The Legality of the Citizenship (Amendment) Act 2019 under the Constitution of India and International Law

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Abstract

This paper focuses on the Citizenship (Amendment) Act 2019 (CAA) of India, which has been the subject of controversy in recent times. It aims to evaluate the Act on two levels: national and international. The CAA provides half a dozen religious communities from Afghanistan, Bangladesh and Pakistan with conditional exemption from holding a passport or other valid travel documents. In addition, the CAA also sets out a criterion for the naturalisation of a migrant as a citizen of India. However, the criterion used by the new law is arbitrary, since it is based on religion in order to choose which illegal immigrants, from a select few neighboring states, may be naturalised. This religion-based criterion is in direct conflict with the secular nature of the Indian Constitution. Furthermore, in the absence of an acceptable and consistent rationale for the exclusion of Muslims and religious minorities from other neighboring states of India, the CAA is arbitrary and unreasonable. In addition, because of its arbitrary nature, this law discriminates against Muslims and other religious minorities not enumerated in the amendment. Finally, on account of its discriminatory nature, the CAA also derogates from various international legal standards, which include the 1951 Refugee Convention, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the UN Convention against Torture, 1985.

Introduction

The issue of citizenship has traditionally been an area where states could fully exercise their sovereignty. It has been a matter of governance and policy, regarding which states historically enjoyed wide-ranging discretion. However, the modern legal framework, both at the municipal and the international level, has evolved to the extent that an individual is no longer subject to the state's absolute and arbitrary power. An individual is no longer a means to an end; in fact, as Immanuel Kant put it ever so eloquently, an individual is no longer a tool to be used for the glory of the state.[1] Rather she is a rational-being, entitled to basic human rights and dignity. Consequently, a state's discretion with regard to many legal areas, including the granting of citizenship, is no longer absolute. Thus, in addition to the constitutional guarantees each state must grant with regard to basic human rights and dignity, modern international law has transcended both physical and political boundaries and has recognised the rights innate in the humanity of the individual.

This paper will focus on a clear example of how states no longer enjoy unfettered discretion in the domain of citizenship. The recent Indian citizenship law, the Citizenship (Amendment) Act 2019 (CAA),[2] has been at the epicenter of fierce controversy for using religion as a ground for the granting of citizenship for the first time in the history of India.[3] It presents a unique example of a democracy departing from the principles of equality and constitutionalism with

[1] Robert Johnson and Adam Cureton, 'Kant's Moral Philosophy' in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2019) <https://plato.stanford.edu/archives/spr2019/entries/kant-moral> accessed on 20 Apr 2020.

[2] The Citizenship (Amendment) Act 2019, No. 47 of 2019.

[3] Jayshree Bajoria, '"Shoot the Traitors" – Discrimination against Muslims under India's New Citizenship Policy' (*Human Rights Watch*, 9 April 2020) <https://www.hrw.org/report/2020/04/09/shoot-traitors/discriminati on-against-muslims-under-indias-new-citizenship-policy> accessed 16 April 2020.

regard to issues of transnational importance – in this case, granting citizenship to refugees, by explicitly excluding a considerable minority of the South Asian population, the Muslims.

The CAA can be assessed on two levels: national and international. In the first part of this paper, the amendment to the CAA that sparked criticism and widespread condemnation will be presented. In the second part, it will be assessed whether the new law is in consonance with the rights guaranteed under the Indian Constitution. The third part will examine whether it complies with the obligations of India under international law. It will be shown how the CAA violates both domestic and international legal standards and therefore it is both unconstitutional and illegal under international law. It is concluded that the Act should find no place in the law books of India.

A. Provisions of the CAA that Appear *Prima Facie* Discriminatory on Grounds of Religion.

Before the CAA, the Citizenship Act 1955 (the 1955 Act)[4] defined an 'illegal immigrant' as someone who entered India without a valid passport or other travel documents, or someone with a valid passport or other travel documents – or authority as may be prescribed by or under any law in that behalf – but remains in the country beyond the permitted period of time.[5] The 2019 Amendment added the following proviso:

> Provided that any person belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community from Afghanistan, Bangladesh or Pakistan, who entered into India on or before

[4] The Citizenship Act 1955, No. 57 of 1955.
[5] ibid s 2(b).

