

# **SIFTING, SELECTING, RELOCATING CITIZENSHIP AT THE COMMENCEMENT OF THE REPUBLIC**

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The date of the enforcement of the Constitution, 26th January 1950, marked a crucial change in the legal status of the people of India. They were no longer British subjects, but citizens of the Republic of India and derived their status as such from the Constitution, which they in their collective capacity as *the people* of India enacted, adopted and gave to themselves. Citizenship at the commencement of the Republic was an encompassing moment, rooted in the shared identity of a sovereign self-governing people, having come together as a community of equals with an overarching 'national identity' which embraced the entire national community as well as each member of the political community. The transition from subject-hood to citizenship was, however, also tied to the history of the creation of nation-states, and the drawing of borders in the Indian sub-continent.

While the Constitution nowhere defines the word citizen, Part II of the Constitution (Articles 5–11) titled Citizenship addresses the question of identification of Indian citizens at the commencement of the Constitution, drawing the lines between citizens and non-citizens/aliens. A close examination of citizenship in this period shows both contest and anxiety over the determination of the national space, whereby the territorial as well as the cultural and legal domain of citizenship was marked and affirmed. The demarcation of citizenship at the commencement of the Republic seems to have been responding largely to the contexts of partition. Thus even as it talks about citizenship accruing to Indians on account of birth and domicile, Articles 5 to 7 of the Constitution concern themselves largely with the modalities of deciding the complicated question of citizenship of people 'migrating' between India and Pakistan between 1 March 1947 and 26 January 1950, when the

Constitution came into force. Significantly, the migrant referred to by the Constitution while laying down the frameworks of citizenship in the new Republic was crucial to the affirmation of the sovereign identity of the nation. Consequently, the rehabilitation of the refugee, the legal accommodation of the returnee, and the recovery and rehabilitation of abducted women, in other words, the relocation and restoration of the 'misplaced' or 'displaced' was of critical significance for the invocation of citizenship. While the citizenship provisions in the Constitution addressed the contexts of the birth of the new nation, the Citizenship Act of 1955 was enacted by the Parliament under Article 11 of the Constitution to take into account all future issues pertaining to citizenship. Between 1950, when the Constitution came into force and 1955/1956 when the Citizenship Act as enacted and Citizenship Rules were framed, there was thus a hiatus – a state of 'legal vacuum'. Ironically, however, while the legal framework of citizenship was being developed, people were actually moving across borders on a variety of travel documents and permits. When the Citizenship Act came into force, the cross-border movements came to be imputed with 'intention' and subsequent ascriptions of legality and illegality. Through a study of archival material, primarily files pertaining to citizenship in the Indian Citizenship Section of the Home Ministry in the 1950s, laws, and court judgements, this paper will explore the liminal spaces of citizenship that emerged in the interregnum between the enforcement of the Citizenship provisions as contained in the Constitution of India and the enactment of the Citizenship Act of 1955. Significantly, while the concern around demarcating in precise terms the territorial boundaries of the Indian nation-state and who could claim its legal membership endured, the process of executive decision-making and the court decisions on citizenship ultimately show how the citizenship question at the commencement of the Republic was fraught with contests. Before one ventures into unraveling these contests, in particular, the manner in which restoration, relocation and alternatively, excision and denial of citizenship took place, it will be pertinent to discuss briefly the legal frameworks of citizenship as they obtained at the birth and early years of the Indian Republic.

## **Enframing the Citizen: Constitutional and Statutory Provisions**

While the word citizen is not defined in the Indian Constitution, *Part II* of the Constitution (Articles 5 to 11), titled *Citizenship*, addresses the question 'Who is a

citizen of India?' at the time of the commencement of the Constitution on 26 November 1949, i.e. the date on which the Constitution was *adopted* by the Constituent Assembly. Although the Constitution came into full force only on 26 January 1950, provisions dealing with citizenship (Articles 5 to 9) became operative on the date of its commencement. The distinction between the Indian citizen and the non-citizen (alien) thus became effective on this date. While a citizen enjoys certain rights and performs duties that distinguish him/her from an alien, the latter has certain rights of 'personhood' that s/he possesses irrespective of the fact that s/he is not a citizen.

Under Articles 5 to 8 of the Constitution the following categories of persons became the citizens of India at the date of the commencement of Constitution: (a) those domiciled and born in India; (b) those domiciled, not born in India but either of whose parents was born in India; (c) those domiciled, not born in India, but ordinarily resident in India for more than five years; (d) those resident in India, who migrated to Pakistan after 1 March 1947 and returned later on resettlement permits; (e) those resident in Pakistan, who migrated to India before 19 July 1948 or those who came afterwards but stayed on for more than 6 months and got registered; (f) those whose parents and grandparents were born in India but were residing outside India.

The Constitutional provisions may be seen therefore as laying down the terms of citizenship for two broad categories of people: (i) those who were 'found' to be residing in India at the time of independence and 'became' Indian citizens (ii) those who, unlike the earlier category moved across the borders. This category was again divided into two identifying two different patterns of movement : (a) those who migrated *from Pakistan* to India after partition and before 19 July 1948 (b) those who migrated *from Pakistan* to India after 19 July 1948 but before the commencement of the Constitution and registered themselves as citizens of India before the concerned authority (iv) those who went to Pakistan and returned to India under a permit for resettlement or permanent return issued by competent authority.

### **Statutory Provisions: The Citizenship Act, 1955**

Article 11 of the Constitution authorised the Parliament to make laws pertaining to acquisition and termination of citizenship subsequent to the commencement of the Constitution. The Citizenship Act (LVII of 1955) made elaborate provisions

specifying how citizenship could be acquired by birth, descent, registration, naturalisation or through incorporation of territory. Following the Assam Accord in 1985, an amendment was made to the Citizenship Act in 1986, which inserted Article 6A, making way for a sixth type of citizenship applying to the state of Assam.

As far as *citizenship by birth* was concerned, everyone born in India after the commencement of the Constitution but before the amendment of the Act in 1986, unless excluded was to be considered a citizen of India. After the amendment of 1986, everyone born in India and either of whose parents is a citizen of India at the time of his/her birth, unless excluded, was to be considered a citizen of India

A person was to be considered *citizen by descent* if he or she was born outside India after 26 January 1950 but before the commencement of the Citizenship (amendment) Act 1992, if his or her *father* was a citizen of India by birth. Following the Citizenship (amendment) Act, 1992, a person could be a citizen of India by descent if *either of his parents* is a citizen of India at the time of his/her birth. The 1992 amendment removed the gender discrimination that had so far existed in the provision of citizenship through descent.<sup>1</sup>

As far as citizenship by registration is concerned, a person of Indian origins, that is, if he or either of his parents were born in undivided India, and ordinarily resident in India for five years before applying for citizenship is entitled to be an Indian citizen by registration. Under this type, the following categories of persons can seek citizenship: (a) Persons of Indian origins resident in any country by following a set of procedures (b) a person married to a citizen of India and has been resident in the country for five years immediately before making an application (c) minor children of persons who are Indian citizens, and (d) persons of full age and capacity of a country specified in Schedule I (commonwealth countries) of the citizenship Act 1955 (Rodrigues 2005: 171). A person may become a citizen of India by naturalization if he or she has resided in India for at least five aggregate years in the past seven years, and continuously for twelve months after that, does not belong to a country which disallows citizenship by naturalization, has renounced the citizenship of his or her country, has adequate knowledge of a language specified in the eighth schedule of the Indian Constitution, and intends to reside in India or serve in government service or an international organization of which India is a member.

The fifth category of citizenship, *through the incorporation of territory into India*, derives from a person's membership in specific 'incorporated' territories by virtue of Citizenship Orders, viz., Goa, Daman and Diu by virtue of the Goa, Daman and Diu Citizenship Order, 1962, Dadar and Nagar Haveli (Citizenship) order 1962, Citizenship (Pondicherry) Order 1962, and Sikkim (Citizenship) Order 1975.

The Citizenship Act 1955 was amended in 1986, adding Article 6 A, which made way for a sixth category of citizenship. The amended Act laid down that (i) all persons of Indian origin who came to Assam before 1 January 1966 from a specified territory (meaning territories included in Bangladesh) and had been ordinarily resident in Assam are considered as citizens of India from the date unless they chose not to be, (ii) (a) person of Indian origin from the specified territories who came on or after 1 January 1966 but before 25 March 1971 and have been resident in Assam since and (b) have been detected in accordance with the provisions of the Foreigners Act, 1946 and Foreigners (Tribunals) Orders, 1964 (c) upon registration, will be considered as citizens of India, from the date of expiry of a period of ten years from the date of detection as a foreigner. In the interim period they will enjoy all facilities including Indian passports, but will not have the right to vote.

The Citizenship (Amendment) Act of 2003 introduced a version of dual/transnational citizenship for Persons of Indian Origin (PIOs), in the form of 'Overseas Indian Citizenship'. Under the amended Act, an OCI is a person who is of Indian origin and citizen of a specified country, or was a citizen of India immediately before becoming a citizen of another country (on a specified list), and is registered as an OCI by the central government. The Citizenship Amendment Act 2003 made several amendments to existing sections and inserted sections 7A, 7B, 7C and 7D titled 'Overseas Citizens' that dealt with the definition and registration of overseas citizens,<sup>2</sup> conferred specific rights to them while also identifying the rights that did not belong to them, and the conditions under which the registration could be cancelled. It is worth reiterating that while defining eligibility and what constituted Indian origin, the Act retained the contexts of Partition and the excision of those who had become Pakistani citizens (and later Bangladeshis).

## **Identifying the Legal Citizen: Sifting, Selecting, Relocating**

If one looks at the constitutional provisions pertaining to citizenship, keeping in mind the fact that they were addressing the immediate contexts of Partition, one is struck by what appears to be an inclusive approach to citizenship, its non-denominational character and an emphasis on people's choices. Valerian Rodrigues (2008 166-167), for example, indicates the inclusive and generous approach towards citizenship which qualified territorial location and stressed upon associational belonging. Rodrigues (Ibid 167-168) argues that while the ascriptive identity of a person in terms of territory and culture, was seen as important for citizenship, a person was not reduced to his/her ascriptive location but was perceived as someone who in important respects had the ability to make choices concerning himself/herself and his/her future and a free and fair society had to consider such choices with the necessary weight for the entitlements due to him. Citizenship, moreover, at its inception, was not confined to the progeny of people found within the territorial bounds of India alone. This, Rodrigues argues was a bold and generous provision in 1948 as the vast majority of people to whom such recognition was accorded were indentured labourers and poor emigrants.

Yet, the nineteen fifties, that is, the period in which the citizenship provisions as contained in the Constitution and thereafter in the Citizenship Act of 1955, and the Rules of 1956, show that citizenship unfolded in multifarious and contending ways. While the element of choice and voluntariness was indeed put down as a legal possibility amidst the tumultuous movements of people across the border, and territorial location and ascriptive identity were not considered relevant for citizenship, there were tensions in the way in which 'choice' and 'voluntariness' were determined and the relationship between issues of territorial belonging and ascriptive identity unfolded in practice. It is interesting how these tensions made themselves manifest in relation to women and religious 'minority'. Significantly, the way in which citizenship was determined in both these cases, threw up new categories e.g., 'alien women' and 'displaced persons', among others, which were not covered in the language of the law. The deliberations among the officials on the issue and the orders and judgements issued by the courts in contested cases, show that these categories were enframed by the contexts of Partition and the emergence of the two nation-states of India and Pakistan, and the problems of fixing the temporal and

spatial boundaries of the nation-state and the precise contours of legal citizenship. It is not surprising then that the process of 'fixing' identity involved a politics of identification – a process of sifting, selecting and relocating – which reflected the contexts of the emergence of the nation-state. In many ways determining citizenship at the commencement of the Republic became a question of territorial location and claims of 'belonging' to the territory. The contours of the contests over claims of belonging were framed primarily in relationship to territorial ties defined in a way which moved closer to an ethnic-cultural relationship to the territory rather than civic-political association. Most importantly, the contest drew into its vortex what had been seen as 'settled' in the Constitution – that is, the aspects of voluntariness and choice in citizenship. Furthermore, one provision which may be seen as having a lasting implication for the way citizenship in the nation-state was to be defined, despite the scope for choice/changing one's decision to migrate and returning to India, was the finality with which the excision from citizenship was laid down in the Constitution for those who had 'chosen' not to become citizens of the new nation-state of India and had migrated to Pakistan before 1 March 1947. This excision and associated with this the interpretation of voluntariness and choice was to figure later in disputed cases under the Citizenship Act of 1955. This 'original' excision would also resonate later in the manner in which the scope of the Overseas Citizenship of India was to be determined 2003 onwards.

