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Contemporary debates on CAA and NRC in India

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Abstract

The Indian idea of citizenship – as embodied in the Constitution and the law – is in the throes of a profound and radical metamorphosis. The twin instruments of this transformation are the National Register of Citizens and the Citizenship Amendment Act. If the former is carving out paths to statelessness for disfavored groups, the latter is creating paths to citizenship for preferred groups. While the first is, despite the looming threat of its extension across India, presently limited to the state of Assam, the second is designed to be pan-Indian in its application. Not only do the two need to be read alongside each other, both of these in turn need to be read in the larger context of the government's policies towards minorities, whether in the forced amelioration of Muslim women by the criminalization of the triple talaq or the clampdown, since early August, in the erstwhile state of Jammu and Kashmir. They also need to be read in the context of the acceleration of violence against minorities over the past few years, especially by vigilante lynch mobs who have been thriving on the promise of legal impunity. An adequate understanding of both the NRC and the CAA depends on an appreciation of the ecosystem for minorities constituted by these twin phenomena, emanating from the state and society respectively.

Keywords: CAA, NRC Indian citizenship, Assam, Muslim identity.

Introduction

The implications of these developments can be interpreted in multiple ways. From a legal perspective, they imply a foundational shift in the conception of the Indian citizen embodied in the Constitution of India, followed by the Citizenship Act, 1955. This is, first, a move from soil to blood as the basis of citizenship, from a *jus soli* or birth-based principle of citizenship in the direction of a *jus sanguinis* or descent-based principle, and second, a shift from a religion-neutral law to a law that differentiates based on religious identity. From the perspective of India's social fabric, they signal an ominous fraying and unravelling of what was a daring and moderately successful experiment in pluralism and diversity.

From a political perspective, they point to a possibly tectonic shift from a civic-national to an ethnic-national conception of the political community and its terms of membership. From a moral perspective, they prompt us to confront the weakness of our commitment to human rights and to the moral and legal personhood of all human beings. From an international perspective, they remind us of, on the one hand, our longstanding aversion to signing international treaties on refugees and the reduction of statelessness and, on the other, our easy engagement in doublespeak with a valued neighbor. I will elaborate on some of these aspects to show how they are collectively refashioning the fundamentals of our collective life. In a sense, we are once again rehearsing the debates on citizenship in the Constituent Assembly. The chapter on citizenship in the Constitution was necessitated by Partition and is limited to the determination of citizenship for those extraordinary times. The debate on what became Article 7 – relating to citizenship for the large numbers of Muslims who had fled India in the midst of the Partition violence but later returned – was fraught, the contention reflecting the communally charged atmosphere of Partition. Several members of the Assembly, who cast aspersions on the loyalty and intentionality of these returning migrants, called it the “obnoxious clause”. Though the markers of religious difference were not openly displayed, they are easily spotted in the consistent use, in the Assembly, of the words refugee and migrant for distinct categories of people – Hindus fleeing Pakistan described as refugees, the returning Muslims described as migrants – subtly encoding religious identity in a shared universe of meaning.

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The Assembly eventually adopted what it called the more “enlightened modern civilized” and democratic conception of citizenship, as opposed to “an idea of racial citizenship” and the Citizenship Act 1955 gave a statutory basis to the idea of *jus soli* or citizenship by birth.

Over time, chiefly triggered by the political unrest in Assam, this conception has been moving slowly but surely in the direction of a *jus sanguinis* or descent-based conception of citizenship. Assam has a long and complex history of in-migration, mostly from Bengal, from the 19th century onwards. It witnessed substantial in-migration from 1947 onwards, peaking in 1971, and continuing steadily thereafter. It was no secret that many of the immigrants in recent decades had acquired forms of what Kamal Sadiq has called “documentary citizenship” through “networks of complicity” and “networks of profit”.

In 1985, in the wake of the gruesome Nellie massacre of 1983, the Assamese students’ organizations that had led the agitation against the enfranchisement of migrants from Bangladesh entered into the Assam Accord with the Rajiv Gandhi government, leading to an amendment in the provisions relating to naturalization in the Citizenship Act. This amendment created categories of eligibility for citizenship based on the year in which a person had migrated to India. All those who came before 1966 were declared citizens, those who came between 1966-1971 were struck off the electoral rolls and asked to wait 10 years before applying for citizenship, and those who came after 1971 were simply deemed to be illegal immigrants. Though these provisions were a response to the genuine grievances of the Assamese, they already contained the seeds of the politicization and incipient communalization of the issue of migrants.

