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THE CITIZENSHIP (AMENDMENT) ACT, 2019: A THREAT TO SECULARISM IN INDIA?

Under the Guidance and Supervision of

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CERTIFICATE

This is to certify that Ms. Magdalin Sudhan (Reg. No. LM0120007) has prepared and submitted the dissertation titled, "**The Citizenship (Amendment) Act, 2019: A Threat to Secularism in India**" in partial fulfillment of the requirement for the award of the Degree of Master of Laws in Constitutional and Administrative Law, to the National University of Advanced Legal Studies, Kochi, under my guidance and supervision. It is also affirmed that the dissertation submitted by her is original, bona-fide and genuine.

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DECLARATION

I, Magdalin Sudhan (LM0120007), pursuing Masters in Constitutional and Administrative Law do hereby declare that the Dissertation word titled '**The Citizenship (Amendment) Act, 2019: A Threat to Secularism in India?',** submitted for the award of L.L.M Degree in the National University of Advanced Legal Studies, Kochi, during the academic year 2020-21, is my original, bona-fide and legitimate research work, carried out under the guidance and supervision of Dr. Sheeba S. Dhar. This work has not formed the basis for the award of any degree, diploma, or fellowship either in this university or other similar institutions of higher learning.

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Magdalin Sudhan

CONTENTS

LIST OF ABBREVIATIONS

AAGSP	All Assam Gana Sangram Parishad
AASU	All Assam Student Union
AIR	All India Reporter
BC	Before Christ
CA	Citizenship Act
CAA	Citizenship (Amendment) Act
CAB	Citizenship (Amendment) Bill
G.S.R.	General Statutory Rules
IFRI	Institut français des relations internationales
IUML	Indian Union Muslim League
JPC	Joint Parliamentary Committee
NRC	National Register of Citizens
R & AW	Research & Analysis Wing
SC	Supreme Court
SCC	Supreme Court Cases
SCR	Supreme Court Reporter
SOR	Statement of Objects and Reasons
SOP	Standard Operating Procedure
W.P.	Writ Petition

CASES REFERRED

- *Keshavananda Bharati v. State of Kerala*(1973) 4 SCC 225; AIR 1973 SC 1461
- *Ahmedabad St.Zavier's College v. State of Gujarat* (1975) 1 S.C.R. 173
- *S.R.Bommai v. Union of India*(1975) 1 S.C.R. 173
- *M. Ismail Faruqui v. Union of India* AIR 1995 SC 604
- *M. Siddiq (D) Thr LRs v. Mahant Suresh Das &Or*s (2019) 4 SCC 641
- *Izhar Ahmad Khan v. Union of India.* AIR 1962 SC 1052
- *IUML, P.K.Kunhalikutty and ors. v. Union of India.* W.P.(C) No. 001470/2019 (pending)
- *State of Kerala v. Union of India.*ORGNL. SUIT No. 000002/2020(pending)
- *Balram Singh &ors v. Union of India &ors*W.P. (C) No. 000645/2020(pending)
- *SamtaAndolan Samiti v. Union of India.* W.P.(C) No. 000193/2021(pending)

Chapter I

INTRODUCTION

1.1 Introduction:

"Our ability to reach unity in diversity will be the beauty and test of our civilization" said the father of our nation. India is a land of great diversity[1]. And yet, it is also characterized by unity. This is largely attributable to the strong principles on which our constitution was built. Such principles include, freedom, equality, secularism and all forms of liberty. These principles are to be treasured as of much value and guarded from factors which undermine them. The closer we stay to these principles, the safer it is for the welfare of the nation. For, the constitution was drafted by a body of people who were not only of very high intellectual standing and rich experience, but also of firm moral conviction and virtue. Though not expressly mentioned at its inception, the concept of secularism is basic to the constitution and it pervades its entirety.

Citizenship is variously viewed as a status, as an identity and as a bundle of rights. The citizenship policy of a nation determines its identity. It is also an indication of the nature of relationship between the government and the people. The Constitution makers, therefore, were very careful to found citizenship on secular principles. After the constitution was brought into force, the Parliament continued in such a secular spirit for many decades. However, with time, religion has come in as a criteria in determining the citizenship of a person. This is a great threat to the principles of secularism and equality- the principles which are vital to the unity of our nation.

