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Melbourne
Law School



Citizenship and Statelessness in India

Background

India is in the midst of a crisis around citizenship and statelessness. There are two immediate triggers for the crisis:

- (a) People are being detained, declared foreigners and left effectively stateless by Indian citizenship verification processes of questionable legality. Almost 2 million people have been left out of the state-run National Register of Citizens ('NRC') in Assam. The government proposes to expand these citizenship verification processes throughout the country.
- (b) Indian Parliament has enacted legislation - the Citizenship Amendment Act, 2019 - which differentiates between religious groups in the provision of citizenship, excluding Muslims (amongst others).

Context of citizenship debates in India

Religion has always played a significant role in collective understandings of citizenship and identity in India. The Partition of British India along religious lines – which some think of as an ongoing process – is the key backdrop against which contemporary debates must be understood. The large-scale displacement caused by the Partition meant that the Constitution framers had to swiftly settle questions of citizenship.

The Indian Constitution's provisions on citizenship were debated under the shadow of Partition. The Constituent Assembly broadly agreed on the basic principle of *jus soli*.ⁱ While the Constitutional provisions do not mention religion, Niraja Jayal has argued that religion was implicitly relevant in debates about citizenship in independent India, referring to language used in the Constituent Assembly debates as well as the differential treatment of mostly Hindu migrants from Pakistan (in one time period) and mostly Muslim returnees from Pakistan (who originally lived in India).ⁱⁱ

Citizenship Act, 1955 and Subsequent Developments

The constitutional provisions are focussed on the immediate issues facing newly-independent India and govern citizenship at the time of the commencement of the Constitution. Parliament was given broad powers to enact a citizenship regime for the period after the commencement of the Constitution. This enactment, the Citizenship Act 1955, recognised different sources of citizenship: by birth, descent, registration, naturalization, and incorporation of territory.

The Act saw significant amendments, including in response to political movements around migration into the state of Assam. Concerns about migration from Bangladesh into Assam, especially in 1971, have been particularly politically significant. The political discourse is said to ‘mark out the illegal alien (“Bengali-speaking, Muslim, Bangladeshi infiltrator”) as the constituent other.’ⁱⁱⁱ A 1986 amendment to the Act, meant to prevent automatic acquisition of citizenship by birth, was a result of large scale agitations in the State of Assam. The agitators under the leadership of the All Assam Students Union (AASU) took to the streets against the increased presence of ‘foreigners’ in the State, particularly in the aftermath of the Indo-Pak war and subsequent creation of Bangladesh in 1971. The agitation culminated in the Assam Accord of 1985 between the Central Government representatives and the protestors. The Accord, among other things, promised the detection and expulsion of foreigners from Assam. **One of the ways to achieve this was through a citizenship verification process, i.e. updating a National Register of Citizens ('NRC') in Assam.**

A 2004 amendment to the Citizenship Act, modified the provision of citizenship by birth to exclude those born in India after 1987 to a parent identified as an ‘illegal migrant’ by the 1955 Act. Since the relevant ‘illegal migrants’ were ‘impliedly Bangladeshi Muslim’,^{iv} this amendment is considered a precursor to the 2019 Citizenship Amendment Act.

The demand to identify ‘foreigners’ within the State of Assam received an unexpected boost in 2013, when a Supreme Court bench presided over by the ex-Chief Justice of India, Ranjan Gogoi, decided to actively oversee the process of updating the National Register of Citizens.

Policy and Delegated Legislation

While the 2019 Act’s treatment of religion as *explicitly* relevant for the grant of citizenship is unprecedented in Indian primary legislation, religion has long been an explicitly relevant factor for immigration status in delegated legislation. For instance, a 2004 amendment to the Citizenship Rules 1956 authorises government officials to grant citizenship to particular “Pakistan nationals of minority Hindu community”. Rules made by the central government in 2015 under the Foreigners Act 1946 and the Passport (Entry into India) Act 1920 exempt ‘persons belonging to minority communities in Bangladesh and Pakistan, namely, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians who were compelled to seek shelter in India due to religious persecution or fear of religious persecution’ from some adverse consequences of those enactments. Both rules appeal to religious identity in very similar terms to the Citizenship (Amendment) Act 2019.

National Register of Citizens

Almost 2 million people have been left out of the state-run National Register of Citizens ('NRC') in Assam. The NRC is a list containing all those who have been deemed Indian citizens in the state of Assam. The original NRC was developed in 1951 purportedly to distinguish citizens from illegal migrants. However, the updating process began in 2015 with the final draft published in August 2019, excluding 1.9 million people. In order to be included on the NRC, citizenship must be established through the provision of official documents to demonstrate residence (either by birth or ancestry) in India prior to 24 March 1971. Many vulnerable people, including impoverished residents, transgender people and minorities, are unable to provide these documents.

Persons excluded from the NRC may appeal against their exclusion to 'Foreigners Tribunals'. Foreigners Tribunals determine whether a person is a citizen of India and there are currently 100 of these tribunals in Assam. However, there are significant flaws in this system of review, the most notable being that approximately 64,000 people have been declared foreigners through ex parte decisions. There are also serious questions about the competence of tribunal members and worries that the burden of proving citizenship falls to the individual. Bengali Muslims have been 'disproportionally affected and targeted' by Foreigners Tribunals.

Large numbers of people declared to be foreigners are being held in detention centres, often within prisons, in harmful conditions and with limited legal rights.

