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## Article 15 and the Citizenship (Amendment) Act – A Thought Experiment

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# ARTICLE 15 AND THE CITIZENSHIP (AMENDMENT) ACT– A THOUGHT EXPERIMENT

—John Sebastian\*

*The Citizenship (Amendment) Act, 2019 ('CAA') has been the subject of many constitutional challenges and intense legal debate. Despite this, there has not been sufficient debate on the question of the applicability of Article 15(1)'s non-discrimination clause to the CAA. Article 15(1) of the Constitution prohibits the State from discriminating, inter alia, on the grounds of religion. Since the CAA covers those who are not currently citizens, and Article 15(1) mentions a citizen as its subject, many have argued that Article 15 cannot apply despite the CAA explicitly being grounded on religion. I contest this, and argue that due to the nature of the CAA as a law which determines the conditions of entry into the community of citizens, it must be subject to Article 15(1) (through the 'conditions of entry' principle). First, recent Supreme Court jurisprudence has shown that entry conditions cannot be ignored when discussing Article 15(1). Second, I conduct a thought experiment through a hypothetical citizenship law. Through this thought experiment, I demonstrate that to not extend Article 15(1) to the CAA would be illogical and allow the legislature to accomplish indirectly what is impermissible directly. It could deprive that great non-discrimination clause of its vitality through an act of subterfuge. I defend my thought experiment by addressing various arguments on the grounds and subjects of discrimination, the question of numbers, and anti-subordination, and demonstrate that my claim*

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*is consistent with the text of Article 15(1). Hence, the CAA should be subject to the rigorous scrutiny of Article 15(1).*

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## I. INTRODUCTION

The legal regulation of citizenship in India has always been contested.<sup>1</sup> The Constitution, while defining who was a citizen at the time of the commencement of the Constitution,<sup>2</sup> left it to the future Parliament to regulate citizenship through ordinary law.<sup>3</sup> In furtherance of this, Parliament enacted the Citizenship Act, 1955 (the ‘Citizenship Act’), which lays down various criteria for the acquisition of Indian citizenship. Under the Citizenship Act, a person can become a citizen of India *inter alia*, by birth,<sup>4</sup> descent,<sup>5</sup> registration,<sup>6</sup> and naturalisation.<sup>7</sup> The legal regime for the acquisition of citizenship was altered substantially by two amendments – the Citizenship (Amendment) Act, 1986 (the ‘1986 Amendments’), and the Citizenship (Amendment) Act, 2003 (the ‘2003 Amendments’).<sup>8</sup> Before the 1986 Amendments, any person born in India, irrespective of parentage, would be a citizen of India by birth.<sup>9</sup> From the coming into force of the 1986 Amendments, however, a person born in India would

<sup>1</sup> Niraja Gopal Jayal, *Citizenship and Its Discontents: An Indian History* (HUP 2013) 2; Leah Vergheese and Harish Narasappa, ‘Contestations over Indian Citizenship: An Analysis of the Citizenship (Amendment) Bill 2016’ [2019] NLSIR 157, 158.

<sup>2</sup> Arts 5-9 in Part II of the Constitution broadly defined who was a citizen of India at the time of the commencement of the Constitution. Interestingly, even though most provisions of the Constitution came into force/commenced on January 26, 1950, the provisions dealing with citizenship came into force on November 26, 1949 itself, the day of the adoption of the Constitution. Constitution of India 1950, art 394.

<sup>3</sup> *ibid* art 11.

<sup>4</sup> Citizenship Act 1955, s 3.

<sup>5</sup> *ibid* s 4.

<sup>6</sup> *ibid* s 5.

<sup>7</sup> *ibid* s 6.

<sup>8</sup> There have been previous amendments to the Citizenship Act, most notably in 1985, but I am focusing on the 1986 and 2003 Amendments as they are most relevant to my argument.

<sup>9</sup> Citizenship Act 1955, s 3(1)(a).

be a citizen only in case at least one of their parents is a citizen.<sup>10</sup> The 2003 Amendments further tightened this regime. A person who entered India at any time in the past without authorisation was termed an ‘illegal migrant’.<sup>11</sup> The 2003 Amendments disqualified illegal migrants from being eligible for citizenship, irrespective of how long they had resided in India.<sup>12</sup> It also disqualified their descendants from being eligible for citizenship – persons born in India after December 3, 2004 are not entitled to citizenship by birth if *either* of their parents is an illegal migrant (even if one of their parents is a citizen).<sup>13</sup>

It is in this context that we must understand the controversial Citizenship (Amendment) Act, 2019 (the ‘CAA’), which sparked protests across the country.<sup>14</sup> The CAA removes the disqualifications brought in by the 2003 Amendments for persons “belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian communit[ies] from Afghanistan, Bangladesh or Pakistan, who entered into India on or before the 31st day of December, 2014”, by removing them from the purview of the term ‘illegal migrant’.<sup>15</sup> Persons falling within the groups mentioned in the CAA are hence allowed to apply for citizenship even if they entered into or remained in India without legal authorisation. In turn, their descendants will also not be disqualified from citizenship by birth in the same manner as other illegal migrants. In effect, therefore, the CAA mitigates the harshness of the 2003 Amendments, but confers these benefits only on certain classes of erstwhile illegal migrants.<sup>16</sup> Several petitions challenging the constitutional validity of the CAA on various grounds are currently pending before the Supreme Court of India (the ‘SCI’).<sup>17</sup>

<sup>10</sup> Citizenship Act 1955, s 3(1)(b). This came into force on July 1, 1987.

<sup>11</sup> Illegal migrants are defined in s 2(1)(b) of the Citizenship Act as follows:

“(b) “illegal migrant” means a foreigner who has entered into India—

- (i) 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
- (ii) 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.” Citizenship Act 1955, s 2(1)(b) (inserted via The Citizenship (Amendment) Act 2003).

<sup>12</sup> The Citizenship (Amendment) Act 2003 disqualified ‘illegal migrants’ from gaining citizenship in various ways. For instance, ‘illegal migrants’ are disqualified from being eligible for citizenship by registration (s 5) or naturalization (Section 6). Citizenship Act 1955, ss 5 and 6.

<sup>13</sup> S 3(c)(ii) of the Citizenship Act disqualifies the children of ‘illegal migrants’ from citizenship by birth (even if one of their parents is a citizen). Citizenship Act 1955, s 3(c)(ii). This came into force on December 3, 2004.

<sup>14</sup> ET Bureau, ‘All India protests against Citizenship Act’ (*The Economic Times*, 20 December 2019) <<https://economictimes.indiatimes.com/news/politics-and-nation/all-india-protests-against-citizenship-act/articleshow/72894519.cms>> accessed 14 March 2021.

<sup>15</sup> Citizenship (Amendment) Act 2019, s 2.

<sup>16</sup> The CAA also relaxes other criteria such as the time period of residence before a person can apply for citizenship, for persons belonging to the communities it specifies. See Citizenship (Amendment) Act 2019, s 6.

<sup>17</sup> Murali Krishnan, ‘In 10 Points, Supreme Court Hearing on Citizenship Act Petitions Explained’ (*Hindustan Times* New Delhi, 30 August 2020) <<https://www.hindustantimes.com>.

There is little doubt that the CAA creates a classification on the basis of religion – as seen above, it explicitly mentions that its benefits are only for persons belonging to the Hindu, Sikh, Buddhist, Jain, Parsi, or Christian communities from the countries concerned. It would, therefore, *prima facie* seem to breach the requirements of Article 15(1) of the Indian Constitution, which prohibits the State from discriminating on the grounds of religion, amongst other grounds such as race, caste, sex, and place of birth.<sup>18</sup> However, this is often countered by the argument that Article 15 specifically applies to citizens i.e. the persons who are eligible for citizenship under the CAA are not *currently* citizens, and therefore, cannot claim rights based on Article 15.<sup>19</sup> In this article, I interrogate this argument, which claims that Article 15 is inapplicable to the CAA. I argue that, due to the inherent nature of the CAA as a law which determines the conditions of entry into the community of citizens, Article 15 should apply to it. I analyse this through the lens of what I term the ‘conditions of entry’ principle (the ‘COE principle’), which requires laws prohibiting discrimination on certain grounds *within* a group to also prohibit discrimination on those grounds *when determining membership* of the group in question. I discuss the impact of the COE principle on the scope of Article 15, and how the application of Article 15 influences the debate on the constitutional validity of the CAA.

In Part II of the article, I briefly explore why extending the application of Article 15 to the CAA matters. Since Article 15 has an effect on the standard of review or scrutiny which a classification is subject to, it is important to know whether the CAA is subject to Article 15. In Part III, I demonstrate that Article 15 applies to the CAA though an analysis of SCI jurisprudence on Article 15 and the COE principle. I further substantiate my argument through a thought experiment on the issue of conditions of entry to citizenship. Part IV refines the thought experiment, and answers many arguments which might be made against it. Part V concludes the article with thoughts on the many possibilities thrown open by the application of Article 15 to the CAA.

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com/india-news/supreme-court-to-hear-144-petitions-on-citizenship-act-petitions-shortly/story-LH1qENFSldrRfSPBq4OGO.html> accessed 12 March 2021.

<sup>18</sup> “Article 15: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth: (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.” Constitution of India 1950, art 15(1).

