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# The Citizen and the Migrant: Postcolonial Anxieties, Law, and the Politics of Exclusion/Inclusion

*Ratna Kapur\**

*This Article examines how the legal subjectivity of the migrant subject is intimately connected to the construction of the citizenship subject and how both have been products of the colonial encounter. Deploying the lens of postcolonialism, I argue that the migrant is addressed through a spectrum of legal rules based on normative criteria reminiscent of the colonial encounter. These criteria reinscribe citizenship within dominant racial, sexual, and cultural norms as well as claims of civilizational superiority. That which does not fall within the boundaries of citizenship is regarded as outcast, an "Other," and subject to restraint, persecution, censorship, social stigma, incarceration, and even annihilation. The discussion draws examples from recent judicial decisions in the context of postcolonial India, dealing with migrant bar dancers and migrant Muslims, highlighting the deep and lasting impact of the colonial encounter and the imperial imagination on understandings and constructions of*

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\* Ratna Kapur is the Director of the Centre for Feminist Legal Research, New Delhi and a Lecturer at the Geneva School of Diplomacy and International Relations, Geneva. I would like to thank all the participants of the Why Citizenship? workshop, University of Toronto, for their invaluable comments and input into an early draft of this paper. Different versions of this paper have been presented at the Institute for Migration and Ethnic Studies, University of Amsterdam; the seminar on Dispersed Trajectories: Feminism, Postcolonialism and the Road Ahead, Oxford University; the Faculty of Philosophy, University of Zurich; the Consultation on Gender, Migration and Human Rights, organized by the Centre For Feminist Legal Research, New Delhi; and the Keynote Address to the Pune Law Institute, Pune. I am grateful to all those who provided helpful comments and constructive criticism on the paper. I would also like to thank Gayatri Sharma for her research assistance.

*citizenship in the contemporary period. The cases further illustrate how notions of "global" or "world" citizen, unbound by territory or the nation-state, are unable to account for the complex and contradictory understandings of citizenship that have emerged from within a postcolonial context. The arguments force us to inquire into the role of citizenship, its relevance or meaninglessness in the lives of the migrant once its exclusionary potential has been exposed.*

[M]ost migrants learn, and become disguises.<sup>1</sup>

Production of national identity is . . . a contested process and the struggle to produce and reproduce "pure" citizens out of recalcitrant people accounts for much of what happens at the borderlands of a state.<sup>2</sup>

[T]he subjectivity of a given social agent is always precariously and provisionally fixed or . . . sutured at the intersection of various discourses.<sup>3</sup>

## INTRODUCTION

This Article examines the legal regulation of migrants in the contemporary period from a postcolonial perspective. Throughout this Article I focus on the migrant who is semi-skilled or unskilled, semi-literate, working class or lower middle class and unemployed. She occupies a subaltern position, which is not simply a descriptive term but also has a normative dimension.<sup>4</sup>

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1 SALMAN RUSHDIE, *IMAGINARY HOMELANDS* 49 (1988).

2 RATNABIR SAMADDAR, *THE MARGINAL NATION: TRANSBORDER MIGRATION FROM BANGLADESH TO WEST BENGAL* 108-09 (1999).

3 Chantal Mouffe, *Hegemony and the New Political Subjects: Towards a New Concept of Democracy*, in *FROM MARXISM TO THE INTERPRETATION OF CULTURE* 89, 90 (Cary Nelson & Lawrence Grossberg eds., 1988).

4 In using the term "subaltern," I borrow from the insights of postcolonial theory and the subaltern studies project, which have highlighted the fact that certain voices have been excluded from the dominant narratives and telling of history. The subaltern studies project regards hegemonic history as part of modernity's power/knowledge complex, which, in the context of colonialism, was deeply implicated in the "general epistemic violence of imperialism." See, e.g., Gayatri Spivak, *Three Women's Texts and a Critique of Imperialism*, 12 *CRITICAL INQUIRY* 242 (1985); Ranajit Guha, *The Small Voice of History*, in *SUBALTERN STUDIES IX: WRITINGS ON SOUTH ASIAN HISTORY AND SOCIETY* 1, 1-12 (Shahid Amin & Dipesh Chakrabarty eds., 1996); Dipesh Chakrabarty, *A Small History of Subaltern Studies*, in *HABITATION OF*

The subaltern is not merely a marginalized subject or a minority member, as understood within the terms of classical liberal thinking. The subaltern emerges from the specific ways in which the liberal project and imperialism operated during the colonial encounter, exposing the "dark side" of the liberal project and its exclusionary potential. The insights provided by the colonial past enable us to understand the operation of power through knowledge and how it sets the terms of inclusion and exclusion in the postcolonial present, though this understanding is not confined to postcolonial states.<sup>5</sup> This perspective reveals how the migrant subject is deeply implicated in the constitution of citizenship, of who counts and who does not. My intention is to highlight how the migrant is addressed through a spectrum of legal rules based on normative criteria reminiscent of the colonial encounter. I examine how these criteria reinscribe citizenship within dominant racial, sexual, and cultural norms, as well as claims of civilizational superiority. Apart from reinforcing dominant norms, the legal responses to the migrant subject expose how the "excess," that which does not fall within the dominant norms and boundaries of citizenship, is regarded as transgressive and justifiably subject to restraint, persecution, censorship, social stigma, incarceration, and even annihilation.

In the first part of this Article, I examine the threshold question of how citizenship was constituted in and through the colonial encounter and the assumptions about civilizational superiority, race, religion, sexuality, and gender on which it was based. Citizenship, in the postcolonial experience, has not been conceived exclusively within the confines of the modern nation-state.<sup>6</sup> My aim is not to provide a comprehensive account of citizenship within

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MODERNITY: ESSAYS IN THE WAKE OF SUBALTERN STUDIES 3 (Dipesh Chakrabarty ed., 2002). In the context of law, the subaltern project challenges the assumptions about universality, neutrality, and objectivity on which legal concepts are based, exposing such concepts to be products of the ruptures produced in and through the colonial encounter. See, e.g., Dianne Otto, *Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference*, 5 SOC. & LEGAL STUD. 337 (1996).

5 ELIZABETH THOMPSON, *COLONIAL CITIZENS: REPUBLICAN RIGHTS, PATERNAL PRIVILEGE AND GENDER IN FRENCH SYRIA AND LEBANON* (2000).

6 The classic account of citizenship is found in THOMAS H. MARSHALL, *CITIZENSHIP AS SOCIAL CLASS* (1950), examining the emergence of citizenship in the last 250 years in Britain and defining citizens as "a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed." *Id.* at 14. There has been a proliferation of scholarship that complicates this account of citizenship, including its embeddedness in claims to territoriality. See, e.g., Will Kymlicka & Wayne Norman, *Return of the Citizen: A Survey of Recent Works on Citizenship Theory*, 104 ETHICS 352 (1994);

a postcolonial context, given its complexity and the impossibility of arriving at an exhaustive definition. I provide, instead, an episodic account of citizenship, focusing on postcolonial India, to highlight the deep and lasting impact of the colonial encounter and the imperial imagination on understandings and constructions of citizenship in the contemporary period. In the second part of the Article, I briefly discuss two recent cases decided in the Indian courts dealing with the migrant that exemplify how these assumptions about citizenship continue to inform the postcolonial present. The first case involves a constitutional challenge to a ban imposed on bar dancers from dancing in certain prohibited establishments throughout Maharashtra, a western state in India, partly on the grounds that they were migrants from outside of the state and country and perceived as corrupting the local men and contaminating Indian culture.<sup>7</sup> The second case, decided by the Indian Supreme Court, addresses the problem of illegal migration of Muslims from Bangladesh into the northeastern state of Assam, recasting this migrant as an "aggressor" and threat to the security of both the state and the country.<sup>8</sup> In the third part of the Article, I discuss how notions of a "global" or "world" citizen, unbounded by territory or the nation-state, are also unable to account for the complex and contradictory understandings of citizenship that have emerged from within a postcolonial context. I argue that such positions have been aligned with a universalist and linear narrative of history based on exclusions and inclusions and do little to advance or facilitate the rights claims of the migrant subject. Nor do these contemporary arguments engage with the emergence of the global citizen in its neo-liberal guise — as a market-actor, consumer, and entrepreneur. The final part of the Article addresses the question "Why Citizenship?" I examine how a postcolonial perspective forces us to ask what the role of citizenship is once its exclusionary potential remains exposed, how and to what extent it remains relevant or useful, and at what point it becomes meaningless in the life of the migrant subject.

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Stuart Hall & David Held, *Citizens and Citizenship*, in *NEW TIMES: THE CHANGING FACE OF POLITICS IN THE 1990S* 173 (Stuart Hall & Martin Jacques eds., 1989); *CITIZENSHIP* (Geoff Andrews ed., 1991); DEREK HEATER, *CITIZENSHIP: THE CIVIC IDEAL IN WORLD HISTORY, POLITICS AND EDUCATION* (1990); *THE CITIZENSHIP DEBATES: A READER* (Gershon Shafir ed., 1998). For a clear analysis of how citizenship in law has become denationalized, see Linda Bosniak, *Citizenship Denationalized*, 7 *IND. J. GLOBAL LEGAL STUD.* 447 (2000).

7 Indian Hotel & Restaurants Ass'n (AHAR) v. State of Maharashtra, paras. 72, 76 (Bombay H.C. 2006) (unpublished, on file with author).

8 Sarbananda Sonawal v. Union of India, (2005) 5 S.C.C. 665, para. 38.

## I. COLONIAL CITIZENRY

I met History once, but he ain't recognize me.  
Derek Walcott, *The Schooner "Flight"*

Modernity posits a set of universal truth claims about equality, citizenship, and representation in law. In the context of Empire, colonialism was coterminous with modernity, but it also bought into sharp relief how exclusions were built into these supposedly universal concepts.<sup>9</sup> While Europe was developing ideas of political freedom, particularly in France, Britain, and Holland, it simultaneously pursued and held vast empires where such freedoms were either absent or severely attenuated for the majority of native inhabitants.<sup>10</sup> Liberalism and the rights and freedoms that it nurtured co-existed quite unproblematically with Empire.

