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CITIZENSHIP

European
Union
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Observatory

COUNTRY
REPORT
2016/14

DECEMBER
2016

REPORT ON CITIZENSHIP LAW: BANGLADESH

AUTHORED BY

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EUDO Citizenship Observatory
Robert Schuman Centre for Advanced Studies
in collaboration with
Edinburgh University Law School

Report on Citizenship Law: Bangladesh
RSCAS/EUDO-CIT-CR 2016/14
December 2016

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Printed in Italy
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu/RSCAS/Publications/
www.eui.eu
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Research for the 2016/2017 EUDO CITIZENSHIP Reports has been supported by the European University Institute's Global Governance Programme, the EUI Research Council, and the British Academy Research Project CITMODES (co-directed by the EUI and the University of Edinburgh).

The financial support from these projects is gratefully acknowledged.

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Report on Citizenship Law

Bangladesh

Ridwanul Hoque

1. Introduction

Bangladesh emerged as a sovereign nation on 26 March 1971, the day on which it declared itself as an independent country.¹ The declaration of independence was followed by a 9-month-long bloody war, and the country became physically liberated from Pakistan on 16 December 1971. The people of Bangladesh through the Constituent Assembly, which comprised all elected representatives of people who were elected for the national parliament and Provincial Legislative Assembly through 1970-1971 elections under the Pakistani regime,² constituted the new sovereign nation and adopted for themselves the Constitution (hereafter ‘Constitution’) on 4 November 1972.³ Bangladesh began its journey with the constituent citizens who were the ‘residents’ of the then East Pakistan. Unlike in India (see Jayal 2016: 164-168), however, there was no debate in the Constituent Assembly regarding the nature of, or the criteria for, Bangladesh citizenship.

Article 6(1) of the original Constitution of Bangladesh stated that ‘the citizenship of Bangladesh shall be determined and regulated by law’.⁴ Article 6(2), however, characterised the collective nationality of the people as *Bangalee*. After an intervening change in 1978,⁵ the amended Article 6(2) now provides that the ‘people of Bangladesh shall be known as Bangalees as a nation and the citizens of Bangladesh shall be known as Bangladeshis’.⁶ It thus seems that Bangladesh sees the ‘institution of citizen’ (Barber 2016: 37-57) both ‘as legal status’ (Kymlicka & Norman 1994: 352) and ‘as collective identity’ (Bosniak 200: 455).

¹ The Proclamation of Independence Order 1971, promulgated by the Constituent Assembly of Bangladesh on 10 April 1971 (with effect from 26 March 1971). See the Seventh Schedule to the Constitution, as below n 3.

² See the Proclamation of Independence Order 1971, and the Constituent Assembly of Bangladesh Order 1972.

³ The Constitution of the People’s Republic of Bangladesh (effective 16 December 1972).

⁴ See also art. 152(1) of the Constitution that defines a citizen as ‘a person who is a citizen of Bangladesh according to the law relating to citizenship’.

⁵ The first military regime extra-constitutionally amended the Constitution to characterise the citizens of Bangladesh as Bangladeshis *via* the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No. IV of 1978), which was later affirmed by the Constitution (Fifth Amendment) Act 1979.

⁶ See the Constitution (Fifteenth Amendment) Act 2011 (Act XIV of 2011), sect. 6.

The Bangladesh citizenry has a constitutionally entrenched participatory role in the governance and affairs of the Republic,⁷ which is a democracy based on universal adult franchise. The Constitution also imposes a protective duty on the state vis-à-vis the citizenship (the ‘existential aspect of citizenship’: Irving 2016). It both entitles citizens to a number of civil and political rights and subjects them to a duty to observe the Constitution and the laws and to perform public duties.⁸ ‘Citizenship’ is a condition precedent for them to exercise voting rights and to run as candidates in general elections,⁹ to obtain passports,¹⁰ and to access basic state services.

At the outset of this Report, a terminological clarification needs to be made. In the literature and in practices of other countries, ‘citizenship’ and ‘nationality’ are not always understood as synonyms. In Bangladesh, however, the term ‘citizenship’ is of predominant usage. It is used in the Constitution and the citizenship laws of the country, although in some policy documents and legal instruments the term ‘nationality’ or ‘nationals’ have been used interchangeably with ‘citizenship’ or ‘citizens’. In the current Report, ‘citizenship’ and ‘citizens’ are used accordingly in preference to ‘nationality’ and ‘nationals’.

The two primary statutes regulating the citizenship of Bangladesh, indicated in the Constitution, were enacted in 1951 and 1972, in both cases before the Constitution came into force on 16 December 1972. At the founding moment of the country, these laws together provided for the recognition and continuation of existing citizenship, while also providing for the acquisition of citizenship by birth, by descent, and by naturalisation. Although Bangladesh does not in practice follow the *ius soli* principle, the law, as will be seen below, recognises both the principles of *ius sanguinis* and *ius soli* as modes of acquiring citizenship, alongside the rule of naturalisation. A commendable aspect of the Bangladeshi citizenship law has been that it does not provide for arbitrary deprivation of citizenship.¹¹ Moreover, there are no differentiated citizenship rights for citizens by birth and naturalised or other types of citizens. Bangladesh’s citizenship law, however, remains affected by three major limitations. First, as noted further below, despite recent improvements in this regard concerning citizenship by descent, the citizenship law of the country is still quite discriminatory against women. Second, the citizenship-status of the so-called Bihari people, the Urdu-speaking minority, who were residents at the time of Bangladesh’s independence, is still based on a nebulous footing because of a mischievous 1978 amendment that provided that a person shall not be deemed to be a citizen at the time of independence if he shows any ‘allegiance to a foreign state’.¹² Although Biharis were granted citizenship recently, this provision is potentially susceptible to abuse against this group of citizenry. Third, the current rule regarding dual citizenship is discriminatory against (former) citizens on the basis of country of their acquired citizenship.

At present, policy dialogues and political debates are underway concerning the further development and consolidation of Bangladeshi citizenship law. The most controversial issue in the current citizenship discourse has been the extent of citizenship rights of Bangladesh’s large migrant community overseas.

⁷ See arts. 11 and 59 of the Constitution that provide for, respectively, ‘effective participation by the people through their elected representatives in administration at all levels’ and local government bodies composed of elected representatives at all administrative units.

⁸ See, e.g., art. 21(1) of the Constitution: ‘It is the duty of every citizen to observe the Constitution and the laws, to maintain discipline, to perform public duties and to protect public property’.

⁹ See art. 122(2) of the Constitution and sect. 7(1) of the Electoral Roll Ordinance 1982.

¹⁰ The Bangladesh Passport Order 1973 (President’s Order No. 9 of 1973).

¹¹ See below Part 3.2.4.

¹² Article 2B(1)(i) of the Citizenship Order of 1972, below n. 24.

2. Historical Background

In the British period, the citizens of British India, of which present day Bangladesh was a part, were known as ‘British subjects’¹³ rather than British citizens. This inchoate institution of citizenship¹⁴ was known as ‘Commonwealth Citizenship’ or ‘British nationality’.¹⁵ After the independence of India and Pakistan in 1947 from the British colonisation,¹⁶ people of Pakistan (and, for that matter, of Bangladesh) enjoyed the Commonwealth citizenship until 1951 when the Citizenship Act was enacted defining the national citizenship. The 1951 Act in Pakistan was enacted in line with an agreement reached ‘between the UK Government and Commonwealth countries including India and Pakistan’ that culminated in the British Nationality Act 1948.¹⁷ This British Act of 1948 ‘recognised that independent Commonwealth countries would determine their own rules on nationality’ although ‘the unifying concept of “subject” remained’ as it were (Sawyer & Wray 2014: 4), that is, the Commonwealth Citizenship was to continue in the independent countries until their own citizenship laws were enacted.¹⁸ India and Pakistan themselves wanted, and they were successful in this regard, to see ‘Commonwealth citizenship’ as an alternative to the status of British subject.¹⁹ Thus, because of the nature of ‘Commonwealth citizenship’ that continued in Pakistan until 1951, the people of Pakistan, although they were citizens of an independent country, could not enjoy, it can be argued, the full citizenship in a legal sense.²⁰

The genesis of Bangladesh’s post-colonial citizenship regime dates back to the *Pakistan Citizenship Act 1951* that later became part of the corpus of Bangladeshi law upon independence of the country. The Citizenship Act 1951 (hereafter the 1951 Act),²¹ along with the Citizenship Rules 1952, framed by the then Pakistan government under it, was adopted as an ‘existing law’.²² Immediately after independence, however, the President promulgated a new citizenship law, the Bangladesh Citizenship (Temporary Provisions) Order 1972.²³ The 1972 Order was later supplemented by the Bangladesh Citizenship (Temporary Provisions)

¹³ By virtue of, for example, the British Nationality and Status of Aliens Act 1914 (as amended up to 1943).

¹⁴ This view is contradicted by the Indian Supreme Court, which in their decision in *the State Trading Corporation of India vs The Commercial Tax Officer*, 1963 AIR 1811, observed that ‘[t]he status of British Indians prior to 1947 was ... analogous to the status of citizens of a Republic’.

¹⁵ See, e.g., sect. 13 of the British Nationality and Status of Aliens Act 1914.

¹⁶ This is famously known as ‘partition’ of British-India. See, among others, Prasad (1998).

¹⁷ *Bangladesh v Prof Golam Azam* (1994) 46 DLR (AD) 193, per Mustafa Kamal J, paras. 91-92.

¹⁸ By virtue of sect. 1 of the British Nationality Act 1948.

¹⁹ See *Indians Overseas: A guide to source materials in the India Office Records for the study of Indian emigration 1830-1950*. Available at: <https://www.bl.uk/reshelp/pdfs/indiansoverseas.pdf> (‘In 1948 India and Pakistan made an important contribution to the British Nationality Act when they requested and succeeded in having the phrase “Commonwealth citizenship” accepted as an alternative to the status of British subject’).

²⁰ As Mustafa Kamal J observed in *Golam Azam’s case*, above n. 17, at [92], ‘[d]uring the period from 1948 to 1951, Pakistani citizens were only potentially so. They enjoyed Commonwealth Citizenship which was synonymous with British subjects without citizenship’. But see *The State Trading Corporation of India vs The Commercial Tax Officer*, above n. 14, in which the Indian Supreme Court held that the assumption that there were in India prior to 26 January 1950 no citizens was wrong. It should be noted that according to the EUDO CITIZENSHIP observatory, the terms citizenship and nationality are synonyms, referring to, in the narrow sense of a legal status, the link between individuals and their independent polity. Available at: <<http://eudo-citizenship.eu/databases/citizenship-glossary/terminology>>.

²¹ Act No. II of 1951.

²² See art. 149 of the Constitution of Bangladesh. It is to be noted that although the Citizenship Rules 1952 became part of Bangladesh laws, they are hardly, if at all, applied by the authorities.

²³ President’s Order No. 149 of 1972.

Rules 1978.²⁴ In addition to these legal instruments, there is the Naturalisation Act 1926,²⁵ a British-era legislation that was enacted as ‘the Indian Naturalization Act’ in 1926 ‘to consolidate and amend the law relating to the naturalisation in British India of aliens resident therein’. Pakistan inherited this law in 1947. Upon its independence, the 1926 Act had therefore become a Bangladeshi law on and from 26 March 1971. The Naturalisation Act 1926, however, has never been amended in post-Independence Bangladesh except for cosmetic adaptations that were required by the emergence of a new legal system.

The legal regime of Bangladesh citizenship thus comprises the Citizenship Act 1951 and the Rules of 1952, the 1972 Citizenship Order and Rules of 1978 made thereunder, the Naturalisation Act 1926 and the Rules of 1961, and relevant judicial decisions.

Bangladesh’s citizenship laws today remain as ‘haphazard’ (Paulsen 2006) and internally conflicting as they were during the formative years of the country. One particular source of this complexity and inconsistency is the existence of a plurality of primary and secondary legislations on citizenship. For the example, naturalisation is covered by three primary statutes and three sets of secondary legislation. Another source of complexity is generated conjointly by Bangladesh’s adoption of the 1951 Pakistani Act that was enacted in the then context of partition of British India in 1947 and the country’s emergence as a sovereign nation in 1971, which gave rise to, and was preceded by, population migration, displacement, and stagnation. To overcome this difficulty aligned with the change of sovereignty vis-à-vis the territory and people of Bangladesh, the 1972 Citizenship Order was promulgated soon after the physical liberation of the country on 16 December 1971. As its very title suggests, the 1972 Order ‘appears to have been enacted with a view to making some temporary provisions’ relating to citizenship of Bangladesh in the context of ‘immediate needs’ of a newly emerged state.²⁶ The need for a law governing the initial status of citizenship was strongly felt even before the 1972 Order was promulgated and the 1951 Act was accepted. To fill the gap, the government issued an administrative order which was superseded by the 1972 Order.

