

Citizenship Issues and Issuing Citizenship: A Case Study of Sri Lanka’s Citizenship Laws in a Global Context

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I. INTRODUCTION

Of the many important protections secured for people by international human rights frameworks, the right to nationality, or a “legal identity,” is among the most significant. As Jacqueline Bhabha¹ notes, “Legal identity does not guarantee a good life, but its absence is a serious impediment to it.”² To use the expression, “The buck stops here,” for most people, the state “is where the buck stops.” Without nationality, there is no “state” for the buck to stop at, so human rights abuses, violations, severe

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discrimination and exploitation occur without any interference or intervention from the state.

The effects of statelessness are particularly egregious for children who are inherently vulnerable and dependent on states.³ The state is often ultimately responsible for children's protection, especially those in marginalized communities, those affected by conflict, and those who do not have parental or family support. The United Nations International Children's Emergency Fund ("UNICEF")⁴ asserts, "Establishing a legal identity is an essential first step in safeguarding children's right to protection and assistance."⁵ The German news agency, Deutsche Presse-Agentur, aptly highlights the pervasiveness of legal identification in an article revealing that in countries with the greatest number of children, "most will not allow a child to enroll in school without a birth certificate and at least 20 would not allow a child to be legally vaccinated."⁶ In addition, these children cannot prove their age for the purpose of avoiding labor or military recruitment or adult treatment and penalties by courts.⁷

Recognition of the centrality of citizenship⁸ has developed rapidly in the past century. Thomas H. Marshall's well-known rights-based conception of citizenship divides associated rights among the civil, political, and social spheres.⁹ Later, scholars have worked to expand the understanding of citizenship to encompass social and community belonging and participation, emphasizing citizenship as reflective of the social construct.¹⁰ Linda Bosniak presents one definition of citizenship as "personhood instantiated or concretized in a particular political

³ See generally JACQUELINE BHABHA, CHILDREN WITHOUT A STATE: A GLOBAL HUMAN RIGHTS CHALLENGE (2011).

⁴ UNICEF is a United Nations Program providing humanitarian aid long-term assistance to children and mothers in developing countries. It was created in 1946 to serve children affected by World War II, and became a permanent program in the United Nations in 1953. The Program is headquartered in New York City. For more information, visit www.unicef.org.

⁵ *Birth registration and Armed Conflict*, U.N. INT'L CHILDREN'S EMERGENCY FUND RESEARCH CTR., vii (2007), [http://www.unicef.org/protection/birth_registration_and_armed_conflict\(1\).pdf](http://www.unicef.org/protection/birth_registration_and_armed_conflict(1).pdf) [hereinafter Innocenti Res. Ctr.].

⁶ *UNICEF: Every Third Child Worldwide Unregistered at Birth* (Deutsche Presse-Agentur, July 8, 1998).

⁷ *Id.*

⁸ The terms, "citizenship" and "nationality" are used interchangeably throughout this paper.

⁹ T.H. MARSHALL, *Citizenship and Social Class*, in CITIZENSHIP AND SOCIAL CLASS AND OTHER ESSAYS 1, 30 (1950).

¹⁰ See, e.g. Linda S. Bosniak, *Universal Citizenship and the Problem of Alienage*, 94 NW. U. L. REV. 963 (2000).

community.”¹¹ She emphasizes that while citizenship describes and represents relationships and community constructs, citizenship is also integrally linked to legal recognition and rights within a polity.¹² Birgitte Sorensen captures many of these ideas when she conceptualizes citizenship as being associated with four foundational values: justice, recognition, self-determination and solidarity.¹³ For children, Sorensen’s values are certainly pertinent to our example here: the relationship between citizenship and education.¹⁴ Education is one of the most important benefits of legal recognition by the state.¹⁵

Despite the central role legal identity plays in the provision and enforcement of people’s, especially children’s, fundamental rights, the United Nations High Commissioner for Refugees (“UNHCR”) estimates that there are 12 million stateless people today.¹⁶ Statelessness is often self-perpetuating because in states where citizenship derives from parental status, stateless parents cannot pass nationality onto their children. Citizenship is typically granted through *jus soli* or *jus sanguinis*. *Jus soli*, birthright citizenship, is granted to those born in the granting State. *Jus sanguinis*, bloodline citizenship, is granted to those born to a parent (or direct relative) with citizenship in the granting State. Beyond these primary modes of granting citizenship, greater global mobility has led to three other kinds of citizenship: 1) citizenship by marriage to a national, 2) citizenship based on “past, present, or future residence within the country’s past, future, or intended borders (including colonial borders),”¹⁷ and 3) so-called “double *jus soli*” or birthright citizenship granted to “children of habitual lawful residents, especially to children of individuals

¹¹ Linda S. Bosniak, *Persons and Citizens in Constitutional Thought*, 8 INT’L. J. CONST. L. 9, 9 (2010).

¹² *Id.*

¹³ Birgitte Refslund Sorensen, *The Politics of Citizenship and Difference in Sri Lankan Schools*, 39 ANTHROPOLOGY & EDUC. Q. 423, 424 (2008).

¹⁴ *Id.* at 424-25.

¹⁵ In his famous essay, *Citizenship and Social Class*, T.H. Marshall identified the education system as one of the two institutions associated with the social element of citizenship. “By the social element I mean the whole range, from the right to a modicum of economic welfare and security to the right to share the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society. The institutions most closely connected with it are the education system and the social services.” MARSHALL, *supra* note 9, at 30.

¹⁶ *Media Backgrounder: Millions Are Stateless, Living in Legal Limbo*, U.N. HIGH COMM’R FOR REFUGEES (August 2011), <http://www.unhcr.org/4e54ec469.html>.

¹⁷ Patrick Weil, *Access to Citizenship: A Comparison of Twenty Five Nationality Laws*, in *CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES*, 17 (T. Alexander Aleinikoff & Douglas Klusmeyer, eds., 2001). This was the citation previously.

themselves born in state territory.”¹⁸ Within the past decade, an estimated 4 million stateless people acquired citizenship “through amendments to nationality laws or changes in policy.”¹⁹

Sri Lanka is among the states where statelessness has been significantly reduced. In Sri Lanka, citizenship laws were enacted and amended in 1986 and 1988, and in 2003 and 2009 to address the large population of stateless Tamils of Indian origin or “Indian Tamils.” Indian Tamils have been the subject of citizenship debate and legislation since the country’s independence from the British Empire in 1948. As in many states, registration and citizenship in Sri Lanka confers the right to vote, to own property, to work officially, to open a bank account and to travel freely.²⁰ The right to vote can be essential to building a political voice and generating group advocacy for government services and protections. More fundamentally, “if the ‘victims’ of non-registration have no legal identity, they are in no position to exert political pressure.”²¹ This applies even more to children, who are politically voiceless and even more vulnerable if their advocates are also silenced. Thus, in most countries, including Sri Lanka, “documentation is only an essential first step” in paving the way for obtaining occupational training and education, advocating for better living and working conditions, or leaving the plantations to find better lives and livelihoods elsewhere.²²

The recent phenomenon of children or their caregivers leaving the plantations to work abroad or in big cities highlights the effect of citizenship on the freedom of movement. Lack of citizenship and any accompanying identity documents can be a serious impediment to free movement, particularly in places where military checkpoints are common and in places that require identity documentation to move throughout the country. In Sri Lanka, social mobility, requiring geographic mobility, was an important driver of the push for citizenship. Valli Kanapathipillai²³ notes that following the 1988 grant of citizenship, “many women and men expressed their desire to move off the estates, to make either themselves or

¹⁸ Peter Spiro, *A New International Law of Citizenship*, 105 AM. J. INT’L L., 694, 729 (2011).

¹⁹ *Addressing Statelessness*, U.N. HIGH COMM’R FOR REFUGEES, 50-51 (2013), <http://www.unhcr.org/50a9f8120.html>.

²⁰ See, e.g. Innocenti Research Ctr., *supra* note 5; *Feature: Sri Lanka Makes Citizens Out of Stateless Tea Pickers*, U.N. HIGH COMM’R FOR REFUGEES (Oct. 7, 2004), <http://www.unhcr.org/print/416564cd4.html>.

²¹ BHABHA, *supra* note 4, at 19.

²² See, e.g., Martin Regg Cohn, *Finally, a Chance to Escape Plantation*, TORONTO STAR, October 23, 2005, at A13.