The liberal project could reconcile promises of universality with exclusions in practice through a clear and persuasive logic.<sup>11</sup> Rights and benefits were linked to the capacity to reason, and the capacity to reason was tied to notions of biological determinism, racial and religious superiority, and civilizational maturity.<sup>12</sup> Uday Singh Mehta sets out how liberalism has enabled the production of "Others."<sup>13</sup> It makes specific assumptions about human nature that all people are born equal, free, and rational, that the subject is atomized and existing prior to history and social context.

Domination was reconciled with the rights normally associated with citizenship through the discourse of difference, whereby the eligibility and capacity for freedom and progress was biologically determined and colonial subjugation legitimized as the natural subordination of lesser

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9 See, e.g., DIPESH CHAKRABARTY, *PROVINCIALIZING EUROPE* (2000); PARTHA CHATTERJEE, *NATIONALIST THOUGHT AND THE COLONIAL WORLD: A DERIVATIVE DISCOURSE?* 2 (1993).

10 UDAY SINGH MEHTA, *LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH-CENTURY BRITISH LIBERAL THOUGHT* 46-54 (1999).

11 Tayyab Mahmud & Ratna Kapur, *Hegemony, Coercion, and Their Teeth-Gritting Harmony: A Commentary on Power, Culture and Sexuality in Franco's Spain*, 33 U. MICH. J.L. REFORM 995, 1012-24 (2000); ROBERT A. WILLIAMS, *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990).

12 Mark Brown, *Before Citizenship: Liberalism's Colonial Subjects*, Paper Presented at the 16th Biennial Conference of the Asian Studies Association of Australia, Wollongong (June 26-29, 2006), available at <http://coombs.anu.edu.au/SpecialProj/ASAA/biennial-conference/2006/Brown-Mark-ASAA2006.pdf>.

13 MEHTA, *supra* note 10.

racess to higher ones. The purportedly universal rights of man could be denied to those not considered to be men or human. Liberal discourses of rights, inclusion, and equality could be reconciled with the colonial policies of exclusion and discrimination only by presuming differences between different types of individuals. A similar logic justified the continued subordination of women, where women were understood as different from men, more specifically, as weaker, subordinate, and in need of protection. In the colonial relationship, gender difference was also conflated with cultural or civilizational backwardness, where the treatment of women was used in part as a justification for colonial intervention and the civilizing mission.<sup>14</sup> Claims to self-determination were contingent on attaining a degree of civilizational maturity, which included the shedding of religious practices that were deemed primitive and acceptable treatment by the colonial subject of its women. The Empire was able to position itself as the infinitely more mature "Great White (Christian) Saviour" and as the defender of women's rights in the colonial context, without however fundamentally affecting its position on gender difference and the representation of women as essentially weak and subordinate, that is to say, to continue to take the existence of gender difference as natural and inevitable.

Law became one site on which to construct the subjectivity of the Other as distinct and external to the liberal circumference of rights and entitlements.<sup>15</sup> The "universal" principles of liberty, equality, and freedom were contingent on the native's ability to conform or be trained into civilization. The native was entitled to certain rights and benefits to the extent that he could reinvent himself as an Englishman, otherwise, "backwardness" and lack of "civilizational maturity" were regarded as limitations.<sup>16</sup> It was a deficiency to be tolerated, even if it could not be altered, or to be eliminated if it was too threatening.<sup>17</sup> These assumptions about the Other informed the ways in

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14 RAJESWARI SUNDER RAJAN, *THE SCANDAL OF THE STATE: WOMEN, LAW AND CITIZENSHIP IN POSTCOLONIAL INDIA* 3 (2003) (arguing that the British imperial project was partly justified as a measure to improve the condition of Indian women and, at the same time, to ensure that the interventions left indigenous patriarchy untouched).

15 See, e.g., *LAWS OF THE POSTCOLONIAL* (Eva Darian-Smith & Peter Fitzpatrick eds., 1999); ANTHONY ANGHIE, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, in *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 32 (2005).

16 Sudhir Chandra, *Subjects' Citizenship Dream: Notes on the Nineteenth Century*, in *CIVIL SOCIETY, PUBLIC SPHERE AND CITIZENSHIP: DIALOGUE AND PERCEPTIONS* 106, 107 (Rajeev Bhargava & Helmut Reifeld eds., 2005).

17 SAVITA NARAIN, *THE HISTORIOGRAPHY OF THE JALLIANWALLA BAGH MASSACRE*,

which the postcolonial nation subsequently came to constitute the legitimate citizen-subject. Exclusion based on difference, or something that is alien either because of inherent immutable qualities or because it is cast as completely outside the folds of liberalism, perceived as a threat or danger, remains integral to understandings of citizenship.<sup>18</sup>

The story of the constitution of the citizen-subject cannot be understood from the trajectory of the Enlightenment and its emancipatory and universalizing vision, but, rather, needs to be told from those moments of rupture, crisis, and disruption. A historical perspective emerging from within a postcolonial context is critical to understanding the ways in which citizenship has played out in the contemporary moment. It is a fractured history, exposing how the content of citizenship is tethered to economic expansion, imperial ambition, and the cultural, gendered, racial, and religious identity of the subject. By disrupting the dominant narratives of modernity, an analysis of citizenship from a postcolonial perspective denaturalizes the relationships of dominance and subordination that underlie such narratives. This perspective captures these complex relationships of domination and subordination and demonstrates how the tools of citizenship were forged on the anvil of Empire. It also exposes how the colonial past continues to discursively inform the postcolonial present, including the practices of powerful countries, some of which were also postcolonial states or never had colonies. Citizenship is not a stable concept, and its vagaries continue to be exposed in the contemporary period in and through the migrant subject.

## II. CITIZENSHIP IN POSTCOLONIAL INDIA

Within postcolonial India, citizenship has been marked by the very feature of exclusion that has characterized its colonial incarnations.<sup>19</sup> Citizenship

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1919 (1998); HELEN FEIN, *IMPERIAL CRIME AND PUNISHMENT: THE MASSACRE AT JALLIANWALA BAGH AND BRITISH JUDGMENT, 1919-1920* (1977).

- 18 There has been an extraordinary proliferation of scholarship in the area of citizenship studies, suggesting that something new and dynamic has been happening to the subject in the context of multiculturalism and globalization in the late twentieth and early twenty-first centuries. The scholarship is wrestling with the contradictions of citizenship, but these contradictions were in fact an integral feature of subject constitution in the late nineteenth century in the context of the colonial encounter.
- 19 The colonial encounter in the Asian subcontinent determined identity partly through the demarcation of borders. For an elaborate discussion on how the very notion of national borders was alien to the Asian subcontinent and came into being during the British period of colonization as a method of dividing the "locals" and "migrants" and was the precursor to contemporary contests of over citizenship and identity,



has been defined primarily in the context of the violent and bloody partition of India where the fracturing of the subcontinent determined the content of citizenship.<sup>20</sup> Cultural identity, increasingly conflated with religious identity, and the principle of descent and blood ties are central to the constitution of Indian citizenship. The forging of Indian citizenship along the lines of cultural and religious identity finds its origins in the colonial past, where the "divide and rule" policy of the colonial power produced and perpetuated religious divides. Persons who reside outside of India can register as Indian citizens if they or either of their parents or grandparents was born in India.<sup>21</sup> However, no person is entitled to become a citizen of India if he or she has voluntarily acquired the citizenship of a foreign state.<sup>22</sup> The courts have also held that a person who migrated to Pakistan after March 1, 1947, and acquired Pakistani nationality could not subsequently claim Indian citizenship.<sup>23</sup> What has emerged during the course of the past forty years is an increasing emphasis on cultural and religious bonds and Indian origin in relationship to citizenship, rather than territorial boundary. It has been increasingly confined to people born to Indian citizens or whose parents were of Indian origin and did not forego their citizenship.<sup>24</sup> Citizenship was initially defined in an inclusive fashion at the time of the adoption of the Indian Constitution, conferring

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see Mayumi Murayama, *Borders, Migration and Sub-Regional Co-Operation in Eastern South Asia*, 61 *ECON. & POL. WKLY.* 1351 (2006).

20 Citizenship is defined in Part II of the Constitution, which addresses the central question, "Who is a citizen of India?" *INDIA CONST.* arts. 5-11.

21 *Id.* art. 8.

22 *Id.* art. 9.

23 See *Kulathil Mammu v. State of Kerala*, (1966) A.I.R. 1614 (S.C.); *State of Madhya Pradesh v. Peer Mohammed*, (1963) A.I.R. 645 (S.C.); *State of Andhra Pradesh v. Abdul Khader*, (1961) A.I.R. 1467 (S.C.); *Mubarak Ali v. State of Bombay*, (1957) A.I.R. 857 (S.C.).