The 1972 Order, though promulgated on 15 December 1972, is given retrospective effect from 26 March 1971, while the 1951 Act, although adopted on the same date, commenced on 13 April 1951. The 1972 Order did not repeal the 1951 Act. As such, the 1972 Order and the 1951 Act are to supplement each other,²⁷ but they are, in more than one respect, mutually conflictive too. At the founding moment of the country, the 1951 Act provided for the continuation of existing citizenship of the residents of what was then East Pakistan, as well as for the acquisition of citizenship by birth, by descent, and by naturalisation. The 1972 Order re-affirmed the rule of initial citizenship and also impliedly provided for citizenship by birth. The 1972 also contains provisions relating to naturalisation, dual citizenship, and the status of permanent residency for foreigners.

²⁴ See Bangladesh Gazette, Extraordinary, 27 July 1978 (as amended in 1985 through SRO No. 164-L/85, 8 April 1985) (hereafter the ‘1978 Citizenship Rules’ or ‘1978 Rules’).

²⁵ Act No. VII of 1926. Two predecessor laws of the 1926 Act were the British Nationality and Status of Aliens Act 1914 and the Indian Naturalisation Act 1852.

²⁶ Bangladesh Law Commission, below n. 135, at p. 1.

²⁷ They also need ‘to be read together to get a complete picture of the law of citizenship in Bangladesh’: *Golam Azam’s Case*, above n. 17, per Latifur Rahman J.

2.1 Initial determination of citizenship

At the time of independence of Bangladesh, the rules for initial determination of citizenship were in the main based on notions of (conditional) *ius soli* (birth) and *ius sanguinis* (descent). Both the Citizenship Act 1951 and the Citizenship Order 1972 jointly cover this field, laying down, by and large, the same criteria.

The Citizenship Act 1951 provided that a person would be ‘deemed’ a citizen of Bangladesh at the commencement of this Act (13 April 1951) if he or she was a person ‘who or any of whose parents or grandparents was born in the territory now included in Bangladesh and who, after the fourteenth day of August, 1947, has not been permanently resident in any country outside Bangladesh’.²⁸ Moreover, a person who or any of whose parents or grandparents was born in British India and had his domicile in Bangladesh,²⁹ and a person who before the commencement of the 1951 Act ‘migrated to [...] Bangladesh from any territory in the Indo-Pakistan sub-continent’ with the intention of residing permanently in Bangladesh was also to be deemed a citizen of Bangladesh.³⁰

These citizens of East Pakistan thus became the constituent citizens of Bangladesh upon its independence on 26 March 1971. However, the 1972 Order again laid down the rule for the initial determination of Bangladesh citizenship, and thus replaced the operation of sect. 3 of the 1951 Act (Islam 2012: 68, n. 2). The 1972 Order basically provided for the constituent citizenship, that is, initial citizenship of the people by operation of the law. It provided for the ‘deemed citizenship’ of a person due to his or her substantive presence or permanent residence in Bangladesh at the time of the emergence of the country. Article 2, clause (i) of the 1972 Order provided that any person who or whose father or grandfather ‘was born in’ *and* who ‘was a permanent resident of’ what became Bangladesh on 25 March 1971, and continues to be so resident, shall be deemed to be a citizen of Bangladesh. This provision of citizenship, though based on permanent residence,³¹ suggests that one could acquire citizenship not only by birth in the territories that constituted Bangladesh, but also by descent if his or her forefather had acquired citizenship via permanent residence. This provision, therefore, seems to be overlapping with those of the 1951 Act.³²

Further, Article 2(ii) provided that a person would be deemed to be a citizen of Bangladesh if he or she ‘was a permanent resident of’ Bangladesh on 25 March 1971, and ‘continues to be so resident and is not otherwise disqualified for being a citizen by or under any law’. In a case involving the citizenship status of a person who showed allegiance to Bangladesh and went to Pakistan without relinquishing his citizenship, the court held that his Bangladesh citizenship was not lost as he was a permanent resident according to these provisions. The father of the person concerned was a retired judge of the High Court of East Pakistan, while the mother lived and died in Bangladesh. The person owned an apartment of his own in Dhaka. In light of Article 2 of the 1972 Order and these facts, the Appellate

²⁸ The Citizenship Act 1951, sect. 3(a).

²⁹ *Ibid.*, sect. 3(b). According to sect. 7 of the Succession Act 1925, the *domicile of origin* of a person is in the country in which at the time of his birth his father was domiciled, or, if he is a posthumous child, in the country in which his father was domiciled at the time of the father’s death. See also sect. 11 of the 1925 Act (any person may acquire a domicile in Bangladesh by making a declaration in writing of his desire to acquire such domicile).

³⁰ The Citizenship Act 1951, sect. 3(d).

³¹ See art. 2 of the Citizenship Order 1972 (uses the term ‘permanent resident’) and sect. 3(a)-(b) of the Citizenship Act 1951 (uses the terms ‘permanently resident’ and ‘domicile ... in Bangladesh’).

³² As Paulsen (2006: 59) observes, this confusing provision ‘does not seem to have been done by design but rather by oversight during the hasty drafting of the Citizenship Order causing, by default, citizenship via birth and descent to be still governed by the Citizenship Act’.

Division held that his permanent residence was in Bangladesh and hence his citizenship could not be denied.³³

The 1972 Order also provided for the continuous residence status of those who were stranded in Pakistan in the aftermath of war of independence, albeit without mentioning the term Pakistan. It laid down that any person who was a permanent resident of Bangladesh and was residing, in course of employment or for the pursuit of studies, in a country that ‘was at war with or engaged in military operations against Bangladesh’ and was being prevented from returning to Bangladesh would be deemed to continue to be resident in Bangladesh.³⁴ By this, the then residents of Bangladesh (East Pakistan at the time) who became stranded in Pakistan (West Pakistan) were recognised as citizens of Bangladesh, although a doubt as to the citizenship status of those who were staying in such a hostile country for other purposes than employment and studies arose. Interpreting the relevant rule (proviso to Article 2 of the 1972 Order), the Appellate Division of the Supreme Court in *Bangladesh v Professor Golam Azam (Golam Azam’s Case)*³⁵ held that ‘persons who stayed in such a hostile country for purposes other than employment or studies can still claim continuation of residence in Bangladesh’ under the general scheme of the law, if not under this specific proviso.³⁶ In this case, Professor Azam stayed for a long time in Pakistan not for the reason of employment or studies, and he even held a Pakistani passport when he returned to Bangladesh. The Court adjudged the deprivation of his citizenship as unlawful because he was a permanent resident of Bangladesh at the relevant point of time, that is, 25 March 1971.³⁷

2.2 Development and reform of citizenship law

The 1972 Order was later amended thrice, in 1973, 1978, and 1990.³⁸ In 1990, the Citizenship Order was amended to make the provision of status of ‘permanent resident’ for foreigners.³⁹ Later, the government made the grant of ‘right of permanent residence’ dependent upon an investment of \$75,000 in any Bangladeshi industry or financial sector. This system of permanent residency status for foreigners is now administered by the Bangladesh Investment Development Authority that was earlier known as Bangladesh Investment Board⁴⁰ in conjunction with the Ministry of Home Affairs. Interestingly, however, it is not yet clear which rights and obligations a foreigner who is granted a permanent resident status would be entitled and subject to.

The major yet controversial reform of the 1972 Order came in 1973 and 1978. An important driver of these amendments was the identity issue of the Urdu-speaking minority in Bangladesh in the aftermath of the country’s independence, who were largely known as having no allegiance to Bangladesh but rather to Pakistan from which the country became independent.⁴¹ In 1973, a new Article 2B was inserted to the Citizenship Order, further

³³ *Bangladesh v Mirza Shahab Ispahani* (1988) 40 DLR (AD) 116.

³⁴ See the proviso to art. 2 of the 1972 Order.

³⁵ As above in note 17.

³⁶ *Ibid.*, at 209 (para. 109), *per* Mustafa Kamal J.

³⁷ *Ibid.*, See further below at part 3.2.1.

³⁸ See the Bangladesh Citizenship (Temporary Provisions) (Amendment) Ordinance 1973 (Ord. No. X of 1973) and the Bangladesh Citizenship (Temporary Provisions) (Amendment) Ordinance 1978 (Ord. No. VII of 1978).

³⁹ See sect. 4A of the 1972 Citizenship Order that provided that the government may grant right of permanent residence to any person ‘on such conditions as may be prescribed’. This reform was made by virtue of sect. 3 of the Bangladesh Citizenship (Temporary Provisions) (Amendment) Act 1990 (Act LVIII of 1990).

⁴⁰ See the Bangladesh Investment Development Authority Act 2016 (Act 36 of 2016).

⁴¹ On this, see Paulsen (2006) and further below part 3.3.

amended in 1978, which provided that the acquisition of Bangladesh citizenship by operation of law, that is, because of one's birth or permanent residence in Bangladesh on or before 25 March 1971 would not apply if the concerned person owed, affirmed or acknowledged, expressly or by conduct, allegiance to a foreign state.⁴² As will be seen below, this provision was applied to prevent the people of Bihari community from being citizens of Bangladesh.

The next important reform was in the area of dual citizenship, acquisition of which was prohibited by the 1951 Act (sect. 14). By virtue of a 1978 amendment to the 1972 Order, however, the facility of dual citizenship was made possible. A Bangladeshi citizen, though he loses his citizenship upon acquisition of citizenship of a foreign state, could reacquire Bangladeshi citizenship. Without mentioning the term 'dual citizenship', Article 2B(2) of the 1972 Order now provided the government with a broad power to 'grant citizenship of Bangladesh to any person who is a citizen of any state of Europe or North America or of any other state' which the Government may specify.

The reform relating to dual citizenship was seemingly influenced by the presence of a growing community of Bangladeshi expatriates overseas. In the late seventies when this provision was enacted, most Bangladeshi migrants were residents (citizens) in the UK, the USA, Canada, and major European countries such as Germany and France. Understandably, the government did not want its increasing migrant communities overseas to be legally disassociated from Bangladesh. Moreover, as is the case now, these expatriates had been the source of a huge amount of foreign remittances.⁴³

Another significant reform with regard to citizenship by descent was brought about in 2009. Section 5 of the 1951 Act, as amended, accords citizenship to children born outside Bangladesh to either a Bangladeshi father or mother. This provision initially remained gender-biased, and it was only the father through whom a child could acquire citizenship.⁴⁴ This discriminatory rule of citizenship by descent was unsuccessfully challenged in 1997 by Sayeeda Rahman Malkani, a Bangladeshi citizen in France, who was married to an Indian citizen and had two sons. When her two sons were refused Bangladeshi citizenship, Malkani challenged section 5 of the 1951 Act before the High Court Division of the Bangladesh Supreme Court on the ground that the law preventing only women from passing citizenship to children of a marriage between such women and foreign citizens was in contravention of the Constitution's equality clause. In *Sayeeda Rahman Malkani v Bangladesh* (1997),⁴⁵ however, the High Court Division turned a blind eye to the citizens' right to enjoy equal legal protection and equality under Articles 27 and 28 of the Constitution, and ruled that the statutory provisions were unambiguous in using the words 'father' and 'grandfather'. In adopting an overly legal positivist interpretation, the Court not only diminished the force of a basic constitutional norm but also brushed aside the application of Bangladesh's international obligation under, for example, CEDAW that the country ratified in 1984.⁴⁶ A decade after this judgment, its consequence was remedied by the legislature when the amendment inserted into

⁴² The 1972 Citizenship Order, art. 2B(1).

⁴³ *Ibid.*, art. 2B(2). See further below at part 3.2.3.

⁴⁴ This gender discrimination earlier prevailed in other South Asian countries. As of 2015, twenty-seven countries did not allow women to pass their citizenship to their children (ERT 2015: 1).

⁴⁵ Writ Petition No. 3192 of 1997 (judgment of 1 September 1997, *per* M.M. Hoque & M.H. Ameen JJ). For a commentary on this, see Forster et al. (2003: 9-11), and Pereira (2002; 1998).