<sup>19</sup> See the ‘Preliminary Counter-Affidavit on Behalf of the Union of India’ in the writ petitions filed before the SCI in matter of *Indian Union of Muslim League v Union of India* (Writ Petition (Civil) No 1470 of 2019) (*SCC Observer*) <[https://scobserver-production.s3.amazonaws.com/uploads/case\\_document/document\\_upload/1191/Counter\\_Affidavit\\_filed\\_by\\_Union.pdf](https://scobserver-production.s3.amazonaws.com/uploads/case_document/document_upload/1191/Counter_Affidavit_filed_by_Union.pdf)> accessed 8 March 2021 110. See also Nivedhitha K, ‘Guest Post: The Citizenship (Amendment) Bill is Unconstitutional’ (*Indian Constitutional Law and Philosophy*, 5 December 2019) <<https://indconlawphil.wordpress.com/2019/12/05/guest-post-the-citizenship-amendment-bill-is-unconstitutional/>> accessed 8 March 2021.

## II. WHY ARTICLE 15 MATTERS

In this Part, I analyse the importance of subjecting the CAA to the scrutiny of Article 15. I highlight the nature of the judicial review of laws under Article 15, and compare it with the traditional reasonable classification test under Article 14. I argue that, at the very least, Article 15 implies that laws which discriminate on any of the prohibited grounds must be subjected to more rigorous scrutiny compared to the reasonable classification test. This, in turn, implies that subjecting the CAA to Article 15 changes the nature of the justificatory burden of the state in defending it. Article 15 also lends further strength to many arguments emphasising the constitutional invalidity of the CAA. It hence matters if Article 15 is applied to the CAA.

### A. Article 15 – a Higher Standard of Review

There is little doubt that the mandate of equality before the law and equal protection of the laws guaranteed by Article 14 of the Constitution does not require that all laws must have universal application, or be based on ‘abstract symmetry’.<sup>20</sup> What equality requires is that equals be treated equally, whereas those in different circumstances can be treated differently. Laws are hence allowed to classify persons and treat them differently as long as the requirements of the reasonable classification test are met. In the words of SR Das, J in *State of WB v Anwar Ali Sarkar*, the reasonable classification test has 2 requirements: “(1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act.”<sup>21</sup> Additionally, it has later been held that the object of the law must also not be discriminatory.<sup>22</sup> Ordinarily, laws are presumed to be constitutionally valid, and the burden lies upon the person challenging a classification to show that it is unreasonable.<sup>23</sup>

Article 15, situated within the equality code in Part III of the Constitution,<sup>24</sup> prohibits the State from discriminating on any of the grounds specified therein. The specification of these grounds (‘prohibited grounds’) – religion, race, caste, sex, and place of birth – makes Article 15 a uniquely powerful tool in discrimination law. At the very least, as Khaitan notes, courts are expected to subject laws which classify or distinguish between citizens on any of the grounds

<sup>20</sup> *State of WB v Anwar Ali Sarkar* AIR 1952 SC 75 : 1952 SCR 284 [55] (SR Das J).

<sup>21</sup> *ibid.*

<sup>22</sup> *Subramanian Swamy v CBI* (2014) 8 SCC 682 [58], [68] (RM Lodha CJ).

<sup>23</sup> *Chiranjit Lal Chowdhuri v Union of India* AIR 1951 SC 41 : 1950 SCR 869 [11] (Fazl Ali J). I deliberately use the term ‘ordinarily’ as it has been argued that, even within Article 14, there are different layers of scrutiny. See text accompanying (n 75).

<sup>24</sup> Arts 14-18 fall within a separate sub-part titled ‘Right to Equality’ within Part III of the Constitution. Constitution of India 1950.

mentioned in Article 15 to a more rigorous or higher standard of scrutiny when compared to other classifications.<sup>25</sup> As an example, a law subjecting children and adults to different penalties for the same crime is qualitatively different from a law subjecting men and women (or Hindus and Muslims) to different penalties. Intuitively, we are more suspicious of (and thereby subject to higher scrutiny) laws treating people differently on the basis of gender or religion, which are among the prohibited grounds mentioned in Article 15. The reasons which inform this intuition, it has been argued, are the recognition that these grounds have historically been sites of discrimination,<sup>26</sup> disadvantage,<sup>27</sup> and stereotypes,<sup>28</sup> as well as the impact that discrimination on these grounds has on personal autonomy.<sup>29</sup> This is also the practice in several other legal systems which have guarantees of equality. Discrimination on similar prohibited grounds is subjected to higher scrutiny in the United States,<sup>30</sup> United Kingdom,<sup>31</sup> South Africa,<sup>32</sup> and the European Court of Human Rights.<sup>33</sup>

The reasons in support of a higher standard of review for Article 15 have been discussed by many, and I will only briefly add to the debate.<sup>34</sup> First, the text of Article 15(1) assumes the form of a categorical command to the state, that it “shall not discriminate” on any of the prohibited grounds, implying a

<sup>25</sup> Tarunabh Khaitan, ‘Beyond Reasonableness – A Rigorous Standard of Review for Article 15 Infringement’ (2008) 50(2) *Journal of the Indian Law Institute* 177, 195.

<sup>26</sup> *National Legal Services Authority v Union of India* (2014) 5 SCC 438 [66] (KS Radhakrishnan J).

<sup>27</sup> *Navtej Singh Johar v Union of India* (2018) 10 SCC 1 [452] (DY Chandrachud J), [638.1] (Indu Malhotra J).

<sup>28</sup> *ibid* [438]-[440] (DY Chandrachud J).

<sup>29</sup> *ibid* [638.3]-[638.4] (Malhotra J). *See also* Khaitan (n 25) 196-97.

<sup>30</sup> In the United States, discrimination on different grounds are subjected to different levels of scrutiny, in a highly complex regime. At the highest level, discrimination on grounds such as religion and race are subject to ‘strict scrutiny’, under which laws will be declared unconstitutional unless they are ‘narrowly tailored’ to achieve a ‘compelling’ governmental interest. Discrimination on grounds such as gender attract ‘intermediate scrutiny’, and will be declared invalid unless they are ‘substantially related’ to ‘important’ governmental interests. In contrast, discrimination which is not on prohibited grounds is subjected to deferential ‘rational basis’ review, under which laws are valid if they are ‘rationally related’ to any ‘legitimate’ governmental interest. *See generally* Richard H Fallon, ‘Strict Judicial Scrutiny’ (2007) 54 *UCLA L Rev* 1267.

<sup>31</sup> Equality Act 2010, ss 4-19 (UK).

<sup>32</sup> Constitution of the Republic of South Africa 1996, s 9 (SA). *See Harksen v Lane NO* (CCT9/97) [1997] ZACC 12 (Constitutional Court of South Africa) [44], [47] (Goldstone J).

<sup>33</sup> Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (European Convention on Human Rights) art 14; Convention for the Protection of Human Rights and Fundamental Freedoms 2000 Protocol 12 article 1. *See* European Court of Human Rights, *Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention* (2020) <[https://www.echr.coe.int/Documents/Guide\\_Art\\_14\\_Art\\_1\\_Protocol\\_12\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf)> accessed 16 April 2021 20.

<sup>34</sup> Khaitan (n 25) 195; Gauri Pillai, ‘Naz to Navtej: Navigating Notions of Equality’ (2019) 12(3-4) *NUJS L Rev* 16 <<http://nujlawreview.org/2020/02/03/naz-to-navtej-navigating-notions-of-equality/>> accessed 10 March 2021; Dhruva Gandhi, ‘Locating Indirect Discrimination in India: A Case for Rigorous Review under Article 14’ (2020) 13(4) *NUJS L Rev* 1, 5-12.

heightened standard of review.<sup>35</sup> Second, the only relaxations permitted in this regard are for affirmative action measures in Articles 15(3),<sup>36</sup> 15(4),<sup>37</sup> 15(5),<sup>38</sup> and 15(6),<sup>39</sup> all of which begin with non-obstante clauses saving them from the rigour of Article 15(1). Articles 15(3)-(6) recognise that equality not only prohibits discrimination, but also requires the state to take ameliorative measures to empower disadvantaged groups.<sup>40</sup> These ameliorative measures will often need to be based on the prohibited grounds in Article 15(1), to improve the situation of groups historically discriminated against or disadvantaged on the basis of those very grounds.<sup>41</sup> Article 15(4), for instance, was inserted into the Constitution precisely in order to safeguard affirmative action measures, which had been struck down by the SCI emphasising the categorical nature of a similar non-discrimination guarantee in Article 29(2).<sup>42</sup> Hence, the very need to put

<sup>35</sup> Constitution of India 1950, art 15(1).

<sup>36</sup> '(3) Nothing in this article shall prevent the State from making any special provision for women and children.' *ibid* art 15(3).

<sup>37</sup> '(4) Nothing in this article or in cl (2) of art 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.' *ibid* art 15(4).

<sup>38</sup> '(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.' *ibid* art 15(5).

<sup>39</sup> '(6) Nothing in this article or sub-clause (g) of clause (1) of article 19 or clause (2) of article 29 shall prevent the State from making,—

- (a) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5); and
- (b) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten per cent. of the total seats in each category.

Explanation.—For the purposes of this article and article 16, “economically weaker sections” shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage.’ *ibid* art 15(6).

<sup>40</sup> *Ashoka Kumar Thakur v Union of India* (2008) 6 SCC 1 [6], [194] (KG Balakrishnan CJ). For similar statements in the context of Article 16, see *State of Kerala v NM Thomas* (1976) 2 SCC 310 [37], [44] (AN Ray CJ); *Indra Sawhney v Union of India* 1992 Supp (3) SCC 217 [74] (BP Jeevan Reddy J).

