

# **LOCATING THE 'RIGHT TO HAVE RIGHTS' IN THE POSTCOLONIAL CONSTITUTION OF INDIA IN LIGHT OF NRC/CAA DEBATE**

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## **ABSTRACT**

“The right to have rights” is a phrase that summed up Hannah Arendt's incredulity with the ‘inalienable’ concept of human rights. Her concern was that the Universal Declaration of Human Rights would remain an assertion as these rights were not formally guaranteed to everyone. She viewed citizenship as being the fundamental aspect for the recognition and achievement of social, political and economic rights. Therefore, refugees and stateless individuals would be unable to enjoy these rights. The concerns Arendt had back in the day, hold true in the Indian context of the National Register of Citizens (NRC) that seeks to leave several individuals in India stateless. Coupled with the Citizenship (Amendment) Act 2019, this right to citizenship is not being accorded to a certain group of citizens and is being limited to certain groups with no justification for why the others are left out.

## **THE RIGHT TO HAVE RIGHTS**

Arendt was a stateless refugee for around 18 years of her life and the conception of the “right to have right” came from her personal experience, as well as the changing global context after World War II. She believed that this right only became important and relevant when millions of people were stripped of it after they lost their citizenship post the War. The Universal Declaration of Human Rights published in 1948 asserted that “human beings have rights simply by virtue of being human”<sup>i</sup>. If rights were natural then the implication is that an absence of political status would result in a general framework of human rights. However, from past experiences, post the mass denaturalisation of individuals, an opposite scenario is witnessed. Those that are impuissant and lack judicial citizenship are treated poorly and are deprived of basic rights. A purely moral assertion of rights does not work in a practical sense since the state provides the politico-juridical framework within which human rights are granted to citizens.

Arendt claimed that access to a political community was a precondition to be assured of rights and this access is what she referred to as the “right to have rights”. When Arendt used this phrase she was not trying to suggest that any such right actually exists, but instead critiqued the Rights of Man as being ‘unenforceable’ when individuals failed to belong to a state. Stephanie Degooyer<sup>ii</sup>, who co-authored a book titled “The Right to Have Rights”, in an attempt to interpret the phrase, refers to it as a posteriori right as it comes into consideration only when we view a situation where millions of people have lost this right. This is a “possession paradox” because a rights discourse only takes place when people’s rights are at issue, are threatened or denied<sup>iii</sup>. Therefore individuals that are citizens are privileged enough to be able to take “the right to have rights” for granted, but for those who have been dispossessed of their citizenship and rendered “stateless” its a right that they have already lost and which they cannot reclaim.<sup>iv</sup>

However, the legal status of citizenship is necessary but not a sufficient condition for the enjoyment of rights. The right to have rights as expounded by Arendt contemplates a general political scenario in the world where it is conceivable for everyone to avail rights, and which is sustained by the participation of individuals through protests and collective action. Therefore, subjects who are tormented and pushed back to the margins of society may have citizenship but cannot ask for the enforcement of their rights. They don’t have a political status in terms of Arendt’s understanding of the phrase since they lack access to public spaces.

## **A STATE'S ABILITY TO RECOGNISE CITIZENS**

The endowment of rights is rooted in the recognition of an individual by the state. TH Green's claim, then, is that recognition is essential to make something a right.<sup>v</sup> Since in the modern system, the state is recognising holders of rights, they often get the power to pick and choose the kind of people they wish to recognise. This allows the government to create the kinds of citizens they want and exclude women, queer people and minorities.<sup>vi</sup> If citizenship is a set of rights but these communities lack access to these rights (for example, queer people do not have the right to marry individuals of their choice), then they are only partial citizens.

Empirical support to affirm this idea of recognition was furnished through an analysis of German society during the Holocaust. Arendt noted that the Nazis deprived those individuals "whom they intended to exterminate of their citizenship"<sup>vii</sup> and eventually reversed the political status and consequently the recognition that the Jews had. This is an extensive process that begins with 'derecognition' of a few rights and ends with being displaced from the community and into the camps. In the German context, initially, rights such as those of ability to trade or holding positions in the civil service were barred.<sup>viii</sup> It was later that non-citizens were put into concentration camps and deprived of the "right to have rights" altogether. Unfortunately, the Indian experience is not too different and will be analysed in detail subsequently.