⁴⁶ The Convention on the Elimination of All Forms of Discrimination Against Women (art. 9 prohibited discrimination against women in regard to rights pertaining to nationality and citizenship). Two other relevant international treaties ratified by Bangladesh at the time and which prohibited gender discrimination in the transmission of citizenship from parent to child were the Convention on the Rights of the Child 1989 (arts. 2 & 7) and the Convention on the Elimination of All Forms of Racial Discrimination 1965 (art. 5).

sect. 5 of the 1951 Act the word ‘mother’ alongside ‘father’ and thus made the principle of citizenship by descent gender-neutral.⁴⁷

2.3 Legacy of pre-independence legal regime, and the impact of bi-lateral relationships on citizenship law

As a legacy of Independence, Bangladesh’s citizenship law was primarily based on the Pakistani model. Pakistan’s citizenship law during the period preceding Bangladesh’s independence was both influenced by and reactive to developments in Indian citizenship law. On the other hand, post-independence Bangladeshi citizenship law has been indirectly influenced by developments in India as well as in Pakistan. Three aspects are noticeable. First, the 2009 amendment to the Bangladeshi citizenship law providing for citizenship by descent through either of the parents who is a citizen of Bangladesh was probably influenced by similar amendments in India in 1992 and in Pakistan in 2000.

The second example of historical or motivated reform pertains to the rule against dual citizenship that prevailed in Bangladesh, Pakistan, and India. At the time India became independent in 1947, ‘it had been the consistent position of its political leadership that Indians living in other countries must give their complete allegiance to their adoptive homes’ (Jayal 2016: 177). This had indeed been a legacy of the common law attitude to undivided nationalist allegiance as a condition of citizenship. The same sentiment was there in Pakistan when it enacted its citizenship law in 1951 to provide that ‘a citizen of Pakistan’ shall lose citizenship upon acquisition of foreign citizenship (sect. 14). Bangladesh adopted this provision of prohibition on dual citizenship, but opened the possibility of dual citizenship on a limited scale in 1978, as discussed above. Thirdly, therefore, the rule of limited dual citizenship that is also common in Pakistan and India can reasonably be seen as a result of mutual legal influence.⁴⁸

It is pertinent here to further reflect on the impact of international migration from Bangladesh on the citizenship discourse. Bangladesh is a country of net-migration. Indeed, it has been pre-dominantly a source country of migrants. Migration from Bangladesh for overseas work began in 1976 – and unofficially even earlier.⁴⁹ ‘In the past 40 years, almost 10 million Bangladeshis migrated to around 160 countries as skilled, semi-skilled or less-skilled workers, and some as professionals’.⁵⁰ Not all of these people have, however, become citizens of other countries or denounced their Bangladesh citizenships. And, there is no available data showing the impact of out-bound migration of Bangladeshis on the size of the citizenry of the country.

⁴⁷ See the Citizenship (Amendment) Act 2009 (Act XVII of 2009), sect. 2 (5 March 2009, with effect from 31 December 2008). In Pakistan, a similar amendment was brought about in 2000 by the Ordinance No. 13, and in India the discrimination against women with regard to passage of citizenship to children was removed in 1992 by amending sect. 4 of the (Indian) Citizenship Act 1956.

⁴⁸ It should be noted, however, that India does not expressly recognise dual citizenship, but rather has created a new institution called ‘Overseas Indian Citizens’. On the other hand, Pakistan in 1972 (25 September) amended the Pakistan Citizenship Act 1951, sect. 14, to provide for dual citizenships for people of Pakistani origin who were citizens of the United Kingdom or any other country as the government would specify. In 2002 this facility was extended for those who were citizens of the USA and Sweden.

⁴⁹ See an interview by Ridwanul Hoque, titled ‘A situation of bonded labour’ published in *D+C (Democracy and Development)*, 3 April 2016, available at: <<https://www.dandc.eu/en/article/many-bangladeshi-migrants-are-exploited-abroad>>.

⁵⁰ *Ibid.*

In most cases, the destination countries for Bangladeshi migrants/expatriates are Middle-Eastern countries. There is an increasingly bigger size of Bangladeshi diaspora across the world including in the USA, Canada, the UK, and other western and European countries. Foreign remittances from Bangladeshi migrants or expatriates have become the third pillar of Bangladesh's economy, behind agriculture and the garments export industry. Bangladesh's migrants remitted USD 15 billion to Bangladesh in 2015 that was 13 times more than the total amount of foreign investment.⁵¹ Undoubtedly, Bangladesh's migrant communities are a politically important stakeholder from the perspective of governance and public participation. Unfortunately, however, there is little, if any, influence of these people on the development and discourse of citizenship law back home in Bangladesh. One apparent reason is that the bulk of Bangladeshi migrants are temporary contractual workers or professionals in destination countries that do not grant them citizenship. Bangladesh accordingly focuses more on the citizenship rights of these people, to be enjoyed as citizens of Bangladesh in countries of work, in Bangladesh, and during their transition.⁵² On the other hand, the government tends to value, though reluctantly, the expatriates who reside in the Western or resource-rich countries as well as those who have settled as citizens there. A reflection, probably the lone case, of the influence of this class of Bangladeshi expatriates can be seen in the limited system of dual citizenship for them. Nonetheless, as the current debates concerning the reform of dual citizenship, discussed further below, show, even this minimal influence of the expatriates has been gradually shrinking.

While the international migration of Bangladeshi citizens for work or otherwise has not been generally a factor in the development and reform of citizenship laws, the issue of migration of Bangladeshis into India has influenced changes in the Indian law. There was a huge influx of Bangladeshi refugees, reportedly 10 million, to India during the country's liberation war of March-December 1971. While most refugees returned after Bangladesh's independence, many stayed back in India. Bangladesh, however, is often accused for its failure to stop the unlawful or irregular movement of its citizens to India in the post-1971 years.⁵³ These facts and debates had an impact on India's citizenship law. For example, in order to regulate citizenship of children of parents who are 'migrants from Bangladesh' (Jayal 2016: 171), India inserted an exception to the rule of citizenship by birth. An amendment of the citizenship law provided that, in order for a person born in India to become a citizen, at least one of his or her parents must be a citizen of India and the other parent must not be 'an illegal migrant' at the time of his or her birth'.⁵⁴

Another problematic issue of citizenship concerning people of Bangladesh 'enclaved' in territories within India (see Jones 2009 & Van Schendel 2002), which until recently remained an unresolved bilateral issue between India and Bangladesh, merits attention. In the aftermath of the partition of British India in 1947 as well as the emergence of Bangladesh in 1971, there were 106 Indian enclaves (with 37,330 residents) in Bangladesh and 96 Bangladeshi enclaves (with 14,200) in India.⁵⁵ Practically, these people were non-citizens of either country and they had been living in a situation of virtual statelessness. Having been enclaved in foreign islets, they could not exercise their right to vote and hence participation in the state affairs was at the minimum. As a document issued by the Indian government puts it, 'the inhabitants in the enclaves could not enjoy full legal rights as citizens of either India or

⁵¹ *Ibid.*

⁵² See the Overseas Employment and Migrants Act 2013. Yet successive governments have persistently refused the expatriates the right to vote while abroad.

⁵³ On this see Samaddar (1999), Datta (2004), and de la Vega (2015).

⁵⁴ See the Citizenship Act 1955, sect. 3(1) (as amended by Act 6 of 2004).

⁵⁵ According to the agreement of 1974, there are 111 Indian enclaves and 51 Bangladeshi enclaves to be mutually exchanged. See below n. 57, at pp. 48-53.

Bangladesh and infrastructure facilities such as electricity, schools and health services were deficient'.⁵⁶ India and Bangladesh signed a bilateral treaty on 16 May 1974 to resolve the enclave issue, which led to some, if inadequate, progress.⁵⁷ Recently, this old land-dispute agreement has been ratified by India, which eventually enacted a constitutional amendment to facilitate the implementation of the agreement concerning the exchange of 'enclaves'.⁵⁸ Under the new arrangement agreed on 31 July 2015, people were allowed to stay in their enclaves or to move out to their respective country (Rahman 2015). Eventually, Bangladeshi and Indian governments have now taken control of their respective enclaves (De la Vega 2015: 432 n. 10). People who stayed in Bangladeshi enclaves or have returned to Bangladesh from India thus became Bangladeshi citizens,⁵⁹ with arguably a fuller citizenship which they never enjoyed before.⁶⁰ Recently (31 October 2016), local government elections have been held in 22 such former enclaves and the 'new' citizens of Bangladesh have exercised their voting rights after 69 years since partition of British India in 1947.

An unpleasant bilateral relationship between Pakistan and Bangladesh with respect to Biharis residing in Bangladesh during and preceding Bangladesh war of 1971 provided a context for certain changes in the citizenship law of both countries. When negotiations between Bangladesh and Pakistan concerning repatriation to Pakistan of Biharis who were willing to resettle were going on, Bangladesh enacted an amendment in 1978 that provided that a person who would otherwise be regarded as a citizen shall not qualify for being a citizen if he 'owes, affirms or acknowledges, expressly or by conduct, allegiance to a foreign state'.⁶¹ This new provision was for a long time resorted to by the authorities to deny Bangladesh citizenship to the Biharis, especially those who expressed willingness to be repatriated to Pakistan. As explained further below, because of this rule and also for political reasons Biharis were not accepted as Bangladeshi citizens until a court intervention in 2008.

On the other hand, Pakistan too amended its citizenship law in March 1978,⁶² providing, *inter alia*, that all Pakistani citizens who, at any time before 16 December 1971, were domiciled in East Pakistan and who were residing there on that day and continued to so reside 'voluntarily or otherwise' shall cease to be citizens of Pakistan.⁶³ It was also provided that such persons, if they voluntarily migrated to Pakistan after 16 December 1971 with the approval of the Pakistani Government, would continue to be citizens of Pakistan. Moreover, the Biharis in Bangladesh whose repatriation to Pakistan had been agreed to but who had not been so repatriated before 1978 were to continue as citizens of Pakistan.⁶⁴ Put simply, the

⁵⁶ As in n. 57 below, at p. 5.

⁵⁷ See the Ministry of External Affairs, India. *India and Bangladesh Land Boundary Agreement*. Available at: http://www.mea.gov.in/Uploads/PublicationDocs/24529_LBA_MEA_Booklet_final.pdf. This Agreement was renewable at 25 years' interval. Accordingly, a protocol was signed to that effect on 6 September 2011.

⁵⁸ See the Constitution (One Hundredth Amendment) Act, 2015 (India) (28 May 2015). Pursuant to this agreement, Bangladesh amended its Constitution as back as 1974, and introduced the idea of 'included territories' as state territories. See the Constitution (Third Amendment) Act, 1974 (Act LXXIV of 1974).

⁵⁹ It is not made known which is the legal source of their citizenship, but it is presumable that these people living in enclaves within Bangladesh became Bangladeshi citizens by virtue of sect. 13 of the Citizenship Act 1951 which provides for 'citizenship by incorporation of territory'.

⁶⁰ The expectations of the enclave people are reflected in the statement of Golam Mostofa, the Secretary General of an association of enclaves who stated as follows: 'All of us are now Bangladeshi citizens. Our pains and decades of frustration are over. We are now liberated and can now claim citizenship rights. The enclaves will now have schools, clinics and government offices' (quoted in NDTV, June 7, 2015, available at: <http://www.ndtv.com/india-news/thousands-celebrate-historic-india-bangladesh-border-pact-769494>).

⁶¹ Article 2B, clause (1)(i), of the 1972 Citizenship Order.

⁶² See the Pakistan Citizenship (Amendment) Ordinance, 1978.

⁶³ The Pakistan Citizenship Act 1951, sect. 16A(1)(i).