<sup>41</sup> *Indra Sawhney* (n 40) [779] (BP Jeevan Reddy J).

<sup>42</sup> *State of Madras v Champakam Dorairajan* AIR 1951 SC 226 : 1951 SCR 525 [9], [10], [12] (SR Das J). Article 29(2), much like Article 15(1), prohibits discrimination on certain grounds, but is confined to admissions to educational institutions. The SCI in *Champakam Dorairajan* refused to accept the state’s justification that the measure aimed to promote the interests of backward sections of society, pointing out the categorical nature of Article 29(2)’s prohibition of discrimination. This prompted the insertion of Article 15(4), through the first amendment of the Constitution in 1951, to safeguard such affirmative action measures (The Constitution (First) Amendment Act 1951). This further emphasises the rigour of the review of non-affirmative action measures under Article 15(1).



in relaxations or emphases through these provisions to safeguard affirmative action measures further highlights the rigour of the scrutiny of non-affirmative action measures falling within Article 15(1).<sup>43</sup> Articles 15(3)-(6) would not have been needed unless laws under Article 15(1) were subjected to a higher standard of review. Conversely, of course, this higher standard of review would not apply to affirmative action measures for oppressed and backward groups under Articles 15(3)-(6), as has been argued by many.<sup>44</sup>

Third, as Khaitan observes, the mere existence of Article 15(1) as a separate provision in addition to the general safeguard of equality in Article 14 implies special protection against discrimination on the prohibited grounds it mentions.<sup>45</sup> Article 15 would otherwise be rendered largely redundant. This is further emphasised in the debates in the Constituent Assembly, where the inclusion of particular grounds in Article 15(1) was the subject of intense debate.<sup>46</sup> These debates would not have been necessary if the mention of certain prohibited grounds in Article 15(1) did not make a difference to the level of scrutiny applicable. Fourth, recent SCI judgments have emphasised the importance of the prohibition of discrimination in Article 15(1) and its role in preventing disadvantage due to stereotypes based on the prohibited grounds.<sup>47</sup> This necessarily implies that courts must carefully scrutinise laws which discriminate on any of the prohibited grounds under Article 15(1) to ensure that they do not perpetuate disadvantage based on stereotypes. For instance, in *Sowmithri Vishnu v Union of India*,<sup>48</sup> the SCI upheld the validity of the gendered criminalization of adultery in S 497 of the IPC<sup>49</sup> on the basis of the

<sup>43</sup> *Indra Sawhney* and *Ashoka Kumar Thakur* establish that affirmative action measures cannot be seen as an exception to 15(1), but are instead facets of it. See *Indra Sawhney* (n 40) [741]-[742] (BP Jeevan Reddy J); *Ashoka Kumar Thakur* (n 40) [126] (KG Balakrishnan CJ). However, even the need for an emphasis through Articles 15(3)-(6) implies that scrutiny under Article 15(1) is rigorous.

<sup>44</sup> In *Ashoka Kumar Thakur*, the SCI held that affirmative action measures are not subject to the 'strict scrutiny' standard used in US jurisprudence to evaluate suspect classifications on certain grounds such as race and religion (*Ashoka Kumar Thakur* (n 40) [209]-[210] (KG Balakrishnan CJ)). Reading *Ashoka Kumar Thakur* with later cases such as *Anuj Garg* has led many to argue that, whereas classifications disadvantaging a vulnerable group should be subject to higher scrutiny, those that provide for affirmative action for them should not be subjected to this higher standard (*Anuj Garg* (n 47) [46]-[51] (SB Sinha J)). See Khaitan (n 25) 207; Pillai (n 34) 16-17.

<sup>45</sup> Khaitan (n 25) 195.

<sup>46</sup> *ibid.*

<sup>47</sup> *Anuj Garg v Hotel Assn. of India* (2008) 3 SCC 1 [42], [43], [46] (SB Sinha J); *Navtej Singh Johar* (n 27) [438] (DY Chandrachud J) (emphasizing the need to infuse Article 15 with "true rigour"); *Joseph Shine v Union of India* (2019) 3 SCC 39 [183]-[186] (DY Chandrachud J).

<sup>48</sup> *Sowmithri Vishnu v Union of India* 1985 Supp SCC 137.

<sup>49</sup> The Indian Penal Code 1860, s 497 (declared unconstitutional) states:

"Adultery.—Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may

“commonly accepted” notion that men are the seducers and women, the victims, of adultery.<sup>50</sup> Such justifications based on “commonly accepted” notions are precisely the kind of stereotypes prohibited by Article 15(1), which is partly why this case was overruled in *Joseph Shine*.<sup>51</sup> However, a court cannot enquire into whether a justification proffered by the state is based on stereotypes unless it is willing to rigorously scrutinise it, implying heightened scrutiny. This heightened scrutiny recognises that discrimination against many groups of people has historically been grounded in, and justified on the basis of, stereotypes based on the prohibited grounds.<sup>52</sup>

Therefore, classifications based on the prohibited grounds under Article 15(1) should be subjected to a higher standard of review or scrutiny, compared to classifications based on other grounds under Article 14. It must be mentioned here that the *precise* standard of scrutiny applicable to a classification on a prohibited ground under Article 15(1) is the subject of intense debate. It is far from settled, for instance, what exactly should be the contours of higher scrutiny under Article 15(1), or even what are its normative justifications.<sup>53</sup> Some have argued that courts should begin the task of interpreting classifications based on any of the prohibited grounds mentioned in Article 15 by presuming that they are constitutionally invalid, rather than begin with presuming their validity.<sup>54</sup> This would shift the burden of justifying the classification to the state, instead of making the person challenging the classification prove that it is unreasonable. On the other hand, Gandhi cites several SCI and High Court cases in support of the proposition that direct discrimination on any of the grounds mentioned in Article 15(1) is absolutely prohibited and can never be justified by the state.<sup>55</sup> Others suggest that a proportionality review might be more appropriate for Article 15(1).<sup>56</sup>

These are all important debates, and will be relevant once the CAA is subjected to Article 15(1)’s scrutiny. I will, however, not be addressing these debates over the precise standard and contours of review applicable to Article 15(1) in detail in this article. The scope of this article is narrow, and I will focus upon the issue of whether Article 15(1) should be *applicable* to the CAA at all, given Article 15(1)’s mention of citizenship. One of the aims of this

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extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.”

<sup>50</sup> *Sowmithri Vishnu* (n 48) [7]-[8] (YV Chandrachud CJ).

<sup>51</sup> *Joseph Shine* (n 47) [179], [220.5] (DY Chandrachud J).

<sup>52</sup> *NALSA* (n 26).

<sup>53</sup> See generally Moiz Tundawala, ‘Invocation of Strict Scrutiny in India: Why the Opposition?’ (2010) 3 NUJS L Rev 465.

<sup>54</sup> Tarunabh Khaitan, ‘Equality: Legislative Review under Article 14’ in Sujit Choudhry and others (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016) 707-08.

<sup>55</sup> Gandhi (n 34) 12.

<sup>56</sup> Tundawala (n 53) 483. Also see generally Aparna Chandra, ‘Proportionality in India: A Bridge to Nowhere?’ (2020) 3(2) University of Oxford Human Rights Hub Journal 55.

article is, in fact, precisely to trigger such a larger debate on the appropriate standard of review to be applied to the CAA.

My purpose in this Part is merely to demonstrate why applying Article 15(1) to any law such as the CAA matters. Article 15(1) would matter as long as applying it to a law made *some* difference to its judicial treatment, compared to classifications made on other grounds. The exact nature of the difference in the standard of review under Article 15(1) is not my concern. *At the very least*, I have demonstrated that Article 15(1) ensures a higher standard of review for discrimination based on the prohibited grounds, compared to classifications based on other grounds under Article 14, which are subject to the reasonable classification test. A higher or more rigorous standard of scrutiny or review increases the justificatory burden of the state in defending the constitutionality of laws, and is crucial in rights adjudication. A court applying a low standard of scrutiny, on the other hand, places the justificatory burden upon the person challenging the constitutionality of a law, which makes it more difficult for such challenges to succeed. Applying a higher standard of scrutiny therefore increases the chances that a law will be declared unconstitutional by a court.<sup>57</sup> Applying Article 15 to the CAA hence matters substantially.

In summation, a law which falls under Article 15(1) should, at the very least, be subjected to more rigorous scrutiny than the traditional reasonable classification test under Article 14. As emphasised above, *how much more rigorous* this scrutiny under Article 15(1) would be, or its precise contours, is not the concern of this piece. I now turn to analyse the impact this heightened scrutiny would have on the CAA.

## **B. The Many Possibilities of Applying Article 15 to the CAA**

As mentioned above, the CAA is a law which directly and explicitly classifies persons on the basis of religion.<sup>58</sup> Under its regime, only persons belonging to the Hindu, Sikh, Buddhist, Jain, Parsi, or Christian communities who migrated from Afghanistan, Bangladesh, or Pakistan on or before December 31, 2014 will be able to gain the benefits of citizenship. The inclusion of only these communities has been defended on the ground that the constitutions of Afghanistan, Bangladesh, and Pakistan provide for a specific state religion (Islam), which leads to the persecution of those belonging to these communities.<sup>59</sup> This, it is argued, compels persons from these communities to seek shelter in India.<sup>60</sup> However, as correctly argued by many, the CAA is uncon-

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<sup>57</sup> Tundawala (n 53) 466; Khaitan (n 25) 178.

<sup>58</sup> See Part I of this article.

