Citizenship (Amendment) Act, 2019 and Protection of Refugees in India: A Panoptic View

Tanmoy Roy
Research Scholar of Law and Governance, Central University Of South Bihar

Dr. Pradip Kumar Das
Associate Professor of Law and Governance, Central University Of South Bihar

Abstract: *The Citizenship (Amendment) Act, 2019, being the most contentious recent piece of legislation, sparked an unprecedented protest and controversy across the whole country. This short piece of legislation granted fast track mode of citizenship to six religious groups in three neighbouring countries. The sceptics assert that through apparently beneficial, this Act is fitted with discrimination, and deprivation and equipped with the ulterior motive of the present ruling government. The scepticism stems mostly from the exclusion of one religious group from its legislative ambit and it calls into question its cherry-picking method of selecting three neighbouring countries. Critics assert that this legislative amendment will surely fail to pass the test of the doctrine of 'intelligible differentia' and hence it is unconstitutional on the ground of violative of Article 14 of the Indian Constitution. To what extent, this contention holds water appears to be the thrust of this paper. A section of refugee law scholars also depicts this piece of legislation as 'quasi refugee law' in the Indian setting. To what extent, it serves the interests of refugees seems to be the special focus of this paper.*

Keywords- Citizenship, Intelligible-differentia, Persecution, Refoulement, Refugee.

> *"The CAA is a limited and narrowly tailored legislation which seeks to provide a relaxation to…specific communities from the specified countries with a clear cut-off date."….*
> *Ministry of Home Affairs, G.O.I in its Annual Report for 2020-21.*[1]

Being derived from the Latin word *"Cavitas,"* the term *"Citizen"* indicates the connection between the individual and the State under which such individual lives or participates in its functions.[2] As a member of the political community or the State, it denotes legal status and bears certain exclusive rights and duties as well.[3] In India, the issue of Citizenship is governed by the

Constitution of India and the Citizenship Act, of 1955. Part II of the Constitution deals with the provisions concerning Indian Citizenship at the commencement of the Indian Constitution. Similarly, the Citizenship Act, of 1955 addresses the Citizenship issue in our country after the commencement of the Indian Constitution. Without delving into the citizenship debate, the researchers keep themselves confined to the very recent 2019 amendment of the Citizenship Act of 1955 because this amendment to the Citizenship law has a specific bearing on the persecuted groups of three neighbouring countries. Here the researchers have dealt with a few important issues like whether there is any specific connection between the recent 2019 Citizenship Amendment Law and the refugees, by assessing the purpose of the Act to protect the refugees who have taken shelter in our country.

It is in this socio-legal backdrop, the authors herein have ventured to write on this topic of contemporary relevance. This paper, inter-alia, highlights the overview of the contentious Citizenship Amendment of 2019 and attempts to trace the furore underlying it. The authors, in this paper, have also emphasized on Government's stand on this issue. Besides this, a reasonable attempt has been made to explore some tentative grounds on which this short piece of legislation can be suitably attacked. Lastly, the authors have tried to find out the role, if any, of this Central legislation towards refugee protection in India and have briefly come up with a way forward to address this crisis.

Citizenship (Amendment) Act, 2019: An Overview-

Keeping this in mind, the researcher now proceeds to the analysis of the Citizenship (Amendment) Act of 2019[4] (hereinafter referred to as CAA). Being enacted by the Parliament on 12th December 2019, the CAA has created a pathway for six minority populations from three nations to petition for citizenship based on religious persecution.[5] This recent 2019 Citizenship amendment, by inserting a Proviso to Section 2(1)(b) of the Citizenship Act of 1955,[6] has reshaped the definition of "illegal migrant", by recognising a "fast-track" mode of granting citizenship to the six specifically mentioned religious groups of three neighbouring countries and, by granting them immunity from prosecution.[7] The effect of this amendment is that: migrants from Afghanistan, Bangladesh, and Pakistan who belong to any of the six religious communities namely Hindu, Sikh, Buddhist, Jain, Parsi, or Christian, and arrived in India by December 31, 2014, would be immune from prosecution as illegal migrants and will be eligible for fast-track citizenship[8]. The 2019 amendment also makes changes to the Third Schedule of the Citizenship Act of 1955. The 11 (eleven) years prerequisite for citizenship by registration or naturalisation in the 1955 Act has now been shortened to 5 (five) years for these categories of people.[9] Here the researchers are not unmindful of the fact that the seeds of this contentious enactment were sown in 2015 itself, when the Passport (Entry into India) Rules, 1950 and Foreigners Order, 1948 were amended to that effect. These two amendments, namely Order 3A of The Foreigners Order,