> the 31st day of December, 2014 and who has been exempted by the Central Government by or under clause (*c*) of sub-section (2) of Section 3 of the Passport (Entry into India) Act, 1920[6] or from the application of the provisions of the Foreigners Act, 1946[7] or any rule or order made thereunder, shall not be treated as illegal migrant for the purposes of this Act;[8]

The aforementioned amendment provides half a dozen religious communities from Afghanistan, Bangladesh and Pakistan with conditional or unconditional exemption from holding a passport or other valid travel documents. The said amendment has exempted illegal immigrants belonging to these communities from legal action, which otherwise could have been taken against them.

The other noteworthy amendment from the perspective of religious discrimination has been introduced by the CAA into the Third Schedule, clause (d), of the 1955 Act. This clause defines the criterion for the naturalisation of a migrant as a citizen of India. Under that rule, a person could be naturalised as a citizen of India if, during the course of the immediately preceding fifteen (15) years, he had either resided in India or had been in the service of Government in India, or partly the one and partly the other, for periods amounting in the aggregate to not less than eleven years.[9] However, the proviso added by the CAA reduces the said aggregate period of residence or service of Government in India from 'not less than eleven years' to 'not less than five years' for persons belonging to the Hindu, Sikh, Buddhist, Jain, Parsi or Christian community migrating from Afghanistan, Bangladesh, or Pakistan.[10] The longer term of eleven

[6] The Passport (Entry into India) Act 1920, No. 34 of 1920.
[7] The Foreigners Act 1946, No. 31 of 1946.
[8] The Citizenship (Amendment) Act 2019, Section 2
[9] The Citizenship Act 1955, Third Schedule, Clause d
[10] The Citizenship (Amendment) Act 2019, Section 6

years would therefore still be applicable to migrants belonging to other communities.

These two provisions will form the specific subject of the investigation of the following two parts of this article. The next part will try to evaluate whether the provisions align with Indian constitutional values and principles.

B. Constitutional Framework and the Citizenship (Amendment) Act 2019

1. Secularism

The Constitution of India defines the Indian Republic as a 'sovereign socialist secular democratic republic'. The preamble of the Indian Constitution reads as follows:

> We, the people of India, having solemnly resolved to constitute India into a [sovereign socialist secular democratic republic] and to secure to all its citizens:
> Justice social, economic and political;
> Liberty of thought, expression, belief, faith and worship;
> Equality of status and of opportunity;
> and to promote among them all
> Fraternity assuring the dignity of the individual and the [unity and integrity of the Nation];[11]

In *Ahmedabad St. Xavier's College Society v State of Gujarat*,[12] a nine-judge bench of the Supreme Court of India elaborated upon the secular nature of the Indian polity:

[11] The Constitution of India 1949, Preamble.
[12] (1974) 1 SCC 71.

> There is no mysticism in the secular character of the State. Secularism is neither anti-God nor pro-God; it treats alike the devout, the agnostic and the atheist. It eliminates God from the matters of the State and ensures that no one shall be discriminated against on the ground of religion.[13]

The precept of secularism has been accepted by the Supreme Court of India as part of the Constitution's basic structure. In *S.R. Bommai v Union of India*,[14] Justice A.M. Ahmedi held that:

> Notwithstanding the fact that the words 'Socialist' and 'Secular' were added in the 42nd Amendment, the concept of Secularism was very much embedded in our constitutional philosophy. The term secular has advisedly not been defined presumably because it is very elastic term not capable of a precise definition and perhaps best left undefined. By this amendment, what was implicit was made explicit… [T]he relevant provisions of the Constitution bring out the dual concept of secularism and democracy, the principles of accommodation and tolerance… [S]ecularism is a basic feature of our Constitution… [A]dequate safeguards were provided in the Constitution to protect the secular character of the country and to keep divisive forces in check so that the interests of religious, linguistic and ethnic groups were not prejudiced.[15]

In addition, Justice Sawant and Justice Kuldip Singh commented that:

> Secularism is a part of the basic structure of the Constitution. The relevant provisions of the Constitution by implication prohibit the establishment of a theocratic State and prevent the

[13] ibid para 75.
[14] (1994) 3 SCC 1
[15] ibid paras 29 and 30.