## **THE PREDICAMENT OF THE STATELESS**

The plight of the stateless comes as a result of the distinction between human and citizen in the current global order where sovereignty is a priority for states. The stateless are those individuals who are not considered citizens or nationals under the operation of the laws of any country.<sup>ix</sup> Mass stripping of citizenship has historically taken place through acts of denaturalisation in countries, post which, individuals belonged to no nation state. It also proves Arendt's assertion that membership to a political community is sine qua non to the enjoyment of rights. However, their plight is entirely distinct from forms of oppression that were witnessed before. Their predicament is not that the laws do not equally apply to them, it is that there is no law that governs them whatsoever.<sup>x</sup>

This "right to have a right" to not be arbitrarily deprived of one's nationality does not work in consonance with the current society where each state has the ability to devise their own

citizenship rules. Seyla Behabib, a political scientist well known for her work on statelessness, however, believes that Arendt was impetuous in believing that citizenship is the singular manner in which states can guarantee rights to people.<sup>xi</sup> She argues that post the publication of Arendt's work, the evolution of international law has led to the creation of a forum above the nation-state in which the rights of non-citizens can be enforced.<sup>xii</sup> This reference could be to the United Nations that had a Convention on the Status of Stateless People in 1954 or the UN Convention on the Reduction of Statelessness in 1961. These conventions require signatory countries to provide a minimum level of protection to stateless individuals. India however has not been a signatory to any of these treaties and it is unclear how the country will treat its stateless population.

### **THE INDIAN EXPERIENCE OF CITIZENSHIP AND HUMAN RIGHTS**

The idea of citizenship was a highly debated topic at the time of the drafting of the Constitution. The Constituent Assembly Debates reveal that several people wanted to use communal distinctions to determine who got to avail "the right to have rights". Alladi Krishnaswami Ayyar had noted that jus soli and jus sanguinis were the principles on which citizenship was established.<sup>xiii</sup> Jus soli means "the law of the place of birth", while jus sanguinis means "the law according to blood". Several members of the Assembly argued that everyone born in the Union should be considered an Indian citizen, irrespective of religion. Contrary to this broad idea was the conceptualisation of citizenship based on ancestry and religion. This idea proposed that irrespective of their birthplace, people belonging to a particular race would get citizenship. PS Deshmukh wanted an amendment where "every person who is a Hindu or a Sikh by religion and is not a citizen of any other State, wherever he resides shall be a citizen of India."<sup>xiv</sup> Some members did not even want Muslim refugees from Pakistan to get citizenship. Nehru<sup>xv</sup> and Brajeshwar Prasad insisted on a secular conception of citizenship and eventually it was decided that the Parliament would have the power to make further laws on the same. Little did they know that the Parliament today would deviate from the secular nature of citizenship and propagate an exclusionary sentiment that should've been left behind long ago.

The concept of human rights in India was based on the Universal Declaration of Human Rights. In the landmark case of *Kesavanda Bharati v State of Kerala*<sup>xvi</sup> it was held that even though the declaration "may not be a legally binding instrument, it shows how India understood the

nature of human rights at the time the Constitution was adopted.” Since India signed this declaration that referred to human rights as inalienable and natural, some rights in India are extended to both citizens and non citizens. The judiciary in the case of *Railway Board v. Chandrima Das*<sup>xvii</sup> held that since “life” is also recognised as a basic human right in the Universal Declaration of Human Rights it will be available not only to every citizen of this country, but also to a “person” who may not be a citizen of the country. The apex court has since expanded the scope of human rights and held that the right to life includes the right to live with human dignity for a British detainee.<sup>xviii</sup>

However, in *Hans Muller of Nuremberg v. Superintendent Presidency Jail, Calcutta*,<sup>xix</sup> and several other cases it was laid down that fundamental rights provided under Article 19 apply only to citizens. The rights available to non-citizens are restricted to Article 14 and Article 21 and they do not get access to voting rights or rights for protection of minority communities stipulated under Articles 29 and 30. In the context of a state where non-citizens do not get equal rights as citizens, it becomes important to discuss the National Register of Citizens and its implications on excluded individuals.