1948[10] and Rules 4(ha) of The Passport (Entry into India) Rules, 1950[11], granted a protective umbrella to the six religious minorities (Hindu, Sikhs, Buddhists, Jains, Parsis, and Christians) of Bangladesh and Pakistan, who took shelter in India to evade religious persecution or its consequent fear. In effect, these two amendments granted an exemption to those specific religious minorities from the penal consequences of the Foreigners Act, of 1946 and the Passport (Entry into India) Act, of 1920. The only difference is that: unlike the Citizenship (Amendment) Act of 2019, these two 2015 amendment benefits illegal migrants from two countries only, namely, Pakistan and Bangladesh. But soon after, these two enactments have been amended and substituted again in 2016 and this time the illegal migrants of Afghanistan were also covered under its protective shield.[12] Hence it transpires from the above, that the substantial legal backdrop of the Citizenship (Amendment) Act, 2019 started its journey in 2015.

Enactment of Citizenship (Amendment) Act, 2019 & Consequent Furore-

This short piece of legislation triggered a heated debate and unprecedented furore across the whole country questioning the legislative intention or object behind it. We have witnessed a nationwide controversy and massive protests against this Act. Critics have mainly attacked this Act on the ground of discrimination against Muslims. The ruling governments' intention was vehemently attacked mainly on the ground of exclusions of Muslims from the legislative ambit. Some notable intellectuals have claimed that the CAA possesses anti-secular characteristics since it has kept Muslims outside its scope and has condemned the legislative move as inherently communal on the ground of embracing 'religion' to confer Indian citizenship.[13] The critics and sceptics have left no stone unturned to criticise the move of the present ruling government by alleging its non-secular nature and also by accusing the present ruling Indian government as a pro-Hindu government. The bone of contention of the opposition is that by excluding Muslims from the zone of consideration and by compromising the secular nature of the Indian Constitution, the present Indian government has moved a step further in the formation of one "Hindu Rashtra".Furthermore, opponents expressed their fear that if interpreted and construed in tandem with the proposed NPR (National Population Register) and NRC (National Register of Citizens), the CAA would tend to become a formidable instrument in the hands of the ruling party for excluding Muslim settlers from this country, thereby rendering them stateless. In the event of such an exclusion process, the CAA would become a saviour to the non-muslims. To buttress this contention, the critics and opponents have cited the NRC-based exercise in Assam, which has excluded almost 19 (nineteen) lakh people after its publication of the final list in 2019. As per the opponents, because more than 10 (ten) lakh Hindus are included in these 19 (nineteen) lakhs excluded figure in Assam, CAA deliberately stepped into safeguarding them from losing their citizenry rights. Opponents had smelled some foul in the timing of this legislative reform.[14]

Citizenship (Amendment) Act, 2019 & Stand of the Government-

Per contra, the Indian Government rebutted this allegation by asserting that the intended beneficiaries of the 2019 Citizenship amendment are none other than the religious minorities of three neighbouring countries of India. In these three neighbouring countries, Islam is admittedly the State religion. Owing to this, these religious groups, being religious minorities, faced severe deprivation, tremendous exploitation, and brutal persecution. Their houses have been burnt, shops were looted, properties were grabbed, religious places were vandalised and more so women members have been raped. To give them a place of honour and dignity, these persecuted religious groups of the specified three neighbouring countries have been given the fast-track mode of acquiring citizenship rights. Hence, by relying on the Statement of Objects and Reasons of the Citizenship Bill of 2019, the government contends that this recent legislative amendment is nothing but a humanitarian move to provide ministration and succour to the religiously persecuted minorities of the above-mentioned three nations.[15] It has nothing to do with the existing status of present Indian citizens. In a nutshell, the government has eliminated any factor of foul or vile in it.