### **'Abducted Women': Relocating Women as Citizens**

The partition was accompanied by reclamation by the two governments of their lunatics, prisoners and women. It is interesting how the three categories clubbed together for recovery were in some sense infantilised or seen as either incapable of independence or unsuited for it, requiring in both cases, custodial care. Significantly, however, as an impressive scholarly literature produced on partition has shown, women were subjected to successive markings of 'difference as closure' even as the nation made a transition into liberatory encompassing/universal citizenship. The Inter-Dominion Conference that followed partition instituted procedures to recover abducted women and children. The Abducted Persons (Recovery and Restoration) Act was passed by the Constituent Assembly of India on 15 December 1949, and a similar Ordinance passed in Pakistan, followed up by periodical conferences between the two

countries, to facilitate the recovery and restoration of women who had been abducted in the course of partition.

If rape and abduction marked women as the 'other' in the national space, their subsequent recovery and restoration into their own national space reinforced their otherness; for the nation reclaimed them not as citizens but as Hindu (or Sikh) women whose restoration 'to their original homes' was essential for redeeming national honour and rejuvenate the emasculated descendants of Ram. Significantly, however, as Urvashi Butalia has put it, 'the notion of the home, and indeed the space of home had changed. No longer was it the boundary of the domestic that defined home; rather it was the boundary of the nation' (Butalia 2006: 139).

Significantly the Hindu and Sikh women who were restored to the 'nation' and to their 'homes', were differently positioned from Muslim women who as 'recovered abducted women' were 'taken into custody' and placed in detention camps under what may be called a 'state of exception', till the time their own government claimed them. It was through what constituted an exception - the *suspension* of the writ of *habeas corpus* that notions of 'national honour' were instituted through law. Muslim women who had been 'recovered' and sent to camps were constituted as *impure* body populations who had no claims to Indian citizenship, and no man or his family could claim that these women had been unlawfully detained in the camps, unlike routine law (Baxi, forthcoming).

That considerable force was used in the recovery programme is now well documented (Menon and Bhasin 1997; Butalia 1997). The literature points out also the 'mistakes' that were made in the process of identification (Pandey 2001: 167) and the modern technologies of rule and governmentality which were evidently in play, with the collection of statistics of identification, recovery and restoration becoming a central part of the operation (Ibid). Amidst the violence of the law and the centrality the recovery operation came to have in the Indo-Pakistan conferences at the inception of the two nation-states, women became central to the political identity of citizenship.

Yet, even as the identification of abducted women, their recovery and restoration was seen as something which would be natural and desired by women, and force was to be applied ostensibly against the abductor, a number of studies have reminded us that the process was not altogether undisputed. Urvashi Butalia, for example, has shown, with reference to the well known



case of *Ajaib Singh vs. the State of Punjab* (1952) that among the recovered abducted women were those who refused to return to their 'own' families, wishing to stay on with their abductors. In the early days of the Central Recovery Operations, these cases were decided by the special tribunals set up under The Abducted Persons (Recovery and Restoration) Act, 1949. With the passage of time, however, issues became more complex. Some of these cases came up before the courts, where issues of border-crossings, the element of choice and/or coercion, nationality, citizenship rights, rights of residence and property rights, became crucial (Butalia 2006: 143-44).<sup>3</sup>

With the passage of time, however, while queries regarding abducted women continued to be made and addressed by the High Commissions and Ministry of External Affairs of the two countries, there was a reticence in acknowledging the existence of such case of 'mis-location'. In a letter dated 3 December 1964, for example, the High Commissioner for Pakistan in India sent the following query:

'The High Commission for Pakistan in India presents its compliments to the Ministry of External Affairs, Government of India, and has the honour to inform them that a Muslim girl Safia, now named Raksha, sister of Manjoor Muhammed Khan, resident of B/63 Naya Mohalla, Rawalpindi was abducted at Patiala at the time of Partition. The High Commission has reason to believe that she is now living in the household of one Harbans Singh who was employed as a motor car driver of the Deputy Commissioner....'<sup>4</sup>

The District Magistrate responded to the query on 18 August 1967:

'... In this connection I am to inform you that confidential and discreet enquiries have been conducted which reveal that Harbans Singh driver of this office was married about 10-11 years ago to the daughter of one Ujjwagar Ram... the name of this lady is Raksha Devi and she has four issues....the statement of Raksha Devi was also recorded by an Executive Magistrate 1<sup>st</sup> class. In her statement she has denied any relation which Shri Mansur Muhammed, and has expressed her complete ignorance about him. She has stated that she was married to Harbans Singh about 11-12 years ago and that she was now mother of four children...'<sup>5</sup>

In another such instance, the High Commissioner of Pakistan wrote to the Ministry of External Affairs, in a letter dated 12 December 1964 that

...one Mr.Arshad Ali has reported that during the wake of disturbances in 1947 the following five girls were abducted from Bawal (Nabha state): Sarwari, Bilquis, Jamila, Haseena, and Rabia...An Indian national of Alwar has now informed Mr.Arshad Ali that about a dozen displaced ladies were brought to Alwar by Mr.Manoo of Punjab state for the purpose of sale. But he was caught by police and all the ladies were sent to Ambala Camp on 15-7-1960. It is reported that among those ladies, there were aforesaid five girls...<sup>6</sup>

The Ministry on its part reported to the High Commission on 5 June 1965 that although proper enquiries have been made, no useful information regarding the five abducted girls could be gathered' concluding that 'the information said to have been supplied by an Indian national to Mr. Arshad Ali is obviously incorrect'.<sup>7</sup>

While the question of these women's authenticity as citizens – as actually belonging to places where they are found – as in the case of Raksha, and the five missing women who were allegedly 'dislocated' and needed to be found and relocated, complicated the question of choice, and in particular women's choice, the question of voluntariness – as in the voluntary acquisition of Pakistani citizenship - which was put down as a primary condition of loss of Indian citizenship in the Constitution, was never actually put to debate and judicial scrutiny and decision, except in the case of minors.

It is interesting how the significance of voluntary choice emerges in a particular case where Mangal alias Maphul (son of Jumen) killed his wife Ghafoori, who was in an advanced state of pregnancy with a gandasa, 'probably' because she refused to accompany him to Pakistan. Jumen was tried for murder and sentenced to death for the offence on 30 December 1948 by the Sessions Judge of Rohtak. His appeal to the East Punjab High Court was rejected and Maphul then submitted a mercy petition which too was rejected by the Governor General. The order of the Governor General rejecting the petition was conveyed to the Government of East Punjab on 17 October 1949. Meanwhile the exchange of Prisoners Act was passed. It appears that Maphul had embraced Hinduism in 1946 and was not 'exchangeable' under the Inter-

Dominion Agreement between India and Pakistan. The government of Punjab addressed the issue to the MHAB, who ordered on 26 November 1949 the postponement of his execution. The case had been pending ever since - for six years and four months since the death sentence was passed upon him. Ministry of Home Affairs received three telegrams from the Government of India, asking for a stay on execution that prisoner Mangal alias Maphul was an exchangeable prisoner.

The exchange of prisoners legislation was passed in 1948 – two exchanges of prisoners took place during April 1948 and October/November 1948, 4084 non-Muslim were transferred to India and 3763 Muslims were transferred to Pakistan. In 1949 supplementary exchange of prisoners took place and Maphul was not 'exchanged' because his case remained a 'doubtful' one. In 1950, however, his execution was stayed and he was categorized a 'transferable' prisoner. On 8 May 1955, the MHA was instructed by the Ministry of Rehabilitation to 'kindly see' the case, after which the Ministry would inform Pakistani authorities that they were agreeable to transferring him.<sup>8</sup>

## **What is Migration? Constitutional Provisions, Voluntariness and Intention**

The provisions of the Constitution of India, particularly Articles 5, 6 and 7, dealt with the question of citizenship at the commencement of the Constitution. Article 5 conferred Indian citizenship on every person who at the commencement of the Constitution had his domicile in the territory of India and-

(a) who was born in the territory of India; or (b) either of whose parents was born in the territory of India; or (c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement.

Articles 6 and 7 concerned themselves with the contentious question of the rights of citizenship of persons who 'migrated' to India from Pakistan (Article 6)<sup>9</sup> or to Pakistan from India (Article 7).<sup>10</sup>

Articles 6 and 7 threw up two significant dates – 1 March 1947 and 19 July 1948 – which constituted the temporal boundaries of migration into Indian citizenship. While constitutional provisions lay down in precise terms the dates within which, and the procedure whereby 'movement' across borders may

confer citizenship, the unfolding of the provisions in the years after independence, showed a contest around questions of intention and choice, which came to play a determining role in ascertaining legal citizenship.

In one of these cases which came up for consideration before the Ministry of Home Affairs in January 1958, a person born in Quetta in West Pakistan, came to India 'with a view to carrying on money-lending business'. He claimed to be an Indian citizen under the provisions of Article 6(b)(i) of the Constitution 'on the ground that he migrated to India before the 19<sup>th</sup> day of July 1948 and has ordinarily been resident in India since the date of his migration'. The Home Ministry sought legal opinion on what the word 'migrated' used in Article 6 (b)(i) of the Constitution meant – 'Does it signify that the person's intention must have been to permanently settle down in India at the time of his so-called migration' and '...can a migration have taken place for the purposes of the Article even before the partition of India i.e. from a date prior to the 15<sup>th</sup> August 1947'.<sup>11</sup>

As apparent from the response of the Law Ministry that the expression 'migrated' as it occurred in Article 7 of the Constitution came up for the consideration of various High Courts, while Article 6 'had not so far come up for judicial notice'.<sup>12</sup> In one such case, the Judicial Commissioner of Kutch argued that 'migration had no reference to domicile and simply means, in Article 7, departure from India to Pakistan for "the purpose of residence, employment or labour", and a person who went to Pakistan for a living ought to be regarded as having migrated to Pakistan even though he had no intention of giving up Indian domicile (AIR 1951 Kutch 38). In another judgement (AIR 1952 Allahabad 257) the Allahabad High Court concurred. The note from the Law Ministry mentioned:

'A person may be deemed to have migrated from India to Pakistan with the intention of shifting his permanent residence from India to Pakistan. That High Court found support for this view in the proviso to article 7 which excluded the operation of article 7 in case of persons who, after having migrated to Pakistan, have returned to India under a permit for resettlement or permanent return. There is great force in the view propounded by the Allahabad High Court that intention for settlement or permanent movement ought to be associated with the concept of migration. An earlier decision of the

Allahabad High Court, reported in AIR 1951 Allahabad 16, also had taken a similar view and stated that the expression 'migration' embraces in scope two conceptions: firstly, going from one place to another, and, secondly, the intention of making the destination a place of abode or residence in future. It was further observed that 'in the context of the Constitution, the expression has the notion of transference of allegiance from the country of departure to the country of adoption'. The subsequent decision of the Allahabad High Court given in 1952, referred to above, therefore indicated that the migration should be of such a nature that the person migrating would lose his citizenship of the country for which he migrated. ....In an unreported case (Sheikh Tyab Alli vs. the State of Bombay) which is referred to in the Allahabad decision of 1952, the High Court of Bombay has observed:

"The expression 'migrated from the territory of India' does not mean leaving India only with the intention either of not returning to India or of settling down permanently outside India. In my view the expression 'migrated from the territory of India' must in its context mean voluntary departure from the territory of India, the departure being not casual or fortuitous but with the intention of carrying on the normal avocation outside India". In this view a person going from one country to another for the purpose of carrying on business for indefinite duration will have to be deemed to have migrated. The Allahabad High Court differed from this view.

The Patna High Court has, in AIR 1953 Patna 112, followed the Allahabad view and observed that the word 'migration' definitely suggests an element of permanent change of residence and not merely movement from one place to another. The Patna High Court considered that the change of movement must be with a view to settle down in the other country so as to affect the migrant's right to citizenship in the country from which he had migrated.

