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Why the CAA Violates the Constitution

By: Suhrith Parthasarathy

'A reasonable analysis based on primary legal principles, on the Constitution's language and on the Court's own past decisions, will show us that the CAA … infracts fundamental rights, in particular the guarantee of equal treatment contained in Article 14.'

Sometime in the weeks ahead the Supreme Court of India will hear arguments on the validity of the Citizenship (Amendment) Act, 2019 [CAA]. The court's handling of the case will be closely watched. The CAA has been the source of contentious debate with demonstrations against the law spontaneously springing up across the country. In North India, despite a bitterly cold winter, large numbers of people, across sections of society, have taken to the streets to protests against the imposition of the law. In many ways, these protests are independent of the legal challenge that has been mounted. They appear to be the rumblings of a larger civil rights movement, transcending the bare exactions of the CAA. But the zeal and the ardour of the protestors have raised the political and social stakes involved in the case. The spotlight, therefore, will shine bright on the Supreme Court when the hearings commence.

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It can be difficult to speak about the CAA in isolation, detached from the other dangers it portends, not least the National Register of Citizens (NRC), which the Union Government, despite its occasionally equivocal comments, is keen to put in force. Indeed, as Niraja Gopal Jayal has pointed out, "the NRC and the CAB are manifestly conjoined in their objectives"; they are twin tools aimed at decimating India's republican ethos. But when the Supreme Court hears the challenges made, although it should give its full attention to the NRC, it is likely to test the CAA on its individual merit. Yet, even so, even viewed independently, the CAA is plainly unconstitutional. A reasonable analysis based on primary legal principles, on the Constitution's language and on the Court's own past decisions, will show us that the CAA, in and of itself, infracts fundamental rights, in particular the guarantee of equal treatment contained in Article 14. By so doing, the law also lays the foundations for a brutal assault on secularism—a precept that the Court has repeatedly viewed as forming a bastion of the Constitution's basic structure.

When the Constitution was adopted in 1950, although it was not initially thought as necessary, the events of the Partition meant that an entire chapter was devoted to the conferment of citizenship. But while Articles 6 to 10 delineate various special forms of citizenship necessitated by the Partition and the ensuing migration of people into India, Article 5 makes it clear that the framers believed that citizenship ought to be governed broadly by the principle of *jus soli*, that is citizenship predicated on residence and birth. To that end, Article 5 states that any person who at the commencement of the Constitution had domicile in India and (a) who was born in the territory of India; or (b) either of whose parents was born in the territory of India; or (c) who has been ordinarily resident in the territory of India for not less than five years preceding such commencement, shall be a citizen of India. The Citizenship Act, 1955, which was enacted based on the power explicitly granted to Parliament under Article 11, to "make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship" only further fortified *jus soli* as the governing creed.[1]

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This principle, however, has been diluted over time. First, in 1985, through the introduction of Section 6A of the Citizenship Act 1955, which, with a view to effectuating the Assam Accord, suspended the conferment of citizenship based on the dates on which people of "Indian origin" had come into India from what was part of Bangladesh before the amendment. And second, when the law was amended in 2003 to deprive the rights of people born in India after the amendment came into force, when even one of the parents of such a person was an illegal migrant.

But until now none of the alterations made to the statute have encroached on the elementary idea that citizenship will not be premised on a person's faith. The CAA topples this vision. It does so by altering the definition of an "illegal migrant", as contained in the Citizenship Act. Under the prevailing law, an illegal migrant was defined as any foreigner who had entered into India without a valid passport or other such valid travel document, or who had entered India with a valid passport and valid travel documents only for such passport or documents to expire during his or her stay. Critically, such illegal migrants were deprived of the various means of acquiring legal citizenship under the law, including citizenship through registration and naturalisation. This effectively meant that a person who had entered India fleeing persecution on some ground or the other, or in search of economic opportunities, who was categorised as an illegal migrant had no valid way of securing citizenship, unless the government had regularised such a person's stay through the issuance of a long-term visa.

> To provide an accelerated path to citizenship to persons facing persecution in their home country is a laudable objective. But the CAA encroaches on this aim by creating a religious test for citizenship and by making classifications that are wholly arbitrary and whimsical.

That this definition of an illegal migrant required changing is beyond debate. To provide an accelerated path to citizenship to persons facing persecution in their home country is a laudable objective. But the CAA encroaches on this aim by creating a religious test for citizenship and by making classifications that are wholly arbitrary and whimsical. This it does by excluding from the definition of an "illegal migrant" any person belonging to the Hindu, Sikh, Buddhist, Jain, Parsi or Christian communities from Afghanistan, Bangladesh or Pakistan, who entered India on or before December 31, 2014. These persons are then provided an augmented route to securing citizenship through naturalisation, with the prevailing residency requirement reduced from a period of 11 to five years.

