Communalisation of Citizenship Law: Viewing the Citizenship (Amendment) Act 2019 Through the Prism of the Indian Constitution

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Abstract

Railroaded through Indian Parliament, the Citizenship (Amendment) Act 2019 (CAA) has met nation-wide *cris de coeur* for defiling the constitutional promise of secularism and equality by excluding Muslim refugees, immigrants and other vulnerable refugee groups from its purview. While some view the law as a ruse to deprive Muslim Indians of their citizenship rights by coupling it with the National Register of Indian Citizens (NRC) exercise, others verbalise vehement support. In view of the academic discourse lacking sincere engagement with opposing views, this article attempts to break the logjam by responding to myriad arguments proffered to substantiate the claim of the CAA's constitutionality and by pointing out argumentative circularity therein. The article traces how the evolutionary expansion in the scope of judicial review under Article 14 of the Indian Constitution is often ignored by those who exalt the CAA. I argue that Supreme Court decisions in *Nagpur Improvement Trust v Vithal Rao* and *Navtej Singh Johar v Union of India* have provided judicial imprimatur to the scrutiny of the constitutional relevance of yardsticks adopted by the legislature in effecting class legislation, which in turn makes striking down laws that have discriminatory objectives (even though such

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objectives may have a nexus with the basis of their classifications) and irrational differentiae possible. Analysed in terms of constitutional requirements, the CAA's discriminatory classifications fail to deliver equal protection and instead impair the Constitution's secular ethos. The article raises imperative questions on enforcement hurdles that arise in determining membership of a religious community for purposes of obtaining asylum and highlights the imbroglio this engenders. Identifying the gaps in Abhinav Chandrachud's reasoning on the pernicious synergy of the CAA-NRC scheme, the article concludes that the CAA has effectively communalized Indian citizenship law. Understood in light of India's international commitments to non-discrimination in conferring rights on refugees, this appears even more reprehensible

Keywords: Indian Citizenship; Citizenship (Amendment) Act 2019; National Register of Indian Citizens; Secularism; Equality; Refugee Law

1. Introduction

The Parliament of India passed the Citizenship (Amendment) Act 2019 (CAA) in December 2019, and since then the Supreme Court has been inundated with a litany of petitions challenging its constitutional validity. The ostensible purpose of the Act is to facilitate the process of granting Indian citizenship to six religious minorities that have fled persecution from Afghanistan, Bangladesh or Pakistan. The CAA is politically divisive; its introduction in the Parliament fomented protests & candlelight vigils, dissidence of many members of the legal fraternity was clear, various scholars inveighed against the Bill, but nothing chastened the Government. There are accusations now that the true purpose of the Act is to make it difficult for Indian Muslims to retain or maintain their citizenship rights.[1] Similarly, the aim of advancing renascent 'hindutva' (an ideology seeking to establish the hegemony of Hindus over India) is attributed to coupling the CAA with the National Register of Indian Citizens (NRC) scheme. The petitions challenging the *vires* of the Act further asseverate that it not only violates the constitutional guarantee of equality by creating irrational classifications, but also imperils the Constitution's commitment to secularism; whereas, the Government maintains its belief that the

[1] Soumya Shankar, 'India's Citizenship Law in Tandem with National Registry, Could Make BJP's Discriminatory Targeting of Muslims Easier' (*The Intercept*, 30 January 2020) <https://theintercept.com/2020/01/30/india-citizenship-act-caa-nrc-assam/> accessed 20 October 2020.

regulation of citizenship is a matter of state policy, a domain beyond judicial evaluation.

Under the Constitution, there are fundamental rights available only to Indian citizens: right against discrimination on the grounds of religion, race, caste, sex or place of birth;[2] right to equality of opportunity in matters of public employment;[3] freedom of speech and expression, assembly, association, movement, residence and profession; [4] cultural and educational rights;[5] and the right to vote and eligibility of membership in legislative bodies. Several constitutional offices like the President of India,[6] the Vice-President of India,[7] judges of the Supreme Court[8] and various High Courts,[9] Governor of a State,[10] Attorney General[11] and Advocate General[12] can also be occupied by citizens only.[13] Apart from this, the law advantages citizens over non-citizens in sundry other domains.[14] This constitutional pedestalling of a citizen for exclusive access to certain constitutional rights and privileges suggests the gravity of depriving individuals of citizenship. This significance of the CAA has prompted a blizzard of articles by apostles on both sides of the debate expatiating on the constitutionality of the Act.[15] On both sides, scholars tend to fall back on sophistry and trite arguments to justify their positions without dispassionately responding to the reasoning of the other side. This inexorably creates confusion.

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[2] Article 15 of the Constitution of India.

[3] ibid Article 16.

[4] ibid Article 19.

[5] ibid Articles 29-30.

[6] ibid Article 58(1)(a).

[7] ibid Article 66(2).

[8] ibid Article 124(3).

[9] ibid Article 217(2).

[10] ibid Article 157.

[11] ibid Article 76(1).

[12] ibid Article 165.

[13] Shruti Jain, 'Explained: The Nuts and Bolts of Indian Citizenship' (*The Wire*, 1 December 2019) <https://thewire.in/rights/india-citizenship-constitution> accessed 3 May 2020.

[14] Neha Mishra, 'Are Foreign Nationals Entitled to the Same Constitutional Rights as the Citizens of India?' (2019 1(6) International Journal of Law and Legal Jurisprudence Studies 1.

[15] Suhrith Parthasarthy, 'Why the CAA Violates the Constitution' (*The India Forum*, 17 January 2020) <https://www.theindiaforum.in/article/why-caa-violates-constitution> accessed 20 October 2020; Pritam Baruah, 'Not Just Equality, The CAA Betrays Constitutional Values of Dignity, Integrity' (*The Wire*, 27 December 2019) <https://thewire.in/rights/caa-constitution-equality> accessed 20 October 2020; Saroj Chadha, 'CAA & Article 14 of Indian Constitution' *Times of India* (Delhi, 29 January 2020) <https://timesofindia.indiatimes.com/blogs/blunt-frank/caa-article-14-of-indian-constitution/> accessed 20 October 2020.

This article analyses provisions of the CAA against constitutional rights to evaluate whether or not its enactment is *ultra vires* and argues that a convincing case can be made for the constitutional abhorrence of these provisions. The article addresses arguments advanced by various legal scholars who support CAA and identifies the inconsistencies in their arguments.[16] It also breathes new life into the debate by clarifying misconceptions surrounding the jurisprudence on Article 14 and the applicability of the 'under-inclusivity is no ground for challenge' defence.[17] Section 2 provides a brief overview of the different legal pathways to Indian citizenship to contextualize the changes made by the CAA. Section 3 scrutinizes the CAA's constitutionality by evaluating it against the constitutional benchmark of equality and secularism, while illuminating misapprehensions on what that benchmark ordains. Section 4 further explains the conceptual and enforcement problems in determining if an individual is a member of a religious group that is listed in the CAA. Section 5 of the article examines the question of the veracity of the argument that the joint application of CAA and NRC will deprive Indian Muslims of their citizenship; and Section 6 discusses the role of international legal instruments on the determination of the CAA's constitutionality and provides an account of the incompatibility between the international legal regime on refugee law and the CAA. This article concludes by noting that arguments in favour of the CAA's constitutionality are based on a fallacious understanding of applicable principles, and that in view of constitutional law on equality and secularism as it stands in 2020, CAA's religion-based provisions carry out a communalisation of secular citizenship law.

[16] Shivam Singhania, 'The Constitutionality of the Citizenship (Amendment) Act: A Response' (*Indian Constitutional Law and Philosophy*, December 2019) <https://indconlawphil.wordpress.com/2019/12/26/the-constitutionality-of-the-citizenship-amendment-act-a-response/> accessed 1 June 2020; Budhaditya, 'The Citizenship (Amendment) Act, 2019: A Legal Overview' (*My Voice,* 5 January 2020) <https://myvoice.opindia.com/2020/01/the-citizenship-amendment-act-2019-a-legal-overview/> accessed 1 June 2020; V Sudhish Pai, 'Why CAA is not against the Constitution' *The New Indian Express* (26 December 2019) <https://www.newindianexpress.com/opinions/2019/dec/26/why-caa-is-not-against-the-constitution-2081028.html> accessed 1 June 2020.

[17] Article 14 of the Constitution of India.

