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a critical analysis of the citizenship laws of India and Myanmar

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Table of contents

List of abbreviations

CAA, 2019	The Citizenship (Amendment) Act, 2019
CAA, 2003	The Citizenship (Amendment) Act, 2003
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
ICERD	The International Convention on the Elimination of Racial Discrimination
IIFM	Independent International Fact-Finding Mission
ILC	International Law Commission
CRC	Convention on the Rights of the Child
CSC	Citizenship Scrutiny Card
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FA, 1946	Foreigner's Act, 1946
FT	Foreigner's Tribunal
FTO, 1964	Foreigners (Tribunals) Order, 1964
HRC	Human Rights Committee
HRLN	Human Rights Law Network
IACtHR	Inter-American Court of Human Rights
ICJ	International Court of Justice
ICCPR	the International Covenant on Civil and Political Rights
NLD	National League for Democracy
NRC	National Register of Citizens
NR Card	National Registration Card
SC	Supreme Court
TRC	Temporary Registration Card
UCA, 1948	Union Citizenship Act, 1948
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNSG	United Nations Security-General
VCLT	Vienna Convention on the Law of Treaties

Abstract

In 2020, UNHCR documented around 4.2 million stateless persons in the world. Statelessness is a consequence of a lack of nationality. This thesis examines, how citizenship laws prompt statelessness and how they require reconceptualization to prevent human rights violations. The thesis, examines the citizenship practices in Assam, India, and Myanmar, with particular focus on the statelessness of Rohingyas with a similar impact on the Bengali-Muslims in Assam, India. The thesis examines whether reconceptualization of citizenship law based on genuine connection to a State can prevent arbitrariness and statelessness in the context of the Rohingyas and the Bengali-Muslims. An indication to demonstrate such genuine connection is based mostly on the long-term residence. The research demonstrates that under international law, regardless of the migratory status of a person, a State is recognized as one's 'own country' due to genuine connection and factual ties to such a State. Further, this thesis discusses whether conforming to a person's genuine connection with a State demonstrates such a person's right to be a citizen of that State. The research relies on the international legal approach to nationality and the States obligation to adhere to a rights-based approach under such context. To adhere to human rights obligations, the thesis examines the domestic laws and recognizes the right to be citizens of the Rohingyas and the Bengali-Muslims with Myanmar and India respectively. Using the case study of India and Myanmar, the thesis indicates that a reconceptualization of citizenship law based on genuine connection prevents arbitrary deprivation of nationality and statelessness and supplement to right to be a citizen of such a State.

1 Introduction

United Nations High Commissioner for Refugees (UNHCR) reported around 4.2 million stateless persons in the year 2020.[1] *'Statelessness is a condition in which an individual has no formal, legal protective relationship with any recognized state, no matter their emotional national identification. In other words, statelessness is a condition where an individual has no nationality.*[2] In the context of statelessness, nationality, citizenship, and ethnicity (including religion) are linked to one another as they signify identities.[3] Few such examples, the Rohingyas, the Romas in Europe, the Bidoon community in Kuwait, etc., are recognized stateless due to to their ethnic identity. Irrespective of the individual definition of nationality, citizenship, and ethnicity, there exists an implicit expectation for them to coincide. And if they do not, then discrimination, oppression of the weak and excluded group is imminent, which is legitimized in the guise of national interest.[4] It is argued that religion and lineage are attributes of an ethnic group but not a prerequisite for a nation to emerge or exist.[5] Until the 1980s, the secularization theory[6] was a dominant theory that predicted a demise or atleast the decline of religion in modern times. However, religion continues to remain relevant. What is seen is the deprivatization of religion[7] by placing it within the public sphere. Globally, an emergence of nationalism based on exclusion and claims that they must have political control over their boundaries and maintain that each culture should have a State is increasingly observed.[8]

Therefore, what is required is a progressive interpretation of nationality by the State to prevent statelessness. This thesis discusses how citizenship laws allow for statelessness, and how they need to change to prevent human rights violations. This need is drawn by examination of the acquisition and determination of citizenship mechanisms in India and Myanmar. Particular focus is on the effect of statelessness on the Rohingyas, and such plausible impact on the Bengali-Muslims in Assam, India.

[1] UNHCR, *Global Trends: Forced Displacement in 2020*, 18 June 2021.
[2] (Monono 2021, 43–44)
[3] (Oommen 1997, 19); (Edwards and Van Waas 2014)
[4] (Oommen 1997, 43)
[5] (ibid)
[6] (Fox 2015)
[7] (Casanova, 2006)
[8] (Spinner-Halev 1994, 140–42); (Soper and Fetzer 2018)

The following research question will be answered:

To what extent is there a need for a reconceptualization of citizenship law to prevent arbitrary deprivation of nationality?

Two sub-questions will guide the analysis:

1. Whether the concept of genuine connection is a necessary factor in determining one's nationality?
2. On establishing one's genuine connection to a State, whether the State is obliged to identify such a person's right to be a citizen?

The intended hypothesis of this research is the need for a reconceptualization of citizenship to prevent statelessness and adhere to human rights, primarily, the principle of non-discrimination and equality. Such reconceptualization is achieved by conforming to the concept of genuine connection as a significant factor in determining one's nationality and the right to be a citizen of that State. The thesis will demonstrate this using the examples of citizenship laws and practices in Myanmar and India and the impact it has on Rohingyas and Bengali-Muslims respectively. The rationale behind using these case studies is to present the existing statelessness of the Rohingyas due to acknowledging their citizenship in Myanmar, in correspondence to consequences that the Bengali-Muslims may encounter with the ongoing citizenship determination process in Assam, India. The other reason is that Assam, India, and Rakhine state, Myanmar, share international borders with Bangladesh. Also, both countries allege these communities being illegal migrants from Bangladesh because of their cultural and linguistic similarities to the communities in Bangladesh.[9] The aim is to highlight the modus operandi in constructing a threat of statelessness, requiring an immediate assessment of citizenship laws and practice to prevent such plight.

The research question is answered using the legal approach of how nationality is interpreted under international law and the *lex ferenda* expectation of citizenship laws in States. To understand in-depth the need for a reconceptualization of citizenship law, the thesis in the next chapter will discuss the international obligation against arbitrary deprivation of nationality and examine the citizenship practice in India and Myanmar and its impact on the Bengali-Muslims and the Rohingyas respectively. The third chapter shall study the concept of genuine

[9] (Parashar and Alam 2019); (Murshid 2016)

connection and its meaning under international law. In brief, the genuine connection is understood as a special bond between an individual and the State.[10] In this context, the chapter will examine whether there exists a genuine connection between the Bengali-Muslims and the Rohingyas to India and Myanmar respectively, to establish their nationality as per international law. The fourth chapter will explore the integration of international law to domestic law, and whether nationality is recognized as a human right under international law. Further, the chapter will explore what is meant by the right to be a citizen and this right of the Bengali-Muslims and the Rohingyas are examined under respective domestic laws and the relation with a genuine connection.

1.1 Methodology and Methods

The thesis will be using the legal methodology to examine the necessity for a reconceptualization of citizenship law. The thesis borrows the structure formulated by Vlieks et al in their paper, to understand nationality in a manner that solves statelessness and identifies the human right of citizenship.[11] The thesis largely relies on the definition of nationality as stated by the ICJ in the *Nottebohm case* and further expand using doctrinal study, case laws, and literature review, to interpret the meaning of nationality, and its association to the concept of genuine connection and the right to be a citizen under international law. The thesis intends to highlight that, international law understands nationality based on human rights and democratic principles. However, the States have failed to oblige to such interpretation, causing statelessness. The thesis highlights this failure by demonstrating the citizenship practice in Myanmar prompting the statelessness of the Rohingyas. And, the resemblance to the experience that the Bengali Muslims may experience due to the practice of citizenship determination practice in Assam, India.

The thesis firstly, will review the international legal expectation against arbitrary deprivation of nationality and study the practice in Assam, India, and Myanmar on the issue of citizenship by analyzing existing literature and secondary data reports. Secondly, the research through literature review and legal analysis will evaluate the concept of genuine connection under international law to determine one's nationality. The thesis largely relies on the concept understood by Baubock et al. (2015), in the *Nottebohm case,* to mean a special bond between the individual and the State. By using desk research and secondary data collection method, the

[10] (Baubock, Rainer and Paskalev, Vesco 2015)
[11] (Vlieks et al 2017)

research intends to explore the genuine connection that the Bengali-Muslims and the Rohingyas may have with India and Myanmar respectively. Thirdly, the thesis will be studying the existing legal literature on the State's responsibility for ensuring human rights. Using doctrinal analysis will explore whether nationality is a human right. This thesis will explore by literature review and legal understanding what entails right to be a citizen. And, explore the State's responsibility in recognizing the right to be a citizen of the Bengali-Muslims and the Rohingyas in India and Myanmar respectively by examining the Constitution and citizenship laws of both countries.

1.2 Defining Nationality

Although international law does not define nationality, in *Nottebohm case*, ICJ has made an effort to interpret nationality as a link between social attachment to a State and membership beyond traditional membership of jus soli and jus sanguinis.[12] ICJ highlights a preference to a real and effective nationality that is based on strong factual ties between the person involved and the State.[13] ICJ in the said case concludes that "*Nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties".*[14] Article 5 of the Convention Relating to the Conflict of Nationality Laws, 1930 (the Hague Convention, 1930) acknowledges the criteria of genuine connection, i.e. recognizing exclusively "*either the nationality of the country in which an individual is habitually and principally resident, or nationality of the country with which in the circumstances such person appears to be in fact most closely connected*".[15]

In accordance with the ICJ ruling in the *Nottebohm case* and the Hague Convention, 1930, the topic of discussion is about the meaning of nationality in event of a conflict and the application of the abovementioned principle by a third State. This thesis intends to discuss the standards of genuine connection as discussed in the *Nottebohm case* and the Hague Convention, 1930, to be a necessary factor in determining one's nationality. Additionally, there is an entanglement of nationality, citizenship, and ethnicity, which requires a definitive explanation and a determination of what extent one is dependent on another.

[12] ICJ, *Nottebohm case*.
[13] ibid, 22
[14] ibid, 23
[15] Hague Convention, 1930; see generally chapter 3 of this thesis

1.3 Nationality and Citizenship

There exists an ambiguity between the two terminologies – nationality and citizenship. There appears to be customary practice of recognizing one's nationality in domestic law by confirming nationality by birth or combination of *jus soli* and *jus sanguinis*.[16] Historically, nationality is equated with identity, that of ethnic, religious, sociocultural markers that are mapped within territorial spaces, and citizenship as a matter of national self-definition.[17]

Alice Edwards highlights two approaches in understanding the terms nationality and citizenship under international law. One, that conceptually and linguistically are two different aspects of the same notion i.e. of State membership.[18] Nationality is described as a relationship between the State and individual and their standing vis- à -vis other States under international law and citizenship, on the other hand, is 'the highest of political rights/duties in municipal law.'[19] The second view being that two terms are interchangeable as there is a close relationship between the two from a rights perspective and a label is less important.[20] As per the *Nottebohm case*, ICJ states that nationality determines that the person enjoys the rights and is bound by the duties within the laws of the State.[21] This implies that the essence of nationality and citizenship have a similar purpose within a domestic jurisdiction of a State and hence, nationality is interchangeable with citizenship.

The Supreme Court (SC) of India[22] discussed the meaning of nationality and citizenship, i.e., "*nationality has reference to the jural relationship which may arise for consideration under international law, while 'citizenship' has similar reference under the municipal law. Citizenship and nationality are not entirely similar concepts though the words are sometimes used interchangeably owing to the fact that most citizens are also nationals and vice versa.*"

More often we see the State definition of who a citizen is based on identity.[23] In the modern era, there is a reassessment of citizenship status from identity to rights perspective.[24] Hence, the thesis acknowledges nationality and citizenship as interchangeable from a rights perspective and follows the international legal identity.

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[16] (Edwards 2014, 16)
[17] (Spiro 2011, 694)
[18] (Edwards 2014, 13)
[19] (ibid)
[20] (ibid); see section 4.2
[21] ICJ, *Nottebohm case*, 20
[22] SC of India, *State Trading Corp. v. C.T.O* (AIR 1963 SC 1811), 26 July 1963
[23] See section 1.4
[24] (Spiro 2011, 695); see also section 4.2

1.4 Nationality and Ethnicity

Ethnicity has played an interesting role in defining an identity of a nation-state and to what extent there exists a dominance of this over nationality.