Citizenship (Amendment) Act, 2019 & Tentative Grounds of Attack-

With this background, the researcher considers it imperative to explore the concerns raised in it. From the perusal of several available literatures, it appears that criticisms are mainly sixfold. Critics assert the unconstitutionality of the amendment on the ground of violation of several provisions of the Indian Constitution and also of compromising its secular feature of it. Besides this, the choice of three neighbouring countries was also put beneath the scanner. Some have also questioned the decision to exclusion of Rohingyas of Myanmar and Tamils of Sri Lanka. However, discrimination against Muslims in these three neighbouring countries seems to be the crux of the criticism. Some have also questioned that if providing soothe to persecuted victims is the only intended objective, then why Shia, Hazaras, and Ahmediyas are being excluded in these neighbouring countries? Thus, it appears that the CAA of 2019 came under considerable attack mainly on the following five factors.

i. Violative of Articles 14, 15, and 21 of the Constitution as well as of the secular fabric?
ii. Can be disputed and debated on the selection of the above-mentioned three specific neighbouring countries.
iii. Can be critiqued about the exclusion of Rohingyas of Myanmar and Sri Lankan Tamils. In short, this method of classification can be questioned for its under-inclusiveness.
iv. Can be challenged since this Act discriminates against Muslims in these neighbouring countries.
v. Can be questioned because Shia, Hazaras, and Ahmediyas also endure persecution in these three neighbouring states.

vi. Can also be questioned on the ground of making religion a basis for classification.

Citizenship (Amendment) Act, 2019 vis-à-vis Constitutionality & Unconstitutionality-

Several Petitions have been filed before the Indian Supreme Court assailing the constitutionality and the vires of the Act. All such petitions have been clubbed together in the seminal case of *'Indian Union Muslim League* v. *Union of India'*[16]. Thus, the matter is now sub-judice and pending consideration before the Indian Apex Court. In this setting, the authors through their limited legal acumen and prudence attempt to legally explore and examine both sides of the contentious Act.

Tentative arguments in support of the CAA move-

a) Those who support CAA can reasonably argue that this 2019 Citizenship Amendment has no bearing on the existing status of current Indian Citizens because it exclusively addresses the needs and concerns of the three neighboring nations' religiously persecuted minorities and has nothing to do with Indian Citizens.[17] At best, it can be termed as a narrowly crafted statute designed to address people who are religiously oppressed and persecuted by our three Islamic neighbours comprising Afghanistan, Bangladesh, and Pakistan.[18] The CAA is certainly not a law that takes away the citizenship of any individual, but rather endows one with citizenship.
b) The contention of the critics that CAA tends to breach the mandate of Article 15 of the Indian Constitution is completely unfounded and baseless because this Article only applies to Indian citizens and by no stretch of the imagination can be held applicable to non-citizens also.
c) In terms of violations of Articles 14 and 21 of the Indian Constitution, the researcher would prefer to argue that these prohibitions apply to individuals "who live in India or dwell in India, rather than those who wish to enter India." As a result, a Pakistani sitting in Pakistan cannot agitate about a breach of his or her rights under Articles 14 and 21 of the Indian Constitution. However, this begs the question of what would the fate of those Muslims who have already managed to enter India.
d) On the issue of the non-inclusion of Rohingya Muslims of Myanmar and Sri Lankan Tamils, one reasonable argument seems to be that: a legislative measure that remedies one injustice does not need to cover all the other related injustices. To answer the question of under-inclusion, it is necessary to understand what the term means in a legal sense. A classification can be questioned with under-inclusiveness, when some members of the class, despite being tainted with the same mischief and as such despite being similarly situated, are kept beyond the zone of consideration.[19] To put it in another way, an

underinclusive categorization occurs when a State confers certain advantages or puts certain burdens upon individuals in a way that advances a legitimate objective but does not bestow the same advantage or impose the same obligation on other similarly situated individuals or groups.[20] Even if one may contend that the classification and categorization under the 2019 citizenship amendment exclude certain similarly situated persons from its legislative scope and coverage, under-inclusion itself or marginal under-inclusion does not render a law unconstitutional under Article 14.[21]

e) On the issue of whether the CAA systematically discriminates against Muslims in the specified three neighbouring Islamic nations, one could reasonably argue that someone belonging to the religious faith of the State itself cannot at least be subjected to religious persecution. Thus, the contention of discrimination against Muslims seems preposterous and ridiculous. Here the prudent contention should be: this law does not state unequivocally and categorically that Muslims from neighbouring countries would never be granted citizenship. If he or she is facing political persecution there, he will fall under the general norm of asylum and will be governed accordingly.

