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Citizenship in India: Special Reference to Recent Developments in Citizenship Laws

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ABSTRACT

This paper examines the laws and provisions that define citizenship in the Constitution of India. Part II of the Constitution of India is titled 'Citizenship' and its six provisions precede the important provisions relating to Fundamental Rights that are housed in the next part. The paper also aims to give a historical background in the context of citizenship from colonial to post-colonial India. Nationality and Citizenship is talked about a lot even though they are not "fundamental rights" in the Constitution. India does not recognize Dual- Citizenship, however there is a phenomenon called Overseas Citizenship which will also be examined in the paper. Recently, the issue of citizenship in India is one of the most debated issues in the country. This controversy is based on the Citizenship Amendment Act 2019 coupled with the National Population Register and National Register of Citizen in the state of Assam, which must be studied collectively. The beginning of this discussion came with the enactment of the CAA 2019, which intends to bestow citizenship to illegal migrants of certain neighbouring nations on the basis of religion. The immigrants of Muslim and Jewish communities remain disqualified from the Act.

Keywords: *Citizenship Amendment Act, National Register of Citizens, Constitution of India, Secular*

I. INTRODUCTION

According to and after the commencement of the Constitution, the people living in the Indian territory as on 26 November 1949 automatically became Indian citizens through operation of the relevant provisions of the Indian Constitution coming into force, and most of these constitutional provisions came into force on 26 January 1950. The Constitution of India also made provision regarding citizenship for migrants from the territories of Pakistan which had been part of India before partition. Then there's Citizenship by birth, descent, naturalisation, and registration that is how the citizenship is acquired.

(A) Historical Background

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It is undisputed that the Indian polity is indelibly marked by colonial rule. It should not come as a surprise then that the current legal regime of citizenship in India was unable to escape the trappings of its colonial history.² In order to gain a better understanding of the current regime and to appreciate the evolution of citizenship law, its historical context needs to be examined closely. This historical evolution of citizenship law in India can be charted across two broad temporal registers – the period of colonial rule, and the post-Independence period. The traumatic moment of India's independence deserves special focus for its continuing impact on post-Independence policies of citizenship.

1. The Colonial Period

There was a lot of ambiguity when it comes to whether all the people living in the territory of India constitute as 'subjects' or just the British for the same. Moreover, no real statute of citizenship existed at the time and term 'subjects' were in the pretext of Regulating Act 1773 as India was under a system of 'double government' where the British Crown and East India Company were in power. There were no defined rights and obligations of the native Indians and their citizenship.³ The territorial units in the colonial period also play an important role in understanding the rights the 'denizens' had at the time. There was British India administered by the British Government and the Princely States. The princely states were technically not affiliated to any nation but had tendencies of a nation with how they interacted with the British even till the time of Independence in 1947. Because of this division, the denizens of the Princely states were not entitled to the status of the British subjects.

The 'Government of India Act, 1858' marked the end of this somewhat coextensive administration of EIC and the Crown. In 1914, British Government passed British Nationality and Statutes of Aliens Act was the first citizenship law witnessed which granted a two-way citizenship. One, to those who were British by birth and by process of naturalisation to those who were not such as native Indians.⁴ Again, the term 'subject' however intended to secular by all modern standards was racially motivated which was evidenced as the native Indian to remain being a second-class citizen when it came to how those subjects were recognised. It seemed like racial discrimination was codified by the British.

2. Post-Colonial Interpretation of Citizenship

In 1947, with the Independence of India Act, the Government of India Act of 1935 was repealed

² Sinha, *Law of Citizenship and Aliens in India*. Lucknow: Asia Publishing House, 1962

³ Id.

