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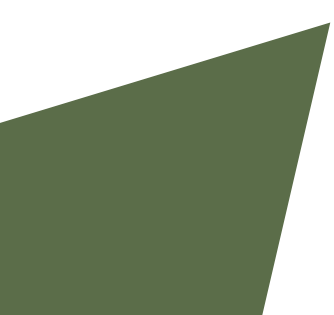
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**Citizenship Amendment Act 2019, National Register for Citizens &
National population Register In context of International Instruments**

Deepak Chatap & Bodhi Ramteke

INTRODUCTION

Martin Luther King, Jr. wrote a letter from Birmingham jail¹ wherein he stated that “One has a moral responsibility to disobey the unjust laws. I would agree with Saint Augustine that an unjust law is no law at all.” This research paper highlights recent amendment to the Citizenship Act 1955 to grant citizenship to the person belonging to Buddhist, Sikh, Hindu, Christian, Parsi and Jain religious communities coming from Bangladesh, Afghanistan and Pakistan who entered India before 31st December 2014. This paper specifically focuses on whether this amendment is just or unjust law.

To suit the nature of the study, a doctrinal method of research is used. Resources are collected through textbooks, journals, legislative history and other socio-legal publication benchmarking the current position. The object of this paper is to argue the need for ratifying certain International standpoints on refugees by India, critically analyse the said amendment and suggest several recommendations in the legal context. For the benefit of the reader, the paper is divided into four parts.

Firstly, the paper looks at the evolution of legal regime governing the rights of citizens under the Constitution of India, the Citizenship Act of 1955, and several amendments as to citizenship in the domestic laws.

Secondly, the paper emphasises on the nexus between basic structures doctrines along with several other provisions under the Indian Constitution and the Citizenship Amendment Act, 2019 (hereinafter referred to as CAA). It also critically analyse some of the burning socio-legal-religious questions arise out of the CAA.

Thirdly, the paper looks at the process of National Register of Citizens (hereinafter referred to as NRC) and National Population Register (hereinafter referred to as NPR), landmark judgements of the apex court and issues interrelated to the CAA and the impact that an international convention would have on Indian society.

Fourthly, the paper looks at the way ahead including the lacuna and the challenges arise due to said amendment. This research leads us to understand the need for refugee law in India.

¹ A letter from Birmingham jail by Martin Luther King Jr.
Available at-https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html

EVOLUTION OF THE CONCEPT OF CITIZENSHIP THROUGH LEGAL REGIME

Anger against British colonisation government laid freedom movement echoing voice for independence from British rulers. This revolution resulted into independence and later on, the Indian constitution came into force which united people from different institutions under one identity and grants citizenship without any discrimination based on faiths, creeds, religions, castes, race, language, sex and gender. Thus the concept of Nation and Nationality evolves through this significance. Under the Indian Constitution, there are broadly two principles to grant citizenship such as 'Jus soli' and 'Jus sanguinis'. Jus soli means a person can acquire citizenship as of birth right based on birthplace. However, Jus sanguinis means a person may acquire citizenship by descent. Citizenship is a question of human existence and also the subject of the relationship between state and person.

In Part II of the Indian Constitution, provisions under Article 5 to Article 11 deals with citizenship² i.e. Citizenship at the commencement of the Constitution (Article 5), Rights of citizenship of certain person who have migrated to India from Pakistan (Article 6), Rights of citizenship of certain migrants to Pakistan (Article 7), Rights of citizenship of certain person of Indian origin residing outside India (Article 8), Person voluntarily acquiring citizenship of a foreign State not to be citizens (Article 9), Continuance of rights of citizenship (Article 10) and Article 11 empowers the Parliament to regulate the right of citizenship by law. Dr. Ambedkar explicitly clears in the Constituent assembly that these provisions are limited to questions of citizenship on the day the Constitution came into force.

Some essential rights are also ensured under part III of the Constitution for the development of the individuals known as Fundamental Rights and those rights are universally applicable to all citizens. Constitutional makers have foresighted and used two distinctive words in the provisions of fundamental rights that are 'Citizens' and 'Person'. The word 'Citizen' signifies the rights available to the citizen of India. However, the word 'Person' connotes rights available for not only to Indians but also inclusive of foreigners. Hence, foreigners have the right to live with dignity and the right to equality under Article 14 and Article 21 of the constitution.³ Every citizen of the India is entitled to all fundamental rights such as the right to life, right to equality, freedom of speech and expression, non-discrimination etc. They have a right to permanently reside in India while

²Available at P.4&5- https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf

³ Indra Sawhney and others versus Union of India and others AIR 1993 SC 477

foreigners do not have that privilege. Citizens have the right to vote and most state welfare scheme is only made for them.