<sup>59</sup> Citizenship (Amendment) Bill 2019, statement of objects and reasons. See also *Preliminary Counter-Affidavit on Behalf of the Union of India* (n 19) 32.

<sup>60</sup> *Preliminary Counter-Affidavit on Behalf of the Union of India* (n 19) 26.

stitutional even by the standards of the relatively deferential reasonable classification test of Article 14.<sup>61</sup> This is because it, *inter alia*, unreasonably (a) excludes equally persecuted religious minorities from other neighbouring countries such as China, Myanmar, Nepal, and Sri Lanka,<sup>62</sup> (b) excludes other equally persecuted religious minorities within Afghanistan, Bangladesh and Pakistan,<sup>63</sup> (c) excludes those who arrived in India after December 31, 2014, even if they have faced persecution,<sup>64</sup> and (d) excludes those who have been persecuted on non-religious grounds.<sup>65</sup>

A claim that the CAA would have to be subjected to Article 15 implies a more rigorous standard of scrutiny by the court, as explained in the previous sub-Part. This, in turn, raises the justificatory burden on the state when defending the law, and lends more force to arguments which challenge the constitutionality of the CAA, such as those mentioned above. The CAA cannot be likened to an ‘affirmative action’ measure, which courts subject to lower scrutiny, since the granting of citizenship cannot be seen as a “special provision for the advancement of any socially and educationally backward classes of citizens [(‘SEBCs’)].”<sup>66</sup> Articles 15(3)-(6) are clearly intended for persons who are *already* citizens of the country, and it is doubtful whether the granting of citizenship itself can be seen as a “special provision” under these clauses. If the CAA, while granting citizenship to *all* persecuted migrants irrespective of religion and country of origin, had granted certain other material benefits such as reservations in employment to migrants belonging to only certain religions on account of their particular backwardness, it would have been arguable that the granting of these reservations could be likened to an affirmative action measure.<sup>67</sup> The CAA, however, is clearly not such an affirmative action

<sup>61</sup> See Shadan Farasat and others, ‘Writ Petition filed on behalf of Deb Mukharji and ors in the CAA matter (*Deb Mukharji v Union of India*)’ <<https://www.livelaw.in/top-stories/-indian-ambassador-to-nepal-two-rtd-ias-officers-move-sc-citizenship-amendment-act-150783?infinite-scroll=1>> accessed 9 March 2021 27-39; Mohsin Alam Bhat, ‘The Constitutional Case Against the Citizenship Amendment Bill’ (2019) 54(3) Economic and Political Weekly 12, 13; Abhinav Chandrachud, ‘Secularism and the Citizenship Amendment Act’ (2020) 4(2) Indian Law Review 138, 154; Jaideep Singh Lalli, ‘Communalisation of Citizenship Law: Viewing the Citizenship (Amendment) Act 2019 Through the Prism of the Indian Constitution’ (2020) 3(1) Oxford Human Rights Hub Journal 95, 104.

<sup>62</sup> The CAA notably excludes Muslim Rohingyas, who have been subjected to genocide and ethnic cleansing in Myanmar. See Writ Petition filed on behalf of Deb Mukharji (n 61) 32.

<sup>63</sup> The CAA notably excludes the Ahmadiyya community, which is persecuted in Pakistan, as well as Jews, Bahá’ís, atheists and others persecuted on account of their religion in these countries. Chandrachud (n 61) 151.

<sup>64</sup> *ibid.*

<sup>65</sup> The CAA excludes many groups such as Tibetans from China and Tamils from Sri Lanka, who are persecuted on grounds such as political dissent, ethnicity and language. See Bhat (n 61) 14; Chandrachud (n 61) 152, 154.

<sup>66</sup> Constitution of India 1950, art 15(4) (emphasis mine).

<sup>67</sup> Whether religion can be used as a basis for affirmative action measures is highly contested. The SCI in *Indra Sawhney* implied that it could be the basis of classification in case the community as a whole is backward. *Indra Sawhney* (n 40) [782] (BP Jeevan Reddy J). In contrast,

measure. On the contrary, the CAA, when read with the proposed nationwide National Register of Citizens (NRC) exercise, will have an adverse impact on other equally vulnerable groups of migrants and undocumented persons.<sup>68</sup> Migrants or undocumented persons belonging to the groups mentioned in the CAA – Hindus, Sikhs, Buddhists, Jains, Parsis, and Christians – will be able to register for citizenship. However, persons belonging to communities not falling within the ambit of the CAA, such as Muslims, will not be able to avail of its benefits, potentially depriving many migrants and undocumented citizens of citizenship along communal lines.<sup>69</sup> It has therefore been widely argued that the CAA-NRC exercise will result in discrimination against Indian Muslims, rendering many of them stateless.<sup>70</sup> The CAA is hence far from an affirmative action measure for SEBCs, and should be subjected to the heightened scrutiny of classifications made on the prohibited grounds in Article 15(1), if Article 15 were to apply.<sup>71</sup> A recognition of this is also implicit in the argument of the Government of India in claiming that Article 15 does not apply to the CAA.<sup>72</sup> There is no reason the Government of India would vociferously deny the application of Article 15 to the CAA unless applying it made a difference to the level of judicial scrutiny applicable.

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the Andhra Pradesh High Court struck down reservations based on religious grounds in *T Muralidhar Rao v State of AP* (2010) SCC OnLine AP 69 [204]-[206] (AR Dave CJ). Appeals against the Andhra Pradesh High Court decision are still pending before the SCI.

<sup>68</sup> See Writ Petition filed on behalf of Deb Mukharji (n 61) 27.

<sup>69</sup> Persons belonging to other religious groups such as Bahá'ís, Jews and other smaller religious communities will also be excluded, and will be equally vulnerable. I emphasise Muslims here only since they are the largest religious group in India who could potentially be negatively affected by the CAA-NRC regime, and not because the persecution suffered by these other religious groups is any less grievous.

<sup>70</sup> Lalli (n 61) 117; Niraja Gopal Jayal, 'The CAA and NRC Together will Reopen Wounds of Partition and Turn India into a Majoritarian State' (*Scroll.in*, 29 December 2019) <<https://scroll.in/article/947458/the-caa-and-nrc-together-will-reopen-wounds-of-partition-and-turn-india-into-a-majoritarian-state>> accessed 17 April 2021.

<sup>71</sup> In addition, as noted above (n 44), the SCI in *Ashoka Kumar Thakur* held that the US doctrine of 'strict scrutiny' cannot be applied to affirmative action measures for socially and educationally backward ('SEBC') citizens in India. Unlike in *Ashoka Kumar Thakur*, where the challenge to reservations for SEBCs were made by upper caste groups, the challenge to the CAA has been made on behalf of other migrants and vulnerable communities, due to the disadvantages the CAA imposes upon them, when read with the NRC exercise. Their claim is hence fundamentally different from that of the petitioners in *Ashoka Kumar Thakur*, warranting a different level of scrutiny. Second, the prayer of many petitioners challenging the CAA includes the remedy of *extension* of the CAA to all persecuted migrants. This too makes the claim fundamentally different from *Ashoka Kumar Thakur* where the prayer was to strike down reservations rather than extend them. The Court in *Ashoka Kumar Thakur* necessarily had to apply a lower standard of scrutiny to reservations since applying a higher standard of scrutiny would adversely affect vulnerable communities seeking the benefit of the law. This is not the case in the CAA matters, where the communities mentioned in the CAA would not be adversely affected by an extension of its benefits. See *generally* Writ Petition filed on behalf of Deb Mukharji (n 61).

<sup>72</sup> See Preliminary Counter-Affidavit on Behalf of the Union of India (n 19) 110.

Of course, as can be seen above, Article 15 is only one instantiation of the principles of the equality code within the Indian Constitution, and several other principles of equality - notably Article 14<sup>73</sup> - are not conditional upon citizenship. Hence, I have highlighted the persuasive arguments of many that the CAA breaches the reasonable classification test under Article 14.<sup>74</sup> It has also been argued that, even *within* Article 14, courts should apply a relatively higher standard of scrutiny to the CAA, since the interests involved - the very 'right to have rights' - are sufficiently serious in nature.<sup>75</sup> Additionally, it has been contended that the CAA breaches the 'manifest arbitrariness' test of Article 14 due to its lack of an adequate determining principle.<sup>76</sup> Further, it has been strongly argued by Ahmed that the CAA breaches the requirements of Article 15's 'anti-subordination' principle, due to its unique signalling value that lowers the status of Muslim citizens in the polity.<sup>77</sup> As a clarification, my arguments do not detract from, but rather add further force to, these other arguments about the correct standard of review to be applied to the CAA.

Hence, the application of Article 15 to the CAA will help us subject that law to the rigorous scrutiny it deserves. In addition, it allows us to consider the impact of other arguments, stemming from Article 15 jurisprudence, to the CAA. For instance, as mentioned above, recent SCI jurisprudence has drawn out the link between Article 15 and the 'anti-stereotyping' principle, through which state action grounded in and perpetuating stereotypes "about a class constituted by the grounds prohibited in Article 15(1)" will be invalid.<sup>78</sup> Does the CAA, in its treatment of persecuted immigrants *not* within its ambit, perpetuate stereotypes about them and their reasons for migrating to India?<sup>79</sup> Does the CAA's mention of migrants from only certain countries (Afghanistan, Bangladesh and Pakistan) also breach another prohibited ground within Article

<sup>73</sup> "Article 14. Equality before law: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." Constitution of India 1950, art 14.

<sup>74</sup> See text accompanying (n 61-65).