⁶⁴ *Ibid.*, sect. 16A(1)(iv).

laws of both Bangladesh and Pakistan made the Biharis' claims of citizenship of either country a little more difficult.⁶⁵

Attention can now be given to the most pressing bilateral issue between Bangladesh and its neighbour on the south-eastern border, Myanmar (earlier called 'Burma'), with respect to Rohingya refugees. The Rohingyas are an ethnic religious-linguistic minority in the Rakhine state of Myanmar and probably the most persecuted people on earth (Hoque 2016). Myanmar deprived them of citizenship in 1982 and officially considers them as Bengalis entering Myanmar during British rule in the late 1940s or earlier (Hoque 2016). Persecution of Rohingyas began even before Myanmar enacted the 1982 citizenship law, which eventually led to an exodus of Rohingyas into neighbouring territories. Bangladesh accepted some 200,000 Rohingyas in 1978 and 250,877 Rohingyas in 1991 as refugees (also called 'Myanmar refugees') 'on a prima facie basis' and from 'humanitarian considerations'.⁶⁶ In the following years, the vast majority of these refugees were repatriated to Myanmar. Approximately 30,000 registered 'Myanmar refugees' in Bangladesh have been now living in two camps in two small towns at the southernmost tip of the country under Cox's Bazar district. On the other hand, around 300,000 to 500,000 undocumented Rohingya people have settled in villages and elsewhere without intervention of the authorities,⁶⁷ and are known as 'self-settled' Rohingyas (Lewa 2008). Rohingya refugees are almost always migrants without valid legal documents, so these forlorn people are denied human dignity and human rights (Hoque 2016). In the past years, Rohingyas from refugee camps in Bangladesh, grouped with Bangladeshi citizens, tended to cross sea on boats and ended up being victims of human trafficking and smuggling, many facing the tragic deaths in transition. Some Rohingyas, however, are reported to have obtained forged Bangladeshi passports to enable them to travel and work abroad.

Rohingya refugees in Bangladesh or the self-settled undocumented Rohingyas are stateless refugees (Sen 1999) or undocumented stateless immigrants. There are no legal rules facilitating their access to permanent residence or citizenship. Neither does the government of Bangladesh presently permit the local integration of refugees (UNHCR 2007: 37). Consequently, children born of Rohingya parents living in camps are not accepted as citizens of Bangladesh, although the present rule of citizenship by birth arguably supports their right to Bangladesh citizenship.⁶⁸ Interpreting the current principle of citizenship by birth as having excluded the Rohingya children born in Bangladesh would run afoul of the principles enunciated in the 1961 Convention on the Reduction of Statelessness, under which a State Party has an obligation to grant its citizenship to a person born in its territory who otherwise will be stateless.⁶⁹ Bangladesh has not yet joined this Convention, but because of its avowed state policy of commitment to respect 'international law and the principles enunciated in the United Nations Charter',⁷⁰ it arguably has a *de facto* obligation under this international treaty 'in discharging' its functions in the field of the law on citizenship (Islam 1990: 5). Moreover, as the Supreme Court has observed, 'a few salutary features of the growing international

⁶⁵ In a recent court hearing on 18 February 2015, the Pakistan government argued that because of section 16A of the Pakistan Citizenship Act 1951, Biharis residing in Bangladesh lost their citizenship of Pakistan (Iqbal 2015).

⁶⁶ Bangladesh's 'National Strategy Paper on Myanmar Refugees and Undocumented Myanmar Nationals in Bangladesh 2013' (approved by the government on 9 Sept. 2013). It is of relevance to note that in November 2016 another wave of a serious form of persecution has engulfed Rohingyas in Myanmar, which led several thousand Rohingyas to desperately try to enter Bangladesh.

⁶⁷ *Ibid.* (National Strategy on Myanmar Refugees).

⁶⁸ Similarly, Rohingya children born in Malaysia and Thailand are not granted citizenship of these countries (ERT 2014).

⁶⁹ The 1961 Convention on the Reduction of Statelessness, art. 1.

⁷⁰ The Constitution of Bangladesh, art. 25.

norms in this regard [as enshrined in this treaty] have stood embodied in [Bangladesh's] national jurisprudence'.⁷¹

Further, Bangladesh has not acceded to the 1951 Refugee Convention, and does not have any legislative provisions that allow those who are often called 'illegal' (irregular) or 'undocumented' immigrants to seek asylum or the permanent residency status on humanitarian grounds. As the government often claims, it accepted 'Myanmar refugees' not out of any obligation, but rather acting under its prerogative and on a humanitarian ground.⁷² As such, the Rohingya refugees or the self-settled Rohingyas do not currently have a chance to get 'earned citizenship' (Ahmad 2017) by virtue of the government's amnesty or regularisation. Nor do their children born in Bangladeshi camps have a right to be naturalised on the basis of residence/domicile in Bangladesh for a certain period.⁷³

3. The current citizenship regime

3.1 Acquisition of Bangladesh Citizenship

Across the world, the two traditional, principal forms of acquisition of citizenship have been *ius soli* (citizenship by territorial birth) and *ius sanguinis* (citizenship by descent), both being dependant on birth of the child.⁷⁴ Upon its independence in 1971, Bangladesh adopted these two modes of citizenship acquisition, while also adopting at the same time the rule of naturalisation.⁷⁵

According to the principle of *ius soli* ('law of the soil'), a child born in a country becomes citizen of that country regardless of the status of the parents. This mode of citizenship acquisition has traditionally been the approach of common law countries (Shearer & Openskin 2012: 98). The modern trend both amongst common law and civil law countries, however, has been towards the 'availability of *jus soli* citizenship, but in more conditional

⁷¹ *Golam Azam's Case*, above n. 17, at para. 48, per M.H. Rahman J.

⁷² But for this reluctant recognition, Rohingya refugees would have been subject to deportation to their source country under the Foreigners Act 1946, which is in force in Bangladesh. An earlier law, still in force in Bangladesh, that authorised deportation of irregular immigrants from what has now become Bangladesh is *the Bengal Foreign Immigrants Regulation of 1812* (Bengal Regulation XI of 1812). It is to be noted that Bangladesh has recently adopted a national strategy on Rohingya refugees/undocumented Myanmar nationals (above n. 66) with a view to, among others, 'providing temporary basic humanitarian relief' to these people.

⁷³ Such a system exists in Australia under which a child born in Australia to non-citizen parents can acquire citizenship after a ten years' stay. See the Australian Citizenship Act 2007 (Cth), sect. 12.

⁷⁴ For a jurisprudential critique of this idea of citizenship transmission, see Ahmad (2017) ('Such a citizenship regime suffers from a fundamental tension, as citizenship promises equality, but its distribution is morally arbitrary').

⁷⁵ See the Citizenship Act 1951, which also provides for acquisition of citizenship (i) by migration, (ii) by registration, and (iii) by incorporation of territory. These categories of citizenship acquisition have indeed been rendered historical now. Citizenship by migration, for example, applied to those people who after 13 April 1951 and before 1 January 1952 migrated to Bangladesh from other parts of the Indo-Pakistan sub-continent (sect. 6 of the 1951 Act). On citizenship by registration and citizenship by incorporation of territories, see respectively sects. 12 & 13 of the 1951 Act.

forms, dependent on limited forms of prior parental residence and other conditions identified with integration'.⁷⁶

Section 4 of the Citizenship Act 1951 provides for the acquisition of citizenship by birth, or *ius soli* citizenship. Despite this provision, however, it is debatable whether Bangladesh recognises unconditional *ius soli* citizenship.⁷⁷ Section 4 of the 1951 Act says that '[e]very person born in Bangladesh after the commencement of this Act shall be a citizen of Bangladesh by birth'. This provision seems to be broad in its scope and, having commenced in 1951, may cover any person born in Bangladesh either before or after its independence in 1971 and even if the person's parents are not citizens of Bangladesh. On the other hand, a proviso to section 4 provides that the rule of citizenship by birth does not apply to a child whose father is a foreign diplomat in Bangladesh at the time of his or her birth or is an enemy alien. These are internationally accepted exceptions to the *ius soli* principle.⁷⁸ In other words, section 4 does not attach any exception to the *ius soli* principle. From these perspectives, section 4 can be said to have enacted the unconditional rule of *ius soli*.

The judiciary, however, seems to regard section 4 to have referred only to birth of the concerned person in independent Bangladesh, and the date of 26 March 1971 is a crucial determinant for that purpose.⁷⁹ Generally, if a person is born before independence, 'he or she is governed by the *Citizenship Order* and obtains citizenship by virtue of her or her forefather's permanent residence, and, '[I]f the person is born after independence, he or she is governed by the *Citizenship Act* and acquires citizenship by birth' (Paulsen: 2006: 58). On the other hand, the 1972 Order that provides for citizenship by birth and permanent residence in Bangladesh before 26 March 1971 does not clearly rule out the possibility of unconditional *ius soli* citizenship, attributable to parents and not citizens. Article 2 of the 1972 Order, at the time of its commencement (26 March 1971), conferred on every person Bangladesh citizenship who was born and had been a permanent resident in Bangladesh.⁸⁰ Article 2 of the 1972 Order can, therefore, arguably be said to be a reflection of the *ius soli* principle, although this applies only to persons already domiciled or resident at the time of Bangladesh's independence rather than to persons born thereafter.⁸¹

In practice, Bangladesh does not accord citizenship to a person born in Bangladesh if at least one of his or her parents is not a citizen of Bangladesh.⁸² Since the Bangladeshi citizenship of the parent(s) of a child born in Bangladesh is a primary reason for his or her becoming a citizen by birth, it can be safely argued that, without any formal legal amendment, Bangladesh citizenship principle has *de facto* shifted from *ius soli* to *ius sanguinis*.⁸³ This

⁷⁶ Please visit: <http://eudo-citizenship.eu/docs/ius-soli-policy-brief.pdf>.

⁷⁷ Islam (1990: 8-9), for example, thinks that Bangladesh does not follow the principle of *ius soli* except when the concerned child's both parents are unknown and the child is born in Bangladesh. It is to be noted that while this has been the practice by Bangladesh, the law does not seem to categorically oust *ius soli* citizenship.

⁷⁸ That a child born to parents who are foreign diplomats does not automatically acquire *ius soli* citizenship is an exception under customary international law (Shearer & Opeskin 2012: 5) and is supported by The Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws 1930, art. 12.

⁷⁹ See also *Golam Azam's Case*, above n. 17.

⁸⁰ As Mustafa Kamal J. in the *Golam Azam case*, *ibid.*, at p. 222, remarked, '[the] citizenship law in Article 2 is governed by the concept of 'permanent residence' which has not been defined in th[at] ... Order'.

⁸¹ For this, I have borrowed the argument of Jayal (2016: 166).

⁸² Earlier, a child (not being an illegitimate child) born in Bangladesh to a Bangladeshi mother and whose father was a non-citizen could not acquire citizenship at birth. Since the legal change of 2009 relating to citizenship by descent (noted above n. 47), a child born to a Bangladeshi mother either in Bangladesh or abroad acquires citizenship.

⁸³ As Jayal (2016: 164) notes, in India too *ius soli* citizenship has over time come to be inflected through several amendments to the citizenship law by elements of *ius sanguinis*.

paradigmatic policy shift is reflected in the fact that a child born to foreign parents generally or to non-citizen Rohingya parents in Bangladesh in particular do not acquire citizenship.

The second major mode of citizenship acquisition in Bangladesh is based on the principle of *ius sanguinis* (law of the blood relationship), that is, citizenship based on parentage. The principle of citizenship by descent was gender-biased before 2009, and it was only the male parentage that was the basis of this mode of citizenship.⁸⁴ As noted in part 2 above, the amended section 5 of the 1951 Act provides for citizenship by descent for a child born outside Bangladesh to a Bangladeshi father or mother who is a citizen by birth at the time of the child's birth. And, if the child is born abroad to a parent who is a citizen of Bangladesh by descent, the child's birth has to be registered at a Bangladesh Consulate or Mission in the concerned country or the citizen parent needs to be in the service of Bangladesh at the time of the child's birth for the obtainment of citizenship certification.⁸⁵ Interestingly, the law is silent as regards the citizenship of a child born abroad to a naturalised Bangladeshi citizen, in which case the rule concerning the parent who is a citizen by descent should apply by default.

3.1.1 Citizenship by naturalisation (Foreigners' acquisition of citizenship)

Bangladesh citizenship can also be acquired through naturalisation, on which the laws are superfluous and contradictory. The major law on the subject is the Naturalisation Act 1926, supplemented by the Naturalization Rules 1961 enacted during the Pakistani regime.⁸⁶ The 1926 Act provides for naturalisation of foreigners ('aliens') resident in Bangladesh. The 1972 Citizenship Order (art. 4) also lays down a provision for naturalisation of foreigners, but without using the terms 'naturalisation' or 'foreigner'.

Ideally, any foreigner ('any person'), who has completed his age of twenty-one years⁸⁷ and whose country of origin does not prevent a Bangladeshi citizen to be naturalised there, may apply for being naturalised as a Bangladeshi citizen.⁸⁸ According to the Naturalisation Act 1926, the concerned applicant has to stay in Bangladesh for a period of 8 years, of which a minimum of 5 years in aggregate, including an incessant continuous stay of 12 months just before applying for naturalisation, is required.⁸⁹ A contradictory rule in the 1978 Rules, however, provides that an ordinary residence of a period of 5 years will suffice as a criterion of naturalisation.⁹⁰ Additionally, the applicant has to renounce his original citizenship and abandon his domicile of origin.⁹¹

⁸⁴ This has been an ancient principle. The Greek citizenship law, for example, was based on the principle of origin (*ius sanguinis*), providing for the child's automatic acquisition of the father's citizenship at birth, irrespective of where the child was born.