24 The Citizenship Act of 1955 made elaborate provisions specifying how citizenship could be acquired by birth, descent, registration, or naturalization or through incorporation of territory. The Citizenship Act, No. 57 of 1955; *India Code* (1993), v. 2. Subsequent amendments reinforced the emphasis on ethnicity as well as birth and descent. The Citizenship (Amendment) Act, 1986, No. 51, Acts of Parliament, 1986. While the Citizenship Act of 1955 provided that every person born in India on or after January 26, 1950, was to be a citizen of India by birth, from July 1, 1987, every person born in India on or after January 26, 1950, would be a citizen of India if either of "his" parents was a citizen of India at the time of his birth. Similarly, the Citizenship (Amendment) Act, 1992, provides that a person born outside of India on or after January 26, 1950, and before the commencement of the Act would be a citizen of India if either of his parents was a citizen of India at the time of his birth. The Citizenship (Amendment) Act, 1992, No. 39, Acts of Parliament, 1992.

citizenship on a vast majority of people who were indentured laborers and poor emigrants. Yet there has been a growing emphasis on the majoritarian ascriptions of citizenship where Indian descent has become an overriding consideration as has Hindu identity.<sup>25</sup>

With the re-emergence of Hindu majoritarianism throughout the 1990s, in the form of the Hindu Right, the entrenchment of citizenship in blood ties and cultural ascriptions reached a crescendo and became more exclusive.<sup>26</sup> The Hindu Right has continuously regarded citizenship as an exclusively cultural and religious enterprise, prioritizing religious identity in its definitions of citizenship, in the hope of establishing a Hindu state in India, where religious minorities, especially Muslims and Christians, would have to conform.<sup>27</sup> Overt expressions of this exclusivity arose during the debate over the citizenship of the Italian-born, Catholic leader of the Congress Party in 2004.<sup>28</sup> During the course of the 2004 election campaign, Sonia Gandhi's "foreign origin" was constantly assailed by the Hindu nationalists

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25 Valerian Rodrigues, *Citizenship and the Indian Constitution*, in CIVIL SOCIETY, PUBLIC SPHERE AND CITIZENSHIP: DIALOGUES AND PERCEPTIONS, *supra* note 16, at 209, 221-22.

26 The Hindu Right is a contemporary right-wing religious and nationalist movement that is dedicated to the ideology of *Hindutva* — that is, the establishment of India as a Hindu state. It is a political ideology completely distinct and separate from Hinduism the religion, though the movement has been quite successful in its efforts to blur this distinction. The Hindu Right refers to the main organizations and political parties in the current phase of Hindu communalism in India — namely, the Bharatiya Janata Party ("BJP" — Indian People's Party), the political wing of the Hindu Right, the Rashtriya Swayamsevak Sangh ("RSS" — Association of National Volunteers), which is the main ideological component of the movement, and the Vishwa Hindu Parishad ("VHP" — World Hindu Council), which promotes the religious ideology of the Hindu Right.

27 The Hindu Right has pursued a narrow conception of citizenship, privileging religious identity from its very inception in the early 1920s. It challenged the expansive definition of citizenship proposed during the Constituent Assembly Debates, which included Muslims. One member of the Constituent Assembly, P.S. Desmukh, proposed that "[e]very person who is a Hindu or Sikh by religion and is not a citizen of any other State, wherever he resides shall be entitled to be a citizen of India," thus limiting citizenship to religious identity and clearly excluding Muslims. Rodrigues, *supra* note 25, at 224. He further argued that citizenship should be limited to territory and not determined by parentage.

28 Sonia Gandhi is currently the leader of the Congress Party, which won the national elections in 2004 and leads a coalition of parties under the banner of the United Parliamentary Alliance at the political Center. She is the widow of Rajiv Gandhi, the late Prime Minister of India assassinated in 1991, and daughter-in-law of Indira Gandhi, who was assassinated in 1984.

as rendering her illegitimate to hold public office, least of all the post of Prime Minister.<sup>29</sup> After their bruising and somewhat unexpected defeat at the polls in 2004, the Hindu nationalists waged a national campaign to prevent Gandhi from being anointed as the next Prime Minister. She had acquired Indian citizenship after her marriage to Rajiv Gandhi, the late Prime Minister of India, in compliance with the formal residence requirements under the Citizenship Act of 1956.<sup>30</sup> Nevertheless, her formal legal status was not deemed sufficient by the nationalists, and she continued to be besieged about her foreign origins, which, it was claimed, disqualified her from being a "real Indian." The nearly hysterical tone of the campaign ultimately forced Gandhi to renounce her claim for the top spot. Ironically, this move almost immediately endeared her to the general populace, who cast her act of "renunciation" as clear proof of her "Indian-ness."

The issue of religious identity has become particularly significant in the debate over the migration of thousands of Bangladeshis into Assam, a state in the northeastern part of India, since 1971. While a number of families have established firm roots in the state, their presence has produced tensions with the local indigenous communities who are claiming erosion of their cultural and political identity. While the story of migration into the northeast is a complex one, the Hindu Right has polarized the issue by viewing it almost exclusively through the lens of religion — that is, representing it as a tension between the Hindu insider and the Muslim outsider. The issue was addressed in a recent decision by the Supreme Court, discussed in the following Part, in which the Bangladeshi migrant is cast as an "aggressor" and a security threat, and the issue of religion further entrenched into the normative definitions of Indian citizenship, of who belongs and who does not.

Gender has also been central to the construction of Indian citizenship in the postcolonial context. In the course of the colonial encounter, the promotion of liberty, equality, and freedom was bound to the logic of gender difference. And gender difference in the colonial context was integrally tied to the civilizational difference.<sup>31</sup> The white woman of the Empire was in perpetual need of protection from the lusts of the native man and was involved in protesting any move to be subject to the rule of the native.<sup>32</sup> At the same

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29 See Shashi Tharoor, *Who Is an Indian?*, 20 SCH. ADVANCED INT'L STUD. 103 (2000).

30 Section 5(1)(c) of the Citizenship Act, No. 57 of 1955; India Code (1993), v. 2.

31 WOMEN, CITIZENSHIP, AND DIFFERENCE (Nira Yuval-Davis & Pnina Werbner eds., 1999); Anna Clark, *Changing Concepts of Citizenship: Gender, Empire and Class*, 42 J. BRIT. STUD. 263 (2003).

32 See the discussion on the controversy around the 1882 Ilbert Bill, which proposed a series of amendments to the Criminal Procedure Code to remove a racially discriminatory clause that did not allow the natives to exercise criminal jurisdiction

time, the colonized woman was cast as a victim who needed to be saved from the barbarism of the native tradition. It was, as Spivak states, a case of "white men saving brown women from brown men."<sup>33</sup> Implicit in the move to rescue the native woman was the assumption that she was complicit in the endeavor to liberate her from the native man.

The Hindu nationalists, in turn, worked to recover the "traditional woman," who was conceived almost entirely within the home and deeply linked to the construction of national identity.<sup>34</sup> The "official" culture of Indian middle-class nationalism was elaborated in the private domain — "the home" — which had important implications for the subject constitution of women in nationalist discourse. The home as the repository of national identity had to be protected from colonial intrusions by women, using their virtues of "chastity, self-sacrifice, submission, devotion, kindness, patience and the labours of love."<sup>35</sup> These assumptions about women's primary roles as wives and mothers came to be equated with Indian cultural values and the primary identity of the "real Indian woman." It was an identity that was distinct from that of the Western woman, as well as of the "street woman" or "prostitute," who could undermine the nationalist project as well as disrupt the social order.<sup>36</sup> Women's participation in the public arena during the course of the anti-colonial struggle was constantly portrayed as dutiful and comparable to their duties in the home and, hence, respectable.<sup>37</sup> Their identities as wives and mothers who were self-sacrificing, obedient, and chaste became the central feature of the

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over British subjects living in certain parts of the colony: The protests by white women, which helped to defeat the bill, were embedded in assumptions about racial and cultural superiority. Elizabeth Buettner, *Spaces, Problematic Races: Defining Europeans in Late Colonial India*, 9 *WOMEN'S HIST. REV.* 277 (2000); Mrinalini Sinha, "Chathams, Pitts and Gladstones in Petticoats": *The Politics of Gender and Race in the Ilbert Bill Controversy, 1882 — 1884*, in *WESTERN WOMEN AND IMPERIALISM: COMPLICITY AND RESISTANCE* 98 (Nupur Chaudhuri & Margaret Strobel eds., 1992); MRINALINI SINHA, *COLONIAL MASCULINITY: THE "MANLY ENGLISHMAN" AND THE "EFFEMINATE BENGALI" IN THE LATE NINETEENTH CENTURY* 33 (1995).

33 Gayatri Spivak, *Can the Subaltern Speak?*, in *MARXISM AND THE INTERPRETATION OF CULTURE* 271, 297 (Cary Nelson & Lawrence Grossberg eds., 1988).

34 Partha Chatterjee, *The Nationalist Resolution of the Women's Question*, in *RECASTING WOMEN: ESSAYS IN COLONIAL HISTORY* 233, 236 (Kum Kum Sanghari & Sudesh Vaid eds., 1989).

35 *Id.* at 287.

36 SUMANTA BANERJEE, *DANGEROUS OUTCAST: THE PROSTITUTE IN NINETEENTH CENTURY BENGAL* (1998).

37 ANUPAMA ROY, *GENDERED CITIZENSHIP: HISTORICAL AND CONCEPTUAL EXPLORATIONS* 172 (2005).

dominant cultural and familial ideology that was to shape and inform the constitution of women's citizenship in postcolonial India.

Anti-colonial nationalism was formative in the molding of Indian women's citizenship after Independence. Their citizenship was simultaneously forged on the anvil of anti-colonial resistance, as well as gender and cultural essentialism. The emergence of Indian women's citizenship post-independence represented the melting and transforming of traditional attachments in favor of new identities, as well as the reaffirmation of authentic cultural values.<sup>38</sup> While citizenship served as a marker of modernity, the grounding of Indian women's citizenship in normative assumptions about culture, sexual conduct, familial roles and religious identity served to distinguish the nation from the "West" and also set the terms of the Indian woman's identity in modern India. The constitution of citizenship for women came to be embedded in both an anti-colonial patriotism as well as dominant familial and sexual ideology.

The construction of women as wives and mothers as partially constitutive of women's citizenship status continues to be delineated within the confines of a Hindu-nationalist identity as well as distinct from the "loose" or "fallen" woman. At the same time, the legal regulation of women in and through these dominant cultural and sexual norms sustains their marginalization, subordination, or exclusion from citizenship. These norms sometimes operate to protect women and the assumptions about cultural authenticity on which Indian citizenship is based. When women have been good wives and mothers, when they have lived up to the expectations that these norms impose on them, they are more likely to be the recipients of rights and benefits associated with citizenship. But, by the same token, a woman whose life has deviated from the roles allocated to her by these norms may often be denied such rights and benefits. The role of sexual and cultural normativity in the production of the Indian woman's citizenship is subtle and complex and cannot be understood within a framework that limits the understanding of citizenship to a territorial boundary or formal legal status.

