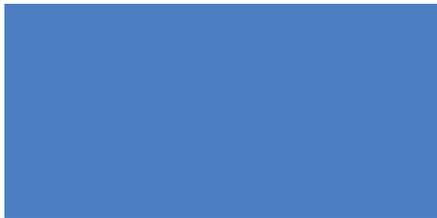




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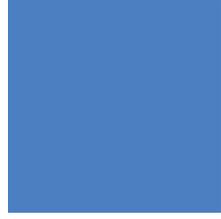
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MAY 2017

REPORT ON CITIZENSHIP LAW: SRI LANKA



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Report on Citizenship Law

Sri Lanka

Luwie Ganeshathasan and Asanga Welikala

1. Introduction

Sri Lanka's proximity to India and its central location along international trading routes has resulted in the influx of different groups of migrants to the island throughout its history. The most notable of this are the several waves of migration to the island from different parts of the Indian subcontinent. According to the most recent census data available, the Sinhalese are the largest ethnic community (74.9%) with Sri Lankan Tamils (11.2%), Sri Lankan Moors (9.29%), and Up Country Tamils (4.1%) making up the other significant ethnic groups.¹ Like the Up Country Tamils, the smaller ethnic groups consist primarily of migrants to the island during colonial rule.²

Sri Lanka's citizenship legislation has been predominantly shaped by the issue of citizenship for the Up Country Tamil community.³ This community was denied citizenship in independent Sri Lanka due to a variety of political and economic reasons, discussed below. However, given that its members constituted the largest proportion of tea and rubber plantation labour on which Sri Lanka was heavily dependant, economic imperatives precluded the Up Country Tamil community from being completely repatriated to India, and was one of the reasons the vast majority of this community were granted Sri Lankan citizenship eventually. The guarantee of basic citizenship rights of individuals belonging to other communities has never been

¹ According to the 2012 census (the first census since the end of armed hostilities), the total population of Sri Lanka is 20,359,439, of which Sinhalese are 15,250,081 (74.9%), the Sri Lankan Tamils 2,269,266 (11.2%), Sri Lankan Moors (Muslims) 1,892,638 (9.3%), and the Up Country or Indian Tamils 839,504 (4.1%): Department of Census and Statistics (2012) *Census of Population and Housing of Sri Lanka 2012* (Colombo: Government of Sri Lanka): Table A3, available at: <http://www.statistics.gov.lk/PopHouSat/CPH2011/Pages/Activities/Reports/FinalReport/Population/FinalPopulation.pdf> (last accessed 15 April 2017).

² These include Burghers: 0.2%; Malays: 0.2%; Sri Lanka Chetty and Bharatha: 0.03%.

³ The community has also been referred to as 'Tamils of Recent Indian Origin', 'Plantation Tamils', 'Estate Tamils' and more recently '*Malayaga* Tamils' in literature and official documentation. For the purposes of this paper this community will be referred to as 'Up Country Tamils'. Geographically a large part of this community is located in the central hill country in Sri Lanka, which is colloquially referred to as the 'Up Country'.

in question, although Sri Lanka has experienced protracted armed conflict in the past arising from unaccommodated claims to territorial power-sharing demanded by the Sri Lankan Tamils in the northern and eastern region of the island.⁴

This paper looks at the post-independence legislation on citizenship and how this legislation resulted in Up Country Tamils being rendered stateless. It then traces the evolution of subsequent legislative reforms that sought to grant Sri Lankan citizenship on this community and other stateless persons permanently residing in Sri Lanka. In doing so the paper also discusses the different geopolitical and domestic political considerations that impacted on that attitudinal change in the ruling elite that led to the resolution of the issue of statelessness.

The paper then outlines the existing citizenship regime, including the methods of acquiring and revoking citizenship, and discusses the limited instances in which Sri Lanka permits dual citizenship. Finally, the paper discusses two key issues relating to the present debates on citizenship, including the return of refugees from India, and the proposals being considered for a new constitution.

2. Historical Background

2.1. Pre-Independence

The island of Sri Lanka is an ancient country with the Sinhalese and the Tamils having lived there for millennia. The origin myths of both communities, however, trace their ancestry to the Indian subcontinent, and the island's long history is saturated with cultural, religious, social, economic, political and military interrelationships with the subcontinent. The island's central location at the crossroads of sea-routes in the Indian Ocean also lent itself to relations with the Greek, Roman, and Arab worlds to the west, and with Burma, Siam, and Java to the east. Arab traders who settled in the island are the ancestors of the country's third largest ethnic community today, the Sri Lankan Moors. The island's encounter with Western imperialism began with the Portuguese (1505-1658), then the Dutch (1658-1796), and lastly the British (1796-1948). It was only in 1815, however, that the British succeeded in finally extinguishing the Sinhala-Buddhist kingdom which claimed its origins in the island from 543 BCE. A Tamil kingdom in the north had succumbed to Portuguese rule in the early 17th century. Having extended British control and sovereignty over the entire island, Ceylon⁵ was then governed as a Crown Colony until 1948. A significant aspect of British rule was the development of the colonial economy around coffee, tea, rubber and coconut plantations. In addition to

⁴ Soon after independence, the Sri Lankan Tamils had first demanded federal autonomy in the areas claimed as their historic homeland in the north and east of the island. This demand was consistently rejected by Sinhala-dominated governments, and in the 1970s, this led to the creation of a militant Tamil separatist movement. Starting as a low-intensity insurgency, the armed conflict between the Sri Lankan state and the Tamil rebel groups became a full-scale war by the 1980s, and only ended in May 2009 with the comprehensive military defeat of the Liberation Tigers of Tamil Eelam (LTTE) by Sri Lankan government forces.

⁵ Sri Lanka was known as Ceylon until 1972.

administrative structures and infrastructure facilities in transport and communication, this also involved the large-scale ingress of South Indian Tamils as a plantation labour force from the mid-19th century onwards. The relative recentness of their presence in the island differentiates them for the purposes of the discussion to follow.