This challenge to secular citizenship became all the more serious with the enactment of the Citizenship (Amendment) Act, 2019. It provides a special route for the acquisition of citizenship by persons belonging to the Hindu, Sikh, Buddhist, Jain, Parsi or Christian community from Afghanistan, Bangladesh or Pakistan. This is the first time in the Indian history, that an explicit mention of religion has been made in a law made by Parliament, as a factor that is of relevance to the deciding citizenship questions. Earlier inclusion of such criteria was only through subordinate legislation.

[1] in religion, language, culture, geography, etc.

For this reason, the amendment was received with much criticism and mass protests by the common man. It has been denounced as arbitrary and discriminatory in the criteria based on which it confers citizenship. It is seen as a step away from the object of achieving unity in the midst of our diversity - a step away from the idea of India that was contemplated by our constitutional framers.

In the modern world, with globalization and the terrors of statelessness which came out during the World Wars, the widely accepted view is that citizenship must be liberal. It is considered to be backward for a country to pose criteria like race or religion for the purpose of granting citizenship.

Citizenship is a subject which has been closely scrutinized by various scholars. From the time the idea of CAA was conceived, scholars started criticising it. From then on till date, quite a few works have come out, examining its provisions from various perspectives. This thesis aims at giving an orderly and comprehensive analysis of the amendment in comparison with the idea of our founding fathers as revealed in the Constitution document, as well as in the Constituent Assembly Debates. This has been done especially with respect to the inclusion of religion based criteria in the question of admitting members into the Indian political community.

Many have commented that the CAA poses a threat to secularism in India. This thesis aims to examine the validity of this claim, by, on the one hand, drawing out the original idea at the time of making the Constitution (with respect to secularism and more specifically, secularity of citizenship), and on the other hand, understanding the provisions of the CAA with its implications.

1.2 Scope and Significance of the Study:

The unity in diversity which is characteristic of the Indian nation is at stake due to the recently enacted Citizenship (Amendment) Act, 2019. This seems to be a clear departure from the original intent of the framers of the constitution. The row of protests that followed its passing, is indicative of the way people perceive the inclusion of religion as a criteria in determining citizenship. This is not healthy for the nation. This study is therefore aimed at studying the idea of citizenship as envisaged in the constituent assembly debates and other discourses at that time, ultimately resulting in the constitution. The constitutional framework is to be studied. As the

Constitution left much regarding citizenship to be determined by Parliament, the conception of citizenship as it grew by way of legislations passed by Parliament from time to time, is also to be studied. The provisions of the recent amendment is to be analyzed in the context of our constitutional principles.

The citizenship provisions of the Constitution, as well as those of the Citizenship laws which were later made by Parliament, have various facets to it. A comprehensive study of all the citizenship laws is neither possible within the framework of this study, nor necessary for its purpose. These laws are, therefore, examined only with respect to their secularity and liberal nature. The CAA has been questioned not only with respect to its implications on secularism, but also for other reasons, like, non-inclusion of certain ethnic groups; and conferment of broad powers to the executive wing. In this thesis, the analysis of the Citizenship (Amendment) Act is limited in its focus, only to its impact on the secular fabric of our nation. Since secularism and equality are interconnected concepts, the equality aspect of the amendment has also been looked into.

1.3. Research Objectives:

The research was carried on to achieve the following objectives:

- To examine and understand the model of secularism which has been adopted by the Constitution of India.
- To understand the various conceptions of citizenship.
- To examine the relevance of religion in determining citizenship related questions.
- To understand the nature of citizenship envisaged by the constitution makers.
- To understand the direction of the development of citizenship laws in the period between the Constitution and the CAA.
- To analyse the provisions of the Citizenship (Amendment) Act, 2019.
- To compare the CAA against our constitutional values, especially secularism and equality.

1.4. Research Questions:

The research has been carried out with a view to answer the following questions:

- What is the model of secularism adopted in India?
- What is citizenship and what are the contemporarily accepted ideas on citizenship?
- What was the nature of citizenship that was envisaged at the time of making of our constitution?
- How has the idea of citizenship been shaped after the making of the constitution?
- What are the implications of the CAA on the citizenship framework?
- Is the Citizenship (Amendment) Act, 2019 compatible with the constitution?
- Is the CAA consistent with the international norms on citizenship?
- Is the CAA in line with the contemporary notions of citizenship?

1.5. Research Hypothesis:

The hypothesis framed at the commencement of this research was:

> **The Citizenship (Amendment) Act, 2019 is incompatible with the constitutional values of equality and secularism.**

The research results confirm the hypothesis.

