

Level Playing Fields: The Post-Colonial State, Democracy, Courts and Citizenship in India

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A. The Puzzle: Citizens and the State in the Time of Globalization

This article analyses the legal, political and moral basis of citizenship in the contemporary world. India is analyzed here as a case in point of a general category of 'changing societies' emerging from colonial or communist rule. Citizenship, which used to be considered a part of the general problem of nation-building, has increasingly acquired the character of a salient problem in its own right. This change in perspective has come about as a consequence of globalization and the world-wide diffusion of basic norms of human rights. In the contemporary context, with regard to the problems of endangered minorities whose lives, dignity and welfare are at risk – be it in Kashmir or Kosovo – the world at large considers itself morally bound to intervene, if not militarily, then at least in terms of the invocation of law and good conduct. As such, from the point of view of the post-colonial state, both its national sovereignty and legitimacy are contingent on its success with turning its whole population into citizens. This, the article argues, is contingent on the ability of the post-colonial state to gear its laws, courts and administration towards effective management of identity and the constitutional incorporation of core social values (see Figure 2 below). With regard to 'making citizens out of subjects', the Indian 'experiment' holds important lessons for other states, ensconced in multi-cultural societies.

B. The Context of Research

The problem of citizenship in post-colonial states refers to two different issues. First, as free-standing actors in international law, these 'new states' share the imperative of national security, identity and welfare on equal terms with stable, post-industrial states, though their material and political conditions are vastly

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different. Secondly, in contrast with stable, industrial democracies of the West, these new states need to transform *subjects and immigrants* – marginal social groups – into *citizens* entitled to enjoy all of the political and social rights. The difference arises from the fact that unlike in the western nation states, in the case of non-western countries, the state, rather than following the successful formation of the nation, preceded it. As one notices from contemporary examples such as Iraq, international organizations and western military alliances, acting in the name of peaceful intervention, have increasingly cut into the national sovereignty of these states. Changing societies, whose sovereignty and political stability are generally less established than older, (mostly) Western states, are particularly vulnerable to such threats of peaceful intervention. Making subjects into citizens by attending to their security, welfare and identity – endogenous variables over which the national state can exercise its control – is, therefore, an issue of great importance for these societies.

Citizenship, as a concept of political analysis, has seen a remarkable renaissance in the 1990s.¹ This reawakened interest in citizenship is partly related to the end of the Cold War and the re-emergence of nationalism in the successor states issuing out of Soviet rule. Separatist movements advance claims to independence or self-government. Another factor that has contributed to the revived interest in citizenship, as mentioned above, is the increase in trans-national migration, leading to the creation of minority communities in the host societies. Nation-states have to work out how to deal with claims of separatist and immigrant minorities - which to accept and which to reject. Social scientists have tried to determine whether claims of minorities can be addressed in the framework of citizenship, challenging the idea of territorial citizenship in the process.² But citizenship has been challenged in other ways too. Some argue that it has been 'devalued' and is in decline, postulating the advent of human rights codes and post-national membership in its place.³ Others advance a slightly different argument, contending that trans-national realities where migrants maintain ties to multiple societies transform the nation-state, and with it, the very basis of national citizenship.⁴

¹ Nearly half of all literature on the subject has been written in that decade, see E.F. Isin & B.S. Turner, *Citizenship Studies: An Introduction*, in HANDBOOK OF CITIZENSHIP 1, 9 (B.S. Turner & E.F. Isin eds., 2002); citizenship studies now *de facto* constitute a field of social science.

² See I.M. Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 ETHICS 250 (1989); W. KYMLIKA, *MULTICULTURAL CITIZENSHIP* (1995); G. MAHAJAN, *THE MULTICULTURAL PATH: ISSUES OF DIVERSITY AND DISCRIMINATION IN DEMOCRACY* (2002).

³ See T. SOYSAL, *LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE* (1994); D. JACOBSON, *RIGHTS ACROSS BORDER: IMMIGRATION AND THE DECLINE OF CITIZENSHIP* (1996).

⁴ See N. Glick Schiller, L. Bash and C. Szanton Blanc, *From Immigrant to Transmigrant: Theorizing Transnational Migration*, in *TRANSNATIONAL MIGRATION* 121 (Ludgar Pries ed., 1997); A. ONG, *FLEXIBLE*

India, as the largest liberal democracy in the world, shares some characteristics crucial to citizenship with the liberal democracies of the West. This sets it apart from most post-colonial states. Furthermore, India is extremely diverse, where different categories of minorities often coexist in a conflict-ridden relationship. These minorities include religious communities, castes, and indigenous communities known as 'tribals.' The first aspect of India as a case study is a new innovation in citizenship laws – namely, the introduction of 'Overseas Citizenship of India' in 2003. This form of membership is clearly different from traditional citizenship, but it cannot be easily categorized as another common form of membership. This makes citizenship in India a 'layered' concept, in the sense that within the same territory, different categories of citizenship, with different levels of rights and entitlements, co-exist. The second interesting aspect of the Indian case is that the notion of citizenship has gradually shifted from a liberal, secular and inclusive basis to a more exclusive, ethnic conception of citizenship that is defined in terms of descent rather than territory. The third aspect concerns India's status as a multi-cultural state. India's Constitution recognizes both individual and group rights. An assortment of public institutions like the judiciary and the national commission for minorities and the competitive political process provide the institutional arrangement necessary to produce a level playing field for competing claims to citizenship.

As a site of research, India offers, simultaneously, both the challenges of industrial and globally connected states as well as poor states, ensconced in transitional societies. As an emerging power, India, since the liberalization of the economy in 1991, has been pursuing the interests of Indians resident in foreign countries, through world organizations like the WTO, or the mechanisms of the United Nations. At the same time, internationally visible issues of human rights violations in Kashmir, communal violence against minorities, and the welfare of women, former untouchables or forest dwellers (Tribals), have had an impact on Indian legislation with regard to the rights of citizens. The sections that follow will analyze India's responses in terms of the consequent institutional arrangement, legislation, and social, economic and political reform.