2.1. Independence to Republic

At the time of Sri Lanka's independence, the only status recognised by law was that of a 'British subject'. Sri Lanka's independence constitution defined a British subject to mean:

... any person who is a British subject according to the law for the time being of the United Kingdom, any person who has been naturalised under any enactment of any of Her Majesty's dominions, and any person who is a citizen or subject of any of the Indian States as defined for the purposes of the Government of India Act, 1935.⁶

The issue of citizenship, however, was one of significant political importance even prior to independence, specifically in relation to the Up Country Tamil community (Vijayapalan 2014). They were a large group of persons who were brought into Sri Lanka from parts of South India to work in the plantation sector at various times during the British colonial period (Vijayapalan 2014). This community is distinct from local 'Sri Lankan Tamils' who have a long history in Sri Lanka, as well as the Indian citizens who resided in Sri Lanka for several years engaging in professions or business activities and who enjoyed greater influence among the political establishment (Corea 1960). At the time of independence, the Up Country Tamil community consisted primarily of labourers in coffee, tea, and rubber plantations (Corea 1960), although later generations have moved onto other employment sectors. The framers of the independence constitution specifically avoided dealing with the issue of citizenship and franchise for the Up Country Tamil community (Kumarasingham 2015: 34). This issue was avoided because, on the one hand, most of the ruling elite did not want to grant citizenship to the entirety (or even a sizable section) of the Up Country Tamil community, and on the other hand, they feared that any attempt to restrict citizenship would draw opposition from the Government of India and could delay the process of gaining independence from the British (Kumarasingham 2015: 44).

Almost immediately after independence, the legislature enacted the Citizenship Act No. 18 of 1948 (the Citizenship Act), which came into operation on 15 November 1948. This legislation established 'the status of a citizen of Ceylon'. In terms of the Act, a person obtained this status either by right of descent⁷ or by virtue of registration⁸ whilst also making provision for the legislature to enact other laws authorising the grant of such status.⁹ It also made provision for the loss of the status of citizen of Ceylon. According to the Act, a person born in Sri Lanka *before* 15

⁶ Ceylon (Constitution) Order in Council 1946: s.3(1).

⁷ See Citizenship Act No.18 of 1948: ss.4-10, available at: <https://www.lawnet.gov.lk/1949/12/31/citizenship/> (last accessed 15 April 2017).

⁸ See *ibid*: ss.11-13.

⁹ *Ibid*: s.2.

November 1948 would be considered a citizen by descent only if such person's father was born in Sri Lanka, and if the father was not born in Sri Lanka, if that person's paternal grandfather and paternal great grandfather were both born in Sri Lanka. A person born outside Sri Lanka before 15 November 1948 would also be considered a citizen, if their paternal ancestors were born in Sri Lanka.¹⁰ A person born after 15 November 1948 would be considered a citizen only if at the time of such person's birth their father was a citizen of Sri Lanka.

The Citizenship Act provided the Minister the power to issue a 'certificate of citizenship of Ceylon by descent' to a person if there was a doubt with respect to that person's status as a citizen of Ceylon by descent.¹¹ However, in terms of the regulations that were issued under the Act, such an application had to be supported by documentary evidence and by three persons who were also citizens by descent (Vijayapalan 2014: 44). Furthermore, despite the Act also providing for the status of citizenship by registration,¹² the exacting qualifications and the high costs made it almost impossible for Up Country Tamils to register (Vijayapalan 2014: 45).

On the face of it, the provisions of the Act do not seem to discriminate against any particular community. However, due to the manner in which the Act was implemented, the community's relatively short history in Sri Lanka and poor socioeconomic conditions, it impacted the Up Country Tamil community more adversely than any other. In fact, by its implementation the Act seemed to be contrived specifically to deny citizenship to Up Country Tamils.

The seeming neutrality of the text of the law helped protect it from constitutional challenges, despite the discriminatory impact of its implementation.¹³ The question of the constitutionality of the Citizenship Act together with the Ceylon Parliamentary Elections (Amendment) Act No. 48 of 1949 came up first before the Supreme Court of Sri Lanka,¹⁴ and subsequently before the Privy Council¹⁵ on appeal from the Supreme Court. The argument on behalf of those challenging the legislation was that the practical effect of the legislation was to discriminate against the Up Country Tamil community in particular, and hence that the legislation violated the provisions of section 29 (2) of the independence constitution (Edrisinha 2008:15).¹⁶ They further argued against a literal interpretation of the Act, and urged the court to examine the political context of the enactment of the Citizenship Act in the light of the anti-discrimination purpose of section 29 (2) of the constitution (Edrisinha 2008:15). Vijayapalan has engaged in a detailed discussion of the decisions of both

¹⁰ See *ibid*: s.4(2), which provides that such person would be a citizen if either his father and paternal grandfather were born in Sri Lanka, or his paternal grandfather and paternal great grandfather were born in Sri Lanka.

¹¹ *Ibid*: s.6.

¹² *Ibid*.

¹³ The independence constitution allowed for judicial review of legislation. However, both the first and second republican constitutions expressly prohibits this.

¹⁴ *Mudanayake v. Sivagnanasunderam* (1951) 53 NLR 25.

¹⁵ *Kodakanpillai v. Mudanayake* (1953) 54 NLR 433.