The full bench of the Saurashtra high Court held in AIR 1953 Saurashtra 37 that persons who had gone over to Pakistan on a temporary permit and overstayed the period of permit without any adequate reason must be deemed to have migrated to Pakistan. In AIR 1954 Bhopal 9, the Judicial Commissioner of Bhopal, following the Allahabad view, construed migration in the sense of

departure from one country to another with the intention of residence or settlement in the other country and held that a temporary visit to another country on business or otherwise cannot amount to migration.

.....According to the Shorter Oxford English Dictionary, the word; migrate' means (1) to pass from one place to another; (2) to move from one place of abode to another; especially to leave one's country to settle in another, to remove to another country etc....The migrant referred to in articles 6 and 7 of the Constitution is obviously change of movement consequent upon political changes in the country and disturbances arising therefrom and only those persons who were uprooted in the wake of those changes and disturbances ought properly to be regarded as having migrated from Pakistan to India and vice versa. Nevertheless, the intention to settle in one country or another could not necessarily be present at the time of the movement in the minds of those who moved from one country to another, particularly, as such movement may be attributed to panic and fear of disturbances. It is possible to imagine that a Muslim owing allegiance to India, out of fear, temporarily moved to Pakistan and vice versa. In determining whether a person migrated from one Dominion to the other within the meaning of the Constitution, not only the movement but also the subsequent conduct of the person concerned will have to be taken into consideration. In other words, the real test would be whether such a person, notwithstanding his movement to another Dominion, owes allegiance to the Dominion from which he moved and his subsequent conduct justifies his allegiance to that Dominion. A temporary visit even during the times of disturbances could not be regarded as migration.

It may be mentioned that the migration need not necessarily be only during or after the partition of the country. It is possible to imagine cases of persons who came over or went away from the territories which are now India on business long time before the partition of the country but having regard to the partition they decided to stay on permanently in the country to the territories of which they had gone. To illustrate the position, a Hindu from Karachi who came to India in 1946 for business and settled in India after the partition ought to be regarded as a migrant to India unless his conduct shows that his stay in India is of a temporary nature and his intention is to return to Karachi in due course. The intention to settle down in India would crystallize after the partition although his physical movement was before the partition.

In the case under consideration [the money-lender from Quetta], the person came to India before the 19<sup>th</sup> July 1948 for business purposes. He seems to have been residing here ever since then. The question would be whether his present residence is merely for business or he has, by his conduct established that he has settled down in India. If he continues to possess property in Pakistan, if he has relations in Pakistan with whom he is in touch, or he has not acquired any property in India even though he has the means to acquire, if he has not assimilated himself in the Indian way of life and though, he cannot be regarded as having settled down in India, and therefore to have migrated to India, in spite of his long continuous residence.<sup>13</sup>

## **The Citizenship Act of 1955 and Disputes over Citizenship**

### ***Registered wives and 'alien women'***

When the Citizenship Act of 1955 was enacted under Article 11 of the Constitution, the question of citizenship under the new Act, threw up 'liminal' 'transitional' and 'awkward' categories of aspiring citizens, whose legal resolution drew attention yet again to the ethnic-cultural and gendered basis of citizenship in India. It is significant that determination of citizenship was determined by the different ways in which the western and eastern borders of India were construed. While the legal freezing of the western border was almost instantaneous, and process of sifting outsiders (Muslim women in Hindu homes in India) and identifying and recovering the dislocated insiders (Hindu/Sikh women in Pakistan), was carried out as a task essential for the consummation of the nation-state, the eastern border remained more or less fluid, and the nature of citizenship emerging from this movement, remained ambivalent.

Nowhere is this more evident than in the manner in which citizenship of people moving across borders in the period intervening the deadline set by the Constitution of India and the enactment of the Citizenship Act in 1955, on long term visas, or the minority population 'displaced' or 'evacuated' from Pakistan, and the Pakistani wives of Indian nationals who needed to be registered as Indian citizens after the enactment of the 1955 Act. It is significant that relocation itself was determined by the different ways in which the western and eastern borders of India were construed. While the legal freezing of the western border was almost instantaneous, and the process of sifting outsiders

(Muslim women in Hindu homes in India) and identifying and recovering the dislocated insiders (Hindu/Sikh women in Pakistan) was carried out as a task essential for the consummation of the nationalist project, the eastern border remained more or less fluid. Thus, if the congealing of the western border and legal resolution of the citizenship question threw up 'awkward' citizens, the eastern border continued to see the flow of people much beyond the constitutional deadline of 19 July 1948, in several continuous and successive waves, leading up to a situation where their presence became 'illegal' (Chakravarty 2005; Roy 2008).

Nowhere is this more evident than in the manner in which the citizenship of people moving across borders (on both sides) in the intervening period between the 19 July deadline set by the Constitution of India and the enactment of the Citizenship Act in 1955 was resolved. Liminal categories included people on long-term visas and entry permits, or the minority (Hindu) population 'displaced' or 'evacuated' from Pakistan, and the Pakistani wives of Indian nationals who needed to be registered as Indian citizens after the enactment of the 1955 Act. The policy regarding citizenship of minorities 'displaced' from Pakistan in this intervening period seems to have been starkly different when compared to the registration of 'wives' as citizens. Internal communications reveal a grudging admission of 'wives' into registered citizenship. Thus, even as they filled up forms declaring that they had spent a year in India and their marriage subsisted, and swore on an affidavit their patriotism to India and abdication of Pakistani citizenship, several government departments including the Intelligence probed into their background to confirm that they had no files on them. Amidst the numerous communications that went on between different departments in each case, the Deputy Secretary, Home Affairs, while admitting that Sogra Begum, a nineteen year old Pakistani woman, and applicant for registration as Indian citizen, was eligible to become one 'as she satisfied all the requisite conditions', proposed: 'If it is considered that a period of two years is too small to assess her loyalty and behavior, we may hold over the consideration of her application for one or two years'.<sup>14</sup>

It is interesting how the 'wives' or Pakistani women marrying Indian nationals, constituted a substantial proportion of women registering as citizens under section 5(1)(c) of the Citizenship Act of 1955. The Pakistani women, who traveled to India with their families on short term visas to get married to or after their marriage with Indian men, occupied the transitional / liminal



space between the closure to Indian citizenship for Pakistani citizens which the Constitution prescribed, and its conditional opening up under the Citizenship Act for women who married Indian men. Among the large numbers of applications for registration as Indian citizens, those by Pakistani women figure in disproportionately large numbers. Interestingly, while the rules for citizenship under the Act did not exclude Pakistani citizens, and their applications followed the usual procedure of 'forwarded and recommended' by a specific state government to the Ministry of Home Affairs (MHA) and its scrutiny by the Indian Citizenship (IC) section of the MHA, as mentioned in the case of Sogra Begum, the applications were subjected to minute scrutiny by the Intelligence Bureau (IB) and the Ministry of External Affairs (MEA). Other specific concerns which would have applied to all applicants and not exclusively to the Pakistani women, were the requirement of renunciation of 'original citizenship', under the Citizenship Act, taking 'an oath of allegiance' under the Citizenship Rules of 1956, and the residential requirements prescribed under rule 4(3).

The requirement of renunciation of 'alien nationality' in the case of Pakistani citizens turned out to be a matter of some concern for the MHA officials since under the Pakistan Citizenship Act 1951, there was no provision 'enabling Pakistani citizens to renounce their nationality'. In Sogra Begum's case, who in her application had not mentioned anything against item ten of the form relating to the 'renunciation of the citizenship of her country in the event of her application being sanctioned', the Ministry of Home Affairs adopted the following lines of reasoning:

....before actually effecting her registration she can be called upon to renounce her Pakistani citizenship by swearing an affidavit and her application may, therefore, be treated as in order..

...However, if Srimati Sogra Begum is registered by us as an Indian citizen, she will by virtue of this fact itself cease to be a Pakistani citizen under section 14(1) of the Pakistan Citizenship Act, 1951. The requirement of renunciation of the alien nationality may therefore be deemed to be satisfied in this case...<sup>15</sup>

More interesting perhaps and something which the archival records fail to capture is the way in which some of these liminal categories, 'registered wives'

and in particular the displaced persons, occupied a zone of uncertainty in the intermediate period between constitutional closure and statutory opening. Sogra Begum's profile shows that she got married to a Dr. M. G. Kibria in February 1955, came to India after her marriage, had been living in India 'continuously' since 20 June 1955, and was registered as an Indian citizen on 14 August 1958. In Sogra Begum's case, we may recall, the issue of loyalty and duration of stay was brought up by the MHA. Zeherambanu Hasanali was a Pakistani national, who came to India in September 1955 on a Pakistani passport and short term Visa, got married to Hasanali Mahomedali Khoja, 'an Indian national by birth' on 23 November 1955, applied for 'permission for permanent settlement in India' / long term visa on 26 December 1955 and for citizenship on 19 May 1957. In the meantime, she had been residing 'continuously' at Gokak in Belgaum district. It may be noted that a person in possession of a long term visa or permission for permanent settlement in the period before the Citizenship Act came into existence, was seen as someone already on the track to citizenship, and when the Act came into being could register as a citizen under section 5(1)(a) of the Act. Interestingly, the MHA had decided that Pakistani women who had been allowed permanent resettlement or granted long term visas could be registered as Indian citizens under section 5(1)(a), which is to say that they could become citizens individually, without any consideration of their status emerging from marriage and the requirement therefore, to register under section 5(1)(c). However, in Zeherambanu's case, while the IC section of the Ministry of Home Affairs were aware that she had applied for permission for permanent settlement, it was not clear that she had actually received it. The papers forwarded to the MHA by the District Magistrate of Belgaum, said that her application for permanent settlement had been forwarded to the Government of Bombay, but did not have any information on its outcome. While Zeherambanu's papers for registration as a citizen upon marriage to an Indian citizen were considered to be in order, the MHA considered it 'desirable to know the action that was taken on her application'. Simultaneously, about eight months after the application had been made and forwarded to the MHA, the Deputy Secretary, noted his query:

Have we any information in regard to the circumstances in which the applicant migrated to Pakistan? How long she stayed in that country? What are his relations to Pakistan? How long she stayed in that country? What are her relations in Pakistan?

Whether she came to India to marry the applicant or this was only incidental?

If we have no information on these points, it may be better to obtain it before taking a decision. In the meantime, the applicant may be allowed to stay in India (note dated 22.1.1958 from the Deputy Secretary, IC section, MHA)

The application submitted by Zeherambanu, may be read as a document providing the broad trajectory of her consecutive transition(s) from one status to another in a span of about twenty years. Born in Bombay on 7 July 1937, Zeherambanu migrated with her father to Pakistan when she was ten years old, in July 1947, which we may recall marks the temporal boundary provided in the Constitution for Indian citizenship. She acquired Pakistani citizenship by Naturalisation. She entered India in July 1955 under a Pakistani passport and a short term Visa, which was later extended by the Assistant Secretary, government Political and Services Department, Bombay, permitting her to stay in India up to 10 July 1957. In the meantime (May 1957) she applied for Indian citizenship and in January 1958, she was permitted to stay on till a decision on her application was taken.<sup>16</sup> It is interesting how Zeherambanu comes across in official communications as having an 'unstable' citizenship, owing to her periodical movement, and in the first instance 'rupturous' migration to Pakistan, under a shroud of suspicion. Her husband, on the other hand, who is 'born in India' and unlike Zeherambanu, has continued to stay in India, is in relation to his wife, embedded as an Indian citizen and therefore benign.

It is interesting how, each application by Pakistani women married to Indian men for registration as Indian citizens, went through the same procedures, whereby the officials in the Indian Citizenship section of the Ministry of Home Affairs, received the application forwarded by the government of the state where the applicant was domiciled after her marriage, ascertained whether the applicant 'satisfied residential qualification required under rule 4(3) of the Citizenship Rules, 1956', had given an undertaking through a sworn affidavit to renounce her Pakistani citizenship in the event of her 'application being sanctioned', that the Intelligence Bureau had 'nothing adverse on their records' and the Ministry of External Affairs had no objections to her registration. Yet, each application, as evident from the above discussion of Sogra Begum and Zeherambanu's 'cases', was also specific, in the sense that each elicited distinct

concerns from the officials, and a corresponding line of reasoning for the award of citizenship.