2. Contextualising the Change: India's Citizenship Regime

The Constitution established who is a citizen of India on the date of the Constitution's commencement, the 26 January 1950.[18] For the acquisition of citizenship after 26 January 1950, Parliament has the authority to enact legislation governing citizenship.[19] The Citizenship Act 1955 provides various paths to Indian citizenship: birth, descent, registration, naturalisation and by incorporation of foreign territory. The notion of an 'overseas citizen of India cardholder' was introduced via a series of amendments to the Citizenship Act in 2004 and 2015. These cardholders can enjoy those rights which the central government specifies by notification, except the rights of holding certain governmental offices and voting rights.[20]

A. Routes to Indian Citizenship

The overall structure of India's citizenship laws denotes a shift from *jus soli* to *jus sanguinis*.[21] Before the 2004 amendment,[22] any person born in India after 26 January 1950 was an Indian citizen, irrespective of whether one or both of her parents were illegal migrants. After the 2004 amendment, an individual born in India after 26 January 1950 but before 1 July 1987 is a citizen of India irrespective of whether one or both of her parents were illegal migrants.[23] However any person born in India on or after 1 July 1987 but before 3 December 2004 would be a citizen only if both her parents are Indian citizens, or, if one parent is an Indian citizen and the other is not an illegal migrant at the time of that person's birth.[24]

The descent path to Indian citizenship is applicable to those who are not born in India. Complex rules regulate this path. Here, a person born

[18] ibid Part II.

[19] ibid Article 11.

[20] Section 7A-7D of the Citizenship Act 1955.

[21] Niraja Jayal, 'Citizenship' in Sujit Choudhry (ed), *The Oxford Handbook of the Indian Constitution* (OUP 2016); Chidanand Rajghatta, 'As Trump Strikes at Birth Right Citizenship, Americans – and Indians – Look up 14th Amendment' (*Times of India*, 31 October 2018) <https://timesofindia.indiatimes.com/world/us/as-trump-strike-at-birthright-citizenship-americans-and-indians-look-up-14th-amendment/articleshow/66450132.cms> accessed 27 February 2020; Ashna Ashesh and Arun Tiruvengadam, 'Report on Citizenship Law: India' (2017) European University Institute <https://cadmus.eui.eu/bitstream/handle/1814/47124/GLOBALCIT_CR_2017_12.pdf?sequence=1&isAllowed=y> accessed 4 March 2020.

[22] The Citizenship (Amendment) Act 2003.

[23] *Karma Gyaltsen Neyratsang v Union of India* 2017 SCC Online Del 10163.

[24] Section 3 of the Citizenship Act 1955.

outside India before 26 January 1950 can become a citizen if either of her parents was a citizen at the time of her birth. A person born outside India after 26 January 1950 but before 10 December 1992 is a citizen if her father was a citizen at the time of her birth. A person born outside India on or after 10 December 1992 can be regarded as a citizen if either of her parents was a citizen at the time of her birth. However, if the father or mother were Indian citizens by descent only, then either birth outside India had to be registered at an Indian consulate within a specific period of time or, the parent must have worked for the Indian government. After 3 December 2004 registration of a person as an Indian citizen by descent is not possible unless her birth is registered at an Indian consulate within a specified time.[25]

In general, the path of citizenship by registration is intended for persons of Indian origin and the spouses or children of citizens of India.[26] Citizenship by naturalisation is a route meant for those who have no ancestral relation to India.[27] Also, if a new territory is incorporated into India, the central government has the power to specify who shall be Indian citizens by virtue of their connection to such a newly incorporated territory, by way of an order notified in the official gazette.[28]

It must also be noted that the 2004 amendment foreclosed any possibility of an 'illegal migrant' obtaining Indian citizenship by registration or naturalisation.[29] The term 'illegal migrant' has been defined to refer to a foreigner who enters or stays in India illegally, that is enters lacking valid travel documents or enters with valid travel documents but stays beyond the permitted time period.[30] The CAA amends this complex legal regime on citizenship to carve out an exception for individuals belonging to select communities.

B. The 2019 Amendments

The CAA seeks to amend the parent Citizenship Act 1955 to pave the way for extending Indian citizenship to illegal migrants belonging to Hindu, Sikh, Buddhist, Jain, Parsi and Christian faiths (notably excluding Islam), who escaped persecution from Pakistan, Bangladesh and Afghanistan and entered India before 31 December 2014. Section 2 of the CAA amends Section 2(1)(b) of the Citizenship Act 1955 by holding that illegal migrants (as defined above) would not be considered illegal migrants

[25] ibid section 4.
[26] ibid section 5.
[27] ibid section 6.
[28] ibid section 7.
[29] ibid sections 5-6.
[30] ibid section 2(1)(b).

for the purposes of the Citizenship Act 1955. Illegal migrants belonging to select faiths from selected jurisdictions can now seek Indian citizenship by registration or naturalisation. Prior to the CAA, a person classified as an illegal migrant had no scope for legal conferment of citizenship. In fact, the Indian Supreme Court has held that in respect of illegal migrants, the Government of India has unfettered and absolute powers of expulsion.[31] But, by virtue of Section 2, the covered class of illegal migrants is governed by a different legal regime contained within Sections 3, 5 and 6 of CAA.

Section 6 of CAA reduces the residence requirement for Indian citizenship by naturalisation. An applicant for citizenship by naturalisation, generally, must reside in India for a twelve-month period before the date of her application. In addition to that, she must reside in India for at least eleven out of the fourteen years prior to the twelve-month period. The CAA reduces this residence requirement from eleven to five years for individuals covered by Section 2. This substantially eases the citizenship requirements for individuals who belong to one of the enumerated faiths, fled from the three specified jurisdictions and have migrated to India before the cut-off date.[32] As per the Government, this bestowal of legislative largess was actuated by the desire to provide much needed succour to victims of persecution who had suffered at the hands of oppressive theocracies.[33]

3. The Constitutional Validity Dispute of the CAA

The Constitution was framed in the crucible of an arduously attained independence and the communal pogrom that followed undivided India's partition. The framers of the Constitution aimed to codify the 'Indian dream' in the *grundnorm*; highlighting the features of the kind of social system they resolved to build. They did this by myriad ways including protection for equality rights, particularly pertinent in a community rife with caste and class based discrimination; by guaranteeing secularism in a nation fraught with communal antagonism and violence;[34] and placing

[31] *Sarbananda Sonowal v Union of India* [2005] 5 SCC 665.
[32] Schedule 3 (c)-(d) of the Citizenship Act 1955.
[33] Statement of Objects and Reasons of the Citizenship (Amendment) Act 2019.
[34] Even though the word secularism was added to the text years later, the judiciary has recognized that the Constitution had always been wedded to the idea of secularism; *SR Bommai v Union of India* AIR 1994 SC 1918.

responsibility on the State to promote education in a country having a literacy rate of approximately 18 percent at the time of independence[35].

In light of that constitutional legacy, the CAA has been condemned for breaching the right to equality because of its use of invidious classifications and its assault on the secular character of Indian citizenship law. The strength of these claims can only be assessed with a clear picture of what the Constitution prescribes; it is imperative therefore, to probe the canons of equal protection and secularism, and then apply them to the CAA.

A. Disinterring the Ignored Evolutionary Process: The Nature of the Article 14 Enquiry

Article 14 of the Constitution synthesises Dicey's conception of rule of law[36] with the equal protection clause of the US.[37] It guarantees every person in the territory of India the fundamental right of equality before law and equal protection of the law. This implies that non-citizens are entitled to rights under Article 14 if they are within Indian territory. A key component of this right is the entitlement of equal treatment for all those who are similarly situated; equals ought to be treated equally.[38]

Bearing that in mind, the Supreme Court has repeatedly held that judicial review of legislation and administrative action is a basic feature of the Constitution,[39] including in the context of Fundamental Rights, it has developed a rich jurisprudence on the right to equality under Article 14 of the Constitution. As early as 1952, the Supreme Court started elucidating doctrinal tests for determining whether an impugned enactment survives the scrutiny of Article 14. It is now well settled that under Article 14, 'class legislation' is verboten, but 'reasonable classification' for the purpose of achieving specific ends is not ('class legislation' here refers to enactments that dichotomize the subjects of the statute for bestowing benefits, imposing burdens or for class specific regulation).[40] In *State of West Bengal v Anwar Ali Sarkar,*[41] the Supreme Court held that equality

[35] 'Literacy and Education', Ministry of Statistics and Programme Implementation, Government of India, <http://www.mospi.govin/sites/default/files/reports_and_publication/statistical_publication/social_statistics/Chapter_3.pdf> accessed 23 May 2020.