1.6. Research methodology:

The doctrinal method of legal research has been employed for carrying out this research. For this purpose, the researcher has gone through the text of documents like the Constitution, statutes of Parliament, sub-ordinate legislation and government notifications. Various official reports, like, the reports of the Constituent Assembly Debates, the reports of the proceedings in the Houses of Parliament and the report of the Joint Committee which examined and approved the CAA, have been surveyed. Various articles on the following subjects have been gone into: on the concept of secularism, on citizenship in general, on the constitutional conception of citizenship, on the history of citizenship law in India till CAA, and on the CAA itself. Books on constitutional law and citizenship have also been referred to.

1.7. The Scheme of the Dissertation:

The thesis has the following scheme:

Since the constitutional value at stake is secularism, **Chapter II** titled 'The concept of secularism', is devoted to the study of this concept. There are various models of relation between the state and religion. Such models have been analysed. Secularism is one of them. A proper understanding of the concept demands an understanding of its historical background. Therefore, the origin of the concept in the west has been traced. This also brings out the significance of the concept and the dangers in moving away from it. In India, we have a distinct model of secularism. The various distinctive features of Indian secularism have been identified based on constitutional provisions. The Constituent Assembly's stand on secularism has been brought out. This chapter brings out the standard of secularism against which the CAA will have to be compared.

Chapter III will be dealing with the concept of citizenship. The chapter begins with an attempt to understand the meaning of the term citizenship. The various facets of citizenship have been described. The history of citizenship has been overviewed. This is both to bring out its origins and to trace out the way it has changed from time to time. The various ideas on citizenship, like, ethno-national citizenship, liberal citizenship, republican citizenship and transnational citizenship have been touched upon. The concepts of *jus soli* and *jus sanguinis* citizenship have been distinguished. Citizenship could be on various criteria (depending on the concept of citizenship held by the legal system), which may be categorised as ascriptive and functional criteria. The comparative advantages and disadvantages of the various concepts of citizenship and the criteria chosen for its purposes, have been mentioned in the course of this chapter, along with their acceptability at different points in history. This is with a view to identify the concept which is most relevant to the current times. The Chapter also proceeds to understand the concept of citizenship held by France, USA, Germany, Great Britain and Israel. These states have been identified due to the distinctive nature of their citizenship laws. The reach of international law into citizenship has also been discussed. The conceptual clarity on citizenship provided by this chapter, gives light to examine India's citizenship policy in a proper way in the remaining chapters.

Chapter IV, titled as 'Secular Citizenship: Debates during the making of the Constitution', begins with a narration of the partition and the mass migrations initiated by it. These events provide the background in which the constitution makers drafted the citizenship related provisions of the Constitution. Part II of the Constitution which deals with citizenship (which provided various modes of citizenship like by domicile, by migration and by registration) has been overviewed. Article 11, which is crucial to the debate, has been elaborated upon. The chapter then moves on to an elaborate account of what transpired in the Constituent Assembly while drafting the citizenship provisions. This is discussed in two parts: the pre-partition debate, and the post-partition debate. For, the partition is a significant event in this regard which had much bearing on the question of citizenship. The liberal concept of citizenship conceived before partition was put to the test. The outcome of further debates has been discussed. The various arguments to show favouritism to some communities on ascriptive criteria, on the one hand, and to exclude others, on the other hand, have been summarised. The arguments to continue with the idea of a secular citizenship has also been explored. This chapter brings out the bold decision of the Constituent Assembly, when they chose secular citizenship in the middle of events which challenged it the most.

Chapter V serves as a bridge from Chapter IV to Chapter VI. It narrates what transpired between the commencement of the Constitution and the passing of the CAA, 2019. As the Constitution left it to Parliament to provide for citizenship after its commencement, the Citizenship Act was enacted. This Act has been skimmed through so as to give an overview. Several amendments came to be made to this Act especially due to the mass migrations that became a major issue in the mid-1980s. The amendments of 1985, 1986, and 2003 have been analysed. Two significant agreements have been discussed in the course of the chapter, namely, the Nehru-Liaquat Pact and the Assam Accord. Concepts relevant to the CAA, like the concept of 'illegal migrant' which made their entry into the citizenship discourse during this period, have been discussed. This chapter will also trace how religion based criteria began entering our citizenship policy ultimately leading upto the Citizenship (Amendment) Act of 2019.