From a social sciences approach, nationality is defined as a *"collective identity that the people of the nation acquire by identifying with the nation"* and a nation is a territorial entity that a national has an emotional attachment to a homeland and such homeland can either be ancestral or adopted. According to him, residents who are nationals are invariably citizens.[25] But when a collective feels that they do not belong or are excluded because of a specific identity, they become an *ethnie*.[26] However, an individual may also become an ethnie, in cases where nationals are transformed into ethnies.[27] In conceptualizing nationality and ethnicity, Ommen deduces that most states have ethnie among their population because, either they do not identify with their present homeland or that their claims over the homeland are not accepted.[28] He argues that, inorder to achieve equality, ethnies must think and act like members of dominant culture.[29] And, that non-nationals cannot inevitably be citizens, but could be citizens by assimilating to the culture of nationals and shedding their cultural identity inorder to acquire citizenship.[30] Citizenship in such a situation provides at least partial aid to ethnies, because of the requisite character of equality.[31] From a social sciences perspective there is clear differentiation between nationality and citizenship. However, there is an unfair burden on the ethnie to establish their nationality on the basis of acceptance of their co-nationals.

It is dangerous to make a differentiation that justifies who is a citizen and who is excluded from citizenship in the case of a pluralistic society. Of course, there is an argument that nations with multi-religious and multi-linguistic communities can exist.[32] What binds the people of a multinational state is common citizenship.[33] It is contended that a State can be a multinational and single nation, taking Britain as an example, the citizens can be Scottish/Welsh/ English and Britain at the same time. This means that merging the state and nation, results in building both citizenship and nationality.[34] But even then, there is an unequal distribution of power,

[25] (Oommen 1997)
[26] (ibid, 18)
[27] (ibid, 51); (Liah 1998, 1137)
[28] (Oommen 1997, 56)
[29] (Spinner-Halev 1994, 79); (ibid, 48)
[30] (Oommen 1997, 48)
[31] (ibid, 18)
[32] (ibid, 23)
[33] (ibid, 45)
[34] (ibid)

where the dominant group defines the standards of this society and the demand for assimilation ignores this.[35]

With the emergence of nationalism in context to boundaries based on ethnicity,[36] citizenship is predominantly identified with their ethnicity.[37] This means that people who are not considered part of this society, cannot be equal citizens in a nationalist State.[38] The issue with nationalism is that there is an assumption that each nation must have their own state. There is an expectation of homogeneity of nationals and states, however, most States are not homogeneous, owing to migration and globalization. In classifying nationality with collective homogeneity, the demands of the right to the self-determination of such nationals often mean that the others will be denied the same right.[39] This meaning of ethnie and national is rather restrictive that suggest that a multi-ethnic and multi-linguistic environment is in conflict for not having a collective identity. This demand for assimilation is from an assumption that this difference is harmful and hence, should be suppressed by assimilating the foreigners to the host society.[40]

From a legal perspective, there are three different ways nationality is acquired: (1) jus sanguinis (law of blood, through lineage) (2) jus soli (by birth) (3) naturalization process (a legal process by which a non-citizen can acquire citizenship after being a resident between 5 to 12 years). In each process, nationality reflects a link to the state, i.e. a bond of membership that is based on a 'social fact of attachment'.[41] An attachment is established via connection to the territory (through jus soli or naturalization) or through lineage i.e. a connection through their family members who are already a national (jus sanguinis).[42] It is noticed that there appears to be a need to reconceptualize citizenship as an individual right that is beyond this traditional membership.[43]

In summary, nationality, citizenship, and ethnicity are intertwined with one another. However, from a human rights perspective, national identities cannot be associated with attributes like race, ethnicity, or religion.[44] The highlight of this section is that the meaning of nationality is when one identifies themselves with the nation, there exists an attachment, making a national

[35] (Young 1989); (Spinner-Halev 1994, 79, 135)
[36] (Spinner-Halev 1994, 140–42); (Soper and Fetzer 2018)
[37] (Levy 2011, 99); (ibid)
[38] (Spinner-Halev 1994, 142)
[39] (ibid, 144)
[40] (Turner 2011, 31); (Saikia et al. 2020, 412)
[41] (Edwards 2014, 16)
[42] (ibid)
[43] (Spiro 2011, 694)
[44] (Carens 2013, 87)

a citizen. This concept of social attachment has found a place in international law when discussing nationality to establish one's membership in a State.

2 Context and Background

2.1 Arbitrary Deprivation of nationality

Article 15 of UDHR provides that, '*no one shall be arbitrarily deprived of his or her nationality*..'. The UN report recommends that nationality cannot be arbitrarily removed and that although acquisition or loss of nationality is governed by internal legislation, the regulations are limited to maintain international order.[45] The States enjoy certain discretion over criteria regarding the acquisition of nationality, such criteria cannot be arbitrary.[46] Human Rights Council recognizes that arbitrary deprivation of nationality especially on discriminatory grounds such as race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or another status, constitutes a violation of human rights and fundamental freedoms.[47] The International Law Commission (ILC) affirms that State discussion on who their nationals are not absolute, and that States must comply with human rights obligations and exercise only within the limits set by international law.[48] The IACtHR indicates that State regulations on nationality cannot be deemed solely as State jurisdiction, but is encompassed by their obligations to ensure full protection of human rights.[49] International human rights norms have established substantive limitations to broad powers of the state in matters concerning nationality. Primarily, anti-discrimination and prevention from statelessness are important criteria to be complied with against state discretion over laws on citizenship.[50]

The Human Rights Committee (HRC) interprets the meaning of 'arbitrary interference' that extends to interference provided by law and that such interpretation is intended to guarantee that even interference provided by law should be as per the aims and objectives of the covenant

[45] UN Human Rights Council, *Human rights and arbitrary deprivation of nationality: report of the Secretary-General*, 14 December 2009, A/HRC/13/34.
[46] ibid
[47] UN Human Rights Council, *Resolution 10/13, Human rights and arbitrary deprivation of nationality*, 26 March 2009
[48] Yearbook of the International Law Commission, 1997, vol. II (1), p. 20-24; *Advisory Opinion No. 4, Nationality Decrees Issued in Tunis and Morocco*, 4, Permanent Court of International Justice, 7 February 1923
[49] IACrtHR, *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, OC-4/84, 19 January 1984
[50] (Adjami and Harrington 2008); (Parashar and Alam 2019); ItACHR, *Haitian expulsion case*, para. 256; ItACHR, *Case of the Yean and Bosico Children*, para 140

and be reasonable in particular circumstances.[51] Article I of the Hague Convention, 1930 lays down that the law enacted by a State to determine who are its nationals *"shall be recognized by other States in so far as it is.... consistent with international custom, and the principles of law generally recognized with regard to nationality"*.[52] The paper intends to review the citizenship laws and practice in India and Myanmar with particular focus on the exclusion of Bengali-Muslims and Rohingyas. The two countries are confronted with problems of national identity in the face of cultural diversity.[53]

2.1.1 NRC and foreigners tribunal in Assam, India.

Two parallel processes exist in Assam to determine whether a person is a citizen or a foreigner. The National Register of Citizens (NRC) process (an administrative process) is to include the names of people and their following generations in the 1951 NRC list. This list is to include names of people who entered India before midnight of 24th March 1971.[54] Those who entered after 24th March 1971 or are unable to produce any documentation of their relation to India are not included in the NRC list. The acceptable documents are ancestors names in the 1951 NRC list or their ancestors or their names in the voter's lists before 1971.[55] In August 2019, around 1.9 million persons have been excluded from the final NRC list, out of which around 480,000 are Bengali-Muslims.[56] Individuals have an opportunity to appeal to the Foreigner's Tribunal (FT) against such exclusion.[57] The second process is the Foreigner's Tribunal (quasi-judicial process) to determine whether a person is not a foreigner. In 2019, it was recorded that around 130,000 persons have been declared as foreigners by the FT in Assam.[58] And those declared as foreigners are presumed to be illegal migrants as these processes heavily rely on documentary evidence that a person or their ancestors entered India before midnight of 24th March 1971.[59]

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[51] UN Human Rights Committee (HRC), *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988, para 4; UN HRC, *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 2 November 1999, para 21.

[52] League of Nations, *Convention on Certain Questions Relating to the Conflict of Nationality Law*, 13 April 1930, League of Nations, Treaty Series, vol. 179, p. 89, No. 4137

[53] (Turner 2011, 25)

[54] *Memorandum of Settlement between AASU, AAGSP and the Central Government on the Foreign National Issue* (Assam Accord), 15 August 1985, para 5.

[55] HRLN report, 70-9

[56] (Saikia et al. 2020, 412); Al Jazeera, *'India exclude nearly 2 million people from Assam citizen list'*, (online, 31 August, 2019)

[57] Ministry of Home Affairs, India, *Foreigners (Tribunals) Amendment Order, 2019*, section 3A, 30 May 2019.

[58] Parliament of India, 2019, Unstarred Question No. 3558 Answered on 10 December, 2019

[59] HRLN Report, 70-9; Amnesty International report

Subsequently, in December 2019, the parliament passed the Citizenship Amendment Act, 2019 (CAA, 2019) that allows any person belonging to Hindu, Sikh, Buddhist, Jain, Parsi, or Christian community from Afghanistan, Bangladesh or Pakistan, who entered India on or before the 31st day of December 2014, shall not be treated as illegal migrants.[60] Additionally, the Act reduces the requirement of residence in India for citizenship by naturalization for such persons from eleven to five years.[61] Interpreting this amendment in relation with the NRC and FT process in Assam, those persons excluded or declared as foreigners and belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian communities from Afghanistan, Bangladesh or Pakistan, who entered India on or before the 31st day of December 2014 shall not be treated as illegal migrants. This means that such persons shall have direct access to citizenship. However, other denominations and predominantly Muslims are excluded from such protection under CAA, 2019. Muslims in Assam are at risk of being declared as foreigner/ illegal migrants, prompting statelessness and indefinite detention.[62]

2.1.2 Denial of citizenship to Rohingya Muslims in Myanmar.

Rohingya Muslims have seen systemic, institutionalized oppression and the keystone for such oppression is lack of legal status.[63] The Constitution of Myanmar, 1947 and their 1948 Union Citizenship Act (UCA, 1948) provided a relatively inclusive citizenship framework.[64] Hence, most Rohingyas were considered as citizens.[65] The 1974 Constitution did not significantly alter the definition of citizens and Rohingyas were considered citizens of Myanmar. However, around this period, the narrative of Rohingyas being illegal Bengali immigrants emerged, with increased emphasis on national races, leading to the nationwide project 'Operation Dragon King' to register all citizens and aliens. This process in Rakhine State led to 200,000 Rohingya fleeing to Bangladesh amidst allegations of serious human rights violations against the State.[66] The Myanmar government conceded with Bangladesh to repatriate lawful residence and almost all refugees returned to Myanmar.[67] Then came the 1982 Citizenship Act that distinguished citizenship into three categories that rely heavily on the national race.[68] The Rohingyas are denied the identity of a national race and hence, refused citizenship. Also, wide discretionary

[60] Section 2, CAA, 2019.
[61] Third schedule, CAA, 2019.
[62] Amnesty International report; HRLN report
[63] Human Rights Council, A/HRC/39/CRP.2, 17 September 2018, para 458-459
[64] (Ibid, 114); Article 11, Constitution of Myanmar, 1947.
[65] (Ibid, para 473)
[66] (Ibid)
[67] (ibid)
[68] See chapter II, III and IV of the Burma Citizenship Law, 1982

powers are given to state authorities in deciding who can be conferred with citizenship, placing the Rohingyas in a vulnerable position.[69] In 2017, over a million Rohingyas fled to neighboring countries due to serious human rights atrocities by the Myanmar military, with the largest population taking refuge in the Bangladesh refugee camp.[70]

2.2 Effective Remedy

Although States have the discretion in determining their citizenship policies, the objectives of such policies are to respect and ensure human rights.[71] More importantly, in a situation of deprivation of one's citizenship, due process must be guaranteed, regardless of their migratory status.[72] The rationale behind the same is the right to be recognized everywhere as a person before the law, that all are equal before the law and entitled without any discrimination and equal protection of the law.[73]

Art 13 of ICCPR provides conditions to be applied in cases of expulsion of an alien and such decision made in pursuance of law and is entitled to be reviewed by a competent authority, and exception to such process is when there are "compelling reasons of national security". HRC submits that aliens shall be equal before the courts and tribunals and shall be entitled to a fair and public hearing by a competent, independent tribunal, to prevent arbitrary expulsion.[74] The ILC has highlighted procedural guarantees such as the right to be heard by a competent authority, right to be represented, right to have the free assistance of an interpreter, to protect the human rights of persons expelled, or in the process of being expelled.[75] The IACtHR has indicated that absence of an effective remedy to violation of the rights, is in itself a violation.[76] Hence, it is not sufficient that it is formally recognized by the Constitutions or by law, but it must be truly effective in providing redress. Also, a remedy is ineffective and constitutes a denial of justice, when there is a lack of judicial independence to render impartial decisions or the means to carry out its judgment, or denied access to a judicial remedy.[77] The African