²³ Valli Kanapathipillai holds a Ph.D. in social and cultural anthropology. She previously served as a consultant and researcher at the International Centre for Ethnic Studies in Colombo, Sri Lanka.

their children socially mobile outside the plantation sector” to escape “the associations and social stigma that estate work implied.”²⁴ The freedom *not* to move is equally important and non-deportability is an essential benefit of citizenship. Upon independence, thousands of Indian Tamils registered as Indian nationals rather than Sri Lankan citizens. Consequently, Sri Lanka forcefully repatriated Indian Tamils to India.

In this article, I will examine the right to citizenship and its implementation in the context of Sri Lanka. I analyze the evolution of Sri Lanka’s citizenship laws both within an international legal perspective and from a perspective of practical access to international human rights, specifically the impact of citizenship on access to education. I use the example of educational access and quality for children in Indian Tamil families to highlight the importance of having documented citizenship and the integral role of citizenship in accessing other fundamental rights particularly in an increasingly mobile world. This example is also useful to show the exaggerated impact statelessness can have on children (both parents’ statelessness and children’s own lack of citizenship) who depend almost completely on others in order to exercise their rights and privileges.

In Part II, I will briefly review the research methodology for collecting qualitative data on Indian Tamil children’s access to education. My findings are based on desk research and qualitative research performed over the course of two weeks visiting the plantation region in central Sri Lanka. In Part III, I will discuss the legal history of citizenship for Indian Tamils in Sri Lanka. In Part IV, I will expand the discussion to the broader international framework of citizenship and in Part V, I will discuss how citizenship impacts access to services and some common challenges that arise in the context of expanding citizenship. I conclude that citizenship is by definition a gate-keeping mechanism that also plays an important role in self-concept and the ability to participate in one’s community. Having passed and promoted grants of citizenship for Indian Tamils through legislative acts in 1988,²⁵ 2003,²⁶ and 2009,²⁷ Sri Lanka offers a hopeful

²⁴ VALLI KANAPATHIPILLAI, *CITIZENSHIP AND STATELESSNESS IN SRI LANKA: THE CASE OF THE TAMIL ESTATE WORKERS*, 175 (2009) (citing VALLI KANAPATHIPILLAI, *A DECADE OF CHANGE IN THE PLANTATIONS. THE IMPLICATIONS FOR WOMEN WORKERS* (1992)).

²⁵ Grant of Citizenship to Stateless Persons Act, No. 5 of 1986 (Sri Lanka), available at [http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3ae6b5081c.](http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3ae6b5081c;); Grant of Citizenship to Stateless Persons (Special Provisions) Act, No. 39 of 1988 (Sri Lanka), available at <http://www.unhcr.org/refworld/docid/3ae6b5084.html>.

²⁶ Grant of Citizenship to Persons of Indian Origin to Make Provision for the Grant of Status of Sri Lanka Citizen to Persons of Indian Origin (Bill No. 153) (Sri Lanka), available at <http://www.unhcr.org/refworld/docid/45af77952.html>.

²⁷ Grant of Citizenship to Stateless Persons (Special Provisions) (Amendment) Act, No.5 of 2009 (Sri Lanka), available at <http://www.unhcr.org/refworld/docid/4c515bfe2.html>.

example of a country that has and continues to productively address statelessness.

II. QUALITATIVE METHODS

The qualitative data for this article was collected in January 2013 during a two-week field study conducted as part of a research project with a group of graduate students at the Harvard Graduate School of Education aiming to illuminate and analyze youth's access to secondary education among Indian Tamils.²⁸ The study included school tours and semi-structured interviews with administrators, teachers, and parents of students at four plantation schools and four "model" schools. The schools were located in Nuwara Eliya, the district with the largest Indian Tamil population, Kandy, and in Colombo, the country's capital. We also conducted interviews with local non-governmental organizations ("NGOs") and international governmental organizations ("IGOs"), working on education in the plantation sector. Translators accompanied us throughout the two weeks and supported interviews whenever necessary. A sub-team of the graduate student group subsequently coded and analyzed notes from these interviews. Early in the study, we adjusted our interview questions to target manifestations of citizenship such as birth registration and documents required for school enrollment rather than specific citizenship laws because the interviewees were not aware of the legal history and evolution of citizenship beyond the initial 1988 Citizenship Grant that was widely publicized and politicized.

III. CITIZENSHIP IN THE INTERNATIONAL FRAMEWORK

In recognition of the importance of possessing an official nationality, particularly for children, three widely ratified international documents protect a child's right to a nationality. First, the Universal Declaration of Human Rights ("UDHR"), while not binding law, establishes nationality as an essential human right in Article 15.²⁹ Article 15 (2) provides, "No one shall be arbitrarily deprived of his nationality or denied the right to change his nationality."³⁰ Second, the International Convention on Civil and Political Rights ("ICCPR"), which is binding law for signatory states, expands the right to a nationality under Article 24.³¹

²⁸ Thank you to Professor Sarah Dryden-Peterson at the Harvard Graduate School of Education for supervising our project, and to my fellow students for helping in organizing and conducting research. A special thank you to Pratima Patil, Olayide Tikolo, Risako Watanabe, and Tiffany Wong for their support throughout this project.

²⁹ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

³⁰ *Id.*

³¹ International Covenant on Civil and Political Rights art. 24 §2-3, Dec. 16, 1966, S. Exec. Rep. 102-23, 999 U.N.T.S. 171 [hereinafter ICCPR].

Section 2 of Article 24 provides, “Every child shall be registered immediately after birth and shall have a name.”³² Section 3 continues, “Every child has the right to acquire a nationality.”³³ Third, the Convention on the Rights of the Child (“CRC”), signed and ratified by all but three states (U.S., Somalia, and the new state of South Sudan), is the most powerful international binding law protecting a child’s right to immediate birth registration, a name, and the right to acquire a nationality, “in particular where the child would otherwise be stateless.”³⁴ Furthermore, the CRC conceptualizes nationality as the right to identity and obligates states to re-establish a child’s identity in the case that he or she is illegally deprived of any part or all of it.³⁵

Also addressing a child’s right to nationality, the Convention on the Elimination of Discrimination Against Women (“CEDAW”) secures the right of mothers to transmit citizenship to their children in its protection of “equality in the transmission of citizenship to children.”³⁶ CEDAW General Recommendation 21 highlights “the connection between discriminatory nationality law and discrimination in the family” and quotes the Committee’s comment that “Nationality is critical to full participation in society.”³⁷ Notably, Sri Lanka has brought its laws into compliance with the CEDAW providing for citizenship based on either parent’s citizenship.³⁸

Additionally, the 1954 Convention Relating to the Status of Stateless Persons³⁹ and the 1961 Conventions on the Reduction of Statelessness⁴⁰ (the “Statelessness Conventions”) establish protections to prevent statelessness and address existing statelessness. However, these conventions are less widely ratified. The 1954 convention defines a

³² *Id.* at § 2.

³³ *Id.* at § 3.

³⁴ Convention on the Rights of the Child, art. 7(1)-(2), Nov. 20, 1989, 1577 U.N.T.S. 3[hereinafter CRC].

³⁵ *Id.* at art. 8(1)-(2).

³⁶ Convention on the Elimination of All Forms of Discrimination Against Women, art. 9, Jul. 17, 1980,, GA Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193 (entered into force Sept.3, 1981) [hereinafter CEDAW].

³⁷ Rep. of the Comm. on the Elimination of Discrimination against Women, U.N. Doc. A/49/38 , GAOR, 49th Sess., Supp. No. 38, at 1, (1994).

³⁸ Rangita de Silva de Alwis, *Legislative Reform on Selected Issues of Anti-Gender Discrimination and Anti-Domestic Violence: the Impact on Children*, Legislative Reform Initiative, UNICEF 51 (2009).

³⁹ Convention Relating to the Status of Stateless Persons, 28 September, 1954, 360 U.N.T.S. 117.

⁴⁰ Convention on the Reduction of Statelessness, 30 August 1961, 989 U.N.T.S. 175.