¹⁶ Ceylon (Constitution) Order in Council: s.29(2) provided for restrictions on the exercise of legislative powers by Parliament. Subsection (c) thereof specifically precluded the legislature from enacting a law that would 'confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions'. According to s.29(3) 'any law made in contravention of section 29 (2) would be void to the extent of such contravention'.

the Supreme Court and the Privy Council and demonstrated the limitations of these decisions (2014: 45). In varying degrees, however, both the Supreme Court and the Privy Council adopted a narrow and technical approach that resulted in the constitutionality of this legislation being upheld by both courts. The approach of the courts and its impact on minority protection has been criticised by Edrisinha:

The Sri Lankan Supreme Court and the Privy Council adopted a superficial and unrealistic approach in the citizenship case, where there was a definite plan to alter the balance of representation in Parliament. That these decisions influenced subsequent Sri Lankan political developments is clear from the fact that there was a substantial shift of political power to the detriment of minority interests. (Edrisinha 2008:16)

The Citizenship Act recognises that Parliament can by any other law authorise the grant of the status of citizen by registration in any special case of a specified description.¹⁷ The Indian and Pakistani Residents Citizenship Act No. 3 of 1949 was the first of such laws and would apply to an individual whose origin was in any territory which formed part of British India or any Indian State immediately prior to the passing of the UK's Indian Independence Act 1947. It provided an avenue for such person or their descendants who had uninterrupted residence in Sri Lanka immediately prior to 1 January 1946 for a specified period of time,¹⁸ and had uninterrupted residence from that day to the date of the application, to apply for registration as a citizen.¹⁹ Registration as a citizen was conditional on that individual being able to satisfy the Commissioners that he had a lawful means of livelihood.²⁰

The grant of citizenship in terms of this Act was predicated on continued residence, as opposed to the Citizenship Act, which was based on the birth of paternal ancestors, and as such seemingly provided an avenue for Up Country Tamils to register as citizens. However, applications for citizenship needed to be submitted within a period of two years from 5 August 1949.²¹ This was an extremely short period of time considering the remoteness of the areas inhabited by the community, their lack of access to government officials, and desperate economic conditions. Further complicating this process was the boycott of the Act called for by the main organisation representing the Up Country Tamil community, the Ceylon Indian Congress (CIC), on the basis that the citizenship laws were unjust (Devaraj 2012).²² The process of submitting applications, which was prescribed by regulations, was also extremely technical and complicated, with multiple application forms for different categories with subtle distinctions and a technical process of attestation (Vijayapalan 2014: 64). Further complicating issues was that the application forms were in English, which meant that a vast majority of Up Country Tamils could not complete the forms without assistance.

¹⁷ See Citizenship Act No.18 of 1948: s.2(2)(b).

¹⁸ In the case of an unmarried person or a divorcee for a period of ten years, or in case of a married person seven years.

¹⁹ See Indian and Pakistani Residents (Citizenship) Act No.3 of 1949: s.3.

²⁰ See *ibid*: s.6(2)(i).

²¹ See *ibid*: s.5.

²² The CIC changed its decision on the boycott in May 1950 ostensibly based on pressure by the government of India: see Devaraj (2012).

Despite this, approximately 237,000 applications covering nearly 824,000 persons were submitted, although due to constraints mentioned above most applications were incomplete (Devaraj 2012). The procedure to inquire into the applications and process them was also complicated and carried out in a manner that was intended to reject applications (Devaraj 2012). The Indian and Pakistani Residents Citizenship Act 1949 allowed the Commissioner for the Registration of Indian and Pakistani Residents to reject applications if a prima facie case for registration was not established. However, the Commissioner had to provide reasons for the rejection and allow the applicant to show cause as to why the application should not be rejected.²³ Thereafter the Commissioner or Deputy Commissioner would conduct an inquiry based on the reasons stated by the applicant as to why the application should not be rejected. Whilst the inquiring officer had the powers of a court in terms of summoning witnesses and recording evidence, the Act did not envisage an adherence to the strict standards of the evidence law.²⁴

In practice, almost all applications were rejected on technical and often insubstantial grounds (Devaraj 2012). In several cases decided by the Supreme Court, the court made adverse findings with regard to the attitude of the Commissioners in implementing the Act (Vijayapalan 2014: 70). The Supreme Court in several cases stated that the Commissioners were not conducting inquiries in accordance with the principles of natural justice, were applying unacceptable standards of proof, and were intentionally attempting to elicit evidence to reject applications.²⁵ Despite the Court's findings and rebuke of their conduct in several cases, the Commissioners continued to apply the provisions of the law in an unfair manner (Vijayapalan 2014: 80). A majority of applicants who were daily wage earners could not afford to appeal against decisions due to significant costs involved with the process. The results of this long drawn out process were not promising for the Up Country Tamil Community:

... by the end of the period of making applications ... 237,034 applications, which included 824,430 persons, had been made. The processing of the applications continued until the early 1960s, and by November 1964 only around 140,185 persons had been admitted to Ceylon citizenship (134, 188 under the Indian and Pakistani Residents (Citizenship) Act and 5,997 under the Citizenship Act). The vast majority of the applications were rejected. (Vijayapalan 2014: 69)

This low acceptance rate and the unfair and often contorted reasoning for the rejection of applications gives further credence to the idea that the governments of the day intentionally engineered the process and gave instructions to officers to reduce the number of successful applicants (Devaraj 2012, Corea 1960).

²³ Indian and Pakistani Residents (Citizenship) Act No.3 of 1949: s.10.

²⁴ Ibid: s.15.

²⁵ *Soosey Fernando v. Commissioner for Registration of Indian and Pakistani Residents* (1955) 57 NLR 67; *Duraisamy v. Commissioner for Registration of Indian and Pakistani Residents* (1955) 56 NLR 313; *Karuppan Muniandy v. Commissioner for Registration of Indian and Pakistani Residents* (1958) 60 NLR 404; *Abdul Cader v. Commissioner for Registration of Indian and Pakistani Residents* (1955) 56 NLR 572; *Addaickalam v. Commissioner for Registration of Indian and Pakistani Residents* (1956) 58 NLR 234.

