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CONTESTATIONS OVER INDIAN CITIZENSHIP: AN ANALYSIS OF THE CITIZENSHIP (AMENDMENT) BILL, 2016

—Leah Verghese* & Harish Narasappa**

Abstract This Article deconstructs the Citizenship (Amendment) Bill, 2016, through the constitutional lens of history, text, and practise. The Bill provides an accelerated pathway to citizenship to certain persecuted minorities of India’s neighbouring countries—but conspicuously, excludes Muslims. This raises the fundamental question: Does the Citizenship (Amendment) Bill, 2016, erroneously, conflates the idea of secular India, born in the aftermath of partition, with the *jus sanguinis* model of citizenship—by introducing religion to the citizenship regime? This Article answers it in the affirmative. It submits that the provisions of the Bill, granting citizenship to illegal migrants based on their religion, contravenes the idea of ‘secular citizenship’, encompassing immense cultural, religious and national diversity. Importantly, it argues that the Bill fails to pass the constitutional muster, because it violates equal protection of laws and the principle of secularism—which are the ‘basic features’ of the Constitution. In this connection, it submits that forging of any national identity by the State within the State apparatus must abide by the constitutional vision and principles, which our founding fathers intentionally designed, pertaining to citizenship—and which this Bill, fails to flagrantly consider.

Citizenship is a bundle of rights and obligations, which forms the basis for attaining a full membership, the terms of participation, the ownership and control of resources and a sense of belonging in the life of a State. Modern citizenship typically provides civil (freedom of speech, rule of law), political (right to vote and contest elections) and social (welfare) rights.¹ A necessary corol-

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¹ HANDBOOK OF CITIZENSHIP STUDIES (2002).

lary is that citizenship also defines the boundaries of exclusion. Citizenship is deeply embedded the identity of a State. The way a State defines citizenship is intimately linked to the kind of society and political community we want.² Citizenship is, in essence, the way nationhood is experienced in practice.³

In India, the issue of citizenship has been contested and challenged over several decades. Most recent of these contestations has been over the Citizenship (Amendment) Bill, 2016 ('the Bill'), which has been mired in controversy since it was first introduced in the Lok Sabha on July 19, 2016.⁴ The future of the Bill will shape the manner in which the identity of Indians are going to be determined. The Bill was hastily passed by the Lok Sabha on January 8, 2019, the last day of the Winter Session of Parliament amidst widespread protest against the Bill in parts of northeastern India.⁵ Since then, the Bill has lapsed since it was not passed in the Rajya Sabha in the Budget Session, and as there were no more sessions of the Parliament before the general elections were concluded.⁶

The Bill is an apparent fulfilment of Indian Prime Minister Narendra Modi's promise to accommodate Hindu migrants from Bangladesh into India in the run-up to the general elections in 2014.⁷ The Bill proposes to create a new naturalisation regime under the Citizenship Act, 1955, where Hindus, Sikhs, Buddhists, Jains, Parsis, and Christians from Afghanistan, Bangladesh, and Pakistan shall not be considered illegal migrants in India.⁸ The Bill also provides members of these communities an accelerated path to citizenship and reduces their residence requirement from 11 years to 6 years.⁹ The objective of these amendments is purported to be to provide asylum to members of certain persecuted minorities from India's neighbouring countries. Muslims have been conspicuously omitted from the list of communities in the Bill.

² *Democratic Citizenship and the Political Community*, in DIMENSIONS OF RADICAL DEMOCRACY: PLURALISM, CITIZENSHIP, COMMUNITY, 225-239 (C. Mouffe ed., 1992).

³ Ornit Shani, *Conceptions of Citizenship in India and the 'Muslim Question'*, 44(1) MODERN ASIAN STUDIES 148 (2010).

⁴ *What is Citizenship Amendment Bill? Why are people in Assam unhappy about it?*, INDIA TODAY (Oct. 25, 2016), <https://www.indiatoday.in/fyi/story/citizenship-amendment-bill-2016-assam-illegal-migrants-protests-348372-2016-10-25>.

⁵ *Citizenship Amendment Bill 2019 passed in Lok Sabha*, BUSINESS TODAY (Jan. 8, 2019, 00:00 IST), <https://www.businesstoday.in/current/economy-politics/citizenship-amendment-bill-2019-passed-in-lok-sabha/story/308057.html>; Furquan Ameen, *Why the Northeast is protesting against the Citizenship Act amendment*, THE TELEGRAPH (Feb. 13, 2019, 1:18 PM), <https://www.telegraphindia.com/india/why-the-northeast-is-protesting-against-the-citizenship-act-amendment/cid/1684432>.

⁶ *Citizenship Bill Lapses in Parliament, Here's What Happens Next*, THE WIRE (Feb. 13, 2019), <https://thewire.in/government/citizenship-bill-lapses-in-rajya-sabha-what-happens-next>.

⁷ *Hindu migrants from Bangladesh must be accommodated: Narendra Modi*, NDTV (Feb. 22, 2014, 18:48 IST), <https://www.ndtv.com/india-news/hindu-migrants-from-bangladesh-must-be-accommodated-narendra-modi-551611>.

⁸ Citizenship (Amendment) Act, 2016, Section 2.

⁹ Citizenship (Amendment) Act, 2016, Section 4.