## **THE WORKING OF THE NRC AND ITS IMPLICATIONS ON STATELESSNESS**

The National Register of Citizens is an attempt to identify “illegal immigrants” in the state of Assam, many of whom are believed to have migrated to Assam after the Bangladesh War of 1971. The Assam Accord in 1985 marked the end of the anti-foreigners movement in the state and stated that those who entered the country after March 24, 1971, would be declared foreigners and deported. The National Register of Citizens, uses the definition of the Assam Accord to determine the status of illegal immigrants even though the implementation has been delayed by 35 years. This moves towards the *jus sanguinis* idea of citizenship as even though an individual was born in the country, citizenship is not guaranteed.

While leaders of the Bharatiya Janata Party are quick to say that the process will not affect any citizens, the burden of proof to prove that they are Indian is hastily pushed onto the individual. At the time of framing of the Constitution, Deshmukh thought that “an Indian is a very easily recognisable person”<sup>xxx</sup> but when he was asked to give a definition he left it to others to decide



what “the colour and complexion” of Indians would be. This clearly did not reflect the diversity of what it means to be Indian in this nation and it is extremely difficult to prove citizenship today as it has to be corroborated via links to the 1951 census, electoral rolls or proof of familial links. If an individual's name is not included in the NRC, they can appeal to the foreigners tribunal but this long drawn process requires expenses as well as adequate documentation, both of which lakhs of people in this flood-prone state lack. Applications are rejected because of typographical errors in certificates of individuals that do not even know how to read and write and people have to often travel over 200km for every court hearing. While stories of a former president’s nephew, Kargil soldiers and public servants being excluded from the NRC garner enough attention to often get support of pro-bono lawyers, the average citizen is left to deal with this complicated process alone. This disproportionately impacts women who get married young and lack documented family trees. In addition, the transgender community is also at great risk as transgender-people are often thrown out of their homes and therefore lack proof of citizenship.

Post the creation of the final list, the excluded individuals are supposed to be deported to “where they came from”<sup>xxi</sup>. Deportation seems like an unlikely outcome considering the state would first have to prove that these individuals belong to another nation. Since most of the people do not have any proof of any kind, no other State would be willing to take them. This move would instead disenfranchise millions of people in Assam, make them stateless and detain them indefinitely in camps that lack adequate facilities.<sup>xxii</sup> Though the most likely outcome for individuals is stateless, it is unknown how India will deal with the same considering it has no legislations or international treaties to guide the same. In *Gangadhar Yeshwant Bhandare v. Erasmo De Jesus Sequiria*,<sup>xxiii</sup> one of the grounds considered by the Supreme Court in accepting the appellant's contention that he was Indian was that it would render him stateless as he had renounced his Portugese citizenship. The court believed that as far as possible, this should be avoided. The Delhi High Court held that, “India is also a signatory to the Universal Declaration of Human Rights, 1948. Article 15 of the said treaty expressly provides that everyone has a right to one nationality. In the facts of this case, the only nationality that the petitioner can have is Indian. Thus, denial of the same would also fall foul of the Universal Declaration of Human Rights, 1948.”<sup>xxiv</sup>

Now, it is the same Supreme Court that is currently spearheading the NRC process in the country, most of which is happening behind closed doors under the garb of confidentiality. Gautam Bhatia<sup>xxv</sup> extensively critiques the same and quotes Arendt to state that once you have deprived an individual of their citizenship you take away their “right to have rights”. The deprivation of the right to citizenship should never be done in a hurry. Since this is an overarching right, the constitution itself incorporated checks and balances for the same. The parliament first has to draft a law, the executive implements it and the judiciary then reviews the same. In the case of the NRC however, the apex court has taken up an all encompassing role. It is this singular entity that is assessing its own execution of the NRC. It bereaves people of the right to challenge the confidential reports through which their future is being decided.<sup>xxvi</sup> This process has radical consequences on the lives of people and therefore the judiciary requires oversight.