⁴ Id.

thus invalidating the ban enforced on the Indian legislature in respect of passing laws affecting British nationality. The rise of India as a sovereign and independent nation caused a change in the political identity of its people from the Crown's subjects to that of citizens without any racial discrimination in terms of classification of citizenship.⁵

Although the Indians were no longer dependent upon the British for their political identity, the emergence of a new neighbouring state – Pakistan created a new challenge post-partition of how the Indian Legislature will interpret citizenship. Until the framing of the Constitution of India. From August 1947 to November 1949, until the Constitution was framed by the Constituent assembly, there was no concrete criteria to ascertain who is the citizen and who is not amid the crisis and suffrage of the partition of India. There was so much influx that the framers not only focussed on the Indian sub-continent but the Indians who left before the Independence to grant citizenship.⁶

Although, the Constitution of India was enforced on January 26th 1950, the obligations pertaining to citizenship came into force on November 29th 1949, the day the Constitution was adopted to India with an exception of Jammu and Kashmir. The Constitution provided for a single form of citizenship – national citizenship. There was no concept of a distinct state-based citizenship remaining along with the national citizenship.

II. ANALYSIS

(A) The Provisions in the Constitution concerning Citizenship

It is important to go through the provisions with a reading of the debates and discussions around these terms so as to truly understand the framers' intent to grasp the significance of the constitutional provisions relating to citizenship. Even though the literal definition of the term 'citizenship' is nowhere in the Constitution, the Part II especially Articles 5-11 - provides the context for citizenship at the time of onset of the Constitution. The pertinent provisions detail the modes of securing citizenship.⁷

Article 5 deals with the matter of 'citizenship at the commencement of the Constitution' by specifying a two-fold requirement for granting citizenship. The prerequisite of being 'domiciled' in India was the primary criteria. Moreover, the ones who met one of the following three conditions would be deemed an India citizen:

⁵ Niraja Jayal, 'Citizenship' in Sujit Choudhry, Madhav Khosla and Pratap Mehta (eds.), *The Oxford Handbook of the Indian Constitution* (Oxford: New York, 2016), pp. 168-170

⁶ Id.

⁷ Constitution of India, 1949

“(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”

This signifies a combination of factors. However, the criteria of descent and domicile are supposed to be complementary, even as the primary nature is closer to the *ius soli* hypothesis since the stress was on physical existence Indian territory. It can be understood by the provision that the framers intended to set a modernist tone in the interpretation and legislation of citizenship.

Article 6 centered on the “Rights of citizenship of certain persons who have migrated to India from Pakistan”.

It provided that “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 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”.

There is a necessary cap of six months that a person has to reside in India prior to the date when he or she registers for the application of citizenship.

Article 7 focuses on “Rights of citizenship of certain migrants to Pakistan”. It says that “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”.

A simple understanding of the Articles 6 and 7 document offers the sense that the framers are universally committed to the ideals of citizenship, *ius soli*.⁸ The secular wording should nevertheless not distract from the religious subsequent passages which informed the discussions on these provisions. Just like the British colonists, the framers of India's Constitution were motivated by communal considerations in their conceptual framework of the group of 'people' because of the caste element in their modernist comprehension of the subject.

⁸ Jain M.P., M.P. Jain Constitution of India, Lexis Nexis, 8th Edition, 2018, pp. 839-847, 2018

The deliberations among the framers are revealing of the diverging differences that existed amongst them. Two particular target classes were drafted for Articles 6 and 7. The Hindus left Pakistan and found asylum in India were told in Article 6. Article 6. In the background of Muslims fled to Pakistan and who would want to go back to India in a time in the future, Article 7 on the other hand has been drawn up. Interestingly, the words used by Hindu Parties expressed some concern for the condition in the debates within the Assembly. However, the Muslims were described as refugees, accusing them of having fled India during the turmoil of the partition of any intentionality. The consequence of such a narrator differential was that for the "migrant" Muslims a precondition of allegiance had to be determined before it could have been awarded citizenship, as can be seen from the debates and jurisprudence that emerged afterwards. The Hindu counterparts have not received related inquiries regarding intentions and loyalty.