[69] ibid
[70] (Parashar and Alam 2019)
[71] ItACHR, *Haitian expulsion case*, para 350; IACtHR, Advisory opinion on *Juridical status & rights of undocumented migrants*, OC-18/03, 17 Sept 2003, para. 105
[72] ItACHR, *Haitian expulsion case*, para 351; IACtHR, *Juridical status & rights of undocumented migrants*, para. 121-22; IACtHR, *Nadege Dorzema et al. v. Dominican Republic*, para. 159;
[73] UNGA, A/RES/40/144, 13 December 1985
[74] UN Human Rights Committee (HRC), *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986, para 7
[75] International Law Commission, Draft Articles on the expulsion of aliens, 2014, Article 26
[76] IACtHR, *Juridical status & rights of undocumented migrants*, para 108
[77] (Ibid)

Commission on Human and People's Rights has similarly stated that the State may have the right to take legal action against illegal immigration, however, it is unacceptable to take action against individuals without giving them the opportunity to plead their case before a competent national court.[78]

In India, although there exists a due process in determining one's citizenship, the question is if such a remedy is effective in nature. The main function of the Foreigner's Tribunal (FT) as constituted under the Foreigner's (Tribunal) Order, 1964 (FTO, 1964) is to determine whether a person is not a foreigner within the meaning of the Foreigners Act, 1946 (FA, 1946).[79] As per FA, 1946, the definition of a 'foreigner' means, *'a person who is not a citizen of India*'.[80] The FTO, 1964 is mandated to determine whether a person is a foreigner or not as defined under the FA, 1946 and not based on the definition of 'illegal migrant' under section 2(b) of Citizenship Act, 1955.[81] However, there is a direct assumption of such a person being an illegal migrant if declared as a foreigner. There are parallel mechanisms established in Assam to initiate proceedings before the FT. The FT are referred cases by: (1) Border police unit[82] (2) Election commission of India (persons declared as D-voters[83]) (3) 1.9 million persons excluded from the NRC process may file an appeal against such exclusion. The framers of the Constitution of India designed the judicial system as an independent institution, with access to judicial review, constitutional remedies, and protection against political interference.[84] The access to justice must be genuine and not merely formal.[85] However, there is apprehension with regards to the Court's integrity and impartiality. There are allegations of abuse of power by FT,[86] having direct domination over one's citizenship. Amnesty International (India) Report on the complicity of FT in Assam, exhibits the courts (SC and Guwahati HC) in India, including FT, have adopted and operates in a manner to exclude people of Bengali-origin and look at

[78] African Commission of Human and Peoples´ Rights, Communication No: 159/96 - Union Interafricaine des Droits de l'Homme, Fédération Internationale des Ligues des Droits de l'Homme, Rencontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Sénégal and Association Malienne des Droits de l'Homme au Angola, decision of 11 November, 1997, para. 20.
[79] Section 2(1) of the Order, 1964
[80] Section 2(a) of the Foreigner's Act, 1946
[81] Amnesty International report, 16
[82] In 1962, the Assam police established a Special Branch Organisation under the PIP (Prevention of Infiltration of Pakistan) Scheme by the ministry of home affairs. Govt. of Assam, Home and Political Department, White paper on Foreigner's Issue, 12 October, 2020
[83] D- voters means persons who are categorized as doubtful voters in Assam, and who are disenfranchised by the state government for lack of or doubtful citizenship credentials; http://nrcassam.nic.in/faq09.html.
[84] (Abeyratne 2017, 170–74)
[85] IACtHR, *Juridical status & rights of undocumented migrants*, para 126
[86] See generally Amnesty International report, 2019; HRLN report

irregular migration from a singular lens of national security and encroachment.[87] Their research identified that the extension of the tenures of the members of FT depends on their performance, and such performance is evaluated based on how many the members have declared as foreigners.[88] According to their study, it appears that members who declare foreigners at less than 10% are at risk of being dismissed.[89] The consequences of a person being declared as a foreigner have a serious impact on their family members and the potential threat of their family members being deprived of citizenship, especially the children[90].

HRC has submitted that the legislative framework cannot ignore deprivation of nationality from statelessness and one such recommendation to avoid such deprivation is that the *"burden of proof lies with the State to establish that an individual will not be rendered stateless and that loss or deprivation can therefore proceed."*[91] In India, The burden of proof lies on the individual to prove that such person is an Indian citizen or entered India before 24 March 1971.[92] The UN special rapporteurs raised their concerns on the risk of statelessness for millions and instability in Assam and noted their concerns on discriminatory and arbitrary nature of the legal system and emphasized that the burden of proof should be on the State.[93] The HRC has recommended that the States must observe the minimum procedural safeguards in matters of nationality, inorder to protect against arbitrariness, for example, they rely on the ILC recommendation of minimum standards should be that the decision issued in writing and open to effective administrative or judicial review.[94] Nevertheless, there is no provision to appeal against the FT order under the order, 1964 and that the scope of judicial review is limited, with higher courts being a supervisory jurisdiction and not appellate, i.e. the court cannot review findings of facts observed by FT unless the evidence may be inferred as error of law apparent on the face of the record.[95]

[87] Amnesty International report, 2019, 11-19
[88] (Ibid, 26-29)
[89] (Ibid)
[90] Section 3 of the Citizenship Amendment Act, 2003, see also section 4.4.2
[91] UN HRC, *Human Rights and Arbitrary Deprivation of Nationality*, A/HRC/25/28, para 5.
[92] Section 3(1), FTO, 1964; see also section 3.4.2
[93] UN experts: *Risk of statelessness for millions and instability in Assam*, India, July 3, 2019; https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24781&LangID=E
[94] A/HRC/10/34, para. 57
[95] SC of India, *State of Assam v. Moslem Mondal & Ors*., para 112; HRLN report, 82

Another concerning aspect is that the procedure is in contravention of the principle of *res judicata* and that in the case of *Amina Khatun v. Union of India*[96], the Gauhati HC held that 'the principle of *res judicata* should not apply to the FT proceedings since a proceeding under the FA, 1946 and the FTO, 1964 is not of civil nature'. The said decision is now overruled by the Supreme Court in the case of *Abdul Kuddus vs. Union of India & Ors*[97]. However, several individuals have been declared Indian citizens by the FT and subsequently declared foreigners by the same FT or again sent notice to prove their citizenship.[98]

Case 1:[99]Applicant was declared Indian citizen in 2018 by the FT order. But received a notice to appear before the FT to prove her citizenship again. She states that in the second process she was asked more or less the same questions and submitted the same documents as the first time. However, this time they asked obscure questions like, where her grandfather was born. The FT second time scrutinized the documents in a stringent manner and declared her a foreigner due to minor discrepancies and made a comment that she is from Bangladesh.

Case 2:[100] A daily labourer by profession. He was declared an Indian citizen in February, 2018 by the FT based on documents such as, 1966 voters list, present voters list, a certificate from the village head, etc. However, in July 2018 he received another notice to prove his citizenship and currently is pending before the FT.

During the military coup in the 1960s in Myanmar,[101] the appointment to judicial positions have been from among the ex-military officials without relevant training.[102] The Independent International Fact-Finding Mission (IIFM) highlights the lack of effective complaint mechanism and access to justice in Myanmar.[103] There are concerns of independence of the judiciary, where the military has an apparent and guaranteed presence.[104] And that, the indication of gross and systematic human rights violations in Myanmar is a result of State policies that involve the executive, military and judiciary at all levels.[105] The judiciary has been consistently undermined, neglected during the military dictatorship, with lack of independence,

[96] [(2018) 4 Gauhati Law Reports 643], para 58-78
[97] SC of India, 17 May 2019, [(20190 6 SCC 604]
[98] Amnesty International report, 18, 44-45,
[99] (ibid, 45)
[100] HRLN report, 126
[101] (Parashar and Alam 2019)
[102] (Crouch 2017); A/HRC/39/CRP.2, para 83
[103] A/HRC/39/CRP.2, para 1585-1592
[104] (Crouch 2017)
[105] A/HRC/39/CRP.2, para 97

poor training and resources, and prone to corruption, that collectively affect a guaranteed fair trial.[106] Also, there appears to be no documentation on access to a remedy for Rohingyas in Myanmar against deprivation of nationality. Hence, it demonstrates that, firstly, the remedial mechanism in Myanmar is not effective, due to the lack of independence of the judiciary and direct involvement of the military at all levels. Secondly, it was during the military rule that the Constitution and Citizenship law of Myanmar associated race with citizenship and considered Rohingyas as foreigners. Thirdly, the Rohingyas were denied by the State access to a complaint mechanism to challenge the deprivation of nationality.

In conclusion, it appears that in India the due process does not explicitly prejudice against Muslims, however, in practice the application of laws is discriminatory against Muslims. And, there appears to be a lack of judicial remedy for the Rohingyas against arbitrary deprivation of nationality in Myanmar.

2.3 Statelessness a concern

Under the international human rights perspective, one of the important factors to be considered in the citizenship framework is the prevention of statelessness. Statelessness is an extremely delicate situation that exposes individuals to arbitrary domination and interference with fundamental rights.[107]

The objective of the 1961 Convention on Statelessness is to prevent statelessness and reduce it over time and formulate a framework to ensure the right of every person to a nationality. Although Myanmar and India are not signatories to this Convention, this Convention aims to give effect to Art 15 of UDHR which recognizes that 'everyone has a right to nationality'.[108] UDHR is a product of a vote on the resolution in UNGA and both Myanmar and India voted in favour, thus incurring an obligation not to act contrary to this declaration.[109] Article 1 of the 1954 Convention Relating to the Status of Stateless Persons, defines a stateless person from a de jure sense as *'who is not considered as a national by any State under the operation of its law'*. The Prato Conclusion discusses the concept of *de-facto* statelessness, where such persons

[106] A/HRC/39/CRP.2, para 1586
[107] (Baubock and Paskalev 2015)
[108] Introductory note by the office of UNHCR on 1961 Convention on Reduction of Statelessness, May 2014, 3
[109] (Parashar and Alam 2019, 103)

are persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country.[110]

The Rohingyas are considered the largest stateless group within the international community.[111] The Rohingyas were identified as citizens, however, the gradual changes of the Constitutions and Citizenship laws of Myanmar and the cumulative practice on the claim to citizenship were narrowed and eventually closed to Rohingyas, causing statelessness.[112] At the same time, the statelessness of the Rohingya is de facto[113], since the real causes are lack of implementation of the Constitution and citizenship laws, of the recognition of citizenship of the Rohingyas, systemic institutionalized oppression, and continuous fear of persecution, that prevent them from availing protection of the State of Myanmar.[114]

The IIFM on Myanmar have reported the UN actions have been concerning, particularly with Rakhine state (predominantly Rohingya population), as their approach has been 'business as usual' with development goals and humanitarian access being prioritized.[115] IIFM submits that the UN leadership engaged in a 'quiet diplomacy' approach to raise concerns of human rights violations with the Government.[116] Nevertheless, this quiet diplomacy approach has been due to existing limited support to be not curtailed.[117] The UN preferred a 'partnership approach', that treated state actors as partners in the humanitarian crisis, making it fundamentally incompatible.[118] Mahoney in his study highlights that, although humanitarian and development actors acknowledged discrimination as a 'long-term' problem and requires a 'long-term approach', the actions in Myanmar in case of Rohingyas have been a "wait-and-see" attitude, with addressing first-aid humanitarian problems and not challenging the underlying problems of discrimination.[119] In conclusion, there is a lack of critical strategic approach by the UN and other humanitarian to address the deep-rooted concerns of discrimination.[120]

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[110] UNHCR, *Expert Meeting - The Concept of Stateless Persons under International Law ("Prato Conclusions")*, May 2010, 6
[111] UNHCR, *Global Trends: Forced Displacement in 2020.*
[112] A/HRC/39/CRP.2; UNHCR, *Global Trends: Forced Displacement in 2017*, 22 June 2018; see also Sections 2.1.2 and 4.4.1
[113] (Kyaw 2017, 282–83)
[114] (Parashar and Alam 2019, 96, 103)
[115] A/HRC/39/CRP.2; 393-95
[116] (ibid)
[117] (Mahony 2018, 22)
[118] (Ibid, 23)
[119] (Ibid, 24)
[120] (Ibid); A/HRC/39/CRP.2