The Bill has been criticised for linking citizenship with religion and violating the principles of secularism and equality. Residents of the northeastern states are opposed to the Bill because they are opposed to any category of immigrants being given citizenship, especially those covered by the Assam Accord. The State governments in Meghalaya and Mizoram have adopted Cabinet decisions opposing the Bill.¹⁰ The Asom Gana Parishad ('AGP') has walked out of the coalition government with the Bharatiya Janata Party in Assam. In response to the criticism of the Bill, it was referred to a Joint Parliamentary Committee which submitted its report to the Parliament on January 7, 2019, in which it recommended the introduction of the original legislation with a few minor changes.¹¹

This article analyses the Citizenship (Amendment) Bill, 2016, by situating it in the context of India's constitutional and political choices. Section I examines the idea of India that was born in 1947 in the aftermath of partition. Section II examines the history of the provisions in the Constitution relating to citizenship. Section III analyses the Bill on the touchstone of the Constitution.

I. THE IDEA OF INDIA

In the aftermath of independence and partition, the challenge before the founders of India was the forging of a common national identity in the face of unparalleled territorial, social, religious, and cultural diversity. The drafters of the Indian Constitution faced the daunting task of answering this challenge through the legal language of constitutional formulations. The core of this question was: what does it mean to be an Indian? Related to this was the question of how the Constitution would facilitate political unity based on shared commitments and values in a society characterised by immense cultural, religious, and national diversity.¹² The Constitution was seen as an instrument to create this new order through which

"Territorial allegiances were wiped out and the past was obliterated except where expressly preserved, at one moment of time the new order was born with its new allegiance springing from the same source for all, grounded on the same basis: the sovereign will of the peoples of India with no class, no caste, no race, no creed, no distinction, no reservation."¹³

¹⁰ Sushanta Talukdar, *Divisive legislation*, FRONTLINE, <https://frontline.thehindu.com/the-nation/article24321378.ece>.

¹¹ Shaswati Das, *Citizenship bill for all states, not just Assam: Rajnath Singh*, LIVEMINT (Jan. 10, 2019, 03:25 AM IST), <https://www.livemint.com/Politics/jw6TvekburADfrUcSOR0oO/Citizenship-Bill-valid-for-all-states-and-Union-territories.html>.

¹² Hanna Lerner, *The Indian Founding: A Comparative Perspective*, in OXFORD HANDBOOK TO THE INDIAN CONSTITUTION (2016).

¹³ *Virendra Singh v. State of U.P.*, AIR 1954 SC 447.

The Constituent Assembly debates reveal that despite the speeches and references to India's glorious past, the dominant theme was the need to build a new society on the ruins of the old. This metaphor of building, of creating something new, was echoed by Nehru in his famous speech on the night of August 14, 1947, when he said, "*we step out from the old to the new, when an age ends*" and when "*the future beckons to us*". The Constitution was intended to realize this new idea of India, and lead the country into the future while drawing a curtain on the past.¹⁴

The principle of secularism was key to the idea of a new India that pervaded these debates. This had its roots in the national movement. In the 1920s, Gandhi used the principle of *sarva dharma sambhava* (equality of all religions) to bind people who subscribed to different faiths together to weld them into a mass movement. This commitment was echoed in the Nehru Constitutional Draft of 1928, the Karachi Resolution of 1931, and later documents issued by the Indian National Congress.¹⁵ A shared history of struggle against British rule became central to this narrative of unity and a commitment to inclusive citizenship.¹⁶

The Constituent Assembly met amidst wide-scale rioting and violence between different religious communities, massacres, and looting of property. Despite this large scale violence along religious fault lines and the fact that the country had been partitioned in the name of religion, the makers of the Constitution stood firm in their commitment to secularism as the unstated but explicit principle underlying the Constitution.¹⁷

Within the Constituent Assembly, most members were determined to banish the spectre of legally recognised communal politics from the institutions of India. Communal electorates were abandoned after four decades of reservation of seats in legislatures and separate electorates for designated religious groups. The Constituent Assembly in fact was the last legislature in India to be chosen on the basis of communal electorates.¹⁸ Although the word secular was not in the original Preamble of the Constitution, the commitment to secularism and equality was evident in other provisions. In a departure from the western concept of secularism, the Constitution made some allowance for the role played

¹⁴ Uday Mehta, *Indian Constitutionalism: Crisis, Unity, and History*, in OXFORD HANDBOOK TO THE INDIAN CONSTITUTION (2016).

¹⁵ Neera Chandhoke, *Secularism*, in OXFORD COMPANION TO POLITICS IN INDIA, 340 (2010).

¹⁶ Rochana Bajpai, *Why Did India Choose Pluralism? Lessons from a Post-colonial State* (April 2017), https://www.pluralism.ca/wp-content/uploads/2017/12/India_EN.pdf.

¹⁷ Neera Chandhoke, *Secularism*, in OXFORD COMPANION TO POLITICS IN INDIA, 340 (2010).

¹⁸ James Chiriyankandath, '*Creating a secular state in a religious country*': *The debate in the Indian constituent assembly*, 38(2) COMMONWEALTH & COMPARATIVE POLITICS 3 (2000).

by religion in public life and gave statutory recognition to minorities while trying to foster a common civic identity.¹⁹

Jawaharlal Nehru, in a letter to the chief ministers in 1952, remarked that the word secular' meant more than the 'free play of religions'; it also conveyed 'the idea of social and political equality'. He stated that, "*we must always keep the ideal of the unity of India and of the political and social equality of her people, to whatever group, religion or province they might belong.*"²⁰

Significantly, the Indian constitutional settlement avoided the excessively modernist solutions tried by the Soviet Union or Ataturk's Turkey in which the secularism of the State pits it in a relation of constant hostility to popular religious practice. It admitted a more realistic, practical solution in which the state distanced itself from all religions, and simply committed to treating them with equal respect in this sense.²¹

At the heart of the project of the Indian republic was a commitment to the creation of a society whose citizens have a strong sense of national identity despite their differences; the protection of historically disadvantaged groups; and the peaceful co-existence of diverse groups within a democratic framework. The founding idea of India was a nation-state that is intrinsically diverse and plural and where no religion, language or ethnic identity is accorded primacy over another.²²