C. Nationality vs. Citizenship

Jawaharlal Nehru, in the famous oration "Freedom at Midnight," announced the birth of India as the soul of a 'nation, long suppressed' finding 'utterance' in the

CITIZENSHIP: THE CULTURAL LOGICS OF TRANSNATIONALITY (1999); A. Appadurai, *Grassroots Globalization and the Research Imagination*, 12 PUBLIC CULTURE 1 (2000); U. Hannerz, *Transnational Research*, in HANDBOOK OF METHODS IN ANTHROPOLOGY, (H. Russell Bernard ed., 1998)

institutional arrangements of the post-colonial state.⁵ While his intention to find a rightful place for India in the comity of nations was both explicit and firm, a similar clarity was not to be found in his understanding of the actual stakeholders of this new nation. The legal vision of the architects of the new republic saw citizenship in terms of territoriality, a definition that went back to the Treaty of Westphalia (1648). The hiatus between the moral definition of Indians in terms of community, and the legal definition in terms of territory was first challenged in the language of riots of the 1950s that led to the redrawing of India's internal boundaries. A subsequent revision of the definition came with the demand of Indians living abroad for succession to property in India, leading, eventually, to the Persons of Indian Origin Card (PIO), which explicitly recognizes the rights of citizenship, not as binary, but as incrementally gradual. The ultimate prize of double nationality is in the offing, bringing the discourse full circle, away from the exclusive reliance on territory.

The experience of transitional societies with regard to the relationship of nationality and citizenship differs sharply from that of industrial societies. In the latter, the nation, speaking in the name of the collective body of citizens, appeared before the state, whereas in the former, the states, issuing out of colonial or communist rule, had to create nations, with citizens as stakeholder. The article suggests that turning subjects into citizens is possible only if the institutional arrangement that governs the concept is *co-authored* by the state and society, standing, respectively, in the case of post-colonial states, for imported norms of equality and embedded values. Globalization, which has seen an Indian 'Diaspora' of twenty million people, has provided additional incentives for developing the legislative basis of a 'layered citizenship'.

Permeable – or at least semi-permeable – borders are “undermining the traditional territorial basis of democracy and creating new political spaces which need democratizing.”⁶ While nationality or “national communities” used to provide the framework of democratic decision making in the past, the new ‘global forces’ remain beyond democratic control and undermine the territorial organization of state and community. This also affects the nexus between democracy and citizenship. Liberal models of democratic sovereignty, largely confined and “over-identified” with the territory of nation-state,⁷ are not only eroded by the theoretical challenges and the practical problems arising from minority rights and

⁵ See SUBRATA K. MITRA & V B SINGH, *DEMOCRACY AND SOCIAL CHANGE* (1999).

⁶ JAMES ANDERSON, *TRANSNATIONAL DEMOCRACY: POLITICAL SPACES AND BORDER CROSSINGS* (Routledge 2002).

⁷ *Id.* at 6.

“multicultural citizenship,”⁸ but also have to come to terms with a trans-national arena of world politics and more localized cross-border contexts.⁹

These new political “spaces” have led to changes in the concept of citizenship. “Border-crossing trans-nationalism could be an escape from the confining rigidity of national frameworks and state territoriality: it might provide new opportunities for more participatory forms of democracy and augment the limited democracy traditionally on offer.”¹⁰ There are indeed widely differing opinions about how national territorial citizenship is changing – or how it should change – and what should be done within and beyond states. There are disagreements about the feasibility of defending and strengthening nationality. As new institutional arrangements govern political processes, the nation is being supplemented or even displaced by other territorial frameworks such as the European Union, or by non-governmental organizations (NGOs) and trans-national social movements – or indeed, Diasporas. The active exercise of citizenship is no longer linked to some common ‘identity’ and ‘community;’ citizenship has become a moving target that shifts back and forth between territorially defined national communities within state borders and non-territorial (often trans-national) communities defined in ethnic and functional terms.¹¹

Nationality and citizenship may depend on each other but they are not necessarily congruent.¹² Within the bounds of comparative constitutional theory, nationality conveys either a status or legal relationship that establishes a state’s jurisdiction over an individual. The effects are double edged, cutting into to international and in constitutional law. “In terms of international law, nationality forms a basis of a state’s jurisdiction and a crucial requirement for the exercise of diplomatic protection in relation to other states. Essentially, states are free to establish the requirements governing acquisition of nationality. However, a merely formal attribution of nationality is not sufficient to create a legal relationship which third states are bound to recognize.” The International Court of Justice, in its famous *Nottebohm* judgment concerning the exercise of diplomatic protection on behalf of a naturalized citizen, held that “the legal bond of nationality had to correspond to social reality. Nationality had to be supported by a genuine, existential and

⁸ See KYMLIKA, *supra* note 2.

⁹ ANDERSON, *supra* note 6, at 6.

¹⁰ *Id.*

¹¹ *Id.* at 7.

¹² STEFAN KADELBACH, UNION CITIZENSHIP (2003).

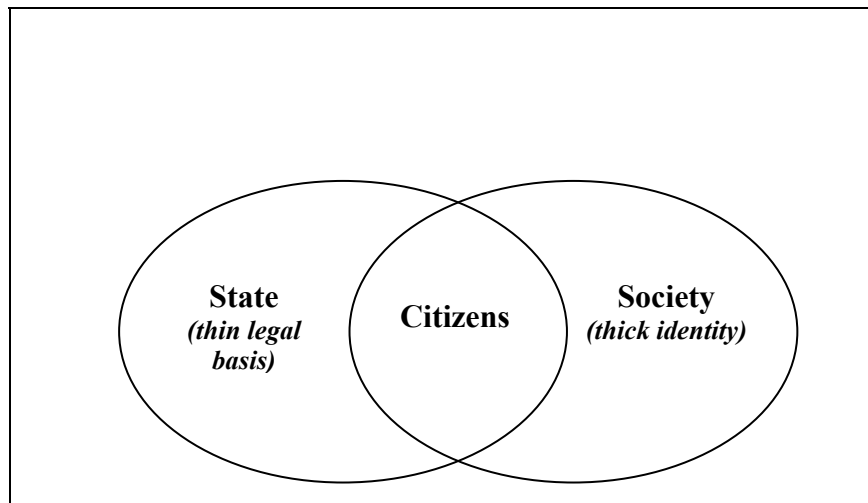
emotionally rooted commitment to the state; otherwise, it would be ineffective and not give rise to any obligations vis-à-vis the claimant state. This restriction is primarily significant for individuals who possess more than one nationality. It accords with the conflict of laws and statutes of many states to choose the effective nationality as a reference point in such cases. Under international law, nationality therefore serves to resolve collisions of jurisdiction.”¹³