The cases discussed in Parts III and IV reveal and deconstruct the ways in which definitions of Indian citizenship have been mediated by normative understandings of religious and gender identity. In the bar dancers' case, the migrant women are compelled to align with specific gender and culturally normative criteria in order to "belong." In the *Sonawal* case, the Supreme Court's harsh response to the influx of Bangladeshi Muslim migrants into

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38 Deniz Kandiyoti, *Identity and Its Discontents: Women and the Nation*, 20 *WOMEN LIVING UNDER MUSLIM L.* 3 (1998).

India foregrounds how religion remains integral to the formation of Indian citizenship, rendering the situation of the Indian Muslim, who is a citizen, increasingly suspect and unstable.

### III. THE BAR DANCERS' CASE<sup>39</sup>

In July 2005, the state legislature of Maharashtra, a western province in India, unanimously passed a bill banning dance performances in eating halls, permit rooms, and beer bars.<sup>40</sup> The new law specifically exempted dance performances in theaters, cinema, auditoriums, sports clubs, and luxury hotels.<sup>41</sup> The several justifications for the ban included the need to prevent obscenity and protect the dignity of women. A second justification made by the government was that the bar dancers were being trafficked into the bars and forced to work in exploitative conditions, and the ban was thus necessary following India's undertaking to combat such activity under the 1949 International Convention on Immoral Trafficking in Women and Girls.<sup>42</sup> And finally, the ban was justified as a means of stopping the inflow of women

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39 *Indian Hotel & Restaurants Ass'n (AHAR) v. State of Maharashtra* (Bombay H.C. 2006) (unpublished, on file with author).

40 Section 33A(1)(a) of the Bombay Police (Amendment) Act, Maharashtra Act No. 35 of 2005, Maharashtra Government Gazette, 2005.

41 *Id.* § 33B.

42 The state relied on a field study conducted by Prayas, a field action project of the TATA Institute of Social Sciences, funded by USAID. PRAYAS, A STUDY OF THE SOCIO ECONOMIC SITUATION AND REHABILITATION NEEDS OF WOMEN IN DANCE BARS (2005). The Prayas Report concluded that middlemen brought women to the bars without revealing much about the nature of the work, and women were forced to dance under threat of punishment or harm. *Id.* at 5. The Report concluded that the basic elements of human trafficking were present as defined in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. GAOR, 55th Sess., Supp. No. 49, U.N. Doc. A/45/49 (Dec. 15, 2000). See *Indian Hotel & Restaurants Ass'n (AHAR)*, para. 86. The ban was also supported by the U.S. State Department in its June 2005 *Trafficking in Persons Report*. This report spoke in favor of the decision to close down the dance bars, stating,

The March 2005 order by the Home Minister of Maharashtra state to close down "dance bars" — many of which served as prostitution and trafficking outlets — may check a new trend of traffickers favoring this more sophisticated and concealed format for selling victims trafficked for the purpose of sexual exploitation over more blatant brothel-based trafficking.

U.S. DEP'T OF STATE, VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION

from outside the state and outside of India, especially from Bangladesh, as they were introducing a dance bar culture into the state that was against Maharashtran tradition, derogatory to the dignity of the women, and "likely to deprave, corrupt or injure the public morality or morals."<sup>43</sup> During the course of the debate on the ban, one member of the legislature called attention to the fact that the bars were damaging families, destroying Indian culture, having an adverse effect on students as the bars were located within the vicinity of schools, and spreading vice in the "lives of the young in the rural areas due to the impact of the bar culture."<sup>44</sup>

The ban was challenged by the Bharatiya Bargirls Union, representing 75,000 workers in bars and hotels in Bombay as well as in other districts of Maharashtra, together with several women's groups, HIV/AIDs groups, sex workers groups, and hotel associations. The dancers argued that the ban violated their fundamental rights to equality,<sup>45</sup> freedom of speech and expression,<sup>46</sup> livelihood, and life.<sup>47</sup> They denied the allegation of being trafficked, stating that they had migrated voluntarily due to economic exigencies and a breakdown of traditional support structures in their home villages.<sup>48</sup> The dancers also challenged the state's contention that their dances

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ACT OF 2000: TRAFFICKING IN PERSONS REPORT 123 (2005), *available at* <http://www.state.gov/documents/organization/47255.pdf>.

43 Bombay Police (Amendment) Act, pmbi.

44 *Indian Hotel & Restaurants Ass'n (AHAR)*, para. 76. After the controversial Bill was passed, the Deputy Chief Minister of the state, R.R. Patil, triumphantly declared, "I knew that eventually the law will be passed because I was acting in the larger interest of Maharashtra and its youth." *Dance Bar Bill Passage Major Boost for Patil*, TIMES INDIA, July 23, 2005, *available at* <http://timesofindia.indiatimes.com/articleshow/1180390.cms>.

45 Article 14 of the Indian Constitution states, "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." Article 15 prohibits discrimination on the grounds of religion, race, caste, sex or place of birth and states that "[n]othing in this article shall prevent the State from making any special provision for women and children." INDIA CONST. art. 15(3).

46 *Id.* art. 19(1)(g) states that all citizens shall have the right "to practice any profession, to carry on any occupation, trade or business."

47 *Id.* art. 21 provides that "[n]o person shall be deprived of his life or personal liberty except according to procedure established by law."

48 *Indian Hotel & Restaurants Ass'n (AHAR)*, para. 2. In contrast to the Prayas Report, a second study, THE SNDDT WOMEN'S UNIVERSITY, RESEARCH CENTRE FOR WOMEN STUDIES & THE FORUM AGAINST OPPRESSION OF WOMEN, WORKING WOMEN IN MUMBAI BARS, TRUTHS BEHIND THE CONTROVERSY (2005) [hereinafter SNDDT REPORT], reported that none of the 500 women interviewed had stated that they had been coerced into the work or bought or sold in any manner. Therefore, according to the SNDDT Report, "the bar dancer is conscious of the implications

were vulgar, obscene, and alien to Maharashtra culture, asserting that their skills were based on traditional dance forms embedded in that culture itself.<sup>49</sup> The dancers were careful to distinguish their work from sex work, arguing that while there was scope to perceive their work as of a sexual nature, they could not be labeled sex workers.<sup>50</sup> Indeed, they merely imitated the dance styles and gestures seen in Indian commercial cinema, advertisements, and music videos. Forcing the women out of the bars would make them more vulnerable to being forced into sex work and subject to highly exploitative working conditions and violence.<sup>51</sup>

In April 2006, the Bombay High Court struck down the ban, holding that it violated articles 14 and 19(1)(g) of the Constitution. While the order constituted a victory for the bar dancers, the Court's central concern revolved around compliance with Indian cultural and sexual norms rather than the fundamental rights of the dancers. The High Court focused on the differential treatment of beer bars and similar establishments as opposed to luxury hotels, sports clubs, theaters, and auditoriums. Judge Rebello stated that the ban made a distinction between these different types of establishments. The eating halls, permit rooms, and beer bars in which dance performances were prohibited had "distinct traits and characteristics of their own," with customers permitted to stand next to a dancer they liked and shower her with money.<sup>52</sup> In contrast, the Court stated, "The class of establishment covered by Section 33(B) are those [sic] conducted by responsible persons/management who are conscious of their social commitments and obligations. These are the types of establishment, which have never conducted any activity of the kind that was being conducted at the dance bars."<sup>53</sup> Nevertheless, the Court held that since a primary objective of the ban was to prevent dances that are "obscene, vulgar or immoral and hence derogatory to the dignity of women and to prevent exploitation of women," the banning of such dances only in the prohibited establishments was not a reasonable classification. The ban should apply to all such dances regardless of where they are performed, even in the exempted establishments. The Court also observed that the second objective of the ban was to prevent exploitation, in which case even work

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of her 'choice' or decision. She knows and agrees to the very specific working conditions of this profession." *Id.* at 12.

49 *Indian Hotel & Restaurants Ass'n (AHAR)*, para. 54.

50 *Id.* para. 38.

51 *Id.* para. 5(iv).

52 *Id.* para. 37.

53 *Id.*



such as waitressing should have been covered by the ban in the prohibited establishments.<sup>54</sup>

Implicit in the Court's holding is the assumption that if the state were to ban *all* women from doing any work at all in the bars because the conditions of work are *per se* exploitative, then the Act would not be considered in violation of article 14. Such a prohibition could be justified in terms of article 15, which permits the state to enact special provisions to protect women from exploitation. Similarly, only dances that take place in exempted establishments that are decent, non-obscene, and moral should be permitted. While the Court held that the dances in the prohibited establishments were vulgar and obscene, the entire context of these establishments constituted an exploitative environment in which women should be prohibited from working.

The decision did not disrupt the central premise of the government's justification for the ban — that the dances were obscene, immoral, vulgar, and contrary to Maharashtran culture. At stake was not a woman's right to equality or livelihood, but rather the moral turpitude of the state and the nation. Women must be protected from this cultural and sexual contamination, and the state must be further protected from citizens who are exposed to this contamination. This contamination is invariably displaced onto the "outsider." While the Court does not address the claim that this contaminant was a foreign national, namely, Bangladeshi, its remarks clearly demarcate and identify attributes that could not and do not belong to Indian culture and are implicitly alien imports.

The Court upheld the state's competence to legislate on matters dealing with women's "dignity" and issues of morality and public decency and did not dispute the central premise of the ban — the need to protect women from derogatory treatment as well as to protect society from immoral, indecent, and vulgar activity.<sup>55</sup> The decision assumes that the female citizen's fundamental rights are contingent on familial and sexual normativity and compliance with rigid and conservative assumptions about Indian culture.<sup>56</sup> The transgression of dominant sexual and familial norms is not compatible with the Indian citizen's cultural status and identity as established during the course of the colonial encounter and the anti-colonial nationalist struggle.

While the bar dancers' basic claim was that their fundamental rights

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54 *Id.* para. 93.