“stateless person” as a person “who is not considered as a national by any State under operation of its law.”⁴¹ It provides minimum standards of treatment for stateless people protecting freedom of education⁴² and movement⁴³ among other protections. The 1961 Convention establishes safeguards against statelessness, particularly for children, by requiring the granting of nationality “at birth, by operation of law, or ... upon an application being lodged with the appropriate authority.”⁴⁴ In addition, it provides provisions under which nationality applications must be accepted or may be rejected.⁴⁵ It also establishes a presumption of *jus sanguinis* in Article 2 while enabling the granting of nationality by *jus soli*, stating that children “found in the territory of a Contracting State shall, in the absence of proof to the contrary, be considered to have been born within that territory of parents possessing the nationality of that State.”⁴⁶ The Convention further establishes protections against statelessness by prohibiting the withdrawal of citizenship by the state or due to territorial transfers.⁴⁷ These two conventions highlight the UNHCR’s simple but powerful assertion that “the only way to resolve statelessness is to grant stateless people citizenship.”⁴⁸ In celebrating the 50th anniversary of the 1961 Convention, the UNHCR launched a campaign to increase ratification and implementation. In 2011, “62 States made formal commitments to address statelessness by various means.”⁴⁹ To aid in this effort, the UNHCR is issuing guidelines on the definition of statelessness, procedures for determining it, and the national status to be granted to stateless people.⁵⁰ In “the first effort to provide comprehensive guidance on the 1961 Convention since it was adopted,” the UNHCR also created further guidelines specific to Articles 1 through 4 of the 1961 Convention (concerning prevention of statelessness among children).⁵¹ A handbook

⁴¹ Convention Relating to the Status of Stateless Persons, *supra* note 33, at art. 1.

⁴² *Id.*, at art. 22.

⁴³ *Id.*, at art. 26.

⁴⁴ Convention on the Reduction of Statelessness, *supra* note 34 at art. 1.

⁴⁵ *Id.*

⁴⁶ *Id.* at art. 2.

⁴⁷ *Id.* at art.5-15

⁴⁸ U.N. High Commission on Refugees, *supra* note 18, at 50.

⁴⁹ *Id.* at 49. “Various means” includes “acceding to the statelessness conventions; reforming nationality legislation; mapping stateless populations; establishing formal stateless determination procedures; and improving civil registration and documentation.” *Id.*

⁵⁰ *Id.* at 50-51.

⁵¹ *Id.* .

with the guidelines was published in 2013, which will hopefully further legal and policy reform to reduce statelessness.⁵²

IV. ISSUING CITIZENSHIP: CITIZENSHIP FOR INDIAN TAMILS IN SRI LANKA

A. *Where do Stateless People Come From?: The Emergence of Indian Tamil Population in Ceylon*

Sri Lanka is a small, teardrop-shaped island in the northern Indian Ocean off the southeastern coast of India. The island is the site of the first Buddhist writings and plays an important role in the Hindu epic, *The Ramayana*.⁵³ Colonized by the British, Sri Lanka, then known as “Ceylon,” gained independence in 1948. Prior to independence, the British brought large numbers of Indian Tamils to work on the tea plantations in Ceylon where there was also an indigenous population of “Sri Lankan Tamils” or “Jaffna Tamils” who lived there for two thousand years.⁵⁴ By 1911, the Indian Tamils were already “enumerated separately from the Ceylon Tamils” and “outnumbered the latter: they were 530,983 to 528,024 respectively.”⁵⁵ The two groups then and still distinguish themselves as having separate identities, despite a common language (Tamil) and religion (Hindu).

From the plantation industry’s beginnings, British planters and then private corporate owners enjoyed wide leverage and deferential treatment as a result of their important place in the British and then Sri Lankan politics and economies.⁵⁶ Before independence or citizenship was considered, laws that required education for Sri Lankan children established much more lenient requirements for education on the estates,

⁵² *Id.* at 51.

⁵³ See, e.g., Ramayana Sites in Sri Lanka, TOURSLANKA, <http://www.tourslanka.com/sri-lanka-map/ramayana-sites.html>, (last visited Dec. 14, 2012); Dharma Data: Sri Lanka, BUDDHA DHARMA EDUC. ASS’N & BUDDHANET., <http://www.buddhanet.net/e-learning/dharmadata/fdd16.htm> (last visited Dec. 14, 2012).

⁵⁴ Innocenti Res. Ctr., *supra* note 5, at 23.

⁵⁵ Amita Shastri, *Estate Tamils, the Ceylon Citizenship Act of 1948 and Sri Lankan politics*, 8 CONTEMP. S. ASIA 65, 67 (1999).

⁵⁶ See Angela W. Little, *Labouring to Learn: Educational Change Among the Indian Tamil Minority in Sri Lanka* 8 (Dec. 14, 2007) (unpublished manuscript) (on file with author) available at <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&ved=0CCwQFjAA&url=http%3A%2F%2Fangelawlittle.net%2Fwp-content%2Fuploads%2F2012%2F06%2FLabouringtoLearneducationalchange2007.pdf&ei=vt3RUvzLJuHjsASxqILwDQ&usg=AFQjCNHWaFkQgtVNPCmrtjleqitqw8lvqw&sig=2=0D8aY5HbKg3d8LxCzcUew&bvm=bv.59026428,d.cWc>); See also, Kurihara Shunsuke, *Tea Estate Plantation Community in Nuwara Eliya District of Sri Lanka: An Introductory Overview of Social Issues and Poverty among Residents Living under the Conventional Plantation System*, 15 YOKOHAMA J. OF SOC. SCI. 124, 131-32.

initiating an entrenched political discrimination against the Indian Tamil tea plantation workers that persists today.⁵⁷

When people move between countries, questions arise concerning which country bears responsibility for migratory people. These responsibilities include the duty to protect and to receive nationals back “home.” Unsurprisingly, issues of citizenship arose early on, and in 1921 at the Imperial Conference, Ceylon agreed to grant Ceylonese citizenship to immigrants in Ceylon as “British Indians lawfully domiciled in other parts of the Empire.”⁵⁸ India followed the 1921 resolution with the Indian Emigration Act No.7 in 1922, prohibiting emigration to countries where Indians did not have equal rights with the local population.⁵⁹ Within this context, Indian Tamils’ migration to Sri Lanka was highly politicized, creating “an ambiguousness in the position of the community... seized on and played up in the populist rhetoric by...the local elite who used the ideology and rhetoric of nationalism to isolate them while strengthening their own position.”⁶⁰ Furthermore, the government and others viewed plantation laborers “as a migratory population having no abiding, long-term interest in the nation of Ceylon,” a sentiment that contributed to their legal disenfranchisement and marginalization as independence approached.⁶¹

The large population of Indian Tamils that settled in Ceylon began to participate in the island’s politics in the 1920s when they nominated representatives in the Legislative Council who advocated for the economically essential but marginalized group.⁶² The majority of the country’s population was and continues to be of Sinhalese origin.⁶³ As the colonial political system evolved, the Sinhala alliance and majority won significant political battles within the Donoughmore Commission for Constitutional Reform (1927). These reforms resulted in stricter franchise laws that excluded a large portion of Indian Tamils; significantly reduced the numbers of nominated members on the Legislative Council, a primary source of representation for Indian Tamils and other minorities; and introduced a narrower definition of Ceylonese citizenship as “a person

⁵⁷ Little, *supra* note 56, at 7-8.

⁵⁸ Shastri, *supra* note 55, at 69.

⁵⁹ *See id.*

⁶⁰ *Id.* at 68.

⁶¹ *See* Little, *supra* note 56, at 5.

⁶² *See* Shastri, *supra* note 55, at 68.

⁶³ *See Sri Lanka: A Country Study*, U.S. LIBRARY OF CONG., <http://countrystudies.us/sri-lanka/37.htm> (last visited Oct. 25, 2014); *Facts About Sri Lanka*, THE CIA WORLD FACTBOOK, available at <http://worldfacts.us/Sri-Lanka.htm> (last visited Oct. 25, 2014).

domiciled in Ceylon and having a domicile of origin.”⁶⁴ This definition had far reaching implications for Indian Tamil laborers and was used to deny “Indian” plantation workers land and other benefits.⁶⁵ Indian Tamils had limited options for asserting nationality and residency. They had the choice to remain as British subjects or apply for a “Certificate of Permanent Settlement.” As British subjects, they were required to establish a domicile of choice in Ceylon in order to enjoy the protections provided by India and the British Empire, but give up political rights within Ceylonese politics. To apply for a “Certificate of Permanent Settlement” Indian Tamils had to prove five years of residence and sign a “declaration of intention to settle permanently,” but forfeit protections afforded by India that were of great importance to the Indian Tamil population.⁶⁶ By incorporating literacy and property qualifications into domicile and citizenship rules, the changes specifically targeted the Indian Tamil population who did not have access to adequate education as a result of the lenient education requirements for planters, as noted above, for exclusion; at the same time, these requirements allowed more wealthy members of the Ceylon Indian population to avoid residency restrictions.⁶⁷ Interestingly, throughout this period, the education system grew and evolved for Indian Tamils to work and live on plantations. Originally formed as line school and mission schools by plantation managers and/or missionaries, estates established and registered a peak of 968 (albeit low quality) schools by 1948.⁶⁸ It was amidst these political developments that Ceylon gained independence and began to develop its own constitution and nationality laws.

