THE INDIA FORUM
A JOURNAL-MAGAZINE ON CONTEMPORARY ISSUES

October 31, 2019

Faith-based Citizenship

The Dangerous Path India is Choosing

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The Citizenship Amendment Bill and the pan-Indian National Register of Citizens mark a foundational shift in the Indian conception of citizenship, providing paths to citizenship for some and driving others on to paths to statelessness.

The Indian idea of citizenship – as embodied in the Constitution and the law – is in the throes of a profound and radical metamorphosis. The twin instruments of this transformation are the National Register of Citizens (NRC) and the Citizenship Amendment Bill (CAB). If the former is carving out paths to statelessness for disfavoured groups, the latter is creating paths to citizenship for preferred groups. While the first is, despite the looming threat of its extension across India, presently limited to the state of Assam, the second is designed to be pan-Indian in its application.

Not only do the two need to be read alongside each other, both of these in turn need to be read in the larger context of the Government's policies towards minorities, whether in the forced 'amelioration' of Muslim women by the criminalisation of the triple talaq or the clampdown, since early August, in the erstwhile state of Jammu and Kashmir. They need also to be read in the context of the acceleration of violence against minorities over the past few years, especially by vigilante lynch mobs who have been thriving on the promise of legal impunity. An adequate understanding of both the NRC and the CAB depends on an appreciation of the ecosystem for minorities constituted by these twin phenomena, emanating from the state and society respectively.

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On the watch of the Supreme Court and under its unrelenting pressure for the completion of the NRC within a certain time-frame, Assam has served as a laboratory for a potentially dangerous experiment. Even though the results belied the expectations, the talk of sending those excluded from the Register to detention centres has given credence to the fear that thousands of people are vulnerable to being rendered stateless and rightless. Existing detention centres in Assam are already populated, and new ones are being erected on an unprecedented scale. In Assam alone, there is the ongoing construction of a large detention camp, with a capacity of 3000 detainees, with ten others planned to fit a thousand people each. A detention centre in Nelamangala, near Bangalore, is being touted as a first in south India.[1] Meanwhile, the Global Detention Project has catalogued 10 existing detention centres in India, most of them in use since 2005 and 2006.[2]

The implications of these developments can be interpreted in multiple ways. From a legal perspective, they imply a foundational shift in the conception of the Indian citizen embodied in the Constitution of India, followed by the Citizenship Act, 1955. This is, first, a move from soil to blood as the basis of citizenship, from a *jus soli* or birth-based principle of citizenship in the direction of a *jus sanguinis* or descent-based principle; and second, a shift from a religion-neutral law to a law that differentiates based on religious identity. From the perspective of India's social fabric, they signal an ominous fraying and unravelling of what was a daring and moderately successful experiment in pluralism and diversity. From a political perspective, they point to a possibly tectonic shift from a civic-national to an ethnic-national conception of the political community and its terms of membership. From a moral perspective, they prompt us to confront the weakness of our commitment to human rights and to the moral and legal personhood of all human beings. From an international perspective, they remind us of, on the one hand, our longstanding aversion to signing international treaties on refugees and the reduction of statelessness and, on the other, our easy engagement in doublespeak with a valued neighbour. I will elaborate on some of these aspects to show how they are collectively refashioning the fundamentals of our collective life.

> [T]he Citizenship Act 1955 gave a statutory basis to the idea of jus soli or citizenship by birth.

In a sense, we are once again rehearsing the debates on citizenship in the Constituent Assembly. The chapter on citizenship in the Constitution was necessitated by Partition and is limited to the determination of citizenship for those extraordinary times. The debate on what became Article 7 – relating to citizenship for the large numbers of Muslims who had fled India in the midst of the Partition violence but later returned – was fraught, the contention reflecting the communally charged atmosphere of Partition. Several members of

the Assembly, who cast aspersions on the loyalty and intentionality of these returning migrants, called it the 'obnoxious clause'. Though the markers of religious difference were not openly displayed, they are easily spotted in the consistent use, in the Assembly, of the words refugee and migrant for distinct categories of people – Hindus fleeing Pakistan described as refugees, the returning Muslims described as migrants – subtly encoding religious identity in a shared universe of meaning. The Assembly eventually adopted what it called the more "enlightened modern civilised" (CAD, I:424) and democratic conception of citizenship, as opposed to "an idea of racial citizenship" and the Citizenship Act 1955 gave a statutory basis to the idea of *jus soli* or citizenship by birth.