This denial of citizenship to Up Country Tamils was the culmination of several efforts to restrict the voting rights of this community from the time the country was granted universal adult suffrage in 1931 (Devaraj 2012). Even the more moderate Sri Lankan political leaders were wary of the electoral power of the Up Country Tamil community (Kumarasingham 2015: 42). Their concerns were two-fold: first, the Sinhala leadership was worried that the Up Country Tamil community would dilute the representation of the Kandyan Sinhalese. There was a large number of Up Country Tamils living in the central highlands where the tea plantations are mostly located, which prior to British colonial rule formed part of the last Sinhala kingdom of Kandy. The Sinhalese in these Kandyan areas would be rendered a minority were all of the Up Country Tamils to be given the franchise. Secondly, the ideological leanings of the Up Country Tamil community towards leftist parties were in conflict with that of the conservative elite in government (Devaraj 2012, Corea 1960, Kanapathipillai 2009). In the election in 1947 just prior to independence, the Up Country Tamil community voted almost exclusively for political parties subscribing to communist ideologies (Kumarasingham 2015: 42).

These electoral considerations thus resulted in measures to restrict the number of Up Country Tamil people who were registering as voters, primarily through restrictions based on Citizenship (Devaraj 2012, Corea 1960). Immediately after the Citizenship Act 1948 was enacted, the Election Ordinance was amended to specify that only a citizen could be eligible to be a voter.²⁶ An analysis of the registered voters in the constituencies where the Up Country Tamil voters were significantly concentrated indicates that the objective of reducing the number of registered voters in the Up Country Tamil community was successfully achieved. Where a total of 162,212 Up Country Tamil voters were registered to vote in these electorates in 1947, only 73,740 were registered after the revision of the electoral register in 1950, and only 3,191 were registered to vote after the revision in 1951 (Vijayapalan 2014: 99).

India and Sri Lanka engaged in a number of rounds of negotiations in order to deal with the citizenship of the Up Country Tamil community living in Sri Lanka (Kanapathipillai 2009). The negotiations and the implementation of the different agreements were not ‘as smooth as would be expected from cordiality of the bilateral relationship in other aspects’ (Kodikara 1978). One of the early initiatives was the Bajpai-Senanayake Discussions²⁷ during the 1940s, but the intervention of World War II and other political factors²⁸ meant that there was no finality in the discussions (Kodikara 1978). Both the Kotelawala and Nehru talks²⁹ of 1954 and the Sirima-Shastri Pact in 1964 (also referred to as the Indo-Ceylon Agreement of 1964)³⁰, were

²⁶ The Ceylon (Parliamentary Elections) Amendment Act No.48 of 1949 amended s.4 of the Ceylon (Parliamentary Elections) Order in Council 1946, to add citizenship as a qualification to be an elector.

²⁷ Discussion in Sri Lanka in the early 1940’s led by Sir Girja Shankar Bajpai a senior Indian Civil Servant during the British colonial era and after independence and by D.S. Senanayake a leading local politician at the time and independent Sri Lanka’s first Prime Minister.

²⁸ It was unclear as to whether there was wide support for this Agreement in Sri Lanka and in 1943 the Government of India informed the Governor of Ceylon that the Board of Ministers of Ceylon should not assume that the Bajpai-Senanayake Agreement was acceptable to the Government of India (Kumarasingham 2015: 44).

²⁹ Discussions between Sri Lankan Prime Minister Sir John Kotelawala and Indian Prime Minister Jawaharlal Nehru in January 1954.

³⁰ The agreement reached after talks between Sri Lankan Prime Minister Sirimavo R.D. Bandaranaike and Indian Prime Minister Lal Bahadur Shastri in October 1960.

based on ‘numerical formulas’ and have been described as ‘numbers games’ with little regard to the individuals concerned (Kanapathipillai 2009). The agreements called for the repatriation of several thousand Up Country Tamils back to India, despite most of them not wanting to do so (Devaraj 2012, Kanapathipillai 2009).

In 1967, the Indo-Ceylon Agreement (Implementation) Act was enacted in order to implement the Indo-Ceylon Agreement of 1964.³¹ Unlike previous legislation, the Act does not prescribe qualifications relating to birth, ancestry, or long residence for the grant of citizenship (Vijayapalan 2014). Any person to whom the Indo-Ceylon Agreement of 1964 applied could make an application to be granted the status of a citizen of Sri Lanka by registration.³² The Act superseded contrary provisions in any other law relating to the grant of the status of a citizen of Sri Lanka.³³ However, it did not preclude a person covered under the Indo-Ceylon Agreement of 1964 from applying for citizenship using the provisions of any other law.³⁴

There was disagreement between India and Sri Lanka with regard to how agreement would operate (Vijayapalan 2014: 125), which resulted in differences between the terms of the 1964 Agreement and the 1967 Act, and the slow implementation of the agreement (Vijayapalan 2014: 126).³⁵ Economic downturn slowed the process of repatriation, and many remained in limbo, even after the Sirimavo-Gandhi Agreement in 1974³⁶ that was intended to grant Indian citizenship to some and repatriate the rest of the Up Country Tamil community to India. The striking feature of the various discussions between Sri Lanka and India as noted however was that they were based on the number of persons to whom each country should grant citizenship, with little regard to the wishes of the affected community (Sabaratnam 1990).

2.3. The Republican Era

Section 67 of the first republican constitution of 1972 preserved the Citizenship Act 1948. This constitution provided the national legislature with seemingly unlimited legislative power, but it did however include a proviso, which restricted the ‘supreme power’ of the National State Assembly by removing from it the power to deprive a citizen by descent of the status of citizen of Sri Lanka.³⁷

³¹ Indo-Ceylon Agreement (Implementation) Act No.14 of 1967.

³² Indo-Ceylon Agreement (Implementation) Act No.14 of 1967: s.7(2).

³³ Ibid: s.6.

³⁴ Ibid: s.2.

³⁵ The main disagreement arose as to whether Sri Lankan citizenship would be granted to 4 persons upon 7 persons being granted Indian citizenship, or on 7 persons being repatriated to India. The disagreement was mostly due to the change of government in 1965 between the Agreement in 1964 and the enactment of the Act in 1967.