55 *Id.* para. 17.

56 *See* RATNA KAPUR, *EROTIC JUSTICE: LAW AND THE NEW POLITICS OF POSTCOLONIALISM* 51-94 (2005).

as citizens had been violated, the central focus of their petition was on countering the state's normative cultural and sexual claims. They sought to establish that their sexual and cultural identities are perfectly consistent with Indian cultural values and sexual mores by arguing that the performance of "erotic" dance is compatible with Maharashtran culture and does not amount to sex work. The women were able to deflect attention from an inquiry into their formal citizenship status and instead concentrate on the state's central concern, that is, their cultural and sexual conduct.<sup>57</sup> While many women would have been able to demonstrate citizenship status through the acquisition of a ration card or voter's card by the mere provision of a residential address, the central focus of the ban and the court case was their compliance with cultural and sexual norms. These norms are considered central to the constitution of citizenship and the conferment of formal legal rights.

This case illustrates how cultural normativity and sexual normativity are formative to the construction of Indian citizenship. The relationship of culture to sexual conduct and status was a central feature of the colonial encounter in the late nineteenth century, when Hindu nationalists and revivalists reconstituted the "home" as a "pure" space of Indian culture, uncontaminated by the colonial encounter. The modern nation-state was, in effect, fashioned in the autonomous private domain of culture, where culture was invariably aligned with religious identity, that is, Hindu identity.<sup>58</sup> The home as the repository of national identity had to be protected from colonial intrusion by women, who used their virtues

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57 The Maharashtran state alleged that many of the women had been trafficked or brought in from Nepal and Bangladesh. The SNTD Report states that evidence was found of only 1% of the women being from Nepal and none from Bangladesh. Nevertheless, the Deputy Chief Minister reiterated his claim and stated that no compensation would be given to the Bangladeshi women.

58 Chatterjee, *supra* note 34, at 236. See also TANIKA SARKAR, *HINDU WIFE AND HINDU NATION* (2004), for an argument that there was an intense contest over the production of Indian women's subjectivity. While women were cast as preservers of cultural identity, controversies over the treatment of women in the home attested to the extent of violence experienced by girls married off at the age of puberty, challenging the view that the home was in fact a space of honor, dignity, and purity. These internal cultural disputes were, however, marginalized in the broader contests between the political nationalists and the colonial power. For a similar context, see LATA MANI, *CONTENTIOUS TRADITIONS: THE DEBATE ON SATI IN COLONIAL INDIA* (1998), arguing that the sati debate earlier in the nineteenth century had set the discursive stage on which nationalists later in the century addressed issues of gender and its relationship to nationalism. Mani argues that the early-nineteenth-century debate between social reformers and conservatives over the legitimacy of sati in

of "chastity, self-sacrifice, submission, devotion, kindness, patience and the labours of love."<sup>59</sup> The bar dancer's case is evidence of the fact that normative sexuality and cultural conformity remain the primary markers of citizenship in relation to women in postcolonial India. While the migrant status of the dancers remained largely unaddressed in the case, implicit was the fact that their "foreignness" or "Otherness" could be muted only through compliance with strict normative criteria that could render them "insiders." While the dancers were able to distance themselves from any allegations of being illegal Bangladeshi migrants, arguing that there was no evidence of the presence of these migrants in the bars, the decision does not indicate that the dancers succeeded at the normative level.<sup>60</sup> The Court's focus was on the limited application of the ban and its failure to protect *all* women workers, as well as *all* public spaces from cultural erosion, rather than its discriminatory impact on the dancers or their cultural legitimacy.

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Indian culture was not about the rights of women as Indian subjects, but a debate over tradition. It was a debate through which social reformers tried to reform Indian culture in order to undermine the legitimacy of Britain's rule, while the nationalists took the position that the colonial power had no role to play in the sphere of tradition and culture. Women's bodies served as the primary site for the re-articulation of tradition and culture. *See also* SUDHIR CHANDRA, *ENSLAVED DAUGHTERS: COLONIALISM, LAW AND WOMEN'S RIGHTS* (1998).

- 59 Chatterjee, *supra* note 34, at 287. Chatterjee links this transformation of the woman through nationalist ideology with the disappearance of social reform in the late nineteenth century. *See also* MAITRAYEE CHAUDHURI, *INDIAN WOMEN'S MOVEMENT: REFORM AND REVIVAL* (1993).
- 60 While the SNDT Report states that there was no evidence of the presence of poor Bangladeshi women in the bars, the lawyer who visited the police stations to represent those dancers arrested after the ban was imposed found that a large majority of the women arrested were poor "illegal" Bangladeshi migrants: Conversation with Flavia Agnes, Lawyer, at the Consultation on Gender, Migration, and Human Rights Law: Focus on Bangladesh, India and Nepal, New Delhi (Jan. 19, 2007). Agnes claims that considerable tension existed between the Indian bar dancers and those migrating from Bangladesh on the grounds that the rates of the migrant women were lower and hence they were able to attract more customers. When the ban was imposed, these tensions become secondary, and a collective decision was made to refute the allegation of the presence of Bangladeshi migrants for two reasons. There was a concern that acknowledging the presence of the migrants would strengthen the government's case for imposing the ban, especially on grounds of security. The second reason was the desire to protect the Bangladeshi female migrants from being immediately deported.

#### IV. THE SONAWAL CASE<sup>61</sup>

The issue of the relationship of citizenship to cultural status emerged recently in the context of an Indian Supreme Court decision dealing with the challenge posed by Bangladeshi Muslim migrants crossing the border into Assam, a northeastern state in India, where many Muslim settlers live in constant fear of deportation or even death.<sup>62</sup> Hundreds of thousands of Muslim migrants fled into Assam in the early 1970s when East Pakistan was liberated and the new country of Bangladesh was formed. The migrants continued to pour into Assam throughout the 1980s in search of a better life. However, the influx created resentment amongst the local population, leading to a popular uprising and the slaughter of thousands of Muslims over the past decade. In response to a specific massacre of three thousand migrant settlers in Assam in 1983 by a student-led movement, the Indian government granted citizenship in 1985 to all settlers from the former East Pakistan who had come to Assam before 1971. In one stroke, thousands of migrants became Indian citizens. But thousands of others, who had arrived after 1971, remained illegal.

On this background, the Illegal Migrants (Determination by Tribunal) Act ("IMDT Act") of 1983 was enacted by the Indian government, partly to prevent a witch-hunt against illegal migrants, but also with the professed aim of making the detection and deportation of illegal migrants easier. As stated in its preamble, the Act was adopted in light of

[t]he influx of foreigners who illegally migrated into India across the borders of the sensitive eastern and north eastern regions of the country and remained in the country [and] pose[] a threat to the integrity and security of the said regions . . . . After taking into account the need for their speedy detection the need for protection of genuine citizens of India and the interests of the general public.

The IMDT Act resulted in the establishment of tribunals to determine whether or not a person is an illegal migrant and was specifically and exclusively applicable to foreigners in Assam, with foreigners in the rest of India covered under the provisions of the 1946 Foreigners Act.<sup>63</sup> The latter

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61 Sarbananda Sonawal v. Union of India, (2005) 5 S.C.C. 665.

62 SANJIB BARUAH, *INDIA AGAINST ITSELF: ASSAM AND THE POLITICS OF NATIONALITY* (1999); PRAFULLA KUMAR MOHANTA, *THE TUSSELE BETWEEN THE CITIZENS AND FOREIGNERS IN ASSAM* (1986).

63 The Foreigners Act confers wide-ranging powers to deal with all foreigners, prohibiting, regulating, or restricting their entry into India or continued presence in

Act specifically provides that the onus of proving citizenship status rests on the person accused of being a non-citizen.<sup>64</sup> However, the IMDT Act contained no such provision, and in *effect*, its provisions accorded greater protection to anyone accused of being a foreigner in placing the burden of proof on the prosecution to establish that he or she is not a citizen of India.

In the *Sonawal* case, the petitioner, a former president of the Assamese Students Union, stated that the IMDT Act was unconstitutional as it discriminated against a class of citizens of India, making it impossible for citizens resident in Assam to secure the detection and deportation of foreigners from India. The petitioner claimed that the Act had actually ended up protecting illegal migrants. The Court declared the Act unconstitutional on the ground that it violated article 355 of the Indian Constitution, which provides, "It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution." According to the Court, the word "aggression" should be broadly defined and not limited to a threat or act of war. On the broad meaning of aggression, the Court referred to the U.S. Supreme Court decision in *Chae Chan Ping*:

To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us.<sup>65</sup>

The Court also quoted Lord Denning, former Justice of the U.K. Court of Appeals:

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the country including through arrest, detention, and confinement. The Foreigners Act, No. 31 of 1946; India Code (1993), v. 1.

<sup>64</sup> Section 9 of this Act is important and reads as follows:

*Burden of proof* — If in any case not falling under section 8 any question arises with reference to this Act or any order made or direction given thereunder, whether any person is or is not a foreigner or is or is not a foreigner of a particular class or description the onus of proving that such person is not a foreigner or is not a foreigner of such particular class or description, as the case may be, shall, notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872), lie upon such person.

<sup>65</sup> *Sonawal*, (2005) 5 S.C.C. 665, para. 57 (citing *Chae Chan Ping v. United States*, 130 U.S. 581 (1930)).