[36] *Ashutosh Gupta v State of Rajasthan* [2002] 4 SCC 34.

[37] *Basheshar Nath v CIT* [1959] Supp 1 SCR 528.

[38] *M Jagdish Vyas v Union of India* AIR 2010 SC 1596; *UP Power Corp Ltd v Ayodhya Prasad Mishra* [2008] 10 SCC 139.

[39] *Kesavananda Bharati v State of Kerala* [1973] 4 SCC 225; *SP Sampath Kumar v Union* of India [1987] 1 SCC 124; *Subhesh Sharma v Union of India* AIR 1991 SC 631.

[40] *S Seshachalam v Bar Council of Tamil Nadu* [2014] 16 SCC 72.

[41] AIR 1952 SC 75.

mandates two inquiries to determine whether a classification contemplated by an impugned statute is reasonable. First, the Court must assess the existence of an 'intelligible differentia' or a yardstick that separates elements within the class from those outside the class. And second, the Court will scrutinize the presence of a rational nexus between the yardstick of differentiation and the object that the statute seeks to achieve. This 'nexus test' has been applied and reiterated in numerous cases over the years.[42] In 1960, however, the Supreme Court observed that the repetition of the test has become mechanical and hackneyed.[43] The Court even wondered if 'fanatical reverence' to the test would decimate the 'glorious content' of Article 14.[44]

In response to academic criticism on the narrowness of the nexus tests,[45] in *Ajay Hasia v Khalid Mujib*[46] the Court enlarged the contours of Article 14 by holding that arbitrariness strikes at the very heart of the right to equality. Since then, 'protection against arbitrariness' has become a basic part of the equality doctrine under Article 14. But jurisprudential advancement on the determining factors of judicial review through Article 14 did not cease.

Two changes in recent history are a watershed in the development of constitutional equality. First, the Supreme Court in *Nagpur Improvement Trust v Vithal Rao*[47], held that establishing a rational nexus between the 'differentia' and the 'object' would not fetch judicial imprimatur if the object of the classification is itself discriminatory. This explicitly expanded the scope of Article 14's enquiry beyond a mere nexus assessment to adjudicating on the constitutional repugnance of the legislature's objective in enacting a law. Second, in *Navtej Singh Johar v Union of India*[48], the Supreme Court added yet another caveat to the nexus tests. In this case, the Court was determining the constitutionality of Section 377 which criminalized sexual intercourse between consenting homosexuals.[49] The Court rejected such criminalization and reasoned that a law that discriminates on the basis of an 'intrinsic and core trait of an individual'

[42] *RK Dalmia v Justice Tendolkar* AIR 1958 SC 538; *In Re Special Courts Bill 1978* [1979] 1 SCC 380; *Laxmi Khandsari v State of Uttar Pradesh* AIR 1981 SC 873; *Suneel Jatley and Ors v State of Haryana* AIR 1984 SC 1534; *State of Haryana v Jai Singh* [2003] 9 SCC 114; *Confederation of Ex-Servicemen Association v Union of India* AIR 2006 SC 2945; *Municipal Committee Patiala v Model Town Residents Association* AIR 2007 SC 2844.

[43] Kangsari Haldar v State of West Bengal AIR 1960 SC 457.

[44] *Lachhman Dass v State of Punjab* AIR 1963 SC 222.

[45] KK Mathew, *Democracy, Equality and Freedom* (Eastern Book Company 1978) 63; MP Singh, *Comparative Constitutional Law* (Eastern Book Company 2011) 485.

[46] [1981] 1 SCC 722.

[47] AIR 1973 SC 689 reiterated in *Subramanian Swamy v CBI* [2014] 8 SCC 682.

[48] [2018] 10 SCC 1.

[49] Section 377 of the Indian Penal Code 1860.

cannot be said to represent 'reasonable classification'.[50] By this logic, the Court examined the 'constitutional relevance' or 'reasonableness' of a yardstick of classification, which in that case was sexual orientation, thereby holding that in case the yardstick is itself unreasonable, the impugned law would be *contra legem*. These two landmark developments signify an expansion in the scope of Article 14's enquiry in the nature of widening the reach of the scrutiny from determining mere intelligibility of the classification, whether its yardstick is discernible/understandable, to reasonableness, an analysis of which also requires a determination of whether the basis of the classification is just as per *Navtej*. This doctrinal evolution has transformed Article 14 into a bulwark against governmental iniquitousness.[51]

B. Reasonableness and Iniquitous Classifications: Never the Twain Shall Meet

The CAA's framework of granting privileges is predicated on two explicit classifications: the faith classification, only illegal migrants belonging to the six faiths enumerated earlier are worthy of protection via the citizenship path; and the nation classification, an illegal migrant only from Afghanistan, Pakistan or Bangladesh can benefit from the CAA. Albeit, the government has tried to defend these classifications per its counter affidavit[52] filed before the Supreme Court in response to the petitions challenging the law, but considered alongside the implicit premises of the CAA's structure, a cogent argument against its incongruence with Article 14's standards can be made.

1. Analysing the Faith Classification

The abhorrence of the CAA's classifications becomes evident when the faith classification is examined. In the government's affidavit, it has been argued that the six faiths chosen are demographic minorities in Afghanistan, Pakistan and Bangladesh. Premised on this is the proposition

[50] *Navtej* (n 48) [637.3] (Indu Malhotra J).

[51] *MG Badappanavar v State of Karnataka* AIR 2001 SC 260; *M Nagaraj v Union of India* AIR 2007 SC 1.

[52] Preliminary Counter Affidavit on Behalf of the Union of India, Writ Petition (C) No 1470 of 2019 (17 March 2020) <https://images.assettype.com/barandbench/2020-03/ce48cef8-485a-4f2f-8026-488240509 2f8/Central_Government_CAA_Counter_Affidavit.pdf> accessed 2 May 2020; Sagar, 'The Government's Disingenuous Defence of the CAA and NRC in the Supreme Court' (*The Caravan*, 11 April 2020) <https://caravanmagazine.in/law/the-governments-disingenous-defence-of-caa-and-nrc-in-the-supreme-court> accessed 13 April 2020.

that only religious minorities are persecuted on the basis of their religious beliefs in the specified countries. What follows from that proposition is that as long as one is a Muslim, irrespective of any specific sect, she is not persecuted in theocratic states with Islam as the State religion. This institutional ignorance of persecution of minority sects, like Ahmadiyyas and Shias, within Islam, in the three specified countries is logically repulsive, and expresses a bigoted prejudice against minority Muslim sects. It is imperative to highlight in this regard that the persecution of Ahmadi minority Muslim sect in Pakistan has repeatedly received legal sanction. The Second Amendment to the Constitution of Pakistan (enforced in 1974), Ordinance XX promulgated by the Government of Pakistan in 1984 and the Twelfth Amendment of Azad Jammu and Kashmir are legal instruments that declare Ahmadis to be non-Muslims and effectively deprive them of religious freedom.[53] The penal code makes it an offence for Ahmadis to propagate their religion or even identify as Muslim.[54] In light of these verities, the justification for the faith classification appears to be characterised by lamentable blind spots. The presumption that only inter-religious minority communities in theocratic states face persecution is baseless and the case of Ahmadi Muslims in Pakistan and that of other Islamic sects in the three countries rebuts it.[55]

It has also been stated in the government's affidavit that the CAA's faith classification is intended only for inter-religious persecution. Inter-religious is understood as implying a concern between two wider faiths, for example, Hindus and Muslims. In contrast are intra-religious concerns, like those between Sunnis and Ahmadis; both groups have a meaningful connection to Islamic doctrine to be considered a part of the same faith's umbrella. It is further explained that the persecution of the Ahmadiyyas or Shias or any other Islamic sect in the three countries is based only on a differing understanding of Islam, as such, the persecution is intra-religious and not inter-religious. However, the distinction between intra-religious and inter-religious persecution is a matter of semantics and ignores the key element of religious-based persecution. The intra/inter religious distinction serves no legitimate aim as it is irrelevant for protecting a group

[53] Sections 2 and 3 of Constitution (Second Amendment) Act 1974; Section 2 of Azad Jammu and Kashmir Interim Constitution (Twelfth Amendment) Act 2018.