As Article 11 of Constitution empowers the parliament to regulate the right of citizenship by law it resulted in the enactment of Citizenship Act, 1955. It elucidates five methods of acquiring citizenship such as; by birth, by descent, by registration, by naturalisation and by the acquisition of territory.⁴ It is pertinent to know that the citizenship act has been amended in the year 1986, 1992, 2003, 2005, 2015 and recently in 2019.

But the recent amendment of 2019, triggered protest and vitiate atmosphere across the country. An illegal migrant is defined as any person who entered India without a valid passport or travel document or having entered India with a valid passport or travel document has stayed behind after its expiry, however proviso to this definition is added by the amendment in 2019 which mentions that any person belonging to Hindu, Christians, Parsi, Sikh, Buddhist, Jain community from Pakistan, Afghanistan, Bangladesh who have entered India on or before 31 December 2014 will not be treated as illegal migrants.⁵ Amendment in the third schedule of principle act, in clause (d) the proviso reduces the period of residence to five years for the included categories of migrants to be registered as a citizen of India.⁶ Furthermore the Central Government specifically mentioned in statements of object and reasons of the said act that, minorities persecuted in Pakistan, Afghanistan, Bangladesh on grounds of religion and emphasise the historical fact that trans-border migration of population has been happening continuously among this nations.⁷

It is important to take into cognizance certain other historical facts which were not considered by the central government. Several Parsis from Iran migrated to India from the 12th century to 20th century. In the 1960s Tibetans migrated to India. In 1980 to 2000 Tamils from Srilanka migrated to India and recently Rohingya Muslims migrated to India from Myanmar.

⁴ Available at- <http://egazette.nic.in/WriteReadData/2019/214646.pdf>

⁵ Under sec 2(1)(b) of the CAA 2019. Available at- <http://egazette.nic.in/WriteReadData/2019/214646.pdf>

⁶ Ibid.

⁷ Statement of object and reasons of CAA 2019. Available at- http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/370_2019_LS_Eng.pdf

CRITICAL ANALYSIS OF THE CAA

This amendment chose three specific countries and excluded Islam religion however the question remained unanswered that why it excluded other countries having historical trans-boundary migration with India. Furthermore, the law remains silent on why it excludes political, economic, linguistic, ethnic and other persecutions. On this background, it is important to critically analyse the said amendment in the context of the Indian Constitution and ‘doctrine of the basic structure’ established through it.

The landmark judgement in the history of the Indian Constitution *Kesavananda Bharti Vs State of Kerala*⁸ specifically mentioned that legislatures have unlimited power to amend the constitution but it should not be against the spirit of the constitution. This verdict recognised the doctrine of the basic structure. Hence while opening a new window to acquire citizenship through CAA it must critically analyse in the above mention principles and doctrines. The doctrine of basic structure says that “the parliament has unlimited power to amend the Constitution is subject to only one restriction that it should not dilute or violate the basic structure of the Constitution.”⁹ Justice Khanna provided that though under Art. 368 Parliament empowers to amend the constitution but they cannot change its basic structure. In *Kesvananda Bharti Case*, the Supreme Court enumerated lists which come under the doctrine of basic structure that the supremacy of the Constitution, India’s foundations as a Republic, and emphasised the importance of the Preamble that stressed on Equality (of status and opportunity) and Justice (social, economic and political). Additionally, inherent values of secularism, equality and non-discrimination are India’s constitutional ideas and aspirations which inspired the country in its struggle for independence. The Constitution allows recently classification with the rational object to do so. The reasonable classification has been further modernized by the Supreme Court in a case of *Royappa vs. State of Tamil Nadu*¹⁰ which discusses the right of every citizen to seek protection against arbitrariness. This indicates that reasonable classification shall be allowed to bring equality and otherwise any citizen can avail the right of protection against arbitrariness, if any, in any Law or Legislation. In the Citizenship Amendment Act, 2019 the classification is not reasonable because firstly, it excluded neighbouring countries such as Srilanka, Tibet, China, Bhutan etc. Secondly, it does not included persecuted minorities in the countries classified such as Ahmadiyyas from Pakistan and