II. CONSTITUTIONAL HISTORY OF CITIZENSHIP

When India's Constituent Assembly began its deliberations in December 1946, there was no thought of a separate chapter on the topic of citizenship. On January 24, 1947, the Constituent Assembly set up an advisory committee on minorities and fundamental rights to examine the question under the chairmanship of Sardar Vallabhbhai Patel. On April 23, 1947, the committee presented its idea of Indian citizenship in the form of clause 3 which provided that "*every person born in the Union or naturalized according to its laws and subject to the jurisdiction thereof shall be a citizen of the Union.*" At this point, even though Partition was seen as a likely scenario, the members of the committee had not entertained the possibility of large-scale migration across the subcontinent.²³

¹⁹ James Chiriyankandath, 'Creating a secular state in a religious country': *The debate in the Indian constituent assembly*, 38(2) COMMONWEALTH & COMPARATIVE POLITICS 20 (2000).

²⁰ T.N. Madan, *The Distinctiveness of Indian Secularism*, in INDIAN POLITICAL THOUGHT: A READER (2010).

²¹ Sudipta Kaviraj, *Nationalism*, in OXFORD COMPANION TO POLITICS IN INDIA, 328 (2010).

²² Niraja Jayal, REPRESENTING INDIA: ETHNIC DIVERSITY AND THE GOVERNANCE OF PUBLIC INSTITUTIONS (2006).

²³ Joya Chatterji, *South Asian histories of citizenship, 1946-1970*, in THE HISTORICAL JOURNAL, 55, 4 (2012).

On August 17, 1947, violence on an unprecedented scale broke out in Punjab and spread to many parts of north India and western Pakistan. This was followed by the massive movement of population from one country to the other and (in some cases) back again to the first. Huge numbers abandoned their homes to cluster in localities on the same side of the border where their co-religionists tended to be concentrated, seeking safety in numbers. Many hoped to return home when ‘normality’ returned. But ‘normality’ never did return to the subcontinent. This large-scale violence, displacement, and homelessness made it impossible to discuss the contents of the Constitution including fundamental rights without some clarity about who would be the bearers of rights in the new Republic.²⁴

The Constituent Assembly had to now draw the contours of a more nuanced citizenship regime keeping in mind the migration that Partition occasioned. In 1949, the issue was vigorously debated in the Assembly. The debate primarily centered on whether the basis of Indian citizenship was to be *jus soli*, i.e., based on a person’s birth on the soil of the country, or *jus sanguinis*, i.e., based on a person’s descent, or the citizenship of their parents.²⁵ *Jus soli* is the dominant form of acquiring citizenship in the United States, Canada, and several Latin American countries. *Jus sanguinis* exists in varying degrees in Germany, the United Kingdom, France, and the Netherlands, and is historically a European tradition.²⁶ In former British colonies like Africa, there was a tilt in favour of the *jus sanguinis* system.²⁷

There were attempts to introduce a religious element into the citizenship regime. Constituent Assembly member P.S. Deshmukh, who became the Agriculture Minister in Nehru’s first cabinet, suggested an amendment which would grant Indian citizenship to Sikhs and Hindus from around the world. Alladi Krishnaswamy Iyer, another member of the Assembly while arguing against this amendment said, “*We cannot on any racial or religious or other grounds make a distinction between one kind of persons and another, or one sect of persons and another sect of persons, having regard to our commitments and the formulation of our policy on various occasions.*”²⁸ The framers of India’s constitution broadly chose the *jus soli* concept as a form of “*enlightened, modern, civilized*” and democratic citizenship, as opposed to *jus sanguinis*, which they described as “*an idea of racial citizenship.*” This

²⁴ Niraja Jayal, *Citizenship*, in OXFORD HANDBOOK OF THE INDIAN CONSTITUTION (2016).

²⁵ Niraja Jayal, *The 2016 Citizenship Amendment Bill consolidates a trend towards a majoritarian and exclusionary concept of Indian citizenship*, THE CARAVAN (Feb. 20, 2017), <https://caravanmagazine.in/vantage/2016-citizenship-amendment-bill-majoritarian-exclusionary>.

²⁶ Amitai Etzioni, *Citizenship Tests: A Comparative, Communitarian Perspective*, 78(3) THE POLITICAL QUARTERLY 353 (2007).

²⁷ As of the end of 2012, only Lesotho and Tanzania among the Commonwealth countries of Africa still retained *jus soli* citizenship; Brownen Manby, *Trends in Citizenship in Africa*, in ROUTLEDGE HANDBOOK OF GLOBAL CITIZENSHIP STUDIES (Engin F. Isin, Peter Nyers eds., 2014)

²⁸ *Constituent Assembly Debates On 12 August, 1949 Part I*, INDIAN KANOON, <https://indiankanoon.org/doc/215406/>.

decision was in keeping with the inclusive character of the Constitution reflecting the intention of the framers to move towards a modernist understanding of citizenship.²⁹

Despite the complex debates on the subject of citizenship, the Indian Constitution in its final form did not elaborate on the subject. Part II of the Constitution provided for rules for determining citizenship at the time of Independence but left it to Parliament to elucidate the finer contours of citizenship. Article 5 of the Constitution provides the broad contours of the Indian citizenship:

“At the commencement of this Constitution every person who has his domicile in the territory of India and (a) who was born in the territory of India; or

(b) either of whose parents was born in the territory of India; or

(c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement.”