[54] Chapter XV section 298-C of Pakistan Penal Code.

[55] Immigration and Refugee Board of Canada 'Pakistan: Situation of Ahmadis, including treatment by society and authorities; legal status and rights with regards to political participation, education, and employment 2013-16' (2016) PAK105369.E; European Asylum Support Office 'Situation of Hazaras and Shias (2018-2020)' (2020) <https://www.justice.gov/eoir/page/file/1311881/download> accessed 23 October 2020; Human Rights Watch 'Breach of Faith: Persecution of the Ahmadiyya Community in Bangladesh' (2005) <https://www.hrw.org/report/2005/06/15/breach-faith/persecution-ahmadiyya-community-bangladesh> accessed 23 October 2020.

from persecution anchored in religious fault lines. Furthermore, there is nothing to indicate why intra-religious persecution should not warrant protection just as much as inter-religious persecution. It is well established that there should be no prejudice against one person compared to another who is similarly situated, if their position regarding the subject-matter of the legislation, is the same. In no way is the persecution faced by Ahmadi and Shia Muslims in Pakistan or in the other chosen jurisdictions incommensurable to the persecution of Hindus in the three countries, and therefore, as a matter of constitutional obligation, the exclusion of Ahmadi and Shia Muslims from the CAA is repugnant to the canons of equality. Moreover, the distinction drawn in the government's affidavit between intra-religious and inter-religious persecution does not explain why the CAA excludes atheists and agnostics, groups that are clearly not a part of Islam, but form discrete inter-religious minority groups. For many, such questionable justifications proffered by the government uncloak the fact that the CAA's purported humanitarian purpose is only being trumpeted to gloss over its pernicious classifications.

2. Examining the Nation Classification

The reasonableness of the nation classification is shrouded in mystery since the government's affidavit only provides a mishmash of incomplete ideas. There are consistent and long-standing reports of linguistic, ethnic, and religious persecution in China, Sri Lanka, and Myanmar.[56] A thoroughgoing explanation as to why religious persecution in these countries has been left out has still not been provided. There appears to be no nexus between the humanitarian object of the CAA and the nation classification. Since it is unclear what yardstick the government selected to make this classification, all possible arguments alluded to in the government's affidavit are examined below.

[56] Eleanor Albert and Lindsay Maizland, 'Religion in China' (*Council on Foreign Relations*, 25 September 2020) <https://www.cfr.org/backgrounder/religion-china> accessed 20 October 2020; 'The Uighurs and the Chinese State: A long history of discord' (*BBC*, 20 July 2020) <https://www.bbc.com/news/world-asia-china-22278037> accessed 20 October 2020; 'Repressed, Removed and Re-educated: The Stranglehold on Religious Life in China' (*CSW*, February 2020) <https://www.csw.org.uk/2020-china-report> accessed 20 October 2020; US Department of State 'China 2019 International Religious Freedom Report' <https://www.state.gov/wp-content/uploads/2020/06/CHINA-INCLUDES-TIBET-XINJIANG-HONG-KONG-AND-MACAU-2019-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf> accessed 20 October 2020; Human Rights Watch, 'Myanmar: Events of 2018' <https://www.hrw.org/world-report/2019/country-chapters/myanmar-burma> accessed 20 October 2020; Amnesty International, 'Report 2017/18 - Sri Lanka' <https://www.refworld.org/docid/5a9938624.html> accessed 15 May 2020.

(a) *The Civilizational Responsibility/Neighbourhood Yardstick*: if it is said that the three specified countries are the ones that disintegrated from India in recent history, and therefore India owes a special civilizational responsibility to the people of these countries, then it does not pass rational scrutiny because Afghanistan does not fulfil that criteria as it has never historically been a part of the Indian nation-state.[57] Further, the classification cannot be based on the claim that the chosen countries share a boundary with India or are its neighbours, because that does not explain the exclusion of Nepal, Bhutan, China, Myanmar and Sri Lanka. The constitutional relevance of such superficial yardsticks would still be a matter of suspicion because *arguendo*, even if this yardstick is taken to be reasonable, it does not explain why a civilizational responsibility/neighbourhood connection is relevant to provide a higher legal entitlement to citizenship to individuals coming from these countries.

(b) *The Theocratic State Yardstick*: it can be argued that the three countries have been chosen on the ground that as neighbouring theocratic states, the propensity of persecuting individuals on the basis of their religion is higher. That may not be the masterstroke that it may seem *ex facie*, because as the Chinese and Burmese cases have shown, propensity for religious persecution is not contingent upon the state's espousal of theocracy. Apart from that, the operation of this yardstick still leaves out two other neighbouring countries, namely Sri Lanka and Bhutan, that are theocratic states,[58] with accusations of severe religious persecution .[59] Preposterously, it may also be argued that the CAA's yardstick is limited to Islamic theocracy. Even in that case, no concessions to the reasonableness of such a yardstick can be made, since the lived experience of persecution in a Buddhist theocracy remains the same for the purpose of determining whether victims of either of the two theocracies are similarly situated in material terms relevant for legislative benefaction.

(c) *Violent Conflict Yardstick*: absurdly, the government's affidavit also states that the three specified countries have in the recent past been embroiled in armed conflict. This assertion does not explain the connection between a violent history and excluding other countries from the purview of the CAA. It can reasonably be conceded that antecedents of communally charged armed conflict in theocracies exacerbate the

[57] Jeffrey Roberts, *The Origins of Conflict in Afghanistan* (Greenwood Publishing Group 2003) 41.

[58] Article 9 of Sri Lankan Constitution; Article 2 of Bhutanese Constitution.

[59] Amnesty International (n 56); US Department of State 'Bhutan 2014 International Religious Freedom Report' <https://2009-2017.state.gov/documents/organization/238704.pdf> accessed 15 May 2020.

manifestation of religious persecution,[60] but that still does not justify turning a blind eye to other countries like Sri Lanka and Myanmar, which have similar chronicles of hostility.

It is evident that none of the possible differentiae properly separate the subjects that are included from those that are not, nor do they spell out their constitutional relevance or reasonableness for a legislation avowing humanitarian protection.

3. Addressing the Detractor's Morass of Cavils

Various scholars and advocates have directed their efforts towards proposing a defence to the enumerated faiths and specific nations in the CAA.[61] Lamentably, propositions advanced to support the CAA lack logical potency. The first one of these arguments asserts that these classifications pass the requirements of Article 14 as long as there is a nexus between the two classifications and the object of the Act, namely the protection of the six religious communities of the three specified countries.[62] This does not afford any vindication to the CAA as long as it is kept in mind that the object itself cannot be discriminatory. For that reason, it cannot be successfully contended that the Article 14 tests are met as long as the object of the CAA is defined in terms of the choice of its beneficiaries, that is, defining it in terms of protecting only the six religious communities of the three specified nations. To clarify, a law which grants the privilege of liability exemption under the penal code to a blonde haired person cannot be justified by saying that the object of the law was to provide the exemption only to blonde haired persons. This is a classic example of the logical fallacy *circulus in demonstrando*. This is because the argument under consideration seeks to justify the questionable classifications of the CAA by relying on the statute's object; and the object's definitional characterisation derives its validity from the tenor of the classifications that the law creates. Circularity in reasoning is evident, since it is a case where A is sought to be justified on the existence of B, and B has a valid existence because it originates in A. Similarly, the argument that the CAA is based on a pattern of comprehending persecution as membership of majority religious community and minority religious communities does not pass muster with rationality since it presupposes that as long as the legislature has a clear and fixed basis of classification, the basis is valid. Therefore, it assumes the very element it must prove.

[60] Brian Grim and Roger Finke, 'Religious Persecution in Cross-National Context: Clashing Civilizations or Regulated Religious Economies' (2007) 72(4) American Sociological Review 633.

[61] Singhania (n 16); Budhaditya (n 16); Sudhish Pai (n 16).

[62] Statement of Objects and Reasons, the Citizenship (Amendment) Act 2019.

