

THE UNCONSTITUTIONALITY OF NRC AND CAA IN ASSAM

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ABSTRACT

The year of 2019 was marred by protests and dissent against the Citizenship Amendment Act, 2019 (CAA), and the National Register of Citizens (NRC), which was implemented in Assam. The ruling *Bharatiya Janta Party* (BJP) had been pushing its agenda to remove 'illegal immigrants' from Assam and send them back to Bangladesh. The government had passed the CAA to achieve their goals, however, the Act has been underlined by pangs of islamophobia, specifically targeting Assamese Muslims. The narrative on these individuals labels them as illegal immigrants, leeching on the resources of the Indian government. However, a closer look at the history Muslims in Assam would reveal that these individuals have adopted Assamese culture, establishing their own hereditary right to citizenship. From a legal purview, the Act revamps the modes through which an individual can attain citizenship. The following paper aims to understand the history of the migrant conflict in Assam, the nature and ways in which citizenship is granted to individuals in India, and also analyse the constitutional validity of the aforementioned acts.

Keywords: Assam, National Register of Citizenship, Citizenship Amendment Act, Migrant politics, Islamophobia, Constitution of India, Citizenship.

MIGRANT POLITICS IN ASSAM

The state of Assam has been dominated by migrant politics since the days of Partition. Such politics has given effect to debates on various social issues, the most important of which is citizenship. For a profound understanding of the issues of citizenship and migrants pervasive in Assam, one must understand the state's history. In his book titled, '*In the Name of the Nation: India and Its Northeast*'ⁱ Sanjib Baruah gives glimpse of the post and pre partition flow of migrants into the state. He writes that "Partition generated a massive new flow of Hindus into India is well known. What is less well-known, is that it did not stop an old pattern of migration from densely populated deltaic eastern Bengal into relatively sparsely populated Northeast India: that of poor Muslim peasants in search of land and livelihoods"ⁱⁱ. Contrary to propaganda spelt out by the state-controlled media houses, Assam's demographic consisted of migration dating back decades before partition itself, when Eastern Bengal was still a part of India. These migrants, Muslims included, have adopted Assamese culture and language as their own, and it is difficult to submit to the claim that migration has destroyed Assamese culture.ⁱⁱⁱ Moreover, given that BJP is a Hindu-Right wing party, the issue of illegal Muslim migrants from neighbouring states would fit their narrative perfectly. Furthermore, Muslims make up 34.2 percent of the population of Assam, as per the 2011 census, which the highest Muslim population in any state after Kashmir.^{iv} The premeditated deletion of Muslim voters would further assist the BJP in electoral polls. Measures for such deletion have already been taken up as the CAA was passed in the Houses of Parliament in 2019, which makes significant changes to the Citizenship Act, but before assessing the new act, the topic of citizenship and how it can be acquired in India will be elaborated upon in the coming paragraphs.

MODES OF CITIZENSHIP

The Citizenship Act of 1955^v prescribed five ways in which an individual could acquire citizenship. These include (i) by birth, (ii) by descent, (iii) by naturalisation, (iv) by registration & (v) by incorporation of territory. Following the Assam agitation, the Congress government amended the Citizenship act and added a sixth way to acquire citizenship under Amendment 6A for migrants emigrating from Bangladesh to India, which was based solely on the dates on which they entered India, and did not prescribe the religion of migrants as a characteristic upon which citizenship would be granted.

“According to the Assam Accord, those who came after March 25, 1971, were to be detected, their names deleted from electoral rolls, and expelled. Those who came between January 1, 1966, and March 24, 1971, would be disenfranchised for ten years. But immigrants from East Pakistan who entered Assam before January 1, 1966, would become Indian citizens.”^{vi}

After coming to power in 2014, the National Democratic Alliance led by the Hindu-nationalist BJP, amended the Act to include another limitation on the grant of citizenship. The new rule stated that the second parent of a child born after 3rd December “will thus have to prove not only that they are born in India but also that one of their parents is an Indian citizen and that the other parent is not an illegal immigrant.”^{vii} As Abhinav Chandrachud puts it, “this signifies a shift in Indian citizenship law from *jus soli* (citizenship by birth) to *jus sanguinis* (citizenship by descent).”^{viii}

THE 2019 CITIZENSHIP AMENDMENT ACT & THE CONSTITUTION

The Citizenship Amendment Act, 2019, makes further changes to ways in which citizenship will be awarded to individuals residing in India. The main aim of the new act, as per the government, is to help curb the inflow of illegal migrants from neighbouring countries, and grant citizenship to those who may to whom it may be deemed necessary. The guidelines laid down in the act, however, contravene the spirit of the constitution and the values upon which India was established. The new guidelines make three distinctions^{ix}, namely between (i) Non-Muslim and Muslim migrants from Bangladesh, Pakistan & Afghanistan, (ii) migrants from the aforementioned countries and other neighbouring countries and (iii) refugees of religious persecution and refugees for other persecution. These distinctions are unfounded and fail the test of equal protection. In neighbouring states of Pakistan and Myanmar, Muslim minorities such as Ahmadiyas and Rohingyas have also been the victim of religious persecution, but have been excluded from the CAA. Similarly, the migrants hailing from Sri Lanka and China have also been left out. It is evident that the Act does not isolate religious persecution from as a basis of granting citizenship, but isolates Muslims and aims to give individuals of all other religions’ citizenship under its purview. Such an amendment is inherently in violation of the secular spirit of the constitution. In the case of *S.R. Bommai v Union of India*^x, it was held that “Secularism