Yasmin K. Wadia, a Pakistani national who married Keki J. Wadia at Bombay on 18 November 1955, had been residing 'continuously in India since 23 September 1955', after coming to India for the purpose of marriage. Unlike Zeherambanu, who had migrated to Pakistan during partition, Yasmin Wadia, was born in Karachi where her parents, both of whom were born in Bombay, were domiciled at the time of her birth. Mr. Minochar Dhala, Yasmin's father, continued to stay in Karachi where he owned property, and Yasmin was 'brought up and educated' in Karachi. In a letter marked 'secret', the Deputy Commissioner of Police, Special Branch, CID, Bombay, provided the above information to the Under Secretary in the Political and Services Department, in the Government of Bombay, stating that there was 'nothing politically adverse known against her and her husband on the records of this office'. While 'clearing' Yasmin's application for citizenship, which could then be forwarded to the Home Ministry in the Government of India, the Deputy Commissioner of Police made special mention of the fact that the 'the applicant has no vested interest or property either in India or in Pakistan, She was brought up and educated at Karachi. Shri Keki Wadia states that he has no vested interest or property either in India or in Pakistan. However, he states that his wife is maintaining contacts with the country of her domicile of origin by writing periodical letters to her relations stationed in Pakistan'.<sup>17</sup> Almost a year later, in November 1957, the Deputy Secretary in the Ministry of Home Affairs was convinced that Yasmin 'will make a loyal and useful citizen', and accepted her application for registration as an Indian citizen.<sup>18</sup>

Sarwar Bano was born in Calcutta on 20 October 1931 and resided in Calcutta till 1946, when she went to Dacca with her parents. She got married to an Indian citizen, Jamil Rahman Khan in Dacca on 22 April 1955:

After her marriage, she came to Calcutta on the 6 May 1955 with a Pakistani passport and resided here till the 10<sup>th</sup> July, 1955 when she went back to Pakistan. She again came back to Calcutta on 8<sup>th</sup> June 1956 and stayed here till the 1<sup>st</sup> January, 1957 when she paid another visit to Pakistan eventually returning to Calcutta on the 2<sup>nd</sup> February, 1957. She has been residing in India continuously since the 2<sup>nd</sup> February, 1957. Her husband, Shri Jamil Rahman Khan, is an Indian citizen by

birth and he is the holder of an International Passport issued by this Government. There is nothing adverse on record against the lady.<sup>19</sup>

Sarwar Bano's father was a former member of the Indian Civil Services. Her case was rejected on technical grounds since she did not 'satisfy the residential qualification of one year's continuous residence in India immediately preceding the date of her application as prescribed under rule 4(3) of the Citizenship Rules, 1956', as she last came to India on 2<sup>nd</sup> February, 1957'.<sup>20</sup> The West Bengal Government made a fresh application on Sarwar Bano's behalf on 10 February 1958, when the residential requirement was completed. Interestingly, the High Commissioner of India in Pakistan, a friend of Sarwar Bano's father, put in a word to the Ministry of Home Affairs, to expedite the proceedings, because Bano had to attend a wedding in the family in Dacca, and did not want to go there 'unless her nationality question was finally settled in her favour'.<sup>21</sup>

Sarwar Bano's intermittent visits to her family in East Pakistan delayed her registration as an Indian citizen. The question of residential requirement of a year before the application, came up for discussion in other cases, where a decision to 'allow relaxation in exceptional cases' was taken. Rule 4 (3) laid down: An application under sub-rule (1) shall not lie unless for one year immediately before the date of application, the applicant – (a) has resided in India; or (b) has been in the service of Government of India. [Explanation: In computing the period of one year, broken periods of residence and service under clauses (a) and (b) may be taken into account.] The Ministry of Home Affairs decided that in the cases of 'foreign wives of Officers in the IFS the applicants fail to satisfy the requirement of rule 4(3) in circumstances on which they have no control'.<sup>22</sup> In one of such cases, Odette Chatterjee, could not fulfill the residential requirement, as she went to Karachi in November 1955, a month before she could complete a year of continuous residence, when her husband was posted there as Deputy High Commissioner for India. 'The requirement of actual physical residence for one year immediately before the date of making the application was waived in her favour as it was felt that Shri Chatterjee might very likely have been posted to some other station direct from Karachi in the exigencies of service and she would not in that case, have been able to satisfy the prescribed condition of one year's residence for some

considerable time. Having regard to these special circumstances, the Ministry of Law agreed that it was at best a technical difficulty and without going into the niceties of the legal question, and having regard to the special circumstances, Smt. Odette Chatterjee might be registered as an Indian citizen'.<sup>23</sup>

Amidst communications that took place among the Ministries of Law, External Affairs and Home Affairs, the question of amending the Rule 4(3) came up in the case of Lucia Powar, 'an Italian national, who was resident in India from 1946 to 1949. She returned to Italy in 1949 with her husband and her husband Shri Powar joined service in the Indian Embassy in Rome in 1950 as a local recruit. He has now been absorbed in the IFS (B) and has recently been posted from Rome to Mombasa where he will have to continue for the next few years. It cannot also be said whether he will be posted back to the headquarters after his term at Mombasa or posted elsewhere, and for how long etc. In these circumstances, Mrs. Lucia Powar may not be able to fulfill the requirement of one year's residence immediately before making her application, for some considerable time, and she cannot be registered as an Indian citizen under section 5(1)(c) of the Act without fulfilling this statutory requirement'.<sup>24</sup>

Anjali Roy was only 'technically a Pakistani national'. Born in Calcutta in February 1935, she would have been an Indian citizen at the commencement of the Constitution, had she not been a minor then. While Anjali and her mother had continued to reside in Calcutta after 1947, her father had settled in Dacca and was therefore a Pakistani national. Being a minor, at the commencement of the Republic, Anjali's nationality followed that of her father, and she continued to be a Pakistani national residing in India, till she married Sudhir Kumar Roy, an 'Indian citizen by birth', in December 1953, and became eligible for registration as Indian citizen.<sup>25</sup> Anjali Roy's case is striking for the manner in which 'voluntariness' seems to be unfolding in disparate and contradictory ways. The papers in support of Anjali's application do not state her mother's nationality, which is most likely to have been Indian, since there is no mention of her having left India at any point to join Anjali's father. For Anjali, however, the choice of Indian citizenship was fore-closed by her father's nationality on the date of the commencement of the Constitution, which opened up with her marriage to an Indian national. It is interesting that the Ministry of Home Affairs was addressed the question of women's nationality in cases where other family members, in particular the husband had Pakistani nationality. In

a letter dated 29 October 1958 to the MHA, the Assistant Secretary to the Government of Rajasthan expressed the state government's quandary over the 'question whether ladies coming to India on Migration Certificates but whose husbands are Pakistani nationals are eligible for registration as Indian citizens'. Seeking the Government's advice, the letter stated:

... a question has arisen whether a lady, belonging to the minority community in Pakistan, who has come to India on a Migration Certificate issued by the Indian High Commission in Pakistan and whose husband is still in Pakistan and is a Pakistani national, is eligible for registration as a Citizen of India u/s 5(1)(a) of the Citizenship Act, 1955. The Act and the Rules made thereunder are, however, silent on this point....<sup>26</sup>

In a noting on the letter from the Rajasthan government, the Under Secretary to the Government of India saw the case as raising a general question: 'Normally it is not our policy to encourage members of the same family to have different nationalities...but it may not always be possible to stick to this policy especially when the husbands are made to stay back in Pakistan by circumstances beyond their control. Each case will, however, have to be examined on its individual merits, to find out whether a departure from the general policy is justified, and as such, it will not be possible to give general instructions to the State Government....'<sup>27</sup>

The official position that emerged out of the Rajasthan Government's query was summarized by the Under-Secretary, Government of India, as follows: (a) the Government of India, as a general principle, would not 'encourage members of the same family to have different nationalities' (b) Yet, in cases where 'it is established that husbands of applicants are precluded from coming to India and acquiring Indian Citizenship by circumstances beyond their control it may not be justifiable to deny Indian Citizenship to the ladies concerned' (c) Each case, however, would require to be examined individually to confirm whether a departure from the general principles was justifiable.<sup>28</sup>

It is interesting that the official position should have been explained to the state government in terms of a general policy which preferred that the husband and wife would have the same nationality, and claims to a different nationality by the wife would be an exception depending on the 'merits' of each case. Almost a year before, the Ministries of Law, Home Affairs and External Affairs,

conferred at length over the response that the government should send to the 'Draft Convention on the Nationality of Married Women' which was to be taken up by the General Assembly of the United Nations at its 11<sup>th</sup> Session beginning from 12 November 1956. The draft prepared by the Commission on the Status of Women had been submitted to the Economic and Social Council (ECOSOC), which recommended that the draft be transmitted to the General Assembly for adoption. At this session of the ECOSOC, the Indian delegation was instructed to 'explain that as the Indian Citizenship law has not yet been passed India could not accept the model convention or offer any comments thereon that stage'.<sup>29</sup> With the forthcoming session of the General Assembly, where the draft was to be put up for adoption, and the Indian Citizenship Act now in place, the 'position had changed'. Unlike the position articulated by the Government of India in its communication on the question of the nationality of married women, the position to be conveyed to the United Nations was that there was no conflict between the Indian citizenship laws and draft convention, precisely on the issue that the nationality of the wife was not dependent on or determined by that of her husband.<sup>30</sup>

The officials pointed out in particular the compatibility with the provisions laid down by Article 1 of the convention, that the nationality of the wife shall not be affected by: (a) the celebration of a marriage between a national of the contracting party and an alien; or (b) the dissolution of a marriage by one of its nationals and an alien; or (c) the change of nationality of the husband during marriage:

The grounds of termination of citizenship under the Indian Citizenship Act are voluntary renunciation by a citizen of full age and capacity; the voluntary acquisition of citizenship of another country by naturalisation, registration or otherwise; and deprivation of the citizenship by order of the Central Government. Marriage to an alien or the dissolution of a marriage with an alien or the change of nationality by the husband are not factors which would, under the above provisions, affect the nationality of a wife. The principle that a wife's nationality should not be dependent on that of the husband has been indirectly recognised by our citizenship laws.<sup>31</sup>



The brief prepared by the Ministries then identified the special provision under the Indian citizenship laws for registration of 'alien wives': 'Our law provides for a special mode of acquisition of Indian Citizenship by the alien wife of an Indian citizen. She is required to reside in India for a period of one year before applying for such registration and also renounce her original nationality...This procedure is much simpler than the procedure for the naturalization of aliens contained in our law...'.<sup>32</sup>

Yet, as another set of communications show, the government was not inimical to Pakistani women registering as citizens of their own accord, i.e., as individuals, under section 5 (1) (a) of the Citizenship Act, rather than as wives under section 5 (1) (c), despite their having married Indian nationals. The discussion was triggered off in 1957, ironically by the ambiguity generated by the precise statutory guidelines laid down by the Citizenship Act and Rules and the provisions that had been worked out periodically by the two countries to address issues of movement of people across the borders. The government of Uttar Pradesh (UP) raised, for example, brought to the Home Ministry's notice the discrepancy in the instructions issued by the central government, ensuing from an enduring position in such cases, regarding the registration of persons, who migrated to Pakistan and were 'readmitted into Indian either on the strength of permanent settlement permits or long term visas'. The instructions issued in July 1956, following the enactment of the Citizenship Act and the framing of Rules, required that the registration of such persons as citizens was 'to be effected along with the registration of displaced persons from Pakistan' under section 5(1)(a) or 5(1)(d) of the Citizenship Act. The inconsistency, as pointed out by the UP government, arose from a later instruction issued by the Central government, whereby 'Pakistani women married to the citizens of India' were to be treated 'on the same footing as other alien wives of Indian citizens' and registered under section 5(1)(c) of the Citizenship Act. These instructions, it argued, put at a disadvantage, 'Pakistani wives/widows of Indian citizens, 'who inspite of their holding long term visas' will be able to register only under section 5(1) (c), which had a more tedious procedure:

The State Government, however, feel that if a Pakistani wife/ widow of an Indian citizen inspite of her holding long term visa is to apply for registration under section 5 (1) (c), she will obviously be put in a disadvantageous position when compared with other long term visa holders, who are eligible for

registrations under sections 5 (1) (a) or 5 (1) (d) as according to rule 4 (1) of the Citizenship Rules she will have to produce documentary evidence to show that she has renounced or lost the citizenship of her country in accordance with the law in force therein or furnish an undertaking in writing that she will renounce that citizenship in the event of her application being sanctioned. Again according to schedule IV of the said Rules she will have to pay a fee of Rs.50/- for her registration. Moreover, in accordance with rule 4 (3) of the said rules she can apply for registration only after she has resided in India for one year. This discrimination between a Pakistan [sic] wife/widow of an Indian citizen holding long term visa and other long term visa holders, who are eligible for registration under section 5(1) (a) or 5 (1) (d) does not seem to be very happy.<sup>33</sup>

A similar query came from the government of West Bengal who wanted to know whether the fee of 50 Rupees required to be paid by 'alien women' under the Citizenship Rules for registration under section 5 (1) (c) of the Citizenship Act. Since the section in the Act itself did not mention the term 'alien women', the West Bengal government wondered why the term 'alien women' had been used in the Citizenship Rules, since 'Pakistani women married to citizens of India would be mostly of Indian origin (in the sense that this term had been used in the "Explanation" to section 5 (i) of the Citizenship Act, 1955)' and wondered whether the requirement of fee-payment would apply also in cases where 'Pakistani women have been married to displaced persons from Pakistan who came over to this country before their marriages and are now facing numerous problems to get themselves rehabilitated here'.<sup>34</sup>

Internal communications between the officials of the Home Ministry before a circular letter was prepared and issued, showed that the officials concurred that 'long term visas were granted to persons to enable them to acquire Indian citizenship under the provisions of the Citizenship Act, 1955' and persons holding long term visas were eligible for registration under sections 5 (1) (a) or 5 (1) (d). Similarly, 'Pakistani women who have been married to displaced persons from Pakistan' as well as 'Pakistani women holding long term visas' were eligible

fore registration under the above sections. The Deputy Secretary in the Home Department noted:

As far as I am concerned, long term visas (which implied permanent settlement in India) were granted to Pakistani wives of Indian citizens not only because they were married to Indian citizens but after taking into consideration all other relevant factors. The intention also was that they should be registered as Indian citizens as soon as the Citizenship law was enacted...that is why *no exception was made in this category when general instruction were issued.*<sup>35</sup>

It is interesting and reflective again of the manner in which the citizenship question had been resolved in the period which intervened between the time when the Constitution came into force and the enactment of the Citizenship Act, that the Rajasthan government, around the same time, should have felt and conveyed this to the central government the following position on the matter:

...It is the view of this State Government that in such cases reference to Government of India should not be necessary as those whom Long Term Visas or one year visas has been granted, are for all practical purposes, already nationals of India...<sup>36</sup>

Yet, almost a year after the question of the procedure concerning the citizenship of Pakistani women having come to India on long term visas and married to Indian men had been resolved, the Rajasthan government remained uncertain about the 'exception'. As a Home Department official in the Rajasthan government conveyed in his letter dated 24 June 1958 to the Secretary in the Home Department:

I am directed to say that a question has arisen whether Pakistani women who have been married to Indian Citizens and have come to India on Migration Certificates are eligible for registration as Indian citizens under section 5 (1) (a) of the Citizenship Act of section 5 (1) (c) of the Act is attracted in such a case.<sup>37</sup>

## **Displaced into Citizenship**

On the other hand, it was understood that the legal confirmation of Indian citizenship of displaced minorities and their inclusion in the electoral rolls for the second general elections, was to be facilitated and expedited. Thus when the draft citizenship rules were framed in 1956 under the Citizenship Act of 1955, the Deputy Secretary (Home Affairs), issued urgent instructions asking the state governments to make 'immediate arrangements' for the registration of displaced persons under the Citizenship Act 1955. The letter, copied also to the Ministries of External Affairs, Rehabilitation, Law, and to the Election Commission, stressed the necessity of taking 'immediate steps so that the displaced persons who have migrated from Pakistan and have not yet become citizens of India are enabled to obtain their franchise in the next general election. Their names cannot, however, be included in the electoral rolls now under preparation, unless they are registered as Indian citizens. All necessary arrangements should therefore be made to complete the registration of displaced persons as Indian citizens with all possible dispatch'.

The letter also drew attention to the assurance that had been given in Parliament 'that the registration of such persons will be effected with the least inconvenience to them. Arrangements for their registration, should therefore be made in all places where they are residents in reasonably large numbers, e.g., towns, villages, refugee camps, settlements, etc.'<sup>38</sup> The last item on the instruction concerned the 'large number of Muslims who migrated from India to Pakistan and have now been re-admitted to either on the strength of permanent resettlement permits or long term visas'. Their registration as citizens, the Deputy Secretary instructed, could also 'be effected along with the displaced persons'.<sup>39</sup>

The ambivalence in the articulation of citizenship along the eastern border has resonated in the amendments to the Citizenship Act in 1986 and 2003/2005—manifesting the ways in which migration across the eastern borders, in particular to Assam, was sought to be addressed. It is worth noting here that the amendment to the Constitution in 1986 pertained to the question of citizenship in Assam and the identification and sifting out of the illegal migrant. In Assam the inflow of people from the adjoining areas of East Bengal started from the early decades of the 20th century as Muslim peasants from Mymensingh, Pabna, Bogra and Rangapur settled in Goalpara, and moved on

to Nowgong, Kamrup (then Barpeta district) and Darrang, and later to North Lakhimpur district, occupying most of the wasteland. After independence and the setting up of the two nation-states, the influx into Assam of what had then become an East Pakistani population continued across what remained a fluid border. As pointed out earlier, unlike the exchange and flow of population on the western border, where the constitutional deadline for migrants from Pakistan to claim citizenship in India was treated as final and legal provisions for the citizenship of some categories were made, the eastern border has remained permeable for a long time. Following the post-Partition riots, and migration of (Hindu) minorities from East Pakistan, the Nehru–Liaqat Pact prescribed that refugees returning home by 31 December 1950 would be entitled to get back their property, effectively pushing back the date beyond the constitutional deadline. The Pact also created a fiction that once calm was restored the refugees would return to their homes across the border. In 1971, during the course of the liberation war in Bangladesh, several lakhs of Hindu and Muslim refugees fled to Assam. In a Joint Declaration on 8 February 1972, the Prime Ministers of the two countries assured ‘the continuance of all possible assistance to the Government of Bangladesh in the unprecedented task of resettling the refugees and displaced persons in Bangladesh’ (Baruah 1999: 119). While not all refugees returned to Bangladesh, more migrants continued to cross the border into Assam and other parts of India in search of livelihood. Within Assam, the presence of large numbers of ‘foreigners’ instilled a sense of unease at the change in the demography, language and access to resources, primarily land, and employment, around which a powerful popular movement wove itself. The implications of this movement/migration of populations across the eastern borders for the legal and philosophical basis of citizenship will be discussed in the next section.

Interestingly, the Indo-Pak agreements reached at the Inter-Dominion Conferences held at New Delhi in December 1948, Calcutta in April 1948 and Karachi in May 1948, agreed on the following principle regarding the rights of minorities and on the movement of minority populations:

They (i.e. India and Pakistan) reiterate their opinion that mass exodus of minorities is not in the interest of either Dominion and Governments of both Dominions are determined to take every possible step to discourage such exodus and to create such conditions as would check mass exodus in either direction

(Preamble Calcutta agreement). Even apart from this, they solemnly and sincerely declare that their governments are fully determined to ensure for the minorities in their respective states all rights of citizenship and complete protection of life and liberty.

Extract from agreement reached at the Inter Dominion Conference at Karachi in January 1949 and at New Delhi in April 1949.

It is interesting that these extracts have figured in the files of communications by the Deputy High Commissioner of India in Lahore, titled 'Evacuation of non-Muslims from Pakistan, difficulties experienced by Harijans at the hands of Pakistani authorities', pointing out the 'delaying tactics' adopted by the Pakistani authorities to 'prevent Harijans from leaving Pakistan for India as migrants' and the 'ban imposed by the Government of Pakistan on the movement of Indian sweepers from Pakistan to India'. Interestingly, the reasons for this ban and delaying tactics emanated not primarily from the agreement cited earlier. As the Deputy High Commission for India in Pakistan reported in a letter dated 27<sup>th</sup> November 1954:

...From the reports I have been sending to the Ministry and the High Commissioner from time to time....in view of the protracted delays taking place at the Secretariat level, I took up the matter again with the Chief Minister on 18<sup>th</sup> November when he agreed to let the men go over to India as a special case, provided that in future we will not ask for facilities to evacuate en masse large numbers of people, particularly the Scheduled Castes to India as we are doing in the present case. He said he was forced to make this condition because at the rate at which the Scheduled Castes have been migrating to India in recent years, some of the districts, especially Sialkot, would soon be denuded of a very essential class of labour and that was going to hit the economy of those districts...

The policy regarding citizenship of minorities 'displaced' from Pakistan in this intervening period seems to have been more starkly different when compared to registration of wives as citizens. Internal communications reveal a grudging admission of wives into registered citizenship. Thus even as the wives filled up forms declaring that they had spent one year in India before they applied, that

their marriage subsisted, and swore on an affidavit their patriotism to India and abdication of Pakistani citizenship, and while several government departments including the Intelligence, probed their background and confirmed that they had no files on them, the Deputy Secretary, Home Affairs, in a noting in the numerous communications that went on between departments on each case, admitted in an unguarded noting that he felt one year of residence was too short a duration to know a person's loyalty. On the other hand, it was understood that the legal confirmation of Indian citizenship of displaced minorities was to be expedited and their inclusion in the electoral rolls for the second general elections, facilitated.

Thus the Deputy Secretary Home Affairs, issued the following Executive instructions under the Citizenship Act 1955. The Office Memorandum (10/1/56 – IC) marked immediate dated 14 June [1956] by the Deputy Secretary to the Government of India:<sup>40</sup>

As the Ministry of External Affairs are aware the draft citizenship rules are now before the Cabinet. It will be necessary to ask the state governments to make immediate arrangements for the registration of displaced persons under Section 5(1)(a) of the Citizenship Act 1955 as soon as Rules are approved by the Cabinet, as this is linked up with the enrolment of voters for the next general elections. A draft of a circular which it is proposed to issue in this connection is attached. It is requested that the comments of the Ministry of External Affairs, if any, on the draft may be furnished to this Ministry by the 18<sup>th</sup> at the earliest. If no reply is received by that date it will be assumed that the Ministry of External Affairs concur in the issue of the draft.

(Fateh Singh) Deputy Secretary to the Government of India

Cc

Ministry of external Affairs

Ministry of Rehabilitation

Ministry of Law

Election Commission

Express letter No.10/1/56 - IC dated 12<sup>th</sup> July 56

To

All State Governments

A copy of the Rules made under the Citizenship Act, 1955, which have been published in the Gazette of India [Extraordinary] dated the 7<sup>th</sup> July 1956 and that come into force on that date is enclosed.

2) The matter which requires immediate attention is the registration of displaced persons under section 5(1) (a) of the Citizenship Act, 1955, and Part II of the Rules. It is necessary to take immediate steps so that the displaced persons who have migrated from Pakistan and have not yet become citizens of India are enabled to obtain their franchise in the next general election. Their names cannot, however, be included in the electoral rolls now under preparation, unless they are registered as Indian citizens. All necessary arrangements should therefore be made to complete the registration of displaced persons as Indian citizens with all possible dispatch.

3) An assurance has also been given in Parliament that the registration of such persons will be effected with the least inconvenience to them. Arrangements for their registration, should therefore be made in all places where they are residents in reasonably large numbers, e.g., towns, villages, refugee camps, settlements, etc. In addition to the Registration Officers specified in the Rules, a number of special officers has to be notified by the Central Government under Rule 2 (b). The State Government under Rule 2(b). The State Governments are accordingly requested to take immediate steps to proceed with the selection of such officers. Their full names, designations, and the areas which will be under their charge may be intimated to the Government of India by the 25<sup>th</sup> June at the latest so that the necessary notification may be issued.



4) Applications for registration may be made in Form I and certificates of Registration issued in Form V of Schedule I of the Citizenship Rules. Since the Government of India are not aware of the number of persons who may offer themselves for registration in each state and since it would be desirable to have the forms printed as quickly as possible, it is suggested that arrangements may be made to have the forms printed locally according to the requirements of each State.