The core chapter of this dissertation is **Chapter VI** which analyses the Citizenship (Amendment) Act, 2019. It begins from the legislative history of the amendment, which began from 2016. The initial introduction of the Bill in 2015, the reference to Joint Parliamentary Committee, the

consideration of the report by the Houses, the lapse of the Bill pending passing by Rajya Sabha, and the final passing of the Bill by both houses have all been covered. The chapter reviews the provisions of the CAA and the change it brings about to the Citizenship law. The CAA, while defended by the government, has been condemned by the civil society. The points raised by the government in defence of the CAA, have been discussed. The various arguments against it have also been summarised. The CAA has been compared with the idea of India that was contemplated at the time of its independence. It has also been tested by the Constitutional standards of secularism and equality. It has been examined against the conception of secular citizenship which the framers chose and incorporated in the transitory provisions contained in Part II of the Constitution.

The CAA sparked a response of widespread protests at various places throughout India. The government replied to these protests with force. Several arrests and detentions were carried out. This Chapter also examines the response to the CAA by the common public, by various state governments, by the Supreme Court of India and the responses from abroad.

In **Chapter VII,** the researcher summarises the findings of the research, draws conclusions and suggests the way forward.

CHAPTER II

THE CONCEPT OF SECULARISM

2.1. Introduction:

Secularism is a concept which has had much debates surrounding it. There is a lack of conceptual clarity as to what it exactly means. While some would say that it requires a wall of separation between the state and religion, others argue that it only mandates that the state must maintain an equal distance from all religions. It is now accepted that there are various models of secularism. Each State can choose to adapt the idea to its own historical and cultural settings and still retain its essence. It is necessary to understand the history of secularism in the west as well as in India in order to understand its importance. The study of its history in the west is necessary because the idea as it now exists has its foundations especially in European history. However, various elements of secularism were found even in Indian history starting from the ancient times. Therefore, when the constitution brought in secular ideas, they were not entirely new to India. Rajeev Bhargava has expressed the view that the Indian idea of secularism is distinct and understanding this variant of secularism is of relevance today not only to our own country but even to the west[2]. The Constitution has fashioned the idea to suit Indian conditions. The model adopted by the framers of our Constitution, is to be discovered from the provisions as well as the Constituent Assembly Debates. The Supreme Court of India has also been engaged in the task of interpreting the nature of relation that the Constitution intends between the state and religion.

The concept is not without its critics. Some would go to the extent of denying that India is a secular country. Some challenge the inclusion of the word 'secular' in the preamble as not reflecting the provisions of the constitution.

This chapter aims at understanding whether the Indian political system as set up by the constitution is in fact secular. If so, the model of secularism that we have adopted is to be discovered.

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[2] *see* Rajeev Bhargava, *The Distinctiveness of Indian Secularism*, first published *in* THE FUTURE OF SECULARISM 20, (T.N..Srinivasan ed. 2006) (available at http://www.chereum.umontreal.ca/activaites_pdf/session%202/Bhargava_Distinctiveness%20of%20Indian.pdf), at 1.

2.2. Relationship between state and religion:

Secularism in its current form is a comparatively new idea. For a long time states were in a state of fusion with religion or church. Rajeev Bhargava has identified three levels of connection between religion and state. namely: (1) At the level of ends, purposes and values; (2) institutional level; and (3) State policy level. He describes three types of non-secular states characterized by a connection at one or more of these levels. They are,

1. Theocracy - Here the state is in union with a particular religious order. In this, there is connection at all the three abovementioned levels. That is, the state and religion both share the same ends. Both the eternal and temporal roles are taken up by the same person. There is no institutional separation at all.

2. Establishment of a single religion - The state recognizes one particular religion alone. It can be of three types based on its relation with religious institutions or churches. There could be non-establishment of any church, establishment of a single church or establishment of multiple churches.

3. Establishment of multiple religions - The state recognizes not one but many religions.

On the other hand, a state could be a secular state. The distinctive mark of a of a secular state is a disconnection not only at the institutional level but also at the level of ends and values. There is a withdrawal of favours to any particular religion or sect. A secular state can go beyond this and get disconnected even at the level of law and public policy. But, this disconnection is not a necessary feature.