In recent times England has been invaded not by enemies nor by friends, but by those who seek England as a haven. In their own countries there is poverty, disease and no homes. In England there is social security, a national health service and guaranteed housing all to be had for the asking without payment and without working for it. Once here, each seeks to bring his relatives to join him. So they multiply exceedingly.<sup>66</sup>

A major factor in the Court's reasoning was the 1998 report submitted by the Indian Army, which had stated that the influx of illegal migrants was a major contributory factor to the outbreak of insurgency in the state.<sup>67</sup> The report had alleged that Muslim militant organizations had mushroomed across Assam and that the large-scale illegal migration was tantamount to external aggression and causing internal disturbance; it identified the IMDT Act and Rules as the main barrier in the identification and deportation of illegal migrants. And, finally, the Court held that "the presence of such a large number of illegal migrants from Bangladesh, which runs into millions, is in fact an 'aggression'" and had

resulted in seriously hampering the growth of the State of Assam although it has vast natural resources as people from [the] rest of the country have a general perception that it is a disturbed area and this factor has resulted in not generating any employment opportunity, which has contributed to a large measure in giving rise to [the] insurgency.<sup>68</sup>

In striking down the Act, the Court produced a bloated definition of aggression, by incorporating economic aggression into the ambit of article 355. A major consequence of the decision was to bring these migrants into the scope of the 1946 Foreigners Act, which places the burden of proving citizenship on the person accused of being a non-citizen.

Cultural and religious identity was integral to the definition of citizenship in *Sonawal*. Those accused of being illegal migrants were invariably referred to as Muslims, though Muslims also constitute 12% of the national population and a significant minority. The Court's heavy reliance on the Army's report is telling of its approach to the issue of citizenship. The report claimed that "dangerous consequences" would result from large-scale illegal migration from Bangladesh, "both for the people of Assam and more for the

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66 *Id.* para. 59.

67 *Id.* para. 17.

68 *Id.* para. 64.

Nation as a whole . . . . No misconceived and mistaken notions of secularism should be allowed to come in the way" of recognizing this reality.<sup>69</sup> The report warned that the Assamese would soon become a minority in their own state and that their very cultural survival was in jeopardy. Moreover, the cultural threat was specifically identified as a Muslim threat:

The influx of these illegal migrants is turning these districts into a Muslim majority region. It will then only be a matter of time when a demand for their merger with Bangladesh may be made. The rapid growth of international Islamic fundamentalism may provide a driving force for this demand. In this context, it is pertinent that Bangladesh has long discarded secularism and has chosen to become an Islamic State. Loss of lower Assam will sever the entire land mass of the North East, from the rest of India and the rich natural resources of that region will be lost to the Nation.<sup>70</sup>

The *Sonawal* decision needs to be read within the context of the re-emergence of the Hindu Right. The movement has its origins in revivalist and nationalist movements of the nineteenth century, which sought to revitalize Hindu culture as a strategy for resisting colonialism. As it developed through the twentieth century, it began to take on a distinctively right-wing, anti-minority stance, particularly in the 1920s with the publication of Vinayak Damodar Savarkar's *Who Is a Hindu?*<sup>71</sup> and the founding of the RSS, the ideological wing of the Hindu nationalists. The latter represents an ideology that has sought to establish the Hindu subject as central to the constitution of the Indian (read Hindu) nation and views all others as suspect in terms of their fealty to the nation and religious affiliations. At the heart of the project of the Hindu Right "lies the myth of a continuous thousand-year old struggle of Hindus against Muslims as the structuring principle of Indian History. Both communities are assumed to have been homogenous blocks — of Hindu patriots, heroically resisting invariably tyrannical, 'foreign' Muslim rulers."<sup>72</sup> The basic precepts of the ideology of the Hindu Right are that Muslims and Christians should be distrusted because they have their religious fealties in foreign lands. Thus the Hindu Right and its political philosophy of establishing a Hindu state are antagonistic to difference, quite specifically

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69 *Id.* para. 17(22).

70 *Id.* para 17(24).

71 VINAYAK DAMODAR SARVARKAR, *HINDUTVA: WHO IS A HINDU?* (1929).

72 TAPAN BASU ET AL., *KHAKI SHORTS, SAFFRON FLAGS: A CRITIQUE OF THE HINDU RIGHT 2* (1993); see also Ratna Kapur, *Normalizing Violence: Transitional Justice and the Gujarat Riots*, 15 *COLUM. J. GENDER & L.* 855 (2006).

religious difference. "[A]ll those . . . can have no place in the national life, unless they abandon their differences, and completely merge themselves in the National Race. So long, however, as they maintain their racial, religious and cultural differences, they cannot but be [sic] only foreigners."<sup>73</sup> The Hindu nation and the identity of the citizen subject were constituted through an attack on the very legitimacy of the religious minorities and on a denial of any protection of minority rights within the Hindu nation.<sup>74</sup>

Central to the ideology to the Hindu Right is the installation of religion and culture as primary attributes of nationalism and citizenship identity. In the early discussions about citizenship in the Constituent Assembly debates, the threat of being overwhelmed by the Muslim presence was expressed as an "air-born baby boom."<sup>75</sup> A similar fear was echoed fifty years after independence, in the statements of India's then-Home Minister Lal Krishna Advani of the nationalist BJP, calling the twenty million "illegal" Bangladeshis in India a security risk.<sup>76</sup> The Hindu nationalists were vociferous in their calls to scrap the IMDT Act on the grounds that it protected "Bangladeshi illegal immigrants at the cost of the country's security."<sup>77</sup> The Hindu Right declared

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73 MADHAV SADASHIV GOLWALKAR, WE OR OUR NATIONHOOD DEFINED 53-54 (1939). Madhav Sadashiv Golwalkar, who led the RSS from 1940-1973, stated that the "'foreigners' or 'strangers' have to acknowledge the National religion as the State religion and in every other respect inseparably merge in the National community." *Id.* at 55.

74 The attack on the legitimacy of religious minorities to be full-fledged citizens plays out in a number of sites, including the call of the Hindu Right to enact a Uniform Civil Code to govern the personal affairs of all communities. Currently, each religious community is governed by its own personal laws. The rise of the Hindu Right has produced a fear within religious minority communities that such a Code could be used to impose "Hindu" norms and values on all other communities. Any resistance to such a Code is being cast by the Hindu Right as anti-secular, as well as a way for Muslim men to continue their subordination and discrimination of Muslim women. See Nivedita Menon, *Women and Citizenship*, in *WAGES OF FREEDOM: FIFTY YEARS OF THE INDIAN NATION-STATE* 244 (Partha Chatterjee ed., 1998).

75 Cited in Rodrigues, *supra* note 25, at 225.

76 Biswajyoti Das, *Muslim Settlers Fear Persecution in Assam*, DAILY TIMES, July 30, 2005, available at [http://www.dailytimes.com.pk/default.asp?page=story\\_30-7-2005\\_pg4\\_10](http://www.dailytimes.com.pk/default.asp?page=story_30-7-2005_pg4_10); see also Michael Gillian, *Refugees or Infiltrators? The Bharatiya Janata Party and "Illegal" Migration from Bangladesh*, 26 ASIAN STUD. REV. 73 (2001); Sikata Ramachandran, *Of Boundaries and Border Crossings: Undocumented Bangladeshi "Infiltrators" and the Hegemony of Hindu Nationalism in India*, 1 INTERVENTIONS 235 (1999).

77 *BJP Criticizes Decision to Retain IMDT Act*, HINDU, Oct. 30, 2004, <http://www.hinduonnet.com/thehindu/2004/10/30/stories/2004103015971300.htm>.



that the Supreme Court decision striking down the Act had constituted a "clear and total vindication of the BJs stand."<sup>78</sup> While *Sonawal* was not overtly decided in terms of religion, the illegal migrant is constantly referred to as a threat to the security of the nation, as a subject intent on robbing the wealth of the real (read Hindu) citizens of India and the Indian (read Hindu) nation. The decision is embedded in a distinctly Hindu history, for example, referring to the treatise on government written by Kautilya, the Prime Minister of fourth-century King Chandragupta Maurya, who gave absolute priority to the defense of the nation from threats both without as well as within.<sup>79</sup>

The case demonstrates how Indian citizenship is deeply anchored in assumptions about cultural and religious identity and not confined to formal legal status. The current cultural paroxysms around illegal migrants in India, especially from neighboring countries, and their relationship to citizenship identity must be seen in the wider context of how culture has been central to the constitution of the Indian subject ever since the nineteenth century. This story of the constitution of the Indian subject and its integral relationship to culture remains as germane in the current moment as it was in the nineteenth century. The suturing of culture into the fantasy of the nation continues to set the discursive stage on which the emerging debates on who is and who is not a legitimate citizen subject are being played out. The role and meaning of Hindu culture and how it emerged as integral to the formation of the Indian citizen at the point of independence have remained significant into the twenty-first century.

Identity was pivotal to the emergence of the postcolonial nation, a nation-state that was not born of the spirit of the Enlightenment nor addressed in the dominant narrative of the emergence of the modern nation-state. It was a nation that was conceived of in terms of cultural identity and its distinction from the West. Culture remains an overriding influence in constituting the identity of the Indian sovereign state and sovereign subject. Under the aggressive emergence of Hindu nationalism, central to this project has been the construction of the Indian citizen as a Hindu citizen. The politics of inclusion and exclusion manifested in the colonial encounter and the treatment of the colonial subject remain integral to the constitution of the citizen subject in postcolonial India.

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78 Statement Issued by L.K. Advani, Leader of the Opposition, and Rajnath Singh, Leader of the BJP (Apr. 4, 2006), available at [http://www.bjp.org/Press/april\\_2006/apl\\_0406\\_p.htm](http://www.bjp.org/Press/april_2006/apl_0406_p.htm).

79 *Sarbananda Sonawal v. Union of India*, (2005) 5 S.C.C. 665, para. 51.

A postcolonial reading of citizenship through the analysis of the *Sonawal* case exposes how citizenship more generally, while it bestows formal legal status on the subject, also has a dark side. It incorporates a relationship of domination and subordination that continues to discursively infuse the postcolonial present, albeit in different ways, and provides an analysis and critique that can account for the complex relationships between law and liberal subject that are not adequately explained through older and increasingly dubious narratives. Furthermore, the colonial past continues to discursively inform the postcolonial present, by exemplifying how today's Others continue to be treated on terms consistent with the liberal project and their subjugation or expulsion justified. The case illustrates the terms on which citizenship is established. While formal legal status is important, this can be easily compromised or nullified through cultural affiliation, religious identity, or national origin. Within the contemporary period, the Muslim is particularly vulnerable to being cast outside the comfort zone of citizenship, simply by virtue of his religious identity and the association of Islam in the public domain, both within India and at the broader global level, with "terror," "injustice," and "illiberal" values.