D. Turning Subjects into Citizens: A Neo-Institutional Model and a Tool Kit

Just as the legal right to citizenship is accorded by the state, identity, and following from it, the moral right to belong, is what people give to their claims to citizenship. When both converge in the same group, the result is a sense of legitimate citizenship where the individual feels both legally entitled and morally engaged. If not, the consequences are either legal citizenship devoid of a sense of identification with the soil, or a primordial identification with the land but no legal sanction of this. These situations can lead to violent disorder, inter-community riot and civil war. In a post-colonial context, citizens are a liminal category, a hinge groups that connect the state and society (see Figure 1 below). Orderly, legitimate citizenship is possible only if the concept is co-authored by the modern state and the traditional society. India, the article asserts, has achieved something along these lines through her form of ‘layered citizenship.’ The Indian strategy has consisted of making rebels into stakeholders. The Constitution, innovating institutions and citizenship, has acted as a backdrop to a set of institutions, political processes and policies.

¹³ *Id.* at 11.

Figure 1
The Modern 'Post-colonial' State, Traditional Society and Citizenship:
Overlapping Legal and Moral Categories



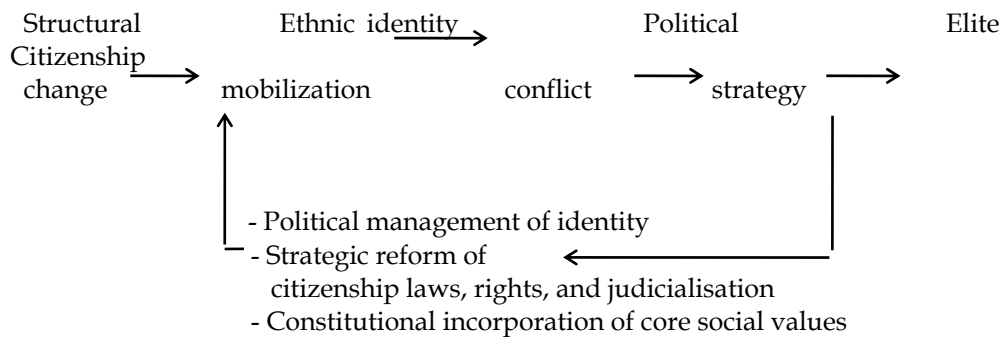
The Indian record of successfully turning subjects into citizens has cross-national significance because, rather than being a unique attribute of Indian culture, it is based on an institutional arrangement containing several important parameters. First of these are the legal sources of citizenship as formulated in the Indian Constitution (articles 5-11), the Constituent Assembly Debates (which provide insights into the controversy surrounding specific articles), and legislation undertaken by the national parliament to enable and amend, depending on the case, the original provisions of the constitution. 'Judicialisation' of citizenship is yet another method of synchronizing the provisions of the law and the new demands emerging from society.¹⁴ The assertion of identity and linkage to India has emerged as a supplementary basis of Indian citizenship, in addition to birth and residence. Property and citizenship have constantly been interwoven: who can own property and how much have had fluid answers. In the case of Kashmir, the laws have

¹⁴ *Izhar Ahmad Khan v. Union of India (UOI)*, AIR 1962, SC 1052. The case dealt in detail with the following questions: the rights to and of citizenship; the issues of partition related citizenship; the value of a passport in determining citizenship; and the question of domicile versus citizenship. The issue in this case was the constitutional validity of Section 9(2) of the Citizenship Act, 1955, which dealt with the termination of citizenship. This case exemplified the policies which discouraged multiple or even dual citizenships, and held that upon acquiring in any manner the citizenship of another country, an Indian citizen automatically loses Indian citizenship.

always had a slightly different tinge due to the special agreement that the Indian Acts would not be normally applicable in Kashmir.¹⁵ In the last decade, case law has tended towards a more flexible and all encompassing understanding of Indian stipulations with relation to property and, of course, the onset of economic liberalization has given wings to even further judicial liberalization of these concepts. Similarly, recent laws allowing NRIs (Non-Resident Indians) to own property have already been registered in case law.

Drawing on my previous work on governance¹⁶, I assert that India's relative success on the issue of citizenship can be attributed to the fact that these tools of citizen-making are used with unusual vigor and imagination by the political decision-makers in India. The typical strategy makes a three prong attack on conflict issuing out of the hiatus between general legal norms of the state and the assertion of political identity contesting the state. India makes stakeholders out of rebels by adroitly combining reform, repression and selective recruitment of rebels into the privileged circle of new elites (see Figure 2 below).

Figure 2
Culture, Context and Strategy in Turning Subjects into Citizens: A Dynamic Neo-Institutional Model



¹⁵ See *Bachan Lal Kalgotra v. State of Jammu and Kashmir*, AIR 1987, SC 1169.

¹⁶ See SUBRATA K. MITRA, *THE PUZZLE OF INDIA'S GOVERNANCE: CULTURE, CONTEXT AND COMPARATIVE THEORY* (2005).

E. Some Empirical Attributes of the Indian Model

Why has India been more successful than many post-colonial states in turning subjects into citizens? The explanatory model specified in Figure 2 is sustained on the basis of five empirical arguments that draw on (a) India's institutional arrangement (the constitution), (b) laws linked to India's social visions, (c) the double role of the state – as neutral enforcer, and as a partisan, supporting vulnerable social groups – in producing a level playing field, (d) the incorporation of elements of bargaining theory into Indian law and political practice, and, finally, (e) judicialisation – evidence of the courts at work in turning subjects into citizens.

I. The Constitution

The Indian Constitution (like most constitutions) avoids the terminology of nation and nationality. Citizenship, on the other hand, is the constitutional key word for dividing the world between 'us and them.'¹⁷ Citizenship thus is a form of adherence to a body politic that identifies a person as a full member thereof. In India too, "*citoyens*," – those creatures of the enlightenment – are united by freedom, equality and brotherliness. The Preamble to the Constitution of India announces this intention with boldness and clarity.