Over time, chiefly triggered by the political unrest in Assam, this conception has been moving slowly but surely in the direction of a *jus sanguinis* or descent-based conception of citizenship. Assam has a long and complex history of in-migration, mostly from Bengal, from the 19th century onwards. It witnessed substantial in-migration from 1947 onwards, peaking in 1971, and continuing steadily thereafter. It was no secret that many of the immigrants in recent decades had acquired forms of what Kamal Sadiq has called "documentary citizenship" through "networks of complicity" and "networks of profit" (Sadiq, 2009).

In 1985, in the wake of the gruesome Nellie massacre of 1983, the Assamese students' organisations that had led the agitation against the enfranchisement of migrants from Bangladesh entered into the Assam Accord with the Rajiv Gandhi government, leading to an amendment in the provisions relating to naturalisation in the Citizenship Act. This amendment created categories of eligibility for citizenship based on the year in which a person had migrated to India. All those who came before 1966 were declared citizens; those who came between 1966-1971 were struck off the electoral rolls and asked to wait 10 years before applying for citizenship; and those who came after 1971 were simply deemed to be illegal immigrants. Though these provisions were a response to the genuine grievances of the Assamese, they already contained the seeds of the politicisation and incipient communalisation of the issue of migrants.[2]

> Two amendments of 2004 – one to the Citizenship Act and the other to the Rules under the Act – show how religious identity was gaining ground as the basis of legal citizenship.

Meanwhile, the gradual dilution of the principle of *jus soli* and the increasing recognition of elements of *jus sanguinis* — dependent on religious identity — was proceeding apace. Two amendments of 2004 – one to the Citizenship Act and the other to the Rules under the Act – show how religious identity was gaining ground as the basis of legal citizenship. Both introduced religion into the language of the law, the first impliedly and the second explicitly. The amendment to the Citizenship Act covertly introduced a religion-based exception to the principle of citizenship by birth. The amendment undercut the *jus soli* basis of citizenship, by stating that even if born on Indian soil, a person who had one parent who was an illegal migrant at the time of her or his birth, would not be eligible for citizenship by birth. Since most of the migrants from Bangladesh, against whose arrival there was so much political ferment in Assam, were Muslims, the term "illegal migrant" signalled this religious identity.

The Citizenship Rules were simultaneously amended to exclude "minority Hindus with Pakistani citizenship" from the definition of illegal immigrants. This amendment, firstly, destigmatised Hindu migrants (most of whom had come into the border states of western India from Pakistan) by dropping the label of "illegal migrants" for them, and officially describing them henceforth as "minority Hindus with Pakistan citizenship." Secondly, it openly introduced a religious category into what was until then a religion-neutral law.

> [T]he passage of the Citizenship Amendment Bill ... will not only make explicit but also legitimise the inflection of the law on citizenship with religious difference.

In the run-up to the Assembly elections in Assam in early 2016, the Bharatiya Janata Party (BJP) had made an electoral promise to "free" the state from illegal Bangladeshi migrants by evicting and deporting them. This was a dog-whistle reference to a specific religion, as it simultaneously promised to give Indian citizenship to all Bangladeshi Hindu immigrants if it won the election. This promise would be fulfilled by the passage of the Citizenship Amendment Bill (passed only in the lower house in January 2019) which will almost certainly be re-introduced and passed in coming months, and will not only make explicit but also legitimise the inflection of the law on citizenship with religious difference.

The Bill essentially provides for fast-track citizenship by naturalisation for migrants from the neighbouring countries of Pakistan, Afghanistan and Bangladesh who are religious minorities in those countries. It makes it possible for the preferred categories of Hindus, Buddhists, Sikhs, Parsis and Christians to obtain Indian citizenship in six years instead of the 11 it usually takes. Muslims are conspicuous by their absence in this listing, ostensibly on the grounds that they are not minorities in these three countries and cannot therefore be seen as persecuted. The fact that Muslim sects like the Ahmadiyyas and Rohingyas are also persecuted in these countries

does not make them eligible for similar benefits. By introducing a religion-based difference in the presently religion-neutral law on citizenship by naturalisation, this amendment would in effect create two categories of potential citizens: those professing the Hindu and other 'acceptable' faiths; and those professing Islam.