<sup>75</sup> See Writ Petition filed on behalf of Deb Mukharji (n 61) 20. See also Gautam Bhatia, 'The Citizenship (Amendment) Act Challenge: Three Ideas' (*Indian Constitutional Law and Philosophy*, 21 January 2020) <<https://indconlawphil.wordpress.com/2020/01/21/the-citizenship-amendment-act-challenge-three-ideas/>> accessed 9 March 2021.

<sup>76</sup> Writ Petition filed on behalf of Deb Mukharji (n 61) 39-41; Bhat (n 61) 14.

<sup>77</sup> Farrah Ahmed, 'Arbitrariness, Subordination and Unequal Citizenship' (2020) 4(2) *Indian Law Review* 121, 133.

<sup>78</sup> *Anuj Garg* (n 47) [42], [43], [46] (SB Sinha J); *Navtej Singh Johar* (n 27) [438]-[440] (DY Chandrachud J); *Joseph Shine* (n 47) [183]-[186] (DY Chandrachud J).

<sup>79</sup> As Jayal observes, the *reasons* underlying a person's decision to migrate from one country to another underlies many citizenship regimes' differential treatment of migrants. Those who migrate for political reasons or persecution are termed as 'refugees', and those who migrate for economic or other reasons are termed 'migrants', with relatively beneficial treatment accorded to the former. Jayal (n 1) 59. There is little doubt that the CAA, read with the 2003 Amendments to the Citizenship Act, perpetuates the stereotype that those who do not fall within its ambit are all 'illegal migrants' who have not fled their countries due to persecution. The full scope of this argument is, however, out of the ambit of this paper.

15(1) – place of birth? If so, will the standard of scrutiny be further heightened?<sup>80</sup> These and related arguments can be more meaningfully explored once the CAA is subjected to the scrutiny of Article 15. I mention these possible arguments to further emphasise the possibilities thrown open by the application of Article 15 to the CAA. Discussing their application to the CAA in further detail is, however, outside the scope of this piece.

To reiterate the scope of this article, I limit myself to the argument that Article 15 ought to apply to the CAA, and do not further analyse whether, once Article 15 applies, the CAA would or would not meet its higher threshold of justification. That would be out of the scope of this piece. However, as highlighted above, many have cogently argued that the CAA fails to meet even the relatively lower requirements of Article 14.<sup>81</sup> These very arguments will apply, even more forcefully, once the CAA is subjected to the more rigorous scrutiny of Article 15.<sup>82</sup>

In this Part, I have demonstrated why it matters whether Article 15(1) applies to the CAA, emphasising, in particular, its impact on heightening the standard of review. At the very least, therefore, Article 15(1) would add further force to many other arguments challenging the validity of the CAA on Article 14 grounds. I now turn to the central issue of this article – the applicability of Article 15 to the CAA.

### III. A THOUGHT EXPERIMENT WITH ARTICLE 15

As the previous Part has demonstrated, the application of Article 15 makes a substantial difference to the manner in which courts can evaluate the constitutionality of unequal laws. In this Part, I argue that Article 15 should be applicable to the CAA. I first analyse the reasoning of two SCI judgments – *Air India v Nergesh Meerza*<sup>83</sup> and *Navej Singh Johar v Union of India*.<sup>84</sup> I argue that inherent in Chandrachud J’s critique of *Nergesh Meerza* in *Navej Singh Johar* is an understanding that conditions of entry are regulated by Article 15. I then conduct a thought experiment through a hypothetical New Citizenship Act (‘NCA’) to demonstrate the flaws of not applying Article 15 to the CAA.

<sup>80</sup> I am assuming, of course, that ‘place of birth’ in Article 15(1) covers place of birth *outside* India as well. This argument is, however, outside the scope of this article.

<sup>81</sup> Bhat (n 61); Chandrachud (n 61); Lalli (n 61).

<sup>82</sup> I am assuming, of course, that the odious ‘sex-plus’ (in this case, ‘religion-plus’) argument, through which classifications based on one of the grounds mentioned in Article 15 in addition to another ground are valid, has been firmly put to rest in recent SCI jurisprudence. See *Navej Singh Johar* (n 27) [431] (DY Chandrachud, J) and Part III(A) of this article.

<sup>83</sup> *Air India v Nergesh Meerza* (1981) 4 SCC 335.

<sup>84</sup> *Navej Singh Johar* (n 27).

## A. Article 15 and Conditions of Entry – Nergesh Meerza and Navtej Singh Johar

In *Nergesh Meerza*,<sup>85</sup> certain service conditions of Air India, which discriminated between Air Hostesses (who were female) and Assistant Flight Pursers (who were male), were challenged by many Air Hostesses. Among the many grounds of challenge was a claim that the classification, being based on sex, was in violation of Article 15(1). The Supreme Court negated this claim, observing that Air Hostesses and Assistant Flight Pursers constituted two separate classes which were “governed by [a] different set of rules, regulations and conditions of service.”<sup>86</sup> Being separate categories of employment or cadres, they could not be compared (much like apples and oranges). In addition, the court observed that Article 15(1) could not apply to this case as that prohibited discrimination *only* on the grounds of sex, whereas this was a classification on the basis of sex and employment cadre (though the Court itself noted that the functions discharged by Air Hostesses and Assistant Flight Pursers were the same).<sup>87</sup> In the words of Murtaza Fazal Ali, J: “what Articles 15(1) and 16(2) prohibit is that discrimination should not be made only and only on the ground of sex. These Articles of the Constitution do not prohibit the State from making discrimination on the ground of sex coupled with other considerations.”<sup>88</sup> This reasoning, often referred to as the ‘sex-plus’ argument, has been strongly criticised on the grounds that it ignores the text of Article 15 as well as the nature of intersectional discrimination.<sup>89</sup> Hence, in *Navtej Singh Johar*, Chandrachud J rightly found the ‘sex-plus’ argument to be erroneous.<sup>90</sup>

However, one of the criticisms of *Nergesh Meerza* also throws sharp light on the perils of ignoring conditions of entry into a group in an analysis of discrimination. As we have seen above, the Court in *Nergesh Meerza* held that the service conditions of Air Hostesses and Assistant Flight Pursers could not be compared, because they constituted separate classes which were governed by different rules. It also held that Article 15(1) could not apply, since the classification was on the basis of sex and employment cadre. In *Navtej Singh Johar*, Chandrachud J observed that one of the many flaws in the reasoning of *Nergesh Meerza* is that the judges failed to enquire as to whether the ‘initial classification’ itself was based on sex, as women could only become Air Hostesses and not Assistant Flight Pursers.<sup>91</sup> Disapproving of the reasoning in *Nergesh Meerza*, Chandrachud, J noted:

<sup>85</sup> *Nergesh Meerza* (n 83).

<sup>86</sup> *ibid* [60] (M Fazal Ali J).

<sup>87</sup> *ibid* [66]-[70].

<sup>88</sup> *ibid* [68].

<sup>89</sup> Shreya Atrey, ‘Through the Looking Glass of Intersectionality: Making Sense of Indian Discrimination Jurisprudence under Article 15’ (2016) 16 *The Equal Rights Review* 160, 171.

<sup>90</sup> *Navtej Singh Johar* (n 27) [431], [438]-[440] (DY Chandrachud J).

<sup>91</sup> *ibid* [435]-[436] (DY Chandrachud J).



The basis of the classification was that only men could become male Flight Pursers and only women could become Air Hostesses. The *very constitution of the cadre was based on sex*. What this meant was, that to pass the non-discrimination test found in Article 15, the State merely had to create two separate classes based on sex and constitute two separate cadres. That would not be discriminatory...The approach adopted [by] the Court in *Nergesh Meerza*, is incorrect.<sup>92</sup>

In other words, it is logically correct to claim that *within the classes* of Air Hostess and Assistant Flight Pursers, respectively, there was no discrimination on the grounds of sex, since all persons within the category of ‘Air Hostesses’ were being subjected to the same treatment (since, by default, they all were women). However, as correctly observed in *Navtej Singh Johar*, the *conditions of entry* into the class of Air Hostesses was itself discriminatory. This, in turn, coloured the entire class with the vice of discrimination even if there was no further discrimination after entry into the class in question. In essence, if the “very constitution” of a class itself is based on a prohibited ground (sex), Article 15(1) will apply to its conditions of entry even if there is no further discrimination within the class thus created. I term this the ‘conditions of entry principle’ (‘COE principle’). The COE principle states that *when a law prohibits discrimination on a certain ground within a group, then it also necessarily prohibits discrimination on the same ground in the determination of who can be a member of the group in question*. If discrimination on the grounds of sex is prohibited *within* the group of Air Hostesses, discrimination on the grounds of sex is also prohibited when determining *who can be* an Air Hostess. This makes sense - otherwise, as Chandrachud J observes above, Article 15 could be completely subverted through the back door by the creation of groups with different entry conditions based on the very grounds it prohibits, as is demonstrated in *Nergesh Meerza*.

It must be clarified here that even though Chandrachud, J strongly critiques *Nergesh Meerza*, terming it ‘patently incorrect,’<sup>93</sup> none of the other judgments in *Navtej Singh Johar* mention that case. It is hence unclear whether *Nergesh Meerza’s* interpretation of Article 15 has been formally overruled.<sup>94</sup> However,

<sup>92</sup> *ibid* [436], [438]-[440] (emphasis added).

<sup>93</sup> *ibid* [437].