Article 6 which is as follows dealt with people who migrated to Pakistan:

“Notwithstanding anything in Article 5, a person who has migrated to the territory of India from the territory now included in Pakistan shall be deemed to be a citizen of India at the commencement of this Constitution if

(a) he or either of his parents or any of his grandparents 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

²⁹ Niraja Jayal, *The 2016 Citizenship Amendment Bill consolidates a trend towards a majoritarian and exclusionary concept of Indian citizenship*, THE CARAVAN (Feb. 20, 2017), <https://caravanmagazine.in/vantage/2016-citizenship-amendment-bill-majoritarian-exclusionary>; Ashesh, Ashna, and Arun K. Thiruvengadam, Report on Citizenship Law: India (2017), https://cadmus.eui.eu/bitstream/handle/1814/47124/GLOBALCIT_CR_2017_12.pdf?sequence=1&isAllowed=y.

made by him therefor to such officer before the commencement of this Constitution in the form and manner prescribed by that Government:

Provided that no person shall be so registered unless he has been resident in the territory of India for at least six months immediately preceding the date of his application.”

Article 7 dealt with people who migrated to Pakistan and wanted to return:

“Notwithstanding anything in articles 5 and 6, a person who has after the first day of March, 1947, migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India:

Provided that nothing in this article shall apply to a person who, after having so migrated to the territory now included in Pakistan, has returned to the territory of India under a permit for resettlement or permanent return issued by or under the authority of any law and every such person shall for the purposes of clause (b) of article 6 be deemed to have migrated to the territory of India after the nineteenth day of July, 1948.”

Article 7 is a departure from the otherwise secularising impulse of modernity in codifying the principle of *jus soli* as the governing principle of citizenship.³⁰ Although Article 7 has not mentioned Muslims, a quick reading of the debates in the Constituent Assembly make it clear that it was intended to cover returning Muslims who had migrated to Pakistan.³¹

A. Citizenship Act

A legislation for providing the finer details of citizenship was passed by the Indian Parliament in 1955. Then Home Minister Govind Ballabh Pant while introducing the Bill in Parliament described the spirit behind the Bill as follows:

“We have adopted a liberal attitude in framing this law. In some countries, no person whose father is not himself a citizen of the country, even if born in that country, can acquire that right. In some others, dual citizenship is not allowed in any shape or form. We have tried to frame a law which,

³⁰ Ashesh, Ashna, and Arun K. Thiruvengadam, Report on Citizenship Law: India, 11 (2017), https://cadmus.eui.eu/bitstream/handle/1814/47124/GLOBALCIT_CR_2017_12.pdf?sequence=1&isAllowed=y.

³¹ Niraja Jayal, *Citizenship*, in OXFORD HANDBOOK OF THE INDIAN CONSTITUTION (2016).

while fully serving the needs of our country and ensuring the status of dignity which Indian citizenship will carry with it will also give opportunity to others by registration and naturalisation to acquire these rights. But all these can be done only with the approval of the State, so far as registration and naturalisation are concerned.”³²

The Citizenship Act, 1955, elaborated on the Constitutional provisions on citizenship. Section 3 provided that, “*every person born in India on or after 26 January 1950 shall be a citizen of India by birth.*” After 1986, an additional condition was added, namely that at least one parent had to be a citizen of India at the time of the child’s birth for the child to be an Indian citizen.³³ In 2003, the conditions for Indian citizenship were made stricter. For a person to be a citizen of India, they had to be born in India and both of their parents had to be citizens of India; or one of their parents had to be a citizen of India and the other could not be an illegal migrant at the time of their birth.³⁴ This amendment was intended to make acquisition of Indian citizenship by registration and naturalisation more stringent and to prevent illegal migrants from becoming eligible for Indian citizenship.³⁵

The citizenship regime was significantly influenced by the large-scale migration from Bangladesh to India occasioned by the 1971 Bangladeshi war of independence. This influx of refugees created a wave of resentment in Assam which led to the Assam Agitation. Between 1979 and 1985, Assam witnessed a mass movement led by the All Assam Students Union and the Assam Gana Sangram Parishad demanding the detection and eviction of Bangladeshis from the state.³⁶ The leaders of the agitation demanded the expulsion of Bangladeshi immigrants relying on census data and electoral rolls that showed significantly higher rates of growth of population and of voters in Assam compared to that in the rest of India. Several rounds of negotiations between the government of India and the movement leaders led to the Assam Accord in 1985.³⁷

³² Speech in Lok Sabha, August 5 and August 9, 1955, Lok Sabha Debates, Vol. 5. Cols 9461-7; Selected Works Of Govind Ballabh Pant, Vol.16, 9732-9748, https://archive.org/stream/in.ernet.dli.2015.136318/2015.136318.Selected-Works-Of-Govind-Ballabh-Pant-Vol16_djvu.txt.

³³ Citizenship (Amendment) Act, 1986.

³⁴ “Illegal migrant,” according to s 2(b) of the Citizenship Act is a foreigner ‘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’.

³⁵ Statement of Objects and Reasons of The Citizenship (Amendment) Bill, 2003.

³⁶ Sudhir Jacob George, *The Bodo Movement in Assam: Unrest to Accord*, 34(10) ASIAN SURVEY 878, 880 (1994).

³⁷ Sanjib Baruah, *Ethnic Conflict, and Political Turmoil-Assam, 1979-1985*, 26(11) ASIAN SURVEY 1184, 1184 (1986).

Since the Assam Accord of 1985, the citizenship regime has been undergoing a subtle shift from *jus soli* to incorporating various elements of a *jus sanguinis* model of citizenship, with the insertion of notions of descent, common religious identity, and common ‘national’ values into the discourse of citizenship.³⁸

The Accord provided for a wall between India and Bangladesh and the detection and expulsion of foreigners who entered Assam after 1971. In 1985, Section 6A which was added to the Citizenship Act and made applicable only to Assam, provided that:

- Those who came into the state before 1966 were to be considered as Indian citizens;
- Those who came into the state between 1966 and March 25, 1971 were to be taken off the electoral rolls, and regularised after ten years; and
- Those who came into the state on or after March 25, 1971 were to be ‘detected’ and expelled in accordance with law.