> State from either identifying itself with or favouring any particular religion or religious sect or denomination. The State is enjoined to accord equal treatment to all religions and religious sects and denominations… [W]hatever the attitude of the State towards the religions, religious sects and denominations, religion cannot be mixed with any secular activities. In fact the encroachment of religion into secular activities is strictly prohibited.[16]

Furthermore, in *R.C. Poudyal v Union of India and others*,[17] Chief Justice L. M. Sharma, in his dissenting opinion, held that a separate electorate on grounds of religion is unconstitutional. The then Chief Justice also stated:

> The Preamble, which is the key to understanding the Constitution, emphasises by the very opening words, the democratic nature of the Republic guaranteeing equality of status to all which the people of India had resolved to constitute by adopting, enacting and giving to themselves the Constitution. The personality of the Constitution is developed in Part III dealing with the Fundamental Rights, and the framers of the Constitution, even after including Article 14 ensuring equality before law, were not satisfied unless they specifically prohibited religion as a ground for differential treatment. The freedom of propagation of religion and the right to manage religious affairs etc. were expressly recognised by Articles 25 to 28 but when it came to deal with the State, the verdict was clear and emphatic that it must be free from all religious influence.[18]

Also, it has been held by the apex court of India in *Valsamma Paul (Mrs) v Cochin University and Others* that 'secularism' and

[16] ibid paras 146 and 148.
[17] (1994) Supp(1) SCC 324.
[18] ibid para 31.

'socialism' were brought into the Preamble of the Constitution in order to provide equal opportunities and facilities to participate in the political process for all sections of the society, irrespective of caste, religion and sex.[19]

It clearly appears that any involvement of religion in the workings of the state is strictly prohibited by the Constitution of India. This unambiguous stance was reiterated by the Supreme Court of India in its pronouncement upon the subject matter in *Abhiram Singh v C.D. Commachen*.[20] The Court made a clear distinction: under the Constitutional scheme the mixing of religion with State power is not permissible, while freedom to practice, profess and propagate religion of one's choice is guaranteed.[21]

The CAA's amendments to citizenship law create an exceptional scheme for religious communities migrating from Pakistan, Afghanistan, and Bangladesh. As per the Statement of Objects and Reasons of the Act, these groups are persecuted minorities in need of refuge. The relevant paragraph has been reproduced below:

> 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.[22]

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[19] (1996) 3 SCC 545, paragraph 6
[20] (2017) 2 SCC 629.
[21] ibid para 74.
[22] The Citizenship (Amendment) Bill 2019, Statement of Objects and Reasons, paragraph 2

However, this argument is inconsistent with the geo-political realities of South Asia. For instance, Sri Lanka's state religion is Buddhism, and there has been a history of persecution of the largely Hindu Tamil Eelam ethnic group. Myanmar grants a special constitutional status to the Buddhist religion and has carried out atrocities against the Rohingya Muslims. Also, the CAA omits the plight of Uighur Muslims in the Xinjiang Uyghur's autonomous region of China, the Hazaras, the Ahmadiyas, and people who profess no specific creed from Bangladesh, Pakistan, and Afghanistan.[23]

Providing persecuted communities with refuge is consistent with the socialist nature of the Indian Constitution, whereas the new amendment creates an arbitrary criterion, based upon religion, in order to naturalise the illegal immigrants from a select few neighboring states. The said religion-based criterion is in direct conflict with the secular nature of the Indian Constitution. It is pertinent to argue that freedom and tolerance of religion is distinct from the secular life of the State, as the latter falls in the exclusive domain of State activities.[24]

2. Equality Before the Law

Article 14 of the Indian Constitution enshrines the principle of equality before law as a fundamental right of every human being subject to the territorial jurisdiction of India. The text of the provision is reproduced here for ease of reference: 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.'[25]

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[23] Jhalak M. Kakkar, India's New Citizenship Law and its Anti-Secular Implications (*Lawfare*16 January 2020) <https://www.lawfareblog.com/indias-new-citizenship-law-and-its-anti-secular-implications> accessed 17 April 2020.