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:
JUSTICE, social, economic and political;
LIBERTY of thought, expression, belief, faith and worship;
EQUALITY of status and of opportunity;
and to promote among them all
FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;
*IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.*¹⁸

¹⁷ "The question of citizenship became particularly important at the time of the making of our Constitution because the Constitution sought to confer certain rights and privilege upon those who were entitled to Indian citizenship while they were to be denied to 'aliens'. The latter were even placed under certain disabilities." DURGA DAS BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA 74 (2001).

¹⁸ CONSTITUTION OF INDIA, pmbli., available at [www.lawmin.nic.in/legislative/Art1-242%20\(1-88\).doc](http://www.lawmin.nic.in/legislative/Art1-242%20(1-88).doc).

Expressed in terms of rights, the Constitution includes citizens' rights which aim to protect the individual against arbitrary interference by state authority. However, almost all of these rights are not limited to the states' own nationals. What is constitutive for an Indian citizen's status are positive rights (especially social rights) and political rights (primarily the right to vote and to stand for election). In historical comparison and in political theory they constitute the criterion of exclusion which distinguishes the fully effective status of a citizen from other forms of membership, especially from that of mere subjects.¹⁹

The status of a citizen also incorporates social rights (e.g., the directive principles jurisprudence and now the entire jurisprudence that evolved with the judicial activism of the Indian Supreme Court judges).²⁰ In this context, social class also plays an important role in the citizenship debates. The view that citizenship can be understood as a status that gives one the rights to a certain bundle of entitlements, benefits and obligations, derives from T. H. Marshall (1950). Marshall's catalogue of civil, political, and social rights is based on the cumulative logic of struggles for expanding democracy in the nineteenth and early-twentieth centuries. Civil rights arise with the birth of the absolutist state, and in their earliest and most basic form they entail the rights to the protection of life, liberty, and property; the right to freedom of conscience; and certain associational rights, like those of contract and marriage. Political rights in the narrow sense refer to the rights of self-determination, to hold and run for office, to enjoy freedom of speech and opinion, and to establish political and non-political associations, including a free press and free institutions of science and culture. Social rights are last in Marshall's catalogue, because they have been achieved historically through the struggles of workers', women's, and other social movements of the last two centuries. Social rights involve the right to form trade unions as well as other professional and trade associations; health care rights; unemployment compensation; old age pensions; and child care, housing, and educational subsidies. These social rights vary widely across countries and depend on the social class composition prevalent in any given welfare state democracy.²¹

¹⁹ See KADELBACH, *supra* note 12, at 12.

²⁰ See T.H. MARSHALL & T. BOTTOMORE, *CITIZENSHIP AND SOCIAL CLASS* (1992); and R. Dahrendorf, *The Changing Quality of Citizenship*, in *THE CONDITION OF CITIZENSHIP* (B. van Steenberg ed., 1994).

²¹ SEYLA BENHABIB, *POLITICAL THEORY AND POLITICAL MEMBERSHIP IN A CHANGING WORLD* 410-11 (2002).

II. Legal Sources of Citizenship and the Constituent Assembly Debates

Citizenship may have had its origin in political struggles and political philosophy, but as the constitution treats it, it is essentially a legal concept. The Indian Constitution employs it in Part II (Articles 5-11, reproduced below). While drafting this section, the Constituent Assembly sought to figure out who would, as of 1950, have a right to Indian nationality and citizenship. The absence of racial distinctiveness as a necessary condition for citizenship was explained by a crucial exchange in the Constituent Assembly Debates (CAD).²² Citizenship proved to be amongst the most disputed issues, debated for almost two years and with more than 120 amendments moved during the sittings of the Constituent Assembly. This trend carried on both in further policy initiatives and in their interpretation.

The attempts in the CAD were restricted to ensuring that the Articles dealt with the situation as it existed at that particular time. All other rules were left to the realm of Parliament to decide. The attempt in these Articles was mainly to clean up the concept of who could be Indian. All acknowledged it as a privilege and the attempt was being made to delineate with a clear conscience those who had opted out of the newly formed Indian territory. Thus, although the international community was present in the minds of the drafters, the main preoccupation was the result of Partition and how it translated into the identity of an Indian. The attempt was more to figure out how to de-link the cultural concept of nationality with the political right.

²² "I thought that an Indian is a very easily recognizable person. When combined with domicile, it is easier to define it. But if the Professor thinks that an Indian cannot be recognized and that it is necessary to lay down who is an Indian, what is his colour and complexion and so on, I would leave it to him to suggest a suitable definition. I think the existing definition is capable of being understood without any difficulty. I do not think that a definition is necessary for every expression used. If you examine the Constitutions of other countries, the Constitution of Poland for instance, you will find that all that they provided is that any person who is born of Polish parents is a citizen of Poland. They know who is a Pole, just as we know who is an Indian. I do not think therefore that any definition is necessary in this connection." Yet, P.S. Deshmukh's optimism for an "easy" solution was misplaced. While the results look fairly effortless and straightforward, drafting the citizenship articles was one of the most contentious issues of the Constituent Assembly, with almost 120 amendments moved. "[T]his article on the question of citizenship has been the most ill-fated article in the whole Constitution. This is the third time we are debating it. The first time it was you, Sir, who held the view which was upheld by the House that the definition was very unsatisfactory. It was then referred to a group of lawyers and I am sorry to say that they produced a definition by which all those, persons who are in existence at the present time could not be included as Citizens of India. That had therefore to go back again and we have now a fresh definition which I may say at the very outset, is as unsatisfactory as the one which the House rejected [...]" (Dr. P. S. Deshmukh, Constituent Assembly Debates).

At the outset, article 5 clearly reflects Dr. Ambedkars' and other members' reiteration by setting out the purpose of the Articles and the desire to curtail it to the question of citizenship at the commencement on the Constitution.

Article 5. Citizenship at the commencement of the Constitution. -At the commencement of this Constitution, every person who has his domicile in the territory of India and-

- (a) who was born in the territory of India; or
- (b) either of whose parents was born in the territory of India; or
- (c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement, shall be a citizen of India.²³

The logical sequence is maintained by Article 6, the second Article dealing with citizenship, which deals with migrants from territory of the undivided India, now Pakistan.

