

INDIA'S CITIZENSHIP (AMENDMENT) ACT: A THROWBACK TO DEBATES AROUND THE 'LONG PARTITION'

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My paper examines the prehistory of India's controversial new Citizenship (Amendment) Act 2019 ('CAA'), which expedites citizenship procedures for non-Muslim minorities from Afghanistan, Pakistan and Bangladesh. Through looking at a longue durée examination of British India's Partition, I argue that the Partition's dislocation conflated the otherwise oppositional categories of 'citizen' and 'refugee' in the formative years of the Republic. Through examining Constituent Assembly and parliamentary debates, judicial precedents and archival files and file notings between 1947–65, I demonstrate how taking responsibility for non-Muslims in Pakistan went hand in hand with ring fencing Muslims at a point where the relationship between the state, citizenship and nationality was abruptly prised open. Rather than an aberration, therefore, the CAA is the culmination of a strand of ideas and decisions that have informed Indian citizenship since Independence, which perhaps a refugee law could go some way to ameliorate.

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We are starting in the days where there is no discrimination, no distinction between one community and another, no discrimination between one caste or creed and another. We are starting with this fundamental principle: that we are all citizens, and equal citizens, of one State.

— Mohd Ali Jinnah, 11 August 1947¹

Here we are an entire nation, with a history of thousands of years, and we are going to discard it, in spite of the fact that the Hindu and Sikh has no other place in the wide world to go to.

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¹ Pakistan, *Constituent Assembly Debates*, 11 August 1947, 20 (Mohd Ali Jinnah).

I INTRODUCTION

Two years and the Radcliffe line separates the above two statements, addressed to the Constituent Assemblies of Pakistan and India, respectively. These continue, however, to offer competing visions of national citizenship and belonging in both countries, often at odds with received political wisdom in both states, that are relevant even today. Since 1947, the question of non-Muslims — read as largely, though not exclusively, Hindus fleeing from real or imagined persecution to India from Pakistan and Bangladesh — has figured significantly in the subconscious of successive governments. A spike in reported atrocities against Hindus and Sikhs leads inevitably to demands upon the Indian state to take action and, at the very least, to provide rehabilitation for these ‘victims’ within Indian territory. Indian governments — including the current government — have usually been sensitive to these questions, announcing long-term visas,³ modifications to citizenship laws and other benefits to migrants from Pakistan, Bangladesh and Afghanistan.⁴ Minority rights, therefore, continue to be inflected with the shadow of British India's Partition and surveillance and control regimes that were drawn up in its aftermath.

The *Citizenship (Amendment) Act 2019* (‘CAA’), provides us with a very clear exposition of this pattern. As per s 2, persons belonging to the ‘Hindu, Sikh, Buddhist, Jain, Parsi or Christian community’ from Pakistan, Bangladesh or Afghanistan are entitled to expedited citizenship within five years rather than the 11 otherwise specified by law.⁵ Though it ostensibly applies to ‘legal’ migrants, earlier modifications to the *Foreigners (Amendment) Rules 2015* have, in respect of non-Muslim immigrants from these countries, effaced the distinction between a legal and illegal migrant.⁶ At the same time, amendments to the *Passport (Entry into India) Rules 1920* exempt minority communities in Bangladesh, Afghanistan and Pakistan who face ‘religious persecution or fear of religious persecution’, allowing them to stay in India even without bona fide documents.⁷

Rather than a traditional refugee law paradigm, as some have argued, I shall argue here that the CAA performs two functions. Firstly, it serves as the culmination of a long-standing historical identification of non-Muslims in

² India, *Constituent Assembly Debates*, 11 August 1947, 9.116.34 (PS Deshmukh).

³ ‘Rajnath Singh Bats for Hindu Refugees’ Citizenship’, *The Times of India* (online, 24 November 2013) <<https://timesofindia.indiatimes.com/city/guwahati/Rajnath-Singh-bats-for-Hindu-refugees-citizenship/articleshow/26281979.cms>>. See also, Vijaita Singh, ‘Govt to Expedite Citizenship Pleas of Hindu, Sindhi Refugees’, *Indian Express* (online, 7 August 2014) <<https://indianexpress.com/article/india/india-others/govt-to-expedite-citizenship-pleas-of-hindu-sindhi-refugees/>>.

⁴ Rahul Tripathi, ‘Steep Rise in Citizenship to Hindus and Sikhs from Pakistan and Afghanistan Under PM Modi-led Government’, *The Economic Times* (online, 21 May 2015) <<https://economictimes.indiatimes.com/news/politics-and-nation/steep-rise-in-citizenship-to-hindus-and-sikhs-from-pakistan-and-afghanistan-under-pm-modi-led-government/articleshow/47364314.cms?from=mdr>>.

⁵ *Citizenship (Amendment) Act 2019* (India) s 2 (‘CAA’) specifically excludes these groups from the definition of illegal migrants.

⁶ *Foreigners (Amendment) Rules 2015* (India).

⁷ *Order GSR No 685(E)* (Notification F No. 25022/50/2015–FI, 7 September 2015).

Pakistan, Bangladesh and India as India's responsibility. Conversely, it ring fences both Muslims and Muslim majority nations in the Indian subcontinent as both uniquely foreign and difficult to integrate in present-day India. Indeed, by only confining itself to Pakistan, Bangladesh and Afghanistan, the *CAA* ignores 'problematic' communities like the mainly (but not exclusively) Muslim Rohingya in Myanmar and both Hindu and Muslim Tamil citizens in Sri Lanka. Rather than being seen as part of the 'rise' of the Hindu right, I use archival and constituent assembly sources to argue that this harks back to the polyphonous and complex process(es) of making and unmaking citizens and nationals that followed British India's Partition, and the different ways in which they operated on the eastern and western frontiers of India.

On the western border, only a few people can now take advantage of the *CAA*. Afghanistan's total Hindu and Sikh population is less than 1,500 people; most Hindus and Sikhs have left since 1979. The vast majority of non-Muslims moved out of what was then West Pakistan within the first year of Independence. As of 2017, Hindus and Sikhs comprise 1.85% of Pakistan's population, chiefly concentrated in Southern Punjab and Sindh.⁸ The Sikh population of Pakistan is even smaller — only about 40,000 Sikhs live in Pakistan; in fact they did not even constitute a separate group in the 2017 census.⁹ Most sources suggest that the annual migration of Pakistani Hindus to India is only a few thousand,¹⁰ though this has significantly increased in the last few years.¹¹ These comparatively small numbers belie their immense symbolic importance in political discourse, especially when articulated in terms of the 'responsibility' of the Government of India for hapless minorities.¹²

Like much else about India's Partition, the eastern flank suggests a different, and more complicated, story. Wary of their experiences on the western border, both India and Pakistan resisted a complete population transfer on the eastern flank. This allowed Hindus and Muslims to migrate into India through the 'half-open' border in the East. As I will show, both the provincial (East Bengal, West Bengal and Assam) and central governments had differing approaches to this migration, subject to their own exigencies. As the politics around the *National Register of Citizens* in Assam shows, the question there is both ethnic and religious. For the Central Government, however, there is no contradiction seen between expediting citizenship to subcontinental minorities and simultaneously taking a hard-line on Muslim migrants from Bangladesh. Rather, these are viewed as part of the same project.

⁸ 'Pakistan: Population by Religion as per the 2017 Census', *Pakistan Bureau of Statistics* (Web Page) <<https://www.pbs.gov.pk/sites/default/files//tables/POPULATION%20BY%20RELIGION.pdf>>.

⁹ Yudhvir Rana, 'Sikhs Included in Pakistan's Census: Lawyer Says One Down, Many to Go', *Times of India* (online, 13 May 2014) <<https://timesofindia.indiatimes.com/city/amritsar/sikhs-included-in-pakistans-census-lawyer-says-one-down-many-to-go/articleshow/57967860.cms>>.

¹⁰ Irfan Haider, '5000 Hindus Migrating to India Every Year, NA Told', *Dawn* (online, 13 May 2014) <<https://www.dawn.com/news/1105830>>.

¹¹ Anushree Fadnavis, 'Living on the Edge: Pakistani Hindus Still Feel Safer in India', *Reuters* (online, 16 June 2020) <<https://www.reuters.com/article/us-refugee-day-india-citizenship/living-on-the-edge-pakistani-hindus-still-feel-safer-in-india-idUSKBN23N3IL>>.

¹² Niraja Gopal Jayal, *Citizenship and Its Discontents: An Indian History* (Harvard University Press 2013) 85.

In this paper, I use the experiences of both flanks of the border in the years after Independence, during and after the framing of the *Constitution of India*, to suggest that both the imperatives that the CAA is based on — the perceived responsibility for non-Muslims *and* the desire to ring fence Muslims — were inherent in the tensions around Indian citizenship at its inception. I argue that privileging citizenship regimes over a refugee law regime can and should be understood through the many and competing processes and practices created in the immediate aftermath of the 'long [P]artition'¹³ — between 1947 and 1965 — when political, bureaucratic and judicial actors conflated the legally distinct (and often oppositional) categories of 'citizen' and 'refugee' in national discourse, and, as we shall see, marked out religion as a significant, albeit unofficial, marker of citizenship. This question, in turn, turns on the position of minorities in South Asia 'after empire' — at a point of decolonisation in wider swathes of Asia and Africa, where the relationship between state, citizenship and nationality was abruptly rendered open, a flashpoint that continues to be of immense significance in the way both states view themselves and each other.

II THE LONG PARTITION AND ITS MIGRANTS: NOT REFUGEES, BUT CITIZENS

Examining the many ways in which British India's Partition played out both at the international level and at various sub-national levels helps us understand both why minorities from Pakistan and Bangladesh (and to a lesser extent Afghanistan) are viewed differently and why the refugee–citizen distinction played out differently in this regard. Rather than viewing Partition as the end point of negotiations around the future of British India and a solution to the 'minority problem', I take Ted Svensson's lead in viewing Partition as the origin of the creation of India and Pakistan, a messy and complicated disentangling.¹⁴ Independence in August 1947, therefore, becomes a moment both of continuity and rupture for many state-building processes, including the question of citizenship and national belonging. As we shall see through examining legislative and constitutional debates, India and Pakistan's creation, and the long and complicated relationship between them, was not predetermined, or even the outcome of a clear, linear process, but contingent on shifting regional realities and political constraints.

As Independence loomed closer and Partition became inevitable in the summer of 1947, the 'numbers game' became significant in determining where the boundary line was to run.¹⁵ Both a 'cartographic and legal conundrum',¹⁶ eventually geographical, economic, political and 'other factors' would determine the final boundaries in the divided provinces of Bengal, the Punjab and Assam. This sundered the cartography and human geography of a thickly populated region

¹³ See Vazira Fazila-Yacoobali Zamindar, *The Long Partition and the Making of Modern South Asia: Refugees, Boundaries, Histories* (Columbia University Press 2007) 79.

¹⁴ Ted Svensson, *Production of Postcolonial India and Pakistan: Meanings of Partition* (Routledge 2007).

¹⁵ Lucy Chester, *Borders and Conflict in South Asia: The Radcliffe Boundary Commission and the Partition of Punjab* (Manchester University Press 2009) ch IV. See also Joya Chatterji, 'The Fashioning of a Frontier: The Radcliffe Line and Bengal's Border Landscape 1947–52' (1999) 33(1) *Modern Asian Studies* 188, 185–6.

¹⁶ Hannah Fitzpatrick, 'The Space of the Courtroom and the Role of Geographical Evidence in the Punjab Boundary Commission' (2019) 42(1) *South Asia: Journal of South Asian Studies* 188, 195.

that had historically been united for at least the better part of two centuries.¹⁷ In doing so, well-settled patterns of migration between and within provinces were now imbued with a deep political significance. Wafer-thin majorities often (but not always) determined the future of districts or their subdivisions, *tehsils*. Even after the actual boundary was drawn, paranoia around minority populations persisted. In the border areas of Bengal, the Punjab and Assam in the 1940s and 1950s, a sudden ‘influx’, or even the continued existence of minority populations, started to be perceived as a security threat in both dominions.¹⁸

Necessarily, the fixed ‘territorialisation’ that Partition entailed in both nascent states catapulted questions around national belonging and citizenship to the fore of national consciousness. This, I argue, was significantly different than earlier ‘divisions’, such as British Burma’s separation from India in 1937, or even India’s fraught relationship with Ceylon. As Laura Robson and Arie Dubnov demonstrate, Partition as the ‘simultaneous division and devolution of power’¹⁹ ‘[to] regulate ... conflict’²⁰ should be distinguished from earlier territorial separations for administrative or political convenience.²¹ The contemporaneity of political division and wide-scale migration meant that legislators in India and Pakistan viewed questions around national minority status very differently from concerns, say, around ethnic Indians in Ceylon and Burma.