³⁶ The agreement reached after talks between Sri Lankan Prime Minister Sirimavo R.D. Bandaranaike and Indian Prime Minister Indira Gandhi in January 1974.

³⁷ The Constitution of the Republic of Sri Lanka 1972: s.67 states, ‘Unless the National State Assembly otherwise provides, such laws relating to citizenship and to rights of citizens as were in force immediately before the commencement of the Constitution shall, mutatis mutandis, continue in force:

A significant development occurred in 1978, when the second republican constitution recognised the singular status of a ‘citizen of Sri Lanka’ by removing the distinction between descent and registration. Thus, every person who prior to the commencement of the constitution was a citizen of Sri Lanka in terms of any law relating to citizenship, whether by descent or by virtue of registration, was entitled to the status of a citizen of Sri Lanka.³⁸ This was a clear departure from the Citizenship Act 1948 and subsequent laws relating to the grant of citizenship through registration. However, despite this constitutional recognition all legislation passed prior to 1978 would continue to be valid.³⁹ Therefore the different legal statuses created by the Citizenship Act 1948 and subsequent laws remained valid and remained the mechanism that regulated the grant of citizenship.

The second republican constitution also included a justiciable bill of fundamental rights. Certain rights were granted to all persons⁴⁰ but other rights were only granted to citizens.⁴¹ However, the constitution did make an exception in the case of persons who were not citizens of any other country and were permanently and legally resident in Sri Lanka immediately prior to the commencement of the constitution. These individuals were entitled to the fundamental rights, which were otherwise guaranteed only to citizens. However this entitlement was only operative ‘for a period of ten years from the commencement of the constitution’.⁴² This provision was intended to protect the interest of the stateless persons residing in Sri Lanka for ten years (Vijayapalan 2014), during which time presumably it was intended that a permanent solution could be found to the citizenship issue.

The Grant of Citizenship to Stateless Persons Act No. 5 of 1986 (GCA 1986) is recognised as an important attempt to address the problem of statelessness in Sri Lanka. The Act was a result of a ‘prayer campaign’ cum industrial action across the plantation sector which was backed by the Ceylon Workers Congress (CWC) in January 1986. At this time, the CWC, which acted as both the dominant trade union and political party representing the Up Country Tamil community, was part of the government and its President a Cabinet Minister (Sabaratnam 1990). The Act was to grant the status of Sri Lankan citizen to 469,000 persons. This included persons who were to be granted Sri Lankan citizenship in terms of the Indo-Sri Lanka Agreements of 1964 and 1974 and their descendants and persons to whom Indian citizenship was to be granted in terms of the 1964 and 1974 agreements, but did not apply for such citizenship.⁴³

Provided that no law of the National State Assembly shall deprive a citizen by descent of the status of citizen of Sri Lanka.’ (Emphasis added).

³⁸ The Constitution of the Democratic Socialist Republic of Sri Lanka 1978: Art.26.

³⁹ Ibid: Art.16(1) provides that, ‘All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter.’

⁴⁰ The constitution guarantees to all *persons* the freedom of thought, conscience and religion; freedom from torture; the equal protection of the law; freedom from arbitrary arrest, detention and punishment; and prohibits retrospective penal legislation.

⁴¹ See rights in Arts.14(1) and 14A which are only available to *citizens*. These include inter alia the freedom of speech, assembly, association, occupation, movement, and the right to access information.

⁴² Art.14(2).

⁴³ Grant of Citizenship to Stateless Persons Act No.5 of 1986: ss.2 and 4. See also Vijayapalan (2014):161.

The Act also stated that if there were any persons of Indian origin, who were lawfully resident in Sri Lanka and continue to be stateless even after persons⁴⁴ were granted Indian citizenship in terms of the Indo-Sri Lanka Agreements of 1964 and 1974, and the 469,000 persons referred to in section 2 of GCA 1986 were granted Sri Lankan citizenship, such remaining persons would also be granted Sri Lankan citizenship. However, in practice the implementation of the Act was fraught with difficulties and the cumbersome registration requirements were particularly hard for a group of persons who lacked basic documentation such as birth certificates (Wolozin 2014).

In 1988, on the cusp of a presidential and parliamentary election, Parliament passed the Grant of Citizenship to Stateless Persons (Special Provisions) Act (GCA 1988), which was intended to grant Sri Lankan citizenship to all Up Country Tamils who had not applied for Indian citizenship under previous Agreements. According to GCA 1988, every person who is of Indian origin and is lawfully resident in Sri Lanka and is stateless and is not within the 506,000 persons referred to in the GCA 1986, who had applied to the Indian High Commission for the Grant of Indian Citizenship, and the children born to them after 30 October 1964, is considered a citizen of Sri Lanka.⁴⁵

The Act was a departure from the past as it did not require a certificate of citizenship and allowed for an affidavit to be sufficient to establish that a person was a citizen in terms of the Act.⁴⁶ However, an individual falling within the Act could if they so wished apply for a certificate of citizenship. The passage of the Act so close to elections was the result of an important political calculation by the political party in government, which relied on the support of the political representatives of the Up Country Tamil community at elections (Sabaratnam 1990). The legislation in the 1980s was made possible also because of growing consensus among the Sinhala community in general and the leadership of the Buddhist monks in particular that the issue of Up Country Tamils' statelessness had to be resolved in order to eliminate any pretence the government of India would have to intervene in the conflict between the government of Sri Lanka and (Sri Lankan) Tamil rebels in the north and east of the island (Sabaratnam 1990).