<sup>94</sup> Shreya Arey and Gauri Pillai, ‘A feminist rewriting of *Air India v Nergesh Meerza* (1981) 4 SCC 335 : AIR 1981 SC 1829: proposal for a test of discrimination under Article 15(1)’ (2021) *Indian Law Review* 8. In addition, a subsequent case, *Ministry of Defence v Babita Puniya* (2020) 7 SCC 469, applies Article 15 to sex discrimination against women officers, even though their service conditions were different from male officers from the time of their recruitment. *Babita Puniya* also, hence, seemingly goes against the rationale of *Nergesh Meerza* to the extent that different service conditions between Air Hostesses and Assistant Flight Pursers were used in the latter to claim that Article 15 does not apply. However, *Babita*

this does not matter to my argument. First, it is questionable whether *Nergesh Meerza's* rationale would directly apply to laws regulating citizenship acquisition, which is the concern of this article. It is similarly not my claim that Chandrachud, J's observations in *Navtej Singh Johar* constitute binding precedent on this issue either. I, instead, use the observations in these judgments as stepping-stones through which I construct an argument for the application of Article 15 to the CAA, which goes beyond either judgment. Second, even if *Nergesh Meerza* does constitute binding precedent on the issue, my argument would then add to the many reasons we need a reconsideration of this case.<sup>95</sup> It is to this argument that I now turn.

## B. The New Citizenship Act – a Thought Experiment

Let us apply the principles discussed above to the CAA. The CAA, while not applying to current citizens, is a law which determines who eventually constitutes the *class* of citizens, since it regulates the conditions of entry for a person who seeks Indian citizenship. Extending the logic of Chandrachud, J in *Navtej Singh Johar*, I argue that to not extend the application of Article 15 to the CAA would be to repeat the mistakes of the court in *Nergesh Meerza*.

In order to paint a clearer picture, consider an example: imagine that Parliament passes a New Citizenship Act (the 'NCA'), which recognises all those who are currently Indian citizens as citizens under the NCA. However, the NCA has a provision which states that "only male children born after the commencement of the Act will be entitled to citizenship."<sup>96</sup> As a result, females or persons of other non-male genders born after the commencement of the NCA will not be granted citizenship. Now, I assume that most of us would intuitively find such a law to be abhorrent and violative of the prohibition of discrimination on the grounds of sex under Article 15, but it is important to interrogate the *reasons* why we would consider this law as unconscionable, and how it sheds light on the CAA.

It is also important to clarify here that another reason we would intuitively find the NCA to be problematic is because a person's sex has nothing to do with citizenship, and that therefore this law would breach the requirements of the reasonable classification and arbitrariness tests under Article 14. Though this is true, this does not detract from the *peculiar* problems with this law, which arise from the fact that sex has historically been an axis of

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*Puniya* does not discuss *Nergesh Meerza*, and is a smaller-bench decision, so cannot overrule it. See *Ministry of Defence v Babita Puniya* (2020) 7 SCC 469 [67] (DY Chandrachud J).

<sup>95</sup> Atrey (n 89); Atrey and Pillai (n 94).

<sup>96</sup> I use sex as the grounds for classification in the NCA, for ease of comprehension, since this was the grounds of classification in *Nergesh Meerza*. However, any of the grounds in Article 15(1) could easily be substituted for sex in this example.

discrimination and stereotypes, and that sex continues to be a marker of disadvantage.<sup>97</sup> Stereotypical justifications on the grounds of sex have also historically been used to deny women equal citizenship rights, and the low standard of scrutiny of traditional classification tests has helped such justifications escape deeper scrutiny.<sup>98</sup> It is precisely because of this that classifications based on prohibited grounds such as sex should be subject to higher scrutiny through provisions such as Article 15(1). On the contrary, we can easily imagine other unreasonable citizenship laws which would not evoke similar concerns – such as a law which, for instance, deprives citizenship to persons who leave the territory of India for more than a month. This law too might be unreasonable, but ‘persons who leave India for more than a month’ does not define a group which is subject to pervasive disadvantage in general. Such a law would hence not evoke the *peculiar* concerns of stereotyping, disadvantage and historical discrimination, which should make laws like the NCA subject to higher scrutiny under Article 15(1). For citizenship laws in particular, this concern is heightened due to the dangers of Article 15(1) being rendered redundant otherwise, as will be demonstrated below.

In defence of the hypothetical NCA above, it might be argued that this is not a law which discriminates against *citizens* on the grounds of sex as is prohibited under Article 15 of the Constitution, as the persons it covers i.e. children who have not yet been born, are clearly not citizens. This law, much like the CAA, deals with persons who are not yet citizens, and more importantly, with the qualifications through which citizenship can be gained. Does this mean that this law will not be subject to the scrutiny of Article 15? Surely not - as the implementation of such a law, over time, would lead to a situation where only males are citizens, rendering nugatory the entire purpose of the prohibition of discrimination on the grounds of sex in Article 15(1). In purely formal terms, of course, this law does not discriminate between persons *who currently are citizens* on the grounds of sex. In fact, adopting such a line of reasoning will eventually lead to a situation where discrimination on the grounds of sex between citizens will become a logical impossibility (since there will be no non-male citizens left after all those in the current generation pass away). But such an interpretation can clearly reduce the guarantee of Article 15(1) to a hollow shell.

Much like the established legal doctrine, when it comes to Fundamental Rights, “the State cannot do indirectly what it cannot do directly.”<sup>99</sup> If dis-

<sup>97</sup> *NALSA* (n 26); *Navtej Singh Johar* (n 27) [438]-[440], [450], [452] (DY Chandrachud J), [638.1] (Indu Malhotra J).

<sup>98</sup> *Sowmithri Vishnu* (n 48) [7]-[9] (YV Chandrachud CJ). Similar issues with the traditional reasonable classification test led to the adoption of higher scrutiny for classifications based on certain grounds such as race and gender by the US Supreme Court. See (n 30).

<sup>99</sup> *Kerala Education Bill, 1957*, *In re AIR 1958 SC 956* : (1959) 1 SCR 995 [31] (SR Das CJ); *The Ahmedabad St Xavier's College Society v State of Gujarat* (1974) 1 SCC 717 [29] (AN

crimination based on a prohibited ground is impermissible, then it remains impermissible even if it is accomplished through two steps instead of one, as Chandrachud J observed above. As in *Nergesh Meerza*, it would be a grave mistake to focus solely on discrimination *within* a class or category of persons without looking at the *conditions of entry* which constitute the class itself. In other words, in *Nergesh Meerza*, the class of ‘Air Hostesses’ was constituted on the basis of sex, which made focusing on discrimination *within* that class illogical, when the focus ought to have been on the *conditions of entry* to the class of Air Hostesses itself. Similarly, in the NCA, the class of ‘citizen’ is constituted on the basis of sex. To then focus only on discrimination *within* the class of ‘citizen’, ignoring the *conditions of entry* to the class, would be to repeat the error of *Nergesh Meerza*, and render Article 15(1) nugatory. Therefore, citizenship laws such as the NCA (and CAA), which define the constitution, and very identity, of the class of citizens cannot escape the rigour of Article 15.

As applied to Article 15(1) and the NCA (or CAA), therefore, the COE principle runs thus: since Article 15(1) prohibits discrimination on the grounds of religion, race, caste, sex or place of birth *within* the class of citizens, it also necessarily prohibits discrimination on these grounds in the determination of *who can be a citizen*. Since laws like the NCA and CAA discriminate on prohibited grounds (sex and religion, respectively) in determining who can be a citizen, they must be subject to the scrutiny of Article 15(1).

As can be seen above, my argument is premised upon an interpretation of Article 15 which looks towards its purpose, effects and position within the Constitution. This can be contrasted with a formalistic interpretation, which would interpret the terms of Article 15 in isolation, devoid of its context and logical implications. It is important to mention here that such a purposive interpretation, moving away from formalistic understandings of equality guarantees in the Constitution, is nothing radical, and has instead been the dominant trend in SCI jurisprudence for the past few decades. Doubts about a formalistic adherence to the reasonable classification test were expressed very early on by Vivian Bose J in *Anwar Ali Sarkar*.<sup>100</sup> *Maneka Gandhi* cemented

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Ray CJ).

<sup>100</sup> “It is ... impossible to apply rules of abstract equality to conditions which predicate inequality from the start; and yet the words have meaning though in my judgment their true content is not to be gathered by simply taking the words in one hand and a dictionary in the other, for the provisions of the Constitution are not mathematical formulae which have their essence in mere form. They constitute a frame-work of government written for men of fundamentally differing opinions and written as much for the future as the present. They are not just pages from a text book but form the means of ordering the life of a progressive people. There is consequently grave danger in endeavoring to confine them in watertight compartments made up of ready-made generalisations like classification. I have no doubt those tests serve as a rough and ready guide in some cases but they are not the only tests, nor are they the true tests on a final analysis.” *Anwar Ali Sarkar* (n 20) [83] (Vivian Bose J).

this approach with its observations that equality cannot “be subjected to a narrow, pedantic or lexicographic approach,” and that no attempt should be made to truncate the “all-embracing scope” of this foundational pillar of the Constitution.<sup>101</sup> Chandrachud J’s observations in *Navtej Singh Johar* about the relevance of entry conditions to Article 15, which I draw from, fall within this larger trend. His judgment, in fact, specifically observes that a “formalistic interpretation of Article 15 would render the constitutional guarantee against discrimination meaningless.”<sup>102</sup> This buttresses my argument that it would be a serious mistake to not apply Article 15(1) to laws defining the conditions of entry to citizenship such as the CAA. Ignoring laws defining such conditions of entry could subvert the entire purpose of Article 15(1) and render it meaningless – an interpretation which furthers this should hence be avoided. However, this does not mean that the interpretation I advocate is not textually supported. In the next Part, I will, *inter alia*, demonstrate how my claim is also supported by the text of Article 15(1). There are, in fact, several further reasons to prefer my interpretation of Article 15(1).