In India, the citizenship determination processes in Assam have seen 1.9 million persons excluded from the NRC list and so far around 130,000 persons have been declared foreigners by the FT. One of the reasons for such exclusion from the list and in being declared as foreigners is the rigid documentation requirements.[121] Also, there prevails a lack of effective judicial remedy against being declared as a foreigner.[122] The examination of the citizenship determination processes in Assam coupled with the CAA, 2019, demonstrates that particularly Muslims are prone to statelessness. That is, around 480,000 Bengali-Muslims excluded from the NRC list and Bengali-Muslims among the 130,000 declared as foreigners are at risk of being stateless .[123] Presently, there exists no objective plan after a person is declared a foreigner other than indefinite detention.[124] Except the migration discourse surrounding Assam sharing a border with Bangladesh, and the government claims of such foreigners being from Bangladesh, there is no concrete evidence to establish their nationality to Bangladesh or any other country besides India.[125] Also, the Indian government has assured Bangladesh that this is an internal matter and will not impact them and the Bangladesh government has also claimed that there are no nationals living in India.[126]

In comparing the stateless Rohingya to the possible threat of statelessness of the Bengali-Muslims, it is time that international commitment towards the prevention of statelessness is taken seriously. The approach of the national and international actors towards human rights violations against the Rohingyas has been to focus on first-aid humanitarian support, with no long-term strategy to discuss the deep-rooted discrimination against them. Looking at this approach of the international actors to the Rohingya situation and impending risk of statelessness of the Bengali-Muslims, there is an imminent need for the international community to shift the burden on States to responsibly act towards prevention of statelessness. The miscarriage of justice in cases of the Rohingyas and Bengali-Muslims makes it necessary for a reconceptualization of citizenship laws. Caren suggests that prevention of statelessness is a strong justification to provide access to citizenship even if no strong ties with the State.[127]

[121] See generally chapter 3
[122] See section 2.2
[123] HL-Senteret (Minority Network), *Citizenship registration in India- Does the process ensure human rights and rule of law?*, Policy brief 2/2020
[124] Presently there are six detention centres in Assam inside six district prisons. See generally National Human Rights Commission (India), *Report on NHRC mission to Assam's Detention Centres*, 26 March 2018
[125] see chapter 3 of this thesis
[126] (Sufian 2020, 15-16); Amnesty International report, 30-36
[127] (Baubock and Paskalev 2015); (Carens 2013)

However, in the next chapter, the aim is to demonstrate that there exist strong ties that the Bengali-Muslims and the Rohingyas have with India and Myanmar respectively.

2.4 Government response

2.4.1 India

Assam has been marked by sustained agitations and ethnic conflicts midst of identity politics.[128] The Assamese sub-nationalism influenced the immigration policies in Assam.[129] The Assamese sub-nationalism meant upholding their cultural, language, and economic development.[130] Holding of elections in Assam became controversial because it was alleged that many non-citizens are included in the official voter's list.[131] The Assam Movement, from 1979 to 1985[132] led to signing of Assam Accord, 1985[133] documenting for the first time, the illegal migrant discourse which had a drastic influence on the citizenship law.[134] The Assam Accord was a broad settlement not just on the issue of 'foreigners' i.e. detection and expulsion of foreigners, but also comprised key cultural and economic development that was influenced by Assamese sub-nationalism.

Although the implementation of NRC in Assam was under the direction and supervision of the SC of India,[135] the politics around illegal migration is equated to national security. The central government submits before the SC that, one, it is difficult to estimate the number of illegal migrants from Bangladesh, because of ethnic and linguistic similarities and second, that such large-scale influx has security implications.[136] The petitioners in the case for implementation of NRC contends that largely Muslims cross borders from Bangladesh into India and that Islamic fundamentalism has a direct correlation to influx into Assam.[137] The Court concurs to the view that Assam is under the external aggression and internal disturbance that is caused by the huge influx of illegal migrants from Bangladesh to Assam.[138] In correspondence to these

[128] (Baruah 1999)
[129] Se section 3.2
[130] (Baruah 1999)
[131] (Baruah 1999, 115–43); (Baruah 1986)
[132] (ibid)
[133] Footnote 54; (Baruah, 1986)
[134] See section 4.4.2
[135] SC of India, *Assam Sanmilita Mahasangha & Ors. vs Union of India & Ors*., WP(Civil) No. 562 of 2012, 17 December, 2014
[136] SC of India, *Sarbananda Sonowal v. Union of India & Anr.*, WP (civil) 131 of 2000, 12 July 2005
[137] Ibid, para 9.
[138] Footnote 135, para 15

contentions, the central politics and elections are dominated by arguments around the threat to national security by alleged illegal Muslims from Bangladesh.[139]

Sufian in his paper strongly asserts that for the present government it was conducive to make a casual recognition of Muslims in Assam as 'Bangladeshi immigrants', to ethnicize the territory using the State apparatus.[140] Other than the government institutions casual allegations of illegal migrants being 'Bangladeshi' Muslims, there is no conclusive evidence as to such illegal migration. It is argued that the population increase in Assam is owing to high birth rate as compared to illegal migration.[141] Additionally, the intention with regards to migration politics became further questionable with the passing of CAA, 2019 which excludes predominantly Muslims from not being treated as illegal migrants and access to citizenship. The government amid the protest against the passing of CAA, 2019 is assuring that CAA is not to take away citizenship but to provide citizenship to the ones that require the protection.[142] The UN High Commissioner for Human Rights intervened in the petition challenging the constitutionality of CAA, 2019 in the SC of India and, submits India's obligation towards international human rights treaties, and highlights the concerns of discrimination against Muslims.[143]

2.4.2 Myanmar

The military coup in the 1960s was argued to be necessary to protect against the alleged ethnic threat to the territorial integrity of the country.[144] This provoked curtailment of freedom of assembly and expression against the military government. The Rohingyas have been experiencing systematic opression, denied citizenship and, insist that this group be called "Bengali," referring to them as illegal migrants from Bangladesh.[145] During the ICJ proceedings, the Myanmar government denied any allegations of a genocide against the Rohingyas, rather was an internal armed conflicts between a militant group (Arakan Rohingya Salvation Army) and the Myanmr Defence services.[146] The response of the government on

[139] (Sufian 2020, 14); The wire.in, *NRC necessary for national security, will be implemented: Amit Shah in Kolkata*, 01 October 2019.
[140] (Sufian 2020); (Murshid 2016)
[141] The scroll.in, Fact check: Are illegal Bangladeshi migrants responsible for increase in Assam's Muslim population? 16 January 2018; see also section 3.2
[142] The wire.in (opinion piece), *Amit Shah's communal dare to CAA critics*, 17 December, 2019, https://thewire.in/politics/amit-shah-citizenship-act
[143] SC of India, Intervention Application in WP (Civic) No. 1474 of 2019
[144] A/HRC/39/CRP.2, 22
[145] (ibid, para 460); (Parashar and Alam 2019, 96)
[146] Aljazeera, *Transcript: Aung San Suu Kyi's speech at the ICJ in full*, December 12, 2019.

violences in Rakhine State (2012 and 2017 violence) is to impose curfew in Maungdaw and Buthidaung township, which is largely inhabited by the Rohingyas, that further curtailed their movements and if in violation of the curfew, reports sugges that some have been killed.[147] During their second Universal periodic review (UPR) in 2015, the permanent representative of Myanmar made a statement that there was no inter-communal violence and that peace and stability is restored.[148] However, it is well-estalished that presently the Rohingyas form the largest stateless group and this in itself shows the Myanmar government's inability to accept or change the state of affairs.

2.5 Conclusion

States enjoy a certain degree of discretion with regards to criterions governing the acquisition of nationality. However, these criteria must not be arbitrary in nature and must be in conformity with international and domestic laws. The Rohingyas have experienced systemic oppression and denied citizenship in Myanmar. The prevailing concern in the case of Bengali-Muslims is the risk of being declared as foreigners under the NRC process and quasi-judicial process before the FT. In India, the due process to challenge the deprivation of nationality is not effective in nature due to a lack of independence and arbitrary practice. Myanmar lacks a complaint mechanism to challenge such arbitrary deprivation of nationality. The lack of international accountability and practice of the Myanmar state authorities gave effect to statelessness. The statelessness of the Rohingyas raises concern of a similar fate in case of oppression against Bengali-Muslims in India prompting statelessness. To prevent the risk of statelessness, there is a need for a reconceptualization of citizenship laws.

3 Geniune Connection

Baubaock et al state that if citizenship is based on a pre-existing special relationship, it is likely to be considered as a valuable expression of a bond between the individual and the State.[149] The legal framework in the acquisition of citizenship is based on three processes - (1) jus sanguinis (law of blood, through lineage) (2) jus soli (by birth) (3) naturalization process. All three processes reflect a link to the state, although, in the first two processes, i.e. *jus sanguinis* and *jus soli*, it is presumed that there is an attachment to the State via birth or through lineage.

[147] A/HRC/39/CRP.2
[148] Universal periodic Review, 23rd session, *Myanmar statement: Situation of Rakhine State and Cooperation with UNSG's Special Advisor*, 6 November 2015
[149] (Baubock and Paskalev 2015, 62)

In a naturalization process, most often there is a requirement of habitual residence in the said State for a certain period to establish a relationship with the State.

Baubaock et al discuss a fourth concept of citizenship that is based on genuine links[150]. This concept starts with individual interest i.e. based on individual choice conception[151], but citizenship is grounded on special relations.[152] A genuine connection that an individual holds, must be given due consideration in determining citizenship status. The concept of genuine link needs to be interpreted broadly to accommodate their basic justifiable features, such as, birthright attribution of citizenship, individual consent, prevention of statelessness, commitment to peaceful and friendly international relations.[153] Such a genuine link can be established, not least with continuity of residence, the establishment of personal relationships, acquisition of property, political participation, holding public offices, etc.[154] Definitive residential criteria defines a threshold for a presumed genuine link and those who pass such a threshold should have access to citizenship.

The concept of a genuine link is affirmed by the ICJ in *Nottebohm case*.[155] Under international law there is a consensus that the meaning of nationality is not merely on the basis of birth or by conferral but is expanded to include individuals that establish a close social connection to a country that they are principally resident to.[156] In the case of *Haitian Expulsion* case, IACtHR established that "*the State must respect a reasonable time frame, and be coherent with the fact that an alien who develops ties in a State cannot be compared to a transient or to a person in transit*."[157] In its recommendation R (1999) 18 on the avoidance and reduction of statelessness, the Council of Europe recommended that "*a State should not necessarily deprive of its nationality persons who have acquired its nationality by fraudulent conduct, false information or concealment of any relevant fact. To this effect, the gravity of the facts, as well as other relevant circumstances, such as the genuine and effective link of these persons with the State*

[150] (Baubock and Paskalev 2015, 66–71)
[151] (ibid, 63-64)
[152] (ibid, 66)
[153] (ibid, 67)
[154] (ibid, 81); (Vlieks et al. 2017)
[155] ICJ, *Nottebohm case*; see also section 1.2
[156] See also section 3.1
[157] ItACHR, *Haitian expulsion case*, para 294; IACtHR, *Case of the Yean and Bosico Children*, para 157

concerned, should be taken into account".[158] Although this may be in the situation of irregular migrants, or nationality acquired by fraud, in broad interpretation, it is safe to say that genuine link has an effective legal and moral influence in defining who a national is. General recommendation XXX by the committee of CERD endorse avoidance of expulsion of non-citizens, especially of long-term residence, to prevent disproportionate interference with the right to family life.[159]

Genuine link is a better fit from a democratic perspective to prevent deprivation and is in concurrence with the right of all to citizenship.[160] Caren suggests that, in liberal democratic states, even irregular migrants are entitled to legal status and access to citizenship if they have been residing for an extended period.[161]

3.1 Long term residence & one's own country

Article 12 of the ICCPR ensures '*the right of every person to leave any country, including one's own, and that no one shall be arbitrarily deprived of the right to enter his or her own country*'. HRC elucidate on the liberal interpretation of 'own country' as 'the special relationship of a person to that country'.[162] The committee identifies that this special relationship is not limited to the concept of 'country of nationality' and that it encompasses, '*individuals who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien*'.[163] This includes nationals of a country who are stripped of their nationality in violation of international law, and that it permits the broader interpretation that embraces long-term residences, including but not limited to stateless persons arbitrarily deprived of the right to acquire nationality of such country. In the discussion of *Stewart v. Canada*, a dissenting opinion by HRC members argued that the existence of a formal link to the State is not relevant in accordance with Art 12(4) of ICCPR and is concerned with the strong personal and emotional links an individual may have with the territory where he lives and with the social circumstances obtaining in it'.[164] In *Nystrom v. Australia*, HRC adopted the dissenting opinion and expressed that 'own country' requires consideration of

[158] UN Human Rights Council, *Human rights and arbitrary deprivation of nationality: report of the Secretary-General*, 14 December 2009, A/HRC/13/34.para 28; Council of Europe, *Recommendation No. R (99) 18 of the Committee of Ministers to member States on the avoidance and reduction of statelessness*, 15 September 1999
[159] OHCHR, CERD general recommendation XXX, para 28
[160] (Honohan 2020, 361)
[161] (Carens 2013)
[162] UN HRC, CCPR General Comment No. 17: Article 24 (Rights of the child), 7 April, 1989, para. 19
[163] Ibid, para. 20
[164] UN HRC, *Stewart v. Canada*, Communication No. 538/ 1993 (1996), CCPR/C/58/D/538/1993.