This was also the implicit objective of the just-concluded NRC in Assam. The first National Register of Citizens for Assam was compiled in 1951, but remained largely dormant until political considerations gave it a new lease of life. In 2005, a meeting between the Centre, the Assam Government and the All Assam Students Union (AASU), chaired by the then Prime Minister Manmohan Singh, resolved to take steps towards updating the NRC to fulfil the requirements of the Assam Accord.

> The result of the NRC has demonstrated the very real possibility that undocumented nationals may be unfairly deprived of their citizenship status.

In 2009, a petition was filed in the Supreme Court by an NGO called Assam Public Works asking for the updating of the NRC to be started. The Court gave a direction to this effect, and the exercise began in 2015, with the objective of recording all those who have documentary proof of being Indian, and of them or their ancestors having been in India before midnight on March 24, 1971. In a society as historically undocumented as India, and in a region that is regularly visited by natural calamities like floods, there are many people who cannot produce documents to establish their ancestry. In fact, those who are native inhabitants for generations may be undocumented even as immigrants have acquired 'paper citizenship.'

The result of the NRC has demonstrated the very real possibility that undocumented nationals may be unfairly deprived of their citizenship status. At the end of its first round, 4 million people out of the 32.9 million who had applied, were excluded. Fresh claims for inclusion were filed by 3.6 million people and at the end of this process, in August 2019, 1.9 million remain unauthenticated.

Champions of the NRC have been surprised and disappointed by this outcome, as large numbers of Hindus are unexpectedly among the excluded, and the percentage of exclusion was larger in areas inhabited by indigenous people, and lower in border areas where illegal migrants have settled. Those left out include people who have served in the Indian Army or the Border Security Force for decades, the nephew of former Indian president Fakhruddin Ali Ahmed, and even Syeda Anwara Taimur, the only woman chief minister Assam ever had. Ironically, a former anti-immigration activist and even a local BJP leader found themselves excluded. In some cases, children's documents were found to be acceptable but not those of their fathers. Notwithstanding the unexpected outcome of the NRC, public pronouncements from the ruling party continue to threaten the nationwide implementation of the Register. It is of course another matter that the state capacity to 'sort' citizens in this manner is very doubtful.

As the factual outcomes of the process contradicted the political expectations of the enthusiasts of this exercise, the political messaging has sought to assuage fears by affirming that no Hindus would be deported. They could anyhow, on the basis of their religious identity, be reinstated as citizens when the CAB becomes law. It is genuine but undocumented Indian nationals belonging to the Muslim faith who would be excluded with no recourse to the CAB, while documented (and possibly illegal) migrants who belong to other faiths would be included.

> Placing people in detention centres is arguably also violative of Article 21 of the Constitution which guarantees the right to life and liberty.

A legal challenge to the CAB could plausibly bring into question its constitutionality, specifically its contravention of Articles 14 and 15 of the chapter on Fundamental Rights. Article 14 guarantees that "The State shall not deny to *any person* equality before the law or the equal protection of the laws within the territory of India." This is not a right that is dependent upon such a person being an Indian citizen, it is available even to foreigners who happen to be within the territory of India. As such, differential treatment to individuals on the basis of their religious faith would appear to be in contravention of the right to equality. Article 15 prohibits the state from discriminating "against any citizen on ground only of religion, race, caste…" and the introduction of religious identity as a criterion into a matter as fundamental as citizenship is certainly questionable. Placing people in detention centres is arguably also violative of Article 21 of the Constitution which guarantees the right to life and liberty.

Experts have moreover questioned the legality of the NRC on the grounds that a provision under the Rules cannot contravene the provisions of the parent Act. Authorised by the Registration of Citizens and Issue of National Identity Card Rules, 2003, the NRC uses the cut-off date of 1971 (based on the Assam Accord) rather than the date of 1987 which is the defining criterion of citizenship by

birth according to the Citizenship Act.