At Partition, the question of minority citizenship had not been adequately explored. Most available evidence, including the quotation with which this paper opens, suggests that votaries of Pakistan neither believed in the possibility or efficacy of complete population transfers.²² Even though Pakistan was conceived as a ‘Muslim Zion’,²³ there was little clarity on what this entailed — different votaries had different opinions on what role Islam would serve in the country after Independence.²⁴ In part, the mixed nature of the subcontinent’s population meant it would be impossible to create a state populated only with and by all of South

¹⁷ This was particularly acute in the Punjab and Bengal, where both provinces were divided by what was later called the Radcliffe Line. An account of how this played out in the Punjab was given in Lucy Payne, ‘Drawing the Indo–Pakistan Boundary in the Partition of India’ (DPhil Thesis, Yale University, 2002). A comparable account for Bengal was given in Willem Van Schendel, *The Bengal Borderland: Beyond State and Nation in South Asia* (Anthem Press 2005) 39. On both sides, the border did not always follow a Hindu–Muslim division. In both the Punjab (around Kasur and at Amritsar) and Bengal (Murshidabad–Rajshahi and around Khulna), there were places where Muslim-majority *Tehsils* or *Thanas* were given to India, which abutted on Hindu-majority *Thanas* now in Pakistan.

¹⁸ As Part C of this paper shows, this would bedevil community relations in Assam after Independence. In 1950, Members of the Constituent Assembly of Pakistan would argue that an ‘unintended by-product of the recent regrettable violence’ in Khulna, East Bengal, was that the district now had a Muslim majority: see Pakistan, *Constituent Assembly Debates*, 18 January 1950, vol IV, 91 (Dhirendra Nath Dutta).

¹⁹ Laura Robson and Arie Dubnov (eds), *Partitions: A Transnational History of 20th Century National Separation* (Stanford University Press 2019) 4 citing Robert Schaeffer, *Warpaths: The Politics of Partition* (Hill and Wang 1990) 7.

²⁰ Robson and Dubnov (n 19) 4 citing Brendan O’Leary, ‘Analysing Partition: Definition, Classification and Explanation’ (2007) 26 *Political Geography* 886, 888.

²¹ Robson and Dubnov (n 19).

²² For a contentious and revisionist exception see Venkat Dhulipala, *Creating a New Medina: State Power, Islam, and the Quest for Pakistan in Late Colonial North India* (Cambridge University Press 2014).

²³ Faisal Devji, *Muslim Zion* (Harvard University Press 2009).

²⁴ Faisal Devji, ‘The Minority as Political Form’ in Chakraborty et al (eds), *From the Colonial to the Postcolonial: India and Pakistan in Transition* (Oxford University Press 2007) 85–96. See especially 91, wherein Devji shows us how Muslim nationality ‘was a thin, even negative ... juridical and temporary category’.

Asia's Muslims.²⁵ Evidence suggests that Mohammad Ali Jinnah wanted a *jus soli* conception of Partition,²⁶ born out by a fascinating vignette of history where jubilant Muslim women in Delhi called on an admittedly unwell Jinnah after the 3 June 1947 acceptance to Partition, to find he asked them to 'stay put' in India.²⁷ Formally, therefore, the '[P]artition' was understood as the creation of two separate states — one with a majority of Hindus and the other with a Muslim majority, but with large minority populations — which explains Jinnah's speech four days before a sovereign Pakistan was to come into effect.

The mass migrations across both sides of the border that accompanied the western Partition set the tone for both states in the fraught process of 'constituting' a new national identity and granting citizenship rights to their population.²⁸ Over 10 million people moved across these newly-constituted boundaries in the first year after Partition;²⁹ by the early 1960s, migration on the eastern and western frontier would amount to over 20 million people. As both dominions scrambled to adjust to these new realities, a ritual deploring of these migrations was accompanied with a strident articulation of the responsibility of minorities on the other side of the border. Both India and Pakistan, however, did not do enough to stop the haemorrhage of their minorities on the western frontier, at least.³⁰ As we shall see, the marking out of minority populations as suspect was neither the original intent of the Partition, nor explicitly laid out in law immediately after Partition; it was, rather, the product of several unspoken assumptions made by innumerable actors — ministers, legislators, custodians and the police, to name a few.

Unsurprisingly, therefore, both Constituent Assemblies — which also functioned as Legislative Assemblies at the time — were sites of discord where these responsibilities were asserted, reworked and forged. In India's case, the rump Constituent Assembly, which had, even five months before Partition, glossed over the question of citizenship was compelled to start reviewing it in the winter of 1947.³¹ Unanticipated and unprecedented population transfers in much

²⁵ Given that the main provinces contemplated in Pakistan had wafer-thin Muslim majorities of 57.1% (the Punjab) and 54.7% (Bengal), it was impossible not to understand citizenship in territorial, rather than religious terms. See MWM Yeatts, 'Subsidiary Tables: Distribution of the Main Communities by Province and State' in *Census of India 1941* (Government of India 1943) vol I, pt I, 102–03. <<http://piketetty.pse.ens.fr/files/ideologie/data/CensusIndia/CensusIndia1941/Census%20of%20India%201941.pdf>>.

²⁶ Joya Chatterji, 'South Asian Histories of Citizenship: 1946–1970' (2012) 55(4) *The Historical Journal* 1049, 1055.

²⁷ Abdul Rehman Siddiqui, *Smoke Without Fire: Portraits of Pre-Partition Delhi* (Aakar Books 2011) 290.

²⁸ See, eg, Zamindar (n 13) 79–119; See also Yasmin Khan, *The Great Partition* (Yale University Press 2007); Joya Chatterji, *The Spoils Of Partition: West Bengal 1947–67* (Cambridge University Press 2007).

²⁹ The Government of India conducted a 'census of displaced persons' from West Pakistan in October 1948 and East Pakistan in June 1949 — with 5 million people having moved from the east and 1.3 million in the west. The Government of Pakistan did not publish figures in that year, but the record of the 1951 census suggests the total number of migrants as 7.23 million, 'the majority of which moved in the first fifteen months after partition': Pravin Visaria, 'Migration Between India and Pakistan, 1951–61' (1969) 6(3) *Demography* 323, 323–24.

³⁰ The West Punjab legislative assembly, for instance, opened in 1948, with the speaker deploring 'the empty seats of their Hindu and Sikh brothers'. West Punjab, *Parliamentary Debates*, Legislative Assembly, 5 January 1948, 3–4 (Khan Iftikhar Hussain Khan). I am grateful to Yaqoob Bangash for access to these.

³¹ Chatterji (2012) (n 2626).

of North India and West Pakistan (especially in the Punjab) at this time meant that both sets of governments had to respond to a massive crisis of refugees as millions of people moved both ways using whatever means of transport they had at their disposal.³² This was given legal imprimatur through a series of ordinances that, barely a month after Independence, allowed both states ‘the most drastic powers’ to ensure a complete population transfer in the Punjab.³³

By December 1947, sectarian violence had spread much beyond the borders of the Punjab — into the United Provinces (the bulk of which forms the modern-day state of Uttar Pradesh (‘UP’)), Rajputana, Sindh and the North–West Frontier Province (a province of British India and later Pakistan, now called Khyber Pakhtunkhwa), though the eastern frontier remained quiescent. Practical consideration, as we shall see, prevented replicating the transfer of populations across the subcontinent without the possibility of additional territorial transfers. Both governments, therefore, agreed to provide all facilities for all those members of minority communities that wished to leave.³⁴ This resulted in minorities on both sides, particularly in India and East Pakistan, being left much more vulnerable to capricious and arbitrary government action in taking over their property and questioning their loyalty. Simultaneously, this encouraged fringe (and increasingly mainstream) elements in India to question the loyalty of Indian Muslims, whose ‘natural home’, they asserted, was now in Pakistan, as opposed to Hindus and Sikhs, who were ‘Indian’, even though separated from the ‘motherland’.³⁵

In contrast to the Constituent Assembly of India, which had at least a set of defined objectives and an ‘oligarchy’ already in place to aid the process of drafting,³⁶ the Constituent Assembly of Pakistan faced a set of questions about the nature of the new union, the place of minorities within it and the tension between being a ‘Muslim’ or ‘Islamic’ state which, as scholars have identified, was to bedevil the future of the country.³⁷ This, coupled with the fact that both countries were unwilling to share details of their minority populations on the floor of the Assembly, meant that questions around citizenship were constantly debated.³⁸ On both sides, governments lauded their own efforts to provide ‘their’ minorities with succour while simultaneously confining the activities of the Relief and Rehabilitation Ministry to those belonging to the right religion. In the initial months of Partition, religious categories came to stand in as substitutes for nationality on the western border at least, most notably in the Punjab.

South Asian disenchantment with a treaty-based refugee law regime also emerged at about this time. The late 1940s were a time of unprecedented

³² India, *Constituent Assembly Debates*, 10 August 1949, vol IX, 9.115.175 (BR Ambedkar): here, Ambedkar refers to the citizenship clause in the *Constitution* as a ‘headache’. See also India, *Constituent Assembly Debates*, 11 August 1949, vol IX, 9.116.7 (PS Deshmukh) where PS Deshmukh refers to it as a profoundly ‘ill-fated’ article; Zamindar (n 13) 71.

³³ India, *Constitutive Assembly Debates*, Legislative Branch, 3 February 1948, 155.

³⁴ *ibid* 156–57.

³⁵ Granville Austin, *The Indian Constitution: The Cornerstone of the Nation* (Oxford University Press 1966).

³⁶ I take this term from Austin (n 35). The ‘oligarchy’ referred to Nehru, Patel, Prasad and Azad, who were presumed to steer the debates along. Nevertheless, I argue the ability of the oligarchy to effect decisions was limited, as a look at the citizenship provisions, among others, shows us.

³⁷ Farzana Shaikh, *Making Sense of Pakistan* (C Hurst and Co 2009) 68–73.

³⁸ Pakistan, *Constituent Assembly Debates*, 8 September 1948, vol 2, col 28 (Nur Ahmed, reply given by Khwaja Shahabuddin).

international migration, not only in south and southeast Asia, but also in the Middle East and Europe. The reorganisation of Europe and the collapse of imperial powers was marked by a 'wave of decolonisation' in South Asia, Southeast Asia and parts of the Middle East.³⁹ Persons rendered 'stateless' by the vagaries of post-war European politics wended their way to 'newly homogenous countries' — particularly Germany as well as Israel and other Middle Eastern countries.⁴⁰ These tussles around citizenship and refugee rights, though contemporaneous with the drafting of the *Convention relating to the Status of Refugees* ('*Refugee Convention*'), were largely separate from it.⁴¹

How the 'refugee problem' was understood in South Asia in the wake of decolonisation may explain this. Most historical literature on Partition has uncritically termed those who migrated across the borders as refugees. Nevertheless, if the term is understood *stricto sensu* to mean a stateless person, this is not how those who migrated saw themselves.⁴² On the contrary, they believed themselves to be full citizens of their adoptive nations — much like exiled Germans at about the same time — though their earlier domicile now stood at odds with their nationality. This, as we shall see, was mirrored in official discourse.

Both India and Pakistan initially viewed the drafting of the *Refugee Convention* with great interest.⁴³ Indeed, the official Indian representative announced her Government's intention of cooperating with the UNHCR were the definition to be a broader one — 'consistent with its own national citizenship laws'.⁴⁴ Nevertheless, the *Refugee Convention*'s Eurocentric approach and lack of interest in South Asia prevented what could have been a more forward-thinking approach to refugee status — not whether persons were formally 'citizens', but whether their inclusion into the refugee regime could ensure their access to basic resources.⁴⁵

³⁹ For an account of this, see Tim Harper and Christopher Bayly, *Forgotten Wars: Freedom and Revolution in Southeast Asia* (Bellknapp Press 2007).