'long-standing residence, close personal and family ties and intentions to remain, as well as the absence of such ties elsewhere'.[165] HRC with this interpretation recognizes that persons who have no nationality can still have their 'own country' and this concept is based on the 'special ties' of a person to that country.[166] And based on these special ties, a person has access to one of the rights associated with nationality i.e. right to enter and reside in that country.[167]

The ECtHR has over time expanded the protective reach of Article 8 of ECHR (right to respect your private and family life) to include long-term residence, including the right to regularize illegal stay.[168] Usually, refugees were protected against refoulement under Article 3 of ECHR, but the court established Article 8 of ECHR based on legitimate ties which migrants have developed in their host states. In the case of *Slivenko et al v. Latvia* & *Sisojeva et al. v. Latvia*,[169] endorsed that long-term residence status enjoys human rights protection independent from right to family life and that removing from a country where they have developed, in most cases uninterruptedly since birth 'a network of personal, social and economic relations, is an interference with their 'private life' and 'home' within the meaning of Article 8 of ECHR. Thym recognizes this as an expansion of human rights law to safeguard the interests of long-term residence and that the State is restricted to act in a manner that interferes with Article 8 of ECHR.[170] In the case of *Sisojeva et al. v. Latvia*, the Court confirmed that Article 8 of ECHR extends to the illegal residence.[171] Therefore, the Court settles that de-facto residence in a country is protected under international human rights law, regardless of the family relationship and state permission to enter the territory. Also, the broader interpretation of the network of personal, social, and economic relations that make 'private life' operates as a threshold. Although there appears to be a lack of general criteria in determining protection under Art 8 for illegal residence, all cases appear to rely on extended periods of residence of many years, if not decades.[172] ECtHR highlight that long-term residence is not limited to the presence in domestic territory only, but also their integration efforts, labour market participation,

[165] UN HRC, *Nystrom v. Australia*, Communication No 1557/2007 (2011), CCPR/C/102/D/1557/2007, para 7.4
[166] (Vlieks et al 2017, 169)
[167] (Ibid)
[168] See *Slivenko et al. v. Latvia*, ECHR (2003) Appl. No. 48321/99, judgment of 9 October 2003 (GC) and ECtHR, *Sisojeva v. Latvia*, ECHR (2007) Appl. No. 60654/00, judgment of 15 January 2007 (GC).
[169] (ibid)
[170] (Thym 2014)
[171] (Ibid)
[172] ECHR, *Üner v. the Netherlands*, (2006) Appl. No. 46410/99, judgment of 18 October 2006

education, linguistic integration, etc.[173] This constitutes a fair balance between the competing interests of the individual and the State as a whole.

On the basis of the interpretation of residence under international law, Thym introduces the need for a reconceptualization of citizenship based on residence.[174] Residence should be protected on the basis of real social links i.e. genuine connection[175] and not to be based on formal status or state authorization. He argues that firstly, human rights are universal and apply to all people. Secondly, although the residence is not the only condition for acquisition of citizenship, it is agreed that residence implies a certain degree of participation in the community.[176] Regularization of long-term residence, even illegal residence acts as a first step towards citizenship.[177]

Hence, when nationality entails 'genuine connection' between the individual and State, and the broader interpretation of 'own country' by HRC, is not limited to nationality in a formal sense, and also embrace individuals having 'special ties', making that country the person's 'own country' has a stronger claim to the nationality of that country.[178] Also, the ECtHR, expands on this issue and identifies that long-term residence status is protected under law in itself on the basis of their right to private life and that even illegal residents must have a right to regularize their residence on this ground. The following section will examine whether there exists a long-standing genuine connection of Bengali-Muslims and Rohingyas with India and Myanmar respectively, to interpret the said States to be their 'own country', and establish a stronger claim to the nationality of that country.

3.2 Whether the Bengali-Muslims establish a genuine connection to India?

Assam shares international borders with Bangladesh and Bengali-Muslims share linguistic and ethnic similarities to that of Bangladesh.[179] Colonial intervention had a role to play in people of Bengali descent migrating to Assam and studies (particularly 1911[180] and 1931 census) confirm such migration.[181] Colonial geography of Assam had a significant impact on the

[173] (Thym 2014, 139)
[174] (Ibid)
[175] See also section 3
[176] (Thym 2014, 137)
[177] (ibid, 138)
[178] (Vlieks et al. 2017, 163–69)
[179](Murshid 2016).
[180] Bengalis constituted 45.8 percent in Assam as per 1911 census; (Baruah 1999, 40)
[181] (Saikia et al. 2020, 414); (Weiner 1983, 281–84); (Murshid 2016)

cultural politics of Assam. Assam was separated from Bengal province in 1874 and during that separation, the East Bengal district of Sylhet[182] with the majority of Bengali speakers was included in Assam. Consequently, there were more Bengalis in Assam than Assamese.[183] At the same time, the empirical study establishes that post-independence period, economic immigration coupled with political refugees (due to the 1971 independence war in East Pakistan) did continue from Bangladesh (then East Pakistan) to Assam.[184]

Baruah suggest that the policy of large scale immigration from Bengal to Assam as well as the way the boundaries of Assam were drawn, produced a language controversy that stretched beyond the post-colonial period.[185] The role of Assamese sub-nationalism in the anti-colonial struggle translated to an Assamese public identity, with an expectation of Assamese as an official language to mobilize a public identity of 'their land'.[186] However, multi-ethnicity of Assam, although a product of colonial geography and immigration, was not conducive to Assam being a language-based province, especially with opposition from the Bengali speakers that constituted 16.5%[187] of Assam's population.[188]

In the post-independence period, particularly with the separation of Sylhet district from Assam to Bangladesh, the political regimes at the state level as well as the central level dominated the discourse around migration and identity. The Assamese language and culture dominated the electoral participation,[189] and by the 1980s, the political movement on the issue of '*Bangladeshi*' immigrants against the native Assamese led to the Assam Accord.[190] The movement relied on the population growth rates to campaign against illegal migration. Baruah in his book relies on several statistical reports of the population of Assam that estimates that in 1971 population of 15 million, 51% may have been descendants of those counted in the 1901 census, and 49% from post 1901 immigrants and their descendants. In the 1951 census, Bengali speakers made up to 16.5% of Assam's population.[191]

[182] Sylhet was part of Assam from 1874 to 1947
[183] (Baruah 1999)
[184] (Saikia et al. 2020, 414)
[185] (Baruah 1999, 39)
[186] (ibid, 69-114)
[187] Post-independence census in 1951
[188] (Baruah 1999, 91), 91
[189] (Sufian 2020, 2)
[190] (ibid); (Baruah 1999)
[191] (Ibid)

Undeniably there continued immigration both political and economic immigration into Assam from Bangladesh due to lack of monitoring of the borders and widely accepted informal obligation towards refugees of partition.[192] This gave way to Assam sub-nationalism contributing to illegal migration discourse in Assam, leading to the determination of citizenship process via NRC and FT process. However, the pre-colonial and post-independence periods indicate significant overlap between the boundaries and cultures of Assam, those of the region that forms part of Bengal province (pre-colonial time) and Bangladesh.[193] It is dangerous to assume Bengali descents being illegal migrants when documentations suggest there is a considerable number of persons of Bengali descents in Assam since 1901.[194] Simultaneously, having documentation of identification is an exception in India, which makes it difficult to determine legitimate residence.[195] The persons declared foreigners through the citizenship determination processes in Assam, have infact strong ties to India, with generations of residence and participation in the society.[196]

3.3 Whether the Rohingyas establish a genuine connection to Myanmar?

The Rohingyas are largely inhabited in the Rakhine state of Myanmar. They are an ethnic minority in Myanmar, where Buddhism has a special status under the Constitution.[197] The Rakhine province shares borders with Bangladesh and that the Rohingya Muslims have been discriminated against and rejected as nationals of Myanmar, because of linguistic similarities to the Chittagonian dialect[198] which is part of Bangladesh and also their religious similarities of practicing Islam as compared to Buddhist majority. Myanmar authorities assert that there are no Rohingyas in Myanmar and insist that this group be called "*Bengali*", referring to them as illegal migrants from Bangladesh.[199] In 2016, Aung San Suu Kyi led NLD government instructed official news platforms to refer to 'Rohingyas' as 'Muslim community in the Arakan state'.[200] However, this was rejected by the Arakan National party and said they will continue calling the Rohingyas as '*Bengalis*' and similarly Rohingyas rejected the idea of being referred

[192] (Baruah 1999, 115–43)
[193] (Baruah 1999)
[194] See ibid, according to the 2011 census Assam has 28.9% Bengali speakers.
[195] See section 3.4.2; Ibid, 117-18
[196] See generally, HRLN report, Amnesty International Report.
[197] (Parashar and Alam 2019, 95); Article 361, Constitution of Myanmar, 2008
[198] (Ibid)
[199] A/HRC/39/CRP.2, para 460; (Parashar and Alam 2019, 96); (Kipgen 2019, 63-66)
[200] (Kipgen 2019, 66)

to as anything other than their ethnic identity of Rohingyas.[201] It is a conflict with how one self-identifies themselves as compared to others and that other being a majority.

There have been several debates on the history of the Rohingyas.[202] Some suggest that they are migrants from Bengal who settled in Myanmar after the first Burmese War and subsequent British colonization in 1824.[203] Whereas, the Rohingyas insist that they have been natives of Rakhine as early as the 8th century and their population increased around the 16th century when many Muslims settled there.[204] Irrespective of generations of residents in Myanmar, the Burmese Government does not recognize them as one of the national races settled before 1823 as required for full citizenship under the 1982 citizenship law. Nonetheless, from a legal perspective, as discussed in section 3.1, it is safe to contend that the Rohingyas are long-term residence of Myanmar for generations.[205] Hence based on the concept of genuine connection, the Rohingyas have a strong claim to Myanmar as their own country.

3.4 Denial and inaccessibility of documentation

One of the ways to deprive persons of their nationality is through inaccessibility of documentation.[206] Owen discusses administrative statelessness wherein application for nationality require documents and such documents are processed and approved by the administrative authorities.[207] Practical difficulties on access to documentation makes it difficult to separate those given citizenship to the one that is alleged to be illegal migrants. The following section discusses the lack of documentation preventing the Rohingyas and Bengali-Muslims from the acquisition of citizenship.

3.4.1 Lack of documentation for the Rohingyas

An overwhelming majority of Rohingyas are without proof of their identity and legal status. First and foremost, since the 1990s, the Rohingya children are denied birth certificates and the only registration of their birth is their inclusion in the household list.[208] The burden is on them to pay heavy costs to get their children's names in the household list and when they fail to do

[201] (ibid)
[202] (Mukherjee 2019)
[203] (Parashar and Alam 2019, 94–95); (Kipgen 2019, 66–67)
[204] (Ibid)
[205] (Topich and Leitich 2013, 151)
[206] (Owen 2018)
[207] (Ibid, 303)
[208] A/HRC/39/CRP.2, 112-113

the same, the parents or guardians are subjected to criminal penalties.[209] Such inclusion is a pre-requisite for obtaining identity documents, travel authorizations, marriage permission, enrolment to governmental school, etc.[210] This is in absolute contravention of Article 7 of CRC, i.e., all the children (including non-national and statelessness children)[211] have the right to be registered immediately after birth without any discrimination. Secondly, as under UCA, 1948 the citizens who are registered, received the National Registration Card (NR card) and Temporary Registration Card (TRC) was issued in case of loss, damage, or pending application for the NR card. As per the UCA, 1948 the Rohingyas were recognized as citizens.[212] However, after the military coup, a nationwide citizenship exercise was introduced, that replaced the NR card by the Citizenship Scrutiny Card (CSC). It is reported that Rohingyas issued with NR cards were refused a CSC, regardless of fulfilling the citizenship conditions.[213] Their NR card was refused to be returned and nearly 700,000 Rohingyas were issued with TRC (interim white card).[214] In 2015, the government announced that the white card will expire in March 2015 and ordered the card to be returned.[215] Following this a new national verification card was introduced on verification of whether the applicant meets the eligibility criteria to become a citizen. In this verification process, the Rohingyas were mandated to recognize as 'Bengalis' with the card being valid for only two years.[216] The number of Rohingyas applying for this was very low due to lack of confidence in the process. By January 2017, around 6000 National verification cards were issued in Rakhine state as compared to the 400,000 white cards that were surrendered.[217] The advisory commission in Rakhine state observed the implementation process to be irregular and lack of communication, outreach by the government undermining the public trust.[218]