Second, it is argued that as per precedent,[63] the law-makers have the authority to restrict the bestowal of privileges based on their determination of degree of harm and where the harm is deemed to be the clearest. That in and of itself does not lend any constitutional credence to the CAA's classifications. While it is true that the legislature does have this power, but in this matter, it is this very determination of harm that is in question for being discriminatory. Merely because the legislature has the power to determine the degree of harm does not authorise it to make that determination unfairly; especially when it is evident that excluded groups are similarly situated to the ones that have been included. It may also be said that illegal migrants do not have any right to claim citizenship. However, the Supreme Court has already given an answer to that argument by declaring that once the State decides to grant a privilege or right which it is not obligated to grant or bestow, then it cannot grant that privilege or right in a manner which is discriminatory.[64]

Third, it has been wrongly argued that *Navtej* does not lay down an absolute prohibition on a classification based on religion. This argument attacks a straw man. *Arguendo*, even if that argument is accepted, it still does not establish why the case's doctrinal extension of the nexus tests beyond mere intelligibility to the determination of the reasonableness of the yardsticks is bad in law. The enlargement of the scope of Article 14's analytical framework is a natural corollary of the Court's reasoning in that judgment. As long as that is not controverted, it is safe to say that questioning the constitutional relevance of the selection criteria is a part of the Article 14 enquiry. Furthermore, even the shield against arbitrariness under Article 14 furnishes the same scope.

Fourth, it has been contended that an analysis of the classifications ought not to be pedantic in that one starts to look for a single coherent yardstick that justifies the classification; instead, the collective effect of all possible explanations should be taken into account for a pronouncement on the reasonableness of the yardsticks. This argument is reminiscent of Amartya Sen's exposition on the concept of 'plural grounding' — the idea that various reasons can collectively undergird a decision without there being a single dominant reason for why that decision has been taken.[65] Even taken together, the yardsticks that the affidavit provides do not produce a sound cause for excluding similarly situated faith communities or countries. At best, this argument is fruitful only to persuade a court to subject the CAA to specific criticism as against rejecting it *in toto*.

[63] *Chiranjit Lal Chaudhary v Union of India* AIR 1951 SC 41.
[64] *Sterling Computers v M/s M&N Publications* [1993] 1 SCC 445.
[65] Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 2.

Finally, advocates of the CAA's validity invoke Chief Justice Patanjali Sastri's remarks that Article 14's scrutiny does not insist on a classification that is 'scientifically perfect or logically complete'.[66] This argument is based on a misunderstanding of the Justice's remarks. In the case where Chief Justice Sastri made these statements, the petitioner had challenged the constitutionality of a West Bengal enactment that established special courts to try specific criminal offences listed in the statute.[67] The purpose of this Act was to deal with corrupt public officials who, during the period after World War II, were overseeing essential supplies, war account adjustments etc. The petitioner's counsel argued that the offences that had been clubbed together to be tried by the special courts were not all offences associated with monetary gain to the accused. Crimes such as forgery or counterfeiting seals should not be clubbed with pecuniary offences for the purpose of legislative classification. The Chief Justice rebuffed this argument and explained that offences like forgery and counterfeiting seals are often committed to facilitate the perpetration of pecuniary offences listed in the impugned statute, thus, it was justified to group them together. It was in this context that the Chief Justice said that Article 14 does not require surgical precision in classification. However, as has been traced in Section 2, the Article 14 requirements have undergone a significant evolution since the 1950s. Judicial remarks must not be applied out of context to whittle down the equality clauses of the Constitution.[68]

C. The 'Under-Inclusivity is No Ground' Defense: A Meaningless Extrapolation

The Supreme Court has repeatedly held that it would view an over-inclusive classification with disfavour, but would be more tolerant of an under-inclusive one.[69] The former is one that confers benefits or imposes burden on members of the selected group as well as others who are not similarly placed, whereas the latter is one that leaves out some who are similarly placed. Apostles of the CAA's constitutionality say that this principle supplies the Act with immunity against a critique of its classifications.

A careful reading of the Supreme Court's case law reveals the weaknesses in this argument. Every judgment that has highlighted this

[66] *Kedar Nath Bajoria v State of West Bengal* AIR 1953 SC 404.
[67] The West Bengal Criminal Law Amendment (Special Courts) Act 1949.
[68] *Ganga Ram v Union of India* [1970] 1 SCC 377.
[69] *State of Gujarat v Ambica Mills* AIR 1974 SC 1300; *Pioneer Urban Land and Infrastructure v Union of India* [2019] 8 SCC 416; *Ram Krishan Grover v Union of India* 2019 SCC Online SC 1469.

broad statement of the Court's general attitude towards an under-inclusive law has been refined with a proviso.[70] The pith and core of this proviso is that the Court shall exercise restraint unless it is evident that there exists no 'fair reason' for why the law has not been extended with equal force to similarly placed persons who have been left out of its scope.[71] This signifies that the Court, precisely in the kind of situation that the CAA's classifications put the citizenship law in, would not stomach unfair under-inclusion. Therefore, summoning this argument to advance the proposition of immunity does not appear to be anchored to the Court's jurisprudence.

D. Bright Line Rules and the Cut-Off Date

The CAA stipulates that individuals of the subject communities from the specified nations are entitled to benefits under the Act only if they entered India before the specified cut-off date, 31 December 2014. The Supreme Court has held that the State has wide latitude in fixing cut-off dates and that it will strike them down only when they are arbitrary and do not bear a rational nexus with the aim of the Act.[72] The Court has also exhibited a trend in favour of preserving the State's decision on fixing cut-off dates.[73]

Since the object of the CAA is to provide security to those who have escaped persecution or its threat, the cut-off date appears to undermine the professed humanitarian purposes of the Act as there appears to be no reason for denying protection to a person who entered India after the marked date. The government's affidavit explains that India's citizenship law has never been open ended. However, in view of the Supreme Court's insistence on a reasonable justification for arriving at a specific cut-off date, the government's legal team will have to do more than just echoing historical practice.

Nevertheless, bright-line rules are known to appear arbitrary in general; from voting age to the age of sexual consent, an argument can be made against all of them that the positions of a person one day under the prescribed age and of a person a day over it are not substantially different to warrant dissimilar treatment. But the main objective of such rules is imbuing the legal system with some form of uniformity. The philosophy

[70] ibid.

[71] *Ambica Mills* (n 69) [56]; *Pioneer Urban Land* (n 69) [36]; *Ram Krishan Grover* (n 69) [46].

[72] *CSIR v Ramesh Chandra Agrawal* [2009] 3 SCC 35; *Govt. of Andhra Pradesh v N Subbarayudu* [2008] 14 SCC 702.

[73] *Union of India v BPN Menon* AIR 1994 SC 2221; *Commander Head Quarter v Biplabendra Chanda* AIR 1997 SC 2607; *Tamil Nadu Electricity Board v R Veeraswamy* AIR 1999 SC 1768; *State of Punjab v Amar Nath Goyal* [2005] 6 SCC 754.

behind such rules is that law requires that a line be drawn somewhere to avoid chaos. Scholars justify it in jurisprudence as a lesser evil.[74] Therefore, the question of incompatibility between the cut-off date and constitutional standards permits greater scope for a decision in favour of the State compared to such a possibility in adjudicating the two key classifications.

E. The Precipice of Smothered Secularism

India was founded on the pillar of secularism by rejecting the two-nation theory and embracing the principles of diversity, pluralism and inclusiveness[75]. It has been held that secularism is an integral part of India's constitutional morality[76] and the basic structure of the Constitution.[77] It would be instructive to note that the Indian conceptualisation of 'secularism' is remarkably different from other jurisdictions. In contrast to strict separation of Church and State in the US,[78] coexistence of theocratic vestiges and preservation of non-believers' rights in the UK's model,[79] and confining religion to the private sphere of a citizen's life in the French model,[80] the Indian version is one that permits State reform of regressive or discriminatory features of religion. For instance, the Indian Constitution abolished the practice of untouchability[81] and allowed the State to throw open Hindu places of worship to all, without prejudice to the entrant's caste[82] – to reform the Hindu caste system. The Supreme Court declared the Islamic customary form of divorce by triple *talaq* as *ultra vires* in pursuance of this constitutional vision of secularism.[83] What follows from this constitutionally consecrated idea is that religious belief should not interpenetrate secular affairs of the State.[84]

Granting citizenship in a secular nation, like India, therefore, is supposed to be a secular affair. When scrutinized against this backdrop, it is apparent that the CAA has perverted the secular character of India's

[74] Vivian Hamilton, 'Adulthood in Law & Culture' (2016) Faculty Publications 1824.