⁴⁰ See Philip Ther, 'The Integration of Expellees in Germany and Poland after World War II: A Historical Reassessment' (1996) 55(4) *Slavic Review* 779. For an account of the process in Germany and Poland, see Tara Zahra, "'Prisoners of the Postwar": Expellees, Displaced Persons and Jews in Austria After World War II' (April 2010) 41 *Austrian History Yearbook* 191. For a recent work that focuses on the German 'expulsion' from Czechoslovakia (which, along with the massive, forced migration of Germans from Eastern Europe, was contemporaneous with the Partition of India), see RW Douglas, *Orderly and Humane: The Expulsion of the Germans After the Second World War* (Yale University Press 2012).

⁴¹ Pia Oberoi, *Exile and Belonging: Refugees and State Policy in South Asia* (Oxford University Press 2006) 25–26.

⁴² The terms *sharnarathi* and *panahgeer* were used in the Indian and Pakistani sides originally (*Panahgeer*, a Punjabi term deriving from Urdu, was used on both sides of the border, whereas *sharnarathi* was used much more on the Indian side). See Zamindar (n 13) 8. Indeed, newspaper reports and governmental bodies also referred to persons emigrating as 'refugees', and the issuance of a 'refugee card' marked the beginning of rehabilitation from the East.

⁴³ Pia Oberoi, 'South Asia and the Creation of the International Refugee Regime' (2001) 19(5) *Refuge: Canada's Journal on Refugees* 36, 37.

⁴⁴ *ibid* 39.

⁴⁵ Sucheta Kripalani, the Indian delegate, said that '[t]he [P]artition refugees were not stateless ... but statelessness was often a lesser hardship than lack of food, clothing, shelter and work'. Agreeing with this analysis, the Pakistani delegate examined this argument further by claiming that statelessness 'was the least of the privations to deal with which the IRO had been set up'. See also *Provisional Summary Record of the Two Hundred and Sixty-Third Meeting Held at Lake Success New York on Tuesday 15 November 1949 at 10:45am*, UN Doc A/C.3/SR.263 (15 November 1949).

Through two specific instances, during and after the drafting of the *Constitution of India*, I will argue that debates around citizenship in the Constituent Assembly of India turned on a sense of Indian (and more specifically, Hindu) victimhood on both flanks of the border. In part, this turned on the ‘naturalness’ of India — largely coextensive with British India — as a timeless political and national unit. This idea had been at the heart of the nationalistic imagination, and one that was not confined to the Hindu right.⁴⁶ Not only had Islam been an essentially ‘foreign’ force (the argument went), but Muslim nationalism had also sundered this unity through the creation of Pakistan and, in doing so, unnaturally constricted the Indian nation. It logically followed, thus, that Muslim migration into India was part of a game plan to undermine India and its sovereignty by creating ‘mini-Pakistans’, which, if near enough to the border, could secede from the Union of India itself. Secondly, Muslims who first moved to Pakistan (in what, contrary to actual events, was perceived as a voluntary migration) and then returned from West Pakistan depleted the land available for settlement of non-Muslims who, through no fault of their own, had been forced to migrate. As we shall see, this repeated invocation of victimhood had important consequences. First, it served to reinforce concern for those refugees who had come to India. Second, it made Muslim migrants seem suspicious and sinister — as treasonous fifth columns.

A *The Western Border: ‘Returnees’ Versus ‘Refugees’*

Due to various causes, chief among them being disillusionment in the promised land of Pakistan, a large number of Muslims who had migrated to Pakistan started going back. The question of restoration to them of their property and rehabilitating them afresh became a great problem for the government of India who took up with Pakistan the question of ensuring a two-way return of refugees. Being unsuccessful in that, the Government of India had no option but to try and limit the influx ‘to manageable proportions.’⁴⁷

The Indian position on ‘returnees’ — or those who moved back from Pakistan to India after Independence, marks a significant moment in which citizenship first started to take religious overtones. Initially, travel between both dominions was supposed to be free, as both dominions were economically one unit. Imposing restrictions on travel was believed to increase minority insecurity and was therefore discouraged.

This sentiment was undergirded by hard economics which prompted a change in this policy. Evacuee property norms, through which both states took over the property of migrants pending a bilateral settlement which would never be realised, became the game changer. Ostensibly evolved to protect the property of those who migrated across both borders in the Punjab, immovable evacuee property was also used to compensate incoming migrants.⁴⁸ As both countries disagreed on the valuation, the Government of India extended the spatial ambit of these laws and

⁴⁶ For how this was imagined, see Manu Goswami, *Producing India: From Colonial Economy to National Space* (University of Chicago Press 2004) 1–2, where she points out how Nehru was easily able to buy into a Hindu conception of ‘Bharat Mata’. In some ways, this parallels Savarkar’s notion of ‘Hind’ as a ‘daughter of God’: see Vinayak Savarkar, *Hindutva* (Savarkar Prakashan 1969) 9–11.

⁴⁷ *Annual and Bi-annual Reports from Pakistan (Lahore)* (Archived at National Archives of India, R&I/50 II, Pak I Branch, NAI No 3(12), 1947–50). Copy on hand with the author.

⁴⁸ See, eg, Manav Kapur, ‘Of “Satanic Ordinances” and “Fictitious Families”’: Creating the “Evacuee” in Indian and Pakistani Law 1947–56’. Unpublished.

broadened the circumstances around which this property could be taken and used to compensate Hindus and Sikhs who had come from Pakistan. These laws would later be noted for their stringency and caprice — Jawaharlal Nehru himself said in Parliament in the early 1950s that these laws increased minority fears and forced migration.⁴⁹

From March 1948, questions around the rights of returning minorities and their citizenship weighed upon the Constituent Assembly of India. Pakistan's alleged refusal to restore the property of 'returnees' in West Pakistan was contrasted with Indian 'alacrity to restore property' to those returning to India. Mahatma Gandhi's assassination the previous month, together with Pakistan's initial economic difficulties, resulted in a situation where Muslims were returning to UP, Rajputana and Delhi; as this was seen as an 'influx,'⁵⁰ Nehru was required to remind his fellow parliamentarians of the pledge India had made to restore minorities their property irrespective of Pakistan's conduct.

As this return continued through the summer of 1948, the question of restoration of property enhanced fears around the creations of 'miniature Pakistans' within Indian territory. Even involuntary migration during times of communal strife, organised by military escorts, was seen as disloyalty to the infant dominion, 'kicking' India to go to Pakistan. Furthermore, as minorities from Pakistan showed little desire to return to their homelands, this 'one-way traffic' interfered with the 'legitimate' task of rehabilitating minorities. Nehru's suggestion, in correspondence, to allow for a special officer in the Relief and Rehabilitation Ministry to deal with Muslim migrants from Pakistan whose property had been taken over by the Government was summarily rejected by the Ministry itself.⁵¹ With reports coming in from UP at the end of June 1948 about 'whispering campaigns' against the Government of India undertaken by recently returned 'Muslim Leaguers' through secret missives they brought through 'courier services'⁵², the Government of India decided to take decisive and sudden action. This was done through that favourite instrument of the colonial period, the ordinance.⁵³

Ordinances had long been anathema to those fighting for the sub-continent's freedom. As 'temporary' laws for emergency circumstances, they did not need legislative approval and could be speedily introduced. After Independence, though, they provided mechanisms by which both governments armed themselves to deal with emergency situations, particularly before both *Constitutions* came into force.⁵⁴ In this interim period, the extension of late colonial instruments of power like the *Government of India Act 1935* gave governments untrammelled power.⁵⁵ Doing so allowed the permit system to be introduced suddenly, virtually overnight,

49 *ibid.*

50 India, *Constitutive Assembly Debates*, Legislative Chamber, 6 April 1948, 2484–87 (Desh Bandhu Gupta).

51 Letter from Jawaharlal Nehru to Mohanlal Saxena, 19 May 1949, 72 reproduced in *Selected Works of Jawaharlal Nehru*, vol 11 (May–June 1949) ('*Nehru Selected Works*'); see also Letter from Jawaharlal Nehru to Mohanlal Saxena, 31 May 1949, 75–77 reproduced in *Nehru Selected Works* (n 51).

52 Letter from BN Jha, Chief Secretary of the Home Ministry, Uttar Pradesh to the Chief Secretary, Home Ministry, Government of India, 1948 (Archived at 211/1948, Uttar Pradesh State Archives, Lucknow). Copy on hand with the author.

53 'No One-Way Evacuee Traffic from Pakistan to India', *Times of India* (20 May 1948).

54 AP Pandey, 'Hundred Years of Ordinances in India: 1861–1961' (1968) 10(2) *Journal of the Indian Law Institute* 259, 263.

55 *ibid.*

being precluded from debate in the Constituent Assembly until this was a *fait accompli*.⁵⁶ Ordinances also performed an additional function. As we see in the case of both the permit system and in Assam in 1950, they could pave the way for a bill to follow — the existence and functioning of the ordinance created an argument of continuity in favour of the status quo.

From 13 July 1948, no person was allowed to enter India from West Pakistan unless they were in possession of a permit. Contravention meant a fine of INR1,000, accompanied by a year's imprisonment.⁵⁷ The press communique accompanying the ordinance highlighted its temporary nature, promising its removal 'as soon as conditions settled down'.⁵⁸ As it happened, though, the date was included in art 7 of the *Constitution of India* and continues to be the cut-off date for determining the citizenship for those who returned from the territory of Pakistan.

How did this system work? Five kinds of permits were contemplated — including the permit for resettlement (which would apply to Muslims who wished to come back) as opposed to the permit for return (meant for non-Muslims).⁵⁹ This officially required the religion of the person who wished to return and details of the property that they possessed. If evacuee property was involved, provincial governments would be required to furnish 'No Objection Certificates'. Examining both government files and judicial decisions, however, as I shall subsequently demonstrate, show us that Muslims wishing to return, even on short trips, were scrutinised much more than non-Muslims. File notings suggest that there was a fear that these persons 'could get lost in India' and therefore needed to be sent back under police escort, as opposed to Hindus from East Bengal, who were merely issued a notice.⁶⁰

Pakistan's political leadership vociferously protested this law, even as it came up with a verbatim copy in September 1948. Here, the motivation was different, though related — Pakistan feared that a mass migration of Muslims from all of India would cripple the country economically, doubling its population.⁶¹ At the time, the Constituent Assembly of Pakistan was grappling with its own questions around the nature of the state's relationship with Islam and the rights of minorities there. Pakistan's *Objectives Resolution 1949* in March 1949 marked another decisive moment.⁶² The *Resolution* provided for observance of 'democracy, freedom, equality, tolerance and social justice' as enunciated by Islam, and 'frankly and unequivocally' provided that all authority was subservient to God.⁶³

⁵⁶ Rohit De, 'Between Midnight and Republic: Theory and Practice of India's Dominion Status' (2019) 17(4) *International Journal of Constitutional Law* 1213, 1230.

⁵⁷ *Influx from Pakistan (Control) Ordinance 1948* (India) cl 3(a), 4. Copy on hand with the author.

⁵⁸ 'System Introduced by Government of India: Move to Check One Way Traffic', *Times of India* (14 July 1948).

⁵⁹ Abhinav Chandrachud, 'Secularism and the Citizenship Amendment Act' (2020) 1(1) *Social Science Research Network* 1, 6.

⁶⁰ *Return to Pakistan of Such Persons Who Have Illegally Come to India Under the Scheme for the Return of Recent UP Migrants to UP* (Archived at 10(9)—BL/50, National Archives of India). Copy on hand with the author.

⁶¹ Zamindar (n 13) 100. Zamindar argues here that Pakistan's acceptance of the permit system allowed it to have a bureaucratic way out of the fear of 'Muslim inundation' and that the rubric of security was used to justify the measure, barely a week after 'police action' in Hyderabad, with its possibility of further migrations.