In 2004, the term “illegal migrant”, defined as someone who enters or stays in India without legal authorization, was introduced into the Act. After this amendment, any child born after 2004 to even one parent who is an illegal migrant would be disqualified from citizenship by birth. The Statement of Objects and Reasons to the Citizenship (Amendment) Bill, 2003, which contained this provision stated that one of the objects of the amendment was to “prevent illegal migrants from becoming eligible for Indian citizenship.” The amendment was an obvious response to the anxiety, well founded or otherwise, that Bangladeshi migrants would get Indian citizenship and participate in elections.³⁹ In the same year, the Citizenship Rules were amended by adding Rule 8A that reads as follows:

“In respect of minority Hindus with Pakistan citizenship who have migrated to India more than five years back with the intention of permanently settling down in India and have applied for Indian citizenship, the authority to register a person as a citizen of India ...shall be the concerned Collector of the district where the applicant is normally resident.”

³⁸ Ashesh, Ashna, and Arun K. Thiruvengadam, Report on Citizenship Law: India, 20 (2017), https://cadmus.eui.eu/bitstream/handle/1814/47124/GLOBALCIT_CR_2017_12.pdf?sequence=1&isAllowed=y.

³⁹ Mohsin Alam, *The constitutional case against the Citizenship Amendment Bill*, 54(3) ECONOMIC AND POLITICAL WEEKLY 12 (2019).

This was the first time religion crept in as a criterion for determining citizenship. Subsequently, the Passport (Entry into India) Amendment Rules, 2015, exempted Hindus, Sikhs, Buddhists, Jains, Parsis, and Christians from Bangladesh and Pakistan who were compelled to seek shelter in India due to religious persecution or fear of religious persecution, from the requirement of a passport to enter India. In 2016, these amendments were extended to these six communities from Afghanistan as well.

This amendment to the Citizenship Rules was intended to address the claims to citizenship of Hindu migrants from Pakistan migrating across the western border into Rajasthan and Gujarat. This region has experienced several waves of such immigration—after the wars between India and Pakistan in 1965 and 1971, and after the demolition of the Babri Masjid in Ayodhya in December 1992. Following the demolition of the Babri Masjid, approximately seventeen thousand Hindus migrated to India from Pakistan. Most of these Pakistani passport holders travelled on Indian visas and simply overstayed. Then they applied for citizenship. To facilitate the process of giving these immigrants citizenship, District Collectors in Rajasthan and Gujarat were given the power to grant citizenship by the Union government through an amendment to the Citizenship Rules, 1956, for a specified and limited period and within a limited jurisdiction. The Union government had previously withdrawn to itself the powers of district collectors to confer citizenship in response to the widespread allegations about the manipulation of citizenship certification in Assam.⁴⁰

After this amendment, Hindus with Pakistani citizenship did not require a permit for resettlement. Residence in India for at least five years is adequate for expressing their intention to permanently settle in India. The *intention* of returning Muslims on the other hand was repeatedly questioned in the Constituent Assembly and subsequently in judicial decisions. Some of them had to wait ten years to seek citizenship by naturalization.⁴¹ The aspect of intention was interpreted in varied ways by courts. The Gujarat High Court in *State of Gujarat v. Saiyad Aga Mohmed Saiyedm Ohmed*, restrained the government from deporting the plaintiff, despite him possessing a Pakistani passport. The Court held that,

“If a plea is raised by the citizen that he had not voluntarily obtained the passport, the citizen must be afforded an opportunity to prove that fact. Cases may be visualized in which on account of force a person may be compelled or on account of fraud or misrepresentation he may be induced, without any

⁴⁰ Niraja Jayal, *Citizenship*, in OXFORD HANDBOOK OF THE INDIAN CONSTITUTION (2016).

⁴¹ Niraja Jayal, *CITIZENSHIP AND ITS DISCONTENTS: AN INDIAN HISTORY* (2013).

intention of renunciation of his Indian citizenship to obtain a passport from a foreign country.⁴²

In *T.E. Mahomed Usman v. State of Madras*, on the other hand, an illiterate person's application to the Pakistan High Commissioner for a passport was deemed sufficient to indicate intention.⁴³

In 2002, individuals of Indian origin in sixteen countries, all advanced industrial societies, were permitted to be registered as Persons of Indian Origin. The choice of these countries was justified by stating that these countries recognised dual citizenship. This was expanded in 2005, when the Citizenship Act was amended to introduce the category of Overseas Citizen of India ('OCI'), and the privileges accompanying the status were expanded. Today, it is only those individuals who are or have been at any previous time citizens of Pakistan or Bangladesh that continue to be excluded from applying for OCI status.⁴⁴

Section 3(1) as it stands today is as follows:

“Except as provided in sub-section (2) every person born in India,—(a) on or after the 26th day of January, 1950, but before the 1st day of July, 1987;

(b) on or after the 1st day of July, 1987, but before the commencement of the Citizenship (Amendment) Act, 2003 and either of whose parents is a citizen of India at the time of his birth;

(c) on or after the commencement of the Citizenship (Amendment) Act, 2003, where—(i) both of his parents are citizens of India; or

(ii) one of whose parents is a citizen of India and the other is not an illegal migrant at the time of his birth, shall be a citizen of India by birth.”

In September 2015, the Union government exempted non-Muslim illegal migrants from the Pakistan, Bangladesh and Afghanistan from the operation of the Foreigners Act, 1946, through an executive order. While the debate on the Citizenship (Amendment) Bill was raging, on October 23 2018, the Ministry of Home Affairs issued a directive that provided a separate and

⁴² (1979) 20 (1) GLR 71.