⁸⁵ See the proviso to sect. 5 of the 1951 Act, and rule 9 of the Citizenship Rules 1952.

⁸⁶ The Naturalisation Rules 1961, framed under sect. 13 of the Act, though part of Bangladesh's law, are apparently not applied by the Bangladesh authorities when dealing with naturalisation of foreigners. The Citizenship Rules 1978 are the governing rules in this regard.

⁸⁷ By virtue of the 1978 Rules, however, the age for an independent application for naturalisation is arguably eighteen, because the 1972 Order does not mention the applicant's age.

⁸⁸ The Naturalisation Act 1926, sect 3(1) read with sect. 2. See also sect. 4 of the 1926 Act and rule 4 of the 1978 Rules that provide for the content of an application for naturalisation.

⁸⁹ *Ibid.*, sect. 3(1)(c).

⁹⁰ See the Citizenship Rules 1978, rule 4(1)(b). The residence requirement for a foreign woman married to a Bangladeshi is, however, 2 years.

⁹¹ *Ibid.*, rule 4(1). Application for naturalisation has to be made directly to the government (Ministry of Home Affairs) if the applicant is in Bangladesh and the appropriate Bangladesh Mission if he is in any other country.

There is not an automatic right of naturalisation, and the ‘grant of a certificate of naturalisation [is] in the absolute discretion of the Government’.⁹² The grant of certificate of naturalisation accords to the person concerned a status of citizenship, which however takes effect only after she or he takes and subscribes the oath of allegiance to Bangladesh.⁹³ Upon naturalisation and the oath of allegiance, naturalised persons are ‘deemed to be citizens of Bangladesh’ and become subject to ‘all obligations, duties and liabilities of a citizen of Bangladesh’ and ‘entitled to all the rights, privileges and capacities of a citizen of Bangladesh’.⁹⁴ If the person applying for naturalisation enters in the application the name of any minor child of him or her residing in Bangladesh, the child also becomes entitled to the rights and privileges of a citizen of Bangladesh.⁹⁵

To help implement the policy to attract and increase foreign direct investment in Bangladesh, a new criterion has been added to the conditions of citizenship by naturalisation. According to what has come to be known as ‘citizenship by investment’, any person who invests an amount of USD 5 million or its equivalent in an industrial or commercial project of Bangladesh or transfers USD 1 million to any of the recognised financial institutions in Bangladesh may be granted citizenship through naturalisation. These investments are non-repatriable, and hence may not be withdrawn.

As discussed immediately below, a foreign woman who is married to a Bangladeshi citizen may also apply for citizenship through naturalisation. This has been a long standing principle of the citizenship law of Bangladesh.

There is no readily available data regarding the grant of citizenship to foreign nationals through naturalisation. The following Table, however, shows statistics of citizenship granted to foreigners on the basis of residence, investment, and marital relationship over a period of 19 years (1988 to 2016).⁹⁶ It is interesting to note that through this long period, only 418 people have been naturalised as Bangladesh citizens, of whom 418 were granted citizenship on the basis of family relationship (which is 99.52% of total naturalisation) and 2 were granted citizenship on the basis of investment (which is only 0.48%). The total absence of naturalisation during this period on the basis of residence in Bangladesh shows that the residency condition is a high threshold barrier on the way to citizenship acquisition. One potential reason might be that foreigners are not interested to be ordinarily resident in Bangladesh on a longer term basis. It might also possibly be a case that the length of the residency requirement (5 years) is a prohibitive condition. On the other hand, the rules regarding visas for foreigners including the ones for the renewal of visas are not supportive enough to encourage foreigners to live in Bangladesh for a longer time.

⁹² The Naturalisation Act 1926, sect. 5(3).

⁹³ *Ibid.*, sect. 7(1).

⁹⁴ *Ibid.* An exception can be made to the enjoyment of those rights ‘as may have been withheld’ by the certificate of naturalisation.

⁹⁵ *Ibid.*, sect. 5(2).

⁹⁶ These statistics are collected from the Ministry of Home Affairs, Government of Bangladesh, by virtue of a personal communication by the contributor of the present report, and the help of the relevant wing of the Ministry is thankfully appreciated.

Table: Bangladeshi citizenship granted to foreigners

Year	Total	Family Relationship	Residence	Investment
1988	4	4	0	0
1989	34	34	0	0
1990	12	12	0	0
1991	14	14	0	0
1992	13	13	0	0
1993	20	20	0	0
1994	37	37	0	0
1995	43	43	0	0
1996	12	12	0	0
1997	26	24	0	2 (one from Hong Kong and the other from Taiwan)
1998	22	22	0	0
1999	15	15	0	0
2000	19	19	0	0
2001	12	12	0	0
2002	6	6	0	0
2003	0	0	0	0
2004	12	12	0	0
2005	24	24	0	0
2006	14	14	0	0
2007	13	13	0	0
2008	13	13	0	0
2009	9	9	0	0
2010	0	0	0	0
2011	3	3	0	0
2012	22	22	0	0
2013	6	6	0	0
2014	8	8	0	0
2015	3	3	0	0
2016	2	2	0	0
Total	418		0	2

3.1.2 Citizenship through marriage and gender-inequality

The law provides for the citizenship acquisition through marriage, which is, however, not an automatic acquisition. Acquisition of citizenship through marriage is indeed through naturalisation of the person concerned and is dependent on obtaining a certificate of domicile or residence in Bangladesh for a period of two years.⁹⁷

The rules of citizenship acquisition through marriage are, however, clearly gender-biased. Unlike in the case of a Bangladeshi woman's right to transmit citizenship to her children born to a non-citizen father, a Bangladeshi woman married to a foreigner cannot pass citizenship to her husband. This is discriminatory against women and therefore unconstitutional,⁹⁸ because a Bangladeshi man marrying a foreign woman can so transmit citizenship to her, albeit subject to the fulfillment of certain conditions. Section 10(2) of the Citizenship Act 1951 provides that a non-citizen woman who has been married to a citizen of Bangladesh shall be entitled to be citizen of Bangladesh upon obtaining a certificate of domicile and taking the oath of allegiance.⁹⁹ The 1978 Citizenship Rules further reaffirm the discriminatory rule of acquiring citizenship through marriage, allowing only a 'foreign national [being] a wife of a citizen of Bangladesh' or 'a foreign woman ... married to a Bangladeshi' to apply for naturalisation certification.¹⁰⁰

It is encouraging that the government of Bangladesh has made a recent declaration in its 8th periodic report under CEDAW that 'a woman's right to pass on her citizenship to her foreign spouse is under consideration'.¹⁰¹ As will be seen below, the draft citizenship bill of 2016 has included a gender-neutral provision in this regard.

3.1.3 Citizenship of foundlings and adopted children: the legal gap

The above shows that the citizenship law of Bangladesh is silent about, or deficient in clarity regarding certain issues of citizenship. Two specific issues that seem to be not covered by the law categorially are the issue of citizenship of a foundling of unknown parentage born or found in Bangladesh. A child born in Bangladesh whose both parents are unknown is nonetheless presumed to be a citizen of Bangladesh. This presumption is supported by the principle of citizenship by birth. Another issue is the citizenship status of a child adopted by a Bangladeshi citizen. In this regard, there seems to be no legal provision at all. Bangladesh is a country of legal and religious pluralism. While Bangladeshi Muslims are not legally allowed to adopt children (Huda 2008), Hindus and Christians of Bangladesh may adopt children

⁹⁷ See rule 4 of the Citizenship Rules 1978 (and art. 4 of the 1972 Citizenship Order), the Citizenship Act 1951 (sect. 10(2)), and the Naturalisation Act 1926 (sect. 7(1)).

⁹⁸ See the Constitution of Bangladesh, especially arts. 27 ('All citizens are equal before law') and 28(1) ('The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth').

⁹⁹ With regard to the same sect. 10(2) of the 1951 Act in Pakistan, the Federal Shariat Court in a *suo motu* ruling (of 12 December 2007) held this provision unconstitutional for being discriminatory against women and directed the Government of Pakistan to take measures towards granting Pakistani citizenship 'to a foreign husband married to a Pakistani woman'. This decision has since been pending on appeal before the Shariat Appellate Bench of the Pakistani Supreme Court (Shah 2016).

¹⁰⁰ See respectively rule 4(1), proviso (a), and rule 4(3) of the Citizenship Rules 1978 (as amended in 1985). See also sect. 7(1) of the 1926 Act under which a non-citizen wife of a person who has become a naturalised citizen may make a declaration expressing her wish to become a Bangladeshi citizen within 1 year of the husband's taking oath of allegiance following naturalisation.

¹⁰¹ See the Eighth Periodic Report of the Government of the People's Republic of Bangladesh under the Convention on the Elimination of All Forms of Discrimination Against Women, May 2015 (available at: http://mowca.portal.gov.bd/sites/default/files/files/mowca.portal.gov.bd/page/762c7e6e_69ce_4979_817c_f7dbc2b561ed/8th%20Periodic%20Report-%20CEDAW.pdf) at p. 14, para. 75.

including children of foreign origin in accordance with their respective personal law system. A clear legal provision regarding the citizenship acquisition of a child of foreign domicile adopted by a Bangladeshi citizen is therefore an obvious need.

It is interesting to note that the government may under the 1951 Act confer citizenship on a foundling of unknown parentage or on a child adopted by a Bangladeshi citizen. Section 11(2) provides that the government ‘may, in such circumstances as it thinks fit, register any minor as a citizen of Bangladesh’. This has been an enabling, remedial provision, but no instance of its use is yet available.

3.2. Loss of Bangladesh Citizenship

That arbitrary deprivation of citizenship or denationalisation entails serious injustice to the person concerned needs no stressing. Denationalisation leads to ‘the total destruction of an individual’s status in organized society’.¹⁰² This is so because ‘[w]hat sovereignty is to a State, citizenship is to a person’.¹⁰³ As noted at the outset of this Report, Bangladeshi citizenship law leaves no room for arbitrary deprivation of citizenship, while the country’s Supreme Court has almost without any exception interpreted the rules relating to cancellation or withdrawal of citizenship from a liberalist legal stance.

Citizenship can be lost through an action of the citizen, or by an act of the state, or through the loss of state sovereignty as was the case with the independence of Bangladesh from Pakistan in 1971. Globally, a citizen is considered having the right to relinquish his citizenship as a corollary of the right to change one’s nationality (Shearer & Opeskin 2012: 7) or under the ‘right of expatriation’ that are customary international law principles.¹⁰⁴ In Bangladesh, renunciation of citizenship applies to both natural-born and naturalised citizens. In regard to the renunciation of citizenship by birth, the Bangladeshi citizenship law does not prohibit such renunciation, while the citizenship acquired through naturalisation may be renounced by a declaration of alienage.¹⁰⁵

The 1951 Act provides for the loss of citizenship by birth only on two occasions. First, when a birth citizen of Bangladesh has been resident abroad for seven years, and, second, when the citizen acquires foreign citizenship. While the 1972 Citizenship Order has not enacted any direct provision on deprivation of citizenship, the 1978 Rules (*see* rule 9) provide for the cancellation of naturalised citizenship¹⁰⁶ or dual citizenship.

3.2.1 Loss of citizenship by birth for long absence

According to sect. 16(4) of the 1951 Act, the government may by an order deprive citizenship when a citizen remains absent for seven years from the country by ‘ordinarily’ and ‘continuously’ being a resident abroad.¹⁰⁷ As the two terms ‘ordinarily’ and ‘continuously’

¹⁰² *Trop v Dulles* 356 US 86 (1957) 101, cited in Lambert (2015: 3-4) (‘It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development [...]').

¹⁰³ *Golam Azam’s Case*, above n. 17, at para. 7, per M. H. Rahman J.

¹⁰⁴ See the Universal Declaration of Human Rights 1948, art. 15.

¹⁰⁵ The Naturalisation Act 1926, sect. 10(1).

¹⁰⁶ See also sect. 8 of the Naturalisation Act 1926 for revocation of certificate of naturalisation.

¹⁰⁷ There are exceptions to this rule such as when the person was in the service of Bangladesh or an international organisation of which Bangladesh was a member during such absence from Bangladesh.

suggest, it is presumable that there should be an exceptional circumstance of total loss of substantial connection by the concerned person with Bangladesh before his citizenship can be taken away on this ground.