Under the 1982 citizenship law, the determination of one's citizenship is by the central body. And, the Rohingyas are at the least eligible for associate citizenship or naturalization in accordance with the 1982 Act.[219] However, due to lack of documentation, it was difficult for

[209] (Ibid)
[210] (Ibid)
[211] A/HRC/27/22, para 11
[212] See also section 4.4.1
[213] A/HRC/39/CRP.2, para 479
[214] (Ibid)
[215] (Ibid, 483)
[216] (Ibid, 484)
[217] (Ibid, 485)
[218] Advisory commission on Rakhine State, final report, Towards a peaceful, fair and prosperous future for the people of Rakhine (August 2017)
[219] See section 4.4.1 of this paper

the Rohingyas to prove their eligibility under the 1948 UCA, as most of them were unaware of such a process under the 1948 UCA and there were no state-run programs to get people to apply for citizenship.[220] To apply for naturalized citizenship to the Central Body, such a person must provide with conclusive evidence of their entry and residence in the State prior to 4th January 1948 and their offspring born within the State and only a few Rohingyas would have the necessary documents to prove the same.[221]

Hence, although they qualify for citizenship, the Rohingyas cannot fulfill the requirements due to a lack of documentation. Concurring to this, the 1982 law accords wide powers to the Central body in determining citizenship application and any appeal is made to the council of ministers, who do not have to give any reasons for rejections.[222] In conclusion, the Rohingyas have already experienced systemic oppression, the citizenship process is arbitrary, with the objective to establish their status as 'immigrants'.[223]

3.4.2 Lack of documentation in India

Sato highlights the fault lines between the normative definition of citizenship in Indian law and the actual exercise of the franchise that is based on the legitimacy of elementary documents than on the registration of citizenship, and this has become the epicenter of political instability in the case of Assam.[224] There exist no clear markers in India that separate those that were given citizenship from those not, as they lack reliable official documentation of citizenship.[225] In the absence of an official documentation to identify Indian citizens, other documents had to pass as a proxy for citizenship proof, such as, Passport (and only few sections of India's population would have that), ration card provided to poor to access subsidized food, voters card (given to individuals during election time), however, at the same time, the government lacks reach to remote rural areas.[226]

Under the citizenship determination process in Assam, a person is heavily burdened with the documentary requirements to prove that such person is a citizen and not a foreigner and such documents must be dated before 24th March 1971. The documentary expectation is that of

[220] A/HRC/39/CRP.2
[221] Burma, Section 42 of the Union Citizenship Act, 1948; A/HRC/39/CRP.2
[222] Section 67 and 71 of the Burma Citizenship Act, 1982
[223] A/HRC/39/CRP.2
[224] (Baruah 2009, 594)
[225] (Ibid, 595)
[226] (Ibid, 597)

proving their citizenship by birth or proving their citizenship via their ancestral lineage.[227] Reports suggest that realities of these documentary requirements are unreasonable, and dissociated from ground realities of difficulties in obtaining documentary evidence.[228] Particularly in a country like India, blame for such lack in uniform documentation is to political inattention, migration, displacement, discrimination, and poor administrative reach in rural areas and indigenous communities.[229] Irrespective of being born in India or entering India before March 1971, a person runs the risk of being declared a foreigner due to lack of documents. Testimonies at the public hearing by HRLN on NRC, highlights a pattern of prejudicial and arbitrary documentation requirements during the process.[230] There have been instances of individuals being declared as a foreigner or excluded from NRC, even when their family members are included in the list or declared as an Indian citizen.[231] On examination of reasons for being declared as foreigners, it appears that only due to minor spelling mistakes in the name[232], or the FT with no valid reason, seems to doubt the genuineness of documents, are declared foreigners.[233]

Case 3:[234] A female belonging to the indigenous Muslim community from Assam incorrectly noted her school district as her home district (both districts are part of Assam). At the time of the proceeding, both her school principal and father testified on her behalf. Even then, she was declared a foreigner because of a discrepancy in her address. All her family members are declared Indian citizens.

It is noted that Bengali-Muslims are disproportionately targeted in the process, especially before the FT.[235]

Case 4:[236] Speaking to Amnesty International India, the husband of a woman declared as a foreigner said, *"The tribunal member openly declared that regardless of the number of documents that Muslims bring, even if it is land deeds, I will send them directly to Bangladesh."*

[227] HRLN report, 72-73
[228] See generally, HRLN report, Amnesty International Report
[229] (Polly J, 2017)
[230] HRLN report, 120-59
[231] HRLN report; Amnesty International report
[232] Amnesty International report, 37-39
[233] See generally Amnesty International report, HRLN report
[234] HRLN report, 141
[235] UN Special Rapporteurs, OL IND 13/2018, 11 June, 2018.
[236] Amnesty International report, 32

There are additional concerns for women particularly married and widowed women[237] to prove their citizenship via ancestral lineage because they have documentary evidence to prove relation to their husbands but are unable to establish documentary relation with their parents or ancestors.[238] This is in clear violation of Article 9 of CEDAW. As per law, Circle officer/ *Gram Panchayat* (village head) secretary certificate is permissible in respect to married women who have migrated after marriage, however, the patriarchal approach of FT disregards such certification by claiming them to be not genuine is prevailing.[239]

There is an unreasonable standard of burden of proof on the individuals to prove their citizenship and appears to be strict, vague, and arbitrary in nature. There is an unwavering requirement of documentation to prove one's citizenship. The documents must show that a person or their ancestors have entered India before 24 March 1971 and secondly, one should establish their legacy to the ancestors. Expecting these high standards of documentation evidence ignores several nuances of the realities. One, ignoring that most people affected by this process are poor, marginalized, and illiterates; secondly, ignores the complexity of documentation in India and thirdly, the State responsibility towards uniform access to documentation.

3.5 Conclusion

When citizenship is based on special relations, then responsibilities for protecting and ensuring human rights cannot be assigned to a third State.[240] From the discussion in this chapter, there is a need for a reconceptualization of citizenship based on an existing special relationship and, particularly in situations where such a person may otherwise be stateless. The Rohingyas and Bengali-Muslims establish a long-standing relationship with Myanmar and India respectively, with long-term residence, and an established network of personal, social, and economic relations. As per HRC interpretation of 'own country', Rohingyas and Bengali-Muslims can identify Myanmar and India respectively as their 'own country'. Hence, it is important irrespective of their legal and/or migratory status, that they are entitled to be regularized and have access to citizenship.

[237] Amnesty International report, 32; HL-Senteret (Minority Network), *Women worst affected Assam's NRC/ Indian Citizenship tests*, Policy brief 3/2020
[238] Amnesty International report, 17; (ibid)
[239] Amnesty International report, 30-36
[240] (Baubock and Paskalev 2015, 68)

4 Right to be a Citizen

4.1 Integration of international human rights norms in domestic law

States are obliged to respect and ensure human rights, and these are enshrined in various international instruments[241], establishing an *erga omnes* character.[242] With regard to article 2 of ICCPR, HRC has observed that, although the State parties have the discretion to choose their method of implementation of the Covenant framework within their territories, the State parties are not only confined to respect human rights, but also that they have to ensure the enjoyment of these rights to all individuals under their jurisdiction, i.e the administrative and judicial authorities are obliged to take affirmative actions to respect and ensure human rights.[243] IACtHR reiterates that '*a customary norm establishes that a State which has ratified a human rights treaty must introduce the necessary modifications to its domestic law to ensure the proper compliance with the obligations it has assumed*'.[244] Hence, this general obligation of the State Party implies that the measures taken under domestic law must be in compliance with the treaty and should be effective.[245] Art 27 of VCLT, in observance of treaties in domestic law, provides that State parties cannot invoke provisions in internal law as justification for its failure to perform a treaty and this has gained the rule of customary law.[246] That is, the State must commit in good faith to guarantee and respect human rights and adapt their domestic law in accordance with international law.[247] Although Article 26 and 27 of VCLT do not decide on a method of how to comply with international treaty obligations, it is recommended that such implementations have to be made by each State within its own constitutional framework and that this freedom to implement is confined within the principle of effectiveness.[248]

[241] Some of these international instruments are: American Convention on Human Rights (Articles 1 and 2), Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" (Article 1), Charter of the United Nations (Article 55(c)), Universal Declaration of Human Rights (Preamble), International Covenant on Civil and Political Rights (Article 2(1) and 2(2)), International Covenant on Economic, Social and Cultural Rights (Article 2(2)), International Convention on the Protection of the Rights of All Migrant Workers and Members of there Families (Article 7), International Convention on the Elimination of All Forms of Racial Discrimination (Preamble), European Convention for the Protection of the Human Rights and Fundamental Freedoms (Article 1), European Social Charter (Preamble), African Charter of Human and People's Rights "Banjul Charter" (Article 1), and the Arab Charter of Human Rights (Article 2).
[242] IACtHR, *Juridical status & rights of undocumented migrants*, para 109
[243] UN HRC, General Comment 3, *Application of the ICCPR at the National Level (Article 2)*, 29 July 1981, CCPR/C/13, paras. 1 and 2.
[244] IACtHR, *Juridical status & rights of undocumented migrants*, para 77
[245] (Ibid)
[246] ICJ, *Mutual Assistance in Criminal Matters (Djibouti v. France)*, [2008] ICJ Rep 177, para 124.
[247] (Ibid, para 166)
[248] (Dörr and Schmalenbach 2018, 494–95)

The expression '*this is an internal matter*' is a favourite justification for the government to reject any international involvement, but what is an internal matter is often debatable. The aim of this chapter is to bridge the expectations of international human rights law with domestic legal practice. When international human rights are legally enforceable, this makes States accountable to individuals and other States for any violation of recognized rights.[249] Hence, it makes it important to recognize nationality as a right, in order to discuss the violation of that right.

4.2 Nationality as a right under international law

More often we see the State definition of who a citizen is, based on identity but in the modern era, there is a reconceptualization of citizenship status from identity to rights perspective.[250] Though international law does not necessarily impose a state mandate towards nationality, there is a trend in recognizing nationality as an inherent right of all human beings and a basic requirement for the exercise of political rights and legal capacity of an individual.[251]

Under Article 15(1) of UDHR, "*everyone has a right to a nationality*" and "*No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.*"[252] With this article, the UDHR is establishing a core legal relationship between the individual and the state. From a human rights perspective, an individual's legal bond with a State via citizenship establishes an essential prerequisite to enjoyment and protection of a full range of human rights.[253] Although a soft law, it has been widely accepted as customary international law that articulates a universal standard of human rights[254] and imposes on all States that they comply, at a minimum, with a core set of human rights.[255] The Permanent Court of International Justice states the citizenship laws and practices must adhere to the principle of international law.[256]

[249] (Hernandez-Truyol 1996, 72)
[250] (Spiro 2011, 695)
[251] (Ibid), (Edwards 2014, 14–42); (Adjami and Harrington 2008); (Owen 2018); IACtHR, *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, OC-4/84, 19 January 1984, para 32; IACtHR, *Case of the Yean and Bosico Children*, para 138
[252] UDHR, Article 15
[253] (Adjami and Harrington 2008)
[254] (Haque 2017, 460); (Barnabas 2017); (Schutter 2014, 63)
[255] (Schutter 2014, 62); ICJ, *Advisory opinion on the legal consequences for the States of the Continued Presence of South Africa in Namibia*, 1971, 16
[256] PCIJ, *Advisory opinion on Nationality Decrees In Tunis And Morocco*, 7 February, 1923.