B. *Disappearing into Hills: Independence and the Ceylon Citizenship Act of 1948*

Coinciding with World War II and Britain’s need for Ceylonese cooperation to fight the war, Ceylonese leadership gained wide discretion in addressing citizenship issues in which Britain and India had previously been heavily involved.⁶⁹ This discretion led to legislation that was more restrictive to the rights of Ceylon Indian people. The Ceylon Indian community protested in the mid- to late-40s with labor strikes out of concern related to increased restrictions on Indian Tamils’ economic and political freedoms and a failure to ensure citizenship within developing

⁶⁴ Shastri, *supra* note 55, at 69-70.

⁶⁵ *See id.*

⁶⁶ *Id.* at 70.

⁶⁷ *See id.*

⁶⁸ *See* Little, *supra* note 56 at 5-6.

⁶⁹ *See* Shastri, *supra* note 55, at 73.

political reforms.⁷⁰ Indian Tamils were excluded from legislative reforms and constitutional protections because the Sinhala elites continued to perceive them as an “unassimilated alien population with no long-term interest in the island.”⁷¹ This view was compounded by the xenophobic fear that the Indian Tamils “would swamp the indigenous population” and still have “foreign loyalties to India.”⁷²

Following independence, the Sinhalese-controlled government passed the Ceylon Citizenship Act of 1948. This act, along with the laws that immediately followed, withheld citizenship from the Indian Tamil population while creating a path for educated, property-owning members of their community to circumvent the act to gain citizenship and deny the Indian Tamils the right to vote.⁷³ Because of preceding legal reform and their economic status, Indian Tamils could not own property and were largely uneducated. This law used *jus sanguinis*, citizenship by descent, and a route to naturalization through registration, “to strip persons of Indian origin of citizenship” by incorporating stricter requirements.⁷⁴ Citizenship by descent required documentary proof of at least two paternal generations born on the island where no system of birth registration or documentation had existed.⁷⁵ Citizenship by registration also required documentary proof of at least one parent’s citizenship by descent and 7 or 10 years of residence, depending on marital status.⁷⁶ Naturalization was an extremely limited tool and could only be granted to 25 people a year “for distinguished public service.”⁷⁷

A year later, the government passed the Ceylon (Parliamentary Elections) Amendment Act No. 48 of 1949 requiring citizenship to vote, a massive disenfranchisement of the Indian Tamil population that was later affirmed by the courts in a 1953 opinion of the Privy Council.⁷⁸ This swift and decisive exclusion of a significant portion of the population (12%) entrenched the already growing discrimination and marginalization of this community in rigid political structures.⁷⁹ Coinciding with these developments was the adoption of Sinhala as the *only* official language in

⁷⁰ *Id.* at 73-76.

⁷¹ *Id.* at 66.

⁷² *Id.*

⁷³ See Shastri, *supra* note 55, at 66-67.

⁷⁴ *Id.* at 77.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 79-80.

⁷⁹ *Id.* at 77.

Sri Lanka in 1956.⁸⁰ This had serious repercussions for educational access, among other things, particularly with the parallel government “take-over” of schools, which were previously under estate management designed to expand educational access and nationalize the school system.⁸¹ With franchise rights and citizenship recognition gone, there was little opportunity to help form and implement or to combat these measures in the political or social spheres.⁸² Even so, despite taking decades to fully implement school take-over (until the early 2000s), the issue remained prominent in politics and closely tied to the development of a legal framework for expanding educational enrollment and exerting a level of control and influence in the plantation sector.⁸³ The policy of universally accessible education was a response to the increasingly powerful block of Sinhalese voters who wanted to improve opportunities for their children in the public sector, which had previously been dominated by Sri Lankan Tamils as a result of educational privilege by the British.⁸⁴ Furthermore, the political and legislative structure deepened tensions between both the Sinhala majority and the Tamil minority who felt persecuted and between the increasingly stateless Indian Tamils and the Jaffna Tamils, who were more easily able to prove birth and residence having lived on the Island for thousands of years.⁸⁵

This was only the beginning of the Indian Tamil struggle for citizenship. Although a dual language policy established Sinhalese and Tamil as the two national languages, it was not until 1997 that the country implemented two languages of instruction in government schools.⁸⁶ During and after the period of independence, India and Sri Lanka agreed to “split the baby,” so to speak, by providing citizenship to an agreed upon quota of the Indian Tamil population. The Indo-Ceylon Agreements of October 30, 1964 and January 27, 1974 “estimated that there were 975,000 persons of Indian origin residing in Sri Lanka in October 1964, who had not been recognized as citizens of Sri Lanka or as citizens of India.”⁸⁷ Under an agreement, India and Sri Lanka agreed to grant citizenship to 600,000 people and 375,000 people, respectively. However, thousands of

⁸⁰ Sorensen, *supra* note 13, at 425.

⁸¹ *See id.* at 425; Little, *supra* note 56 at 7-8.

⁸² Eventually union activists would provide the most powerful voice for Indian Tamils, advocating for important legislative changes in addition to better working conditions and pay. *See* KANAPATHIPILLAI, *supra* note 24.

⁸³ *See* Little, *supra* note 56 at 7-8.

⁸⁴ *See* Sorensen, *supra* note 13 at 425.

⁸⁵ Innocenti Res. Ctr., *supra* note 5 at 23.

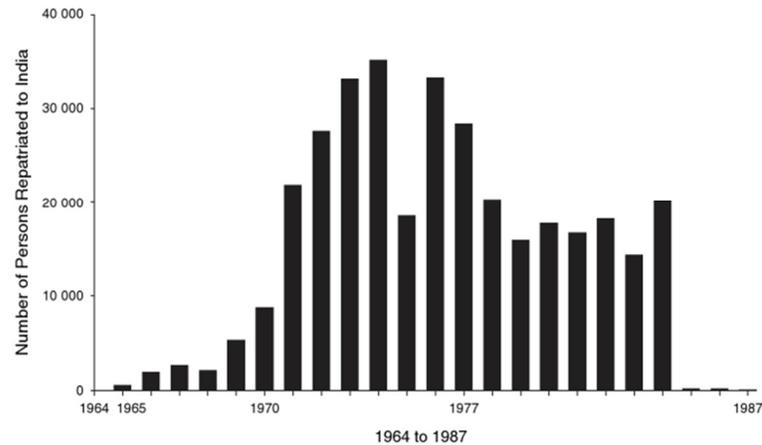
⁸⁶ *See* Sorensen, *supra* note 13 at 429.

⁸⁷ Grant of Citizenship to Stateless Persons Act, No. 5 of 1986, *supra* note 25.

Indian Tamils who acquired Indian citizenship were forcefully repatriated to India until 1984, when violence broke out in Sri Lanka and India closed the ferry between countries.⁸⁸ UNICEF reports that by the mid- to late-1980s, almost 500,000 Tamils had been repatriated “where they struggled to survive under harsh conditions.”⁸⁹

8 CITIZENSHIP AND STATELESSNESS IN SRI LANKA

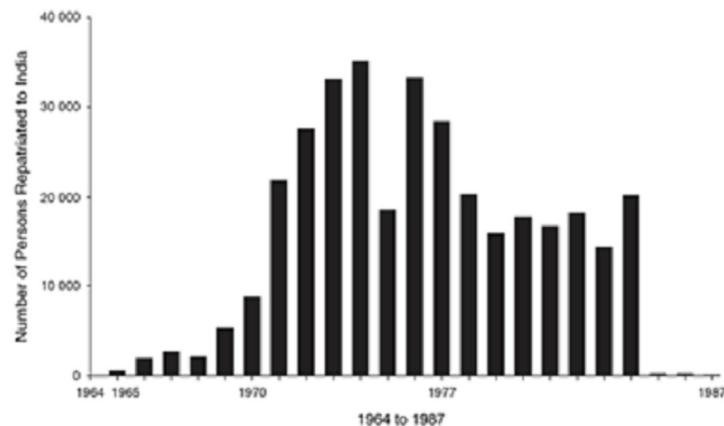
Figure 1.1 Number of Persons Repatriated to India From 1964 to 1987



Based on data from Sahadevan, P. *India and the Overseas Indians: The Case of Sri Lanka* (1995,242). 90

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Figure 1.1 Number of Persons Repatriated to India From 1964 to 1987



Based on data from Sahadevan, P. *India and the Overseas Indians: The Case of Sri Lanka* (1995,242).