[75] BR Ambedkar, *Pakistan or the Partition of India* (Thackers Publishers Bombay 1945).

[76] *State (NCT of Delhi) v Union of India* [2018] 8 SCC 501; *Indian Young Lawyers Association v State of Kerala* [2019] 11 SCC 1.

[77] *Bommai* (n 34).

[78] *Everson v Board of Education* 330 US 1 (1947) (US Supreme Court).

[79] The Act of Settlement 1701.

[80] Blandine Chelini-Pont, 'Religion in the Public Sphere: Challenges and Opportunities' (2005) 3 Brigham Young University Law Review 611.

[81] Article 17 of The Constitution of India.

[82] ibid Article 25(2)(b).

[83] *Shayara Bano v Union of India* [2017] 9 SCC 1.

[84] *Kesavananda* (n 39); *M Ismail Faruqui v Union of India* AIR 1995 SC 605; *State of Karnataka v Dr Praveen Bhai Thogadia* [2004] 4 SCC 684; *MPG Nair v State of Kerala* AIR 2005 SC 3053; *Bal Patil v Union of India* AIR 2005 SC 3172.

citizenship law. First, it has elevated religious persecution, out of a pool of myriad forms of persecution, to the pedestal of the only type of persecution that would be grave enough to warrant a claim to citizenship for an illegal migrant. This creates a classification where individuals who are persecuted on grounds other than religious beliefs are excluded. This implies that in the eyes of Indian law, persons who are persecuted on account of their political views, sexual orientation, race or ethnicity are less deserving of citizenship rights. This is a dangerous approach for equality and secularism for two reasons. One, in terms of the suffering of individuals who are persecuted on grounds not included in the CAA, they would be situated similarly to those who are persecuted on religious grounds as regards the nature, character and effects of persecution, for example, Sri Lankan Tamils. And two, this implies that the Indian legal system incorporates a preference for religious causes in the conferment of citizenship.

Second, the CAA wrongly considers refugees belonging to one religion more worthy of citizenship as compared to those belonging to another. The manner in which the CAA grievously undermines constitutional secularism has already been discussed above while analysing the faith classification. What is of essence here is that such a classification announces that certain religious communities are preferred for conferment of relaxation in citizenship requirements to the exclusion of others, an idea that is diametrically opposed to secularism.

4. Who is Hindu? The Conceptual Imbroglio of Community Membership

Proponents of the CAA's constitutional validity have argued that the Act intends to ensure protection for specific and recognizable target groups.[85] The obvious question to such a framework is, who would be considered a member of such a target group? What is the standard to determine who a Hindu, Buddhist or Christian is for the CAA?

Although, determining who is regarded as a Hindu or Christian is possible in other spheres of Indian law (in personal laws, for instance), the CAA fails to specify how definitions provided in other statutes are to be applied to the ascertainment of a foreigner's religion. Thus, the bases of determining an individual's religion for the purposes of citizenship is shrouded in mystery. It may be suggested that a person would be considered Hindu if she is perceived as a Hindu (irrespective of her

[85] Shivam Singhania (n 16).

personal religious beliefs or with which religion she personally identifies) and she faces the threat of persecution owing to such a perception. But can one be identified a Hindu even though that person does not self-identify with Hinduism? This concern reveals a significant loophole in an approach grounded on 'external perception'. Besides, what must a person produce to demonstrate that she is perceived as a Hindu in her home country? She cannot be asked to cite an incident of persecution against her to establish that she is perceived as a Hindu, since the Act protects even those who are under a mere threat of persecution. How then would membership of the six subject communities be discerned? Would a person be considered Hindu because she identifies as Hindu (even though she may have been born in a Muslim family), or because her persecutors view her as Hindu? To explain the woolliness of the CAA further, would she be regarded as a Hindu because she conforms to a Hindu way of life or because her persecutors think that she conforms to such a way of life or because Hindus of India would look at her as Hindu? A model that abides by the 'personal identification' approach triggers questions on the status of converts. If in pursuance of the humanitarian aim of the Act, the benefits are extended to converts, then what would a conversion require? What measure must an official employ to come to a conclusion on whether conversion in a person's case is genuine?

These issues might come off as too abstract to have practical ramifications. But, in asylum and refugee law, these questions have generated real consequences in terms of people being denied asylum because they failed to pass an official's litmus test of what membership of a specific religious community entails.[86] Instances of asylum seekers being subjected to detailed questioning on knowledge of religious doctrine and consequent denial of asylum on failing to render satisfactory answers (even in genuine cases of conversion) are rampant,[87] despite the fact that comprehensive command over religious doctrine is a defective proxy for earnestness of religious devotion. With excessive diversity in understanding the tenets of faith and their practice even amongst genuine believers, punishing heterodoxy by declaring someone as not being Hindu

[86] Michael Budd, 'Mistakes in Identity: Sexual orientation and Credibility in the Asylum Process' (MA Thesis, The American University in Cairo 2013).

[87] Evangelical Alliance, 'Asylum seekers' Conversion to Christianity' <https://www.eauk.org/current-affairs/publications/upload/alltogether-for-asylum-justice.pdf> accessed 2 June 2020; All Party Parliamentary Group for International Freedom of Religion or Belief, 'Fleeing Persecution: Asylum Claims in the UK on Religious Freedom Grounds' <https://appgfreedomofreligionorbelief.org/media/Fleeing-Persecution-Asylum-Claims-in-the-UK-on-Religious-Freedom-Grounds.pdf> accessed 2 June 2020; Right to Remain, 'Faith in the System? Claiming Asylum on the Basis of Religion' <https://righttoremain.org.uk/faith-in-the-system-claiming-asylum-on-the-basis-of-religion/> accessed 2 June 2020.

enough would undermine the ostensible purpose of the CAA. On the other hand, if access to the CAA's benefits is made contingent merely upon self-declaration of religious identity, there would be no filter to separate genuine from non-genuine cases.

The provisions of the CAA do not address any of these matters. Currently, the determination of community membership has been left to individual functionaries. As noticed in asylum cases, officials all too often fall into conundrums of acting upon parochial notions of what the membership of a particular religious group requires.[88] Those who do not fit into these notional pigeonholes are rejected. With no guiding principles in place, the CAA confers overly broad discretion on individual functionaries, which itself is the antithesis of Article 14's protection against arbitrariness.[89] This shortcoming can be addressed by framing rules for the CAA, but that has not happened even after months of its promulgation.

5. The CAA-NRC: A Dangerous Synergism

As pointed out in the introduction, critics of the CAA have maintained that its hidden intent is to deprive Indian Muslims of their citizenship rights and to make them stateless. This theorising has arisen out of ministerial discussions on implementing a nationwide NRC. To understand the basis of this argument against CAA, it is necessary to provide a contextual background for the NRC.

A. The Genesis of NRC: A Step Back in Time

The Indian State of Assam has been a focal point for illegal migrations largely from East Pakistan (now Bangladesh) ever since India's independence in 1947. The situation severely worsened in the 1960s, leading up to the Indo-Pak War of 1971 which led to the creation of Bangladesh.[90] Even after the war, illegal migration continued, which led to acrimonious disputes between autochthonous Assamese people and the migrant community. This sparked the Assam movement (1979-85) which protested the conferment of voting rights on illegal migrants. To placate

[88] Michael Budd (n 86); ibid.

[89] *ITC Ltd v Deputy Commissioner (CT)* 2002 SCC OnLine AP 555.

[90] Governor of Assam, 'Report on Illegal Migration into Assam: Submitted to the President of India dated Nov 8, 1998' <https://www.satp.org/satporgtp/countries/india/states/assam/documents/papers/illegal_migration_in_assam.htm> accessed 2 June 2020.

the agitators, the central government struck the Assam Accord with the leaders of the movement and amended the Citizenship Act in 1985.[91]

As per the amended regime,[92] individuals of Indian origin who entered Assam before 1 January 1966 from Bangladesh and were residing in Assam since then were considered Indian citizens. Individuals of Indian origin who entered Assam on or after 1 January 1966 but prior to 25 March 1971 and had been residing in Assam ever since, if found to be foreigners, were to receive citizenship of India and all its rights except the right to vote for a period of ten years, and even that right subsequently.[93] Any person who arrived in Assam thereafter was to be deported.[94]

As mentioned above, the government has absolute discretion and power to expel foreigners from India.[95] Since the task of identifying and deporting foreigners in Assam was reeling under severe neglect, the Supreme Court intervened to enforce the amended provisions of the Citizenship Act. [96] Thereupon, the central government issued a notification[97] to the effect that 'minority communities' defined as Hindus, Sikhs, Buddhists, Jains, Parsis and Christians in Pakistan, Bangladesh and Afghanistan[98] who had entered India before 31 December 2014 to flee persecution or its threat would not be deported for illegal entry or overstaying.