2.3. The Origin and History of Secularism in the West:

2.3.1 **Ancient History:**

While certain elements of secularism have been identified in various countries even before its formal origin, the idea attained its current form and significance in the west. Its origin had a particular historical context. Chaudhari R.L, in his doctoral thesis has traced the history of the concept. The early Greek city state was "not only a social, economic and political unity but also a

spiritual and religious one. It was omni-competent"[3]. Each one of these city states was a city of a God. Rome, which was a city state, later became an empire. The Divine Origin theory was resorted to justify the expansion. Then, Christianity entered the Roman world. Christianity supports dualism, that is, a distinction between the church and the State, based on the teaching of Christ : "Render to Caesar the things that are Caesar's, and to God the things that are God's"[4]. With the conversion of Constantine to Christianity, Christianity once opposed, now became the state religion. In the fifth century, Gelasius I expounded the doctrine of two swords i.e., the Church focuses on the spiritual interest and the state on temporal affairs. Saint Augustine of Thagaste preached the theory of two cities, namely the earthly city(civitas terrena) and the city of God (civitas dei). His doctrine favoured the supremacy of the Church over the state.

2.3.2 **Middle Ages**

Masiglio of Padua played a major role in contributing to the secular idea in the later middle age. He viewed the state as self sufficient and powerful enough to regulate the temporal concerns of even the church. He thus tried to place the church under the authority of the state. Then there were Wycliffe (1320-1384) and John Hus (1373-1415) who were against the papacy though not against the church itself. They did not recognize the authority of the Pope or any other priest to be an intermediary between God and man.[5]

2.3.3 **Modern Age**

The modern age brought in the renaissance and then the Reformation movement. The renaissance shifted focus from God to man. Man was viewed as the centre of the universe. This movement was characterized by "the various inventions in different branches of science and discovery of new territories, which influenced and changed the whole system of life. New knowledge created new values of life."[6] Machiavelli, who belonged to this period, saw power as an end in itself and the state as an 'autonomous system of values independent of any other source". He rejected the supremacy of the Church over state though he was not hostile to religion itself. Religion is neither above nor beside the state, but within it. The reformation began in 1517

[3] Chaudhari R.L., Concept of Secularism in Indian Constitution (June, 1987)(Ph. D. Thesis, The Marathwada University, Aurangbad) (available at http://hdl.handle.net/10603/105731)
[4] Mark 12:17, The Bible.
[5] *See* Chaudhari R. L., *supra* note 3, at 53.
[6] *Id.* at 54

with the teachings of Martin Luther (1483-1546) and Calvin (1509-1564) and aimed at the purification of the Christendom. They both argued for freedom of individual conscience and state supremacy over the Church.[7] Though the reformation movement was internal to Christianity and was not aimed at church-state separation, it had that effect, because, it had a negative impact on the ideas of universal Empire and the universal Church. Ideas of nationalism and individualism also started coming in. There was an assumption among the Catholics as well as protestants that "civic cohesion could not exist without religious unity within a state"[8]. This idea was concretized in Germany at the Peace of Augsburg. This agreement went by the policy "cujus regio, ejus religo" meaning, "whose realm, his religion". That is, the princes of the various states were permitted to choose between Lutheranism and Catholicism for their domains. Subjects who did not wish to follow the chosen sect were given a right to emigrate to any other state whose Prince has chosen the faith of their choice[9]. While this policy of territorialism was adopted in Germany as a solution to the religious diversity problem, the reformation brought about different results in England and France. As sects began to multiply, there was religious diversity and this led to a strong religious minority. This diversity brought in a necessity for toleration. The possibility of a citizenship without common religious faith came about. According to Sabine,

> "only slowly and under the compulsion of circumstances that permitted no other solution did a policy of religious toleration emerge, as it was discovered that a common political loyalty was possible to the people of different religions"[10].

2.3.4.France and the USA:

In France, the idea that religious uniformity is necessary for political unity was opposed by Montesquieu (1689-1755). The French Revolution of 1789 was a big move towards secularism.

As for America, there was much diversity in the colonies. Till the founding of the United States, there was a union of the state and the church, except in Rhode Islands.[11] Due to the diversity, the idea of church-state separation was much accepted and the First Amendment to the Constitution

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[7] *Id.* at 57
[8] DONALD EUGENE SMITH, INDIA AS A SECULAR STATE12 (Princeton University Press, 1967)
[9] The Peace of Augsburg, art. 24
[10] Sabine G.H., as quoted by Chaudhari, R.L *supra* note 3, at 60.
[11] In Rhode Islands, the founder, Roger William followed the principle of liberty and separation.

in 1776 provided for such separation. Madison and President Thomas Jefferson were great proponents of the separation of Church and State.