Religion as identifier

Meanwhile, the gradual dilution of the principle of *jus soli* and the increasing recognition of elements of *jus sanguinis* – dependent on religious identity - was proceeding apace. Two amendments of 2004 – one to the Citizenship Act and the other to the Rules under the Act – show how religious identity was gaining ground as the basis of legal citizenship. Both introduced religion into the language of the law, the first implicitly and the second explicitly. The amendment to the Citizenship Act covertly introduced a religion-based exception to the principle of citizenship by birth. The amendment undercut the *jus soli* basis of citizenship, by stating that even if born on Indian soil, a person who had one parent who was an illegal migrant at the time of her or his birth, would not be eligible for citizenship by birth. Since most of the migrants from Bangladesh, against whose arrival there was so much political ferment in Assam, were Muslims, the term “illegal migrant signaled this religious identity.

The Citizenship Rules were simultaneously amended to exclude “minority Hindus with Pakistani citizenship” from the definition of illegal immigrants. This amendment, firstly, destigmatize Hindu migrants, most of whom had come into the border states of western India from Pakistan, by dropping the label of “illegal migrants” for them, and officially describing them henceforth as “minority Hindus with Pakistan citizenship.” Secondly, it openly introduced a religious category into what was until then a religion-neutral law.

In the run-up to the Assembly elections in Assam in early 2016, the Bharatiya Janata Party had made an electoral promise to “free” the state from illegal Bangladeshi migrants by evicting and deporting them. This was a dog-whistle reference to a specific religion, as it simultaneously promised to give Indian citizenship to all Bangladeshi Hindu immigrants if it won the election. This promise will be fulfilled by the passage of the Citizenship Amendment Act, 2019, which not only makes explicit but also legitimizes the inflection of the law on citizenship with religious difference. The Act essentially provides for fast-track citizenship by naturalization for migrants from the neighboring countries of Pakistan, Afghanistan and Bangladesh who are religious minorities in those countries. It makes it possible for the preferred categories of Hindus, Buddhists, Sikhs, Parsis and Christians to obtain Indian citizenship in six years instead of the 11 it usually takes. Muslims are conspicuous by their absence in this listing, ostensibly on the grounds that they are not minorities in these three countries and cannot, therefore, be seen as persecuted.

Constitutional provision of CAA and NRC

Dilemma of citizenship - All pervasive social prudence

The Citizenship Amendment Act 2019 is eristic hereafter CAA which was recently sanctioned by the India parliament houses which not only poisonous for the country but also very arbitrary, discriminatory, divisional and completely against the ethos and principles of the philosophical Indian constitution. The CAA is fundamentally discriminatory towards a particular section in general i.e Muslims. It is to be kept in mind that the fundamental act i.e The Citizenship Act 1955 has laid down five major ways to acquire Citizenship of India which include by birth, Registration, Naturalization, and Descent and by Incorporation of some area into the borders of India. The move has been called as political to remove Muslims from the country and not grant them citizenship.

Who is an Indian Citizen?

3 every person born in India: on or after the 26th day of January, 1950, but before the 1st day of July, 1987; on or after the 1st day of July, 1987, but before the commencement of the Citizenship (Amendment) Act, 2003 (6 of 2004) and either of whose parents is a citizen of India at the time of his birth; on or after the commencement of the Citizenship (Amendment) Act, 2003 (6 of 2004), where: both of his parents are citizens of India; or one of whose parents is a citizen of India and the other is not an illegal migrant at the time of his birth, shall be a citizen of India by birth1.

2(b) illegal migrant means a foreigner who has entered into India: without a valid passport or other travel documents and such other document or authority as may be prescribed by or under any law in that behalf; or with a valid passport or other travel documents and such other document or authority as may be prescribed by or under any law in that, behalf but remains therein beyond the permitted period of time

What is Citizenship (Amendment) Act of 2019?