An NRC was prepared for the first time in the 1951 census.[99] Rules under the Citizenship Act were enacted in 2003 to facilitate the preparation of an NRC for India and Assam, and they were amended in 2009.[100] Through a concatenation of orders, the Supreme Court directed

[91] Sangeeta Barooah, *Assam: The Accord, The Discord* (Penguin Random House India 2019).

[92] Section 6A of the Citizenship Act 1955.

[93] The date on which the Indo-Pak War of 1971 began.

[94] Gautam Bhatia, 'The Constitutional Challenge to S. 6A of the Citizenship Act (Assam Accord): A Primer' (*Indian Constitutional Law and Philosophy*, 7 May 2017) <https://indconlawphil.wordpress.com/2017/05/07/the-constitutional-challenge-to-s-6a-of-the-citizenshipact-assam-accord-a-primer/> accessed 3 June 2020.

[95] *Hans Muller of Nuremburg v Superintendent Presidency Jail* AIR 1955 SC 367.

[96] *Assam Sanmilita Mahasangha v Union of India* [2015] 3 SCC 1.

[97] Orders GSR685(E) & GSR686(E), Ministry of Home Affairs (MHA), Government of India (7 September 2015), <https://indianfrro.gov.in/frro/Notifications_dated_7.9.2015.pdf> accessed 3 June 2020.

[98] Ministry of Home Affairs, 'The Gazette of India' 18 July 2016 <http://egazette.nic.in/WriteReadData/2016/170822.pdf> accessed 3 June 2020.

[99] Ipsita Chakravarty, 'Why did Assam Prepare the 1951 NRC, Which Has Become a Touchstone of Citizenship Today?' (*Scroll.in*, 27 July 2019) <https://scroll.in/article/931879/why-did-assam-prepare-the-1951-nrc-which-has-become-a-touchstone-for-citizenship-today> accessed 12 October 2020.

[100] The Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules 2003.

the Assam NRC to be updated.[101] In this court-supervised updating of Assam's NRC, around 1.9 million people were excluded.[102] The religious demography of the people who were excluded was: roughly 1.1 million Bengali Hindus, 0.7 million Muslims and the rest included local ethnic groups and tribes.[103]

B. Exploring the CAA-NRC Ramifications: Malignant or Benign?

It is widely believed that the ruling Bharatiya Janata Party has ties to the right-wing, Hindu fundamentalist organisation called the Rashtriya Swayamsevak Sangh (RSS).[104] Accordingly, those who oppose the CAA suspect that it was introduced to smooth the path of regaining citizenship for non-Muslims and keeping Muslims deprived; the same logic is applied to the central government's insistence on preparing an NRC for the entire nation.[105] The CAA's critics warn that once a nation-wide NRC is conducted, out of those who would be excluded on account of not being able to prove their citizenship because they lack the requisite documents, the ones who do not belong to Islam, that is persons belonging to the six faith communities of the CAA, would stand to regain their citizenship entitlement under the CAA. This process would render only Muslim Indians stateless as NRC would first exclude them for not having the required documents and the CAA would provide them no succour. The crux of the argument is that even if the CAA's taxonomical defects are cured by including more groups that deserve inclusion like Ahmadiyas, Shias, Tamil Hindus of Sri Lanka etc., the Act's operation coupled with NRC would still result in discriminatory statelessness of Muslim Indians. This prognosis of the effects of the operation of the CAA and NRC is

[101] *Assam Public Works v Union of India* 2017 SCC Online SC 1885; *Assam Sanmilita Mahasangha v Union of India* [2019] 9 SCC 79; *Assam Public Works v Union of India* [2019] 9 SCC 70.

[102] Prateek Hajela, 'Assam Final NRC List Released: 19,06,657 People Excluded, 3.11 crore make it to citizenship list' (*India Today,* 31 August 2019) <https://www.indiatoday.in/india/story/assam-final-nrc-list-out-over-19-lakh-people-excluded-1593769-2019-08-31> accessed 3 June 2020.

[103] Sanjoy Hazarika, 'Assam's Tangled Web of Citizenship and the Importance of a Consensus' (2019) The Hindu Centre for Politics and Public Policy <https://www.thehinducentre.com/the-arena/current-issues/article29724344.ece> accessed 4 June 2020.

[104] Neelam Pandey and Shanker Arnimesh, 'RSS in Modi Govt in Numbers–3 of 4 Ministers are Rooted in the Sangh' (ThePrint, 27 January 2020) <https://theprint.in/politics/rss-in-modi-govt-in-numbers-3-of-4-ministers-are-rooted-in-the-sangh/353942/> accessed 20 October 2020; Arundhati Roy, *My Seditious Heart* (Penguin Random House India 2019).

[105] Soumya Shankar (n 1).

widely believed amongst the protestors and has been accepted as axiomatic by many.

Per contra, a recent influential piece on the CAA's constitutionality argues otherwise.[106] It asserts that it is fallacious to think that the CAA will confer citizenship on non-Muslim Indians who were excluded from the NRC for two reasons. First, it says that accessing the CAA's benefit would require them to prove that they migrated from any of the three specified countries before the cut-off date. Chandrachud wonders how non-Muslim Indians would be able to prove something that never happened, but in the same breath, he concedes that in view of the presumptions under Section 8 of the Foreigners Act, proving that might still be possible.[107] The main thrust of Chandrachud's assertion lies in his second reason. He writes that despite being able to establish some connection to one of the three specified countries, proving one's presence in India for fear of religious persecution in Afghanistan, Pakistan and Bangladesh would not be a simple task for a non-Muslim Indian since the persecution claim would feature veridical weakness on account of the fact that such person has never really been to any of the three specified countries, let alone faced persecution there. Based on these arguments, he concludes that the CAA/NRC scheme is equally perilous for non-Muslim Indians, which in turn means that the speculations of the protestors are misconceived.

Before these arguments are dissected, it is pertinent to correct Chandrachud's understanding of what considerations apply to which category of foreigners in the determination of their nationality under Section 8 of the Foreigners Act.[108] Clause (1) of Section 8 stipulates that: (a) in case a 'foreigner is recognised as a national by the law of more than one foreign country', then such a foreigner would be 'treated as the national of that country with which he seems most closely connected in interest and sympathy' (the close connection factor); but, (b) in case a foreigner's nationality is uncertain, he would be considered a national of that country with which he was last connected (the last connection factor). Oblivious of the subtleties of semantics, Chandrachud wrongly assumes that the close connection factor applies to 'case (b)'.[109] It's an aberration in as much as the close connection factor does not work for a foreigner of uncertain nationality. Consider this hypothetical – X is a foreigner whose nationality is uncertain. If the government official applies the close connection factor to determine her nationality, the person might just get herself a declaration of being treated as an American (even though she

[106] Abhinav Chandrachud, 'Secularism and the Citizenship Amendment Act' (2020) 4(2) Indian Law Review 138.
[107] The Foreigners Act 1946.
[108] ibid.
[109] Abhinav Chandrachud (n 106) 156-157.

may in fact be Russian) merely because she is able to successfully demonstrate how closely her interest or sympathy aligns with the stereotypical American life. Chandrachud's comprehension of the section is faulty by reason of *reductio ad absurdum*. The absurd implications of his interpretation warrant its dismissal.