⁸ *Kesavananda Bharti and others VS State of Kerala and Anr. (1973) 4 SC 225*

⁹ *Ibid.*

¹⁰ *Royappa vs. State of Tamil Nadu AIR 1974 SC 555*

the Hazaras from Afghanistan. The classification of three countries and six religions violates the basic principle of equality as the classifications made are manifestly arbitrary.

Municipal Board Pratapgarh vs. Mahendra Chawla¹¹ is one of the important case decided by the Supreme Court which underline the principle related to social rights and effects of any Laws on human beings. This case mentions that laws cannot be interpreted and enforced divorced from their effect on human beings for whom the laws are meant. Undoubtedly 'Rule of Law' must prevail but as it is often said, Rule of Law must run akin to the rule of life and life of the law is not logic but experience. Additionally, In Super Cassette Industries versus Entertainment Network (India) Limited¹² it has been decided that International Convention could be used to fill gaps when Law was silent.

On behalf of the Government, it can be argued that 'Due Process' is established by sending such cases to 'Foreigners Tribunal.' It is important to mention that Foreigners Tribunal are setup in detention homes and it is not an open court where journalist, common people can attend the court proceedings. Sending any person in a detention home, labelling such person as 'Doubtful Citizens', snatching their citizenship rights and then compelling them to appear before Foreigners Tribunal may lack any element of the 'Due Process of Law'. As per our personal view, it is a prejudiced process of presuming someone as Non-Citizen and then initiating legal proceeding against such person. It is a denial of Natural Justice and gross violation of Human Rights.

"Bangladesh, Pakistan, Afghanistan are Islamic dominated countries. Hence, Muslims cannot be said to be religiously persecuted in these countries and so they are not being included under this amendment.¹³ Due to this government leave out people belong to Islamic religion from this enactment." Such an irrational argument in support of this enactment is made by the Union Home Minister Amit Shah in the Parliament. It can be seen that some group of Muslims are also persecuted in the said countries.

All Muslims who seek Indian citizenship by naturalization will not be eligible for grant of citizenship by right this will be discretionary alone by implication. Thousands of Afghans Refugees as well as Rohingyas, currently living in India could come under direct threat. The result in statelessness is a cause for deep concern as their fates could lie not in the Refugee or Transit camps, as they are at the moment, but in detention camps, the legal basis of this detention camps is as

¹¹ Municipal Board, Pratapgarh vs. Mahendra Chawla AIR 1982 SC 1493

¹² Super Cassette Industries vs. Entertainment Network (India) Limited AIR 2004 Delhi 326

¹³Speech of Union Home Minister in Council of States.

Available at-<https://www.youtube.com/watch?v=59Z50VmcSfY>

much in question as are the abysmal conditions and non-transparency under which they operate. The implications have not been enumerated in the law on stateless person/refugees living in India.

Once the Government determines the Nationality of illegal migrants, ideally, they should be sent back to their home country. For this fulfilment, there should be 'Repatriation Treaty' between the home country and country wherein illegal migrant currently resided. Unfortunately, India doesn't have a Repatriation Treaty with Bangladesh, Pakistan, and Afghanistan so those countries may refuse to take their citizens back to their home country. Due to this India has to send them in Detention camps. As we mentioned earlier the foreigners also have Right to Life and Personal liberty, and Right to Equality guaranteed under Article 14 and Article 21 of the Constitution. So send them to the detention camp amounts to violation of the doctrine of the basic structure laid down by the apex court. While political efforts take place to redefine citizenship it creates a threat to the basic structure of the constitution and ultimately efforts reach to modification of fundamentals of the constitution.