> Together, the NRC and the CAB have the potential of transforming India into a majoritarian polity with gradations of citizenship rights ...

The NRC and the CAB are manifestly conjoined in their objectives. The first paves the way to statelessness and detention centres for many poor and vulnerable people, and most unjustly for those whose genuine nationality is repudiated *only on the basis of their faith*. The second offers a smooth path to citizenship for groups of migrants who are deemed acceptable *only on grounds of their faith*. In other words, faith is set to become the exclusive criterion for determining who is an Indian citizen and who is not, for inclusion as well as for exclusion. Together, the NRC and the CAB have the potential of transforming India into a majoritarian polity with gradations of citizenship rights that undermine the constitutional principle of universal equal citizenship; with privileges of inclusion being attached to some categories of citizens while others suffer the disabilities of exclusion.

Though the Citizenship Amendment Bill ostensibly relates only to migrants seeking the legal status of citizenship, this is not just about migrants. The threat, rhetorical or otherwise, of a nationwide NRC shows that the fig leaf of illegal immigration is being used to bring the citizenship of *all* Muslim citizens into question. Migrants –beginning with those in Assam – are fast becoming a pretext to fabricate and advance a much more ambitious and nationwide project of 'othering.' The multiple identities that have historically been at play in Assam make it disingenuous to present the animosity towards migrants exclusively in terms of Hindu sentiments against Muslims. When it visited Assam in May 2018, the Joint Parliamentary Committee on the CAB was petitioned by hundreds of organisations agitating against the Bill, expressing not only the secular constitutionalist objection to introducing religion-based citizenship provisions, but also in many cases the fear of both Assamese-speakers as well as indigenous tribal communities, of becoming minorities in their own land. The attempt to extrapolate lessons for a national-level Hindu political consolidation from the Assam situation is based on a misrecognition of identities in that state, and on a flawed singularising of its plural identity-related anxieties.

Not only does the CAB exclude Muslim migrants from the provisions for fast-track citizenship, Indian Muslims who are full citizens by birth, have also been experiencing the abrogation of their constitutionally guaranteed rights of equal citizenship. Their endemic under-representation in India's public institutions and their abysmal education and employment indicators are well-known. The unprecedented increase in incidents of vigilante violence against them over the last few years, and the impunity enjoyed by the perpetrators of such violence, signifies a systematic political and ideological attempt to render them second-class citizens.

> In comparisons between the anti-immigrant and Islamophobic rhetoric of populist politicians across the world, it is rarely acknowledged that the 'other' in India is wholly, historically and organically Indian ...

The politicisation of religious identity, finding articulation in and through the law, is a worrying portent for the founding vision of Indian nationalism which was emphatically civic-national in form. The march from a *jus soli* to a *jus sanguinis* conception of citizenship is also simultaneously a march from civic-nationalism to ethno-religious nationalism, from a universalist and inclusive form of nationalism to an exclusionary form that renders difference as graded hierarchy. This is nothing less than a radical re-invention of the imagination of India that informed and inspired the freedom struggle and found embodiment in the Constitution. The context of the anti-immigrant discourse that underlies the NRC, and the selective acceptance of persons "treated as illegal migrants" that underpins the CAB is important. It entails a substantive disenfranchisement of the Muslim minority, a normalisation and justification of violence – both discursive and physical – against it, and a reconstruction of the Indian nation in the form of a Hindu Rashtra in which this minority lives on sufferance and must be prepared for everyday discrimination, legal and social.

In comparisons between the anti-immigrant and Islamophobic rhetoric of populist politicians across the world, it is rarely acknowledged that the 'other' in India is wholly, historically and organically Indian, and not a recent entrant or stranger as in Europe or the United States. It is the Sri Lankan Tamils, the Afghans and the Tibetan Buddhists who are relatively recent immigrants to India, but even before the CAB, India had no difficulty in assimilating them. In a society as plural and diverse as that encompassed by the territorial boundaries of the Indian nation, the quest to make the borders of religion and nation coincide is tantamount to opening up the scars of the Partition of 1947. This cannot be achieved without damaging the delicate balance in a society characterised by multiple heterogeneities of language, region, caste and even of religious sects.