### **CONSEQUENCES OF THE CITIZENSHIP (AMENDMENT) ACT 2019?**

Amit Shah has stated that there are plans for rolling out a nationwide NRC that was only limited to the state of Assam till now.<sup>xxvii</sup> The government also introduced the CAA which would then permit Hindu, Sikh, Buddhist, Jain, Parsi and Christian migrants from Afghanistan, Pakistan and Bangladesh who settled in India prior to 2015 and have been excluded from the NRC the right to apply for citizenship. This clearly excludes persecuted Muslims such as the Ahmadiyyas from Pakistan and the Hazaras from Afghanistan and oppressed minorities from other neighbouring countries. This is an attempt by the nationalist government to only give this “right to have rights” to individuals that would aid in their creation of the Hindu state. The BJP government was in fact disappointed by the first draft of the NRC due to the exclusion of a substantial number of Bengali Hindus.<sup>xxviii</sup> This discrimination against Muslims and arbitrary deprivation of citizenship has been pointed out by the UN High Commission that believes that the NRC and CAA would "perpetuate discrimination against minorities and perpetuate a climate of uncertainty, including fears of prolonged statelessness, detention or even deportation".<sup>xxix</sup>

Eerily enough, a scrutiny of the NRC and CAA process is comparable to Arendt’s analysis of the Nazi Regime discussed earlier. Similar to the German state, the current government seeks to create a state where the Hindu population is privileged enough to have access to rights

whereas others are second class citizens. The introduction of the Beef ban- to ban a meat consumed by members of the Muslim community as well as lower castes, abrogation of Article 370 in the Muslim-dominated state of Jammu and Kashmir as well as the creation of a Ram Mandir in the place where the Babri Masjid was demolished, are all primary steps that steer the way for de-nationalising a community. This is done by diminishing their place in the nation and then stripping them of “the right to have rights”.

## **CONCLUSION**

The NRC and CAA process set dangerous precedents for minority rights and citizenship in India. No individual deserves to live under this cloud of uncertainty when it comes to the availing oneself of rights. However since these rights are only enjoyed by them if they are citizens, they are unable to claim welfare benefits if this is stripped from them. Defining stateless individuals will also be left to the discretion of the state but it is unlikely that they'll be treated well since they are currently placed in detention camps. At the same time, it is essential to understand that “the right to have rights” is often insufficient for an individual to demand the implementation of rights they have been guaranteed. The government in an attempt to marginalise the Muslim communities is trying to cut off their access to public spaces. Even those Muslims that are definitely Indians are slowly losing access to negative rights such as that of freedom of speech and expression. It is hoped that the judiciary and the government will reassess their oppression of minorities and depriving individuals of “the right to have rights”.