Under this act it has been clearly mentioned that any person who belongs to such communities as Hindu, Buddhist, Jain, Parsi, Sikh or Christian refugees from neighboring countries like Afghanistan, Pakistan or Bangladesh who have come to the country on or before 31st December 2014 without any

valid documents of their travel like the passport and visa will not be treated as illegal immigrants now. The CAA further states that such migrant will be granted citizenship of India by the way of naturalization after having a 6 years of continuous residence.

What is NRC?

National Citizenship Register was made in 1951. The NRC was made to fulfill the post partition needs by counting all the people who have been the residents of the country or claimed to be the Indian citizens at that time. In most of the states of India (except Assam), the NRC has not been updated correctly since its inception i.e 1951.

The reason has been that no state has a method of registration of citizens or has maintained any documents for birth, death or marriage registration. The process of NRC was seen in Assam during 2012 to 2018 with the mandate and supervision of Supreme Court of India asked people prove their citizenship based on birth documentation, lineage certificate and name of yourself or your immediate ancestors during the pre-1971 voting list of Assam.

On an all India-level these set of documents will be required for NRC. However, it has been witnessed that the concept of NRC is flawed inherently as it asks for documents mandatorily. Finding the documents all of a sudden is going to be troublesome for a whole lot of population. The most shocking part of the latest legislation CAA is that it seeks to grant citizenship rights to particular minorities of the neighboring countries based on the religion which stands completely biased and impractical making it a violation of article 14 of the Constitution of India. The point of reasonable classification given by the ruling Indian government and is not at all tenable under the eyes of the legal system of the country.

There is actually no reasonable classification to whom citizenship of the country should be awarded and there exists the class legislation deciding the classification. Thus, making act stand fundamentally incorrect and clearly unconstitutional. In expansion, the CAA terribly violates the preamble, various important articles of Indian constitution like Article 15, 25, 29 and 30 with Article 14 as well like supra. Besides the act also violates article 51C and article 253 that makes the country party and mandates obligation on the country to make sure that international law is reputed in true nature.

The impugned provisions does violate the doctrine of basic structure

The Constitution of India has certain fundamental aspects of the Constitution called the doctrine of Basic Structure. The Constitution empowers Parliament and the State Legislatures to make laws within their respective jurisdiction. Bills to amend the Constitution can only be introduced in the Parliament, but this power is not absolute. If the SC finds any law made by the Parliament inconsistent with the Constitution, it has the power to declare that law to be invalid.

Thus, to preserve the ideals and philosophy of the original Constitution, the SC has laid down the Basic Structure doctrine. According to the doctrine, the Parliament cannot destroy or alter the Basic Structure of the Constitution of India hereinafter COI. The concept developed gradually with the interference of the judiciary from time to time to protect the basic rights of the people and the ideals and the philosophy of the Constitution. That the Constitution has "basic features" was first theorized in 1964, by Justice J.R. Mudholkar in his dissent, in the case of *Sajjan Singh v. State of Rajasthan*³.

He wrote, It is also a matter for consideration whether making a change in a basic feature of the Constitution can be regarded merely as an amendment or would it be, in effect, rewriting a part of the Constitution and if the latter, would it be within the purview of Art. 368? SC, through the decisive judgments of Justice H. R. Khanna in *Keshavananda Bharti v. State of Kerala* (1973) case, declared that the Basic features of the Constitution is resting on the basic foundation of the Constitution. The basic foundation of the Constitution is the dignity and the freedom of its citizens which is of supreme importance and cannot be destroyed by any legislation of the Parliament⁵. The basic features of the COI has not been explicitly defined by the judicial bodies.

At least, 20 principles have been described as "essential" by the Courts in multiple cases, and have been incorporated in the Basic Structure. Only Judiciary decides the basic features of the Constitution. In *Indira Nehru Gandhi v. Raj Narayan* and also in the *Minerva Mills* case, it was, observed that the claim of any particular feature of the Constitution to be a "basic" feature would be determined by the Court in each case that comes before it. Here are some of the features of the Constitution termed as basic are given below:

The feature of Separation of Powers

The objectives which are given in the Preamble to the COI Judicial Review

Art. 32 and 226 and so on.

The preamble to the Constitution of India is a brief introductory statement that sets out guidelines, which guide the people of the nation, and to present the principles of the Constitution, and to indicate the source from which the document derives its authority, and meaning.