There are several international human rights treaties that enunciate the right to a nationality. Article 24, para 3 of ICCPR, recognizes the right of every child to acquire a nationality. However, the State does not necessarily have an obligation to grant such nationality but is required to adopt appropriate measures, with particular emphasis on the principle of non-discrimination, to protect the rights of every child to nationality when they are born.[257] In concurrence to the broader interpretation of 'one's own country' under Article 12 of ICCPR as highlighted in section 3.1, the article identifies the right to stay in a country that an individual has special ties and such person is not a mere alien.[258]

Similarly, Art 7 of the CRC establishes a legal mandate to register children at birth, the right to acquire a nationality and to constitute a legal framework that allows registration of children at birth and actively ensures that they are registered regardless of their legal status. This is considered as a minimum obligation under CRC. And Article 7(2) of CRC mandates the State to ensure implementation of these rights as per their national law and obligation under the international law, particularly where the child may otherwise be stateless.[259] Article 7 suggests that the States adopt the principle of jus soli to prevent a child from being afforded less protection and the procedure for acquisition of nationality to be non-discriminatory inorder to prevent statelessness.[260] HRC explains that states are required to *'adopt every appropriate measure ... to ensure that every child has a nationality when he is born'* but it does not necessarily suggest this as an obligation on the state to do so.[261] However, Art 3 of CRC that submits that State must adopt measures concerning nationality with primary consideration to the best interest of the child, to ensure full and effective enjoyment of all rights, must be read harmoniously with Art 7 of CRC.[262] CEDAW recognizes under article 9 the equal rights of women to acquire, change or retain their nationality. Convention on Reduction of Statelessness, 1961 does not allow arbitrary or discriminatory deprivation of nationality[263] or deprivation resulting in statelessness[264]. The HRC report on human rights and arbitrary deprivation of

[257] UN HRC, *CCPR General Comment No. 17: Article 24 (Rights of the Child)*, 7 April 1989, para. 8
[258] UN HRC, *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 2 November 1999, para 19-20
[259] (Ziemele 2007, 21–29)
[260] Footnote 257, para 49
[261] (Ibid)
[262] (Ziemele 2007, para. 50)
[263] Article 9, UN Convention on reduction of statelessness, 1961
[264] Article 8, UN Convention on reduction of statelessness, 1961

nationality highlights that States should establish safeguards to ensure that nationality is not denied to persons with relevant links to that State who would otherwise be stateless.[265]

4.3 Principal of equality and non-discrimination: State limitation to citizenship laws

In laws pertaining to citizenship, the principle of non-discrimination and prevention from statelessness is an important criterion that must be complied.[266] This paper demonstrates that there exists a risk of statelessness in the case of Bengali-Muslims on the application of Indian citizenship laws in parallel to the statelessness situation of Rohingya Muslims on the practice of citizenship laws of Myanmar.[267] Hence, the States have failed to formulate citizenship laws that prevent statelessness as a consequence. This section will discuss in length whether the principle of the right to equality and non-discrimination is applied.

The principle of equality before law and non-discrimination[268] establishes a cardinal requisite on every action of the States related to respecting and ensuring human rights. Article 26 of ICCPR presents that discrimination on grounds such as race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth, or other status is prohibited. HRC highlights that non-discrimination in this context includes issues related to nationality.[269] They further maintain that the State party must ensure the rights in the Covenant to *"all individuals in its territory and within its jurisdiction"* (Art 2 para 1) and that each one of the rights must be guaranteed without discrimination to both aliens and citizens.[270]

Racial discrimination with regard to the right to nationality is prohibited under Article 5(d)(iii) of CERD. The Committee on the Elimination of Racial discrimination, in its general recommendation XXX state that the States are obligated to ensure non-discriminatory enjoyment of the right to nationality and will be in breach of that obligation if deprived of

[265] UN Human Rights Council, *Human rights and arbitrary deprivation of nationality: report of the Secretary-General*, 14 December 2009, A/HRC/13/34, para. 36
[266](Adjami and Harrington 2008); IACtHR, *Haitian expulsion case*, para. 256; IACtHR, ItACHR, *Case of the Yean and Bosico Children*, para. 140; (Baubock and Paskalev 2015, 63)
[267] See Section 2.3
[268] ICCPR, Article 26
[269] UN Human Rights Council, *Human rights and arbitrary deprivation of nationality: report of the Secretary-General*, 14 December 2009, A/HRC/13/34, para. 26
[270] UN Human Rights Committee (HRC), *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986

citizenship on the basis of race, colour, descent or national or ethnic origin.[271] Further the committee has also recommended that in the fight against terrorism, discrimination is not permitted on grounds of race, colour, descent, or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping.[272]

Equality before law, equal protection before the law and non-discrimination belongs to principle of *jus cogens*, as all structure of domestic and international public order depends on this and is a fundamental principle that permeates all laws.[273] On these basis, IACtHR establishes that the State both internationally and in its domestic legal system cannot act in a way that is contrary to this principle, that is detrimental to a determined group of persons.[274] The Court further highlights that this obligation to be peremptory under general international law and that this applies to all States whether or not they are party to a specific international treaty.[275] In the *Haitian expulsion case*, IACtHR records that international human rights law prohibits actions and omissions that discriminate against certain categories of persons, even when it is not possible to prove such discriminatory intention.[276] The State has the obligation to provide every persons with equal and effective protection of law without discrimination in determination of nationality.[277] The Durban Declaration and Programme of Action against Racism, Racial Discrimination, Xenophobia and Related Intolerance urged all States to take necessary steps with regard to their immigration policies inorder to eliminate any element of racial discrimination and is consistent with international human rights instruments.[278] In discussing discrimination, legal theory and practices have dealt with realities of indirect discrimination, whereat even though the literature may appear to be neutral, there exists a disproportionate impact of the law, and other actions on certain vulnerable groups.[279] In the citizenship determination process in Assam, India (both the NRC and Foreigner's Tribunal) there have been several fact finding reports that suggest the vulnerabilities and biases against the poor and backward class of people, especially Muslims and women.[280] Similarly, in the

[271] OHCHR, CERD general recommendation XXX, para. 14
[272] Ibid, para.10
[273] IACtHR, *Juridical condition and rights of undocumented migrants*, para. 101
[274] (ibid, para. 100-101)
[275] (Ibid)
[276] IACtHR, *Haitian expulsion case*, para. 263
[277] ibid, para. 264, 318
[278] Durban Declaration and Programme of Action, A/CONF.189/12, 8 September 2001, paras. 38 & 30(b)
[279] (Schutter 2014, 91)
[280] See generally Amnesty International report; HRLN report; HL-Senteret (Minority Network), *Citizenship registration in India- Does the process ensure human rights and rule of law?*, Policy brief 2/2020; HL-Senteret

case of Rohingyas, the Burmese government introduced laws and policies that in practice is discriminatory against them, that tok away their documentation and denied citizenship.[281]

The State is obliged to abstain from carrying out actions, that directly or indirectly aim at establishing a situation of de jure or de facto discrimination.[282] States are also obliged to take affirmative action to alter any discriminatory practice that is detrimental towards a specific group.[283] IACtHR highlights that irrespective of the migratory status of a person, the State has the obligation to guarantee the principle of equality and non-discrimination and the same extends to the right to a nationality.[284] UNGA in their resolution on protection of migrants express the need for States to protect the universally recognized human rights of migrants, especially of women and children, despite their legal status and provide humane treatment.[285]

However, when discussing the situation of Bengali-Muslims and Rohingyas, it is tricky and arbitrary to refer to them as migrants. This thesis demonstrated a lack of documentation and arbitrary deprivation of documentation in the case of Rohingyas and Bengali-Muslims to prove their citizenship, which raises concerns over State inability and discrimination to access such documentations and that they may not necessarily be undocumented 'migrants' and infact be undocumented 'citizens'.

Case 5:[286] He is a native of West Bengal, India, and moved to Assam, India in 1965. In 2015, Border Police issued a notice to prove his nationality before FT. He provided documents such as 1966 voters id issued by West Bengal, ration card issued by Assam. However, FT declared him 'foreigner who entered illegally from Bangladesh after 25.03.1971' and arbitrarily concluded the electoral roll not valid as Director of State Archives, Higher Education Department, Government of Bengal was not the custodian of 1966 electoral roll. However, through the Right to Information Act, 2005, it was confirmed that the said State Archive is

(Minority Network), *Women worst affected Assam's NRC/ Indian Citizenship tests*, Policy brief 3/2020; see also chapter 2 & 3 of this thesis

[281] A/HRC/39/CRP.2; see also chapter 2 & 3 of this paper

[282] IACtHR, *Juridical condition and rights of undocumented migrants*, para. 103

[283] (Ibid, para. 104)

[284] (Ibid, para.111); IACtHR, *Haitian expulsion case*, para 263; UN CESCR, General Comment No. 20, *Non discrimination in economic, social and cultural right*s, E/C.12/GC/20, 2 July 2009, para.10(b).

[285] UNGA, A/RES/54/166, "*Protection of migrants*", 24 February 2000; see NHRC report on detention conditions in Assam, HL-Senteret (Minority Network), *No Education- lost generation: The right to education for stateless Rohingyas in Bangladesh*, Policy Brief 4/2020.

[286] Amnesty International report, 52-53

infact the custodian of the 1966 electoral roll. For the past three years, he has been detained in *Goalpara* jail

4.4 Right to be a citizen

International human rights law recognizes the right to nationality.[287] There is a need for a holistic approach to citizenship law i.e. to bridge the gap between the notion of belonging and issues of citizenship. Ballins identifies the right to be a citizen to be beyond protection against statelessness, as he focuses on the human rights dimension of the constitutional relationship between person and state.[288] Vlieks et al suggest that in recognizing the right to be a citizen as a human right, implies that the State is dethroned as the author and owner of citizenship,[289] i.e. then overturning the State dominance over citizenship.

Citizenship is recognized as a status that forms the bridge between the universal right of every human being to live freely in equality and the political and social setting that helps achieve that. This is established in the domestic laws that protect everyone equally under the law and enables them to contribute to public life.[290] Owing to migration and urbanization, Ballins questions whether in the 21st century, citizenship can be based on an exclusive relationship with a particular State?[291] He suggests that citizenship relates to universal recognition of human rights and restricting citizen's right to one's group impacts the equal protection of human rights.[292] Citizenship is based on universal personhood rather than national belonging, which is laid down by conventions and declarations that are gradually incorporated to the constitutions.[293] Ballins suggests that there is a need for a constitutional system accomplished by legislative powers and independent judiciary. He discusses the importance of democracy as a constitutional system and such polity cannot exist without citizens and therefore, the right to be a citizen has to be part and parcel of fundamental rights.[294] However, Castles critics that though this perspective corresponds with the recent trends, there is an overstatement to the extent which it has been achieved because the number of countries where democracy and human rights prevail is fairly small.[295]

[287] See section 4.2
[288] (Ballin 2014, 125)
[289] (Vlieks et al. 2017, 162)
[290] (Ballin 2014, 10)
[291] (ibid, 16)
[292] (Ibid)
[293] (Castles and Davidson 2005, 18); (Soysal 1994)
[294] (Ballin 2014, 121)
[295] (Castles and Davidson 2005, 18–19)

The concept of citizens is described as ties to a political community, whereas a 'person' is referred to the dignity of every human being, that demands universal recognition.[296] A nationalist perspective that enables citizenship to be a legal tool for demarcation and exclusion is threatening, and has an increasing emphasis on the national element to citizenship, developing friction between human rights and citizen's rights.[297] When talking about people that subject themselves voluntarily to a jurisdiction that is not theirs, denial of citizens' rights leads to exclusion from the process of realization of human rights.[298] Hence, State should liberalize process of acquisition of citizenship[299] and it is necessary to recognize the right to be a citizen extended to every person in society who is inclined to assume the reciprocal responsibilities of citizenship.[300]

As discussed in chapter 3, having been a resident for a sufficiently long period, i.e. someone that is effectively at home, is an important factor to be considered for the acquisition of citizenship. Such consideration over human rights to be a citizen of a state will go beyond the existing norms of nationality.[301] Concurrently, the State can assess based on well-ordered administrative proceedings, whether such a person's bond with society justifies and require recognition as a citizen.[302] One such way of establishing that bond is via the long-term residence. And, that citizenship can be rescinded only if such bond does not exist.[303] However, for a State there is an expectation that such residence is prescribed under law. Nonetheless, the previous chapter argues that residence is understood beyond a formal recognition and has liberal interpretation under international law.[304]

To be not arbitrary, denial of access to a nationality must conform with domestic law and standards of international law.[305] The following section will highlight that even within domestic laws, India and Myanmar are obliged with their constitutional responsibilities.