In *Golam Azam's Case*, the respondent was abroad almost for more than seven years (November 1971 to July 1978). The Court found that 'there was nothing to show that while staying abroad he had taken any steps like renting or buying a house or even having a fixed address in Pakistan indicating that he had no *animus revertendi* so far [as] his permanent residence in Bangladesh is concerned'.¹⁰⁸ These facts were therefore not considered to form a ground for deprivation of citizenship under sect. 16(4) of the 1951 Act for ordinarily and continuously residing abroad. In *Bangladesh v Abdul Haque* (1982) and a series of other cases, the Supreme Court held that the citizenship by birth is not lost by temporary absence from the country of origin.¹⁰⁹

3.2.2 Dual citizenship and the loss of Bangladesh citizenship upon the acquisition of foreign citizenship

The Citizenship Act 1951 generally prohibits 'dual citizenship', and a citizen by birth who accepts foreign citizenship automatically loses Bangladesh citizenship unless he or she relinquishes it voluntarily.¹¹⁰ Following a 1978 amendment to the 1972 Citizenship Order, however, Bangladesh now permits dual citizenship under limited circumstances.¹¹¹ Bangladeshi-origin nationals of certain countries may apply to the government for the reacquisition of Bangladeshi citizenship without having to relinquish their existing citizenship of other countries. Currently, Bangladeshi-origin citizens of Australia, Canada, the UK, the USA, and certain Western European countries may apply for a 'Dual Nationality Certificate', and the government may notify any other country as an eligible country for this purpose.¹¹²

While the Bangladeshi citizens holding citizenship of other countries stand at par with, and are entitled to full social and political rights as, Bangladeshi citizens, there are currently ongoing debates regarding the breadth and scope of their citizenship rights and liabilities. At present, Article 66(2)(c) of the Constitution of Bangladesh disqualifies a Bangladeshi citizen with citizenship of another state to be or to continue as a member of Parliament.¹¹³ The 15th Amendment to the Constitution has reaffirmed this position of law, with certain clarifications.¹¹⁴

¹⁰⁸ *Golam Azam's Case*, above n. 17, at para. 58.

¹⁰⁹ (1982) 2 BLD (AD) 143. A similar, pre-1971 case is *Superintendent and Remembrancer of Legal Affairs, Government of East Pakistan v Kiron Chandra Dutta* (1963) 15 DLR (Dhaka) 436, 441 (a citizen of Pakistan, who went to India for medical treatment before the introduction of the system of passport between East Pakistan and India and returned home with an Indian passport with a Pakistani visa, was held to have not lost his Pakistani citizenship). On the impact of permanent residence on the right to citizenship, see also *Bangladesh v Mirza Shahab Ispahani* (1988) 40 DLR (AD) 116, and *Sena Kalayan Sangstha v Haji Sufi Fazal Ahmed & Others* (2006) 11 MLR (AD) 86.

¹¹⁰ See the Citizenship Act 1951, sect. 14; and the 1978 Citizenship Rules, rules 3-5.

¹¹¹ See the 1972 Order, art. 2B(2).

¹¹² Please visit: <<http://www.dualcitizenship.com/countries/bangladesh.html>>. If the applicant is in a foreign country, the application has to be lodged with the local Consulate or Embassy/Mission. And, when the applicant is in Bangladesh, the application has to be lodged with the Ministry of Home Affairs, Bangladesh Secretariat.

¹¹³ See also *Abdul Halim v Abul Hasan Chowdhury* (2001) 21 BLD (HCD) 391 (a person affirming allegiance to a foreign state either by acquiring citizenship of that state or otherwise would disqualify to be or to continue as a Member of Parliament).

¹¹⁴ Article 2A of the Constitution, inserted by virtue of s. 24(iii) of The Constitution (Fifteenth Amendment) Act 2011 (Act XIV of 2011), provides that despite the provision of article 66(2)(c), 'if any person being a citizen of Bangladesh by birth acquires the citizenship of a foreign State and thereafter [...], in the case of dual citizenship,

There is no available data as to how many people have acquired Bangladesh citizenship under the dual citizenship rule. According to a rough estimate, around three thousand Bangladeshi citizens take citizenship in different countries, and the bulk majority of them apply for dual citizenship certificates in the concerned Bangladesh missions/consulates.

3.2.3 *Loss of citizenship acquired through naturalisation*

The law provides for a number of reasons for which the citizenship of a naturalised citizen or of a person holding dual citizenship can be annulled, revoked, or withdrawn. The grounds for denationalisation in this regard include the practice of fraud in obtaining a certificate of domicile or a certificate of naturalisation, furnishing in the application for citizenship any false information or suppression of any material fact, showing disloyalty or disaffection to Bangladesh or to the Constitution of Bangladesh, residing ordinarily for more than seven years outside Bangladesh, or indulging in unlawful or treacherous activities associated with an enemy country, and so on.¹¹⁵ Breach of conditions of granting citizenship may also result in the deprivation of citizenship by naturalisation. For example, a citizen naturalised upon investment in Bangladesh becomes denationalised when she or he removes the non-repatriable investment from the country.

3.2.4 *Natural justice and the absence of arbitrariness vis-à-vis deprivation of citizenship*

Whatever be the ground for cancellation, withdrawal, or revocation of citizenship, the person concerned has to be given a reasonable opportunity of being heard and the government has to have an objective reason to believe that the deprivation of citizenship is ‘in the public interest’.¹¹⁶ Additionally, in certain specified situations, the authorities must make an inquiry before a person’s citizenship can be cancelled or nullified.¹¹⁷ Nevertheless, when a person is denationalised and he or she does not have a second citizenship, the loss of Bangladesh citizenship would result in statelessness.

It appears that the citizenship law does not allow deprivation of Bangladesh citizenship for misconduct or serious criminal offence or even collaboration by a citizen with the enemy forces at the time of Bangladesh liberation war or on any other similar grounds. To better understand the judicial stance vis-à-vis deprivation of citizenship, it is convenient to refer to Article 2B(1) of the 1972 Order which provided that a person would not be a ‘deemed’/‘constituent’ citizen at the time of Bangladesh’s independence if he showed, expressly or by conduct, allegiance to a foreign state. While allegiance to one’s own country is at the core of citizenship, expression of allegiance by a citizen born in Bangladesh to a foreign country cannot be a ground for deprivation of citizenship.

In *Golam Azam*, Prof. Golam Azam was one of thirty-nine people who were declared by the government on 18 April 1973 to not qualify to be citizens of Bangladesh under Article 2B because they had been staying abroad since before the liberation of Bangladesh and ‘by their conduct’ could not ‘be deemed to be citizens of Bangladesh’.¹¹⁸ Behind the scene, the

gives up the foreign citizenship’ or, ‘in other cases, again accepts the citizenship of Bangladesh ..., he shall not be deemed to acquire the citizenship of a foreign State’.

¹¹⁵ Other grounds include the conviction of the person with certain sentences by any court in or beyond Bangladesh. See the Citizenship Act 1951, sects. 16(2), 16(3)(a)-(b), 16(5) & (6); the Naturalisation Act 1926, sects. 8(1) & 8(2)(a)-(e); and the Citizenship Rules 1978, rule 9.

¹¹⁶ The Citizenship Act 1951, sect. 16(5), and the Citizenship Rules 1978, rule 9.

¹¹⁷ *Ibid.*, sect. 16(7). See also the Naturalisation Act 1926, sect. 8(4).

¹¹⁸ *Golam Azam’s Case*, above n. 17, at para. 2.

real reason for his deprivation of citizenship was Prof. Azam's involvement in the anti-Bangladesh activities in the 1971 war and in crimes against humanity. In this intensely contested case, the court found that there is no power in law to denude a person of his citizenship for the offence of collaboration with the Pakistan Occupation Army, and that unless the person concerned expressly enunciated his citizenship, his deprivation of citizenship would be unlawful.¹¹⁹ In consideration of Prof. Azam's proven permanent residence and birth in Bangladesh before 26 March 1971, the Court also disregarded his Pakistani passport as a conclusive proof of foreign citizenship or as a reason of terminating his Bangladesh citizenship attained at the time of Bangladesh's independence.¹²⁰ It can be safely argued that in *Golam Azam*, the court in effect made inapplicable the ground of lack of allegiance to deprive citizenship acquired by birth.

That the Bangladeshi courts have persistently interpreted citizenship law liberally to promote the individuals' right to citizenship is further evident in cases concerning citizenships of Biharis in Bangladesh, discussed below.

3.3. Citizenship of Biharis in Bangladesh

While mere presence or residence in Bangladesh on or before 25 March 1971 was a primary criterion for the acquisition of Bangladesh citizenship under Article 2 of the 1972 Order, successive Bangladeshi governments made an invidious distinction between Bengali and non-Bengali residents (Islam 1990). As a consequence, the non-Bengali Biharis (better called 'Urdu-speaking minority') were persistently refused citizenship until the recent court intervention as noted below.

Like the Rohingya refugees and settled Rohingyas in Bangladesh, Biharis in Bangladesh are an ethnic community who have gone through a traumatic trajectory of statelessness and rightlessness. It has been a widely-held knowledge that the Biharis, originally mostly from Bihar in India, migrated to what was then East Pakistan (later Bangladesh) in the aftermath of the partition of British-India in 1947 with intent to reside or settle there. Upon Bangladesh's independence, a great majority of Biharis became 'stranded' in Bangladesh, to be known by the locals as 'stranded Pakistanis'. Some 178,000 Bihari people were repatriated to Pakistan, and around 90,000 moved out to Pakistan voluntarily. There are still around 151,000 Biharis located in about 116 camps or settlements in Dhaka and across Bangladesh, while some have effectively mingled with the mainstream society. Some Biharis, though not too many, do still consider themselves as citizens of Pakistan and have been unwilling to accept Bangladesh citizenship.

Because of post-1971 political developments as well as for their controversial and allegedly anti-Bangladesh role in 1971, Biharis in Bangladesh were never deemed to qualify for citizenship. As briefly noted above, laws and policies of both Bangladesh and Pakistan made these people 'stateless' or 'stateless refugees' in Bangladesh. Their statelessness became more complex when the chance of their acquiring citizenship became lost with the

¹¹⁹ *Ibid.*, at p. 220. This case is somewhat similar to the famous US case of *Trop v Dulles*, above n. 102, which the Appellate Division cited with approval at para. 45. In *Dulles* where the appellant was determined by the authorities to have lost US citizenship on his conviction by a court-martial for dishonorable discharge/defection, Warren CJ held that 'the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be. As long as a person does not voluntarily renounce or abandon his citizenship, [...] I believe his fundamental right of citizenship is secure'.

¹²⁰ See, for example, *Gour Chandra Saha v. The Vice-Chairman, East Pakistan Enemy Property, Dhaka and Others*, (1969) 21 DLR (Dhaka) 535.

introduction in 1978 of Article 2B to the 1972 Order that provided that a person, despite being a resident of pre-1971 Bangladesh, shall not qualify for being a citizen if he ‘owes, affirms or acknowledges, expressly or by conduct, allegiance to a foreign state’. This new provision was for a long time interpreted by the authorities as having stripped the Biharis who were absent from the Bangladesh territory for some time or who had opted for repatriation to Pakistan of the right to be citizens of Bangladesh.

Although the Biharis qualified to be the constituent citizens of Bangladesh and hence were not required to apply for citizenship,¹²¹ those Biharis willing to remain in Bangladesh as citizens were required by the authorities to apply for naturalisation. Accordingly, a government notification required all non-Bengali people who had been resident before 25 March 1971 to make a declaration of loyalty to Bangladesh before they could apply for citizenship. This legal requirement doubtless was incompatible with the existing law relating to initial determination of Bangladesh citizenship. Further, despite a clearer right of *ius soli* citizenship of Biharis born in Bangladesh after 1971, the new generation Biharis too were denied Bangladesh citizenship presumably on the argument that their parents were not considered Bangladeshi citizens.