APPROACH OF INDIA TOWARDS INTERNATIONAL STANDPOINTS ON REFUGEE STATUS

The internationally accepted definition of a refugee – taken from the United Nations High Commissioner for Refugees' Convention of 1951 and the 1967 Protocol – is someone who has “a well-founded fear of persecution by reasons of race, religion, nationality or political opinion” and who cannot return to his country or has become ‘stateless’.¹⁴

India is not a signatory to the United Nations Convention on Refugees Status of 1951 as the perception was that this convention came after World War II and its provisions were against communist countries across the world. Additionally, critics of this convention pointed out, that this convention had European centric provisions. As this convention had a large influence of World War II and the cold war in the European area, critics alleged that it included certain provisions by taking into consideration the European geographical area. Moreover, the protocol of 1967 is inclusive and has adopted a more universal approach. Despite this, India's approach towards International standpoints on refugees never changed. On the other hand, there are some international treaties and conventions through which India's 'stand' on Refugees law can be understood. It includes the Universal Declaration of Human Rights 1948, the International Covenant on Civil and Political Rights (ICCPR) 1966, the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, the Convention Relating to Status of Stateless Persons

¹⁴ Available at- <https://www.unhcr.org/1951-refugee-convention.html>

(1954), the Convention on the Reduction of Statelessness (1954), the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979, the Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child 1989. It has great significance in international refugee's laws regime as India signed these conventions with some reservations. The treaties or conventions which are not contradictory to the domestic law can be enforced in directory manner by India judiciary. This approach had taken in Vishakha case¹⁵ by the apex court.

In respect of the Refugee Convention, though it sits on the executive committee, India has taken the position that it is not a party. But India cannot deny that it is bound by the other human rights treaties which it has signed. The principle of non-refoulement¹⁶ governs instances relating to the treatment of persecuted refugees. It means that the person cannot send back to the country wherein they faced persecution and torture. If those people prove persecution on it then refuge state has to provide asylum to them.

NRC, NPR AND ITS LINKAGE WITH CAA

The NPR according to the ministry of home affairs is “Resident of usual residents of the country. It is being prepared at the local (village/sub town), sub-district, district, state and national level under provisions of the Citizenship Act 1955 and the citizenship (registry of citizens and issue of National identity cards Rules, 2003) it is mandatory for every usual resident of India to register in the NPR. A usual resident is defined for NPR as a person who has resided in a local area for the past six months or more or the person who intends to reside in that area for next 6 months or more. The objective of NPR according to Ministry of Home Affairs is to; create a comprehensive identity database of every usual resident in the country. The database would contain demographic as well as biometric particulars.”¹⁷ The Process of the NPR was conducted in 2010 but it does not contain any field for information on date and place of birth of parents which is sort under the process of NPR in 2020.¹⁸

National Population Register	National Register of Citizens
Database of all residents of the country. ¹⁹	Exercise to identify illegal immigrants. ²⁰

¹⁵ Vishakha vs. State of Rajasthan (1997) 6 SCC 241

¹⁶ Available at- <https://www.unhcr.org/1951-refugee-convention.html>

¹⁷ Available at- <http://censusindia.gov.in/2011-Common/IntroductionToNpr.html>

¹⁸ Ibid.

¹⁹ Available at- <http://censusindia.gov.in/2011-Common/IntroductionToNpr.html>

²⁰ Rule 3, Ministry of Home Affairs Notification dated 10th December 2003,

It also counts Foreigners residing in India. ²¹	Even if any person is a citizen of India and residing outside the country they have to come back during the NRC process with their documents to prove their citizenship. ²²
NPR is for a person who usually resides in India. ²³	NRC is for citizens of India. ²⁴
Estimated expense for NPR process is 3941.35 crore. ²⁵	More than twelve thousand crore expenses incurred to conduct NRC in Assam for approximately three crore people. ²⁶

NRC was conducted in 1951 for the first time across the country and it was prepared by recording the particulars of the entire person during that census. It is updated as per the provisions of The Citizenship Act, 1955 and the Citizenship (Registration of Citizens and Issue of National identity cards) Rules, 2003 hence it has a direct relation with NPR as it has its origin in the said rule of 2003.²⁷ To fulfil the provisions of Assam Accord and order given by the Hon'ble Supreme Court the NRC was recently conducted in Assam. Moreover the documents namely NRC, 1951 is coined as legacy data. Legacy data is the primary set of documents admissible to prove the claim of citizenship for inclusion in NRC updated for the State of Assam.²⁸ On the contrary Hon'ble High Court of Guwahati mentioned that the NRC, 1951 documents are not admissible.²⁹ Perhaps these documents used to prove citizenship in Assam. According to the report of UNICEF, out of 100 only 58 names of children registered when they born.³⁰ It means 42% of citizens will not have Birth proof documents. According to a survey conducted by NSSO, approximately 1.70 crore homeless people live in India. 15 crore citizen belongs to Nomadic Tribes they often migrate from