⁴³ 1959 SCC OnLine Mad 235 : AIR 1961 Mad 129.

⁴⁴ Niraja Jayal, *Citizenship*, in OXFORD HANDBOOK OF THE INDIAN CONSTITUTION (2016).

accelerated process for non-Muslim legal migrants from the three countries to get citizenship.⁴⁵

It is thus evident that the Bill must not be seen in isolation or merely as a political stunt. It is a part of a larger move from a *jus soli* citizenship regime as envisaged by the framers of the Constitution to a *jus sanguinis* citizenship regime since 1985.

III. CONSTITUTIONALITY OF THE CITIZENSHIP (AMENDMENT) BILL, 2016

The Bill makes three kinds of distinctions: (i) between Muslim and non-Muslim migrants from Afghanistan, Bangladesh, and Pakistan; (ii) between migrants from these three countries and those from other countries; and (iii) between residents who migrated due to reasons of religious persecution and those who migrated due to other forms of persecution like racial or ethnic persecution.⁴⁶ By doing so, it appears to give effect to the idea that Hindus are the natural and normal citizens of India and that India is the natural home of Hindus from all over the world.

This is not just a corruption of the idea of India as was envisaged by the framers of the Constitution and the beliefs of the people who chose India as their homeland, but is also a betrayal of the universalist and inclusive conception of citizenship contained in the Constitution. By introducing a religion-based distinction into the law on citizenship with provisions similar to Israel's Law of Return policy, the Indian state is openly undermining its constitutional commitment to equality, fraternity, and secularism.⁴⁷

The Union government claims that the bill aims to provide refuge to persons who have been persecuted in their homelands because of their religion and who have "*nowhere else to go but India*".⁴⁸ The assumption is that Muslims are not persecuted in India's neighbouring countries, which is patently untrue.⁴⁹ The Bill violates Article 14 of the Constitution which provides for equality and equal protection. Equal protection of laws implies the application of the same laws alike and without discrimination to all persons similarly

⁴⁵ Mohsin Alam, *The constitutional case against the Citizenship Amendment Bill*, 54(3) ECONOMIC AND POLITICAL WEEKLY (2019).

⁴⁶ *Id.*, at 13.

⁴⁷ Niraja Jayal, *CITIZENSHIP AND ITS DISCONTENTS: AN INDIAN HISTORY*, 5 (2013).

⁴⁸ Apoorva Anand, *The new citizenship bill and the Hinduisation of India*, AL JAZEERA (Jan. 12, 2019), <https://www.aljazeera.com/indepth/opinion/citizenship-bill-hinduisation-india-190110141421871.html>.

⁴⁹ Rohingyas in Myanmar, Uighurs in China, and Ahmedis in Pakistan face persecution despite being Muslim.

situated. The Supreme Court explained this in *Western U.P. Electric Power and Supply Co. Ltd. v. State of U.P.*, by stating that,

“Article 14 of the Constitution ensures equality among equals: its aim is to protect persons similarly placed against discriminatory treatment. It does not however operate against reasonable classification. A person setting up a grievance of denial of equal treatment by law must establish that between persons similarly circumstances, some were treated to their prejudice and the differential treatment had not reasonable relation to the object sought to be achieved by the law.”⁵⁰

Exclusion of a certain group from the applicability of a certain law is permissible provided there is a substantial basis for making the classification, and a nexus between the basis of classification and the object of the statute under consideration. A mere differentiation or inequality of treatment does not *per se* amount to discrimination within the inhibition of the equal protection clause. To attract Article 14, it is necessary to show that the selection or differentiation is unreasonable or arbitrary, and satisfies the above two tests.⁵¹ In *Chiranjit Lal Chowdhuri v. Union of India*, J. Mukerjea observed:

“The legislature undoubtedly has a wide field of choice in determining and classifying the subject of its laws, and if the law deals alike with all of a certain class, it is normally not obnoxious to the charge of denial of equal protection; but the classification should never be arbitrary.”⁵²

J. Pasayat, in *Sharma Transport v. Govt. of A.P.*, elaborated on the concept of arbitrariness:

“The expression ‘arbitrarily’ means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone.”⁵³

It is not necessary that for a classification to be valid, its basis must always appear on the face of the law. To find out the reasons and the justification for the classification, the court may refer to relevant material, e.g., objects and reasons appended to a Bill, parliamentary debates, affidavits of the parties, matters of common knowledge, the background circumstances leading to the passage of the Act.

⁵⁰ (1969) 1 SCC 817 : AIR 1970 SC 21, ¶7.

⁵¹ *Jaila Singh v. State of Rajasthan*, (1976) 1 SCC 602 : AIR 1975 SC 1436.

⁵² AIR 1951 SC 41 : 1950 SCR 869.

⁵³ (2002) 2 SCC 188.

The Statement of Objects and Reasons of the Bill states that the Bill intends to grant citizenship to persons belonging to the minority communities, such as Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh, and Pakistan. There is no explanation for why these particular communities were picked out. Even the term 'religious persecution' finds no mention there. Amongst India's neighbouring countries there are various Muslim communities who have been persecuted, e.g., Rohingyas in Myanmar, Uighurs in China, and Ahmedis in Pakistan, but are expressly excluded by the Bill. Given that India is a secular state that treats all religions equally, it will be challenging to defend such unequal treatment. Using religion to differentiate between different categories of persecuted minorities in fact goes against the principle of secularism has been recognised as part of the basic structure of the Constitution.