However, of the 506,000 mentioned above, 84,000 persons had not been granted Indian citizenship and were also not covered by GCA 1988, and as such these individuals continued to be stateless (Vijayapalan 2014:167). These persons and their natural increase continued to reside in Sri Lanka up until the beginning of the 21st century. Then the Grant of Citizenship to Persons of Indian Origin Act was enacted in 2003 and was indicative of the change in Sri Lanka's approach to statelessness. With support from the United Nations High Commissioner for Refugees (UNHCR), the

⁴⁴ According to the terms of the Sirima-Shastri Pact of 1964 and the Sirimavo-Gandhi Agreement of 1974, India was to grant citizenship and repatriate to India 600,000 Up Country Tamils living in Sri Lanka. However as set out in the preamble of GCA 1986 only 506,000 of the 600,000 persons applied to the Indian High Commission in Sri Lanka for Indian citizenship. The remaining 94,000 persons applied for Sri Lanka citizenship. The preamble of GCA 1986 further stated that the Government of India had given an under taking to complete the granting of Indian citizenship to these 506,000 persons, within six to eight months of the date of enactment of that Act.

⁴⁵ See Grant of Citizenship to Stateless Persons (Special Provisions) Act No.39 of 1988: s.2.

⁴⁶ Ibid.

Ceylon Worker's Congress (CWC) and other political parties pushed for the grant of citizenship to all those who had not been able to apply under the previous Acts. This particular effort is considered significant because it framed the issue of Up Country Tamils statelessness as a human rights issue, rather than simply an interstate or political issue as it had been previously (Wolozin 2014). The Grant of Citizenship to Persons of Indian Origin Act No. 35 of 2003 passed with unanimous support in the Sri Lankan Parliament (Sivapragasam 2009).

The 2003 Act granted citizenship to any person of Indian origin who has either been a permanent resident of Sri Lanka since 1964 or is a descendant of such a resident. The Act stipulated that if such a resident already held an Indian passport or other document, he or she must declare to the Commissioner their desire to voluntarily acquire citizenship to Sri Lanka. It allowed all eligible persons to apply to the Commissioner for a certificate of citizenship, and stated that a certificate should be granted within 60 days.

As noted by Sivapragasam (2009:71), 'the innovation of this legislation lies in its simplified procedure whereby, rather than applying to state authorities for citizenship, individuals could obtain a general declaration, which was to be countersigned by a justice of peace and serve as proof'. The Act was well received internationally. UNHCR called it a 'turning point in addressing the long standing problem of birth registration and citizenship'. As a result of this, Sri Lanka was hailed as a global example for resolving statelessness. As Philippe Leclerc, UNHCR's Senior Legal Officer for Statelessness, observed:

We are extremely pleased that Sri Lanka has managed to resolve the nightmare situation into which so many of its inhabitants were locked ... It has taken a really concerted effort by the government and by committed individuals and groups such as the Ceylon Workers' Congress to bring this about ... Hopefully other states with big groups of stateless people will look at the example provided by Sri Lanka.⁴⁷

Despite its successes, the law still left some gaps in the legal framework of citizenship. Vijayapalan notes that the Act did not provide for appeals to courts from decisions of the Commissioner, nor did it provide any recourse if the Commissioner failed to issue a certificate in sixty days (2014:179). However, this critique discounts the availability of general administrative law procedures and the application of the fundamental rights jurisdiction of the Supreme Court in obtaining remedies for breaches of the Act. The most significant shortfall of the 2003 Act is that it required proof of permanent residency since 30 October 1964 by the applicant or the applicant's predecessor. Thus, the law failed to provide citizenship to the Up Country Tamils who left the country from the early 1980s due to the armed conflict and were mostly living in refugee camps in South India (Sivapragasam 2009: 72).

The Grant of Citizenship to Persons of Indian Origin (Amendment) Act No. 6 of 2009 was enacted to fill this lacuna. Nearing the end of the protracted armed conflict in the north, the government of Sri Lanka identified that there was a large population of stateless persons who were ineligible to apply under the 2003 Act

⁴⁷ C.P. Wijetunga, 'Sri Lanka makes Citizens out of Stateless Tea Pickers', *UNHCR website Feature Article*, 7 October 2004, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&skip=864&docid=416564cd4&query=india> (last accessed 17 April 2017).

because they had fled the country, largely to South India during the conflict (see below).

The 2009 Act provides citizenship to any person who was ‘compelled to leave Sri Lanka’ and therefore ‘took up residence in India.’ Eligibility would be determined based on proof that the person had been a resident of Sri Lanka beginning in 1964 or was a descendent of such a person. Like the 2003 Act, if such a person already held an Indian passport or other document, he or she must declare on a special form their desire to voluntarily acquire Sri Lankan citizenship. However, it allowed all eligible persons to apply to the Commissioner for a certificate of citizenship only when they arrived in Sri Lanka with the intention of permanently residing here.

In 2008, the government of Sri Lanka also enacted the Grant of Citizenship to Persons of Chinese Origin Act. This intended to grant citizenship to the small number of persons of Chinese origin, living in Sri Lanka and who were stateless. The Act would apply to any person of Chinese origin, who has been a permanent resident of Sri Lanka since 15 November 1948 – the date on which the Citizenship Act 1948 came into operation – or a descendant of such a person who is presently a resident in Sri Lanka.⁴⁸ The Act requires any person who is eligible in terms of section 2 to make an application to be registered as a citizen of Sri Lanka⁴⁹ within a period of five years from 31 October 2008, the date on which the Act was certified.⁵⁰ A person who registers in terms of this Act will be entitled to all the rights and privileges of a citizen of Sri Lanka as recognised by law.⁵¹

3. Current Citizenship Regime

The second republican constitution, which has been in operation since 1978, recognises a single status of citizenship known as ‘the status of a citizen of Sri Lanka’.⁵² The subjects of citizenship, naturalisation, immigration and emigration are vested exclusively with Parliament and are not devolved to Provincial Councils.⁵³ The primary source regarding the law of citizenship continues to be the Citizenship Act 1948, which has been amended on several occasions. Furthermore, as seen above and as provided for in the 1948 Act, the legislature from time to time has passed legislation authorising the grant of the status of citizen by registration in special cases.