⁶² *Objectives Resolution 1949* (Pakistan).

⁶³ Pakistan, *Constituent Assembly Debates*, 7 March 1949, vol V, 1–10.

While Liaquat Ali Khan used Islam's 'great record of tolerance' in medieval times to assure the fair treatment of minorities, Hindu members of the Assembly, having witnessed the communal violence throughout the subcontinent during the 1940s, were far less sanguine.⁶⁴

BK Datta, the Leader of the Opposition Congress, gave a relatively measured speech fearing, diplomatically, the possibility of abuse by 'adventurers ... at some future date'.⁶⁵ Sris Chandra Chattopadhyaya more stridently argued that this reduced minorities to being tolerated only on sufferance. Despite it having no formal binding value, he argued that the *Resolution* effectively created a *herrenvolk* of those who professed Islam. Indian observers were carefully watching these negotiations, even as the citizenship articles started to be discussed in the final sessions of the Constituent Assembly.

As these 'ill-fated' citizenship clauses started to be discussed in November 1949, the return of Muslim migrants from Pakistan aroused suspicion for economic and political reasons. For JR Kapoor, of UP Khatri parentage but with close links to the Punjab, and BS Mann from East Punjab, it was shocking that property worth 'crores and crores' would be removed from the compensation pool, were returnees allowed to come back. The financial ramifications were clear: Muslim migration to Pakistan — even under duress — precluded migrants from having any claim, either on India as citizens or over property that they still technically owned. To allow them to return was to further impoverish what they called 'our brethren', at the cost of populations whose loyalty to India was deeply suspect.

Nehru and others strongly rebutted these charges of misplaced secularism. Nehru's response based itself on 'equality and justice' — that non-Hindus could not be treated differently from Hindus. Less reassuringly, he also pointed out that the procedure for getting the permit had been made extremely difficult — only a few thousand were likely to return, and those, either 'nationalist Muslims' or from 'divided families', were not likely to significantly affect the compensation pool. In 1951, the whole evacuee property argument was dispensed with altogether — it was decided that a 'resettlement permit' would not provide any undertaking about returning property of those who moved back.⁶⁶

Though economic arguments predominated, fellow-feeling for non-Muslims and their 'first right' on the nascent state was far from absent.⁶⁷ Rather, it was echoed in discussions at the highest political level; many drafters of the *Constitution of India* argued that the 'mere fact' of a person being Hindu or Sikh would enable him (or her) to possess Indian citizenship.⁶⁸ Ostensibly, the costs of rehabilitation were disclaimed. Lofty statements suggesting India was 'not a land of shop-keepers' were made, and somewhat ironically accepted, one imagines, by

⁶⁴ *ibid* (Liaquat Ali Khan) 3.

⁶⁵ Pakistan, *Constituent Assembly Debates*, 9 March 1949, vol V (BK Dutta).

⁶⁶ Letter from the Prime Minister's Secretariat to AV Pai, Secretary, Ministry of Home Affairs, 15 May 1955 quoted in Avtar Singh Bhasin, *India-Pakistan Relations: A Documentary Study 1947-2007* (Geetika Publications 2009) 8475.

⁶⁷ This was true in both India and Pakistan. To examine how this played out in Pakistan, see Tahir Naqvi, 'Migration, Sacrifice and the Crisis of Muslim Nationalism' (2012) 25(3) *Journal of Refugee Studies* 474; see also Vazira Fazila-Yacoobali, 'A Rite of Passage: The Partition of History and the Dawn of Pakistan' (2006) 1(1) *Interventions: International Journal of Postcolonial Studies* 183. In the context of Bengali Hindus, see Joya Chatterji (2007) (n 28) 92-93.

⁶⁸ India, *Constituent Assembly Debates*, vol IX, 356.

those who been at the receiving end of the vagaries of evacuee property law and the permit system. Indeed, in the conventional narrative, India's Central Government worked in tandem with the provincial governments of East Punjab and Delhi to draft comprehensive rehabilitation policies for incoming migrants from West Punjab and the North–West Frontier Province.⁶⁹ Components of these included land reorganisation in the Punjab, the setting up of 'refugee colonies' in urban Punjab and Delhi,⁷⁰ and the formulation and disbursement of 'standard acres' as units of land.⁷¹ On both sides of the border, the 'success story' of resettlement merged with the triumphalist creation of the new states, particularly on the Western border.⁷² On the flip side, though, the Muslim minority bore the brunt of the hard economic choices that undergirded these decisions. Evacuee property norms placed severe limitations on the rights of Muslims on their own property and even on their return to India.⁷³

Though citizenship was not explicitly linked to religion in either country, the link between both was clear both in legislative debates and in the actual operation of citizenship laws. In India, the general rule remained citizenship by birth or domicile (naturalisation was to come after the passing of the *Citizenship Act 1955* five years later), but two sets of people were marked out — migrants from Pakistan to India and vice-versa. Those migrating from Pakistan to India had to have migrated after 1 March 1947 and not returned under a permit for resettlement issued by this purpose,⁷⁴ and those migrating to Pakistan from India had to have done so by 19 July 1948.⁷⁵ A year later, Pakistan's *Citizenship Act* similarly provided for citizenship for any person domiciled in Pakistan who had migrated into Pakistan before 1 January 1952,⁷⁶ while excluding persons who had migrated to India after March 1947 from its ambit.⁷⁷

⁶⁹ India, *Constituent Assembly Debates*, 12 August 1949, vol IX (Braieshwar Prasad). For an account of these processes of settlement, see Gyanesh Kudaisya, *The Aftermath of Partition in South Asia* (Routledge 1999) 126.

⁷⁰ See *ibid*; See also VN Datta, 'Punjabi Refugees and The Urban Development of Greater Delhi' in RE Frykenberg (ed), *Delhi Through the Ages: Essays in Urban History, Culture and Society* (Oxford Paperbacks 1994) 287.

⁷¹ Kudaisya (n 69). For an understanding of what the standard acre entailed, see Kanwaljit Kaur, 'Riots, Refugees and Rehabilitation: A Case Study of Punjab 1946–56' (PhD Thesis, Punjabi University, 2010).

⁷² A somewhat hagiographic account of the state's support to migrants on the western frontier is given in U Bhaskar Rao, *The Story of Rehabilitation* (Ministry of Information and Broadcasting 1967).

⁷³ Recent re-examinations of these claims have somewhat tarnished this narrative, with evidence suggesting that these schemes privileged those with access to resources at the cost of 'have-nots', including Dalits and women, see Ravinder Kaur, 'Distinctive Citizenship: Refugees, Subjects and Post-Colonial State in India's Partition' (2009) 6(4) *Cultural and Social History* 429, 434–40. But see Ian Talbot, 'Punjabi Refugee Rehabilitation and the Indian State: Discourses, Denials and Dissonances' (2011) 45(1) *Modern Asian Studies* 109, 128–29; Talbot suggests that while the *proportion* of aid given to Dalits was much lesser than that given to other social groups, the fact that this aid represented the first sustained governmental help given to Dalits means that it thus figures prominently in Dalit accounts of the Partition.

⁷⁴ *Constitution of India*, art 6.

⁷⁵ *ibid* art 7.

⁷⁶ *Citizenship Act 1951* (Pakistan) s 6 but see s 14-B under which there was no such cut-off date provided for inhabitants of the disputed territory of Jammu and Kashmir and all persons, regardless of when they migrated into Pakistan, would be considered citizens of Pakistan.

⁷⁷ *ibid* s 7.

B *The Eastern Frontier: Of 'Half-Open' Borders and Continuous Migration*

If citizenship laws both reflected and simultaneously created realities on the western border, they proved completely unable to reflect the situation on the eastern frontier. Here, though, another logic of Partition came into play — how to protect large minority populations from physical, economic and bureaucratic violence (as in Bengal), while simultaneously balancing local nationalisms (as in Assam). In doing so, we see another method by which Muslim migration was marked out.

Spared the cataclysmic violence that had plagued the Punjab in 1947, both Bengals retained a large proportion of their minority population in the years after Independence. Nevertheless, minorities on both sides of the border were subject to low-grade, chronic violence both by the state and vigilante groups.⁷⁸ Along with this, their identification with the state was imperfect. In the case of East Bengali non-Muslims, despite protestations of loyalty by minority legislators in the Constituent Assembly of Pakistan and Legislative Assemblies of East Bengal,⁷⁹ their position in a 'Muslim homeland' was ambiguous, as discussions around the *Resolution* show.⁸⁰ Upper-caste Hindus in East Bengal, though a numerical minority, had seen themselves as the *bhadrolok* elite; the Partition immediately reduced them to a shrinking minority away from 'their' people. Similarly, West Bengal's Muslims were repeatedly told to 'assimilate [or] leave'.⁸¹ In February 1950, Modassir Hossain, a Muslim League Member of Legislative Assembly, argued that Partition had left West Bengal's Muslims 'mere pawns ... whose suggestions were habitually dismissed'.⁸² Cries of 'Go to Pakistan' greeted his speech.⁸³

Nevertheless, both the Governments of India and Pakistan were clear about avoiding an exchange of populations like in the Punjab, and eager to work jointly if they could do so. Taking a leaf out of interwar 'minority rights' regimes in Europe, international law and agreements provided a useful blueprint to do so.⁸⁴ Inter-dominion minority rights agreements became a useful tool to ensure minorities were seen as 'joint' responsibilities.⁸⁵ Here, too, some of the motivation was economic — Eastern Pakistan depended on India for almost all its coal and oil, and East Pakistani jute was essential for Calcutta's industries. Both governments also feared the recrudescence of violence, along with the concomitant issues of refugee resettlement in two overcrowded provinces. Therefore, allaying minority fears and ensuring that they did not see post-Partition migration as permanent was of the essence on the eastern frontier. As Pallavi

⁷⁸ See Haimanti Roy, 'Citizenship and National Identity in Post-Partition Bengal: 1947–65' (PhD Thesis, University of Cincinnati, 2006) 169.

⁷⁹ See, eg, East Bengal, *Parliamentary Debates*, Legislative Assembly, 23 March 1948, 17 (Gobindalal Bannerji):

As minority citizens, we are proud to be the white stripe in Pakistan's national flag.

⁸⁰ Nilanjana Chatterjee, *Midnight's Unwanted Children: East Bengali Refugees and the Politics of Rehabilitation* (Brown University 1994).

⁸¹ Chatterji (2007) (n 28).

⁸² West Bengal, *Parliamentary Debates*, Legislative Assembly, 6 February 1950, 31–32.

⁸³ *ibid* 33.

⁸⁴ Thomas Musgrave, *Self-Determination and National Minorities* (Oxford University Press 2000). 27–31.

⁸⁵ See, eg, Pallavi Raghavan 'The Finality Of Partition: Bilateral Relations Between India And Pakistan, 1947–57' (DPhil Thesis, Cambridge University, 2013) 66–67.

Raghavan points out, categories of ‘minorities’ and ‘citizens’ were threshed out through complicated bilateral negotiations.⁸⁶ It was sometimes unclear, even to delegates, which populations came within which categories.

In April 1948, an Inter-Dominion Conference between India and Pakistan in Calcutta underlined each state’s responsibility for protecting the lives and properties of the minority communities and the equal rights of all citizens.⁸⁷ Here, too, there was disagreement on what this entailed. Delegates from the Indian side were clear that the issue was only to pertain to both Bengals; Pakistani delegates, including two future Governor-Generals, were insistent that peace in Bengal could not be maintained were Muslims to be prevented from returning to their homes in UP and Gujarat.⁸⁸ Again, who the nationals were and who respective governments took responsibility for were often blurred — it was often said that the High Commissioner of India was ‘looking after the interests of Hindus in Sind as his people’⁸⁹ whereas Pakistani delegates were accused of being more concerned about fake propaganda about Indian Muslims than East Bengali Hindus!⁹⁰ In December 1948, a subsequent agreement, concluded in New Delhi, continued to underscore the importance given to the other dominion in protecting national minorities.⁹¹

There was precedent for this — the imperatives of an unstable and volatile Punjab in the winter of 1947 had meant that Indian troops took responsibility for Hindu and Sikh refugees and, correspondingly, Pakistani troops assumed responsibility for Muslim refugees.⁹² Muslim refugee camps in Delhi were perceived as only theoretically within the domain of the Government of India.⁹³ Indeed, a significant proportion of the duties of the High Commissioners of both countries, in the initial years, involved dealing with petitions and documents that the minority populations had presented to them and reports about the welfare of minorities formed an integral part of despatches sent back by High Commissioners throughout the decade after Independence.⁹⁴

Almost exactly a month after the *Constitution of India* was promulgated in December 1949, this system was placed under threat. Riots in East Bengal,

⁸⁶ Pallavi Raghavan, ‘The Making of South Asia’s Minorities: A Diplomatic History, 1947–52’ (2016) 51(21) *Economic and Political Weekly* 45, 49–50.