Currently, there is also concern that this NRC model may be replicated in other Indian states, possibly through the Census (the 'National Population Register'). The central government had initially indicated this will be rolled-out from 1 April 2020. Nevertheless, with the COVID-19 outbreak, the exercise has been postponed for the time being.

There is a widespread fear that this exercise will be used to filter out 'undesirable' citizens, possibly over 100 million of them.

The Citizenship Amendment Act 2019

A related legal development which is escalating the crisis is the recent passage of a discriminatory new citizenship law. The Citizenship Amendment Act 2019 ('CAA') differentiates between religious groups in the provision of citizenship. The Act amends the definition of "illegal migrant" in the Citizenship Act 1955 to create a fast-tracked pathway to Indian citizenship for Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan. The Act provides for the abatement of immigration-related legal proceedings pending against such migrants once they are conferred citizenship; this conferral may be retrospective, from their date of entry into India. The Act further amends a provision in the Citizenship Act 1955 which required applicants to have lived in India or "been in central government service for the last 12 months and at least 11 years of the preceding 14 years". The

Act reduces this requirement to five years for Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan.

The Citizenship Amendment Act 2019 may therefore allow for persons who have been excluded from the NRC to gain citizenship if they belong to some religious communities, while explicitly providing no avenue for Muslims who are in otherwise identical circumstances. The Amendment Act thus signifies a further shift away from the secular vision of citizenship envisaged in the Constitution.

There are widespread protests against the Amendment Act, centred around the Constitution, as well as legal challenges to its constitutionality. Many protesters have been arrested in what is widely-seen as a move to stifle dissent. Similarly, legal challenges against the procedure before Foreigners Tribunals as well as the legislative recognition of Assam Accord too are pending before the Supreme Court.

Protections for Refugees and Stateless Persons in India

Since the new citizenship regime (above) is at least ostensibly based on concerns about persecution of minority communities in Pakistan Afghanistan and Bangladesh, it is also important to appreciate that, while India hosts diverse groups of refugees, domestic protections for refugees and asylum-seekers is limited. There is no national level legislation on refugees; legal and policy regimes do not apply uniformly across groups of refugees or asylum seekers; and India is not a signatory to the 1951 Convention on Refugees or the 1967 Refugee Protocol. Contemporary Indian law, including constitutional law, offers very limited protections to refugees and asylum seekers; even the principle of non-refoulement is not consistently respected.

This project aims to contribute to studies of India's broader regime relating to refugees and stateless persons, in addition to the more specific issues raised by the NRC and CAA. It seeks to achieve this through three main activities: (a) generation of research oriented to India's citizenship and statelessness crisis, with focus on constitutional law, administrative law and international law, (b) curation and dissemination of such research via an online repository, and (c) a virtual research workshop.

More details on each of these may be found below:

A. Planned Activity: Research Oriented to India's Citizenship and Statelessness Crisis

Research generation on the following **research questions (and others)**:

1. The constitutionality of the Citizenship Amendment Act 2019
2. The legality of administrative rules, policies, regulations around citizenship
3. Problems/illegalities with the Foreigners Tribunals
4. Evaluation of the Citizenship Amendment Act against concepts of Indian secularism
5. The legality, from an international law perspective, of the Citizens Amendment Act, as well as planned NRC, NPR exercises

6. The history, including colonial continuities, of the Foreigners Tribunals
 7. The history of citizenship and refugee regulation in India, with particular attention to Partition (in the East and West) and the Nehru - Liaquat Pact
 8. Gendered aspects of determination of citizenship
 9. Whether “determination” of citizenship and “verification” are subject to the same legal norms
 10. Issues of privacy and data protection around citizenship verification
 11. Problems with requiring documentation / paper evidence for impoverished populations, women and other vulnerable people
 12. Limits on Sovereign power – can the state confer citizenship without any connection to the soil?
 13. Current v ideal refugee and statelessness regulation in India
 14. The significance of the constitutional directive principle to maintain friendly relations between states
 15. Histories of minority rights in South Asia
 16. Comparative legal experience with de-nationalisation and citizenship verification processes
- B. *Scholarship* curation and dissemination via an **online repository**, tentatively managed by the Peter McMullin Centre on Statelessness. This repository will contain up-to-date scholarly resources on the NRC and CAA.
- C. A **virtual research workshop** for researchers to get feedback on works-in-progress on these issues and disseminate preliminary research findings. Key players in this crisis from the Indian legal community will be invited to contribute and gain exposure to these research findings.

PARTNERS

This is a collaborative project between Melbourne Law School, the Bonavero Institute of Human Rights and Jindal Global Law School

INVITATION

We invite anyone interested in contributing to these (or allied) research questions to contact us.

ⁱ Niraja Gopal Jayal, *Citizenship and its Discontents: An Indian History* (Harvard University Press 2013) 57.

ⁱⁱ *ibid*

ⁱⁱⁱ Anupama Roy, ‘Ambivalence of Citizenship in Assam’ (2016) 51(26-27) *Economic and Political Weekly* 45.

^{iv} Niraja Gopal Jayal, ‘The Misadventure of a New Citizenship Regime’ *The Hindu* (27 November 2019) <<https://www.thehindu.com/opinion/lead/the-misadventure-of-a-new-citizenship-regime/article30090226.ece>> accessed 09 January 2020.