Available at- http://censusindia.gov.in/2011-Act&Rules/notifications/citizenship_rules2003.pdf

²¹ Available at- <http://censusindia.gov.in/2011-Common/IntroductionToNpr.html>

²² Available at- Ministry of Home Affairs Notification dated 10th December 2003,

Available at- http://censusindia.gov.in/2011-Act&Rules/notifications/citizenship_rules2003.pdf

²³ Available at- <http://censusindia.gov.in/2011-Common/IntroductionToNpr.html>

²⁴ Available at- Ministry of Home Affairs Notification dated 10th December 2003,

Available at- http://censusindia.gov.in/2011-Act&Rules/notifications/citizenship_rules2003.pdf

²⁵ Press Information Bureau, Government of India Cabinet.

Available at- <https://pib.gov.in/newsite/PrintRelease.aspx?relid=196075>

²⁶ Press Information Bureau, Government of India Cabinet

Available at- <https://pib.gov.in/newsite/PrintRelease.aspx?relid=178400>

²⁷ Rule 3, Ministry of Home Affairs Notification dated 10th December 2003, Available at- http://censusindia.gov.in/2011-Act&Rules/notifications/citizenship_rules2003.pdf

²⁸ Available at- <http://www.nrcassam.nic.in/faq03.html>

²⁹ Manora Bewa vs UOI and Others. WP (C) No. 2634 of 20176

³⁰ The said report is available at- https://www.unicef.org/publications/files/UNICEF_SOWC_2016.pdf

one place to another and do not have a permanent place of residence.³¹ Thus it becomes terrible and chaotic to show the document for proving their citizenships.

In absence of refugees' law and the repatriation treaty, the responsibility of illegal migrants will lie on citizens. If we look at this issue from an economic perspective then the intensity of this question will be highlighted. As per statistics from Assam NRC, they found nearly nineteen lakhs, illegal migrants. A country having twenty-nine states and eight union territories with huge population may have millions of illegal migrants. Firstly the country has to make administrative arrangements in the detention camps then they have to ensure the daily livelihood of illegal migrants. If we consider the expense of hundred rupees for one illegal migrant in a day then it may amount to billions of rupees in a month. Taxpayers of the country must cautious on it because this economic burden will lie on them.

CONCLUSIONS

Dr B.R. Ambedkar laid down interesting theory of 'Broken Men' to describe the origin of untouchability. According to this theory, broken men were treated as untouchables because of beef eating and it leads to division among broken men and the settled community.³² The process of NRC-NPR leads to a division between the persons as citizens and non-citizens. It ultimately leads into hatred of non-citizens by the citizens and may result in the 'modern form of untouchability' wherein non-citizens will be 'Broken Men.'

The Concept of Citizenship evolves through domestic laws and international standpoints. Recent amendment in the Citizenship Act is inconsistent with the doctrine of basic structure as well as contradictory to Article 14 and Article 21 of the Constitution. There is no specific policy to govern refugees in India. NRC and NPR are the distinctive processes but there is space for administrative authorities to interlink it with each other for the recognition of illegal migrants. On this background, there are some specific recommendations would like to state in the conclusive part of this paper as follows-

1. The said amendment is fundamentally void. Hence, it should be struck down and has to declare null and void.

³¹ Available at <https://www.hlrn.org.in/homelessness>

³² The Untouchables: Who were they and why they became untouchables ? by Dr. B.R.Ambedkar

2. The Central Government has to take into cognizance quasi-federal nature of our constitution and need to follow the duty of central towards state government enumerates in Article 355 of the Indian Constitution.
3. India shall sign to the UN's Convention on Refugees Status.
4. Central Government shall enact Domestic law on refugees.
5. The opposition is not for the inclusion of certain religion but it is for the exclusion of only one religion as it is against the very 'Idea of India.'
6. India shall take the pro-active initiative to settle boundary disputes with neighbouring countries.
7. To re-think on implementation on the NPR process and not to apply NRC across the country in future.