Although the word secular was added to the Preamble in 1976 through the 42nd Amendment, it has been held to be a basic feature of the Indian Constitution. Secularism encompasses religious tolerance and equal treatment of all religious groups and the protection of their life and property.⁵⁴ The Supreme Court has stated that secularism is a part of the fundamental law and an inalienable segment of the basic structure of India's political structure:

"It is clear from the Constitutional scheme that it guarantees equality in the matter of religion to all individuals and groups irrespective of their faith emphasising that there is no religion of the state itself. The Preamble and the Constitution read in particular with Articles 25 to 28 emphasises this aspect and indicates that it is in this manner the concept of secularism embodied in the constitutional scheme as a creed adopted by the Indian people has to be understood while examining the constitutional validity of any legislation on the touchstone of the Constitution. The concept of secularism is one facet of the right to equality woven as the central golden thread in the fabric depicting the pattern of the scheme in our Constitution."⁵⁵

The Bill also violates India's obligations under international treaties which are meant to be honoured under Article 51(c) of the Constitution. Public international law principles recognise a State's right to determine who its citizens

⁵⁴ *S.R. Bommai v. Union of India*, (1994) 3 SCC 1 : AIR 1994 SC 1918.

⁵⁵ *M. Ismail Faruqui v. Union of India*, (1994) 6 SCC 360.

will be,⁵⁶ the freedom to regulate nationality is not without limitations.⁵⁷ In a 1923 decision of the Permanent Court of International Justice regarding the power of States to determine nationality, the Court stated that, “*The question of whether a certain matter is or is not solely within the domestic jurisdiction of a state is an essentially relevant question; it depends on the development of international relations.*”⁵⁸ Article 7 of the Universal Declaration of Human Rights guarantees equal protection of laws. Article 26 of the UN Covenant of Civil and Political Rights provides that the law “*shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*” Article 26 has been interpreted as precluding the legislation and administration from introducing arbitrary discrimination or differences in treatment without any objective justification whatsoever.⁵⁹ In the nature of an autonomous right, it prohibits discrimination in any field regulated and protected by public authorities, requiring all legislation adopted by a State party to comply with the non-discrimination obligation thereunder.⁶⁰

The Bill was sent to a Joint Parliamentary Committee which presented its report to the Parliament on January 7, 2019. The Report stated that the Bill was constitutional, though not unanimously. Members of the Congress, TMC, CPI(M), and the Samajwadi Party moved dissent notes to the JPC report on the bill.⁶¹ Bhartruhari Mahtab, in his dissent note, stated that the Bill contravenes the provisions of the Assam Accord and that implementation of the provisions of the Bill would affect peace and tranquility in the state. Adhir Ranjan Chowdhury in his dissent note pointed out that the Bill violated Article 14 because it provided preferential treatment to certain categories of migrants. He also said that using religion to distinguish between citizens and non-citizens goes against the secular foundations of the citizenship in India and constitutional morality.⁶²

⁵⁶ Kay Hailbronner, *Nationality in Public International Law and European Law*, in ACQUISITION AND LOSS OF NATIONALITY: COMPARATIVE ANALYSES – POLICIES AND TRENDS IN 15 EUROPEAN COUNTRIES (Rainer Bauböck *et al.* eds., 2005); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 373 (6th edn., 2003), 373.

⁵⁷ Mihika Poddar, *The Citizenship (Amendment) Bill, 2016: international law on religion-based discrimination and naturalisation law*, 2(1) INDIAN LAW REVIEW 7 (2018).

⁵⁸ Advisory Opinion on the Tunis and Morocco Nationality Decrees, [1922] PCIJ 3, ¶ 38 (Oct. 4, 1922).

⁵⁹ Kay Hailbronner, *Nationality in Public International Law and European Law*, in ACQUISITION AND LOSS OF NATIONALITY: COMPARATIVE ANALYSES – POLICIES AND TRENDS IN 15 EUROPEAN COUNTRIES (Rainer Bauböck *et al.* eds., 2005).

⁶⁰ Mihika Poddar, *The Citizenship (Amendment) Bill, 2016: international law on religion-based discrimination and naturalisation law*, 2(1) INDIAN LAW REVIEW 7 (2018).

⁶¹ *4 Oppn parties move dissent notes to JPC report on Assam's Citizenship Bill*, BUSINESS STANDARD (Jan. 24, 2019 13:10 IST), https://www.business-standard.com/article/politics/4-oppn-parties-move-dissent-notes-to-jpc-report-on-assam-s-citizenship-bill-119010600367_1.html.

⁶² Report of the Joint Committee On The Citizenship (Amendment) Bill, 2016, 101 (2019).

The Law Ministry sought to allay the apprehensions related to the violation of Articles 14 and 25 as follows:

“The Bill has been examined with respect to the issue of violation of Article 14 and 25 of the Constitution. With respect to Article 14 of the Constitution, it may be mentioned that the legal position in this regard is fairly settled. Article 14 encompasses both the negative Concept of ‘equality before law’ as well as the positive concept of ‘equal protection of law’. Thus, the same ensures that no special provision in favour of any one is made and that all are equally subject to the ordinary law of the land. The positive concept of equality does not postulate equal treatment of all persons without distinction but rather stresses on equality of treatment in equal circumstances or to similarly situated persons. A legislature is entitled to make reasonable classification for purposes of legislation and treat all in one class on equal footing...the legal position aforementioned clearly establishes that any legislation may withstand challenge on the ground of discrimination and violation of Article 14 of the Constitution, in case the classification created by it is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and that differentia has a rational relation to the object sought to be achieved by the statute in question. The provisions of the Bill appear to have made a classification based on the fact of minority communities being persecuted in the specified countries on the basis of their religion and leaving their country without valid travel documents. The Bill appears to have the object of facilitating all such minority communities without any discrimination, though, the same is not clearly specified in its Statement of Object and Reasons appended to the Bill but was specifically mentioned in the Cabinet Note seeking approval of the Cabinet for introduction of the Bill.”