Article 8 details the rights of citizenship of persons who reside outside India but are of Indian descent. This category of people, unlike those referred to in Article 5, are required to register to become citizens.

Article 9 limits the acquisition of Indian citizenship to persons willingly becoming residents of another State.

Article 10, while titled "Continuance of citizenship rights," means a clause that details the authority of the Parliament, not a legislation that establishes a right, as a restriction of the right of citizenship.

Article 11 is relevant because Parliament is allowed in the plenary session of Parliament to enact citizenship law and its associated matters. In specific, it empowers Parliament to enact laws relating to continuity, loss and other matters related to citizenship without being bound by constitutional requirements and their underlying principles. If you can, Parliament has exercised its constitutional authority and updated these laws with precisely the self-understanding. As noted above, only at the time the Constitution was adopted were constitutional provisions to determine citizenship.

The constitutional requirements were crafted only at the time the Constitution was initiated to establish citizenship. In compliance with the powers detailed in Article 11, the fundamental basis for citizenship was defined by the 1955 Citizenship Act. This Act was complemented by the 1956 Rules of Citizenship which were abrogated by the 2009 Rules of Citizenship. The Act

and the 2009 Citizenship Laws have also become the new legal citizenship regime in India.⁹

The Citizenship Act of 1955 attempted to define the concrete edges of citizenship following the constitution's beginning when the Constitution was dealing with citizenship.

(B) The Validity of Constitutional Amendment Act, 2016 and 2019

The Act 2016 also calls for mention as the amendment is closely connected to the 2019 amendment. The 2016 amendment aimed at making the application for Indian citizenship possible to undocumented immigrants in some ethnic groups in Afghanistan, Bangladesh and Pakistan. The results are making an increasingly suspected and dysfunctional Indian Muslim resident in the state of Assam. The fundamental legitimacy of the amendments was brought into question on the grounds that they almost entirely discriminate based on religion. Such extreme action on the grounds solely of religion runs contrary to Article 14 of the Indian Constitution on civil protection. In the absence of Hindu, Sikh, Buddhist, Jain, Parsi or Christian tradition, a group in Afghanistan, Bangladesh or Pakistan will, for example, predicted increased them from the advantage of the CAA for 2019 without apparent reason. Also, it is apparent that the freedom of all residents, not just the citizens of India, is bestowed in Article 14 of the constitution. Thus, it is evident that in CAA 2019 the concept of citizenship is inserted into a faith feature that explicitly hits the heart of a secular constitution and is theoretically contradictory to the constitutional framework of the constitution.¹⁰

There are serious issues in the sense of the Act, in conjunction with the NRC exercise in the state of Assam (and the suspected pan-Indian model) because there is a lack of clarification regarding the fate of millions of people who are unable to confirm their citizenship with records. We often effectively see the installation of detention centers in India, but we do not yet know what the future of the prisoners will be. The acts of the Indian Government in this operation are only reflective of the mindset towards the 200 million Muslims of India, one of the world's largest Muslim communities. Many afraid Muslim citizens viewed the Citizenship Amendment as a step in their own country and make them second-class citizens and destitute.¹¹

(C) NRC exercise in the state of Assam

The National Citizens' Register is a database kept by the Indian Government with names and certain relevant information for Indian citizens' proof of identity. It requires people to demonstrate their presence on or before March 24, 1971 in Assam or any part of India. This is

⁹ Id.