Article 6. Rights of citizenship of certain persons who have migrated to India from Pakistan. - Notwithstanding anything in article 5, a person who has migrated to the territory of India from the territory now included in Pakistan shall be deemed to be a citizen of India at the commencement of this Constitution if-

- (a) he or either of his parents or any of his grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted); and
- (b)(i) in the case where such person has so migrated before the nineteenth day of July, 1948, he has been ordinarily resident in the territory of India since the date of his migration, or
- (ii) in the case where such person has so migrated on or after the nineteenth day of July, 1948, he has been registered as a citizen of India by an officer appointed in that behalf by the Government of the

²³ CONSTITUTION OF INDIA, art. 5.

Dominion of India on an application made by him therefore to such officer before the commencement of this Constitution in the form and manner prescribed by that Government; Provided that no person shall be so registered unless he has been resident in the territory of India for at least six months immediately preceding the date of his application.²⁴

The problem of re-migration was tackled in Article 7, which, while stating that no person who migrated to Pakistan was a citizen of India, nevertheless made provision to include those who had re-migrated to India from these territories. These people were required to have a permit of resettlement or permanent return issued by the proper authorities.

Article 7. Rights of citizenship of certain migrants to Pakistan.-Notwithstanding anything in articles 5 and 6, a person who has after the first day of March, 1947, migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India; Provided that nothing in this article shall apply to a person who, after having so migrated to the territory now included in Pakistan, has returned to the territory of India under a permit for resettlement or permanent return issued by or under the authority of any law and every such person shall for the purposes of clause (b) of article 6 be deemed to have migrated to the territory of India after the nineteenth day of July, 1948.²⁵

It is interesting to note that the root of the idea of PIO (Persons of Indian Origin) can be glimpsed in Article 8, which deals with people residing outside India at the time of independence. It gives them the right to apply for citizenship based on origin – again, subject to the provision that the person has registered with a consulate of India in the country of residence.

²⁴ *Id.*, art. 6.

²⁵ *Id.* at art. 7.

Article 8. Rights of citizenship of certain persons of Indian origin residing outside India.- Notwithstanding anything in article 5, any person who or either of whose parents or any of whose grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted), and who is ordinarily residing in any country outside India as so defined shall be deemed to be a citizen of India if he has been registered as a citizen of India by the diplomatic or consular representative of India in the country where he is for the time being residing on an application made by him therefor to such diplomatic or consular representative, whether before or after the commencement of this Constitution, in the form and manner prescribed by the Government of the Dominion of India or the Government of India.²⁶

The necessity to demarcate between the citizens of the newly partitioned territories is captured in Article 9, which states that those who have voluntarily acquired citizenship of any foreign State lose Indian citizenship claims.

Article 9. Persons voluntarily acquiring citizenship of a foreign State not to be citizens.- No person shall be a citizen of India by virtue of article 5, or be deemed to be a citizen of India by virtue of article 6 or article 8, if he has voluntarily acquired the citizenship of any foreign State.²⁷

Article 10 makes every effort to include everyone the CAD have not expressly disallowed to be or remain citizens of this country. Questions raised in recent years of stateless citizens in India would probably have to find recourse as best as they can in this Article, since refugees with no proof of identity and expressly disowned by neighboring countries often find themselves in the unenviable position of being stateless.

²⁶ *Id.* at art. 8.

²⁷ *Id.* at art. 9.

Article 10. Every person who is or is deemed to be a citizen of India under any of the foregoing provisions of this Part shall, subject to the provisions of any law that may be made by Parliament, continue to be such citizen.²⁸

Article 11. Parliament to regulate the right of citizenship by law.- Nothing in the foregoing provisions of this Part shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship.²⁹

The Constituent Assembly thus made a distinction between five categories of people:

- (1) Persons domiciled in India and born in India: (In other words, persons who formed the bulk of the population of India. The period of domicile was a minimum of five years. Though subsequent case law decided that mere domicile was not enough (*Abdul Sattar v. State of Gujarat*, AIR 1965 SC 810), the person had to fulfill one of the other conditions in the article.);
- (2) Persons who are domiciled in India: (In other words, persons not born in India but have resided in India. For instance, persons who were the subjects of the erstwhile Portuguese or the French Settlements in India, or persons, though not born in India, who have resided for a long time with the undoubted intention of becoming the citizens of India.);
- (3) Persons who were residents in India but who migrated to Pakistan;
- (4) Persons resident in Pakistan and who migrated to India; and
- (5) Persons who or whose parents were born in India but were residing outside India, and those who migrated to Pakistan but who returned to India after going to Pakistan.

The Articles referred to citizenship specifically on the date of the commencement of the Constitution. The object was not to lay down a permanent law of citizenship for this country. Article 6 could effectively allow Parliament to take away citizenship from those who are declared to be citizens on the date of the commencement of the

²⁸ *Id.* at art. 10.

²⁹ *Id.* at art. 11.

Constitution by the provisions of article 5, and also grant citizenship to those originally disallowed this privilege by the Constitution.

Religion, as a marker of citizenship, was explicitly rejected by the CAD, although, there were members, like P.S. Deshmukh, who wished to include provisions which consolidated the rights of Hindus and Sikhs. The emphasis was more on territorial loyalty than religion. This included the important financial aspect of evacuee property. One of the most forceful arguments was based on the fact that re-migrants were to be granted Indian citizenship. All the questions left unanswered by the Constituent Assembly were to be decided by India's Parliament and the courts, which responded to the challenges in a similar structure, but with the courts displaying a slightly more flexible approach at times.

III. State as Both Neutral and Partisan

The Indian state, which juxtaposes its neutral profile to that of a partisan, reinforces the capacity of weaker members of the political community to negotiate their way in favor of dignity, equality and citizenship. This has greatly helped India in achieving a generally peaceful and orderly transition. Rudolph and Rudolph formulate this in terms of the multiple roles of the *post-colonial state* in India. In their characterization of the state in India, Rudolph and Rudolph show how it has successfully incorporated some apparently contradictory values in order to create a space where different social groups can periodically negotiate the priorities for the politics of the day:

Like Hindu conceptions of the divine, the state in India is polymorphous, a creature of manifold forms and orientations. One is the third actor whose scale and power contribute to the marginality of class politics. Another is a liberal or citizens' state, a judicial body whose legislative reach is limited by a written constitution, judicial review, and fundamental rights. Still another is a capitalist state that guards the boundaries of the mixed economy by protecting the rights and promoting the interest of property in agriculture, commerce, and industry. Finally a socialist state is concerned to use public power to eradicate poverty and privilege and tame private power. Which

combination prevails in a particular historical setting is a matter for inquiry.³⁰