⁴⁸ Grant of Citizenship to Persons of Chinese Origin Act No.38 of 2008: s.2.

⁴⁹ Ibid: ss.4 -6.

⁵⁰ Ibid: s.5.

⁵¹ Ibid: s.3.

⁵² 1978 Constitution: Art.26.

⁵³ See *ibid*: List II of the Ninth Schedule.

Despite the constitution providing that provisions of all existing written laws⁵⁴ relating to citizenship should be read subject to the provisions of the constitution, no attempt was made until 2003 to reform the Citizenship Act 1948 which recognised two different statuses of citizenship and thus inconsistent with the constitution's recognition of a singular status. Amending the 1948 Act was important because Sri Lanka does not provide for judicial review of legislation, hence the provisions of that act which established substantive differences between citizenship by descent and citizenship by registration continued to be valid law regardless of the provisions of the constitution.⁵⁵

The Citizenship (Amendment) Act 2003 repealed the provisions of the Citizenship Act 1948 which established the distinction between citizenship by descent and citizenship by registration.⁵⁶ The Citizenship Act 1948 required the children born outside of Sri Lanka⁵⁷ to citizens by registration to make a declaration to the Minister prior to their 22nd birthday in order to be able to continue their citizenship by descent.⁵⁸ This section which discriminated against the descendants of citizens by registration was also repealed by the Citizenship (Amendment) Act 2003.⁵⁹ Furthermore this Act repealed⁶⁰ provisions of the Citizenship Act 1948 which placed additional restrictions for citizens by registration, provided for the loss of citizenship if he or she resides outside Sri Lanka for five consecutive years,⁶¹ or in specified circumstances,⁶² by a declaration issued by the Minister.

A person can acquire Sri Lankan citizenship by right of descent or by virtue of being registered. Citizenship by descent is based on either parent being a citizen of Sri Lanka at the time of the person's birth, with an additional requirement for registration if the person was born outside Sri Lanka.⁶³ Citizenship by virtue of registration is provided for in the Act,⁶⁴ primarily for persons who have a connection to Sri Lanka through their parents⁶⁵ or spouse.⁶⁶ However, even if such person meets the

⁵⁴ 1978 Constitution: Art.170 defines 'written law' as any Act of Parliament and subordinate legislation including Statutes made by a Provincial Council, Orders, Proclamations, Rules, By-laws and Regulations made or issued by anybody or person having power or authority under any law to make or issue the same.

⁵⁵ Ibid: Art.80(3).

⁵⁶ Citizenship (Amendment) Act No.16 of 2003: s.2.

⁵⁷ Citizenship Act 1948: s.5(2).

⁵⁸ Ibid: s.20(3).

⁵⁹ Citizenship (Amendment) Act No.16 of 2003: s.9.

⁶⁰ Ibid: ss.10 and 11.

⁶¹ Citizenship Act 1948: s.23.

⁶² Ibid: s.24.

⁶³ Ibid: s.5 as amended by s.3 of the Citizenship (Amendment) Act No 16 of 2003. As discussed above, prior to the amendment in 2003, the Citizenship Act 1948 recognised citizenship by descent based only on paternal ancestry. A new mechanism was introduced by s.4 of the 2003 amendment Act to provide for situations where a person's mother was the only parent with Sri Lankan citizenship between 15 November 1948 and the commencement of the 2003 Act.

⁶⁴ The provisions concerning the citizenship by registration for specific classes of persons have been discussed above.

⁶⁵ Citizenship Act 1948: s.11.

⁶⁶ Ibid: s.12.

qualifications set out in the Act, the Minister has the right to refuse their application on grounds of public policy or public interest as the case may be.

The Act also allows for the grant of citizenship by registration to a limited category of persons who have rendered distinguished public service or who are eminent in professional, commercial, industrial, or agricultural life, and intend to continue to be ordinarily resident in Sri Lanka.⁶⁷ Additionally a limited category of persons⁶⁸ who have obtained a visa valid for a period of five years and have been registered in a 'Resident Guest Scheme' approved by the government for foreign investors and professionals can also be registered as citizens.⁶⁹ In order to be able to qualify for this programme the applicant should satisfy the Minister that he or she has made a substantial contribution to the economic development of Sri Lanka or that they have made a significant contribution to the social and cultural life of the country in a specified field⁷⁰ and intends to continue to be ordinarily resident in Sri Lanka. Thus, naturalisation of foreign nationals is allowed in only very limited situations where such persons have a link to Sri Lanka either through their parents or spouse or in situations where such persons have made a significant contribution to the country. The number of persons permitted from the latter category is regulated by statute.

No person can be required to produce a citizenship certificate for any purpose to prove their citizenship; an affidavit stating that person is a citizen should be accepted as prima facie evidence of that fact.⁷¹ This provision has been particularly useful for Up Country Tamils in order to assert their rights and access government services. Furthermore, an infant of unknown and unascertainable parentage is deemed to have the status of a citizen of Sri Lanka by descent, until the contrary is proved.⁷²

A citizen can lose their citizenship by express renunciation,⁷³ or if a Sri Lankan citizen becomes a citizen of another country by operation of law – of that other country – and fails to renounce the citizenship of that country within the prescribed period of time,⁷⁴ or voluntarily becomes a citizen of another country.⁷⁵ These methods defined in the citizenship law are the only situations in which a Sri Lanka citizen can lose their citizenship.⁷⁶ As a general rule no person can be granted or continue their Sri Lankan citizenship if such person is a citizen of any other country.⁷⁷

However, the legislation provides for two exceptions to this general rule. Firstly, in the case of a person who has lost their Sri Lankan citizenship due to

⁶⁷ Ibid: s.13.

⁶⁸ See *ibid*: s.13A(2): the number of persons registered category cannot exceed 200 in any one year and 1000 in the aggregate.

⁶⁹ *Ibid*: s.13A as amended by Citizenship (Amendment) Act No.43 of 1993: s.2.

