreigner who has entered into India without prescribed documents or has stayed in India beyond permitted date. In terms to this section it is very unlikely that the citizenship act would grant nationality via jus soli to children born in the territory of India who are at risk of being stateless, this is not in accordance with Article 1²⁰ of 1961 Convention which requires States to "grant nationality to a person born in its territory". Further Section 3 of the Citizenship Act has defined the meaning for parent and fails to clarify the different sets of parents of a child such as biological parent 'adoptive parent', 'unmarried parent' 'surrogate parent', etc. all of which are necessary to determine the nationality of the child. The law in India is also silent of children born out of wedlock. The provision also fails to take into account children born to both parents who may not citizens of India or may be without nationality thus the Citizenship Act does not provide nationality to children born in the territory of India who would otherwise be stateless and has the potential to create statelessness by operation of law²¹.

The statutory provisions in India are also silent on the nationality of children found in India. These are the children in the territory of India who are of unknown parentage and pose a challenge with regard to determination of citizenship. Article 2 of the 1961 Convention on Reduction of Statelessness has laid down that in case no proof to the contrary a child found in the territory of the state shall be considered born in that state. Article 7 of the Convention on Rights of Child states that every child shall be registered after birth and have right to nationality, further Article 8 states that every child has the right to preserve his/her identity. With respect to international laws India's legal framework fails to determine the nationality and status of stateless children²².

Extent of stateless children in India

There is no Comprehensive, publically available government record of the number of stateless persons in India. The census in India which is carried out under the Census Act, 1948 along

²¹ Deepika Prakash, &Maanvi Tiku, India and the Challenge of Statelessness; A Review of the Legal Framework relating to Nationality, NLUJ 45-60, (2012)

²² Ghosh, D.P.S, 'Migrants, Refugees and the Stateless in South Asia,' SAGE Publications India Pvt. Ltd, Feb 12 (2016)

with Census Rules, 1990 is a statutory framework for creating a social, economic, demographic and numerical profile of citizens of India, however it fails to take into consideration such persons without nationality or persons having unknown nationality. In the absence of specific procedures to identify stateless persons it is unclear how many children go unnoticed and unidentified²³

The stateless children of India are vulnerable to exploitation and human rights violations as India has not ratified the two UN conventions on statelessness and the protection of these children is left to the state. The relationship between protection of these stateless children and human rights is one of the primary issues in India, these children lack opportunity of participation, education, Health Care, Employment, Identification, social security or any other form of recognition in the society. Apart from the UN convention on Statelessness India is a part of a significant body of International Law that has elaborated the principle of non-discrimination on basis of race, ethnicity, religion etc. and also elaborates on significance of nationality and equality under law, India's acceding of the ICCPR²⁴, ICESCR²⁵, CRC²⁶, ratification of ICERD²⁷, and CEDAW²⁸ which have widened the scope of human rights²⁹.

Significance of nationality

Article 15 of the Universal declaration of Human Rights²⁹ confers upon everyone the right to nationality. No one shall be arbitrarily deprived of his nationality or denied the right to change nationality. Nationality is the fundamental element of human security, it ensures a sense of recognition and identity nationality entitles the individual to the protection of the state and provides a legal basis to exercise civil and political rights. Nationality is a legal bond between the individual and the state, this bond is easily established for the vast majority of people and in situations where these conditions do not pertain the problem of statelessness arises.

²³ *Supra* note 18.

²⁴ International Covenant on Civil and Political Rights, Dec. 16, 1966, I.L.M 171 U.N.T.S. 999.

²⁵ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, I.L.M., U.N.T.S. 993.

²⁶ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

²⁷ International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195.

²⁸ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

²⁹ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 71 (1948).

Every child has the right to survive, develop and reach their full potential without discrimination and free from exploitation. Yet stateless children are exploited and vulnerable to human rights violations and are often denied the basic resources and protection available to other children in the society.

This denied protection due to lack of nationality affects every aspect of the child's life such as;³⁰

Legal Identity

Nationality ensures legal identity and with no legal identity stateless children lack birth registration or be otherwise recognized and protected by state. Stateless children have no documents proving their name, age, and origin making them hard to trace if they are abandoned, go missing or orphaned.

Health Care

Children born in a state are ensured right to access to health care, yet children born to stateless mother may not have access to antenatal care, child born may not be entitled to any postnatal care by the state. In several countries stateless children cannot be legally vaccinated and require documentation to have access to health facilities.

Education

Stateless children are often excluded from school, even if they are able to secure primary education they are barred from taking state exams and attaining secondary education as they have no form of identification to be entitled to state facilities.

Social Welfare and Child Protection

Social welfare programmes are rarely extended to stateless communities, since it is difficult to establish legal existence of these children, most stateless children are trapped in poverty and exploited.

Missing and missing out in Emergencies

The lack of registration or any legal documentation makes it difficult for these children to obtain relief during emergency situation. Those displaced by long term conflict or other

³⁰ Chan, J.M.M. Nationality as a Human Right. 12 HRLJ, 1-14. (1991)

disasters are separated from families go untraced for years. Without documentation children may remain in orphanages or foster care because it is difficult to trace their families.

Protection from Violence and Abuse

Stateless children are also vulnerable to violence, abuse, and exploitation. They may recruited or used by armed forces and other groups as soldiers, slaves etc. These children are trafficked and sold as bride or domestic workers. Stateless children who are victims of violence or abuse often find it harder to access support services and remain unprotected.

Child Labourers

Laws prohibiting child labour offer little protection to children born in the stateless community because parents are often poor and unable to obtain legal employment themselves, many stateless children are unable to access schools and end up working in hazardous and exploitative conditions. Without documentation to prove the age of these children it is difficult to prosecute the employers

Children in Conflict with Law

Without any form of identification these children are at risk of being prosecuted as adults and locked up in adult prisons and detention centres or convicted for crimes they have not committed.