⁸⁸ See KANAPATHIPILLAI, *supra* note 24, at 173; Shastri, *supra* note. 55 at 80.

⁸⁹ Innocenti Res. Ctr., *supra* note 5, at 23.

⁹⁰ Reprinted from KANAPATHIPILLAI, *supra* note 24, at 8.

This agreement was particularly harsh on children. Many of them had no voice in choosing India or Sri Lanka for citizenship, or in the forced repatriation that accompanied Indian citizenship. Kanapathipillai paints a picture of the difficult decisions faced by children too young to initiate their own citizenship applications but old enough to have their own agency and citizenship preferences, and “carry the burden of their parent’s choice.”⁹¹ He writes,

“Mrs. T. Nagamma [decided] to stay on in Sri Lanka as stateless, even though it implied the trauma of breaking up both the family and the kinship network. When I interviewed her, Nagamma was 54 but looked far older. Toothless and bent, her job was to look after cattle for an NGO in the Nuwara Eliya district. She could not read or write. But she knew that she did not want to go to India. Her parents applied for Indian citizenship and left, but Nagamma did not leave with them. ‘We were born here, we do not know India, and what are we to do there?’ She stayed on, and never heard from her parents again.”⁹²

Furthermore, the window to apply for citizenship expired in 1981 leaving a portion of the Indian Tamil population stateless because they had not applied for Indian citizenship but were denied Sri Lankan citizenship stateless.⁹³ These circumstances combined with political and ethnic pressures pushed the government to pass the 1988 Citizenship grant, affecting a large portion of this population.

C. *Too Little Too Late: Civil War and the 1986 and 1988 Citizenship Grants*

Growing ethnic and political tensions eventually led to a civil war in 1983 between the Jaffna (Sri Lankan) Tamils and the Sinhalese majority government.⁹⁴ That year, a “massive ethnic program against the minority Tamil community” was established, alarming the government and the country that plantation workers would become embroiled in the violence.⁹⁵ The Ceylon Workers Congress (“CWC”), a political party primarily representing plantation workers, took advantage of the government’s sudden concern, and advocated for greater civil and political rights for the Indian Tamils. Kanapathipillai argues that the government was skittish enough about the Jaffna Tamils recruiting the Indian Tamils to their cause

⁹¹ KANAPATHIPILLAI, *supra* note 24, at 173.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Innocenti Res. Ctr., *supra* note 5, at 23.

⁹⁵ KANAPATHIPILLAI, *supra* note 24, at 164.

that it made “the government realize that the plantation workers could not be kept stateless, unrecognized, underdogs forever.”⁹⁶ The Prime Minister said, “Understand the real aspect of this matter, that there is a militant terrorist organization called EROS, which was wooing the stateless people in the up-country.”⁹⁷ While the Indian Tamils were not separatists like the Sri Lankan Tamils, they were vocal about their own grievances with the government including their citizenship status.⁹⁸ The workers also advocated for citizenship with work union activities and prayer campaigns in which they took part in days of prayer rather than working on the plantations.⁹⁹ The Sri Lankan government also wanted to avoid Indian involvement in the civil war, and citizenship for the Indian Tamils had long been a point of contention between the countries.¹⁰⁰

Economic pressures also influenced laws, which operated in a way that resonates with the current discussion about citizenship and immigration for undocumented workers in the United States. The massive repatriation that occurred in the previous decades resulted in a labor shortage in part because most Sinhalese did not want to work on the plantations, and the Sinhalese peasants that *began* picking tea were not hardworking, often missing work to tend their own crops during the rainy season.¹⁰¹ In addition, Indian Tamil youth began to leave the estates, posing a serious economic threat to the now fragile country.¹⁰²

The government responded first with the Grant of Citizenship to Stateless Persons Act, No. 5 of 1986, which granted citizenship to “the 94,000 persons who were to be granted Indian citizenship under the Indo-Ceylon agreements, and to those who have not applied for such citizenship, but have applied for the status of Sri Lanka citizen...by registration.”¹⁰³ The Act also made provisions for children of potential beneficiaries of the Act born after October 30, 1964 but before application of the grant.¹⁰⁴ The act was not widely implemented due to the onerous registration requirements for a largely undocumented group.¹⁰⁵ Birth registration, or any registration, was an essential component to citizenship

⁹⁶ *Id.* at 171.

⁹⁷ Cited in KANAPATHIPILLAI, *supra* note 24, at 171.

⁹⁸ Barbara Crossette, *Nuwara Eliya Journal; A Sri Lankan Minority that Doesn't Do Battle*, N.Y. TIMES, June 16, 1987, at A4.

⁹⁹ See KANAPATHIPILLAI, *supra* note 24 at 171.

¹⁰⁰ Innocenti Res. Ctr., *supra* note 5, at 23.

¹⁰¹ See KANAPATHIPILLAI *supra* note 24 at 175-76.

¹⁰² *Id.* at 175.

¹⁰³ *Supra* note 28, at §2.

¹⁰⁴ *Id.* at §4.

¹⁰⁵ See Crossette, *supra* note 99.

rights, but many people did not have the required documentation.¹⁰⁶ With the Grant of Citizenship to the Stateless Bill of 1988, “the government did away with the formality of applications and declared all such persons were citizens of Sri Lanka... bringing to an end ... 40 years of being denied their basic rights in the country of their choice and belonging.”¹⁰⁷ The government cited the crippling effects of statelessness, including “an inability to get other work, a bank loan, a passport or a higher education.”¹⁰⁸ These efforts amidst civil strife led to efforts by political parties to recruit the Indian Tamils to their various causes and attempt to form labor organizations that opposed the Ceylon Workers Congress.¹⁰⁹

The 1986 and subsequent 1988 Citizenship Grants were an important step toward addressing the extensive statelessness present in Sri Lanka, and were influential in Indian Tamils’ self-concept and sense of belonging.¹¹⁰ Despite this, the Citizenship Grants had a limited legal effect on stateless people. The grant was inapplicable to those who were “not within the 506,000 persons referred to in the Grant of Citizenship of Stateless Persons Act, No.5 of 1986, people who have applied to the Indian High Commission for the Grant of Indian Citizenship, and children born to applicants after October 30, 1964.”¹¹¹ Therefore, any Indian Tamil who applied for Indian citizenship under the afore-mentioned agreement was not covered under the new law, whether or not Indian citizenship had been granted. The act also provided for the application and receipt of a Certificate of Citizenship for any person covered by §2 but limiting the number of certificates for “persons born prior to October 30, 1964...to the balance of 469,000 persons to whom certificates have not been issued under the Indo-Ceylon Agreement (Implementation) Act, No. 14 of 1967.”¹¹²

Kanapathipillai, however, questions the accuracy of the estimated number of people to whom the act applied. She highlights both the

¹⁰⁶ *Id.*

¹⁰⁷ KANAPATHIPILLAI, *supra* note 24, at 164.

¹⁰⁸ *See* Crossette, *supra* note 99.

¹⁰⁹ *Id.*

¹¹⁰ Every interview subject affirmed without hesitation that they, their students, and all members of their families were citizens. The concept of citizenship was so ingrained that they did not understand why I was asking the question. Several teachers reassured us that all the students were citizens and had a right to citizenship. Only one subject cited any legal source of citizenship, and she referred to the 1988 law as granting citizenship to all Indian Tamils. Interview with anonymous subjects in Nuwara Eliya, Sri Lanka in January 2013.

¹¹¹ Grant of Citizenship to Stateless Persons (Special Provisions) Act, No. 39 of 1988, (Sri Lanka), §2(c), 11 November 1988, *available at* <http://www.unhcr.org/refworld/docid/3ae6b5084.html>.