The Preamble of India State's India 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 By the introduction of both the CAA & NRC the Parliament is trying to challenge the Preamble of the COI i.e., Preamble clearly States that the India is a secular country. Secularism in India means equal treatment of all religions by the State. With the 42nd Amendment of the Constitution of India enacted in 1976, the Preamble to the Constitution asserted that India is a secular nation.

Amendment details of citizenship

What is the Citizenship Act, 1955?

The Act regulates that a person may become an Indian citizen if he is born in India or has Indian parentage or has resided in the country over a period of time. However, illegal migrants are prohibited from acquiring Indian citizenship.

An illegal migrant is a foreigner who:

1. Enters the country without valid travel documents, like a passport and visa, or
2. Enters with valid documents, but stays beyond the permitted time period.

Illegal migrants may be imprisoned or deported under the Foreigners Act, 1946 and the Passport (Entry into India) Act, 1920. The 1946 and the 1920 Acts empower the central

government to regulate the entry, exit and residence of foreigners within India.

The Citizenship (Amendment) Bill, 1986

As per the law amendment, it is no longer adequate to be born in India to be granted Indian citizenship. At the time of birth either one of the parents has to be an Indian citizen for the person to become a citizen of India.

The Citizenship Amendment Bill, 1992

The Act provides that a person born after January 26, 1950 but before the commencement of the Act shall be a citizen of India if the father is Indian at the time of birth; after the commencement of the Act, the person shall be Indian if either of the parents is Indian. Also replaces references to "male persons" with "persons".

The Citizenship (Amendment) Act, 2003

The Act was passed by the Parliament in December 2003, and received presidential assent in January 2004. It is labelled "Act 6 of 2004". The Act amended The Citizenship Act, 1955 by introducing and defining a notion of "illegal migrant", who could be jailed or deported.

Citizenship (Amendment) Act, 2016

In 2015 and 2016, the central government issued two notifications exempting certain groups of illegal migrants from provisions of the Foreigners Act, 1946 and the Passport (Entry into India) Act, 1920.

These groups are Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan, who arrived in India on or before December 31, 2014.

This implies that these groups of illegal migrants will not be deported or imprisoned for being in India without valid documents. The Citizenship (Amendment) Bill, 2016 was introduced in Lok Sabha on July 19, 2016 to amend the Citizenship Act, 1955. It seeks to make illegal migrants belonging to the same six religions and three countries eligible for citizenship.

Conclusion

Changes in criteria qualifying a person as citizenship of India has been on Centre's priority on various occasions that began 64 years ago when Citizenship Act, 1955 was passed, and it went through six periodic amendments with the recent Citizenship Amendment Act, 2019 that faces violent demonstrations across India. The conferment of a person, as a citizen of India, is governed by Articles 5 to 11 (Part II) of the Constitution of India. The legislation related to this matter is the Citizenship Act 1955, which has been amended by the Citizenship (Amendment) Acts of 1986, 1992, 2003, 2005, 2016 and 2019. The contentious Citizenship Amendment Act, 2019, an amendment to the Citizenship Act, 1955, aims to fast-track citizenship for six persecuted minority communities -- Hindus, Parsis, Sikhs, Buddhists, Jains, and Christians -- who arrived in India on or before December 31, 2014, from Muslim-majority Afghanistan, Bangladesh, and Pakistan.

The Act came into force on January 10 when the Ministry of Home Affairs made the announcement through a gazette notification -- almost a month after it was passed by Parliament on December 11, 2019, during the winter session -- which triggered widespread violent demonstrations in the Northeastern state of Assam as protesters feared it would

convert thousands of illegal migrants from neighboring Muslim-majority Bangladesh into legal residents. The Act got President Ramnath Kovind's assent on December 12. There has been disapproval on many grounds by political parties as well as some certain groups of people on every occasion whenever the Central government carved deep into the basic legal fabric of the principal Citizenship Act, 1955 to change the criteria qualifying a person as a citizen of India. At the first hearing on petitions challenging the Citizenship Amendment Act, 2019, the Supreme Court declined to stay the contentious law but asked the Centre to file its reply against the petitions that say it violates the Constitution.

The petitioners say the Act discriminates against Muslims and violates the right to equality enshrined in the Constitution.

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