The unwillingness of governments to assume their proper responsibility with respect to the question of nationality has some significant consequences to child security and welfare. Governments must acknowledge, both formally and in practice that withholding the benefits of citizenship from whole section of society is more likely to cause harm in the society. Failure to acquire status under the law creates significant human problems, these problems can negatively impact many important elements of life including the right to vote, right to own property, right to employment, right to health care and other facilities granted by the state.

METHODS TO REDUCE STATELESSNESS AND ENSURE HUMAN RIGHTS ³¹

Compulsory Birth Registration

Birth registration is the first official record of a child's birth, although it does not confer nationality it establishes a child's legal identity, age and place of birth. Birth registration is crucial to reducing statelessness as all children are entitled to basic rights regardless of national status. Without birth records and formal documentation children are legally invisible and denied basic rights and facilities from the state. Despite the importance of birth registration each year 51 Million new-born remain unregistered³². This may be for several reasons such as high cost, discriminatory laws against and excluding girls, restrictions on late birth registration, social barriers and other factors.

Registration of Births and Deaths Act 1969

The registration of birth of any child in India is governed by the Registration of Births and Deaths Act 1969. The preamble of the act or the definition clause do not mention the extent of applicability of the act. The act is also silent on ascertaining the nationality of a child at birth, or his/her parents. Furthermore the act mandates registration of all births in the country and creates a national and state level authority to regulate these registrations. Section 8, 9 and 10 of the act mandates officials to submit the information of birth to persons in responsible position of the child or persons who are based in the place of occurrence of birth. Registration of Child's birth forms an effective tool to prevent statelessness and provides for proof of decent, age and place of birth. It is the first step is assisting the process of identification of newborn.

Certificate of Identity

Certificate of Identity is a document issued by the government to non-citizens of the state, to facility the person's entry, exit or status of the person in that country. Certificate of Identity establishes the identity but not nationality of that person, it gives the person right to enter/leave

³¹ Under the Radar and Under protected; The Urgent need to address Stateless Children's Right, UNHRC, ISBN, May (2017).

³² UNICEF Child protection from Violence.(2007) http://www.unicef.org/media/media_45451.html.

the country. A certificate of identity allows a person to be recognised and protected by the government.

Passport Act 1967

The Passport Act 1967 is the only law that recognizes the term stateless for the issuance of Certificates of identity. It is the only statutory provision that caters to the need of stateless persons to an extent. Schedule II Part II of the Passport Rules 1989 lays down provisions to issue a Certificate of Identity to stateless persons residing in India or foreigners whose country is not represented in India or whose national status is in doubt. Moreover schedule III Part I of the rules provide for travel document of stateless person and takes into consideration the spouse of such a person along with any children below the age of 15.

Issuing a certificate of Identity is a positive step towards recognising the status of stateless children and their parents who either resides in India without nationality or is a foreigner whose nationality is ineffective. The certificate of Identity would help such persons to exerciser their human right to travel. The recognition of statelessness through this certificate is a significant step toward redressing the problem.

Determination of Nationality

In India the term stateless persons require further deliberation and explanation. The meaning of citizens and non-citizens are not clearly mentioned in the Citizenship Act, 1955. The act must be amended to incorporate 'stateless persons' in its provisions and also incorporate procedures to establish and determine the nationality of such persons.

Determination of Status of Persons Stateless Community

A centralized authority set up by the state to determine the procedure for Identification and recognition of Stateless persons in order to prevent the children of these stateless person from becoming stateless once they are adults. This centralized authority could also take into consideration to assist asylum seekers and refugees alongside stateless persons. This may further facilitate the central authority to obtain qualitative and quantitative data to statelessness

and facilitate research and development programs to reduce statelessness among children as well as adults and ensure the protection of human rights among stateless communities³³.

Judicial review

Courts should avail their inherent powers and exercise judicial review in matters pertaining to fundamental rights or human rights issues of stateless persons. Any decision against the central authority violating the basic rights of individuals in the state must be addressed by the court by way of appeal and courts must have power to protect basic rights of individuals irrespective of nationality.

Awareness Campaigns and Monitoring Statelessness

In order to ensure people are aware of the importance of nationality and determination of citizenship the state must take a step toward redressing statelessness by holding nationality campaigns and national verification camps so that people can have access to recognise their status and implement identification process. Also an uniform procedure to monitor and keep a track of the extent of statelessness through domestic bodies can help analyse the extent of statelessness in the country and help redress the causes of the statelessness.

CONCLUSION

The issue of Statelessness is a global phenomenon, despite a body of international law relating to acquisition, loss, or denial of citizenship for millions of people. Existing ad hoc methods taken to deal with stateless persons appear to be grounded on selective political conveniences rather than ensuring rights for the stateless community through international covenants. Statelessness in India are caused due to a variety of factors and mainly affect the children of these communities. India need to move its nationality laws toward inclusive citizenship based on fairness and equal opportunities, though India has national laws to determine and terminate citizenship it is submitted that a specific provisions must be enacted to ensure mechanisms catering to and preserving the rights of existing stateless persons but also preventing future statelessness. Moreover the status of the existing stateless children must be accorded based on

³³ Department Of Information Technology, Government of India. National Population Register. (Apr. 4 2014), <http://ditnpr.nic.in/FAQs.aspx>

the principle of equality and agreed standards of determination and treatment in accordance with the principles of international conventions. States must aim to resolve the situation of statelessness and safeguard the right of children e-who are rendered stateless by strengthening national framework to ensure policies of the state do not inadvertently or deliberately render children stateless.