#### IV. ADDRESSING POSSIBLE OBJECTIONS TO MY ARTICLE 15 CLAIM

In the previous Part, I have claimed, through an analysis of SCI jurisprudence and a thought experiment with the NCA, that it would be a grave error to not extend the application of Article 15(1) to the CAA. In this Part, I address certain arguments and objections which might be made against my claim. I, first, draw out the distinction between the *grounds* and the *subject* of discrimination in Article 15(1) to defend my analogy between the CAA and NCA. I then address other arguments such as Ahmed’s ‘anti-subordination’ argument and the question of numbers, and defend my claim as textually supported by Article 15(1).

##### A. The Difference between *Grounds* of Discrimination and the *Subject* of Discrimination

I now move to objections which may be made to my claim that the thought experiment’s hypothetical NCA is similar to the CAA in its effect on Article 15. It might be argued to the contrary that the distinction between the NCA and the CAA is that in the NCA, the children in question will be born to parents who are currently citizens of the country, and thereby discriminates against *them*. In other words, since the parents are *current* citizens, any discrimination on prohibited grounds which affects their children is also

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<sup>101</sup> *Maneka Gandhi v Union of India* (1978) 1 SCC 248 [7] (PN Bhagwati J).

<sup>102</sup> *Navtej Singh Johar* (n 27) [431] (DY Chandrachud J).

discrimination against the parents of those children. Therefore, the argument goes, Article 15(1) would apply to the NCA, but not the CAA.

In this regard, it is critical to note that the discrimination in question, while being on the grounds of sex (a prohibited ground), is not *on the grounds of the sex of the parents* i.e. those who are currently citizens. A single father (a citizen) of a girl child born after the commencement of the NCA (not a citizen) is not discriminated against because of *his* sex. Therefore, it could be countered, that this again is not discrimination between citizens on the grounds of *their* sex. It is pertinent to underline that this is not a trivial distinction, and is precisely the distinction advanced by those who support the idea that Article 15 does not apply to the CAA. They do not claim that the CAA does not classify on the grounds of religion (which it obviously does), but rather that it does not classify on the grounds of the religion of *those who are currently citizens*. Therefore, they argue that even though the CAA discriminates against Muslims, that does not matter, since *current* Muslim citizens are not affected by it. In other words, their argument is that Article 15 has two conditions: (a) that the discrimination be on the prohibited *grounds* specified, **and** (b) that the *subject* of the discrimination be someone who is *currently* a citizen, and not someone who potentially can be.

My NCA example brings out clearly the flaws of this reasoning advanced commonly in defence of the CAA. Even though, formally, the NCA (much like the CAA) (a) does not discriminate between those who are *currently* citizens on the grounds of sex, and (b) only discriminates between those who can *potentially* be citizens, its effects could be devastating and undermine the very purpose of Article 15, as I have demonstrated above.<sup>103</sup> A purely formal construction of Article 15 would lead to absurd results. Entry conditions are hence clearly relevant to the prohibition of discrimination guarantee in Article 15.

## **B. The Question of Numbers and Textual Justification**

Let us continue with the NCA example.

Of course, supporters of the CAA may argue that it only deals with a minor number of persons, and does not substantially change the nature of the polity the same way as my NCA example does i.e. there will continue to be many Muslim citizens in India after the CAA. But any such assertion ignores the fundamental premise of my argument - that Article 15 is relevant to *any* law which determines who is to be a citizen. We can tweak the example of my NCA so that it now states that while all males born after its commencement will be citizens, only one in two non-male persons born after its

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<sup>103</sup> See Part III(B) of this article.

commencement will be citizens. This new version of the NCA ('NCA 2.0') clearly also suffers from the same flaws as the first NCA. It cannot be claimed that just because now there will be *some* women and other non-male citizens in the polity, NCA 2.0 need not meet the requirements of Article 15. The nature of the group composed of citizens will still be disproportionately men *due to the conditions* in the new NCA. The benefits and burdens of citizenship would hence be disproportionately shared by men, and not identifying this as discrimination under Article 15 will suffer from the same flaws as in my discussion above. This applies irrespective of the size of the fraction (one-half, one-fourths etc) we are to apply to the determination of which non-male person can be a citizen.

It is also not my claim that Article 15 requires an equal number of all groups of persons within the citizenry i.e. that there should be an equal number of men and women, or Hindus and Muslims etc. Article 15 only operates to raise the burden of proof on the state to justify a classification on the prohibited grounds; it does not completely prohibit it.<sup>104</sup> If citizenship is defined, for instance, by birth within a given territory, there will naturally be variations and some groups will be numerically more dominant than others. Even if Article 15's prohibition of religious discrimination was to apply to such a case of indirect discrimination, it would be possible for the state to meet its justificatory burden for such a law, for reasons I mention in the following paragraph.<sup>105</sup> The CAA, on the other hand, directly discriminates on religious grounds, and it is questionable whether the state can justify the classifications it makes.<sup>106</sup>

In a similar vein, it might be argued that, if Article 15(1) were to apply to citizenship laws, it would lead to the invalidity of provisions defining citizenship by birth in India. This is because Article 15(1) prohibits discrimination on the grounds of place of birth as well.<sup>107</sup> However, this does not necessarily follow since, as mentioned above, Article 15(1) only operates to raise the justificatory burden upon the state in defending laws classifying on prohibited grounds. Citizenship defined by birth within India would meet this higher justificatory burden, *inter alia*, due to the territorial nature of sovereign power, administrative convenience, and the fact that most people born within Indian territory live their lives within and contribute to the country's civic, political,

<sup>104</sup> See Part II of this article.

<sup>105</sup> It is also questionable whether *indirect* discrimination would be subject to the same scrutiny as direct discrimination under Article 15 specifically. Even otherwise, indirect discrimination is also generally subjected to lower scrutiny compared to direct discrimination. See Gandhi (n 34) 25, 26.

<sup>106</sup> As mentioned in Part II of this article, I will not be examining whether the CAA meets this justificatory burden, and am limiting myself to the question of the applicability of Article 15 to the CAA.

<sup>107</sup> Constitution of India 1950, art 15(1).

economic and social life.<sup>108</sup> These reasons would also justify the indirectly unequal impact that citizenship by birth would have on the distribution of various religious groups in the country, discussed in the previous paragraph. To reiterate, it is, however, doubtful whether the CAA or NCA would be able to meet similar justificatory burdens.<sup>109</sup>

Importantly, the COE principle does not reduce the word ‘citizen’ in Article 15 to a nullity. There is little doubt that the use of the word ‘citizen’ in Article 15, as opposed to ‘person’ in some other fundamental rights, is relevant.<sup>110</sup> Therefore, my argument only applies to a law *which lays down the conditions for citizenship and thereby affects the composition of the citizenry* as a consequence. A law which, for example, classifies non-citizens on the prohibited grounds mentioned in Article 15 for some other purpose, *while keeping intact their status as non-citizens*, would not be affected by my argument. For instance, a law which grants humanitarian aid to illegal migrants from certain religious communities, while keeping intact their status as non-citizens, would not be subject to Article 15, even though it classifies on the prohibited ground of religion. This does not, of course, mean that such a law will necessarily be valid (or less morally worrisome). There might be other constitutional principles at play - such as Article 14, Article 25(1)<sup>111</sup> and the general principle of secularism<sup>112</sup> - under which such a law could be invalid, but that is outside the scope of this piece. The COE principle hence conforms with judgments holding that Article 15(1) would not apply to non-citizens in such situations (when conditions of entry to citizenship are not involved).<sup>113</sup> Therefore, the only expansion in the ambit of Article 15(1) as a result of my argument would be to include laws which govern conditions of entry into the citizenry within its scope. It does not affect laws dealing with non-citizens while keeping intact

<sup>108</sup> This, of course, is why citizenship by birth, or *jus soli*, was one of the dominant modes of citizenship acquisition at the time of the commencement of the Constitution. See Vallabh Patel, *Constituent Assembly Debates* (29 April 1947) <<http://loksabhaph.nic.in/writereaddata/cadebatefiles/C29041947.pdf>> accessed 31 July 2021; Alladi Krishnaswami Ayyar, *Constituent Assembly Debates* (12 August 1949) <<http://loksabhaph.nic.in/writereaddata/cadebatefiles/C12081949.pdf>> accessed 31 July 2021; Jayal (n 1) 57.

<sup>109</sup> As mentioned in the text accompanying (n 80-82) above, I will not be dealing with this question in this article.

<sup>110</sup> Fundamental rights which are available to all persons, and not just citizens, include Article 14 (equality before law), Article 20 (protection in respect of conviction for offences), Article 21 (protection of life and personal liberty), Article 22 (protection against arrest and detention in certain cases), Articles 25-28 (freedom of religion) and Article 32 (constitutional remedies). Constitution of India 1950, arts 14, 20, 21, 22, 25-28, 32.

<sup>111</sup> Art 25(1): “(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.” Constitution of India 1950, art 25(1).

<sup>112</sup> Vergheese and Narasappa (n 1) 175.