## ENDNOTES

- <sup>i</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).
- <sup>ii</sup> STEPHANIE DEGOOYER et al, *THE RIGHT TO HAVE RIGHTS* 42 (2018).
- <sup>iii</sup> JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 13 (3<sup>rd</sup> ed.,1985).
- <sup>iv</sup> HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 296 (1951).
- <sup>v</sup> TH GREEN, *LECTURES ON THE PRINCIPLES OF POLITICAL OBLIGATION* 13 (1999).
- <sup>vi</sup> Richardson, D. , ‘*Rethinking Sexual Citizenship*’, 51 *Sociology* 208–224 (2017).
- <sup>vii</sup> HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 296 (1951).
- <sup>viii</sup> *Id.*
- <sup>ix</sup> UN General Assembly, *Convention Relating to the Status of Stateless Persons*, 28 September 1954, United Nations, Treaty Series, vol. 360.
- <sup>x</sup> HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 299-300 (1951).
- <sup>xi</sup> SEYLA BENHABIB, *THE RELUCTANT MODERNISM OF HANNAH ARENDT* 82 (1996).
- <sup>xii</sup> *Id.*
- <sup>xiii</sup> Constituent Assembly Debates, Book No3. , April 29, 1947 speech by Alladi Krishnaswami Ayyar 60 (1999).
- <sup>xiv</sup> Constituent Assembly Debates, Book No9. , August 11, 1949 speech by PS Deshmukh 15 (1999).
- <sup>xv</sup> Constituent Assembly Debates, Book No9. , August 11, 1949 speech by Jawaharlal Nehru 20 (1999).
- <sup>xvi</sup> *Kesavanda Bharati v State of Kerala*, (1973) 4 SCC 225.
- <sup>xvii</sup> *Railway Board v. Chandrima Das*, (2000) 2 SCC 465.
- <sup>xviii</sup> *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi*, 1981 AIR 746.
- <sup>xix</sup> *Hans Muller of Nuremberg v. Superintendent Presidency Jail, Calcutta*, 1955 AIR 367.
- <sup>xx</sup> Constituent Assembly Debates, Book No9. , August 11, 1949 speech by PS Deshmukh 15 (1999).
- <sup>xxi</sup> India Today Web Desk, *What is NRC: All you need to know about National Register of Citizens*, December 18, [indiatoday.in/india/story/what-is-nrc-all-you-need-to-know-about-national-register-of-citizens-1629195-2019-12-18](http://indiatoday.in/india/story/what-is-nrc-all-you-need-to-know-about-national-register-of-citizens-1629195-2019-12-18).
- <sup>xxii</sup> Nazimuddin Siddique, *Inside Assam’s Detention Camps: How the current citizenship crisis disenfranchises Indians*, 55 *ECONOMIC AND POLITICAL WEEKLY* 7 (February 15, 2020).
- <sup>xxiii</sup> *Gangadhar Yeshwant Bhandare v. Erasmo De Jesus Sequiria*, 1975 AIR 972.
- <sup>xxiv</sup> *Prabhleen Kaur v. Union of India & Anr.*, (2019) 195 AIC 352.
- <sup>xxv</sup> Gautam Bhatia, *In the Court of Last Resort*, *THE HINDU*, October 3, 2018, [www.thehindu.com/opinion/lead/in-the-court-of-last-resort/article25105456.ece](http://www.thehindu.com/opinion/lead/in-the-court-of-last-resort/article25105456.ece).
- <sup>xxvi</sup> *Id.*
- <sup>xxvii</sup> Dhruv Rathee, *Amit Shah’s nationwide NRC will be the same as Modi’s demonetisation*, *THE PRINT*, December 3, 2019, [theprint.in/opinion/amit-shahs-nationwide-nrc-will-be-the-same-as-modis-demonetisation/329372/](http://theprint.in/opinion/amit-shahs-nationwide-nrc-will-be-the-same-as-modis-demonetisation/329372/).

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<sup>xxviii</sup> Ratnadip Choudhury, *BJP Worried As Many Bengali Hindus Missing From Draft Assam Citizens List*, NDTV, August 27, 2019, [ndtv.com/india-news/bjp-worried-as-many-bengali-hindus-missing-from-draft-assam-citizens-list-nrc-2090934](https://www.ndtv.com/india-news/bjp-worried-as-many-bengali-hindus-missing-from-draft-assam-citizens-list-nrc-2090934).

<sup>xxix</sup> Samanwaya Rautray and Dipanjan Roy Chaudhury, *UNHCR moves SC against CAA; India rejects intervention*, THE ECONOMIC TIMES, March 4, 2020, [https://economictimes.indiatimes.com/news/politics-and-nation/unhcr-moves-sc-against-caa-india-rejects-intervention/articleshow/74468523.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cpst](https://economictimes.indiatimes.com/news/politics-and-nation/unhcr-moves-sc-against-caa-india-rejects-intervention/articleshow/74468523.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cpst)