The multiple roles of the post-colonial state as conceptualized by Rudolph and Rudolph is reinforced by the *dynamic neo-institutional* model of economy-society-state interaction (see Figure 2 above) where the new social elites, themselves the outcome of a process of fair and efficient political recruitment through democratic elections, play a two-track strategy and institute processes of law and order management, social and economic reform and accommodation of identity as a basis for inter- and intra-group negotiation. The key function of this model is to help establish an agenda for empirical research into the policy process by focusing on the key decision-making elite.³¹

The Indian Constitution, thanks to the presence of a large number of lawyers, politicians and members of the liberal professions inspired by the values of Fabian socialism, rule of law and the values of consensus and accommodation championed by the Freedom Movement, accepted *social change* in its larger sense, as the normative objective of the modern state, and parliamentary democracy based on methodological individualism, as its preferred method of achieving it. There in lies a paradox: how can a state, based on a prior commitment to modernization and democracy generate a social program that would be seen by a society which, at least at the time of the promulgation of the constitution, was still deeply committed to the Indian tradition? Not surprisingly, the paradoxical juxtaposition of the modern state and traditional society has been at the root of problems of governance and citizenship.

IV. Enhancing the Bargaining Power of Weaker Sections

Independence came to India not as a result of a revolutionary war but protracted negotiation – between the colonial ruler and the main actors in the freedom movement. The process of negotiation was complex because the discussions between the colonizer and the colonized intersected conflicts among the colonized themselves. This had one major consequence. The post-independence regime in India was based on power-sharing among adversaries, who in the process learned to use democratic institutions to constrain the struggle for power. As such,

³⁰ LLOYD I. RUDOLPH & SUSANNE HOEBER RUDOLPH, *IN PURSUIT OF LAKSHMI: THE POLITICAL ECONOMY OF THE INDIAN STATE* (1987).

³¹ SUBRATA K. MITRA, *Caste and the Politics of Identity: Beyond the Orientalist Discourse*, in *CULTURE AND RATIONALITY: THE POLITICS OF SOCIAL CHANGE IN POST-COLONIAL INDIA* (1999); MITRA & SINGH, *supra* note 5; MITRA, *supra* note 16.

negotiation has become an essential part of India's politics, and indeed, an integral part of everyday life.³² In fact, the constant presence of conflict in the local arena is also indicative of the growing propensity of people from all walks of life to assert their rights to dignity, basic needs and security.³³

The political culture of bargaining that has developed in India in the course of the post-independence party competition can be best described in terms of 'principled negotiation,' which underpins the process of citizen-making in India.³⁴ The most crucial of these principles are the capacity on the part of the negotiators to dissociate the profiles and personalities of actors from the interests over which negotiations are held, and the knowledge, particularly on the part of the weaker partners, that there is an acceptable alternative to the agreement that has been or might be worked out in the course of the negotiation, which makes it possible for them to be less obdurate and more confident in their negotiating style. Legislation, like the 1955 Untouchability Offences Act, which criminalized the very use of the word untouchable to address someone, or reservation, which guarantees a minimum presence of the former untouchables in legislatures in proportion to their numbers in the population, have raised the level of the BATNA – best alternative to a negotiation agreement – of these groups. The sophisticated negotiations that one finds in the successful campaign of the Bahujan Samaj Party – the BSP, set up by Kanshi Ram and led by him and Mayavati, the current Chief Minister of Uttar Pradesh – can be seen as the ultimate successors to the steadily growing profile, and political clout of the former untouchables.

The sophisticated and sustained negotiation that one finds in the CAD gives an insight into the functioning of India's high politics at the crucial stage of the transfer of power from the colonial government to Indian hands. The question that

³² "Negotiation is a basic means of getting what you want from others. It is back-and-forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed [...]. People negotiate even when they don't think they are doing so. A person negotiates with his spouse about where to go for dinner and with his child about when the lights go out." ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AN AGREEMENT WITHOUT GIVING IN*, at XIII (1991).

³³ The comments of Fisher *et al.* are perfectly appropriate for India's everyday life. "Everyone wants to participate in decisions that affect them; fewer and fewer people will accept decisions dictated by someone else. People differ and they use negotiations to handle their differences. Whether in business, government, or in the family, people reach most decisions through negotiations. Even when they go to court, they almost always negotiate a settlement before trial." *Id.*

³⁴ Fisher, Ury and Patton describe the characteristics of principled negotiations as follows: [1] 'wise' and durable; [2] based on interests and not positions; [3] objective (inter-subjective) rather than subjective; [4] separate people from interests; [5] look beyond perceptions by putting themselves in other people's shoes; and [6] Principled negotiators know their BATNA (Best Alternative to a Negotiated Agreement).

can be raised by those unfamiliar with India is not so much about the requisite mental sophistication as it is the capacity to communicate across the differences of language, region, religion and the city-rural dichotomy. Does culture (shared norms) matter in negotiation (searching for mutually acceptable outcomes to a conflict over interests)? Does the question of cultural identity make sense in the face of the communications revolution, globalization and the search for a global society?

Those familiar with the bargaining that underpins Indian politics can also explain how, in the course of the evolution of India's politics, bargaining across and not just within ethnic groups has already become an integral part of India's politics. Further references to the negotiation literature help us understand the constant and continuous negotiation that goes on behind the formal outward agency. The literature shows us concrete examples of how negotiations work in terms of sequences.³⁵

V. Judicialisation of Citizenship

As a result of consciousness of interests that are bargained over, the political process that makes a veto player out of weak players whose BATNA has been boosted thanks to legislation have transformed the knowledge and self esteem of former untouchables. *Izhar Ahmad Khan v. Union of India (UOI)*³⁶ dealt in detail with the following questions: the rights to and of citizenship; the issues of partition related citizenship; the value of a passport in determining citizenship; and the question of domicile versus citizenship. The issue in this case was the constitutional validity of Section 9(2) of the Citizenship Act, 1955, which dealt with the termination of citizenship. This case exemplified the policies which discouraged multiple or even dual citizenships, and held that upon acquiring in any manner the citizenship of another country, an Indian citizen automatically loses Indian citizenship. The recent amendment of the Act in 2003 now renders the whole series of definitive judgments based on this case obsolete while at the same time making it an important resource for judicial arguments.