It was, therefore, logical for the Biharis in Bangladesh to turn to courts in an attempt to establish their citizenship. And, the court has taken a consistently liberal approach to the relevant rules concerning the citizenship by birth and by operation of the law. Specifically, the judiciary has interpreted the terms ‘owes, affirms or acknowledges, expressly or by conduct, allegiance to a foreign state’ quite progressively so that the Biharis are not rendered stateless. In the famous case of *Mokhtar Ahmed v Government of Bangladesh* (1979),¹²² Mr. Ahmed became a naturalised citizen by taking the oath of allegiance to Bangladesh, but later registered his name, in time of distress, with the International Committee of Red Cross for being repatriated to Pakistan. The Court ignored this expression of intention to resettle in Pakistan by a person who had been domiciled in Bangladesh since 1951, and held that he continued to be a Bangladesh citizen. In the Court’s words:

The mere fact that he filed an application for going over to Pakistan cannot take away his citizenship. The Bangladesh Citizenship Order [...] has not discriminated among [...] citizen[s] no matter in which way they have become citizens of this country. So the petitioner is on the same footing as any other citizen. His citizenship, therefore, clings to him. He could voluntarily renounce it or he could be deprived of it if he had incurred any disqualification. Though he filed the application, he did not even pursue it. He filed an affidavit affirming his allegiance to Bangladesh in 1972. The petitioner having not acquired the citizenship of any other country, his citizenship of Bangladesh which he acquired long before cannot evaporate and he continues to be a citizen of this country.¹²³

Similarly, the case of *Abdul Haque*, although it was concerned with the meaning of ‘permanent residence’, is worth noting for its bearing on the construction of allegiance to a foreign country.¹²⁴ Mr. Haque, born within the territory of what later became Bangladesh, went to Pakistan in connection with his business in November 1971. In 1975 he returned to Bangladesh with a Pakistani passport and reunited with his family. Surrendering his Pakistani passport, he applied for citizenship of Bangladesh which was denied. The government rather

¹²¹ This implication of art. 2 of the 1972 citizenship Order was reflected in the 1978 Citizenship Rules (rules 3 & 4) that provided for applications for citizenship by citizens of other specified countries and by the foreigners who wanted to be naturalised.

¹²² (1982) 34 DLR (HCD) 29 (judgment of 7 June 1979). In an unreported judgment of 13 June 1980, the Appellate Division of the Supreme Court in *Bangladesh v Mukhtar Ahmed* reaffirmed this ruling.

¹²³ *Ibid.*, at p. 31. See also *Abdul Khaleque v The Court of Settlement* (1992) 44 DLR (HCD) 273 (filing of an application for repatriation to Pakistan does not disentitle one to citizenship).

¹²⁴ Above n. 109.

treated him as a foreigner and directed him to leave the country. The Appellate Division of the Supreme Court held that his citizenship or permanent residence had never been lost.

On the question of impact of alleged ‘allegiance’ to a foreign country, expressed through registration for repatriation or otherwise, the Appellate Division earlier in *Golam Azam* categorically held that even a diehard pro-Pakistani, born in Bangladesh, is entitled to be a citizen of Bangladesh if he fulfills the criterion of Article 2 and is not disqualified under clause (i) of Article 2B(1) of the 1972 Citizenship Order (the ground of non-allegiance).¹²⁵ The court indeed articulated ‘the resilient quality of citizenship’ (Southwick 2011: 128) and stated as follows:

Citizenship, though not mentioned as a fundamental right in [the] Constitution, is to be considered as the right of all rights as on it depends one’s right to fundamental rights expressly provided for a citizen in ... the Constitution.¹²⁶

The above justice-promotive interpretations of the citizenship law had a little, if at all, impact on the executive perceptions of citizenship of Biharis. Against such a background, ten members of this Urdu-speaking community, born both before and after 1971, in a 2002 constitutional litigation sought a declaration of citizenship and a mandamus to enrol them as voters. In this landmark case on citizenship, *Abid Khan v Bangladesh*,¹²⁷ the High Court Division once again confirmed that Biharis were entitled to citizenship under both the 1951 Act and the 1972 Order. The Court held that the birth and the residence of the petitioners in the Bihari camps do not disentitle them to citizenship, and ‘mere residence’ in the Bihari camps could not be deemed as allegiance to another State. For the Court, residents of the Bihari camps had not ‘attained any special status so as to be excluded from the operation of the laws of the land’.¹²⁸

Unfortunately, however, *Abid Khan* and other judicial decisions that sought to protect the Biharis or to prevent the government from discriminating against them could not resolve the issue of statelessness of Biharis generally. An unambiguous right of citizenship for the Bihari people remained a far cry despite this decision, principally because the government did not make clear its policy or take measures pursuant to the court decision (Paulsen 2006: 67). The Biharis therefore still needed to apply for citizenship (by naturalisation) and the authorities were glaringly resistant to accepting them as citizens. Moreover, the impact of *Abid Khan* was limited to the ten petitioners of that case.

Against the backdrop of the deficiency in impact of *Abid Khan*, another ten petitioners of the Bihari community in 2007 sought a *mandamus* for their enrolment as voters. They successfully obtained a ruling in *Md. Sadaqat Hossain Khan (Fakku) and Others v Chief Election Commissioner* (2008) that established a general citizenship right of the Biharis.¹²⁹ The High Court Division was unequivocal in holding that Biharis in Bangladesh generally were entitled to citizenship, and directed the Election Commission to register all Biharis willing to be enrolled as voters. The Government this time also was willing to ‘look at the issue objectively and with compassion’ (Katherine 2011: 130). Consequential to this decision, there seemed to be some willingness on the part of the government during the 2007-2008 state

¹²⁵ *Golam Azam’s Case*, above n. 17, at para. 52.

¹²⁶ *Ibid.*, at para. 8.

¹²⁷ (2003) 55 DLR (HCD) 318.

¹²⁸ *Ibid.* The Court directed the Election Commission to enroll the petitioners as voters if not otherwise disqualified under sect. 7(1)(b)(c) & (d) of the Electoral Rolls Ordinance 1982 (*per Zinat Ara and M. Hamidul Haque JJ*).

¹²⁹ (2008) 60 DLR (HCD) 407 (WP No. 10129 of 2007) (judgment 18 May 2008). A copy of the judgment is available at: <http://www.refworld.org/docid/4a7c0c352.html> (accessed 5 September 2016).

of emergency to grant citizenship to Biharis, but no legislative reform ensued in the end. Later, however, around 80% of eligible Urdu-speaking men and women, of all ages, registered to vote and obtained national identity cards (*Ibid.*: 131).¹³⁰ In *Sadaqat Khan*, the Court also made a policy suggestion as to the integration of Urdu-speaking community within the mainstream of the citizenry, a sensible advice that remains unattended to, as of today.¹³¹

Despite this judgment, Biharis still have been facing ‘serious obstacles to obtaining citizenship documents such as passports and birth certificates’.¹³² This claim finds support in a recent case before a UK immigration tribunal that involved the issue of ‘identity’ of a Bangladeshi Bihari person who had been living in London. This person, born to Bihari parents in Bangladesh in 1978, was refused in 2015 a passport by the Bangladesh High Commission in London on the ground that the applicant was a ‘stranded Pakistani national’.¹³³ It can be argued that the decision by the authorities to grant passports to children born in Bangladesh to Bihari parents would be in breach of the court decision in *Sadaqat Khan*.¹³⁴

4. Current political debates and reform plans

Currently, a draft bill on citizenship awaits its introduction to Bangladesh Parliament, the Jatiya Sangsad (the House of the Nation). The ongoing reform plans relating to the citizenship law in effect began in the early 2000s during the time of the then Bangladesh Nationalist Party (BNP)-government. The inadequacy of the Bangladeshi citizenship regime was first revealed in *Golam Azam’s Case* (1994), discussed above. Later in 2005 when the BNP-government was in power, the Law Commission of Bangladesh first proposed the amendment of the existing citizenship laws, proposing a simple statute instead of the two existing discordant statutes.¹³⁵ This draft proposed to eliminate the discrimination against women that existed concerning the citizenship by descent.¹³⁶ As seen above, the provision of *ius sanguinis* citizenship was made gender-neutral in 2009. Most importantly, this 2005 draft proposed a simple, rights-enhancing provision for the acquisition of dual citizenship, stating that a citizen of Bangladesh will not lose his or her citizenship upon the acquisition of citizenship of a

¹³⁰ On this, see further Redclift (2013) and Farooqui (2016; 2008).

¹³¹ As M.A. Rashid J, at p. 413 (para. 8) observed: ‘Question of citizenship of Urdu-speaking has got another aspect, which is very important from the constitutional perspective. Miseries and sufferings of such people due to statelessness were time to time reported in the national media [...]. [...], they are constantly denied the constitutional rights to job, education, accommodation, health and a decent life like other citizens of the country. By keeping the question of citizenship unresolved on wrong assumption over the decades, this nation has not gained anything [...]. ... The sooner the Urdu-speaking people are brought to the mainstream [...] the better’.

¹³² Please visit: <https://www.theguardian.com/global-development/gallery/2014/aug/11/stranded-pakistanis-camps-bangladesh-bihari-in-pictures>.

¹³³ The passport authorities require proof of citizenship for the issue of a passport, because the law provides that they ‘may refuse to issue a passport’ if ‘the applicant is not a citizen of Bangladesh’. See art. 6(1)(a) of the Bangladesh Passport Order 1973, and the Bangladesh Passport Rules 1974. The usual documents that are accepted as a proof of citizenship are: certificate from a head of the concerned local government unit (City Corporation/Union Parishad/Municipality Corporation/Cantonment Board); a national identity card; or the birth-certificate.

¹³⁴ The author of the present report was involved in this case as a *pro bono* advisor to Professor Werner Menski who wrote an expert report for the tribunal’s use.

¹³⁵ The draft bill is attached to the Report, on which see the Law Commission of Bangladesh (2005).

Interestingly, the Law Commission did not recommend repeal of the Naturalization Act 1926 was not suggested by.

¹³⁶ *Ibid.*, clause 5 of the draft bill.

foreign country (clause 6). Another notable proposal of the proposed 2005 draft bill was that it acknowledged a citizen's right to renounce citizenship except during the time of war (clause 15).

Later, the Ministry of Home Affairs issued a preliminary draft in 2009 when the post-Emergency Awami League government just came into power. The proposed 2009 draft, modelled on the 2005 draft proposed by the Law Commission, had a provision for acquisition of citizenship through marital status (dependent on the applicant's residence for 3 years), but also had a draconian provision for the cancellation of citizenship of any person accused of showing non-allegiance to Bangladesh or its sovereignty. This draft also proposed a simple provision relating to the initial or existing citizenship, stating that a person who was a citizen under the 1951 Act or the 1972 Order would ipso facto be a citizen at the commencement of the new law.

However, further later, a new draft was prepared in 2015 which the Awami League government on 1 February 2016 has approved in principle. This version of the draft citizenship bill will be eventually laid before parliament for enactment.

The draft 2016 Citizenship Bill has not indeed proposed anything new. Contrarily, it has generated much controversies first by proposing quite a retrogressive model of the dual citizenship clause, and secondly by offering an overly faulty legal scheme generally with respect to citizenship and citizenship rights (see Sakhawat 2016, and Ahmed 2016). On the second aspect, many have critiqued the draft, for example, for posing a potential threat against enclave dwellers who have been recently granted Bangladesh citizenship, the Urdu-speaking community, and the indigenous people of the Chittagong Hill Tracts who might face difficulties in retaining citizenship or in effectively exercising their citizenship rights. In other words, the draft citizenship bill can be said to have proposed an exclusionary regime instead of an inclusionary one.¹³⁷

As regards the deprivation of citizenship, the draft bill seems to have proposed quite a vague, regressive, and anti-liberty provision. Clause 18 of the bill provides that a citizen shall be disqualified to remain a citizen if he or she expressed, directly or indirectly, allegiance to a foreign state except the one of his or her dual citizenship. This broadly couched provision shows a lack of reasonableness, and it remains unclear what allegiance to a foreign country means. The power to deprive citizenship on certain enumerated grounds including the ground under clause 18 is provided in clause 20 of the bill, which, however, does not apply to a citizen by birth. According to the established principles of legal interpretation, a by birth citizen's citizenship cannot therefore be nullified for allegiance to a foreign state despite that clause 18 uses 'citizen' in its generic sense. Ambiguities, however, remain, and any overweening government may use clause 18 to deprive even a citizen by birth of her citizenship, without taking resort to clause 20.