2.4. Secularism in Indian History:

There were some elements of secularism even in the ancient history of Indian civilization. Some would go to the extent of arguing that "the acceptance of secularism as the basis of the Indian Constitution did not represent a break from tradition; rather it constituted a continuation of some of the secular features which can be seen right from the ancient period"[12]. At any rate, there was atleast some minimal influence of the earlier primitive versions of secularism over the current version in India.

2.4.1.**Ancient India:**

Surely there was no institutional separation between religion and state at this point. One of the chief functions of the state was promotion and patronage of religion. The Aryan society was divided into four varnas, namely, "(1)'Brahmans' who were supposed to be priests and the custodians of knowledge, (2) 'Kshatriyas', who were expected to be rulers and soldiers, (3) 'Vaishyas', they were traders and landholders, and (4) 'Sudras' who performed the other needed services"[13]. Historians do no find evidence of conflict between the ruler and priestly class. In the later vedic period, the ideal of universal empire entered the minds of Indian rulers. During the time of Sutras, Brahmins were held high, resulting in 'brahmanism'[14].The 6th century BC was an age of enlightenment. Jainism and Buddhism were born in this age almost as a revolt against Brahminism. They were protestant movements due to the displeasure of the ruling class, i.e., the Kshatriyas.[15] By the fourth century BC, the influence of priests on government declined[16]. The nexus between religion and state grew in the Mauryan age. Religion was often used to serve political ends. Hinduism, Sikhism and Buddhism were existing side by side. The Maurya Age put in place "the tradition of religious toleration which is one of the basic feature of Indian

[12]AmitkumarIshwarbhai Parmar, A study on the concept of Secularism and Right to Religion under the Indian Constitution (February 2015) (Ph. D. Dissertation submitted to Hemchandracharya North Gujarat University, Patan) (available at: http://hdl.handle.net/10603/77961)
[13]*see* Chaudhari, R.L, *supra* note 3, at 78.
[14]*see id, at 85.*
[15]*see id at* 88.
[16]*see* Parmar, *supra* note 12, at 69.

Secularism."[17] It was during this age that Kautilya wrote Arthashastra. According to him, the sole basis of the state is power. He would say that the policy of the state cannot be independent of religion. His idea of state was not secular but one of lesser influence from religion. The nexus further grew closer when Emperor Ashoka reigned. For, during his reign, the state identified with one religion, Buddhism. Yet, tolerance was a characteristic of this period also. With Ashoka, imperialist tendencies came to an end. During the Gupta period, there was more royal control over religion. The Gupta rulers patronized Hinduism and upheld Brahmanism.[18]. Thus, at no point in ancient India, was any particular creed imposed on anybody.

2.4.2.**Medieval India:**

The Delhi Sultanate, in contrast to earlier dynasties, was Islamic. According to the Islamic theory of state, there is unity of state and religion. Mohammad established a religio-political society to which he was both the messenger of God and the ruler. Yet, all through the Muslim rule in India, theologians were not allowed to dictate the law and policy of the state.[19] There was quite a good degree of tolerance. Hindus were permitted to practice their religion freely. Donald E. Smith would say that "the religious policy of the Indian Muslims rulers ranged from tolerance and syncretism of Akbar to the bigotry and fanaticism of Aurangzeb".[20] Akbar may be regarded as the first ruler to bring common citizenship for all the members of the society irrespective of religion. He also abolished jizya.[21]. Even during the reign of Aurangzeb, inspite of his policy of intolerance, the state was still not a theocracy. Some would characterize medieval India as "negatively secular, so to say, in that it subordinated religion to politics rather than politics to religion"[22].

2.4.3. **Modern India:**

The policies of the British during their rule, to some extent constituted a basis for secularism in India.

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[17]*see* Chaudhari, R.L., *supra* note 3, at 84
[18]*see* p.91 *ibid. Also see* Parmar, *supra* note 12, at 70.
[19]*see id,* at 73.
[20] Donald E. Smith as quoted by Chaudhari, R.L., *supra* note 3, at 97.
[21] Jizya is defined as "a capitation tax formerly levied on non-Muslims by an Islamic State". (Merriam-Webster Dictionary online)
[22]HarbansMukhia, as quoted in Parmar, *supra* note 12, at 76.