The Constitution and What it Demands

Under our constitutional structure, any law, whether made by Parliament or a state legislature, will be void if it takes away or abridges one or more of the fundamental rights that the Constitution guarantees. Even a law made by Parliament as envisaged in Article 11 will have to necessarily yield to these promises. Unlike, say, in Britain, Parliament in India, is not sovereign. Its powers are not unqualified; they are limited by the Constitution's text, in particular by the fundamental rights that are enlisted in Part III.

These rights partake a number of different characteristics. Some of them, such as the right to freedom of expression, are made available only to Indian citizens. Many others, though, are conferred on persons, regardless of the citizenship they hold. Article 14 falls into the latter category. It stipulates 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. Even on a simple reading of its text, there are two facets to the clause that are apparent. First, that it imposes a positive obligation on the State to guarantee equality. Second, that it grants the right not only to citizens but to any person within the territory of India.

> *India's Supreme Court recognised almost right from the outset ... [that] the moral precepts of Article 14's guarantee demanded an Aristotelian reading: that people equally situated are to be treated alike while people unequally situated are to be treated in an unlike manner.*

Underpinning the abstract language of Article 14 is a basic moral belief that all men are created equal. Now, we know, as the makers of the Constitution did, that this is not true in the actual, concrete sense—people are after all born with different natural attributes and differ from each other in a number of material ways.[2] Therefore when the Constitution speaks about equality it speaks about treating, as the American philosopher Ronald Dworkin said, every person with equal concern and respect. Or, as India's Supreme Court recognised almost right from the outset, the moral precepts of Article 14's guarantee demanded an Aristotelian reading: that people equally situated are to be treated alike while people unequally situated are to be treated in an unlike manner.[3]

But this formulation of equality as a moral principle needed to be fleshed out into legal doctrine. It was to that end that the Court looked towards America and its Supreme Court's interpretation of the equality clause of the U.S. Constitution. The 14th amendment guaranteed among other things that the State shall not deny to any person within its jurisdiction the equal protection of the laws. To examine when a state law might impinge on this clause, the U.S. Supreme Court relied on a doctrine of reasonable classification, explicated in these terms by its 1910 decision in *Southern Railway Co v. Greene*: "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification," Justice William R. Day wrote,"must be based upon some real

and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and the classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification."

In *Budhan Choudhary v. State of Bihar*, the Court in 1955 summed up the test as follows:

> In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases; namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure. The contention now put forward as to the invalidity of the trial of the appellants has, therefore to be tested in the light of the principles so laid down in the decisions of this Court.

Over the years, the Supreme Court has added an additional imperative, that the object of the law must itself serve a legitimate aim of the State.

As the constitutional scholar HM Seervai observed, in adopting the doctrine, the Supreme Court was making explicit what was really always implicit in the very idea of equality. That is, that Article 14 while forbidding class legislation nonetheless, somewhat paradoxically, required the State to make categorisations that are predicated on achieving substantive equality. Consider the following example that Seervai cites: if a law prescribes that members of Community A have to pay tax at 5 percent of their income while members of Community B, who are similarly situated, have to pay tax at 10 percent of their income, such a law would violate Article 14, because the classification it makes is unreasonable. Although Community A may be intelligibly distinguishable from Community B such a classification would bear no rational nexus to the object of the law, which is to allow the State to earn revenue by taxing people on the basis of their incomes. Yet, these two prongs of the test do not do enough to guarantee equality. Consider another example: the State decides to promote the growth of moustaches amongst the country's male population. To that end, it grants subsidies to all men who sport moustaches. Such a law may well meet both prongs to the test: moustached men are intelligibly distinguishable from those without moustaches; and the classification will also bear a rational nexus with the object of the law, which is to promote the growth of moustaches amongst men. It is therefore that a proper interpretation of Article 14 would demand that the State is additionally required to show that the object of any law made by it is by itself shorn of all arbitrariness, and seeks to serve a legitimate governmental objective.

CAA's Classifications

A simple reading of the CAA shows that it makes three separate classifications. First, it distinguishes migrants from Pakistan, Bangladesh and Afghanistan from migrants from all other countries. Second, it makes a sub-classification separating those belonging to the Hindu, Jain, Sikh, Buddhist or Christian faiths from all other persons, including, significantly, Muslims. And third, it confers privileges to those migrants fulfilling the above criteria only if they have entered India on or before December 31, 2014.