⁷⁰ These include science, education, medicine, archaeology, music, literature, agriculture or entertainment.

⁷¹ Citizenship Act 1948: s.6A as amended by Citizenship (Amendment) Act No.16 of 2003: s.5.

⁷² Citizenship Act 1948: s.7.

⁷³ *Ibid*: s.19(1).

⁷⁴ *Ibid*: ss.20(2) and 21(2).

⁷⁵ *Ibid*: ss.20(5) and 21(1).

⁷⁶ 1978 Constitution: Art.26(4).

⁷⁷ Citizenship Act 1948: ss.15, 20(2), and 21(1).

obtaining of citizenship in another country and who desires to resume the status of a citizen of Sri Lanka while continuing the citizenship of that other country.⁷⁸ Secondly, in the case of a person who intends to obtain citizenship in another country, while retaining their Sri Lankan citizenship.⁷⁹ In both cases the person can make an application to the Minister to issue a declaration that they can resume or continue, as the case may be, their Sri Lankan citizenship despite also being a citizen of another country.⁸⁰ In order to grant such a declaration the Minister has to be satisfied that doing so in the circumstances of the case, would ‘be of benefit to Sri Lanka’. The term ‘be of benefit to Sri Lanka’ is vague and the government suspended issuing dual citizenship between September 2011 and March 2015 because it thought the system was not benefitting Sri Lanka. However, dual citizens do not enjoy all the benefits of a ‘citizen of Sri Lanka’ in that they are prohibited from standing for elections to be elected as a Member of Parliament or as the executive President.⁸¹

4. Current Political Debates and Reforms

Over 100,000 Sri Lankan refugees are estimated to be living in South India, having fled the country during the war from the 1980s onwards. Though armed hostilities ended in 2009, the pace of return has been slow for multiple reasons including difficulties in travelling back, access to land, shelter and livelihood assistance as well as concerns relating to security. Many of these individuals have been refugees for more than twenty years. With such a large number of persons still to return the complexities of determining the citizenship status of the refugee returnees are yet to be seen. One such complication could be in relation to persons who belonged to the Up Country Tamil community who initially moved to the Northern Province to escape ethnic pogroms in the 1970s and 1980s, and were then forced to leave as refugees to India as war began and escalated in the north. A significant part of this population would not have had their citizenship status settled prior to having to leave the country and the legislation enacted between 1986 and 2003 to resolve the issue of statelessness required persons to be resident in the country. The Grant of Citizenship to Persons of Indian Origin (Amendment) Act 2009 was enacted to remedy this problem. However, depending on how strictly the provisions of the Act are enforced, individuals could have difficulties in establishing their residence in Sri Lanka prior to becoming refugees due to the lack of documentation and the lapse of a considerable period of time. Furthermore, children of citizens born in these refugee camps have not been able to register their births in accordance with section 5(2) of the Citizenship Act 1948 and will need to be registered in terms of the Act. This process too, depending on the enforcement policy, could cause significant difficulties to the persons

⁷⁸ Ibid: ss.19(2).

⁷⁹ Ibid: ss.19(3).

⁸⁰ Ibid: ss.19(4)-(8).

⁸¹ 1978 Constitution: Art.91(1)(d)(xiii). This provision was introduced by the Nineteenth Amendment to the Constitution 2015.

concerned, especially in relation to the costs associated with registration and in cases where there are not adequate documents to establish their parents' citizenship.

In March 2016, Sri Lanka embarked on a process of formulating a new constitution through a Constitutional Assembly.⁸² The process has seen considerable delays due to political negotiations. The Constitutional Assembly appointed a Steering Committee and six sub-committees to formulate proposals for a new constitution. One proposal which was submitted by the Sub-Committee on Fundamental Rights was to include a constitutional provision which would allow a stateless person who has been permanently and legally resident in Sri Lanka on the date on which the new constitution comes into force, to be entitled to all the rights declared and recognised by the fundamental rights chapter of the new constitution.⁸³

5. Conclusion

The issue of statelessness among the Up Country Tamil community, created by the citizenship regime set up immediately after independence, has now been resolved legislatively. The statutory changes were a result of a change in political culture and attitudes towards the Up Country Tamil community and their place within Sri Lanka. As such one is hopeful that the existing citizenship regime will not be implemented in the same manner it was done historically, with the intent to exclude this community from the Sri Lankan state. Despite being considered a global success story in resolving the issue of statelessness, Sri Lanka still needs to deal with the impact of excluding the Up Country Tamil community from political life and denying them basic rights and freedoms for several decades. This has left a majority of the Up Country Tamils economically deprived and socially vulnerable.

The term nationality has the same meaning as citizenship within the Sri Lankan legal system. Sri Lanka does not encourage naturalisation of foreign citizens. This is a likely result of the historical fears of the Sinhala Buddhist majority that allowing migration would endanger their historic primacy to the island. Citizenship by registration is open primarily to those who have a link to the country either through their spouse or parents. In the limited circumstances in which foreign nationals are permitted to register as citizens the primary consideration is the benefit to the Sri Lankan state and not the benefit of the person applying for citizenship.

⁸² K. Venkataramanan, 'In the Throes of Political Reform', *The Hindu*, 6 January 2016, available at: <http://www.thehindu.com/opinion/op-ed/In-the-throes-of-political-reform/article13984280.ece> (last accessed 30 March 2017); Press Trust of India, 'Sri Lanka Kick-Starts Process to Adopt a New Statute', *The Hindu*, 9 January 2016, available at: <http://www.thehindu.com/news/international/Sri-Lanka-kick-starts-process-to-adopt-new-statute/article13990310.ece> (last accessed 30 March 2017).

⁸³ The Steering Committee of the Constitutional Assembly (2017), *Report of the Sub-Committee on Fundamental Rights*, available at <http://english.constitutionalassembly.lk/images/pdf/01-Fundamental-Rights-ste.pdf> (last accessed 15 April 2017).

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