The Supreme Court has interpreted the Articles and the Citizenship Act in stricter and more generous ways, thus, not giving any clear indication of the judicial attitude of and towards citizenship. It reflected the policies as well as the emotions of the day. The task of carving out an identity which was incompletely carried out by the legislature was given form by the subsequent interpretations of these sections by the Courts. Domicile and territorial links became important in this

³⁵ See I.W. ZARTMAN & M.R. BERMAN, *THE PRACTICAL NEGOTIATOR* 201-02 (1982).

³⁶ See *Izhar Ahmad Khan v. Union of India (UOI)*, *supra* note 14.

context. International conventions of domicile, as well as ideas of political privilege, were only accepted insofar as they reflected what the judges felt were in consonance with India's new, historical background. In this process, *Chakma* refugees from Bangladesh, who were said to be 'causing disturbances' in the areas they settled in, were denied the rights of domicile and citizenship by residence. Of course, the question of what constituted domicile was itself a troublesome one, and this debate had its roots in the Constitution drafting committee discussions where Alladi Krishnaswami's note during discussions on who should be a citizen and precautions to be introduced in the Constitution succinctly indicate the thinking of both policy makers and the judiciary thereafter. While the exigencies of the Indian political situation might make it necessary to introduce some qualifications into these conceptions, we need not go to the other extreme. The merit of the present clause is that while retaining the birth-test, it emphasizes the connection with India as under the Constitution as an essential condition.

Even as late as in 1994 in *Mysore Wodeyar* (1994 Supp (1) SCC 191), the abolition of privy purses have also been linked to every Indian citizen feeling that India has one common citizenship and the desire to inculcate in every citizen that he is an equal Indian first, irrespective of social particularities. This concept had also been applied to the questions of grants of land. Grants made by erstwhile rulers were subject to the recognition of the Indian state in consonance with the idea of the equal citizen. That the foreign resident is also being included in this family of the equal citizen is shown in cases where origins have been held to be valid grounds for wanting to have a house and buy property in India - formerly a right not granted to NRIs and, by implication, PIOs. In the 2003 case of *Atma S Berar* ((2003) 2 SCC3), Canadian citizenship was held to be no bar for a person who had links to his ancestral village wanting to buy or maintain property and live there. These cases also show the gaining acceptance of the all important emotional factor, clearly reflecting the desire to include Diaspora communities in the emotional definition of an Indian. In the last decade, case law has tended towards a more flexible and all encompassing understanding of an Indian with relation to property and, with the onset of economic liberalization giving wings to even further judicial liberalization of these concepts. Recent laws allowing NRIs to own property further emphasizes the transformation of citizenship from territoriality to ethnicity in India. With global legal scenarios encompassing municipal laws, the question of identity in terms of psychological ties as opposed to physical ties to India have gained prominence. The courts have long held that citizenship is not a prerequisite for having a home in the country.

F. Conclusion: Negotiating Citizenship in Divided Societies

Paradoxically, citizenship – the seventeenth century totem of exclusive political and economic rights, but confined to the bounded territory of a nation-state³⁷ – has once again emerged as a salient and complex problem in the age of globalization. The world-wide mobility of ideas and people – both legal and clandestine – has emerged as a challenge to political order in stable, liberal democracies where immigrants, often with a different religious background than that of the mainstream, demand both the legal right to citizenship at par with the natives, *and* the recognition of their ethnic right to difference in the public sphere.³⁸ In changing societies, many of which adopted the norm of territorial citizenship at independence, trans-national networks and cultural flows have emerged as challenges to the norm of territorial citizenship, sometimes with violent consequences.³⁹ In sum, terrorism, new technology of communication, trans-national movement of capital and labor, and global norms of human rights have brought the exclusive rights of the territorial state on its citizens into question.

We have seen some of the concrete and specific aspects of the global issue of citizenship in our analysis of India. The Indian Constitution accepts and recognizes citizenship by birth, descent and naturalization. The question of ‘Who is an Indian?’ nevertheless is a complex one. It is further complicated by the rapid internationalization of both territory and the individual. Thus, affording citizenship one concise definition is difficult, if not impossible. Perhaps identity can be construed as private as well as public, namely, the identity one has of oneself with regard to countries and nations and the identity the public confers on the individual. Dual nationality was not discussed in much detail in the CAD probably because the nationality of the Sub-continent obfuscated nationality issues to the country. But loss of Indian citizenship as a result of acquiring that of another country is expressly mentioned in Article nine.⁴⁰ The effects of Partition rendered it necessary to first and foremost resolve citizenship issues at the time, and thus the CAD often and expressly mentions that its area of concern was citizenship at the time of the commencement of the Constitution.

³⁷ This is attributed to the Treaty of Westphalia, 1648, which led to the recognition of the territorial state as the ultimate, sovereign unit in national and international politics.

³⁸ See the case of immigrants from North Africa in the suburbs of Paris, and the controversy surrounding the head scarf in France and Germany.

³⁹ The reference here is to the rise of the language movement and the violent separation of Bangladesh from Pakistan; and, the current civil war in Sri Lanka.

⁴⁰ CONSTITUTION OF INDIA, art. 9.

Citizenship has evolved from meaning a political right by which a State identifies the people it governs to a benchmark of identity, and in today's global context, one of the many identities the individual seeks to assert for oneself. The concept of who is a citizen has evolved over the past decades to grow wider and less discriminatory. In addition to multiple citizenships, perhaps the most tolerant of citizenship ideologies, there are now also concepts of different types of citizenships. For example, the EU with its expanding and fluctuating notions of citizenship, and India with her extension of citizenship to include single and dual citizenship, explore the potential for transforming a dichotomous, territorial concept to one which is more nuanced, layered and straddles the separate worlds of home and abroad, and defies ethnic categorization in the strict sense while being sensitive to ethnicity. These concepts more and more take into account present wisdom in making the acceptance or renunciation of citizenship as explicit acts based on individual will rather than any state laws.