At the same time, it cannot be denied that India has never had a spectacular record of commitment to human rights, or even to the idea that all human beings are entitled to moral and legal personhood. The conundrum before us recalls a contention most starkly

identified by Hannah Arendt in her book *The Origins of Totalitarianism*. The supposedly universal and inalienable rights of man, Arendt argued, could not be invoked or claimed in contexts of statelessness. In the inter-war years, there was no international body to which 10 million *de facto* stateless people could appeal for their human rights, because a human being who is not a member of some political community is without recourse to such rights. The loss of a polity is the loss of humanity, for only membership in a political community, i.e. citizenship, can give people what Arendt famously called the right to have rights. The deprivation of legality, of a juridical existence, is tantamount to the loss of moral personhood. Rights are meant to be enjoyed within a community, and the calamity of the rightless, said Arendt, is that since they do not belong to any community, no law exists for them, and nobody even wants to oppress them. This was why the Nazis first deprived Jews of their legal status of citizenship before conveying them to concentration camps.

> Stripping people of citizenship (even of the merely documentary kind) and rendering them stateless is a clear violation of the duty, placed on states by the Universal Declaration of Human Rights ...

In Assam, following the NRC, 1145 people have already been placed in six detention centres in Assam, living in sub-human conditions; 335 of these have spent 3 years in camps; 25 persons declared 'foreigners' have already died in the detention camps; and an estimated 33 persons have been driven to suicide by the fear of not possessing papers.[3] Although the Supreme Court has passed orders for the improvement of the conditions in these centres, there is a genuine moral concern about the very idea of such detention centres which is at odds with India's constitutional values and more generally with the idea of human rights. Stripping people of citizenship (even of the merely documentary kind) and rendering them stateless is a clear violation of the duty, placed on states by the Universal Declaration of Human Rights, to avoid taking actions that result in statelessness and the deprivation of citizenship.

Bangladesh, meanwhile, has been persuaded at the highest inter-governmental level, that the political rhetoric of sending the 'termites' and 'infiltrators' back to Bangladesh is an internal matter, and that there will be no deportation. In fact, the impressive economic indicators of Bangladesh today give rise to the speculation that we could now be looking at less migration from Bangladesh to India than in the reverse direction. Already, with 1.1 million illegal Indian immigrants, Bangladesh is the fifth largest sender of remittances to India. Given the cross-border movement of people in both directions, the two countries could even consider devising a mutually acceptable arrangement based on guest-worker visas.

In the meantime, as the NRC converts legitimate citizens into illegal immigrants and illegal immigrants into stateless people, both destined for the camp; as the CAB selectively legalises illegal migrants; and as minorities are rendered second-class citizens by the insidious use of the law, India stands on the edge of a dangerous precipice where not only its constitutional values but also its moral compass are at grave risk.

Footnotes:

1 This is being described as a "movement restriction centre" rather than a jail. https://www.thenewsminute.com/article/nrc-karnataka-inside-detention-centre-illegal-immigrants-40-km-bengaluru-109992

2 In 1983, the Congress government at the centre had also passed the Illegal Migrants (Determination by Tribunals) Act (IMDT), ostensibly assuaging nativist Assamese sentiments by providing for tribunals to detect and expel foreigners, but apparently banking on local networks of ethnic solidarity to render such complaints largely irrelevant. India's law on foreigners places the burden of proving citizenship status on the individual in question. The Act created an Assam-specific exception to this, removing the burden from individuals and placing it on their neighbours, who could file a complaint to report illegal immigrants in their area. These complaints would then be adjudicated by a tribunal that would determine conclusively as to whether the person was indeed an illegal migrant and, if so, order her/his deportation. One of the leaders of the student movement that had led the agitation against immigrants filed a writ petition in the Supreme Court claiming that the IMDT Act had actually *prevented* rather than facilitated the identification and deportation of illegal migrants. In 2005, the Court struck down the Act as *ultra vires* the Constitution. The student leader who filed that petition was Sarbananda Sonowal, now the Chief Minister of the state of Assam.

3 "Passport to Kill", https://www.news18.com/news/immersive/assam-nrc-suicides.html

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