In examining whether these classifications are reasonable it's important to first understand what the objective of the CAA is. The statute itself doesn't clearly lay out an aim. The Statement of Objects and Purposes [SOA] which accompanied the bill, as introduced in the two Houses of Parliament, contains the following assertion:

> It is a historical fact that trans-border migration of population has been happening continuously between the territories of India and the areas presently comprised in Pakistan, Afghanistan and Bangladesh. Millions of citizens of undivided India belonging to various faiths were staying in the said areas of Pakistan and Bangladesh when India was partitioned in 1947. The constitutions of Pakistan, Afghanistan and Bangladesh provide for a specific state religion. As a result, many persons belonging to Hindu, Sikh, Buddhist, Jain, Parsi and Christian communities have faced persecution on grounds of religion in those countries. Some of them also have fears about such persecution in their day-to-day life where right to

practice, profess and propagate their religion has been obstructed and restricted. Many such persons have fled to India to seek shelter and continued to stay in India even if their travel documents have expired or they have incomplete or no documents.

But if we were to take this SOA at its word, as representing the stated objective of the law, the CAA, it is clear, will violate Article 14, because it treats people equally situated in an unlike manner. For the SOA makes a series of assumptions that rend the legitimacy of its specified purpose. Under this SOA, if one were to assume that the objective is to protect only minorities from neighbouring countries with a state religion, the exclusion of Bhutan and Sri Lanka is stark. After all, the constitutions of both these countries emphasise a special place for Buddhism. Even assuming, therefore, that the State is entitled to offer special protection to persons persecuted from neighbouring countries with a state religion to the exclusion of all other persecuted migrants, the omission of Bhutan and Sri Lanka undoes any nexus between the object of the law and the classifications it makes.

If, on the other hand, based on the SOA, the State were to argue that its objective is to offer the law's protection only to migrants from neighbouring countries where Islam is a state religion, then the classification made is still bad because the law leaves out not only certain communities of Muslims from these countries, who would also ordinarily qualify as minorities—notably the Ahmadiyyas from Pakistan and the Hazaras from Afghanistan—but also excludes other people persecuted on the basis of religion, including Jews, agnostics and atheists.

Should we take an altogether different explanation for the law, which, once again, the SOA hints at, that is that the objective of the CAA is to protect migrants from countries that were originally a part of pre-partition India, the classification will still be unconstitutional. If this were the prevailing logic, the inclusion of Afghanistan and the exclusion of Myanmar (which as Burma was governed as a part of the British Indian administration until 1937) means that the classification that the CAA makes can have no rational relation to its objective.

There are a host of other reasons why the classifications that the CAA makes are unequal. The law, for example, segregates apparent religious persecution from other forms of persecution. But can there be anything to suggest that a Tibetan subjected to persecution on political grounds is somehow in a better position than a Christian or Buddhist subjected to persecution in Pakistan or Bangladesh on the basis of their faith? The law also proceeds by making an assumption that it is only persons from countries with a state religion who can be subjected to religious persecution. But as the example of the Rohingya Muslims in Myanmar shows us, this assumption is not only incorrect but also invidious.

> [W]hatever the State might want to peg as the objective of the CAA, the classifications it makes are simply unsustainable.

All of this apart, there can simply be no explanation for restricting the CAA's applicability only to migrants who have entered India on or before 31 December 2014. Surely, it cannot be the State's case that migrants who have since entered are ineligible for an accelerated route to citizenship because their persecution has somehow been less exacting. Therefore, whatever the State might want to peg as the objective of the CAA, the classifications it makes are simply unsustainable. Even if one assumes that one limb of the test is met, in that it is possible to easily distinguish between those migrants who are offered the law's protection and those that are not, the classification will still bear no rational relation to the law's aims and purposes.

To some, the test of reasonable classification might appear too rigid. It could even be plausibly argued that it takes away from the moral axiom inherent in Article 14. Indeed, Justice Subba Rao, in a dissenting opinion, in *Lachman Das v. State of Punjab* (1963) was keen to point out that the doctrine of classification was merely a subsidiary rule: "Over emphasis on the doctrine of classification or an anxious and sustained attempt to discover some basis for classification may gradually and imperceptibly deprive the article of its glorious content," he wrote. "That process would inevitably end in substituting the doctrine of classification for the doctrine of equality: the fundamental right to equality before the law, and equal protection of the laws may be replaced by the doctrine of classification."

But the test has entrenched itself in our jurisprudence chiefly because it works—it allows the judges to practically conceive what equality really demands. And, here, in the case of the CAA, it shows us, beyond all doubt, that the law, if it is allowed to stand, will prove patently discriminatory. The Supreme Court ought to need no other reason to strike it down.

Footnotes:

1 All of this can be gleaned by reading Niraja Gopal Jayal's excellent book, *Citizenship and its Discontents: An Indian History*.

2 Amia Srinivasan's essay, "More Equal Than Others", published in the *New York Review of Books* (April 19, 2008) explores these differences and what equality demands.

3 *State of West Bengal v. Anwar Ali Sarkar (1952).*