[24] *Abhiram Singh v C.D. Commachen*, (2017) 2 SCC 629, paragraph 69

[25] The Constitution of India 1949, Article 14

It was held in *Motor General Traders v State of A.P.*[26] that the equality clause contained in Article 14 requires that all persons subjected to any legislation should be treated alike under like circumstances and conditions. Equals have to be treated equally. In the same case, it was further stated that:

> While that Article forbids class legislation, it does not forbid classification for purposes of implementing the right of equality guaranteed by it. 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 that differentia must have a rational relation to the object sought to be achieved by the statute in question. While the classification may be founded on different bases what is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration.'[27]

Article 14 provides for the equal treatment of every individual, subject to any legislation. However, the said Article has been interpreted by the superior courts of India to include classification for the purpose of implementing the right of equality itself.

Therefore, in order to assess the constitutional validity of the classification laid out by the CAA, it is imperative to test the said law against the yardstick of the two-pronged test from *Motor general.*

Firstly, the only apparent 'intelligible differentia' is religion, which distinguishes and groups together certain communities from others. Secondly, the religion based criteria for the naturalisation of illegal immigrants is inconsistent with the law's object to provide persecuted religious minorities with refuge in India. As mentioned

[26] (1984) 1 SCC 222.
[27] ibid para 10.

before, the new law fails to take into account various persecuted religious minorities from China, Myanmar, etc. Such inconsistency renders the classification of illegal immigrants from selected religious communities arbitrary and discriminatory.

Further support to this standpoint comes from the decision of the Supreme Court of India in *Ajay Hasia and others v Khalid Mujib Sehrvardi and Other*.[28] In this case the Court held that Article 14 strikes at the root cause of inequality, because any action that is arbitrary, must necessarily involve negation of equality:

> It must therefore now be taken to be well settled that what Article 14 strikes at is arbitrariness because any [Under Article 32 of the Constitution] action that is arbitrary, must necessarily involve negation of equality. The doctrine of classification which is evolved by the courts is not paraphrase of Article 14 nor is it the objective and end of that article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions referred to above, the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached. Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an 'authority' under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution.'[29]

[28] 1981 SCC (1) 722.
[29] ibid para 16.

Categorising only certain religious communities from designated countries as 'persecuted' is arbitrary and without any acceptable rationale. The legislature has singled out persecuted religious communities from Pakistan, Afghanistan and Bangladesh without any apparent logical reason. The law excludes persecuted Muslims from some of India's neighboring countries without any reasonable justification. Moreover, if the purpose behind the law was to provide refuge for persecuted communities, why not make it general in its reach and extent? These are some of the questions left wanting a reasonable answer. In absence of an acceptable and consistent rationale for the exclusion of Muslims and religious minorities from other neighboring states of India, the CAA cannot but be classified as arbitrary and unreasonable. Hence, the said law discriminates against Muslims and some of the other religious communities from neighboring states not enumerated in the amendment. Therefore, the CAA is in violation of Article 14 of the Constitution of India and is unconstitutional.

C. The CAA under the Scrutiny of International Law

This part will show how the CAA also derogates from multiple international legal standards, which include the 1951 Refugee Convention, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the UN Convention against Torture, 1985.

1. General Norms Concerning the Status of Refugees

The Convention Relating to the Status of Refugees[30] (the Refugee Convention) defines a 'refugee' as someone who:

[30] Convention Relating to the Status of Refugees 1951, United Nations Treaty Series, vol. 189, p. 137.

> Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'[31]

However, it has been pointed out by Samarth Trigunayat in an article published in the 'Foreign Policy News'[32] that India has refrained from being party to the Refugee Convention on account of 'South Asian borders being porous and conflict ridden, whereas mass movement of people across the borders may result in serious pressure on India's domestic infrastructure and might end up changing the demography of the region.'[33]

However, despite the aforementioned fact, India has consistently accepted refugees until recently. To list a few, India has sheltered Hindus and Sikhs from Pakistan, Tibetan refugees from China, Chakma Refugees from Bangladesh, Ugandan refugees, and Tamil refugees.[34] The same author further states that since Article 38 of the Statute of the International Court of Justice[35] recognises custom as a source of international law. Since the Refugee Convention has become part of customary international law, India is bound by its provisions. The fact that India has accepted refugees since its birth, is an instance of state practice that highlights how India cannot claim the status of 'persistent objector'.[36] It is pertinent to note here that the existence of a custom depends, firstly, upon persistent state practice