¹⁰ Ejaz Maqbool, Akriti Chaubey & Mohammad Isa Hakim, CAA-NPR-NRC – The Bermuda Triangle, 2020, available at <https://www.barandbench.com/columns/litigation-columns/caa-npr-nrc-the-bermuda-triangle-2>

¹¹ Id.

a consequence of the significant historical problems of Assam with undocumented immigrants. There were therefore two inclusion qualifications in the updated NRC –

1. Existence of a person's name in the pre-1971 period
2. Family tree verification with such person.

In keeping with these Statutes, the government of Assam and thus the India Government have developed a methodology to update the NRC jointly. In total, 3,11,21,004 people were found to be eligible for inclusion in the final version of the NRC in Assam following the strenuous application process, the completion of requests in the Foreign Trials and the publication of various draft documents. There are 19,06,657 persons left behind, including those who had no means of presenting their demands. This exercise in Assam proved that this burden shift on the citizens to prove their right to belong (instead of the state to prove non-publicity) created many problems that emphasize the disparity between people with the means and people fighting in poverty.

University scholars and lawyers from all over the world have criticized this. Haley Duschinski made a succinct point of the matter: "That's when state power and state subjects are formed, the demand for identification, which opens up possibilities for penalty and prohibition." She further argues that identification papers are unforeseeable, unstable state power acts, oscillating constantly between being a "threat" and "garantee," crossing the unpredictable geographies of absurd violence and law-making. This demonstration of state authority and the application of the positive law was practically demonstrated by the exclusion of more than nineteen people from the list. The NRC process emphasized the State's inability without fault and legally to carry out such an exercise. In all the NRC lists, there were countless inconsistencies, proving that the influence of a technical error could mean statelessness. This kind of brutal State action almost seems to forget the right to live with dignity guaranteed to all citizens. The Amnesty International Report, which considered the foreign courts 'complicated in the continued exclusion and abuse' when deciding cases of exclusion highlighted these disadvantages. these disadvantages.¹² The Report further stated that method of functioning adopted by the Tribunals were not those that met the international standards of fair trial as they were found to be riddled with prejudices, bias and most importantly arbitrary decision-making processes. Even though the NPR and National Register for Indian Citizens shall both follow different processes, the NRC exercise paints us an accurate picture as how efficiently state policy in the hands of

¹² Abdul Kalam Azad, Assam NRC Draft: How Women In Char Areas Were Left High And Dry, 8 August 2018, available at <https://www.news18.com/News/Opinion/Assam-Nrc-Draft-How-Women-In-Char-Areas-Were-Left-High-And-Dry-1835325.html>

underprepared executive can implemented. The Citizenship Amendments clause explicitly shows that the State is able to refuse service against individuals on a religious basis. That was the opinion of the Hon'ble Union Home Minister that all non-Muslims are entitled to citizenship. In certain cases and thus under poor rule, the NRC was questioned to be inconsistent with the fair test set by the Supreme Court.

(D) Link between NRC, NPR, and the CAA, 2019

Apart from the constitutional legitimacy of the CAA 2019 the manner in which the Government carried out the enactment provides for a troubling legislative precedent for the future, particularly in relation to the NRC and NPR. The NRC, NPR and CAA 2019 have an evident correlation.¹³ The fearful result of most Muslim people in India demonstrates how this collective impact is to come into being. The exercise of the NRC and the NPR is fearful for Muslims across Canada as witch-hunting. Many of these people are 'foreigners.' Where Muslims subsequently qualify for citizenship under the amended legislation, the cost (as opposed to the advantages of those benefiting under the Act) of providing evidence for a long duration of stay required for the exempt religious community underneath the CAA for 2019 rises. This proves to be a mammoth challenge in countries such as India, where the bulk of the population is weak and registered. There is no error in itself and there are serious flaws that make the manipulation of the procedure to oppress people who do not like the process. There would be an unimaginable effect and social struggle created by this act.¹⁴

While the so-called goal of NPR is the development of the detailed identification lists of all national residents, its ties with NRC are transparent according to Section 14A of the Citizenship Act 1955 and the Citizenship Rules of 2003. These regulations specify that after adequate verification of an individual's data from the NPR, the national NRC must be collected. One can see that our constitutional values have been violated by the enactments, specifically the NRC. The impact of the CAA's combined effect with the NPR, accompanied by a national exercise in the NRC, could be devastating. It is clearly misleading that the Government says that the three are not interlinked. The easiest solution to this argument is the fact that all three – CAA, NPR and NRC – remain under the 1955 Citizenship Act. The results put together of these laws further complement the argument that such State acts are obviously unconstitutional and contrary to Article 14 of the Indian Constitution.