[296] (Ballin 2014, 6); Bosniak (2010), p. 9
[297] (Ballin 2014, 13)
[298] (Ibid)
[299] (ibid, 124)
[300] (Ibid)
[301] (ibid, 125)
[302] (ibid, 124)
[303] (Honohan 2020, 360); see chapter 3
[304] Section 3.1
[305] UN Human Rights Council, *Human rights and arbitrary deprivation of nationality: report of the Secretary-General*, 14 December 2009, A/HRC/13/34, para. 29

4.4.1 The Rohingyas right to be citizens of Myanmar

The IIFM identifies the 1947 Constitution of Myanmar and the UCA, 1948 relatively had an inclusive citizenship framework.[306] As per section 4(2) of UCA, 1948, persons whose ancestries for atleast two generations were permanent residents within the territories of the Union and whose parents or themselves have been born in any such territory shall be deemed to be citizens. Further, section 7 of that Act provided access to citizenship of persons above 18 years and resided in the country for atleast five continuous years and intend to reside in the country. However, in 1982 citizenship based on national races became the 'golden standard' for membership, and Rohingyas were denied citizenship based on this.[307]

The 1947 Constitution avoided any classification between and among the citizens.[308] The concerning aspect of the UCA, 1948 was that it did not categorically recognize the Rohingyas as an indigenous race,[309] however, there are indications that at the time, the official authorities recognized them as one of the indigenous groups.[310] Additionally, liberal interpretation of the phrase "and such racial group as has settled in", makes section 3 as non-exhaustive and extends access to citizenship to other unrecognized groups including the Rohingyas.[311] In the case of *Karam Singh v The Union of Burma*,[312] the Supreme Court of Myanmar observes that, s. 4(2) of the UCA,1948 grants citizenship status to a person born within the territories of the Union and both of whose parents were also born within the said territories. This judicial ruling demonstrates that the Rohingyas were eligible to be citizens of Myanmar because there are persons from the community with themselves and their parents born in the territories. The 1974 Constitution introduced citizenship status to persons born of parents who are both nationals of Myanmar or have been vested with citizenship according to existing laws.[313] Although the meaning of nationals is not defined in the Constitution, the essence of the said Constitution and standards of international human rights law, the Rohingyas largely fulfilled both the conditions to be recognized as citizens. This changed with the 1982 citizenship law, which had restrictive and exclusionary provisions with outright discrimination against the Rohingyas. Although

[306] A/HRC/39/CRP.2, 114; Article 11, The Constitution of Myanmar, 1947.
[307] A/HRC/39/CRP.2, 116-117, see also section 2.1.2
[308](Parashar and Alam 2019, 97-99)
[309] Section 3 of UCA, 1948
[310] (Parashar and Alam 2019, 98); A/HRC/39/CRP.2, para. 473
[311] (Ibid, 99)
[312] SC of Myanmar, (1956 BLR 25 SC)
[313] Article 145 of 1974 Constitution of Myanmar, 1974; (Parashar and Alam 2019, 100-101)

Rohingyas are not recognized as a national ethnic group as per the 1982 citizenship law, they are at the least qualified to be identified as 'associate citizenship' or 'naturalized citizenship'.[314] Section 23 of the 1982 citizenship law provides associate citizenship to '*applicants for citizenship under UCA, 1948….*', however, is confirmed only after determined as associate citizens by the Central Body.[315] Similarly, a person must have entered and resided in the State before 4 January 1948 and their children born in the State to acquire naturalized citizenship.[316] Section 3.3 highlights generational residence of the Rohingyas in Myanmar, even before January 1948. Further, as per the 2008 Constitution, to be a citizen one has to prove that such person was born of parents "both of whom" are nationals or that one is already a citizen according to law.[317] Theoretically, this indicates that, as per the national laws of Myanmar, the Rohingyas can be identified as citizens of Myanmar. However, as demonstrated in section 3.4.1 of this paper, such citizenship is derived from strict documentation requirements, and Rohingyas have experienced systemic discrimination in access to citizenship.

Although the Rohingyas have experienced systemic human rights violations, the domestic laws of Myanmar recognize them as citizens. Firstly, because of the genuine connection that the Rohingyas have with Myanmar, that establishes the state as their own country. Secondly, Myanmar must uphold the constitutional and domestic regulations as well as their international responsibility as highlighted in this thesis.

4.4.2 The Bengali-Muslims right to be citizens of India

Over time, the citizenship laws in India have seen drastic shifts to exclusionary provisions. Originally, under the Citizenship Act, 1955 a person could acquire Indian citizenship by birth, by descent, by registration, and by naturalization.[318] To regulate and detect irregular migration, an amendment was made to the said Act in 1985 with the special provision on citizenship for the State of Assam as per the Assam Accord, 1985.[319] NRC was one of the parallel processes introduced to regularize Indian citizens, which was accelerated after the Supreme Court direction in 2014.[320] This process led to the exclusion of 1.9 million persons from the final

[314] A/HRC/39/CRP.2, para. 478
[315] Chapter III of The Burma Citizenship Law, 1982
[316] Section 43 of The Burma Citizenship Law, 1982
[317] Article 345, The Constitution of Myanmar, 2008
[318] Citizenship Act, 1955
[319] Section 6A, The Citizenship Amendment Act, 1985
[320] SC of India, *Assam Sanmilita Mahasangha & Ors. vs Union of India & Ors;* 17 December 2014, WP(Civil) No. 562 of 2012

NRC list in 2019. Subsequently, Citizenship Amendment, 2019 allowed persons belonging to Hindu, Sikh, Buddhist, Jain, Parsi, or Christian communities from Afghanistan, Bangladesh, or Pakistan and who entered India on or before the 31st day of December 2014, not to be treated as illegal migrants and allow access to citizenship by naturalization. The amendment denies similar access under this category for persons belonging to other denominations, predominantly Muslims.

Citizenship Amendment Act, 2003, (CAA, 2003) modified the provisions on acquisition of citizenship by birth and provided that the following persons shall be citizens of India: (a) persons born in India on or after January 26, 1950 but before July 1, 1987; (b) born in India after July 1, 1987, but before the commencement of CAA, 2003 and one parent is Indian citizen; (c) born in India after commencement of CAA, 2003 – (i) either to both parents being Indian citizens or (ii) one of the parents is an Indian citizen and other is not an illegal immigrant. Hence, when this law is analyzed with the NRC process in Assam, atleast persons born in India on or after January 26 1950, and before July 1, 1987 shall be citizens of India irrespective of parents being illegal immigrants. However, in contradiction to this amendment, the citizenship (amendment) rule, 2003 introduced special provisions to NRC in the State of Assam,[321] which states that the consolidated list of NRC shall include (a) persons whose name appears in any electoral rolls before the year 1971 or their name is included in the NRC list 1951; (b) descendants of persons mentioned in point (a).[322] And the burden of proof is on that person to prove the same. Hence, what the NRC process has been doing is that citizenship by birth as specified under section 3(1)(a) of the amendment, 2003 is not being implemented and rather is being done as per the citizenship rule, 2003. So even if such person is born in India on or after January 26 1950, and before July 1, 1987, will not be a citizen of India, if such person cannot prove as per the citizenship rule, 2003 of their name or their ancestor's name included in the NRC list 1951 or in any electoral rolls before the year 1971. A case is pending before the Constitutional bench of SC, *Deepak Kuma Nath v. Union of India*[323] on the interpretation of section 3(1) and 6A of the Citizenship Act to identify whether "every person born in India" includes persons born in India to illegal immigrants. However, in the case *Assam Public works v. Union of India*,[324] the SC took a harsh route by deciding that the court cannot ask the

[321] Rule 4A, The Citizenship (Amendment) Rule, 2003
[322] (Ibid)
[323] SC of India, registered on 21 May 2015, WP(Civil) No. 311 of 2015
[324] SC of India, Writ Petition (Civil) 274 of 2009

administration to repeat the process of NRC based on the issue of section 3(1)(a) raised. And that until the constitutional bench decides the matter on the interpretation of section 3(1)(a) and 6A of the Act, due consideration must be given to rule 4A of the citizenship rule, 2003. Hence, even before the SC decides on the interpretation of sec 3(1) and 6A of the citizenship act, the State is denying persons their right to be citizens of India by birth as per section 3(1)(a) of the CAA, 2003. This contradiction and harsh ruling, persons who would otherwise be categorized as citizens by birth as per section 3 (1)(a) are at threat of being declared as foreigners/ illegal migrants, and their following generation is at risk to be not considered as citizens even if born in India.

Although India follows the *jus soli* principle, individuals are arbitrarily deprived of nationality. As per the Citizenship Act, 1955 and following amendments, atleast persons born in India on or after January 26, 1950, and before July 1, 1987, are citizens of India and then as per *jus sanguinis* principle, their following descendants born in India should be a citizen of India. However, in practice the contradictions among rules/ laws, lack of access to documentation, and the burden on the individuals to prove their citizenship, provoke arbitrary deprivation of nationality. Simultaneously, this highlights that the Bengali-Muslims demonstrate a genuine connection to India by being residents of the country by birth.[325]

4.5 Conclusion

Nationality is recognized as a human right under international law. Hence, States have an obligation to respect and ensure such right to nationality as enshrined under various international instruments. Although the matter of nationality is under State discretion, States cannot arbitrarily deprive persons of nationality and have limitations to such power, i.e. principle of equality and non-discrimination and prevention of statelessness. That the procedures and criteria applicable for citizenship, must not result in persons denied acquisition of citizenship in a State that they regard as their home.[326]

The Rohingyas and Bengali-Muslims have the right to be citizens in Myanmar and India respectively. As per, the domestic laws of India and Myanmar, Bengali-Muslims and the Rohingyas are de jure citizens. That the practice of both States has been such to arbitrarily

[325] See section 3.1 and 3.2
[326] (Ballin 2014, 123)

deprive certain sections of nationality, which is not only against their international responsibility towards human rights but also against their domestic law.

5 Conclusion

Article 15 of UDHR provides that everyone has a right to nationality and no one shall be arbitrarily deprived of nationality. This has been validated by international human rights norms, endorsing nationality as a human right. The thesis examines the citizenship practices in India and Myanmar and their impact on Bengali-Muslims and the Rohingyas. The fundamentalist ideology of who makes a citizen is well expressed in these two countries. Deprivation of one's nationality is an illiberal strategy to that exclusion. The structure of the citizenship mandate of these two countries has been such that is discriminatory with wide discretionary powers to government institutions. The citizenship determination practice in Assam excluded 1.9 million individuals from the final NRC list, of which 480,000 are Bengali-Muslims and around 130,000 individuals have been declared foreigners by FT. The Rohingyas have undergone systemic discrimination, denied citizenship, and enjoyment of a full range of rights. There is a lack of effective remedy to seek redressal against arbitrary deprivation of nationality. In Assam, the citizenship determination process mandates a remedy against deprivation, however, the realities have been prejudicial, especially against Bengali-Muslims. Myanmar lacks a complaint mechanism against deprivation of nationality of Rohingyas. The consequences of denying citizenship to Rohingya minorities in Myanmar placed them in a vulnerable position of statelessness and human rights violation resulting in a large refugee influx to Bangladesh and other neighboring States. The prevalent concern with the existing citizenship practice in Assam is the impact on the Bengali-Muslims i.e. the risk of statelessness, which conforms to the present outcome of the statelessness of the Rohingyas.

Using the example of the citizenship practices in India and Myanmar, the thesis demonstrates the citizenship practice in these States is arbitrary, with the existing statelessness of the Rohingyas, and serious impact on the Bengali Muslims with a threat to statelessness. Therefore, the thesis proves that it is vital for a reconceptualization of citizenship laws to prevent arbitrary deprivation of nationality, statelessness and that adhere to human rights, primarily, the principle of non-discrimination and equality. The thesis demonstrates that such reconceptualization is based on the concept of genuine connection. The thesis cites the recognition of genuine connection in the context of nationality under international law. Genuine links can be established, not least with continuity of residence, the establishment of personal relationships,

integration efforts, labour market participation, education, etc. HRC expands on the interpretation of one's own country to include individuals having special ties to a country and embraces long-term residences, including but not limited to stateless persons. Accordingly, the thesis demonstrates the genuine connection that follows generationally among the Bengali-Muslims and the Rohingyas with India and Myanmar respectively, to recognize the respective States as their own country regardless of any formal recognition. Additionally, the practice in India and Myanmar is heavily dependent on documents to prove one's citizenship, and the thesis highlights the practical difficulties in accessing such formal documentation. In such circumstances, it is complex to differentiate between a foreigner and a citizen. Hence, it becomes necessary to reevaluate the citizenship determination practice and enforce the concept of genuine connection as recognized under international law to prevent statelessness and arbitrary deprivation of nationality.

In recognizing the concept of genuine connection in the context of nationality, the thesis exhibits the right to be a citizen. The thesis highlights the State are under an international obligation to respect and ensure human rights within their territories. The general obligation to respect and ensure human rights binds States, regardless of a person's migratory status.[327] The States are obligated to introduce necessary modifications to its domestic law to ensure proper compliance of human rights norms. By solely examining the constitutional mandates and citizenship laws of India and Myanmar the thesis highlights that the interpretation of domestic laws of India and Myanmar corroborates the right to be citizens of the Bengali-Muslims and the Rohingyas respectively. Also, the thesis highlights that the concept of genuine connection establishes the right to be a citizen of the Bengali-Muslims and the Rohingyas, even in circumstances where domestic law is interpreted in a manner to deprive such nationality. The States can re-evaluate their citizenship laws, to uphold the international understanding of nationality based on a strong factual connection to a State. In adopting the concept of genuine connection in the determination of one's nationality, the States will be facilitating towards prevention of statelessness and ensuring human rights norms under international law.

[327] IACtHR, *Juridical condition and rights of undocumented migrants*, para 106

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