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[31] ibid Article 1.
[32] Trigunayat Samarth, 'India's Citizenship Bill 2019 and the Violation of International Law' (*Foreign Policy News*, 11.12.2019) <https://foreignpolicynews.org/2019/12/11/indias-citizenship-bill-2019-and-the-violation-of-international-law/> accessed 17 April 2020.
[33] ibid.
[34] ibid.
[35] Statute of the International Court of Justice (18 April 1946), Article 38(1)(b).
[36] Trigunayat (n 32).

and, secondly, upon the presumption of the existence of a legal obligation, i.e. *opinio juris.* Samarth further elaborates that, when it comes to state practice, India has hosted the largest refugee population in South Asia since 1947; and with regard to the second parameter, India has consistently participated and voted in favour of various resolutions concerning the status of refugees.[37] Some significant examples are the resolutions pertaining to Afghanistan, Palestine and Africa.[38]

In light of the above, India cannot ignore the rules of the convention which are now customary in nature and therefore general in scope. The next section will dwell on how the CAA poses India in violation of international standards on refugees' protection.

2. CAA Allows Violations of the Principle of *Non-Refoulement*

Article 33 of the Refugee Convention prohibits contracting parties from:

> [Expelling or returning] a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.[39]

This rule, called the principle of *non-refoulement*[40] becomes inderogable if the refugee is at risk of being subjected to torture if returned to the country they come from. The UN Convention against

[37] ibid.
[38] ibid.
[39] Convention Relating to the Status of Refugees 1951, Article 33(1).
[40] *Non-refoulement* is a French expression which means that refugees should not be returned to the countries they fled from. It is the main principle underlying the Refugee Convention and, nowadays, a settled norm of customary international law.

Torture (the Torture Convention)[41] states that the parties to it are bound by the principle of *non-refoulement*, which means that where there are substantial grounds for believing that the migrant would be in danger of being tortured upon return to that person's home state, the state party should refrain from the expulsion or extradition of such a person.[42]

> 1) No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
> 2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

The principle of *non-refoulement* means 'the practice of not forcing refugees or asylum seekers to return to a country in which they are liable to be subjected to persecution.'[43] It is worthy to note here that India has signed the Torture Convention but has not ratified it. However, this does not bar the application of this principle to the state of India for two reasons: the first is that due to constant state practice and systematic reaffirmations, the principle of prohibition of torture has achieved the status of customary international law and applies even to states that are not parties to the Torture Convention.[44]

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[41] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 10 December 1984, United Nations Treaty Series, vol. 1465, p. 85.
[42] ibid Article 3.
[43] Trevisanut Seline, 'International Law and Practice: The Principle of *Non-Refoulement* and the De-Territorialization of Border Control at Sea' (September 1, 2014) 27(3) Leiden Journal of International Law 661.
[44] Vang Jerry, 'Limitations of the Customary International Principle of *Non-refoulement* on Non-party States: Thailand Repatriates the Remaining

The second is that the prohibition of torture has been characterised by the International Court of Justice (ICJ) as a peremptory norm or *jus cogens*. For instance, in the case concerning *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*[45] the ICJ held that the prohibition of torture is part of customary international law and it has become a peremptory norm or *jus cogens*. It is also pertinent to note that the principles of *jus cogens* or peremptory norms are rules of international law that cannot be derogated from, neither by treaty nor by consistent state practice. As an extension of the prohibition of torture, India is legally barred from expelling, returning, or extraditing a person to another state where he or she is in danger of being subjected to torture.

Consequently, India's likely *refoulement* of Muslim refugees fleeing persecution under the new Citizenship Law would be in direct violation of not only the established rules of customary international law, but of the peremptory norms against torture as well.

3. Violation of Human Rights Law

The UN Declaration on the 'Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief' was adopted by the UN General Assembly out of concern regarding the 'manifestation of intolerance and by the existence of discrimination in matters of religion or belief still in evidence in some areas of the world.'[46] Article 2 of the Declaration bars states from subjecting anyone to discrimination on grounds of religion or belief. Article 2(2) defines intolerance and discrimination on grounds of religion or belief as:

Hmong-Lao Regardless of International Norms' (Summer 2014) 32(2) Wisconsin International Law Journal 355.

[45] Judgment, ICJ Reports 2012, 422.

[46] UN General Assembly, 'Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief' (25 November 1981) A/RES/36/55.

> Any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.[47]

Article 3 deems discrimination between human beings on grounds of religion or belief as an affront to human dignity and a disavowal of the principles of the UN Charter. Accordingly, the new Citizenship Law violates the aforesaid international instruments to which India is also a party.