⁸⁷ *Inter-Dominion Conference in Calcutta: Implementation* (Archived at F8/48 Pak I., National Archives of India) (*‘Calcutta Conference’*). Copy on hand with the author.

⁸⁸ Ghulam Mohamed and Khwaja Nazimuddin, *Proceedings of the Inter-Dominion Conference held on Saturday, the 17th April 1948 at the Writer’s Building, Calcutta; Proceedings of the Conference Held on the 18th and 19th April 1948* (Archived at F8-15/48- Pak I., National Archives of India, April 1948). Copy on hand with the author.

⁸⁹ *ibid.* As Ghulam Mohammed said on the day the conference convened:

Sri Prakasa looks after the interests of Hindus in Sind. My government gives him every facility to do so. Every day many people see him. My government never stops them. Ask him if his house is not the beehive of lakhs of people? Sardar Patel calls them ‘our people’ ... I can also say ‘Musalmans are my people’

prompting a furious exchange about ‘naked Hinduism’ and ‘naked [I]slamicism’ at the conference.

⁹⁰ *ibid.*

⁹¹ *Inter-Dominion Agreement For Preventing Mass Exodus Of Minorities*, India–Pakistan, signed 14 December 1948.

⁹² Chatterji (2012) (n 26) 1059.

⁹³ Gyanendra Pandey, *Remembering Partition: Violence, Nationalism, and History In India* (Cambridge University Press 2001) 139–43.

⁹⁴ Pallavi Raghavan, *Animosity at Bay: An Alternate History of the India–Pakistan Relationship, 1947–52* (C Hurst and Co 2001) 1.

initially prompted by the arrest of suspected communists, took on a communal angle and spread across the border to produce the largest migration on the eastern frontier to date. Initially, the provincial governments of East and West Bengal tried to manage the situation.⁹⁵ Nevertheless, on the first day of the first session of the Provisional Parliament of India (constituted by almost all of the members of the Constituent Assembly after the *Constitution* was drafted), Pandit LK Maitra sought permission to move a motion on the 'ruthless persecution of the Hindu minority in East Bengal'.⁹⁶ As the situation deteriorated following rioting in Calcutta a week later, both governments started to correspond directly with each other. Nehru himself proposed a joint tour of East Bengal to Liaquat Ali Khan, as well as a 'visit in his private capacity';⁹⁷ Liaquat summarily refused both proposals.⁹⁸

By April 1950, 2,934,065 people had moved to India from East Bengal, while approximately 550,000 people had crossed from India to East Bengal.⁹⁹ This migration had not gone unnoticed. Through February and March 1950, Deputy High Commissioners in both states sent urgent missives to their governments about the fates of minorities. Strident voices, first in the press,¹⁰⁰ and then even in Parliament, called for either an exchange of populations or, more ominously, war.¹⁰¹ On the floor of the House, Nehru was compelled to state that minorities in East Pakistan, though citizens of Pakistan, 'were certainly [India's] concern to the extent they had security; if not, measures have to be devised to give them security'.¹⁰²

By now, it was clear that, unlike the alleged 'influx' from Pakistan in 1948, this migration was a 'two-way traffic', though the proportion of Hindus migrating into India was higher than Muslims migrating to Pakistan.¹⁰³ Hard economics again undergirded India's approach to the matter — *if* a complete population exchange were to take place in Bengal, West Bengal would be compelled to accept 3 million additional citizens in a truncated, already overcrowded and food-deficient province. Pakistan itself was rattled at the violence spiralling out of control and, by April 1950, Liaquat Ali Khan proved amenable to a joint effort to restore confidence to minorities of both dominions. On a visit to Delhi, he signed

⁹⁵ Indeed, a major outbreak of violence against Hindus in East Bengal happened when the West Bengal Chief Secretary was in Dhaka, outside the secretariat where he was conducting discussions, owing to a rumour that Fazlul Haque, a Premier of undivided Bengal and soon to be Premier of East Bengal, had been killed in Calcutta.

⁹⁶ India, *Parliamentary Debates*, Provisional Parliament, 1st session, 27–28.

⁹⁷ Letter from Jawaharlal Nehru to Liaquat Ali Khan, 17 February 1950, followed by an offer to privately tour East Bengal on 23 February 1950, reproduced in Bhasin (n 66) 7218–20.

⁹⁸ Letter from Liaquat Ali Khan to Jawaharlal Nehru, 1 March 1950, reproduced in Bhasin (n 66) 8237.

⁹⁹ Ministry of Rehabilitation, *Comments by Prime Minister Jawaharlal Nehru on the Note Of the Cabinet Committee on 'Displaced Persons from East Bengal'* (Archived at National Archives of India, 4 August 1950).

¹⁰⁰ A Gallup Poll conducted by the *Amrita Bazar Patrika*, a leading Bengali newspaper in West Bengal, showed that 87% of the readership was in favour of war: *Dawn* (Karachi, 12 March 1950). The Provincial Government of East Pakistan referred to this in a Press Note on 10 March 1950, calling it 'bellicose Bharati propaganda'.

¹⁰¹ Srinath Raghavan, *War And Peace in Modern India* (Palgrave Macmillan 2009) 168–70.

¹⁰² India, *Parliamentary Debates*, 17 March 1950, 1704 (Jawaharlal Nehru).

¹⁰³ *ibid.* In the course of this, Nehru, while deploring the 'libellious' allegations in the Pakistani press, admitted that he was unable to congratulate India's press on its restraint.

the *Delhi Agreement on the Rights of Minorities*, now known as the Nehru–Liaquat Pact.¹⁰⁴

Following the passing of the CAA, the Nehru–Liaquat Pact was touted as a justification for offering citizenship to minorities.¹⁰⁵ This, however, is an erroneous conclusion. On the contrary, the Nehru–Liaquat Pact was an attempt to ensure the governments took over the responsibility for their own citizens, regardless of whether they were minorities or not. Aimed at ensuring ‘complete equality of citizenship’ and the assurance of all ‘democratic rights ... without distinction’ to the populations of both dominions,¹⁰⁶ it made provision for Minority Commissions which were to submit reports to each government. The Pact did provide for ‘two ministers ... from each government’ to remain in areas affected by the violence to ‘restore confidence to minorities for as long as necessary’, but it was clear that this was a temporary provision.¹⁰⁷ For the right-wing members, both within and outside Nehru’s cabinet, the pact amounted to a betrayal. Disenchantment with India’s refusal to accept a population exchange was the immediate cause of both Shyama Prasad Mukherji and KC Neogy’s resignations (the former would go on to found the Jan Sangh, the forerunner to the Bharatiya Janata Party (‘BJP’)). Subsequently, when the Bengal situation came up for discussion three months later, it was clear that the rights of minorities in East Bengal were seen as a ‘national, not a provincial concern’ for right-wing members of the Congress as well as other parties.¹⁰⁸

At the same time, a longer and more intractable problem was festering in Assam, just north of Bengal. Under British rule, the destinies of Eastern Bengal and Assam had been considered economically and culturally intertwined. Indeed, the province of Assam, as constituted in 1874 and again in 1912, included Bengali speaking areas such as Sylhet, the most populous district of the province until 1947. Geographically, Chittagong, close to the Burmese border in Eastern Bengal, was considered the ‘natural port’ for Assam. Between 1905–11, the first Partition of Bengal had politically united Eastern Bengal and Assam, with its capital in Dacca.¹⁰⁹ Given Assam’s frontier status and low population density, it was unsurprising that East Bengal’s predominantly Muslim population had moved north from the overcrowded districts of Mymensingh and Rangpur to emptier land in the North. Equally unsurprisingly, this had pitted the indigenous Assamese population against these immigrants. The ‘line system’, which started in 1920,

¹⁰⁴ See *Agreement Between The Governments of India and Pakistan Regarding Security and Rights of Minorities*, Pakistan–India, signed 8 April 1950, INTSer 9 (‘*Dehli Pact*’). The Delhi Pact, signed between Liaquat Ali Khan and Jawaharlal Nehru in April 1950, as a response to the riots on both sides of the border in Bengal, was the last major instance when both governments committed to ‘secure equality of citizenship rights’ to provide ‘a full sense of security’ for all minorities. I do not intend to argue that these assurances were not repeated later, but joint meetings were no longer to be the fora from which these emerged.

¹⁰⁵ ‘The Nehru–Liaquat Pact and Its Connection to the CAA’, *IND Samachar*, (online, 26 December 2019) <<https://indsamachar.com/the-nehru-liaquat-pact-and-its-connection-to-the-caa/>> (‘The Nehru–Liaquat Pact’).

¹⁰⁶ *Dehli Pact* (n 104) [1].

¹⁰⁷ *ibid* [C(E)].

¹⁰⁸ For discussions around the Motion A, see ‘The Nehru–Liaquat Pact’ (n 105); regarding the Bengal situation, see India, *Parliamentary Debates*, Provisional Parliament, 7–8 August 1950.

¹⁰⁹ Iqbal Iftekhar, ‘The Space between Nation and Empire: The Making and Unmaking of Eastern Bengal and Assam Province, 1905–1911’ (2015) 74(1) *Journal of Asian Studies* 69, 69–94.

attempted to solve this problem by allowing immigrants to settle in specific parts of districts demarcated for 'new settlers'.¹¹⁰ This, however, did not halt migration.

Separate electorates and limited franchise after the passage of the *Government of India Act 1935* caused this issue to acquire communal undertones.¹¹¹ Maulana Bhasani (1880–1976), one of East Bengal's longest-serving politicians, started his career with a Bengali agitation in Assam, arguing that restrictions to immigration hindered 'land development'.¹¹² This was made worse by the musical chairs in the Government of Assam: the Muslim League and Congress alternated power through 1935–1947. The Muslim League was seen as encouraging Bengali — largely Muslim — settlers from Mymensingh and Dacca districts under the guise of the 'Grow More Food' programme; the Congress pursued an 'Assam for Assamese' policy, even being ambivalent about Bengali Hindus.¹¹³ As Partition drew closer, the Muslim League claimed Assam, despite Muslims being a minority in the province, arguing that Bengal–Assam, *as a unit*, had a bare Muslim majority.¹¹⁴ At Partition, most of Assam's largest district, Sylhet, was excised from Assam and added to East Bengal; the rest of the province stayed with India.

After 1947, the new Government of Assam, now Congress-dominated and with the Muslim League reduced to political insignificance, saw the Partition as a way to rework Bengali migration as a question of national security rather than merely a provincial concern. This necessarily required modifying the contours of the issue. No longer was the issue to be framed as an Assamese versus Bengali struggle; Assamese Members of Parliament now had to tone down their opposition to Hindu Bengali migration, which had increased after Partition, while giving a sinister overtone to Muslim migration. Muslims in border districts were increasingly seen as potential fifth columnists, with suspect loyalty and intentions. As early as the Calcutta Inter-Dominion Conference in April 1948, Gopinath Bordoloi, Assam's Premier, had confronted East Bengal's politicians with his demand that Muslim migration to Assam cease forthwith.¹¹⁵ A month later, he followed that up with a complaint to the Indian Home Minister, Sardar Patel. While the movement of Hindus was seen as 'due to fear complex ... and discriminatory treatment',¹¹⁶ the movement of Muslims could only be explained, for these legislators, in terms of Pakistani aggression. Therefore, he argued, it was

¹¹⁰ See Amalendu Guha, 'East Bengal Immigrants and Maulana Abdul Hamid Khan Bhasani in Assam Politics, 1928–47' (1976) 13(4) *The Indian Economy and Social History Review* 419, 419–42. As Amalendu Guha explains, this question had various dimensions. On the whole, Assamese Hindus were anti-settler. Assamese Muslims were ambivalent — they disliked the lumpen Bengali-speaking settlers but held out the possibility of them becoming 'Assamified'. Bengali Hindus were increasingly worried, over time, about their position as a linguistic and religious minority in the province. Bengali Muslims, almost unanimously, opposed the line system and argued for unrestricted settlement.