5) Rule 31 of the Rules provides that no fee shall be levied on displaced persons for registration under section 5(1)(a) of the Act. All expenditure incurred in connection with registration will be debitable to the Central Government.

6) Detailed instructions for the use of Registration Authorities have also been prepared and are enclosed. The State Governments are requested to take immediate steps to inform all the affected persons of the arrangements which are being made for their registration by giving wide publicity in every manner possible. This should be done when the forms for registration have been printed and all other arrangements are complete.

7) In addition to the displaced persons from Pakistan, there may also be a large number of Muslims who migrated from India to Pakistan and have now been re-admitted to either on the strength of permanent resettlement permits or long term visas. Their registration may also be effected along with the displaced persons...

The Deputy Secretary  
Ministry of Rehabilitation

No.13(25)/55 – N  
Government of India  
Ministry of Rehabilitation

Dated 19<sup>th</sup> June 1956

The undersigned is directed to ....say that the Ministry of Rehabilitation have no comments to offer except that the provision of Displaced Persons and Muslims who have returned to India from Pakistan on the strength of permanent

resettlement permits or long term visa, which is only upto 30<sup>th</sup> September 1956, would appear to be too short.

As in the case of registration of Pakistani women on long term visas and those married to displaced persons or Indian nationals, the procedure regarding the registration of displaced persons continued to raise queries from different state governments. Unlike, however, the 'registered wives' cases discussed above and the case of 'minors' to be discussed later, the registration process was based on an assumption of trust. As discussed earlier, in this section the process was also to be facilitated and accelerated. Thus queries from the governments of West Bengal and Tripura regarding 'persons of minority community of Pakistan' who were not able to produce proof of their having surrendered their Pakistani passports, and whether they could be asked to swear on an affidavit as having done so, in order to ease their registration into Indian citizenship,<sup>41</sup> elicited the following response from the Ministry of Home Affairs:

It is quite clear that we have to make registration as simple as possible in such cases. It is therefore not necessary to insist on acceptance of surrender of Pakistani passports by the Deputy Commissioner for Pakistan at Calcutta before registration is effected. Is such a condition is laid down, it is almost certain that these persons will be subjected to a good deal of harassment by the Pakistan authorities in India...<sup>42</sup>

The process of simplification and facilitation involved introducing exceptions in the general requirement for registration as citizens under section 5(1) (a). In the discussion among officials in the Home Ministry on the registration of Pakistani women married to Indian nationals and displaced persons, the decisive factor which qualified these women as candidates for registration under the same section [rather than the more tedious 5(1) (c)] was that they had all come to India before the Citizenship Act was enactment under long term visas. We know from the official deliberations that long term visas had a distinct promise for citizenship in the post Citizenship Act citizenship regime, in the sense that they could be construed as 'ordinarily resident in India', under the Act. The case of displaced persons under consideration by the government of West Bengal and Tripura, the applicants had entered India on short term visas and were not therefore as the official note puts it, 'ordinarily eligible for

registration under section 5 (1) (a) of the Citizenship Act, 1955'. The internal note prepared for circulation among the officials of the Home Ministry before instructions could be issued to the two state governments emphasised:

...the persons about whom the present reference has been made belong to the minority community in Pakistan and are stated to have sworn declarations renouncing their Pakistani nationality. It is also stated in the M.E.A.'s letter no. F6(44)/57-PSP, dated the 14.4.58 that in most of these cases their permanent settlement in India would eventually be granted. Their present ineligibility for registration under section 5(1) (a) of the C.Act is therefore **only technical**...in cases where the applicants belonging to the minority community in Pakistan are staying on in India swearing affidavits that they have surrendered/lost their Pakistani passports, it was the authorities to satisfy themselves that the intention was to permit the persons concerned to stay on indefinitely in India or the applicants have severed all connections with Pakistan and intend to settle down permanently in India; and in cases where the authorities are so satisfied, the applicants can be registered under section 5(1)(a)...<sup>43</sup>

It is indeed significant that specific requirements pertaining to the possession or surrender of the passport, documentary proofs, and the nature of entry permit should have been waived in the case of minority communities of Pakistan (Hindus) who were construed as displaced persons entitled to special consideration. In another case, which is discussed in the following section, we shall see how adherence to these requirements was seen as essential while determining the citizenship of a minor, a Muslim, whose mother was an Indian citizen under the Constitution provisions.

### **'Minors' and the Contest over Voluntary Renunciation/ Acquisition of Citizenship**

Discussed in communications between officials of the Ministries of Home Affairs and Law as 'the first case after the enactment of the Indian Citizenship Act, and the making of the rules, in which the holder of a Pakistani passport claims

Indian citizenship', Wajid Alam's 'case' raised several contending issues. While apparently, the case involved a dispute over whether a 'minor' could 'voluntarily' renounce or acquire citizenship, the manner in which the case unfolded and was subsequently resolved it manifested a contest over the demarcation of the respective domains of institutional authority on matters pertaining to citizenship.

Wajid Alam was born in 1940 in village Kopa, Pargana Masaurha, in Patna district in India. Wajid's father Naseemuddin had died in 1946, 'killed during the common [communal] disturbance'. After Naseemuddin's death, Wajid and his mother Bibi Shahar Bano shifted to village Firoza in the Gaya district of Bihar and continued to reside there with Wajid's grandfather. In 1952, Wajid's Uncle Kasimuddin, who was a central government employee in undivided India, had opted for Pakistan after partition, and lived in Sylhet district in East Pakistan, came to visit them in India. When Kasimuddin returned to Pakistan in the same year, he took Wajid with him promising to bring him back in 'a month or two'. Wajid was then twelve years old. Kasimuddin fell ill upon his return to Sylhet and by the time he recovered, the passport system had been introduced between India and Pakistan, which became effective from 15 October 1952. With the introduction of the passport system, Wajid could not cross the borders without a passport which showed him to be a national of either of the two countries. In 1954 Kasimuddin met the High Commissioner of India in Dhaka who showed his inability to help Wajid in the matter. The only way he could now travel to India and return to his mother was by procuring a Pakistani passport. Kasimuddin's friends advised him that on reaching India, the passport could be surrendered in the office of the Deputy High Commissioner for Pakistan in Calcutta. Wajid, now 14, traveled to India on a Pakistani passport and a short term Indian Visa. In Calcutta, however, he was told by the Pakistani High Commissioner's office, that it was not possible to surrender his passport. Wajid then went to Kopa and got enrolled in a village school in Bihta. He got his Visa extended periodically, until in July 1956, the state government refused to extend it beyond 1 September 1956, and advised him to get the Visa renewed by the Indian Commissioner in Karachi. Wajid Alam's mother decided to contest this decision and petitioned with the Patna High Court, claiming that Wajid Alam was an Indian citizen, and did not require any visa to stay in India.

While petitioning for her son Bibi Shahar Bano made five significant claims:<sup>44</sup>

- (i) that Wajid in fact never 'migrated' to Pakistan
- (ii) that he never 'voluntarily' acquired the citizenship of Pakistan

- (i) that being a minor he is 'incapable' of acquiring citizenship
- (v) that without a Pakistani passport he would not have been able to travel to India
- (iii) that he is an Indian citizen and by asking him to leave India or by restricting/controlling his movement in India, the government was violating his constitutional rights.

Much of the case was built on the premise that as a minor, not only did Wajid have no say in deciding where he went or how long he stayed, he was in fact oblivious of the legal intricacies involved and the implications of his movement. Paragraphs 6 onwards of the petition, which narrate the sequence of Wajid's travel to and back from Pakistan show how an older person was constantly determining his circumstances:

....6. That in 1952 when the said Kasimuddin [Wajid's Uncle] was going back to Pakistan he took petitioner no. 2 [Wajid] with him saying that he will send him back after a month or two.

7. That as ill luck would have it the said Kasimuddin fell seriously ill after going to Pakistan and was bed ridden for about six months and in the meantime passport system was introduced between India and Pakistan.

8. That after his recovery from illness the said Kasimuddin who lived in Sylhet (East Pakistan) tried his best to send petitioner no.2 to his mother and grandfather who live in Bihar but could not succeed because of the introduction of the passport system.

9. That all the time your petitioner no.2 was very anxious to come to his mother but was told that unless he had a passport he could not go beyond the boundaries of Pakistan.

10. That in 1954 the said Kasimuddin went to the office of the Deputy High Commissioner for India at Dacca and wanted to know if he could be of any help to petitioner no.2 in his going to his home land but was told that nothing could be done.

11. That then the only way left for your petitioner no.2 for coming to India was to get a Pakistani Passport and come

here. He was accordingly advised by this well wishers that he should take the passport and [in] India he should surrender it in the office of the Deputy High Commissioner for Pakistan at Calcutta.....

13. That when your petitioner no.2 came to India his Uncle Md. Rafique Uttahhid took him to the office of Deputy High Commissioner for Pakistan at Calcutta so that your petitioner no.2 may surrender his passport but was told that it could not be done.

14. That your petitioner no. 2 then came to Kopa and is reading in class VI of a School in Bihta.<sup>45</sup>

The High Court admitted Shahar Bano's petition against the Bihar Government and the District Magistrate of Patna and the Government of India. It is interesting how in its response, made through a counter-affidavit to on 28 September 1956, the Bihar government remained silent on the question of Wajid Alam being a minor, and steered clear entirely of the associated issue of the voluntariness of his travel to and back from Pakistan. On the other hand, much of its case against recognizing Wajid's citizenship, was based on the argument that Wajid in fact 'acquired' a Pakistani passport (and citizenship), 'concealed' facts about his stay in India and now 'intended' to prolong his stay in India 'indefinitely while retaining his Pakistani citizenship'. While the petition filed by Wajid's mother takes pains to show how Wajid had no role in any of the decisions that had been taken regarding his travel and stay in Pakistan or in India, the counter-affidavit filed by the Bihar government, made Wajid not just complicit in the events that led to his loss of Indian citizenship, but in fact the sole person responsible for his predicament. Unlike the petition in which the mother, the two uncles, and the grandfather appear as people who were either accompanying or guiding Wajid at crucial moments, in the counter-affidavit Wajid is not only the only person mentioned, he figures as a person consciously choosing and deciding on matters relating to his travel and stay.

Paragraph 4 of the counter-affidavit filed by the Bihar government on 24 September 1956 stated:

...with respect to the statements mentioned in paragraphs 8 and 9 and 11 of the petition it is stated that in accordance

with Indo-Pakistan agreement, Indian national in Pakistan from before the 15<sup>th</sup> October, 1952 and intending to continue there for employment or otherwise, were to equip themselves with valid India Passport and Pakistan Visas by 14<sup>th</sup> January 1953. This date was periodically extended till finally it was fixed at 30<sup>th</sup> April, 1954. During this period the State Government issues Indian Passports to a very large number of Indians residing in Pakistan on receipt of their application through the diplomatic missions at Pakistan. *Petitioner no. 2 [Wajid] it seems made no attempt to get an Indian Passport. In the alternative he could have obtained a repatriation certificate from the India Mission in Pakistan.* [emphasis added]

Paragraph 6 stated:

....The fact that he was attending a school was kept concealed from the State Government throughout; and extensions of visas were prayed for on ground of illness supported by Medical certificate.

Paragraph 8 emphasises that Wajid voluntarily chose Pakistani citizenship:

...if a citizen of India has obtained on any date a passport from the Government of any other Country it should be conclusive proof of this having voluntarily acquired the citizenship of that country before that date.

Paragraph 9 suggests a way out by asking that he could register as an Indian citizen if he 'really desired':

....That the petitioner, if he really desires to be registered as a citizen of India, after abandoning the citizenship of Pakistan, it is open to him to have himself so registered by an application made in that behalf to the prescribed authority U/S 5 of the Citizenship Act No.5 of 1955.