> These policies constituted an attempt to combine three different roles. The commercial imperial objectives of the British Government dictated the policy of religious neutrality, its role as an Indian ruler compelled it to follow the traditional role of patron and protector of Indian religions and the pressure from Christian missionaries compelled it to assume the role of a Christian Government.[23]

The general attitude of the British rulers in India was one of non-interference with personal laws and customs of Indians. However, they interfered to set aside some social evils like sati. They also introduced secular education by way of Wood's Education Despatch of 1854. Some of the other moves towards secularism were, the bringing in of uniform criminal laws for members of all religions. The principle of equality before law was introduced though the Europeans themselves were treated differently. The sepoy mutiny resulted in Queen Victoria's Proclamation in 1858[24] wherein it was made clear that **"none be in any wise favoured, none molested or disquieted by reason of their Religious Faith or Observances; but that all shall alike enjoy the equal and impartial protection of the Law"**[25]. The British however started embarking on a policy of divide and rule. Bengal was partitioned. Separate electorates were given to Muslims in 1909, and then to Sikhs, Indian Christians, Europeans and Anglo-Indians in 1919. Such measures brought in tendencies of communal separation.

The Indian National Movement was a secular movement. It was spearheaded by the Indian National Congress , which was non-communal. People of all religion fought for independence from the British rule. However, sometimes there were appeals to religious sentiments. And, in the 20th century, there were conflicts between the moderates and the extremists. While the moderates argued for state neutrality and for placing the nation above religion, the extremists did not hesitate to use religion as a factor in mass mobilization against the British. Slowly, parties like Hindu Mahasaba and the RSS cropped up with open religious affiliation. Savarkar

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[23] Donald Eugene Smith, as cited in Parmar, *supra* note 12, at 76.

[24] Proclamation by the Queen in Council to the Princes, Chiefs, and the People of India (Published by the Governor-General at Allahabad, November 1st, 1858)

[25] The entire concerned paragraph in the Proclamation read as,

"Firmly relying Ourselves on the truth of Christianity, and acknowledging with gratitude the solace of Religion, We disclaim alike the Right and the Desire to impose our Convictions on any of Our Subjects. We declare it to be Our Royal Will and Pleasure that none be in any wise favoured, none molested or disquieted by reason of their Religious Faith or Observances; but that all shall alike enjoy the equal and impartial protection of the Law; and We do strictly charge and enjoin all those who may be in authority under Us, that they abstain from all interference with the Religious Belief or Worship of any of Our Subjects, on pain of Our highest displeasure"

introduced the two nation theory in his book 'Hindutva'. All this ultimately culminated in the partition.

The above analysis indicates that the model of relation between religion and state greatly varied from time to time. Sometimes, the state was guided by religion. Sometimes the state dictated over religion. But, it seems that at no point was any religion forced on all citizens. Further, the Indian culture has been plural from long ago. Religious liberty promoted this diversity.

2.5. Analysis of the meaning of Secularism:

The meaning of the term secularism has always been an area of debate. Different scholars have conceptualised it in different ways.

In his book, 'India as a Secular State', Donald Eugene Smith brings out the idea of a **triangle of state, religion and individual** to explain secularism. According to him,

> "The secular state is a state which guarantees individual and corporate freedom of religion, deals with the individual as a citizen irrespective of his religion, is not constitutionally connected to a particular religion nor does it seek either to promote or interfere with religion".[26]

He refers to three sets of relationships among religion, state and individual. They are:

1. Religion and the individual - This is the 'freedom of religion' aspect of secularism. The third end of the triangle, that is, the state, must be excluded from this. This means that the state must not interfere in the decisions of an individual regarding religion. He must have the liberty to choose any religion, discuss it, follow its principles and also to reject it without state interference. No one can be forced to follow any religion or even be compelled to contribute to the financing of a religious institution by way of tax. Rajeev Bhargava calls this component as the "libertarian ingredient"[27].

2. The State and the individual - In this relationship, again, the third factor must be excluded. Thus, there must be no reference to religion in the relation between a state and an individual. The individual is seen as a citizen of the state and not as a member of a religious

[26]SMITH, *supra*note 8, at 4.
[27]*see* Rajeev Bhargava, *supra* note 2

group. The rights and duties of a citizen are not affected by one's faith or religious affiliation. He is not subject to any disadvantage by virtue of him belonging to a certain religion. According to Rajeev Bhargava, this is the "egalitarian component" of secularism.