¹¹¹ Monoj Kumar Nath, *The Muslim Question in Assam and North-East India* (Routledge Press 2021) 37–42.

¹¹² *ibid* 38–39.

¹¹³ For a deeper history of this, see Udayon Misra, *Burden of History: Assam and the Partition — Unresolved Issues* (Oxford University Press 2017) 44–45, 47–48.

¹¹⁴ Memorandum by Sir Stafford Cripps (L/P&J/5/337) reproduced in Nicholas Mansergh (ed), *Constitutional Relations Between India and Britain: The Transfer of Power 1942–47* (Her Majesty's Stationery Office 1970) vol VII, 177. Bengal and Assam together had a Muslim majority population of 51.6%.

¹¹⁵ *Calcutta Conference* (n 87) 5.

¹¹⁶ Letter from the Premier of Assam to Home Minister Sardar Patel for Checking the Migration of Bengali Muslims reproduced in Bhasin (n 66) 7188.

imperative for *both* the province of Assam *and* the Central Government to have the power to expel ‘undesirable immigrants’.¹¹⁷

The Central Government acted swiftly, again through ordinance, on 6 January 1950.¹¹⁸ Within a fortnight of the *Constitution of India* (with its promise of secular citizenship) coming into effect, identical provisions were introduced through a Bill in Parliament. The *Undesirable Immigrants (Expulsion from Assam) Bill* (‘Undesirable’ was later removed) conferred upon the Central Government the power to expel any person or class of persons who had come into Assam and whose stay was ‘detrimental to the interests of the general public’ and allowed it to delegate this power to the Provincial Government.¹¹⁹ Again, religion was not expressly mentioned, but a proviso restricted the operation of the Act against any person who on account of disturbances or fear of disturbances had come to India. The interests of both were not identical, however. The Provincial Government was increasingly opposed to *any* Bengali migration, particularly after Sylhet was jettisoned in 1947. However, for the Central Government, East Bengali Hindus had to be protected and allowed refuge.

What comes through very strongly in the three days of debate occasioned by this Bill is the palpable fear aroused by the possibility of Muslim migration into Assam. Member after member made a clear religious distinction between disloyal persons whose stay would be detrimental to Assam’s peace and security and those who had come to India as ‘unfortunate refugees’.¹²⁰ Sardar BS Man argued that ‘any person now resident in Pakistan ... or territories now included in Pakistan had no business to come and settle here’. His next remarks made it clear, however, that this did not apply to non-Muslims from Pakistan, who were there ‘by the mere drawing of a line on the map of India’.¹²¹ T Hosain, a Muslim League member who had taken his seat in Parliament after the Partition (most Muslim League members had boycotted the Assembly before Partition; some subsequently joined it), went further in suggesting that the law was not communal, but based on nationals versus non-nationals, between Hindus in ‘fear’ of their lives and non-Indian, ‘undesirable’, potentially dangerous Muslims.¹²² The movement of Bengali Muslims into India was seen as part of a wider conspiracy against India, compared to the movement of raiders in Kashmir aimed at incorporating Assam into Pakistan to provide ‘Lebensraum’ to East Bengal.¹²³

By reworking this as a question of national security, a sizable group of parliamentarians argued for exceptional remedies. Some even went so far as to argue that harbouring Muslims who had emigrated from Pakistan was ‘treasonous

¹¹⁷ *ibid.*

¹¹⁸ Ornit Shani, *How India Became Democratic: Citizenship and the Making of the Universal Franchise* (Cambridge University Press 2018) 58.

¹¹⁹ *Immigrants (Expulsion from Assam) Bill 1950* (India) s 2.

¹²⁰ India, *Parliamentary Debates*, Provisional Parliament, 8–10 February 1950, 314 (Gopaldaswami Ayyangar).

¹²¹ *ibid* 318 (Sardar BS Man).

¹²² India, *Parliamentary Debates*, Provisional Parliament, 8 February 1950, 331–33, see especially 332. Tajamul Hussain’s interventions, first in the Constituent Assembly and then in the Provisional Parliament, seem to be a complete repudiation of the logic of the Partition and were perhaps motivated by his attempt to distance himself from the Muslim League’s erstwhile support for Pakistan. This was only partially accepted; the same page of the Debates has him being asked to ‘communicate directly with the Pakistanis’. Gopaldaswami Ayyangar, the promulgator of the Bill, said that Hussain’s speech ‘was a little more emphatic than it need have been’: *ibid* 338.

¹²³ *ibid*, the term was actually used in the Debates: India, *Parliamentary Debates*, Provisional Parliament, 10 February 1950, 438 (Thakurdas Bhargava).

activity', akin to waging war against the state.¹²⁴ Like evacuee property legislation, this was seen as an 'abnormal legislation ... applying to an abnormal set of circumstances'.¹²⁵ This called, in legislative minds, for exceptional penalties. Indeed, a sizable group suggested that those who 'harboured' these migrants — usually earlier Bengali migrants — be subject not to imprisonment, which they argued would provide 'free food and lodging' and thus be an incentive to come to India, but to forfeiture of their property.¹²⁶ It fell, finally, to the originator of the Bill to point out that doing so would violate constitutional guarantees, and with a new Supreme Court in place, such drastic measures would be liable to being struck down.¹²⁷

C *The 'Sentinel Qui Vive' or 'A Dead Letter': The Judiciary and Citizenship in the 1950s and 1960s*

How did the judiciary, often the final arbiter of questions around citizenship, negotiate these questions? I argue that religion implicitly informed the operation of judicial decisions around citizenship laws. Under the permit regulations in place on the western border, subordinate officials — of sub-inspector rank and above — were allowed to issue orders of deportation.¹²⁸ Given that permits of permanent resettlement were very sparingly issued, most persons trying to move back to India tried to get temporary permits, come to India and then apply for resettlement.¹²⁹ In some cases, persons were able to slip through; when the restoration of property was involved, however, this was much harder. After the *Constitution of India* came into force, petitioners tried to use the High Court's writ jurisdiction (art 226) to challenge the most capricious exercise of deportation procedures.¹³⁰

Nevertheless, case law on citizenship and migration through the first 20 years of India's Independence show subtle and not-so-subtle biases against Muslims. Article 7 of the *Constitution* required proof of 'intention to migrate' to support a conclusion that a person had decided to permanently give up Indian citizenship by shifting to the territory that later became Pakistan. In case after case, the petitioner's links to the Muslim League before Independence,¹³¹ or the fact that

¹²⁴ *ibid*, in response to Gopaldaswami's argument that forfeiture of property was impossible to justify.

¹²⁵ India, *Parliamentary Debates*, Provisional Parliament, 10 February 1950, 444 (JR Kapoor).

¹²⁶ Thakur Das Bhargava, from the Punjab, and RK Chaudhuri, from Assam, were the most strident advocates for this, as were Bugohain and Borooah from Assam: India, *Parliamentary Debates*, Provisional Parliament, 10 February 1950, 426–28.

¹²⁷ *ibid* 431 (Gopaldaswami Ayyangar).

¹²⁸ *Sayedah Khatoon v State of Bihar* [1951] AIR Pat 434.

¹²⁹ *ibid*. In many of the cases I will discuss here, we see that this was the technique adopted.

¹³⁰ *ibid*.

¹³¹ *Nisar Ahmed v Union of India* [1958] AIR Raj 65. Here, the petitioner claimed he had visited Karachi in July 1948 to arrange Scotch whiskey for the Maharaja of Jodhpur, but the Court relied on his links with the Muslim League before Independence to justify their finding that he intended to migrate to Pakistan.

part of their family was presently in Pakistan¹³² was used to support such a conclusion, even ignoring petitions to the High Commission pleading for permanent resettlement permits.

Gender intersected with domicile in many ways — prior to the promulgation of the *Constitution*, the domicile of women was supposed to follow that of their father or husband. The migration of fathers or husbands, therefore, would and did deprive women of their nationality even though they had not moved.¹³³ Interestingly, even a clarification issued by the Government on the citizenship of women married to Pakistanis *assumed* the woman would be Muslim — the note very clearly pointed out that Muslim marriage, unlike Hindu marriage, is a contract, not a sacrament.¹³⁴

After the introduction of the passport system between India and Pakistan in 1952, this became even more complicated. As per *Citizenship Rules* issued under the *Citizenship Act 1955*, a foreign passport was to be considered ‘conclusive proof of [a person having] voluntarily acquired the citizenship of [a foreign] country’.¹³⁵ This led to ridiculous situations — people were told to acquire a Pakistani passport by the High Commission of India in order to go back to India and apply for Indian citizenship; once there, they found that their passport raised an insuperable objection to their citizenship!¹³⁶ Through the 1950s, fears of ‘undesirable Pakistan nationals’ coming into India plagued passport and visa policies, creating the restrictive regime that still exists.¹³⁷

The Supreme Court of India was often not immune to using religion. ‘Intention to migrate’ was interpreted differently when talking of Hindus and Sikhs *via-à-vis* Muslims who showed (or were, as minors or persons of unsound mind incapable

¹³² *Habib Ahmad Rizvi v The Crown* [1950] Cri L J 817. Here, the fact that the petitioner’s mother-in-law and daughter resided in Karachi was seen as sufficient to assume he had moved to Karachi with the intention of migration even though the petitioner argued that the rest of his family (including his wife and other children) continued to reside in India and that he had only returned, in September 1948, on a temporary permit because he was informed at Karachi that a permit for resettlement would take a long time to arrange. The High Court of Bombay acknowledged various problems with the order issued by the Deputy Commissioner but claimed that, according to precedent, it had no power to interfere with orders passed by the Commissioner in its executive capacity.

¹³³ *Mst Allah Bandi v Union of India* [1954] AIR All 456. In 1957, a press note was issued by the Government of India that made the legal position on married women clear — a woman married prior to 26 January 1950 would cease to be a citizen of India if she married a Pakistani national or someone who moved to Pakistan; however, post-1950, she would continue to be an Indian citizen until she voluntarily gave up Indian citizenship (or took up a Pakistani passport): *Question Regarding Nationality of Indian Women Married to Pakistani Nationals* (Archived at 41 (97)/56-PSP, National Archives of India). Copy on hand with the author.

¹³⁴ *ibid.*

¹³⁵ *Citizenship Rules 1956* (India) sch III, r 3. The full provision is

The fact that a citizen of India has obtained on any date a passport from the Government of any other country shall be conclusive proof of his having voluntarily acquired the citizenship of that country before that date.

¹³⁶ The constitutionality of sch III, r 3 was challenged in multiple high courts in India. The Rajasthan High Court (in *Ghaurul Hasan v State of Rajasthan* [1958] AIR Raj 172) and the Madras High Court (in *Mohammed Usman v State of Madras* [1961] AIR Mad 129) held that the rule was constitutional. The Allahabad High Court, however, held that this was unconstitutional, on the grounds that merely acquiring a passport did not mean that there was an intention to give up Indian citizenship.