Paragraph 10 imputes illegality onto Wajid's actions by suggesting that he intended to retain Pakistani citizenship while also extending his stay in India indeterminately:

...it appears that the petitioner has been attempting to prolong his stay in this country indefinitely, while retaining his Pakistan Citizenship, on grounds not warranted by law. <sup>46</sup>

The discussions among the different Ministries of the Government of India [the Union Government] which had also been made a party in the appeal, veered between the concern over putting up an appropriate 'defence' in the court, which amounted to countering the petitioners on all counts, and on the other hand the advisability of contesting the suit if Wajid Alam was, as he contended, 'still a minor and the son of an Indian citizen'.<sup>47</sup> By December 1956, the dilemma faced by the officials of the Ministry of Home Affairs seems to have been resolved, as evident from the following comments on the state government's counter-affidavit filed before the court in September 1956,

While the statement made in the counter-affidavit sworn by the state Government in the Civil Appeal No,643 of 1946 are generally in order, if as alleged in the plaint, the petitioner no. 2 is still a minor and his father was or his mother is an Indian citizen, it cannot be said with certainty that the petitioner no.2 can be deemed to have ceased to be a citizen of India, even though he had come to India on a Pakistani Passport obtained by him in 1954 under Section 9(1) of the Citizenship Act, 1955, read with Schedule III to the Citizenship Rules, 1956 in so far as a minor cannot be deemed to have exercised his own willingness in acquiring the citizenship of another country. ...the Ministry of Law have agreed with our view that Indian citizens who have voluntarily acquired the citizenship of another country after 26.1.1950, shall cease to be Indian citizens under Section 9(1) of the Citizenship Act of 1955, which is retrospective in operation in so far as it provides for automatic termination of Indian citizenship Act in the case of any person who has between 26.1.50 and the date of commencement of the Act acquired the citizenship of another country.

.....under rule 30(2) of the Citizenship Rules, 1956, the authority to determine the question of acquisition of citizenship of another country is the Central Government for the purposes of section 9(2) of the Act. The jurisdiction of the civil courts to



determine the question whether, when or how any person has acquired the citizenship of a foreign country is impliedly barred by Section 9(2) of the Citizenship Act, 1955, read with rule 30(2) of the Citizenship Rules, 1956, and Section 9 of the Code of Civil Procedure 1908...

...In this connection it may also be mentioned that in that file we have decided to allow Mr.Afaq Ahmad Fatmi whose case is similar ro that of Mr.Wajid Alam in the present case, to stay on in India on the ground that he was minor when he migrated to Pakistan in 1952 and his father has continued to be an Indian citizen. In the circumstances it is for consideration whether, we should ask the State Government in the present suit, if Mr.Wajid Alam is still a minor and his parents are Indian Citizens. The State Government, however, do not, expect any instructions from us in the matter...<sup>48</sup>

Responding to the note on the Bihar Government's counter-affidavit the Under Secretary responded:

The case of Shri Afaq Ahmad Fatmi referred to in the office note of F.III Section stands on a slightly different footing from the present case in that former filed in 1954 before the Citizenship Act, 1956, had come into force and the Court while passing judgement in the case also did not take into account the provisions of the act. The present civil appeal has on the other hand been filed after the coming into force of the Citizenship Act 1955 and Citizenship Rules 1956, made thereunder. Therefore, even though Shri Wajid may also be a minor, and it may be difficult to establish that he had 'migrated' to Pakistan, the fact that he has taken out a Pakistani Passport can be justified as the basis for our holding that he had acquired Pakistani citizenship in the light of provisions 9(2) of the citizenship Act, 1955, and rule 30 of the Citizenship Rules 1956 read with paragraph 3 of Schedule III thereto.

....I agree that we should consult the Ministry of Law in this case. My own view is that we have a strong case to contest

this judgement. For one thing, we have clearly laid down under our rules, which are of a statutory nature, that the holding of a passport of any other country would be sufficient evidence to hold that the person concerned has become a citizen of that country. The intention of this rule was to exclude the jurisdiction of courts in all such cases. In another case, the question whether a minor can be regarded as having ceased to be an Indian by virtue of migration to Pakistan under the provisions of Article 7 of the Constitution, is not quite free from doubt. Our view, however, is that Article 7 of the constitution as it stands, does not exclude minors from its scope. To test the strength of our case, it would therefore, be better if an appeal is allowed to be filed in such a case....<sup>49</sup>

The Ministry of law's suggestions under the subject heading: Union's defence in the application on behalf of Wajid Alam, alleged minor:

- 1) Being the first case, after the enactment of the Indian Citizenship Act, and the making of the rules, in which the holder of a Pakistani passport claims Indian citizenship, this should be contested properly. Besides, the Central Government should, by a separate order communicate to the State Government, determine under Section 9(2) of the Act and Rule 30 that this person has voluntarily acquired the citizenship of Pakistan.
- 2) It appears that the State Government has entered appearance and will have to be in charge unless the Union decides in view of its great importance that there should be a separate defence....
- 3) General grounds: This application is immature. After all the applicant will have an opportunity of making these averments for what they are worth if and when he is dealt with for breach of the passport and visa regulations. In that event it will go to the criminal courts with the usual rights of appeal and revision. It is also malafide. He has been in India for some time...only when he is cautioned that no more extension would be allowed at his end, then for the first time

he sets up a new claim viz., that he is an Indian citizen and that the Pakistani Passport, the Indian visa and the renewals were all unnecessary and of no consequence. This is not a case for the application of the extraordinary jurisdiction of the High Court. On that claim being communicated to the Central Government, it has determined that he is a Pakistani citizen.

4) On merits it is to be emphasised that here we do not have simple process of his going to Pakistan, or his being already found there with the possibility of a mere inference that he has become a Pakistani citizen. Here it is a conscious and voluntary act on his part by which he has represented that he is a Pakistani citizen and has obtained a Pakistani Passport.

5) The allegation that he is a minor, if really a fact is, for what it is worth a point in his favour. But it may be met (and will have to be met in the following way. Firstly, it is not likely that he got the Pakistan passport on stating that he is a minor. However, if the age on the passport is really that of a minor, it means that Pakistan does give passports to minors as well; or assumes that a man of 12 or 13 is a major (ba'lig) under their (may be Muslim) law. Either way having asserted it, even a person, who may be a minor under our law, may not go back. One cannot be a minor for one person and one of ripe understanding for another, and have it both ways.

6) There is one important step to be taken in this (and in similar). ....This [his citizenship] has to be determined, under Rule 30, and section 9(2) of the Act. Obviously this could not have been done earlier in his case. With the Central Government's determination, it should be contended that the matter may not be agitated in the court.

7) While sending out instructions to the State Government, ...the Central Government should, "Central Government acting under section 9(2) of the Citizenship Act and Rule 30 of the Citizenship Rules, and giving due regard to

the principles of evidence contained in Schedule III, Rule 3, determines that he has acquired the citizenship of Pakistan'.

8) In my opinion, there is a reasonable chance of success. This will be precedent, and whatever the chances, should be keenly contested.<sup>50</sup>

After receiving the note from the Ministry of Law, the Home Ministry decided to ask the state government to file another counter-affidavit stressing the point mentioned in the law Ministry's note, and issuing an order under section 9(2) of the Citizenship Act.

While the communications among the officials of the Government of India in the two Ministries were still continuing, the Bihar High Court heard the case on 26 November 1956 and dismissed the petition, on the undertaking that 'the petitioner no.2, Shri Wajid Alam, should make an application within a week from the 26<sup>th</sup> November 1956 for Indian citizenship and the authorities will not take any action against the said practitioner for prosecution till the application is finally considered by them'.<sup>51</sup> The decision of the court was conveyed by the Bihar government to Ministry of Home Affairs in the Central government through a letter dated 28 December 1956. The issue of the order by the High Court truncated the discussions along the earlier lines and put them on a different course. As an internal communication in the Ministry of Home Affairs on 28 January 1957 shows, it was realised that an order under section 9(2) was no longer necessary, since the issue of the order

...would normally have the effect of having the registration of the person concerned under Section 5(1) of the Citizenship Act, 1955, vide Section 5(3) 7. However, as the civil appeal petition was dismissed on the undertaking that Wajid Alam would make an application for Indian Citizenship within a week from the 26-11-56, it does not at this stage seem desirable to issue such an order. *We can of course refuse to register Wajid Alam as an Indian citizen without assigning any reason.....*I think we should send a copy of the note recorded by the Law Ministry to the State Government for their information. It will also help them in dealing with similar case in future. We may also add that the application of Wajid Alam for Indian citizenship

should not be accepted but should be referred to the Central Government for orders.<sup>52</sup>

Pursuant to this communication from the Deputy Secretary, the Under Secretary, Ministry of Home Affairs, Government of India, conveyed the same to the Bihar Government.

Judgement, dated 27 November 1956, Judges: The Chief Justice and Justice Raj Kishore Prasad):

We do not like to express any concluded opinion on the question whether the petitioner still retains his India citizenship. We consider, however, that there is prima facie material for holding that there has been a termination of the petitioner's status as an Indian citizen. ....As we have already said, the matter is primarily one for the decision of the Central Government and we hope that Central Government would take all the relevant and Proper circumstances into account determining that question. ....It was suggested by the Advocate General that petitioner no.2 could make an application under section 5(1) to the District Magistrate for registration; and if a proper case is made out for petitioner no.2, there is no reason why he should not obtain the status of an Indian citizenship by registration. Counsel for petitioner no.2 states that an application under section 5(1) would be made to the prescribed authorities within a week's time. The learned Advocate General undertakes in the circumstances that till the application of the petitioners under section 5(1) is dealt with by the registering authorities, the state Government would not take any action to prosecute the petitioners or to deport them from Bihar. Subject to the above observation, the application is dismissed. There will be no order as to costs.

K.V. Ramaswami  
Raj Kishore Prasad  
High Court, Patna, 27<sup>th</sup> September, 1956

While the fate of Wajid Alam's application for registration as an Indian citizen is not known from the file, by early 1958, the central government had started issuing precise instructions on specific queries from the states pertaining to the citizenship of people who claimed Indian citizenship and also possessed a Pakistani passport. An enquiry from the Assam government over the 'registration of persons as Indian citizens - under the Citizenship Act, 1955 - of persons who are known to have voluntarily acquired the Citizenship of another country (particularly Pakistan)' cited instances where

persons of Indian origin residing in the Indian Union from before the partition of the country who were deemed to be citizens of India by virtue of Article 5(c) of the Constitution who applied for and obtained Pakistani Passports without renouncing their Indian citizenship. Such persons also applied for registration as Indian Citizens under Section 5(1)(a) of the Citizenship Act, 1955 but they were refused registration by the Registering authority concerned on the ground that Section 5(1)(a) does not contemplate registration of Pak-nationals as citizens of India. Some of these persons desire to resume Indian citizenship and have submitted applications under section 8(2) of the Citizenship Act. But the question arises whether by obtaining a Pak-Passport without renouncing his Indian Citizenship, a person can be legally held as a Pak-national, and whether a person possessing a Pak-Passport against which Indian Visa is to be renewed from time to time, tantamount to possessing dual citizenship.<sup>53</sup>

It is interesting that the conditions of termination of citizenship that were laid down by the Citizenship Act of 1955 and the Citizenship Rules of 1956, as evident from the Assam government's query, introduced uncertainty and confusion over the dual statuses of people, and an apparent conflict between the constitutional provisions as laid down in Article 5 (c) and the provisions of the Citizenship Act. The response of the central government to the query we are aware from the deliberations over Wajid Alam's case, emphasised three points:

- (a) That an Indian citizen who obtains a Pakistani passport can be deemed to have voluntarily acquired the citizenship of that country in accordance with rule 30 of the Citizenship Rules, 1956,....he does not therefore have dual nationality.
- (b) The question of resumption of Indian Citizenship under the provisions of section 8(2) of the Act by such as person does not arise, since this section is applicable only in the case of minor children of a person who has formally renounced his Indian Citizenship by making a formal declaration under section 8(1) of the Citizenship Act.
- (c) The rejection of the application for registration as an Indian citizen under section 5(1)(a) of the Citizenship Act, of a person who has become a Pakistani citizen is therefore in order. Such a person could reacquire Indian citizenship only by registration under section 5(1)(c) of the Citizenship Act, 1955 read with Section 5(3) of the Act, ....<sup>54</sup>

It is interesting, how a point made in the internal communications in the Ministry of Home Affairs and deleted from the final instructions sent to the Assam government is symptomatic of the tendency to retain its discretion in matters concerning citizenship. Earlier in Wajid Alam's case the officials of the Ministry contemplated rejecting his application for registration as an Indian citizen, if such an option was made available to him by the Patna High Court. While contemplating its response to the government of Assam's query, the preliminary note prepared in Home Ministry sought to lay down first the general principle where the legal closure to 'resumption' of citizenship could be compensated by 're-acquisition' of citizenship under the Act. It then proceeded to lay down an exception stating ...'However, if in the opinion of the State Government the case of an individual deserves special consideration his case may be referred to us for instructions together with full facts of the case and the State Government's recommendation thereon'.<sup>55</sup>

## **Conclusions**

The interregnum between the enforcement of the Constitution and the enactment of the Citizenship Act of 1955 was a period of indeterminate citizenship. While the conferences between the two countries – the inter-dominion conferences - made possible a framework whereby movement across

borders could take place, depending upon the nature of the movement, viz., restoration, relocation, rehabilitation, return, settlement etc., and who moved viz., children/minors, prisoners, abducted women, women marrying Indian men, minority populations, etc., a different possibility for citizenship was offered to each. While the Citizenship Act of 1955 intended to deal with the conditions of acquisition, termination and deprivation of citizenship in the contexts which obtained after independence, much of the concerns surrounding citizenship as evident from the internal communications in the Ministry of Home Affairs which dealt with issues of citizenship, in consultation with the Ministry of Law and the Ministry of Rehabilitation and the Election Commission, in some cases, show how the contexts of partition continued to dominate and determine decisions pertaining to citizenship. Issues of loyalty, which were related to religion, constituted a basis for executive discretion, exception and arbitrariness even where law permitted admission into citizenship. Yet, the liminal spaces of indeterminate citizenship at the commencement of citizenship also saw ways by which the closures which were brought in by the constitutional deadline open up to admit people into citizenship, albeit on differential terms, so that the hierarchy of citizenship continued to unfold in the constitution as precise categories of citizenship by birth, descent and registration.