¹³ Manasvin Andra, Why the nationwide NRC is Unconstitutional, 7 June 2020, available at <https://www.barandbench.com/apprentice-lawyer/why-the-nationwide-nrc-is-unconstitutional>

¹⁴ Supranote 11

Detention Centres

These NRC detention centres in January 2018 - holding hundreds of minors, children, and men - have reported in reports from the National Human Rights Commissioner's special observer who visits the centres of detention in violation of domestic law norms and of various international human rights principles. The monitor has found that children over six years of age are segregated from their family and that females are also not jailed for their husbands. Some had not seen their wife for years and had not been allowed to marry. In Bangladesh there was an address only for three of the 28 people who died so far in the Assam detention camps. In the absence of clarification regarding their policy, the imprisoned worry they be held hostage till eternity.¹⁵

(E) Supreme Court and NRC

In the affair *Assam Sanmilita Mahasangha v. The NRC* update was given by the Supreme Court with the order of 17 December 2014.

In order to enforce the Assam Agreement by offering different rules for the citizenship of the province, the Mahasanha questioned section 6A of the Citizenship Act. Unlike in other states, the migrants who settled in Assam before 25 March 1971, were qualified as Indian citizens or as citizenship paths, unlike any other State. The Mahasangha submitted that the measure violated the rights of the people to remain in Assam by facilitating Bangladesh's "massive influx of illegal immigrants." He also claimed that the separate system impaired the legally protected right to culture.

Ranjan Gogoi and Justice R.F. Nariman, a Justice (now Chief of Justice) bench, proposed a broader judicial bench to determine the matter. By conducting private in-house meetings with the NRC Coordinator, the Supreme Court has put itself in a highly controversial role to remove all parties to the topic including the Attorney General of India. It has been responsible for drafting the NRC.

While the Assam administration admitted in Court that there was an analphabet and bad citizen who had been unable to submit paperwork in those who did not take part in the claims operation, we did see the Court asking for no improvements to the NRC's public outreach exercise. In the present era of growing religious and ethnic fragmentation, the Supreme Court did not thus play a role by its intervention in addressing citizens' concerns or reducing the

¹⁵ Press Trust of India, Guwahati, Only three Bangladeshis among 28 who perished in Assam detention camps, 30 November 2019, available at https://www.Business-Standard.Com/Article/Pti-Stories/28-Died-In-AssamDetention-Camps-3-Of-Them-From-B-Desh-119113000707_1.html

pressure of the affected people.

III. CONCLUSION

In order to represent a broad and strong definition of citizenry in the Constitution, the systems of India's constitution have followed a modernistic, secular idea of citizenship. This was amended over time to combine different aspects of a jus sanguini citizenry paradigm with the incorporation into the debate of citizenship of conceptions of descent, shared religious identity and collective 'national' ideals. This indicates that the judiciary is always called to address cracks and conflicts. The experience of the Indian judiciary in its position as arbiter in this matter was less striking than in most other constitutional issues. In order to avert a scenario in which this essential constitutional landscape is seized by such groups, other structural players must take action. The balancing between opposing groups and their interests is needed by constitutional stability. The new Indian citizenship legislation indicates a trend towards a drastic end.

Thanks to the pandemic, do we expect a war against oppressed parts of society? The NRC mechanism only revealed that the parties most influenced and unheard of are people from the Muslim community, women, and the poor. In the battle against belonging groups, though, one can only fear division of society given the Indian politics and the resolve of the states to carry out such exercises. The only thing left is whether such an experiment would have to be carried out by citizens and organizations including the Supreme Court.

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