¹³⁷ *Overstay of Pak Nationals—Policy Regarding* (Archived at 15(48)/56 PSP, National Archives of India). The phrase is taken from a note in Jawaharlal Nehru’s own hand at the beginning of the file. Copy on hand with the author.

of showing) no definite intention to migrate.¹³⁸ In some cases, this situation reached absurd levels as persons were forced to leave under laws made to check the 'influx' from Pakistan, even if there was no record of them ever having visited Pakistan, purely on the grounds that one of their parents had a Pakistani passport!¹³⁹ Over time, Pakistan followed suit.¹⁴⁰ By the early 1960s, the question about the constitutionality of sch III, r 3 was settled by a Supreme Court decision elevating the passport to an irrefutable proof of citizenship, rather than merely a permit to travel.¹⁴¹

As both this explanation and archival exploration make clear, the Nehru–Liaquat Pact had a limited long-term effect on ending migration across the border. In the immediate aftermath, of course, people returned to their original homes and not only in Bengal. This was often not an easy process. The Government of Uttar Pradesh, for instance, had announced a scheme by which 5,000 'recent migrants' — those who had moved after January 1950 — would be allowed to return to India on a permit for resettlement. In contrast to the lackadaisical surveillance of non-Muslim migration in Bengal, the UP Government and Home Ministry were excessively strict, deporting anyone who was unable to prove when they had migrated, even on the basis of minor errors in the permit.¹⁴² Fears that such persons would 'disappear' in India and seem 'indistinguishable from the local population' suggest, at the ground level, deep discomfort at the prospect of persons returning, despite the highfaluting words of the Pact. Little importance seems to have been attached to 'intention to migrate' or even whether a person actually left. As shown by the case of *Abida Khatoon v State of Uttar Pradesh*, a rare occasion where an appeal reached the High Court, the enquiry process was often a sham. An illiterate couple that had left UP for Pakistan in March 1950 to see the wife's ailing brother, who subsequently died, was denied permission to resettle, arguing that they were 'old migrants' who had returned on a Pakistani passport. Holding that no intention could be ascertained to emigrate, the Allahabad High Court excoriated the state's 'evasive replies, assertions, vexatious and frivolous denials, and vague

¹³⁸ Though a legal enquiry as to intention to migrate is outside the scope of this paper, see *Mangal Sain v Shanno Devi* [1961] AIR SC 58, where the Court said that intention to migrate had to be interpreted with all the relevant facts taken into consideration, but see *Kulathil Mammu v State of Kerala* [1966] AIR SC 1614, where even a child who left for Pakistan was considered to have shown an 'intention' to migrate.

¹³⁹ *Izhar Ahmed Khan v Union of India* [1962] AIR SC 1052. This decision, by a five judge constitutional bench, was split 3:2. The majority held that a foreign passport would be irrefutable proof of having given up citizenship; the minority (Dasgupta and Sarkar JJ) held that this was not the case.

¹⁴⁰ For further demonstration of this see Zamindar (n 13) 145; see also *PG Bhandari v The Rehabilitation Authority, Lahore* [1961] PLD 89, where Mr Bhandari's Pakistani passport served as proof of domicile and therefore of citizenship. As it happened, Mr Bhandari moved to India in the wake of the 1965 war (in May 1969) and this led to a fascinating set of litigation: see *Rajinder Mohan Bhandari v Income Tax Officer* [1978] 111 ITR 407.

¹⁴¹ *Government of Andhra Pradesh v Syed Mohd Khan* [1962] AIR SC 1778.

¹⁴² *Return to Pakistan of Such Persons Who Have Illegally Come to India Under the Scheme for the Return of Muslim Migrants to UP* (Archived at F. 10(9)—BL/50- Part I, National Archives of India). Copy on hand with the author.

allegations'.¹⁴³ Worryingly, despite the lack of evidence, the decision to deport the petitioners had been upheld by the trial court.

Throughout the 1950s, migration continued on both sides of the border with Muslims moving to West Pakistan and Hindus moving from East Bengal to India.¹⁴⁴ At the same time, the plight of minorities in both countries continued to burden officials in both governments. High Commissioners' reports to India throughout the 1950s and early 1960s had large sections devoted to the condition of minorities, particularly in East Pakistan.¹⁴⁵ Ten years after Partition, the Deputy High Commissioner in Lahore was still running the DAV College camp for non-Muslims awaiting migration to India — the number of camp inmates actually increased in 1956.¹⁴⁶ Pakistan's first, short-lived *Constitution* declared Pakistan to be an Islamic state (albeit with protections for minorities). This further cemented the belief in India that Pakistan would not provide a fair deal for its minorities.

The High Commissioner of India made a point of mentioning that most representatives from minority parties had voted against it and that it exacerbated fears of 'fanaticism' in East Bengal.¹⁴⁷

A temporary lull in migration, following better relations between India and Pakistan between 1958–62, sparked hopes that the displacements of Partition were over but this proved illusory. In the early 1960s, the Central Government increased the deportation of Muslims living in Assam after the 1961 census, launching the Prevention from Infiltration from Pakistan scheme ('Operation PIP'). This saw the creation of the first Foreigners Tribunals in 1963, which were given the power to summarily issue 'Quit India' notices to those adjudged foreigners.¹⁴⁸ Additionally, by increasing surveillance and screening the inhabitants of all border districts in Assam, Operation PIP made the border an intrusive reality in the lives of villagers. Over 200,000 people were issued these notices.¹⁴⁹ In 1963, these numbers prompted the Government of Pakistan to complain about a 'sustained campaign of eviction of Indian Muslims from Assam and Tripura'.¹⁵⁰ India responded sharply by arguing that this was a response to uncontrolled Pakistani infiltration. A few months later, in January 1964, riots in East Bengal (themselves provoked by the theft of a hair of the prophet in Kashmir) provoked clashes in West Bengal,

¹⁴³ *Abida Khatoon v State of Uttar Pradesh* [1963] AIR Allahabad 260: the only proof that could be given of the intention to emigrate was a statement made by the husband of the petitioner who claimed that 'when leaving for Pakistan, he had cast a lingering look behind to his native country and cherished home'. On the contrary, the petitioners had left almost all their belongings in India and had made no attempt to dispose of their property; this, however, was only considered by the High Court.

¹⁴⁴ The Prime Minister was kept informed of these numbers, as a series of files in the National Archives suggests. Copy on hand with author.

¹⁴⁵ The fortnightly reports from Dacca in 1960 and 1961, for instance, have a separate section devoted to minority affairs, where they cover the condition of minorities and threats of violence, often with subheadings like '*Nightmare Haunts The Hindus*': *Reports (Other than Annual) From Dacca* (Archived at Pakistan 6(32) RBI/60 196(d), National Archives of India). Copy on hand with the author.

¹⁴⁶ *DAV College Camp, Lahore, For the Year 1957–58* (Archived at F7—57/pak-I, National Archives of India, 1957–58). Copy on hand with the author.

¹⁴⁷ *Fortnightly Reports from Karachi, April 1956* (Archived at 3(71)/56 Pak-I, National Archives of India, April 1956). Copy on hand with the author.

¹⁴⁸ Government of Assam, *White Paper on the Foreigners Issue* (Web Page, 20 October 2012) <<https://cjp.org.in/wp-content/uploads/2018/10/White-Paper-On-Foreigners-Issue-20-10-2012.pdf>>.

¹⁴⁹ *ibid* 12.

¹⁵⁰ Note from Pakistani Ministry of Foreign Affairs to the Indian High Commission in Pakistan, 8 August 1963 quoted in Bhasin (n 66) 7447–49.

Bihar and Orissa, and sabre-rattling against minorities in both states.¹⁵¹ As in 1950, an aging Nehru once more wrote a letter to Pakistan; as had happened then, Pakistan's leader, now Ayub Khan, responded urging a joint settlement. Almost 14 years to the day after the Nehru–Liaquat Pact, the Home Ministers of both India and Pakistan issued a communique reiterating its proposals in Delhi.¹⁵²

The period 1965–71 saw significant changes in these practices. In April 1965, amidst fears of renewed Muslim migration into Assam, the Government of India finally restricted migration on the eastern frontier; people could no longer cross the border without documentation.¹⁵³ A few months later, India and Pakistan were at war. Diplomatic relations ceased completely for a year. Even when restored, they were severely restricted. This, along with a severely restricted visa policy, meant less practical scope for concern for minorities on both sides of the border.

While both governments protested the draconian 'enemy property' legislation issued on both sides of the border in the wake of the war, joint negotiations, unlike in the evacuee property matter, were not attempted. By this time, Pakistan was grappling with other issues. Fault lines between East and West Pakistan, exacerbated by military rule, had made the union increasingly unsustainable. In 1970, Pakistan's first national elections since Independence, coming in the wake of a devastating cyclone in East Pakistan, saw the Awami League win 160 of 162 seats in the East and an overall majority in the Parliament of Pakistan. The military regime responded with violence and this culminated in civil war.

India's intervention in the Bangladeshi civil war, justified officially as 'humanitarian intervention', was in part prompted by national outrage at Pakistani forces disproportionately targeting East Pakistan's Hindu minority. By November 1971, over one-eighth of East Pakistan's population — and 70% of its Hindu population — had migrated to India, particularly in West Bengal and the northeast. During this war, Indian army successes in Tharparkar and in Sindh, West Pakistan's only Hindu-majority district (and incidentally, the one with the lowest Human Development Index ranking), saw about 90,000 Hindus emigrate to Rajasthan, where they were granted citizenship in 1978.¹⁵⁴

For India, Bangladesh's separation, based on Bengali, rather than Islamic, nationalism, served many functions. Not only did it 'cut Pakistan to size', but it also marked a potential solution to the unending refugee inflow into India, given that most of Pakistan's Hindus were now in Bangladesh, an avowedly 'secular' country.¹⁵⁵ Indira Gandhi's repeated insistence, at a variety of international and national forums, that those who crossed the border would have to go back, marked

¹⁵¹ Nilanjana Chatterjee, 'Interrogating Victimhood: East Bengali Refugee Narratives of Communal Violence' (Paper submitted to University of North Carolina, Chapel Hill) <<https://swadhinata.org.uk/wp-content/uploads/2017/08/chatterjeeEastBengal-Refugee.pdf?fbclid=IwAR1jsszqDLsm6x9Sq4ftMdDfulk-jwmWpYGY2LrGfYLoliQhXsaF80O-6xE>>. An interesting fictional depiction of this is provided in Amitav Ghosh, *The Shadow Lines* (Ravi Dayal Publishers 1988).

¹⁵² *Joint Communique Issued On the Conclusion of Talks Between the Home Ministers of India and Pakistan*, 11 April 1964, quoted in Bhasin (n 66) 7495–505.

¹⁵³ *Memorandum From the Home Ministry to the State Governments of Assam, West Bengal and Tripura Regarding Enforcement of Entry Requirements For Persons From East Pakistan* (Archived at 44/31/64 Pol(i), Ministry of Home, National Archives of India, 6 April 1965). Copy on hand with the author.

¹⁵⁴ See, eg, Farhana Ibrahim, 'Defining a Border: Harijan Migrants and the State in Kachchh' (2005) 40(16) *Economic and Political Weekly* 1623, 1623.

¹⁵⁵ To get a contemporaneous sense of the importance of secularism to Bangladesh's national identity, please see Kabir Choudhury, 'Secularism in Bangladesh' in *A Nation is Born* (Calcutta University Press 1974) 62–67.

a return to the Nehru–Liaquat Pact’s attempts to ‘close’ the Eastern border, albeit with a friendlier government in Dacca, rather than Islamabad. Over the 1980s, Pakistani Hindus stopped being significant in popular discourse in India. Instead, migration into India started to be seen from the perspective of illegal infiltration from Bangladesh in West Bengal and Assam.

III CONCLUSION: IS THE CAA A RETURN TO AN EARLIER PARADIGM?

If, as I have argued, the prehistory of the CAA emerges in the practices that were formulated and emerged during the period between 1947–65, what explains their re-emergence now? The resurgence of Hindutva as a political project is one part of the answer.¹⁵⁶ Savarkar’s Hindutva (a term often translated as ‘Hinduness’) was both a religious and nationalistic term and had some commonality with the Indian nationalism of the late 19th Century. In this analysis, ‘Hindu’ was both a geographical and religious term used to denote ‘all those whose religion had grown out of the sacred soil of India’.¹⁵⁷ In this formulation, religions that were specifically excluded included Islam and Christianity, proselytising religions that a ‘tolerant’ and unresisting Hinduism had subverted over the last millennium.