### **Endnotes:**

<sup>1</sup> Those born outside undivided India at the time of the commencement of the Constitution could enroll themselves as citizen by descent only. By descent, citizenship can be extended generation after generation (Rodrigues 2005: 170)

<sup>2</sup> The Act provided that the Central Government could, on application, register any person of Indian origin as an Overseas Citizen of India if that person was from a country which allowed dual citizenship. A 'Person of Indian Origin' (PIO) was in turn a citizen of another country who (a) was a citizen of India on 26 January 1950 or at any time thereafter; (b) was eligible to become a citizen of India on 26 January 1950; (c) belonged to a territory that became part of India after the 15th day of August, 1947; (d) is the child or grand-child of a person described above; and (e) has never been a citizen of Pakistan or Bangladesh. Overseas Indian Citizenship does not entitle people who have acquired foreign nationality to retain their Indian passports.

<sup>3</sup> On 17 February 1951, Major Babu Singh, an officer of the No.1 Field Company in Faridkot, reported that one Ajaib Singh had three abducted persons, all women in his possession. The officer was convinced that these were abducted women and he sued the extraordinary powers



the law gave him to go into Ajaib Singh's house, where he found only one of these women, and to take her into custody. The girl he took into custody was called Mukhtiar Kaur (alias Sardaran) and was believed to be some 14 years old. The police took her away, theoretically until her fate would be decided. Fearing that the police use their powers to send Mukhtiar Kaur to Pakistan, Ajaib Singh filed a writ of habeas corpus in the Division court, asking that the girl not be removed from Jalandhar, where she was being held, until the disposal of his petition (Butalia 2006: 144).

<sup>4</sup> Fike no. F.3(18) P/64, Ministry of External Affairs (PakII), NAI.

<sup>5</sup> Ibid.

<sup>6</sup> File No.F-11(7) /64, Ministry of External Affairs (Pak II), NAI..

<sup>7</sup> File No.P(IV)289(4)69, Ministry of External Affairs, NAI.

<sup>8</sup> File no. 32/82/55 Judl, NAI (Subject Petition for mercy from Maphul s/o Jumen sentenced to death on 30 December 1948.

<sup>9</sup> *Article 6: Rights of citizenship of certain persons who have migrated to India from Pakistan.* Notwithstanding anything in article 5, a person who has migrated to the territory of India from the territory now included in Pakistan shall be deemed to be a citizen of India at the commencement of this Constitution if - (a) he or either of his parents or any of his grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted); and (b) (i) in the case where such person has so migrated before the nineteenth day of July, 1948, he has been ordinarily resident in the territory of India since the date of his migration, or (ii) in the case where such person has so migrated on or after the nineteenth day of July, 1948, he has been registered as a citizen of India by an officer appointed in that behalf by the Government of the Dominion of India on an application made by him therefore to such officer before the commencement of this Constitution in the form and manner prescribed by that Government: Provided that no person shall be so registered unless he has been resident in the territory of India for at least six months immediately preceding the date of his application.

<sup>10</sup> *Article 7: Rights of citizenship of certain migrants to Pakistan* - Notwithstanding anything in articles 5 and 6, a person who has after the first day of March, 1947, migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India: Provided that nothing in this article shall apply to a person who, after having so migrated to the territory now included in Pakistan, has returned to the territory of India under a permit for resettlement or permanent return issued by or under the authority of any law and every such person shall for the purposes of clause (b) of article 6 be deemed to have migrated to the territory of India after the nineteenth day of July, 1948.

<sup>11</sup> Letter dated 31 January 1958 by the Joint Secretary in the Ministry of Home Affairs. File no.2/4/58 MHA-IC, NAI.

- <sup>12</sup> Letter dated 3 February from the Ministry of Law. Ibid.
- <sup>13</sup> Note dated 15 March 1958 by the Joint Secretary and Legal Advisor in the Ministry of Law in response to the query about the legal status of a money-lender from Quetta. File no. 2/4/58, MHA – IC, NAI.
- <sup>14</sup> Noting dated 30 July 1957. File no.6/27/57, MHA – IC, NAI.
- <sup>15</sup> Ibid
- <sup>16</sup> For details of Zeherambanu's journey into Indian citizenship see File no. 6/40/57 MHA - IC NAI
- <sup>17</sup> Letter no. 14572/IPP, dated 16 November 1956, file no.20/42/57, MHA-IC, NAI.
- <sup>18</sup> Noting dated 21 September 1957, by the Deputy Secretary in the MHA. Ibid.
- <sup>19</sup> Letter dated 14 January 1958 from the Deputy Secretary to the Government of West Bengal to the Ministry of Home Affairs, Government of India. File no. 6/2/58, MHA-IC, NAI.
- <sup>20</sup> Letter dated 23 January 1958 to the Government of West Bengal, from the Ministry of Home Affairs (I.C. Section). Ibid.
- <sup>21</sup> Letter dated 17 February 1958 from C.C. Desai High Commissioner of India in Pakistan. Ibid.
- <sup>22</sup> File noting at the Ministry of Law. File no.6/46/58, MHA-IC, NAI.
- <sup>23</sup> Ibid.
- <sup>24</sup> There were other cases that the Ministries discussed of wives of Indian nationals in the foreign services, including that of Mrs. Ethel Ella Elsie Kesavan, wife of Shri N.Kesavan, First Secretary, Indian Embassy, Rangoon, as well 'wives of Indian citizens employed with International Organisations'. Ibid.
- <sup>25</sup> Express letter no. 4898-P/7C-425/58, dated 16 June 1958, from the Government of West Bengal to the Ministry of Home Affairs (IC Section) . File no. 2/11/58. MHA-IC, NAI.
- <sup>26</sup> Letter dated 29 October 1958 from the Assistant Secretary to the Government of Rajasthan, to the Secretary, Ministry of Home Affairs, Government of India. File no.4/221/58, MHA-IC, NAI.
- <sup>27</sup> File noting dated 13 November 1958. Ibid.
- <sup>28</sup> Letter dated 20 November 1958 from the Under Secretary to the Government of India to the Secretary, Government of Rajasthan. Ibid.

<sup>29</sup> Brief dated 9 October 1956 prepared by the Ministry of External Affairs and conveyed to the MHA and Ministry of Law, giving a background of the issue in preparation for the upcoming session of the General Assembly. File no.6/49/57, MHA-IC, NAI.

<sup>30</sup> As per the communications that took place between the officials of the three Ministries between October 1956 and March 1957. Ibid.

<sup>31</sup> Brief for the 11<sup>th</sup> Session of the General Assembly of the United Nations pertaining to Item 34 – Draft Convention on the Nationality of Married Women – External Affairs memorandum No. D. 5905-UN III/56 of 3.1.56 and Ministry of Law u.o. no.3348/56 of 20.9.56. Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Express letter no.59 CP/VIII-D-433 PT/54, dated 23 February 1957, marked secret, from the under secretary to the government of Uttar Pradesh to the Secretary to the Government of India, Ministry of Home Affairs. File no.6/11/57, MHA-IC, NAI.

<sup>34</sup> Letter dated 8 January 1957 from the Deputy Secretary of West Bengal government, in the Home Department, to his counterpart in the Home Department in the Central government. Ibid.

<sup>35</sup> Note dated 24 May 1957. Ibid. [emphasis added]

<sup>36</sup> Letter dated 11 June 1957 from the Deputy Secretary, Home Department, Government of Rajasthan to the Secretary, Ministry of Home Affairs, Government of India. Ibid.

<sup>37</sup> File no. 6/48/58, MHA-IC, NAI.

<sup>38</sup> Executive instructions issued in the letter from the Deputy Secretary (Home) dated 14 June 1956. File no. 10/1/56, MHA – IC, NAI.

<sup>39</sup> 8 In an article titled provocatively 'Can a Muslim be an Indian?' Gyanendra Pandey (1999: 609–29) points out how the Muslims—those who stayed in India as well as those who returned to India from Pakistan—were virtually a 'community on trial'. While their patriotism was always seen as suspect, in the press and in speeches by leaders, which demanded extraordinary proof of loyalty, those who returned or withdrew from their earlier decision were put under a perpetual 'Pakistani' label. In November 1947, for example, nearly 5,000 Muslim railwaymen who had earlier opted for Pakistan refused to leave India, and became subject to the charge of being Pakistani agents (ibid: 628).

<sup>40</sup> File no.10/1/56, MHA-IC, NAI.

<sup>41</sup> Express letter dated 11 April 1958 from the government of West Bengal to the Ministry of Home Affairs, IC Section. File no. 4/65/58, MHA-IC, NAI.

- <sup>42</sup> Internal communication dated 8 July 1958. Ibid.
- <sup>43</sup> [emphasis added] Note dated 18 July 1958, Ministry of Home Affairs (Indian Citizenship Section). Ibid.
- <sup>44</sup> Civil appeal no.643 of 1956, Bibi Shahar Bano and another versus the State of Bihar and Others. File no.13/16/57, MHA-IC, NAI.
- <sup>45</sup> Ibid.
- <sup>46</sup> Counter-affidavit filed by the government of Bihar in the Patna High Court on 24 September 1956. File no.13/16/57, MHA-IC, NAI.
- <sup>47</sup> Note dated 28 September 1956 prepared in the Ministry of Home Affairs upon receiving the notice from the High Court. Ibid.
- <sup>48</sup> Note dated 14 December 1956 prepared in the Pakistan Section (FIII) of the Ministry of Home Affairs on the counter-affidavit filed by the Bihar Government, for further instructions from the Fateh Singh., Under Secretary, Ministry of Home Affairs. Ibid.
- <sup>49</sup> Response dated 20 December 1956 from Fateh Singh, Under Secretary, Ministry of Home Affairs. Ibid.
- <sup>50</sup> Note dated 11 January 1956, by H.R.Krishnan, Joint Secretary in the Ministry of Law. Ibid.
- <sup>51</sup> Letter dated 28 December 1956 to the Under Secretary to the Government of India, Ministry of Home Affairs, New Delhi from D.W. Pires, Additional Under Secretary, Government of Bihar, Political Department (Passport Branch).
- <sup>52</sup> Internal note dated 28 January 1957 by Fateh Singh, Deputy Secretary, Ministry of Home Affairs. Ibid.
- <sup>53</sup> Letter dated 17 March 1958 from the Deputy Secretary to the Government of Assam to the Secretary to the Government of India, Ministry of Home Affairs, New Delhi. File no.4/50/58, MHA-IC, NAI.
- <sup>54</sup> Letter dated 24<sup>th</sup> April, 1958 from the Under Secretary to the Government of India to the Deputy Secretary to the Government of Assam. Ibid.
- <sup>55</sup> Preliminary note dated 17 March 1958, Ministry of Home Affairs. Ibid.

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