Moreover, it is significant to note that Article 14 of the Universal Declaration of Human Rights (UDHR) recognises every individual's right to seek asylum, irrespective of their religion, race, creed, class, ethnicity, etc.

Article 7 of Universal Declaration of Human Rights (UDHR) further declares that:

> All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Clearly, the exclusion of Muslims from the general criteria of naturalisation and citizenship on grounds of religion is discriminatory and, resultantly, violates the UDHR.

Furthermore, the CCA violates the International Covenant on Civil and Political Rights (ICCPR), as it goes against the principles

[47] ibid.

of non-discrimination of Article 2(1)[48] and equality before the law of Article 26.[49]

According to the Human Rights Committee, created under the ICCPR, Article 26 not only entitles all persons to equality as well as equal protection of the law, but also prohibits any discrimination on various grounds including religion. The Human Rights Committee maintains that Article 26 (unlike Article 2) extends beyond the Covenant itself,[50] providing protection against discrimination with respect to social and economic as well as civil and political rights.[51] The explicit mention of religion in the aforementioned provisions clearly indicates its importance as a ground, which ought not to be the basis of any discrimination.

Since India has acceded to the ICCPR, it is bound by the non-discrimination obligation contained therein. Therefore, the CAA's use of religion as a deciding factor with regard to naturalisation of illegal immigrants is in clear violation of international human rights standards.

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[48] ICCPR, Article 2(1): 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

[49] ibid Article 26: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

[50] Human Rights Committee, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 27.05.2008

[51] Poddar, Mihika 'The Citizenship (Amendment) Bill, 2016: International Law on Religion-based Discrimination and Naturalization law' (10 August 2018) 2(1) Indian Law Review 108.

The Inter-American Court of Human Rights in its advisory opinion on the *Costa Rica Naturalisation Case* held that differentiation might be permissible if the criterion for categorisation is not arbitrary and capricious.[52] As mentioned earlier in this paper,[53] the new law for naturalisation is based on incoherent reasoning. For instance, the CAA seeks to provide refuge to persecuted minorities, yet it arbitrarily provides exemptions to religious minorities from only three of India's neighbours.

At the end of this analysis it can be safely maintained that the aforementioned rules of customary and conventional international law concerning human rights, *non-refoulement*, torture, and discrimination are evidence that the CAA violates India's obligations under international law.

Conclusion

The CAA is a discriminatory piece of legislation that violates the principles of secularism and equality of the Indian Constitution. The Indian Constitution prohibits religious discrimination and guarantees all persons within its territorial jurisdiction equality before the law. However, on the contrary, the CAA creates an arbitrary criterion – based upon religion – for naturalisation of immigrants from a few selected neighbouring states. Accordingly, the CAA is also inconsistent with rules and principles of international law for being discriminatory on grounds of religion.

In addition, the CAA, as argued by eminent Indian historian Mukul Kesavan, is 'couched in the language of refuge and seemingly

[52] Inter-American Court of Human Rights, *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/ 84 (19 January 1984) A/4/14.
[53] Part B and this Part, Sections 1 and 2.

directed at foreigners, but its main purpose is the delegitimisation of Muslims' citizenship'[54]. Mukul further argued in a recent article published in The Guardian that, 'this statutory, institutional subversion of Muslim citizenship would be a great prize for a majoritarian party like the BJP.'[55] The CAA might not expressly delineate Muslims of India as second class citizens, yet it provides mechanisms that will have the same effect. The new citizenship law is another feather in the cap of the ruling party's extremist right-wing politics. In conclusion, the CAA is unconstitutional and in violation of India's international obligations. It is a provision that will fan sectarianism and communal hatred in the country. It should be eliminated as soon as possible from the law books of a secular state like India.

[54] 'Citizenship Amendment Bill: India's new "anti-Muslim" law explained' (*BBC News* 11 December 2019) < https://www.bbc.com/news/ world-asia-india-50670393> accessed 17 April 2020.

[55] Kesavan Mukul, 'Anti-Muslim Violence in Delhi Serves Modi Well', *The Guardian* (26 February 2020) <https://www.theguardian.com/commentisfree/2020/feb/26/violence-delhi-modi-project-bjp-citizenship-law> accessed 17 April 2020.

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