f) On the issue of Shia, Hazara, and Ahmediya's persecution in those three specified countries and their non-inclusion within the contours of the Act, it might be claimed that the goal of this amendment is not to fix all the governance-related difficulties in our neighbouring nations. India has no duty or commitment to go to its neighbouring countries and locate individuals who are being mistreated in those countries and extend protection to enable them to settle in India.

g) On the choice of three Islamic countries, it can be argued that the matter falls within the policy decision of the government and the Court would be very slow to scrutinize it unless it is patently arbitrary. Thus, the selection of three Islamic nations can be claimed to be a matter of government policy and the scope of judicial review should be very limited unless it is manifestly whimsical and capricious.

h) On the question that 'religion' cannot be a reasonable basis for classification, reliance may be placed upon the decision of the Indian Supreme Court in Mahant Moti Das's case[22], where the court upheld the factor of 'religion' as a reasonable basis for classification. In reality, members of religious minority communities in our country have certain specific privileges under the Indian Constitution. Thus, religious categorization is not *'ipso-facto'* unconstitutional.[23] Judicial attention may also be drawn to the 2004 Lautenberg-Spectre Amendment of the United States that conferred refugee status upon the historically persecuted communities and consequential citizenship tag to the Jews, Christians, and Baha'is from three countries.[24] Finally, it can also be argued that the partition of India has been made on

religious lines.

Tentative arguments to counter and contradict the CAA move-

a) First of all, religion had never been envisaged by our Indian Constitution while considering Indian citizenship, and thus the CAA, which confers citizenship based on affiliation to six religious groups, is invalid because it goes beyond our constitutional philosophy of not granting citizenship based on 'religion'. The Citizenship amendment of 2019 makes a whimsical and capricious differentiation between 'illegal immigrants based on their religion by conferring entitlements to certain religious communities while eliminating Muslims.[25]

b) For the sake of argument, even if it satisfies the test of Article 14 and 21, the 2019 Citizenship (Amendment) Act can still be vehemently attacked on the ground of violating the cherished principle of 'secularism', which has been declared as one of the essential and cardinal features of the Indian Constitution in the landmark nine judges Bench decision of the Indian Supreme Court in S.R. Bommaiv. Union of India. A religion-based citizenship scheme is incompatible with our constitutional framework and hardly goes with our constitutional ethos and culture.[26] Since this legislative amendment of 2019 seeks to combine and blend citizenship and religion, the petitioners may reasonably place their contention that it has transgressed constitutional limits, torn apart the constitutional fabric of secularism, and hence it is unconstitutional.[27]

c) On the issue of prescribing the cut-off date of 31st December 2014, it may also be questioned what is the justification or rationale for the insertion of such a cut-off date in the Citizenship (Amendment) Act of 2019? The petitioners may contend that here the date is chosen at random. Neither the Statement of Objects and Reasons of the Act nor the Act in its entirety, illuminate the rationale or premise for the incorporation of such a cut-off date and that's why the rational relationship with the Act's purported goal is missing.[28]

d) The 2019 Citizenship amendment (CAA) can still be attacked on the ground of contradiction with the Assam Accord of 1985 and will tend to compromise the linguistic, cultural, and social identity of Assam. Assam Accord fixed 25th March 1971 as its cut-off date for granting citizenship to Bangladeshi migrants in Assam. However, the CAA makes changes in the Cut-off date and prescribes a new one (31st December 2014). Hence, these two dates will certainly have a conflicting tendency.

e) CAA detractors can fairly argue that the deadline of 31st December 2014 is difficult to grasp. The incorporation of a specific cut-off date may indicate that either persecution of minorities in those countries ceased after that date or that the Indian Government was apathetic about it and did not like to bother it too much on this score.[29]

f) On the question that the Partition of India has been made on religious

lines, it can be argued that 'illegality can't be invoked to perpetuate another illegality' under the so-called equality doctrine. The equality clause is not applicable in a case where the purported act itself arises out of illegality.[30]