The Report mentions that the Committee asked the Law Ministry why the term “persecuted minorities” was not used instead of listing specific religions to which the Ministry responded as follows:

“Using persecuted minorities from the neighbouring countries instead of its current form may negate the objectives of the Bill. As there is a possibility for wider scope of interpretation, it may be construed to include other communities

(religious or otherwise). Moreover, the aspect of ‘religious persecution’ would also be lost sight of.”

It is not clear what objectives of the Bill are being negated by expressly mentioning persecuted minorities. It is not clear why only religious persecution has been singled out as a ground under the Bill and not persecution on other grounds such as ethnicity, gender, and sexual orientation.⁶³ The Ministry of Home Affairs has stated that to deal with other foreigners persecuted on account of race, religion, sex, nationality, ethnic identity, membership of a particular social group, or political opinion, a Standard Operating Procedure (‘SOP’) has been in place since 2011, and a foreign national can stay in India on Long Term Visa if it is proved that he has been a victim of oppression in his native country on account of his caste, religion, sex, nationality, identity, different political view, etc.⁶⁴ There is no explanation for why all cases of persecuted foreigners applying for Indian citizenship cannot be dealt with in accordance with this SOP.

The findings of the Joint Parliamentary Committee on the constitutionality of the Bill seem to be specious and based on an incomplete understanding of the Constitution. The Joint Parliamentary Committee that reviewed the Bill opined that that it does not violate the spirit of Article 14 because it meets the test of reasonable classification as laid down in *State of W.B. v. Anwar Ali Sarkar*.⁶⁵ Article 14 requires equality of treatment of similarly situated persons in equal circumstances which the Bill does not fulfil, since persecuted members of various religions are similarly situated. It is not clear how Muslims facing persecution differ from Hindus, Sikhs, Buddhists, Jains, Parsis, and Christians facing persecution.

By legitimizing the grant of citizenship on the basis of religion, this Bill strikes at the root of the idea of India as envisaged in the Constitution. By conflating citizenship with religion it fundamentally changes the nature of the relationship between the state and various religious groups and accords certain groups primacy over others. The change in the citizenship regime engendered by the Bill may not affect large numbers of people, but it will represent a significant break from the promise of equality, fraternity and secularism that the Indian republic offered through its Constitution, when it was founded.

⁶³ *Jagdish Pandey v. University of Bihar*, AIR 1968 SC 353; Report of the Joint Committee On The Citizenship (Amendment) Bill, 2016, 49 (2019).

⁶⁴ Report of the Joint Committee On The Citizenship (Amendment) Bill, 2016, 71 (2019).

⁶⁵ AIR 1952 SC 75.

IV. CONCLUSION

Apart from violating specific provisions of the Indian Constitution, this Bill goes against the essence of Constitution as articulated by Justice Vivian Bose in *S. Krishnan v. State of Madras*,

“Look past the verbiage of the words and penetrate deep into the heart and spirit of the Constitution. What sort of State are we intended to be? Have we not here been given a way of life, the right to individual freedom, the utmost the State can confer in that respect consistent with its own safety? Is not the sanctity of the individual recognized and emphasized again and again?”⁶⁶

It goes against ‘constitutional morality’ described by J. Chandrachud as

“founded on essential facets of the constitution; the preamble, liberty, equality and the autonomy of the individual coupled with our sense of fraternity and sense of compassion which we have for each other. Using these founding pillars you test if a particular law or particular action of the government is consistent with constitutional morality.”⁶⁷

He further described constitutional morality as a bulwark against majoritarianism:

“It is the concept of constitutional morality which strives and urges the organs of the State to maintain such a heterogeneous fibre in the society, not just in the limited sense, but also in multifarious ways. It is the responsibility of all the three organs of the State to curb any propensity or proclivity of popular sentiment or majoritarianism.”⁶⁸

This Bill also appears to be the most recent step in a series of steps to move from *jus soli* to *jus sanguinis* citizenship. The Bill carries with it the implicit assumption that India is a Hindu state or at least, an assumption that Hindus outside India have a right to claim citizenship in India. If it becomes law, it has the potential to undo the concerted effort of all the people who maintained the plural and secular structure of the Constitution.

⁶⁶ AIR 1951 SC 301.

⁶⁷ *Navtej Singh Johar v. Union of India*, (2018) 1 SCC 791.

⁶⁸ *Navtej Singh Johar v. Union of India*, (2018) 1 SCC 791.

It must be kept in mind that the Indian Constitution has remarkably balanced the fundamental individuality of Indian citizens as beings of equal worth and the fundamental collectivity of their many identities.⁶⁹ Through this balancing act and the recognition of the collective contexts which play such a crucial role in the personal identity of the individual, the Constitution has managed to uphold the fundamental principles of equality, secularism, and fraternity for several decades. The gradual dilution of the citizenship framework as conceived in the Constitution by gradually making religion a marker for citizenship is a debasement of these ideals. It is understandable in a diverse state like India that the production of national identity is a contested process especially since the creation of the state was accompanied by enormous sectarian violence.⁷⁰ However, these contestations need to be resolved in a manner that aligns with the vision that the drafters of the Indian Constitution had for India.

⁶⁹ Chakravarthi Ram Prasad, *Pluralism and Liberalism: Reading the Indian Constitution as a Philosophical Document for Constitutional patriotism*, 16(5) CRITICAL REVIEW OF INTERNATIONAL SOCIAL AND POLITICAL PHILOSOPHY 676 (2013).

⁷⁰ Sankaran Krishna, *Cartographic Anxiety: Mapping the Body Politic in India*, 19(4) ALTERNATIVES: GLOBAL, LOCAL, POLITICAL 507 (1994).