The case illustrates how citizenship, while it sets out the terms for political inclusion, has been and continues to be based on political exclusions in practice, as highlighted in the judicial treatment of the Bangladeshi Muslim migrant within postcolonial India. While the exclusion of Others has occurred outside of the postcolonial context and on historical terms that may have little to do with the colonial encounter, a postcolonial reading of citizenship unmask how the treatment of the world's Others is integral to the liberal project rather than a deviation or erroneous application of the project. Such a reading exemplifies the particular ways in which this treatment played out in the specific historical and political context of the colonial encounter and how the dark side of the liberal project can be reconciled with its emancipatory and liberatory claims. This dark side is integral rather than antagonistic to the project. And this logic continues to operate in the contemporary moment and justifies a host of exclusions and of distinguishing Others.

Religion was a marker of difference during the colonial encounter, an indicator of the primitive past from which the native subject needed to be recuperated and brought to a state of civilizational maturity. Within the colonial context, difference in treatment of the native subject was justified partly on the grounds that her ancient practices and traditions relegated her to the primitive end of the civilizational spectrum. The transition from the primitive into the modern, ahistorical and evolved form is partly articulated through the shedding of religious attributes and the historical

past.<sup>80</sup> A postcolonial reading demonstrates how the neutral and universal claims used to justify such interventions were in fact quite specific, based on a Eurocentric vision of the world that was white, Christian and male. In postcolonial India, the Hindu Right has deployed a similar logic in terms of its response to the Muslim minority community, which is regarded as backward and uncivilized, and has urged that the Muslim community surrender its "special treatment" and assimilate into the Indian (read Hindu) mainstream in order to receive full entitlements to citizenship. Otherwise, it risks being regarded as untrustworthy, and subject to justifiable violence, incarceration and exclusion.

## V. GLOBAL CITIZENS AND THE NEO-LIBERAL PROJECT

Some scholars have attempted to shift the conversation on citizenship to one that is denationalized and articulated in more universal terms. Recent articulations of this position are expressed in terms of "global" or "world" citizenship, which argue that the conferment of rights and benefits on human beings, regardless of their citizenship status, constitutes part of our moral obligation.<sup>81</sup> It is a position that argues in favor of a conception of "global," "world" or "transnational" citizenship. One version asserts that the growing problem of statelessness has not been adequately addressed in traditional theories of citizenship based on the framework of the nation-state.<sup>82</sup> It proposes a model of formal global citizenship, one that flows from the concept of dual or multiple nationalities that exists in tandem with national

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80 WENDY BROWN, *POLITICS OUT OF HISTORY* 6 (2001); KAPUR, *supra* note 56, at 21.

81 See, e.g., Martha C. Nussbaum, *Patriotism and Cosmopolitanism*, in *FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM* 2 (Joshua Cohen ed., 1996) (arguing in favor of a notion of "citizens of the world," challenging the arbitrariness of patriotism and how it can be dangerous, by producing nationalist chauvinism that can lead to an immoral disregard of other people and other cultures); Iris Marion Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 *ETHICS* 250 (1989) (examining the aspirational goal of universal citizenship, which assumes that citizenship is a progressive concept that has included more and more people over the course of time — blacks and women, for example). See also Mike Featherstone, *Cosmopolis: An Introduction*, 19 *THEORY CULTURE & SOC'Y* 1 (2002); Berta Esperanza Hernandez-Truyol & Matthew Hawk, *Traveling the Boundaries of Statelessness: Global Passports and Citizenship*, 52 *CLEV. ST. L. REV.* 97 (2005); Andrew Linklater, *Cosmopolitan Citizen*, 2 *CITIZENSHIP STUD.* 23, 41 (1998).

82 Hernandez-Truyol & Hawk, *supra* note 81.

citizenship, and that is based on the idea of the universality of human rights.<sup>83</sup> Another proposal argues in favor of a "world citizen," based on the metaphor of the expanding concentric circles, the outermost, being humanity as a whole, or the notion of a *polis* extending around the globe.<sup>84</sup>

Yet it is not at all self-evident that appeals to human rights bound to conceptions of a "global" or "world" citizen would inevitably rescue or benefit the migrant or unlawful non-citizen and accord her a recognition that transcends the monopoly power of nation-states to determine who counts and who does not. Several scholars have exposed how international law, coupled with its humanitarian zeal, was structured by the colonial encounter and its distinction between the civilized and uncivilized.<sup>85</sup> The universalist claims of human rights have similarly been unmasked in light of the harms and exclusions that have characterized their liberal antecedents.<sup>86</sup> The search

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83 *Id.*

84 Nussbaum, *supra* note 81; Featherstone, *supra* note 81. For a critique of the global citizenship position, see Brett Bowden, *The Perils of Global Citizenship*, 7 CITIZENSHIP STUD. 349 (2003). Bowden argues that the idea of global citizenship is invariably a call made from within the Western academia and "is inextricably linked to the West's long and torturous history of engaging in overzealous civilising-cum-universalising missions in the non-Western world." *Id.* at 350. At the same time, the idea of global citizenship raises many of the same concerns associated with the problem of statelessness, "an absence of the guarantee of rights and security that are generally taken for granted by citizens of stable sovereign states." *Id.* See also COSMOPOLITANISM (Carol Breckenridge et al. eds., 2002) (challenging the notion of cosmopolitanism as a known entity with a clear genealogy stretching from the Stoics to Immanuel Kant and engaging with the limits and possibilities of a non-coercive and egalitarian cosmopolitan politics).

85 MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW, 1870-1960*, at 98-178 (2002); ANGHIE, *supra* note 15; see also DAVID KENNEDY, *THE DARK SIDE OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (2004); Vasuki Nessiah, *The Ground Beneath Her Feet: "Third World" Feminisms*, in *THE THIRD WORLD AND INTERNATIONAL ORDER: LAW, POLITICS AND GLOBALIZATION* 133 (Anthony Anghie ed., 2003).

86 Some scholars have asserted these moments of exclusion as to be profoundly inconsistent with the very basis of liberalism, what the project actually stands for, and how it has operated, for example, in relation to women and other socially disadvantaged groups. These past manipulations can and have been rectified through a gradual process of inclusion of these previously excluded groups. Independence from colonial rule fought and won through the invocation of civil and political rights is used as another example to substantiate this position. See, e.g., MARTHA NUSSBAUM, *SEX AND SOCIAL JUSTICE* (1999); MARTHA NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME AND THE LAW* (2005); Catharine MacKinnon, *On Torture: A Feminist Perspective on Human Rights*, in *HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE* 21 (Kathleen

for a standard to both explain and justify exclusion of non-European subjects from international law in the nineteenth century was based on the prevailing, and uninterrogated, assumption that European states were civilized. In order to gain entry into the community of international law and family of civilized nations, outside communities had to strive to resemble the European. Yet that standard remained an elusive one.<sup>87</sup> It was a standard that was unattainable, for no matter how hard the native struggled to mimic the European at the cost of her own subjectivity, the non-European remained at most, "almost white, but not quite."<sup>88</sup>

Revisiting the colonial encounter is critical in order to understand the limitations and possibilities of newer projects formulated around conceptions of global or world citizenship. These new universal projects have often denied the reality of those whom they claim to represent and speak for, disclaiming their histories and imposing another's through a hegemonizing move. Human rights have emerged from a liberal tradition that not only incorporates arguments about freedom and equal worth, but also incorporates conceptions of civilization, cultural backwardness, racial and religious superiority.<sup>89</sup> And human rights remain structured by this history. This dark side is intrinsic to human rights, rather than something that can be resuscitated and refashioned in terms such as that of a global or world citizen. Moreover, if citizenship is emerging in any global guise, then that guise would appear to be that of a neo-liberal citizen. Wendy Brown argues that neo-liberalism is becoming the dominant form of governmentality and may emerge as the dominant ideology where privatization schemes and a flourishing market economy become the measure of democracy.<sup>90</sup> This formation is global though constructed through local maneuvers such as "corporatized media, schools and prisons."<sup>91</sup> It is also a formation that is established partly through the

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Mahoney & Paul Mahoney eds., 1993); Rebecca Cook, *Women's International Human Rights Law: The Way Forward*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 3 (Rebecca Cook ed., 1994).

87 KOSKENNIEMI, *supra* note 85, at 135.

88 HOMI BHABHA, THE LOCATION OF CULTURE 15 (1994).

89 KAPUR, *supra* note 56.

90 WENDY BROWN, EDGEWORK: CRITICAL ESSAYS ON KNOWLEDGE AND POLITICS 37-50 (2005) (discussing Foucault's work on governmentality); *see also* Thomas Lemke, *The Birth of Bio-Politics — Michel Foucault's Lecture at the Collège de France on Neo-Liberal Governmentality*, 30 ECON. & SOC'Y 190 (2001); Thomas Lemke, *Foucault, Governmentality and Critique*, 14 RETHINKING MARXISM 49 (2002) [hereinafter Lemke, *Foucault*].

91 Lemke, *Foucault*, *supra* note 90, at 56.

production of a neo-liberal citizenry, where individuals are entrepreneurial actors across all dimensions of their lives.

The neo-liberal citizen is generally defined as someone who has earned her rights and for whom duties necessarily precede rights. This stands in contrast to classic liberal notions of citizenship that have focused on rights, and on the idea that every individual enjoys rights regardless of the duties performed or not performed on her part. This tradition places an obligation on the state to ensure the protection of the rights of the citizen, including social and economic rights. But the welfare regimes ostensibly set up to promote the basic social security of citizens have faced continuous erosion in the context of neo-liberalism, which discourages the dependency of the individual on the state. This has led to an emphasis on duties, the performance of which is a condition for rights. The role of the state has thus shifted to one of ensuring the freedom necessary for self-reliance and intervening only vis-à-vis those who are incapable of meeting their citizenship obligations through the market.<sup>92</sup> In countries such as the United States and the United Kingdom, such citizens are still required to earn their right to state support by participating in workfare programs.