is more than a passive attitude of religious tolerance. It is a positive concept of equal treatment of all religions. In the affairs of the state, religion is irrelevant. It is strictly a personal affair.” The Act is further in violation of Article 14, which provides for the equality for all, even non-citizens residing in India. Although the legislation is allowed make classifications as it may deem fit in pursuance of certain objects, these classifications must not be “palpably arbitrary” or give rise to “profound inequality”^{xi}.

There is also the National Register of Citizens, which was implemented in 2019 following the judgement of *Assam Sanmilita Mahasangha Vs Union of India*^{xii}. The two-judge bench in this case directed the government to commence the process of identifying illegal immigrants through Foreigners Tribunals, and also to update the NRC^{xiii}. The NRC conducted in Assam in 2019 left out more than 19 lakh individuals, many of them whose families have been settled in the state for decades. The process of identifying individuals through papers which ratify their ancestors in the state has been incredibly daunting, and needless to say there would have been corruption at every level of the executive.

Foreigners Tribunals, on the other hand, have their own set of problems. Abhinav Chandrachud narrows it down to three major issues^{xiv}. Firstly, the representatives of the tribunals are not considered judges and their terms is not for a fixed period, but is subject to review and renewal by other authorities. This takes away the independence the court should have had in an ideal scenario, and but now the ‘members’ would make their decisions with a nagging fear of whether that decision would affect the renewal of their terms. Secondly, the many members do not have a judicial background and lack the necessary experience to make appropriate judgements. This is a result the government appointment even retired civil servants to Foreigners Tribunal. Lastly, there is no process of appeals in an appellate court against the judgment given out in Foreigners Tribunals. The decisions can be challenged via a writ jurisdiction but only on few grounds^{xv}.

The situation in Assam is also reminiscent of Giorgio Agamben’s State of Exception, “where ‘homo sacer’ are reduced to bare bodies, stripped of all their civil, political, economic, social rights and the whole society turns into a camp and the State as the sovereign enjoys an absolute ‘monopoly of violence’ by enforcing law”^{xvi}. The CAA and NRC have been implemented

arbitrarily in the state and excludes the citizens of India who have been left out of the NRC. As Baruah argues, the presence of the AFSPA in Assam, coupled with the state's isolation and its 'otherness', "creates an entirely separate space within India, a sort of a second and shadow nation^{xvii}. This shadow nation is devoid of democratic rights and its citizens are under the arbitrary rule of the sovereign.

It is evident here that the dual policies of NRC/CAA are harmful for Muslim and Non-Muslim citizens of India alike. The Citizenship Amendment Act, 2019 utterly violates the spirit of the Indian constitution, and the implementation of National Register of Citizens arbitrarily deprives people of their basic rights. Coupled with these are the problems of the Foreigners Tribunal and misuse of AFSPA and the judiciary must work with the government to rectify them at the earliest.

ENDNOTES

ⁱ Sanjib Baruah, *In the Name of The Nation: India and Its Northeast* (Stanford University Press 2020).

ⁱⁱ Id 47-48.

ⁱⁱⁱ In Chapter One of his book, Baruah gives a detailed account of how the migrants have indoctrinated Assamese culture, rather than 'destroying it', contrary to the claims of British Officer C.S. Mullan.

^{iv} Baruah, *supra* note 1, at 56

^v The Citizenship Act, 1955.

^{vi} Baruah, *supra* note 1, at 65

^{vii} Mihir Desai, *CAA–NRC–NPR and Its Discontents*, 55 *Economic and Political Weekly* (2020).

^{viii} Abhinav Chandrachud, '*Secularism and The Citizenship Amendment Act*' *SSRN Electronic Journal* 15 (2020).

^{ix} Mohsin Alam Bhat, *The Constitutional Case Against the Citizenship Amendment Bill*, 54 *Economic and Political Weekly* (2019).

^x *S.R. Bommai v Union of India* 1994 SCC (3) (India)

^{xi} Chandrachud, *supra* note 8, at 23

^{xii} *Assam Sanmilita Mahasangha Vs Union of India* (2015) 1 SCC 3 (India)

^{xiii} Baruah, *supra* note 1, at 71

^{xiv} Chandrachud, *supra* note 8, at 31

^{xv} *Ibid* 33

^{xvi} Prasenjit Biswas, *Reading Kafka and Agamben through the NRC of Assam* | *CJP CJP* (2018), <https://cjp.org.in/reading-kafka-and-agamben-through-the-nrc-of-assam/> (last visited Jun 9, 2021).

^{xvii} Baruah, *supra* note 1, 11