¹¹² *Id.* at § 4.3.

difficulty in accurate data collection on statelessness and the potentially limited scope of the act.¹¹³ Finally, despite the government's hope that the Citizenship Act would quell the violence and demands for separation by addressing a primary grievance of Sri Lankan Tamils and giving all Tamils a stronger political voice, "these concessions were too little too late."¹¹⁴ Ethnic relations had become too fraught and "the heavy-handed response of the government to early militant tendencies among the Tamils" exacerbated existing ethnic tensions.¹¹⁵ Fearful of the recruitment of Indian Tamils by the nationalist militant organization, the Liberation Tigers of Tamil Eelam ("LTTE" or "Tamil Tigers"), the police conducted periodic raids in the plantations taking young men for questioning.¹¹⁶ The country erupted into a civil war that would last for three decades until 2009 during which time attaining citizenship remained elusive for many Indian Tamils.¹¹⁷

D. *A Hopeful Future: The 2003 and 2009 Citizenship Grants*

Over thirty years after the agreements with India "to solve the problem of statelessness within a period of fifteen years" of the Indo-Ceylon Agreements of 1964 and 1974 and after twenty years of civil war, the Sri Lankan government passed the Grant of Citizenship to Persons of Indian Origin Act, No. 153 of 2003.¹¹⁸ The 2003 Citizenship Grant eliminated the provision excluding those who had previously applied for Indian citizenship under former agreements and "streamline[d] the process of registration and the acquisition of citizenship for Tamils of recent Indian origin."¹¹⁹ UNICEF notes that the 2003 Act reduced the required documents from eleven to eight, including the birth certificates of the mother, father, eldest siblings, and youngest siblings; parents' marriage certificates; horoscopes; and letters of support from a local government administrator and medical services.¹²⁰ Despite the continued hurdles, UNICEF claims that this law "is a turning point in addressing the long-

¹¹³ KANAPATHIPILLAI *supra* note 24, at 163.

¹¹⁴ *Id.* at 167.

¹¹⁵ *Id.* at 163.

¹¹⁶ *See* Crossette, *supra* note 99.

¹¹⁷ BBC News Asia Sri Lanka profile, <http://www.bbc.co.uk/news/world-south-asia-12004081>, (last visited Dec. 14, 2012).

¹¹⁸ Grant of Citizenship to Persons of Indian Origin. Bill No. 153, to Make Provision for the Grant of Status of Sri Lanka Citizen to Persons of Indian Origin. 153, preamble (Sri Lanka), September 23, 2003, *available at* <http://www.unhcr.org/refworld/docid/45af77952.html>.

¹¹⁹ Innocenti Res. Ctr., *supra* note 5, at 23.

¹²⁰ *Id.*

standing problem of birth registration and citizenship.”¹²¹ In coinciding campaigns by the UNHCR and CWC, over 190,000 people were registered using mobile clinics where people could fill out forms and apply for identity documents.¹²² A second large-scale campaign was launched in 2007 to follow-up on prior efforts.¹²³ An aid program run by World University Service of Canada has also been critical to implementing the new laws.¹²⁴ This development is particularly important for young people “trying to reclaim their rights” and take advantage of the new amendments.¹²⁵

The 2009 Grant of Citizenship, an amendment to the 1988 Citizenship Grant, extends the right of citizenship to former permanent residents of Sri Lanka “who due to circumstances beyond the control of such person—(a) was compelled to leave Sri Lanka; and (b) thereupon took up residence in India” and who could not satisfy residency requirements from prior citizenship acts as a result.¹²⁶ The amendment only applies to people who are stateless and who did not apply for Indian citizenship or has “proof that such person is descendant of a person who was a permanent resident of Sri Lanka with Indian Origin.”¹²⁷ The 2009 Act is designed to accommodate refugees forced to leave Sri Lanka because of the civil war rather than Indian Tamils, although it would apply to both groups.¹²⁸ Perhaps the most striking indication of Sri Lanka’s success in addressing statelessness was the internalized sense of citizenship and belonging that most of the people we interviewed expressed. Firstly, most were unaware of the 2003 Citizenship Grant and told us they had had citizenship since the 1980s. When we asked one teacher how many of her students were citizens, she immediately replied, shaking her head slightly, “They are all citizens. We are all citizens here.”

¹²¹ *Id.* at 23.

¹²² *Feature: Sri Lanka makes citizens out of stateless tea pickers*, UNHCR (Oct. 7, 2004), <http://www.unhcr.org/print/416564cd4.html>.

¹²³ *Id.*

¹²⁴ *See* Cohn, *supra* note 22.

¹²⁵ *See id.*

¹²⁶ Grant of Citizenship to Stateless Persons (Special Provisions) (Amendment) Act, No.5 of 2009 (Sri Lanka), §2, 29 July 2010, *available at* <http://www.unhcr.org/refworld/docid/4c515bfe2.html>.

¹²⁷ Grant of Citizenship to Stateless Persons (Special Provisions) Act, No. 39 of 1988, *supra* note 100 at §2A.

¹²⁸ *Sri Lanka/India: Whether Tamils living in India are repatriating to Sri Lanka, including the procedure to repatriate and support services available to those wishing to repatriate (January 2009-January 2011)*, Immigration and Refugee Board of Canada, (Feb. 9 2011), *available at* <http://unhcr.org/refworld/docid/50b484102.html>.

V. CITIZENSHIP ISSUES

A. *Globalization and Developing International Norms*

Increased globalization has led to stronger international norms and greater obligation to follow these norms. In a study of citizenship laws in 25 countries, Weil notes that states have become more democratic, stable, and less restrictive on citizenship as they perceive themselves more as countries of immigration rather than emigration. In particular, provisions barring or failing to integrate generations of immigrants are amended or overturned.¹²⁹ Weil's description of this transition fits perfectly with the evolution of citizenship law in Sri Lanka. He writes that techniques used to change nationality laws "usually come as amendments to existing laws concerning the granting of nationality of origin, the status of second- and third-generation migrants, or the status of married people."¹³⁰ The first two techniques are evident in Sri Lanka's history from independence to today.

Globalization has increased oversight and pressure from international and human rights institutions, in addition to other interested states enforcing compliance with human rights norms. In Europe, admission to the Council of Europe and the European Union comes with conditional "provisions regarding nationality and human rights...and they [conform] almost exactly to the recent developments in international law of territorial nationality."¹³¹ Peter Spiro notes, "regional institutions, especially those of Europe and the Americas, have been receptive to a rights conception of citizenship practice," but that citizenship and statelessness began and continue to be somewhat "rooted in state-oriented concerns."¹³² In Sri Lanka, India historically seems to have greater sway than international institutions, reflecting the state-oriented roots of citizenship itself and the decades of long negotiation regarding citizenship status for Indian Tamils. Recently, however, because of the sharpened focus on stateless populations, UNICEF and the UNHCR has increased attention on the issue and funneled resources into the country to implement laws that bring the country into compliance with international human rights objectives, as seen with the mobile registration and media campaigns following the 2003 Citizenship Grant. Spiro observes that where international law "demurred from dictating to states the terms of their membership rules," now international norms have led to "bars on gender discrimination in citizenship practice, as well as constraints on the termination of citizenship" and "the emergency of norms that require extension of territorial birthright citizenship in some cases and that limit

¹²⁹ Weil, *supra* note 17.

¹³⁰ *Id.* at 33.

¹³¹ *Id.*, at 32.

¹³² Spiro, *supra* note 18, at 695, 709.

discretion concerning nationalization thresholds.”¹³³ In fact, Sri Lanka is one of the few countries highlighted by UNICEF as having brought their laws into compliance with new international gender norms under CEDAW. This trend is growing with the information, mapping, and database projects initiated by the UNHCR to “strengthen the analysis of nationality legislation and improve the availability of technical advice for interested States.”¹³⁴

B. *Consensual Citizenship*

A controversial concept in the discussion surrounding citizenship is the idea of “consensual citizenship”¹³⁵ and “birthright lottery.”¹³⁶ Peter Schuck¹³⁷ asserts that consensual citizenship, where both the state and the subject choose each other, is more fair, and indeed more child-friendly because it does not determine a child’s destiny by the country of his or her birth.¹³⁸ Birthright citizenship, in contrast, is arbitrary and less “morally acceptable” because it “bases national status wholly upon the accident of geographic location at birth.”¹³⁹ The very dangers that Schuck identifies as potential downfalls for consensual citizenship ring true in Sri Lanka. Namely, as was the case for the Indian Tamils, consensual citizenship can lead to unjust exclusion and “might imply that a society could deny outsiders opportunities for membership in ways that are harshly restrictive or discriminatory” or “denationalize citizens against their will, reducing their security and status, perhaps even leaving them stateless.”¹⁴⁰ Schuck warns that “persons faced with a choice of only limited, exceedingly harsh alternatives may be more aptly described as compelled than free to choose.”¹⁴¹ This applies to the Indian Tamils who “chose” Indian citizenship following the Indo-Ceylon agreements, subsequently forcing them to return to the harsh conditions in India. Kanapathipillai highlights this issue with respect to the 1988 Act writing “the stateless were in fact persons who had expressed their choice

¹³³ *Id.* at 694-95

¹³⁴ U.N. High Commission on Refugees, *supra* note 19, at 50.