<sup>113</sup> *Railway Board v Chandrima Das* (2000) 2 SCC 465 [28] (Saghir Ahmad J); *Stelmakh Leonid Iuliia v Secretary to the Ministry of External Affairs* 2010 SCC OnLine Bom 1791 [8] (PB Majmudar J). It bears mentioning that there are no judgments which hold that Article 15(1) is inapplicable to laws regulating conditions of entry to citizenship.



their status as such. My argument is hence also in conformance with the text of Article 15, and does not render irrelevant the use of the term ‘citizen’ within it.<sup>114</sup>

In addition, several hypothetical examples can easily be constructed to further demonstrate my argument, and the NCA is just one instance. It is easy to imagine a law which specifically grants citizenship only to persons of white colour who immigrate, or to imagine also if the Citizenship Act, when it was passed in 1955, recognised only upper caste men as citizens. The underlying problem with such hypothetical laws is however the same as that of the NCA, which implies that conditions of entry matter to Article 15.

### C. The Anti-subordination Principle and the Question of Identity

Citizenship is critical due to its effects on the standing of individuals across multiple dimensions. In Arendt’s words, citizenship is the very “right to have rights” and involves “something much more fundamental than freedom and justice.”<sup>115</sup> It must be remembered that citizenship is not just a matter of the legal status of a person within a polity, but also their political, social and civic status. Marshall highlighted three distinct facets of citizenship – the civil, political and social.<sup>116</sup> The civil element consists in possessing various rights to freedom. In India, for instance, several Fundamental Rights in Part III, such as the right to free speech, are conditional upon citizenship.<sup>117</sup> The political element encompasses the right to participate and exercise political power. Rights

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<sup>114</sup> My argument is also supported by the debates in the Constituent Assembly on the criteria of citizenship. As Bhatia argues, underlying the citizenship provisions in the Constitution was a strong normative commitment to the principles of non-discrimination, inter alia, on the grounds of religion. He uses this to argue that conditions of entry such as citizenship laws should not defeat this founding identity of the Constitution. Gautam Bhatia, ‘Citizenship and the Constitution’ (2020) 12, 13 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3565551](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3565551)> accessed 12 March 2021. However, for a contrary view, see Abhinav Chandrachud (n 61) 144. Even if the citizenship provisions at the commencement of the Constitution were indirectly discriminatory against Muslims, this does not lend justification to the CAA, which is *directly* discriminatory. Direct discrimination is generally subjected to higher scrutiny than indirect discrimination (see Gandhi (n 34) 25). In addition, it might possibly be argued that the grave situation at the time of Partition might have justified the citizenship provisions then adopted, and that it would thereby meet the requirements of the higher scrutiny under Article 15(1) anyway, unlike the CAA (see Abhinav Chandrachud (n 61) 153). However, these arguments are outside the scope of this piece.

<sup>115</sup> “[Non-citizens] are deprived, not of the right to freedom, but of the right to action; not of the right to think whatever they please, but of the right to opinion. Privileges in some cases, injustices in most, blessings and doom are meted out to them according to accident and without any relation whatsoever to what they do, did, or may do.” Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Brace 1973) 296.

<sup>116</sup> TH Marshall, *Citizenship and Social Class* (Pluto Press 1950) 8 as cited in Jayal (n 1) 5.

<sup>117</sup> Constitution of India 1950, art 19(1)(a).

such as the right to vote<sup>118</sup> and stand for elections<sup>119</sup> are confined to citizens in India. The social aspect consists not only in the right to share in the economic resources of the country,<sup>120</sup> but also the social heritage and life of the community. Citizenship also conveys “a sense of *identity* and belonging.”<sup>121</sup> It is therefore not just a matter of the legal relationship between the state and the citizen, but also between citizens inter se.

It is in this context that we can analyse another significant manner in which Article 15(1) is applicable to the NCA (and CAA). The NCA also attracts Article 15 because it *does* in fact affect *current* citizens who are women (and those of other non-male genders). Even though their citizenship continues to be recognised, the NCA would send a message to non-male citizens that persons who share their gender are not equally worthy of citizenship as men. The law signals that a fundamental part of the identity of women (and other non-male genders) is not equally worthy of recognition in the future generation. This precisely is the ‘anti-subordination’ argument proposed by Ahmed, who argues that Article 15 would accordingly apply to laws like the CAA, which determine conditions of entry into the polity.<sup>122</sup> She argues that it is important to account for the expressive impacts of laws upon a person’s social and civic status. “Jim Crow” laws not only legally segregated black and white people in the US, but also conveyed a message about the status of black people in the country.<sup>123</sup> Similarly, the CAA, by unreasonably excluding Muslims from its ambit while including all other major religious groups in the country, is a “subordinating speech act” which conveys their marginal status as citizens in the country.<sup>124</sup>

I agree with Ahmed’s argument – there is little doubt that the law can express, and affect, the social standing of the persons it governs.<sup>125</sup> In a similar vein, Section 377 of the IPC, which criminalised consensual non-heterosexual sexual intercourse, was not just about criminalising the *act* of engaging in non-heterosexual intercourse. The SCI in *Koushal* had infamously held that Section 377 was constitutionally valid partly because it only criminalises acts

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<sup>118</sup> *ibid* art 326.

<sup>119</sup> *ibid* arts 84, 173.

<sup>120</sup> Some Directive Principles of State Policy in Part IV of the Constitution, such as the duty of the state to provide an adequate means of livelihood, are aimed towards citizens. *See* Constitution of India 1950, art 39(1)(a).

<sup>121</sup> Jayal (n 1) 2.

<sup>122</sup> Ahmed (n 77) 134.

<sup>123</sup> *ibid*.

<sup>124</sup> *ibid* 136.

<sup>125</sup> John Sebastian, ‘The opposite of unnatural intercourse: understanding Section 377 through Section 375’ (2017) 1(3) *Indian Law Review* 232, 246. *See also* Ahmed (n 77) 134, citing Deborah Hellman, ‘Discrimination and Social Meaning’ in Kasper Lippert-Rasmussen (ed), *The Routledge Handbook of the Ethics of Discrimination* (Routledge 2017) 103, 104.

and not a person's identity.<sup>126</sup> This view was unanimously overruled in *Navtej Singh Johar*, with all the judges in five-judge bench emphasising the invalidity of Section 377 due to its impacts on criminalising not just acts, but the *identity* and dignity of the persons it affects.<sup>127</sup> The expressive impact of laws in lowering a person's social status has hence been explicitly acknowledged by the SCI. Much like Section 377 and the CAA, the NCA too would convey a demeaning message to current citizens. To non-male citizens of the country, it would convey the message that the paradigm, central or preferred case of a citizen is a male person. It thereby affects the status of *current* non-male citizens, and attracts Article 15(1).

The argument I make in this article through the example of the NCA claims, in *addition* to Ahmed's argument, that the violation of Article 15 stems not just from its impact on *current* citizens but also from its ability to change the nature and identity of the body politic itself, by altering its conditions of entry. Citizenship laws such as the NCA (and CAA) determine the identity of a polity, by determining the identity of the people it comprises of.<sup>128</sup> As I have demonstrated above,<sup>129</sup> Article 15(1) should not be rendered otiose through laws which define conditions of entry and thereby affect the composition of the citizenry itself. Article 15(1), in this context, remains an important safeguard of the plural, diverse and secular identity of our Constitution and people, and is directly relevant in any debate on citizenship laws.

## V. CONCLUSION

We need to think more seriously about Article 15 and the CAA. That the CAA applies to those who are not *currently* citizens of India is not a sufficient reason to deny the application of Article 15 to it. On the contrary, since the CAA specifies conditions of entry into the community of citizens on the prohibited ground of religion, it must be subjected to Article 15. *Navtej Singh Johar* and the flaws in *Nergesh Meerza* show us that conditions of entry cannot be ignored in an Article 15 analysis. The COE principle, the hypothetical NCA, and the various other arguments I consider further emphasise the dangers of not applying Article 15 to laws defining citizenship such as the CAA.

The application of Article 15 to the CAA will help us subject that law to the rigorous scrutiny it deserves. In addition, it allows us to consider the impact of other arguments such as the 'anti-stereotyping principle', stemming

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<sup>126</sup> *Suresh Kumar Koushal v Naz Foundation* (2014) 1 SCC 1 [60] (GS Singhvi J).

<sup>127</sup> *Navtej Singh Johar* (n 27) [121], [155] (Misra CJ), [369] (Nariman J), [377], [465], [469] (DY Chandrachud J), [640.2.4] (Malhotra J).

<sup>128</sup> Verghese and Narasappa (n 1) 158.

<sup>129</sup> See Part III(B) of this article.

from Article 15 jurisprudence, on the CAA. It is hence crucial that we include Article 15 to a greater extent in the wide-ranging debate around the constitutional validity of the CAA. There is, indeed, much that we can draw from this non-discrimination guarantee in the Constitution.

Fundamentally, citizenship does not only confer legal status and identity, but is also a bundle of many rights including the rights to share in the common resources of a community.<sup>130</sup> If laws based on the grounds prohibited in Article 15 can alter *who* can share these resources and exercise these rights, without being subjected to its heightened scrutiny, it would deprive that great anti-discrimination safeguard of much of its force. Much like Article 14 has been liberated of the constraints of the formalistic reasonable classification test in recent case law,<sup>131</sup> it is time for us to liberate Article 15 from formalistic arguments which take away from its essence as a safeguard, for both those who are citizens as well as the many who will become citizens in the future.

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<sup>130</sup> Jayal (n 1) 2.

<sup>131</sup> Bhatia (n 75).