More recently, there is evidence that citizenship in India is being increasingly shaped by the global economic enterprise, where the primary attributes of the citizen are as a consumer or entrepreneur. The emergence of the neo-liberal citizen in India is both similar to as well as distinct from its western counterpart. In the context of postcolonial India the rise of the neo-liberal citizen has taken a unique form in relation to migrants, or what are more popularly described as Non-resident Indians. The Indian government has enabled overseas Indians to acquire dual nationality.<sup>93</sup> This new move is primarily intended to tap into the wealth of the non-resident Indian and provide an incentive to invest in one of the world's most rapidly growing economies.<sup>94</sup> Formal legal status is not relevant here. While the

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92 Naila Kabeer, *Introduction: The Search for Inclusive Citizenship — Meanings and Expression in an Interconnected World*, in *INCLUSIVE CITIZENSHIP: MEANINGS AND EXPRESSIONS* 1, 17 (Naila Kabeer ed., 2005).

93 This is made explicit in section 7A of the Citizenship (Amendment) Act of 2005, which provides for non-resident overseas Indians to become citizens of India. The Citizenship (Amendment) Act, 2005, No. 32, Acts of Parliament, 2005.

94 See HIGH LEVEL COMMITTEE ON THE INDIAN DIASPORA, MINISTRY OF EXTERNAL AFFAIRS, REPORT OF HIGH LEVEL COMMITTEE ON THE INDIAN DIASPORA 510 (2002): "The Committee is of the opinion that the grant of dual nationality will remove for those who have taken foreign passports the obstacles to travel to and from India, promote investments in business ventures and foster a greater space of belonging." The Report further states that dual nationality will "facilitate the contribution of the

overseas Indian citizen does not have the right to vote, what is of importance is the forging of umbilical ties between this non-resident and the motherland through the mode of financial and economic investment. The overseas Indian represents and is invited to more intimately participate in India's arrival as a significant market-player and promoter of neo-liberal market ideology. And this appeal to the non-resident Indian is also cast in cultural and religious terms:

They live in different countries, speak different languages and are engaged in different pursuits. What gives them their common identity is their Indian origin, their cultural heritage, their deep attachment to India.<sup>95</sup>

This deterritorializing move is consistent with the cultural conception of Indian citizenship. Proof of Indian lineage, that is, evidence that parents or grandparents were born in India, is still an absolute requirement. The new scheme specifically excludes any person who was ever a citizen of Pakistan or Bangladesh from acquiring Indian citizenship, thus retaining the notion of Indian-ness/Hindu-ness that was made explicit in the *Sonawal* case.<sup>96</sup> The new amendments also specifically exclude "illegal migrants" from rights to citizenship, providing that citizenship by birth can accrue to persons born in India only where "both of his parents are citizens of India; or one of his parents is a citizen of India and the other is not an illegal migrant at the time of his birth."<sup>97</sup> This new classification explicitly incorporates the fear articulated in both the *Sonawal* and the bar dancers' cases, and reinforced in the claims of the Hindu Right, that the Bangladeshi Muslim migrant is not only a threat to the security of the nation, but is equally threatening to the purity and identity of the Indian (read Hindu) nation. While Indian-ness derives its origins from the colonial encounter and resistance to colonial rule, it remains germane in the contemporary environment in the context of neo-liberalism and market ideology.

Non-resident Indians represent the new neo-liberal citizens who are accorded rights by the "motherland" because of their status as high-income earners, primarily in the affluent West. They constitute the diaspora of

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Diaspora to India's social, economic, and technological transformation and national development." *Id.*

95 *Id.* at 2. The Report is replete with statements of fealty and love for the motherland, for example, "Their love for India and their pride in their Indian heritage propels their consistent demand for dual nationality." *Id.* at 510.

96 *Id.*

97 Citizenship (Amendment) Act, 2003, § 3C, No. 6, Acts of Parliament, 2003.

the country, who are usually businessmen, capital oriented, and who are defined in terms of their market success. They have also simultaneously performed their duties as the "sons" and "daughters" of the motherland, and have demonstrated their loyalty and reliability. The normative criteria of "family," loyalty and devotion are constantly invoked in order to tie these disparate elements and entities to the motherland. These attributes have earned them the right to claim citizenship from the homeland, though this claim also comes with expectations of increased investment in the homeland and corporate success.

The neo-liberal citizen in India stands in contrast to those who, while formally recognized as citizens, do not have access to the full spectrum of rights to which citizens are entitled. While it is unlikely that neo-liberal citizens will displace this rights seeking subject, what remains evident is that their route to the full enjoyment of citizenship is normatively determined. As made explicit in the discussion of the Indian cases, their rights are contingent on dominant sexual, cultural and familial norms. In the cases discussed, their roles as market actors, as laborers or sex workers, come into collision with the normative criteria. While the market demand for cheap exploitable labor or sex workers in part produces the movement of people, the trespassing of normative boundaries renders their subjectivity and claims to citizenship less stable.

## **VI. WHY CITIZENSHIP?**

The brief analysis of citizenship within postcolonial India proposes a response to the central question "Why citizenship?" The critique is not intended to do away with citizenship. Rather, it is intended to view citizenship from a different historical trajectory. While a Eurocentric narrative of citizenship aligns itself with the emergence of the nation-state, in the postcolonial imagination, citizenship emerges from the colonial encounter, where gender, culture, race, and civilizational maturity determined who was entitled to benefits and recognition and who was not. While formal legal status was never conferred on the native subject, access to benefits and rights was contingent on this subject's ability to conform to or mimic the colonial power. In the contemporary moment, this criterion continues to inform the way in which citizenship is played out in the legal arena. Even when formal legal status is conferred, citizenship remains poised along the axis of inclusion and exclusion. Given its starting point as always and already exclusive, what are the terms on which citizenship can continue to have any relevance today?



The critique offered in this Article illuminates how the migrant subject has injected herself into these debates and exposes the more complex and contradictory narrative of citizenship. The analysis is not intended to reject or render defunct the entire project of citizenship, but rather to offer a reading of citizenship that serves, in the words of Wendy Brown, as "an act of reclamation" that takes over "the object for a different project than that to which it is currently tethered."<sup>98</sup>

So what is this project? Citizenship has an appeal not because of its strong identification by citizens within the nation-states in which they are living. Citizenship provides very conditionally an "in" to the migrant subject who recognizes her exclusion, her "Otherness," and the fact that her disadvantage can only be offset by seeking some benefits, as was seen in the bar dancers' case. Citizenship becomes a strategy in her hands to use when it serves a purpose or to change and cast off when it does not. In this sense, citizenship is a very useful tool for survival as well as for gaining access to advantages or benefits. Without it, the Other is condemned to remain the Other, as illustrated by the *Sonawal* case. But it is also expendable. The historical narrative presented and the discussion of cases reflects how this tool is not an enduringly positive one. It can cease to be of service and turn on its bearer. And the migrant subject is the one who is most acutely aware of these side-effects and the functionality and limitedness of citizenship.

Yet this operational strategy, which is a conscious strategy, is not divorced from the normative consequences of invoking and using citizenship. It is a strategy that appeals to dominant assumptions about race, religion, gender, culture, and civilizational evolution. By participating in the playground of citizenship, the migrant subject is not insulated from the normative content of this concept and from how her sexual and cultural conduct and religious identity can all serve to exclude her from being regarded as the "real thing." And this normative content of citizenship is being increasingly strengthened against more rigid, frozen conceptions of the Other, while the Other continues to contest or challenge these conceptions in the hope of constantly grounding citizenship within the globalized space and time in which we live. The challenge posed by the migrant subject cannot be captured by propositions in favor of a so-called world citizen or transnational citizenship. Such proposals fall into the familiar trap of appealing to the universal as a way out. Yet this appeal fails to recall how the universal has also historically been a deeply problematic and, at times, exclusive notion.

Returning to postcolonial India, while the recently adopted amendments

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98 BROWN, *supra* note 90, at 16.

to citizenship law continue to stress the notion of Indian-ness, they are also involved in the production of a neo-liberal citizenry. There is a direct appeal to the migrant subject, specifically to affluent non-resident Indians, to come home to "Mother India." It is not an appeal to physically return, but rather an invitation to participate in the emergence of the motherland as a global economic giant, through direct private and foreign investment in the economy. The result is the accumulation of almost 21.7 billion dollars in remittances in 2005 alone.<sup>99</sup> This preliminary discussion suggests that any notion of the global or world citizen may be more accurately represented in the rise of the neo-liberal citizen. And this story of citizenship will, indeed, have its own postcolonial narrative as it evolves and unfolds.

The starting point of developing an empowering politics on citizenship has to commence from an analytical position. This involves turning a critical postcolonial gaze onto the project of citizenship, one that is detached from the confines of the modern-nation-state, while, at the same time, not reinscribed in new universal projects, which are also being exposed as built along a similar axis of exclusion and inclusion. And it is the migrant subject who continues to unmask the complex ways in which citizenship operates to include as well as exclude. The journeys of the migrant subject continue to bring to the surface new narratives of citizenship and the emerging political formations that accompany them.

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99 THE INT'L BANK FOR RECONSTRUCTION AND DEV., THE WORLD BANK, *GLOBAL ECONOMIC PROSPECTS: ECONOMIC IMPLICATIONS OF REMITTANCES AND MIGRATION* (2006), available at [http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2005/11/14/000112742\\_20051114174928/additional/841401968\\_200510327112047.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2005/11/14/000112742_20051114174928/additional/841401968_200510327112047.pdf); see also *India Gets US\$ 21.7 Billion from NRIs in 2005*, *ECON. TIMES*, Nov. 18, 2005, [http://ibef.org/artdisplay.aspx?cat\\_id=60&art\\_id=8417&refer=i1121](http://ibef.org/artdisplay.aspx?cat_id=60&art_id=8417&refer=i1121).