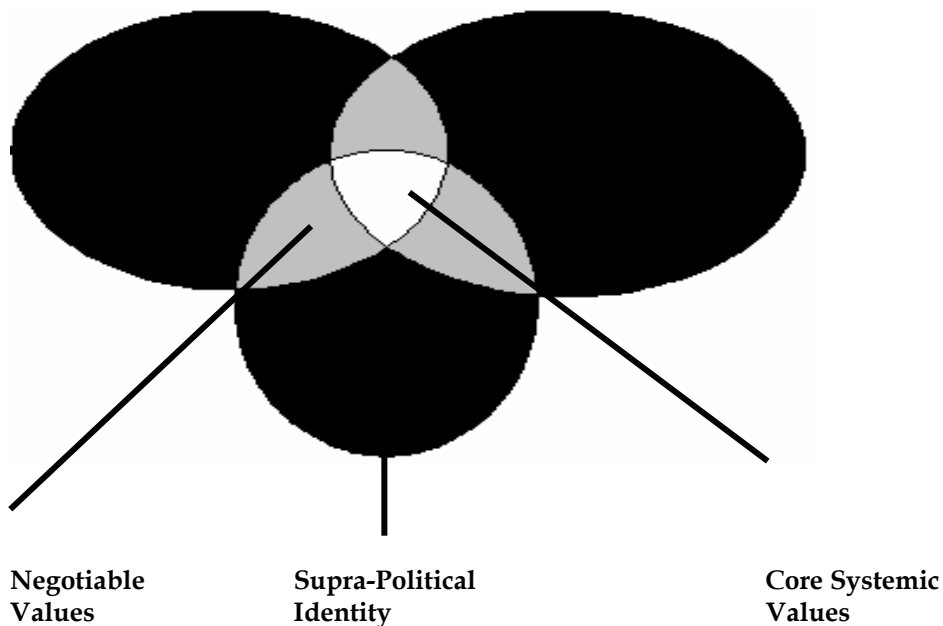
The CAD and subsequent debates on who is a citizen of India or who has the right to be a citizen were at no time linked to race. Gender played a part to the extent that the Indian Succession Act, which accepts international convention by stating that domicile of the wife is presumed to be that of the husband, was also not imposed blindly or literally. Recent arguments have taken into consideration the psychological link to the country and the understanding of the complexities in more practical terms of giving physical form to the Partition of the Sub-continent. PIOs were the subject of debate insofar as there were discussions on some form of dual citizenship for persons belonging to this category, as well as a later attempt to allow simpler forms of registration for citizenship for those who wished to regain Indian citizenship. These threads were not pursued by the legislature in the last sixty years but attempts are now being made to follow them.

In the political space of India, it is possible today for communities to form and dissolve in order to re-emerge as part of other communities. Seen from a distance and over time, political transaction has taken manifold forms, ranging between voting and lobbying to protest movements and ultimately, violent conflict. These in turn have produced knowledge of what leads to violence, instilling in the process greater understanding and accommodation of cultural and religious differences. Castes, religious communities and ethnic groups are all impregnated by the spirit of transaction and coalition building. The result is a significant empowerment of minorities.⁴¹

⁴¹ When asked "Suppose there were no parties or assemblies and elections were not held - do you think that the government in this country can be run better?," 69% of Indians argue in the opposite. But the number of Muslims, at 72%, making the same argument in favor of retaining the democratic structure, is even higher than the average.

In India's multicultural society, the members of different communities, castes and language groups have risen to the highest levels, in public office as well as in sports, films or academia. The dark predictions of balkanization, periodically renewed, have not been borne out by events. The Indian model, a multi-cultural cooking pot, slowly melting away sectional differences on the steady fires of democracy, appears to be creating the proto-type 'Indian' citizen, much like it happened in the United States – over the centuries since the founding of the state. The integration of nation, region and community is reminiscent of the Swiss solution, the accommodation of the cleavages of language and religion within the institutional space of a canton.

Figure 3
Negotiating Identity in Divided Societies



The long-standing controversy over India's personal law shows how different communities, who consider their laws on marriage, divorce, adoption and succession as essential to and constitutive of their identity, can still share a common territorial space. In Figure 3 (above), one can see how separate and conflicting identities can still share a set of core values common to all the parties, and, open to judicialisation. Once this is achieved, rather like in the case of many personal laws

co-existing within the same constitution, a private sphere, unique to individuals and groups, can get legitimate acceptance by all concerned. Under the sovereign presence of this core, different communities can negotiate the terms under which they can share the same territorial space (see shaded area in Figure 3), such as, for example, how, in a multi-religious village, the Hindu religious processions will take a specific route so as to avoid disturbing law and order, or for that matter, how much space on the public roads can be occupied for Friday prayers.

Finally, in the contemporary world, globalization, which was meant to make national boundaries increasingly less salient, has in fact revived their importance. The agenda of contemporary international politics is crowded with competing claims of the state and supra-stage agencies on the loyalty of individuals and ethnic groups. In the absence of global governance, states, acting in their capacity as the collective voice of their citizens, remain the most important agents of accountability and enforcement. The complex process through which subjects and immigrants become citizens, thus, pitches territoriality and ethnicity as competing norms for the entitlement to citizenship. Caught in this double bind, citizenship has become a contested category and a political problem of global importance.

Though this article is based on a country-specific study, the research design is comparative and cross-national in perspective. The Indian case opens up the analytical space for the comparative and general dimensions of the problem of citizenship. One learns from the Indian case that with regard to citizen-making in a post-colonial context, the constitution and law matter, but politics matters too, and most of all, history (path dependency) matters enormously. India's relative success at turning subjects into citizens, more successfully at least than neighboring Pakistan or Sri Lanka, is a function of India's political structure, process and memory, woven together in an institutional arrangement that draws its inspiration both from the modern state and the traditional society. The article has focused on the general factors. A detailed discussion of the contextual features specific to India that also play an important role such as the uncertain nature of divinity in Hinduism are beyond the remit of this article, but need to be taken into account for a deeper inquiry into the role of religion, culture and context in providing space for citizenship in divided societies.⁴²

⁴² See Subrata K. Mitra, *Kashipur Revisited: Social Ritual, Electoral Politics and the State of India*, in *JAGANNATH REVISITED: STUDYING SOCIETY, RELIGION AND THE STATE IN ORISSA* (Hermann Kulke & Burkhard Schepel eds., 2001) (for an analysis of the cult of Jagannath, which provides an example of inter-community accommodation and its role on extending a sense of dignity to those previously excluded from the mainstream, from the South-Eastern State of Orissa).