As Hindu majoritarianism took an explicitly political turn in the 1980s, ‘aggrandising, reifying and mythologising’ the Muslim threat to an (imagined and ahistorical) Hindu nation was imagined as integral to this process.¹⁵⁸ In Assam, agitations against Bengali Muslim migrants culminated in the Nellie massacre in 1983 and the slaughter of over 2,400 Bengali Muslims.¹⁵⁹ In response, the Central Government passed the *Illegal Migrants (Determination by Tribunals) Act 1983* which, recognising the dangers of assuming Bengali Muslims as foreigners, shifted the burden of proof onto the accuser rather than the accused, a departure from the *Foreigners Act*.¹⁶⁰ The Ram Janmabhumi movement, aimed at the destruction of a 16th Century mosque due to a belief that it was built on the birthplace of Rama, culminated in the demolition of the Babri Masjid in 1992, sparking off the worst communal riots since the 1960s.

In Pakistan, the Zia-Ul-Haq regime led to another wave of Islamisation. New laws prescribed the death sentence for blasphemy,¹⁶¹ brought in Sharia punishment for sexual offences¹⁶² and started targeting religious minorities, particularly Ahmedis and Christians, but also Hindus. Muhammad Zia-Ul-Haq’s death in 1988 resulted in a restoration of democracy but did not reverse this process. Further west, the Soviet invasion of Afghanistan and the rise of the Taliban prompted Afghanistan’s small Hindu and Sikh population to flee across the border.

¹⁵⁶ While a detailed explanation is beyond the scope of this paper, see Thomas Blom Hansen, *The Saffron Wave* (Princeton University Press 1998) 67–89.

¹⁵⁷ *ibid* 79.

¹⁵⁸ Richard Davis, ‘The Iconography of Rama’s Chariot’ in David Ludden (ed), *Contesting the Nation: Religion, Community and the Politics of Democracy in India* (University of Pennsylvania 1996) 27–54, see especially 48.

¹⁵⁹ Sumanta Sen and Jagannath Dubhashi, ‘Assam: A State Ravaged’, *India Today* (1983) 23–31.

¹⁶⁰ *Sarbananda Sonowal v Union of India* (2005) 5 SCC 665; *Illegal Migrants (Determination by Tribunals) Act 1983* (India).

¹⁶¹ *Pakistani Penal Code* (Pakistan) ss 295–295-C, 298–298-C.

¹⁶² A set of ordinances, later enacted as legislation, on offences against property, adultery and fornication, called the *Hudood* ordinance.

The BJP proved quick to capitalise on these. By 1993, its leader in the Rajya Sabha, the upper house of the Parliament of India, reasserted India's 'historical responsibility' towards non-Muslims from Pakistan, Bangladesh and Afghanistan.¹⁶³ While initially tempering its rhetoric after coming to power, religion entered India's citizenship regime expressly in the final year of AB Vajpayee's term as Prime Minister. Replacing the earlier inchoate regime of discretionary 'long-term visas', *Citizenship Rules* now allowed District Collectors in the border states of Rajasthan and Gujarat to grant Pakistani minorities Indian citizenship. This required them to (i) have been resident in India for more than five years and (ii) belong to a minority community in Pakistan.¹⁶⁴ Doing so served an important purpose — while it included Christians, with whom the Sangh had had an uneasy relationship, it also served to ring fence Muslims as the definitive 'other'. Additionally, it allowed the Government of India to exclude Ahmadis — considered Muslim in India but not so in Pakistan — and Shias, who, though subject to persecution in Pakistan, were still Muslim. Under Narendra Modi's Government in 2015, new amendments to the law changed the definition of 'illegal immigrants' to exclude Hindus, Sikhs, Parsis, Christians and Buddhists from Pakistan, Afghanistan and Bangladesh; from there to the *CAA* itself was a short step, especially after the BJP's unprecedented victory in 2019.

The Government of India has justified the *CAA* as a benevolent piece of legislation, indeed, as a quasi-refugee law.¹⁶⁵ Those who assert this note that the legislation cites 'religious persecution or fear of religious persecution' as the basis for granting citizenship. Nevertheless, examining the motives and categories created by the *CAA* makes clear that, if anything, the *CAA* is a *reversal* of the logic of refugee law. Limiting the operation of modified citizenship laws to Pakistan, Bangladesh and Afghanistan, and *religious* minorities within these two communities, speaks both to a particular conception of a historical 'Bharata' and a need to mark out its denizens through a religious prism. As I have argued, this links to two related concerns. Firstly, it speaks to a continuing preoccupation with the Partition of India as the vivisection of the homeland for all Indians.¹⁶⁶ Secondly, it marks out states with Muslim-majority populations in the subcontinent as particularly intolerant to their minorities — whether officially Islamic (Afghanistan or Pakistan) or constitutionally secular (Bangladesh). Once Partition had occurred, the argument seems to be that Muslim immigration into India needed to have additional limits placed upon it, especially from Muslim-majority countries.

How is the *CAA* likely to be received by those it benefits? If earlier amendments to the citizenship law are anything to go by, the answer is somewhat equivocal. Migrants have often argued for citizenship as providing a higher form of protection to vulnerable communities, both symbolically and in terms of its concrete

¹⁶³ Sikandar Bakht, then Vice-President of the BJP, made this statement in 1993: see Farzand Ahmad and Soutik Biswas, 'BJP Hopes to Reap Political Dividends By Communalising Bangladeshi Immigrant issue', *India Today* (15 May 1993).

¹⁶⁴ *Citizenship (Amendment) Rules 2004* (India) s 3(2)(ii) quoted in Niraja Gopal Jayal (n 12) 67–69.

¹⁶⁵ Adil Hasan Khan and Michelle Foster, 'Citizenship (Amendment) Act 2019 and International Law', (Brief, Peter McMullin Centre on Statelessness; Institute for International Law and the Humanities, 1 April 2021) 10 [27].

¹⁶⁶ While votaries of Hindutva have often spoken of an Akhand Bharat as encompassing large swathes of South East Asia, including Sri Lanka (a region that has strong geographical and cultural links with modern India), the *CAA* does not include either Rohingyas in Myanmar, which was a part of British India until 1937, or Tamils in Sri Lanka.

protections. However, Niraja Gopal Jayal suggests that migrants prefer citizenship due to the economic security it entails.¹⁶⁷ Granting citizenship to these migrants, who continue to live on the peripheries of urban and rural life, even after coming to India, provides them access to public distribution systems through Aadhar, Below Poverty Line cards and ration cards¹⁶⁸ and, dependent on their caste status, Scheduled Caste and Scheduled Tribe status.¹⁶⁹

Given precedents under the *CAA*, the actual process of granting citizenship continues to be problematic.¹⁷⁰ The *CAA* has reignited sustained Assamese–Bengali tensions and political opposition in Assam. Even in relatively underpopulated Rajasthan and Gujarat, those who have been granted Indian citizenship under the *CAA* are often at loggerheads with local residents, despite being Hindus with shared cultural and social values.¹⁷¹

Perhaps the biggest failure of the *CAA* as a quasi-refugee law is how it deals with the Rohingya crisis. The majority-Muslim Rohingya population of the Arakan region of Myanmar, with cultural links to Bengal and a language akin to Bengali, have been denied Myanmar nationality since 1982 and have been subject to increasing persecution since 2012. In 2016, a major crackdown on Rohingyas led to a mass migration into Bangladesh, Pakistan and (to a lesser extent) India, with 54,000 refugees having moved to India by September 2017.¹⁷²

Were the *CAA* neutral in religious terms, there would be no reason to deny the Rohingya the opportunity to become Indian citizens, given their historical links with India. Indeed, Burma was even part of British India until 1935. The Rohingya people currently fulfil all the criteria of a persecuted minority — indubitably more so than Afghan, Pakistani or Bangladeshi minorities, who are ostensibly citizens of these countries with equal rights. Myanmar's regime, on the other hand, continues to deny the Rohingya citizenship rights, using the same rubric of 'illegal immigration' that India has used to deny Bengali-speaking Muslim citizenship rights in the northeast.¹⁷³ Incidentally, by dating the residence requirement of the ethnic group from 1823, the Myanmar law carries *jus sanguinis* to a level unprecedented in South Asia. Additionally, the level of violence unleashed on both Hindu and Muslim Rohingyas since 2016 far exceeds the 'routine, low-grade' violence to which minorities in Pakistan and Bangladesh are subjected.¹⁷⁴ The

¹⁶⁷ Niraja Gopal Jayal (n 12) 93–96.

¹⁶⁸ Below Poverty Line Cards would entitle these refugees to obtain certain necessities of life at subsidised rates: *ibid* 94.

¹⁶⁹ The vast majority of immigrants into Rajasthan and Gujarat are tribals usually coming from either the Cholistan desert of Southern Punjab or Sindh: see Maitreya Buddha Samantaray, 'Pakistan's Disappearing Hindus', *Open Democracy* (online, 22 October 2012) <<https://www.opendemocracy.net/en/opensecurity/pakistans-disappearing-hindus/>>.

¹⁷⁰ Pranjal Baruah, 'Government Tells HC about Refugee Citizenship Nod', *Times of India* (online, 18 July 2014) <<https://timesofindia.indiatimes.com/india/Government-tells-HC-about-refugee-citizenship-nod/articleshow/38596847.cms>>.

¹⁷¹ Niraja Gopal Jayal (n 12) 96.

¹⁷² Krishna N Das, 'India in Talks With Myanmar, Bangladesh to Deport 40,000 Rohingya', *Reuters* (online, 11 August 2017) <<https://www.reuters.com/article/us-myanmar-rohingya-india-idUSKBNIAR0MH>>.

¹⁷³ NyiNyi U, 'The Case Against Rohingya Citizenship', *Myanmar Times* (online, 4 June 2018) <<https://www.mmtimes.com/opinion/9519-why-the-government-is-right-to-deny-rohingya-citizenship.html>>.

¹⁷⁴ The UNHCR Independent International Fact-Finding Report has, in its September 2018 report, demonstrated instances of a 'horrifying and ubiquitous' pattern of human rights violations through decades and laid out evidence to support prima facie claims of genocide and crimes against humanity: *Report of the Independent International Fact-Finding Mission on Myanmar*, (UNHCR Report, 12 September 2018).

CAA, however, bars them from citizenship or even refugee status. On the contrary, the Government of India, unwittingly using language similar to the *Foreigners Order 1948* which led to the permit system, has cited 'compelling' arguments of national security and the threat of an 'organised and well-orchestrated influx of illegal immigrants' based on unspecified 'reports from intelligence agencies' to commence deportations. The Supreme Court of India has acquiesced in this, claiming that there is no customary international law obligation preventing non-refoulement, in contravention of earlier decisions, and that 'they cannot comment on something happening in another country'.¹⁷⁵ Indeed, by confining the applicability of the *CAA* to Muslim-majority countries in South Asia, the *CAA* is unable to help even Hindu Rohingya refugees, despite the fact that their Myanmar identity cards give their race as Indian.¹⁷⁶

As I finish my final revisions on this article, Kabul has fallen to the Taliban. Videos from the airport show desperate Afghan citizens — largely, one imagines, Muslim — attempting to flee. Had the *CAA* not been inflected with the ghosts of India's Partition, even three quarters of a century after the event, a neutral refugee law or liberal citizenship regime could have been leveraged to support these persons.

¹⁷⁵ *Mohammad Salimullah v Union of India* (Supreme Court of India, Bobde CJI, Bopanna and Ramasubramanian JJ, 8 April 2021) 5.

¹⁷⁶ Hindu Rohingyas seem caught in a bind. Even though they are recognised as Myanmar citizens, their Rohingya identity makes them suspect in the eyes of Myanmar officials. They have a fraught relationship with Muslim Rohingyas, which necessitates them being kept under armed guard in camps in Bangladesh, often at some distance from other camps: Vidya Krishnan, 'Hindu Rohingya Refugees Also Wait For a Home', *The Hindu* (online, 1 July 2018) <<https://www.thehindu.com/news/international/hindu-rohingya-refugees-also-wait-for-a-home/article24301661.ece>>; see also Vidya Krishnan, 'These Rohingya Refugees Actually Want to Return to Myanmar: The Difference is They're Hindu', *Los Angeles Times* (online, 6 January 2019) <<https://www.latimes.com/world/la-fg-bangladesh-rohingya-hindus-20190105-story.html>>.