¹³⁵ PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP* 209 (1998).

¹³⁶ *See generally* AYELET SCHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* (2009).

¹³⁷ Peter Schuck is the Simeon E. Baldwin Professor Emeritus of Law at Yale Law School. His teaching and research focus on tort law; immigration, citizenship, and refugee law; groups, diversity, and law; and administrative law.

¹³⁸ SCHUCK, *supra* note 136, at 216.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 210.

¹⁴¹ *Id.*

for Sri Lankan citizenship, but whom the government of Sri Lanka would not accommodate as they did not fall within the stipulated number... in the original agreement.”¹⁴² With the 2003 and 2009 citizenship grants, Sri Lanka is accommodating Indian Tamils who chose Sri Lanka as their state but were “not admitted” as citizens and made stateless as a result.¹⁴³

C. Birth Registration

The primary focus on birth registration in international legal documents reflects the international community’s embrace of the documentation approach to citizenship rights. Specifically, the CRC and other international conventions have chosen birth certificates as the document of choice for establishing a legal identity. A birth certificate has the benefit of establishing the place of birth, age, nationality, and family connections from an early point.¹⁴⁴ Birth registration is widely acknowledged to be integrated with the delivery of social services of all kinds, including health services, education, and family services.¹⁴⁵ Human rights advocates also recognize that birth registration is a powerful tool to fight child trafficking, the recruitment of child soldiers, and child laborers.¹⁴⁶

In certain contexts, however, birth registration becomes very difficult. In conflict and post-conflict affected states, for example, registering the birth of a child can become impossible due to non-functioning of birth registration services, violence, or impassible roads.¹⁴⁷ In the post-colonial context, formal, over-centralized government structures may impede efficient birth registration and there may be “systematic discrimination against specific population groups.”¹⁴⁸ In Sri Lanka, conflict and systematic discrimination against the Indian Tamils made consistent birth registration extremely difficult. The early citizenship laws of 1948 and 1949 used birth registration as a tool of discrimination rather than protection by requiring birth registration as a qualification for citizenship when birth registration and residency documentation did not exist for the Indian Tamil population. During the civil war, majority of the Sri Lankan Tamil people in the northern and eastern region faced enormous barriers to registering births, especially during periods of the

¹⁴² KANAPATHIPILLAI *supra* note 24, at 164.

¹⁴³ SCHUCK, *supra* note 136, at 211.

¹⁴⁴ Caroline Vandenaabeele, *To Register or Not to Register? Legal Identity, Birth Registration, and Inclusive Development*, in CHILDREN WITHOUT A STATE: A GLOBAL HUMAN RIGHTS CHALLENGE 307-330 (Jacqueline Bhabha, ed. 2011).

¹⁴⁵ Innocenti Res. Ctr., *supra* note 5, at 1.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 2.

¹⁴⁸ *Id.* at 7.

heaviest violence when registrations centers did not function normally.¹⁴⁹ In addition, many people lost possession of their legally identifying documents when fleeing the violence in the region.¹⁵⁰ The 2003 and 2009 citizenship grants and the accompanying mobile registration campaign attempted to address both of these fundamental and entrenched challenges.

Caroline Vandenabeele¹⁵¹ suggests that promoting birth registration could further marginalize people who do not register their children's births for various reasons ranging from cultural practice to travel barriers. However, a variety of documents may be used to confirm a person's legal identity.¹⁵² Rather than promoting "birth registration as a legal prerequisite for accessing rights such as education," Vandenabeele argues that states should take advantage of the varied existing and functioning forms of identity documentation while implementing birth registration interventions.¹⁵³ UNICEF also acknowledges that "the unregistered children of ethnic, cultural or religious minorities and indigenous groups are, in turn, more vulnerable to discrimination and exploitation" creating "a vicious cycle in which marginalization causes non-registration and the lack of birth registration further marginalizes children."¹⁵⁴ Perhaps in an attempt to address this, or the administrative costs of granting citizenship to such large numbers,, the Sri Lankan Citizenship Acts since 1986 specifically distinguish having citizenship from possessing a Certificate of Citizenship. The 1986 act states in §4(4), "No person shall require the production of a Certificate referred to in subsection (1) for any purpose and an affidavit shall be prima facie evidence of the facts stated therein. (sic)."¹⁵⁵ An interesting addition, this subsection presumably eliminates registration requirements but bars only the requirement of the Certificate of Citizenship and leaves questions of birth and residence unaddressed. In Sri Lanka, as in Nepal where Vandenabeele works, birth certificates are not officially required in order to obtain citizenship.¹⁵⁶ However, letters of recommendation along with other official (and potentially unavailable)

¹⁴⁹ Innocenti Res. Ctr., *supra* note 5, at 23.

¹⁵⁰ *Id.*

¹⁵¹ Caroline Vandenabeele is the Head of Office, Office of the UN Resident and Humanitarian Coordinator in Myanmar and Senior Counsel at the Asian Development Bank. She is also a strategic planning advisor.

¹⁵² Vandenabeele, *supra* note 146, at 308.

¹⁵³ *Id.*

¹⁵⁴ Innocenti Res. Ctr., *supra* note 5, at 17.

¹⁵⁵ Grant of Citizenship to Stateless Persons Act, No. 5 of 1986 (Sri Lanka), *supra* note 25. See Grant of Citizenship to Stateless Persons (Special Provisions) Act, No. 39 of 1988, *supra* note 100, at §4(4) .

¹⁵⁶ See Vandenabeele, *supra* note 146, at 312. See, e.g. Innocenti Res. Ctr., *supra* note 5, at 2.

documents are central to acquiring citizenship particularly for children and adults born prior to the recent effort to register Indian and Sri Lankan Tamils and those born before giving birth certificates at birth in hospitals was common practice.¹⁵⁷

Interviews with Indian Tamil parents confirmed this challenge in some cases and in others where there was no barrier to accessing documentation and registering birth. Whether documentation was available, accessible, and required for primary school enrollment varied depending on the plantation policy and income of subjects. However, all students entering secondary school need this documentation to sit for national exams while some students need it to travel to more distant secondary school facilities. While many teachers reported that they have assisted students in obtaining documentation, we met several families and school administrators who cited a lack of identification documents as a reason their children did not or could not continue their education. Students have also reported that they did not continue their own schooling for the same reasons.

Finally, Vandenabeele raises the question of a causal link between birth registration and access to services. But as she points out, the causal link may be self-inflicted stemming from the “unintended consequence” of resulting “legal exclusion of children without birth records from access to benefits and opportunities.”¹⁵⁸ In Sri Lanka, following the grant of citizenship in 2003, the UNHCR published several articles documenting the transition to citizenship. One woman’s story shows the reverse causality Vandenabeele highlights. The woman “had no possibility to apply for documents like a passport or birth certificate” until she received citizenship in 2003.¹⁵⁹ There does seem to have been some effort made to accommodate lack of birth certificates and identity documentation both in law and practice. For example, the UNESCO Education for All National Action Plan notes twice that “heads of schools were instructed to admit children whose parents were not able to provide birth certificates or affidavits” and that “letters from Grama Niladari were accepted as proof of a child’s age.”¹⁶⁰

My research also revealed that both registration efforts and accommodations have been largely successful. Every parent, teacher, and

¹⁵⁷ *Id.*

¹⁵⁸ Vandeabeele, *supra* note 130, at 313.

¹⁵⁹ *Feature: Sri Lanka makes citizens out of stateless tea pickers*, UNHCR, available at <http://www.unhcr.org/416564cd4.html>.