Turning to Chandrachud's reasoning on the CAA/NRC regime, it must be stated at the outset that his premises are misguided. The kernel of his first reason is that even a Hindu Indian who is excluded from the NRC will have to prove that he is a national of one of the three specified countries, and that on the impossibility of proving a lie, the benefit of the CAA would not extend to a Hindu Indian. This is a deceptive argument because the CAA opens the gates of citizenship for illegal migrants, that is individuals who enter India without the requisite identity documentation.[110] A law that recognises that its beneficiaries do not have necessary documents will not obligate their production for availing its entitlements. In fact, the 2015 notification of the Ministry of Home Affairs provides in crystal clear terms that those who entered India 'without valid documents including passport or other travel documents' prior to the cut-off date are exempt from deportation'.[111] This provides sufficient context to unravel what the CAA does and does not require to be proved. The production of a national identification document of one of the three specified nations has also not been made a condition precedent to avail the CAA's protection. With that, it seems that determination of nationality would more likely be governed by self-declaration. However, what non-Muslim Indians would still have to prove is that they were in India before the cut-off date. The Act's provisions do not insist on the proof of the specific date of entry into India. The focus is merely on one's presence in the country before the cut-off date, proving which is easy for those who have always lived in India.[112]

The second reason advanced by Chandrachud is even more astounding as it bespeaks a misinterpretation at best and ignorance at worst. The very spirit of the CAA is that it does not require one to prove that she has been persecuted or that she was under a threat of persecution, if the person fulfils the classificatory criteria. The law is grounded on the policy presumption that persons belonging to one of the faith communities in the specified countries are under a threat of persecution, which is why it confers benefits on them, to make the process of obtaining Indian citizenship easy. Therefore, his conjecture that the CAA would require someone who is able to prove that they are Hindu and that they have a

[110] Section 2 of the CAA 2019.

[111] Ministry of Home Affairs (n 97).

[112] Could be accomplished by producing school certificates, phone bills, electricity bills, bank statements, lease deeds, tenancy agreements etc.

connection with one of the three specified countries, along with presence in India before the cut-off date (all of which is fairly easy for an Indian Hindu who was excluded out of NRC) to additionally establish that they faced fear of persecution, is farcical. It is glaringly conspicuous that the critics of the CAA were right in asserting that the CAA/NRC undertaking only leaves out Indian Muslims, and that it has been designed to make it wide enough to encapsulate non-Muslim Indians within the sphere of its selected beneficiaries. The exclusion of Muslims sanctions Islamophobia and is only fodder for those seeking to incite hatred.

6. *Pacta Sunt Servanda: The International Law Discord*

International law on refugees and asylum seekers has attempted to provide a legal framework for these very issues. The UN Convention Relating to the Status of Refugees [113] and the Protocol Relating to the Status of Refugees[114] ask State parties to grant refugee status for fear of persecution on grounds of 'race, religion, nationality, membership of a particular social group or political opinion'.[115] Furthermore, State parties are required to implement the provisions of the Convention without discriminating on the basis of an applicant's race, religion or country of origin.[116] Juxtaposing these stipulations with the classification scheme of the CAA makes the inherent contradictions obvious. India, however, is not a signatory to either of the two international legal instruments.[117]

Nonetheless, India has acknowledged its obligation of non-discrimination amongst sub-classes of refugees by adopting the Bangkok Principles.[118] Apart from that, other international legal instruments that India is a signatory or party to, recognise the principle of non-

[113] UN Convention Relating to the Status of Refugees (adopted 24 December 1950, entry into force 22 April 1954) 189 UNTS 137.

[114] Protocol Relating to the Status of Refugees (adopted 16 December 1996, entry into force 4 October 1967) 606 UNTS 267.

[115] Article 1 of Refugee Convention.

[116] ibid Article 3.

[117] Sital Kalantry, 'India Should also Accede to the UN Refugee Convention' *The Hindustan Times* (12 March 2020) <https://www.hindustantimes.com/analysis/india-should-also-accede-to-the-un-refugee-convention/story-6XP68ZzpFZGBXkTFMGD6EM.html> accessed 12 October 2020.

[118] Article IV(5) of Asian-African Legal Consultative Organization, Bangkok Principles on the Status and Treatment of Refugees.

discrimination.[119] Even though the Supreme Court has emphasized the national incorporation of international law as a prerequisite for its enforcement in the country,[120] some notable decisions reflect a novel approach to interpreting treaty obligations. The Vienna Convention on the Law of Treaties[121] has been invoked to require India's internal legislation to abide by its international commitments (although India is not a party to the Vienna Convention).[122] The discussion of India's binding international obligations becomes even more intriguing when it is observed that Article 26 of the International Covenant of Civil and Political Rights[123] echoes the same principles as Article 14 of the Indian Constitution. The prohibition of non-discrimination in Article 26 of the ICCPR has been construed to convey its application even amongst classes of refugees in granting them rights, whatever these rights may be.[124] The claim of CAA's invalidity finds greater strength when examined against this legal backdrop. Besides, the Universal Declaration of Human Rights warns against activities that result in statelessness and the arbitrary deprivation of the right to nationality.[125] Arguably, the content of this right has assimilated into customary international law already.[126] This only goes on to underpin the claim of legal virulence of the CAA/NRC exercise.

7. Conclusion

Viewed through the prism of constitutional morality, the government's ersatz valorisation of the purported humanitarian purpose of the CAA

[119] Articles 2 and 7 of The Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III); Article 2(1) of International Covenant on Civil and Political Rights 1966, (adopted 10 December 1966, entry into force 23 March 1976) 999 UNTS 171; Articles 2(2) and 3 of International Covenant on Economic, Social and Cultural Rights 1966 (adopted 10 December 1966, entry into force 3 January 1976) 993 UNTS 3; Article 2 of Convention on the Rights of the Child (adopted 20 November 1989, entry into force 2 September 1990) 1577 UNTS 3.

[120] *Jolly George Varghese v Bank of Cochin* AIR 1980 SC 470; *State of West Bengal v Kesoram Industries Ltd* [2004] 10 SCC 201.

[121] The Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

[122] *Ram Jethmalani v Union of India* [2011] 8 SCC 1; *Jeeja Ghosh v Union of India* [2016] 7 SCC 761.

[123] Article 26 of ICCPR.

[124] James Hathaway, *The Rights of Refugees Under International Law* (CUP 2005) 160.

[125] Article 15 of UDHR.

[126] *Anudo v Tanzania* Application No 012/2015 (African Court on Human and People's Rights); Ndjodi Ndeunyema, '*Anudo v Tanzania*: The African Court Recognises the Right to Nationality under Customary International Law' (*OxHRH Blog*, 19 April 2018) <http://ohrh.law.ox.ac.uk/anudo-v-tanzania-the-african-court-recognises-the-right-to-nationality-under-customary-international-law> accessed 4 June 2020.

turns out to be a diaphanous curtain; one that is not enough to conceal its prejudice-laden scheme. Arguments in support of the CAA's validity do not inspire confidence for they are couched in circular reasoning and disingenuous extrapolation of comments made by Supreme Court judges in past cases. The key vice that plagues such arguments is of overlooking the development of nexus tests of Article 14. This often leads many down the path of the illusion that the CAA is valid as long as its classifications correspond to a legislative object that is tailored to correspond to the language of such classifications.

Disappointingly, the most recent governmental justification of the CAA failed to deliver on account of its obfuscation. The dichotomy that it creates between inter-religious and intra-religious persecution emerges as inconsequential in light of the fact that the nature of inter or intra religious persecution does not materially alter or differentiate the circumstances of those who face either of those forms of persecution. Even the Islamic theocracies yardstick proffered as an explanation for the nation classification comes out as vacuous, bearing in mind the fact that persecution in theocracies with different established religions are equally noxious. Cases of persecution in constitutionally secular countries further demonstrate the irrelevance of this yardstick.

While the cut-off date remains an open question, the wrangle over the true motives of the CAA/NRC exercise involves telling arguments which can impact the CAA's constitutionality. One of these arguments that has enjoyed a handsome amount of traction subscribes to misleading logic and does not square with how the CAA is structured. In that regard, the inference that the CAA/NRC scheme would result in disenfranchisement of citizenship rights for Muslim Indians sounds reasonable.

Lastly, the CAA's remodelling of secular citizenship law to establish a framework of citizenship rooted in religious identity to the exclusion of Muslims is best described as the communalisation of Indian citizenship law. This rends the constitutional vision of equality to smithereens and cocks a snook at the mainstay of our constitution: secularism. The saccharine diet of empathy for the persecuted makes no difference to the credibility of the constitutional law arguments against the CAA. Therefore, it can be said with confidence that as long as the fair conferment of India's citizenship remains eclipsed by the CAA, the assurance of equality and secularism really does seem a hollow promise.