Citizenship (Amendment) Act, 2019 & Protection of Refugees in India-

It appears from the above that the issue involved in this case is multi-faceted. Presumably, it will be an arduous, challenging, and onerous task for the Supreme Court to settle this controversy and mess. However, keeping in mind that the matter is sub judice before the Supreme Court of India, it will not be a prudent exercise for the researcher to arrive at a definite conclusion. As the ball is now before the Supreme Court, it will be inappropriate and pointless to speculate further on the amendment itself. Being a sentinel of our Indian Constitution, it is expected that the Indian Apex Court will set this controversy at rest. So far as refugee issues are concerned, it is clear from the Act itself, that the Act has not specifically used the term 'refugee', but the contemplation of conferring citizenship rights is explicitly manifest in the Act to those six specified religious groups who are persecuted based on their religion only and that too only in three specified countries. Hence, apart from religious persecution, this 2019 Citizenship Amendment does not whisper on other recognised grounds of persecution, namely, "race, nationality, membership of a particular social group or political opinion". Thus, by no stretch of the imagination, it can be asserted that the CAA of 2019 fulfils the complete mandate of the 1951 UN Refugee Convention and its 1967 Protocol. Except for conferring citizenship to certain persecuted groups, this Act does not deal with refugee issues in any manner. Conferment of citizenship would permanently put an end to the lifelong plights and predicaments of refugees, but what would be the fate of those who do not belong to the specifically mentioned three countries and who are not associated with the six specified religious groups? Thus, the humanitarian concerns and needs of all refugees are not addressed in this legislation. Critics asseverate that this short piece of legislation, in effect, would exclude the Rohingya refugees, Sri Lankan Tamil Refugees, and many other refugee groups and thereby resulting in patent discrimination and manifest indifference to the similarly situated groups. But the fact that India is not a signatory to the 1951 UN Refugee Convention and its 1967 Protocol, does not in any way make India accountable for such deliberate omission. One can unhesitatingly assert that India is under no obligation to offer floodgates to all refugee groups of all religions. The process of 'how to choose' and 'whom to choose' falls within its sovereign legislative competence. This eventually comes under the purview of policy. So far as constitutionality and vires of the Act are concerned, this would hardly make any difference.

In terms of the NRC, it is asserted that if CAA is used in combination with the NRC, it will make it easier for the government to exclude Muslims from the garb of illegal immigrants. However, following countrywide demonstrations and protests, the government administration attempted to separate the two, stating that there are no plans to roll out or implement the

NRC at this time[31]. So, based on probability or anticipation of fear, it will not be a prudent exercise on the part of the researchers to comment on the future course of action. After all, the most widespread worry and misinformation in India is that: the CAA would result in selective discrimination and deportation of Indian Muslims, after taking their citizenship away from them. But CAA, if construed in isolation from NRC, has hardly any such deterrent effect. Now so far as CAA's impact on Indian Refugee Law is concerned, some had depicted it as a "quasi-refugee law"[32], as religious persecution or its consequent fear had been made the basic parameter of granting Indian Citizenship. But the narrow categories specified by this contentious piece of legislation frustrate the completely established logic of refugee law.[33] However, one should not be unmindful of the fact that under Sovereign Prerogative, the Union Government is fully within its legislative competence to amend laws on citizenship as the issue of citizenship comes within the scope of Entry 17 of the Union List of the Seventh Schedule.[34] Besides this, it should also be kept in mind that India is neither a signatory to the 1951 U.N Refugee Convention nor its 1967 Protocol. As a result, the government cannot be held accountable on a global scale for modifying its municipal law concerning citizenship. At best, it can be termed as a narrowly tailored law with constrained limits. As has already been mentioned that in terms of persecution, the scope of this contentious Act of 2019 is very limited. Thus, without questioning the intended purpose and goal of the 2019 Citizenship Amendment and further keeping in mind that the CAA solely concerns Citizenship, the researcher feels that what India requires is: dedicated and explicit refugee-centric legislation. Even if this 2019 amendment is found to be legally valid by the Indian Apex Court, there is hardly any iota of doubt that India requires comprehensive and cohesive asylum and refugee legislation that accommodates and addresses all types of refugees and their concerns. Hence, a specific and comprehensive refugee-centric national legislation is to be enacted that would inter-alia cover the definition of 'refugee', stipulate all the recognised grounds of *'persecution'*, the issue of asylum, *'non-refoulement'*, exceptions to *'non-refoulement'*, *'non-discrimination'* and would also regulate their civil and political as well as economic, social, and cultural rights, etc. In fine, before we conclude we must say that the enactment of specific legislation is the need of the hour to combat the refugee crisis in our country.

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