¹⁶⁰ K.L. Premachandra, *et al.*, *Education For All: National Action Plan, Sri Lanka* 81 (Ministry of Human Resources Development, Education & Cultural Affairs ed., 2004).

administrator we interviewed said that some form of identity document was required for school enrollment at the elementary level and to sit for national exams from the fifth grade scholarship exam to the exams at the end of secondary school. The various documents interviewees listed as required to enroll their children or students include birth certificates, parents' ID cards, parents' birth certificates, marriage certificates, vaccination cards, house deeds or other proof of residence, voting cards, and a proof of bank account.

Most people reported needing their children's birth certificates rather than other documents and generally said that the expense incurred for acquiring a birth certificate was minimal. There were, however, a few exceptions. One family explained that acquiring a birth certificate required filling out a form in the government agency. They said, "If the Estate management processes it, we pay 150 rupees per birth certificate. If we go on our own, the birth certificate costs no money for children under one year but costs more than 2,000 rupees if the child is over five years old." Separate from the direct costs incurred to acquire a birth certificate, there can be significant travel costs and salary reductions due to a missed day of work. The same family told us, "It takes a full day to go and get the documents." Even so, none of the families that we interviewed cited barriers to acquiring documentation as reasons for their children not being in school or continuing their education. However, a minority cited costs of acquiring birth certificates as a financial challenge for the family. The majority of the interviewees said that they received their children's birth certificates in the hospital when they were born. One teacher told us that if parents could not produce a birth certificate for an enrolling student, the teachers and principal would admit the student and work with the parents to complete and submit the necessary paperwork. Another family told us that if children or parents did not have the necessary paperwork, estate management or the local Grama Niladari would provide letters of certification confirming the 2004 UNESCO report. Thus, there is a strong tie between citizenship, documentation, and access to public services such as education, and the flexible implementation of granting citizenship that ensures that the gate is truly opened to the myriad of other rights that come with it.

D. *Beyond Citizenship: The Right to Non-discrimination*

While granting citizenship addresses access to many formal rights, it does not directly address subtler issues like discrimination. To explain, I will turn to our education example and examine it through Sorensen's four key values: justice, recognition, self-determination, and solidarity.¹⁶¹ Beyond accessing and enrolling in primary and secondary schooling, school and teacher quality and structural discrimination is a serious

¹⁶¹ Sorensen, *supra* note 13 at 424.

concern for Indian Tamils implicating issues of recognition and solidarity. Although great effort has been made to register citizens and enroll children in school, structural discrimination continues. While formally these children and their families are citizens, the evident disparity in resources and quality of education suggests that the government does not recognize them as equal or as part of the “deserving” members of its society. There are vast discrepancies in school quality and resources between schools in the plantation region and schools in the cities and other regions of the country. The most common complaint of parents, teachers, principals, and NGO workers we talked to was unfair allocation of high quality teachers and school resources. These were all sources of frustration and direct contradiction to the “notion of equal citizenship that was in contained in textbooks.”¹⁶²

In Sri Lanka, the government provides “free” education in that there are no admission fees to attend school and no fees for books, uniforms, basic school infrastructure like buildings and maintenance, and sometimes a meal in primary schools.¹⁶³ On paper, the Ministry of Education has egalitarian goals and laudable objectives for the next few years. In practice, the resource structure of schools is diffused and based heavily on local networking and contributions, which means that schools are “doubly marginalized” because lack of resources is self-perpetuating.¹⁶⁴ Furthermore, there is very little transparency concerning enrollment, graduation rates, and test scores for the Indian Tamil population. It is interesting to note that all Tamil medium school statistics were “accidentally” left out of the 2012 education report for the Hatton district despite their submission by the district office to the central ministry.¹⁶⁵ Again, these issues cut at the core values that undermine the meaningfulness of formal citizenship. The lack of transparency raises questions about justice and fairness, in addition to the clear lack of recognition by the government and a rejection of citizen-wide solidarity. Further, without resources or access to networks that can provide resources, self-determination is severely limited because children and families are essentially constrained within their existing social and economic group. In an interview with the Sri Lankan Minister of Education, he made clear that while there is no discrimination in resource distribution, he would rather see some schools receive the best resources in each district rather than equal resource distribution among all public

¹⁶² *Id.*, at 440.

¹⁶³ See, e.g., Planning and Performance Review Division, Sri Lanka Ministry of Education, *Education Sector Development Framework and Programme*, October 30, 2006; Sri Lanka Ministry of Education, *Progress and Recent Trends*, November, 2011.

¹⁶⁴ Sorensen, *supra* note 13, at 439.

¹⁶⁵ Interview with anonymous subject in Nuwara Eliya, Sri Lanka. January 2013.

schools in Sri Lanka. Again, we see a substantive lack of citizenship benefits despite the existence of formal citizenship at the highest levels of policy-making and government. The significant room for discretion revealed by the Minister of Education allows for serious resource discrimination in administering public education and compounds existing discrepancies and distinctions from the rest of the Sri Lankan population. Notably, without a political identity and the political voice that goes with it, this type of discrimination is even more difficult to expose and remedy.

Despite these serious challenges and thanks to great advances in official recognition as part of the state, these families at least have a pathway to be heard. The story of one particular family is exemplary. The parents in this family were aware of their legal rights and their ability to intervene in their children's education and advocate for their family's needs. Their younger daughter and son were in eighth and third grade, respectively. Although neither parent had finished school past the seventh grade, they were incredibly dedicated to the education of their children. For example, their older daughter was attending the local school in the 10th grade, where the family had successfully petitioned the government-run school to add a 10th grade class so students would not have to travel far distances to continue their education.

Having successfully advocated at the local office of the Ministry of Education for adding the 10th grade to the local school, the parents continued to mobilize the community in an effort to improve education for their children. They told us a story about a very good principal who had been at their local school for several years and who was about to be transferred to a larger and "better" school in a nearby larger town because of his experience and success. Wanting to prevent the transfer and keep the effective principal at the school in their community, the father and a few other men in the community took a day off of work to travel to the Ministry of Education in Colombo to argue for the retention of the principal in their local school. They were ultimately successful and the principal stayed at the local school and continued to provide valuable, effective leadership.

The parents also explained that new property laws, which aimed at empowering the plantation community, have allowed them to be persistent advocates for their children. Under a recently enacted law, the parents have the right to own their line house – a type of housing provided by and typically owned by plantation owners and managers – and pass it to their children, as long as a member of the family worked on the plantations. This made it worth their while to invest in their home and another property nearby. With greater stability and assets, and a result of improved legal protections, they had more flexibility and security in their lives.

Although most parents are less civically engaged and less adept at financial management, this family is an example of the importance and promise of having a legal identity. Their recognition and legitimacy as

members of the state enabled them to successfully advocate for themselves and assert their rights to better, albeit not equal, treatment.

VI. CONCLUSION

This paper uses the history and development of nationality law in Sri Lanka to concretize key issues in international citizenship law, particularly as they pertain to human rights. The evolution of citizenship in Sri Lanka for a large and notorious stateless population reflects the developing international norms surrounding statelessness and the urgency with which both domestic and international communities perceive them. Peter Spiro interestingly notes, “The unintended long-term result of situating citizenship practice in the realm of human rights may be to diminish the value of citizenship.”¹⁶⁶ Perhaps this is instead a “re-valuing” of citizenship as an international *and* national right and status providing protections and obligations both within the state and within the world as a whole. With increased mobility and an expanding global labor market, international protections and obligations will become even more important as the present and future generations of children become adult citizens of their own countries and the world. This is true for Sri Lanka, where citizenship for Tamils of Indian origin evolved from a domestic and interstate political lever from 1948 to 1988 to a human rights issue in 2003 and 2009. As we learn more about child development and the importance of state services like health and education, citizenship becomes an even more important tool for ensuring that today’s children are able to grow and develop into healthy, productive adults. Formal citizenship rights, however, are necessary but not sufficient for true civic engagement and social equality. While citizenship rights often act as a gatekeeper to other formal and substantive rights, we can return to Sorensen’s four key values to measure the substantive success of formal citizenship law: justice, recognition, self-determination, and solidarity.¹⁶⁷ Only when citizenship law is fortified by social and economic reforms will Indian Tamils enjoy full and meaningful citizenship.

¹⁶⁶ Spiro, *supra* note 18, at 696.

¹⁶⁷ Sorensen, *supra* note 13 at 424.