Another controversial and restrictive provision is regarding the citizenship by descent in clause 5 of the draft bill that contains an unwarranted deviation from the existing simple provision of citizenship by descent. Clause 5 of the proposed bill states that a child born abroad to a Bangladeshi mother or father would be a citizen by descent if the parent/s was/were Bangladeshi citizen/s immediately before the commencement of the proposed law. Further, it is proposed that the child would not be such a citizen if she or he is not registered with the concerned Bangladesh Mission within two years of the birth or within 2 years of the commencement of the proposed law, whichever is later, or if the child has not had a certificate of birth from the country of birth. While these provisions are certain to have negative

¹³⁷ On the notion of inclusionary citizenship, see Kabeer (2006).

implications for the citizenship rights of the persons concerned, the draft bill leaves a damaging gap by not covering the children born to Bangladeshi parent/parents who has or have become Bangladeshi citizens after the commencement of the proposed law.¹³⁸

A partially progressive provision in the draft bill is the one concerning the citizenship through marriage, which seeks to allow a Bangladeshi citizen to transmit citizenship to her or his spouse and this removes the existing gender-discrimination on the subject. The conditions of citizenship through marriage have, however, been toughened. Clause 11 of the draft bill states that the foreign spouse must be a resident in Bangladesh for a minimum period of five years¹³⁹ and that he or she must not be an unauthorised immigrant. It is presumable that this proposed rule has Rohingya refugees in mind so that they cannot attain citizenship by marrying Bangladeshi men or women. Earlier, in July 2014, the government by a notification instructed the registrars of Muslim marriages not to register any marriage between Bangladeshi citizens and Rohingya refugees. The proposed provision can also be used against members of the Bihari community who have not obtained documents establishing their citizenship. On a positive note, a commendable aspect of the draft bill is that it proposes to keep the provision of *ius soli* citizenship as it now exists under the 1951 Act, no matter that Bangladesh does not in practice apply/follow the *ius soli* principle.

The draft bill, on the other hand, is silent about the citizenship rights of the new-generation children born to non-Bangladeshi parents such as stateless Rohingya parents in Bangladesh. Nor does it consider the vulnerable position of foundlings¹⁴⁰ or the adopted children. As an expert has insightfully commented, since one of the UN Sustainable Development Goals (SDGs) is to ensure ‘legal identity for all’ by 2030, Bangladesh cannot deny its international responsibility towards the protection of the stateless people.¹⁴¹ As noted above, Bangladesh has indeed a *de facto* obligation to reduce statelessness. The draft bill, therefore, stands deficient in addressing the issue of rights of stateless people living in Bangladesh.

And, with specific reference to the dual citizenship, there are several complexities. The most drastic of them is the proposal that the Bangladeshi citizens with dual citizenships will not be allowed to stand for national or local elections and will not be eligible to be elected as President of the country, or for any appointment in the public service or as judges of the Supreme Court. Nor will they be entitled to join any political party or group (clause 7). These limitations on the citizenship rights also apply to a naturalised citizen, citizen by descent, citizen by dint of marriage, and citizen *honoris causa* (clause 13). Understandably, this provision of differentiated citizenship rights shows a major policy shift and would have implications for Bangladesh’s internal politics and arguably for its international relations. Civil society members have been arguing that creation of differentiated citizenship rights would run counter to the constitutional principles of equality and non-discrimination. The Constitution guarantees certain fundamental rights for the citizens, without discriminating citizens by birth from those citizens who are citizens otherwise than by birth. Specifically, Article 27 of the Constitution establishes that all citizens of Bangladesh are equal before the

¹³⁸ This would have made it ‘virtually impossible for the third or fourth generation Bangladeshis to claim Bangladeshi citizenship’ (Khasru 2016).

¹³⁹ This is a deviation from the existing provision that requires a two year’s stay. See above n. 97.

¹⁴⁰ A clause in the draft bill, however, provides that any child may be given citizenship upon registration (clause 16), which, again, is problematic as it requires an application to be made by the guardian of the child.

¹⁴¹ See a report titled ‘Revisit the draft citizenship law’ published in the *Law and Our Rights, the Daily Star*, Dhaka, 22 November 2016, available at: <http://www.thedailystar.net/law-our-rights/revisit-draft-citizenship-law-1318324>.

law and are entitled to equal protection of the law, while Article 28 prohibits discrimination against ‘any citizen’, inter alia, on the ground of ‘place of birth’.

In addition to clause 7 noted in the preceding paragraph, there are two provisions (with much drafting vagueness) in the draft bill of 2016 regarding dual citizenship. First, clause 6 concerns the expatriates of Bangladeshi origin, and, second, clause 8 concerns the citizens of Bangladesh who might want to acquire citizenship of a foreign country. Clause 6 in effect seeks to reenact the controversial dual citizenship rules of the 1951 Act and the 1972 Order, and states that only those expatriates may apply for Bangladesh citizenship whose parents or grandparents were, before their acquiring foreign citizenships, Bangladeshi citizens. This provision ignores the claim of the Bangladeshi diaspora overseas to simplify the rule of dual citizenship which currently burdens a citizen by birth to lose her citizenship upon acquiring a foreign citizenship and then to go through a tardy ‘bureaucratic process’ of applying for Bangladeshi citizenship (Khasru 2016), which entails a police check of antecedents and records of the applicant.

On the other hand, clause 8 allows a Bangladeshi citizen to acquire citizenship of any foreign country other than a country in SAARC,¹⁴² Myanmar, or a country that the government may specify. It is unclear why the Bangladeshi citizens are not being allowed to acquire citizenship of SAARC countries. This prohibition was not there in the 2005 and 2009 drafts. Further, this provision does not quite address the concerns of expatriates of Bangladeshi origin, and leaves it unclear whether such an expatriate after the commencement of the proposed law would be able to retain Bangladeshi citizenship upon acquiring a foreign citizenship. In some cases, this provision would not help the expatriates in that regard, because some countries require the renunciation of original citizenships before acquiring their citizenships.

The pending draft bill lays down a provision for the attainment by foreigners of permanent resident status, but makes this facility dependent only on investment in Bangladesh. This is a narrow approach and is a departure from the existing approach that keeps the conditions of permanent residence a matter of discretion of the government.

The above debatable reform proposals in regard to the citizenship rules were not part of political agendas of the concerned political parties before elections. Nor, indeed, have these reform proposals been discussed in the public domain and subjected to scrutiny. Quite unusually, consultation with the civic society and expatriates/migrants’ organisations at home and abroad, or the wider public engagement at the drafting stage of the bill of such a constitutional significance were completely avoided.¹⁴³ Expatriates overseas or non-resident Bangladeshis have, however, expressed their deep concerns about the rights-restrictive provisions of the draft bill, especially the provisions regarding dual citizenship and citizenship by descent. In particular, the expatriates in the UK have been mobilising public opinions as well as lobbying with the relevant stakeholders back home in Bangladesh. The media has also been quite critical of the current controversial reform proposals.

¹⁴² The South Asian Association for Regional Cooperation (with Afghanistan, Bangladesh, Bhutan, the Maldives, India, Nepal, Pakistan, and Sri Lanka).

¹⁴³ Even the draft (pending) bill has not been made available on the website of the relevant government Ministry. Concerns of this type were registered in a recent Dhaka seminar on the proposed bill, on which see Samad (2016).

5. Conclusions

The above shows that the citizenship regime of Bangladesh is by and large in line with the international norms relating to citizenship, although there are a number of issues of concern from the perspectives of the rule of law and constitutionalism. It has been found in this report that Bangladesh citizenship is basically based on the *ius sanguinis* principle in the sense that, although the law literally provides for *ius soli* citizenship, the actual practice of the country has been to provide a child born in Bangladesh with citizenship when, at least, one of the parents is a Bangladeshi citizen. While this practice is not uncommon among other nations, it would be more democratic to find a better alternative to this practice. A potential alternative might be to introduce the requirement of residence of a certain length for children born in Bangladesh to non-citizen parents to be eligible for citizenship. Such an approach to *ius soli* citizenship would have been a potential tool towards solving the problem of statelessness of the refugee children born in Bangladesh.

As this report has shown, an outstanding development in the citizenship law of Bangladesh is the unambiguous judicial recognition of the citizenship-eligibility of the so-called Biharis in Bangladesh. Nevertheless, the existing citizenship law as well as the pending reform proposal contain provisions that might restrict or even deny the citizenship right of this linguistic minority community. It is, therefore, suggested that the citizenship bill of 2016 should enact a clearer provision recognising the citizenship of those who were citizens of Bangladesh on 26 March 1971. Specifically, such a provision should categorically accord Bangladesh citizenship to Biharis who were the citizens of East Pakistan and to the Bihari children born in Bangladesh on or after 26 March 1971.

The current proposals made in the draft citizenship bill, approved by the government in February 2016, are in many respects incompatible with the constitutional and common law principles of equality and legality. More specifically, the provisions concerning dual citizenship and citizenship by descent should be made simple and put in line with international standards. The draft bill should incorporate the proposal of the 2005 draft recommended by the Bangladesh Law Commission, allowing a citizen acquiring foreign citizenship to retain Bangladesh citizenship and thereby relieving him from the burden of applying for dual citizenship of Bangladesh. Further, the current non-discriminatory rule of citizenship by descent should be maintained.

The most consequential and anti-liberty provision in the draft bill of 2016 is the creation of differentiated citizenship/civic rights for citizens by birth on the one hand and for citizens by descent/naturalisation and dual citizens on the other. The differentiated regime of citizenship rights, as has now been proposed, is incompatible with the existing citizenship law and the Constitution. The proposed discriminatory system will most likely have a negative socio-political and developmental impact. The Bangladeshi diaspora overseas has been maintaining a close connection with their family-members left behind home. The so called 'non-resident Bangladeshis' including the temporary migrants as well as the dual citizens of Bangladesh resident abroad are a significant source of foreign investment in Bangladesh and of a huge number of foreign remittances. If these people are allowed to be citizens of Bangladesh only in name, they will more likely than not to be discouraged to contribute to the development of Bangladesh.

The existing law provides for the grant of 'permanent resident' (PR) status for the foreigners, but does not clarify what would be the rights and liabilities to which such a

foreigner of that status would be entitled to. In this regard, it may be recommended that a foreigner with PR status for a certain period should be made eligible for Bangladesh citizenship. It is also observed that the rule of citizenship through marriage is sort of prohibitive and is gender-biased. A clear statutory provision should make citizenship through marital status non-discriminatory against women, allowing them to transmit citizenship to their husbands. In this regard, the requirement of the spouse's stay in Bangladesh should be either obviated or reduced to one year from the current requirement of two years irrespective of the gender of the spouse. The present report also found that there is almost no record of naturalisation on the basis of residency, a responsible factor for which situation is probably the difficult residency-requirement. It is accordingly advisable that the rules of naturalisation should be made simple and accessible. The new reform proposal should also enact unambiguous provisions relating to citizenship of foundling and adopted children on a non-discriminatory basis.

With regard to the institutional aspect of the Bangladesh citizenship law, it may be noted that there is currently no centralised or self-sufficient institutional mechanism. A number of departments and agencies such as the Ministry of Home Affairs, the Police, and the Investment Development Authority are currently involved. It may be proposed that a distinct department under the Ministry of Home Affairs, which may be named 'Department of Citizenship', may be installed to administer the citizenship laws.

On a structural front, the present report noted that the citizenship laws in Bangladesh are too many and, therefore, are not consistent. The current reform proposals seek to enact a stand-alone law by way of repealing the 1951 Act and the 1972 Order. The draft does not, however, propose to repeal and replace the Naturalisation Act 1926. Therefore, there will still be inconsistent provisions with regard to naturalisation and the deprivation of citizenship acquired through naturalisation. To attain a coherent and consistent citizenship regime, the new bill should repeal these three statutes and enact one comprehensive statute instead, covering all aspects of Bangladesh citizenship.

Last, but not the least, Bangladesh should consider ratifying or acceding to the relevant international conventions concerning citizenship.¹⁴⁴ At present, it has been party only to the 1930 Hague Convention on Citizenship.¹⁴⁵ Accession to or ratification of other relevant international citizenship instruments is critical for Bangladesh, because, in the event that any rule of Bangladesh citizenship laws is found deficient, it would be able to solve the problem of legal deficiency by adhering to international standards and practices (see further Islam 1990: 25). Moreover, in case of any conflict between Bangladesh laws and the citizenship laws of any other country the international treaties might too help resolve the conflict of law issues.

¹⁴⁴ These conventions are the 1951 Refugee Convention, the 1954 Convention Relating to the Status of Stateless Persons, the 1957 Convention on the Nationality of Married Women, and the 1961 Convention on the Reduction of Statelessness.

¹⁴⁵ Because of the principle of succession of international law obligations. Pakistan declared its adherence to this Convention and the two Protocols on Statelessness on 29 July 1953, which arguably binds Bangladesh upon its independence on 26 March 1971.

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