3. The State and religion - There needs to be a disconnection between these two for a state to be characterized as secular. This is the aspect of 'separation of state and religion'. State and religion are two different areas of human activity. The state has no business to 'promote, regulate, direct, or otherwise interfere in religion'[28]. However, religion being an association, must to some minimal extent be regulated by the state just like other associations. The bar on interference also works in the opposite direction. That is, political power is outside the ambit of religion. The authority of the state comes from a secular source and not from any religious or ecclesiastical power. This rules out state churches in a secular state. The state, in a secular country, need not and must not engage in deciding religious questions. All religions in a secular state are subordinate to as well as separate from the state.

Rajeev Bhargava, in his article, 'The Distinctiveness of Indian Secularism', brings out some of the features of secularism in the course of his arguments to lay out the distinctiveness of secularism in India:

a. The State is separated not merely from one but from all religions[29].

b. Religious Liberty or the liberty of members of any religious group.[30]

c. Such religious Liberty is granted non-preferentially to all members of every religious community[31].

d. 'individuals are free not only to criticize the religion into which they are born, but at the very extreme, to reject it, and further, given ideal conditions of deliberation, to freely embrace another religion or to remain without one'[32].

[28]SMITH, *supra* note 8, at 6.
[29]*See* Rajeev Bhargava, *supra* note 2, at 14
[30]*See id* at 15
[31]*See id* at 16
[32]*id*

e. There must be no discrimination in the availability of benefits of citizenship on grounds of religion.[33]

f. No one should be denied admission to educational institutions, solely on grounds of religion.[34]

g. A community wide acknowledgement of equal respect for everyone in the political domain. (absence of community weighed voting, etc)[35]

On analyzing the constitutional provisions, he opines that all these features are present in India.

The definitions of secularism are often imprecise. The exact nature of relation between a secular state and its citizens is not unanimously agreed upon. There is difference of opinion even about the necessary minimum features for a state to be defined as secular. It may be said that the basic feature for a secular state is where the state maintains some distance from religion. It does not identify with any religion in particular. There is freedom of religion in such a state. The state does not interfere into the affairs of various religious sects, except in few rare and exceptional cases, where public interest necessitates. On the other hand, religion also has no authority over the state. Thus, the restriction on exercising influence works both ways. If religious liberty is fundamental to a state, it is implied that no person should be denied political membership on the basis of religion.

2.6. Constituent Assembly Debates on Secularism:

The Constituent Assembly discussed secularism at various points of its proceedings. Various facets of the concept came up several times. The implications of the choice of secularism for India was mused upon. The highlights of these discussions are covered in this section.

2.6.1. Express inclusion of 'secular':

The idea of secularism pervaded the Constituent Assembly debates though the Assembly was not in favour of express inclusion of the word 'secular' or 'secularism' in the Constitution. The

[33] *See id. at 17*
[34] *See id.*
[35] *See id.*

Objectives Resolution introduced in the Assembly by Jawaharlal Nehru on December 13, 1946 contained the values on the basis of which the constitution was to be made. Neither this, nor the draft constitution contained the word 'secular' in it. Dr.Gajendragadkar, the ex-Chief Justice of India opined that this omission was "not accidental, but was deliberate". Guessing on the reason for this, he said, that it was due to the apprehension that the usage of the term 'secular' would send out 'anti-religious overtones'. The constitution makers did not want to make religion irrelevant[36].

Twice in the Constituent Assembly attempts were made to amend the draft Constitution, by expressly introducing the word 'secular'. On 15th November, 1948, Prof.K.T.Shah moved an amendment to Article 1(1) so that it would read as 'India shall be a Secular, Federal, Socialist Union of States'. Having been told that we are a secular state, he asked why we not include it in the constitution itself to avoid misunderstandings. This was also negatived without much discussion. A counter that came to this from H.V.Kamath, was that, these words, if at all, could be added only in the preamble.

Later, on 17th October, 1949, Shri Brajeshwar Prasad sought to introduce the word 'secular' in the preamble, saying that the word did not find place in any part of the Constitution though the National Leaders laid much stress on it all the time. In the same amendment, he also sought to introduce the word 'socialist'. The discussion following this move was around the term 'socialist' and the Assembly ultimately negatived the motion without much discussion on the introduction of the word 'secular'.

2.6.2. **Meaning of a 'secular state':**

Though highly stressed upon, the meaning of the term 'secular state' lacked clarity and the debates reveal that various members had various different interpretations in mind. On 3rd December 1948, Mr.Tajamul Husain moved an amendment to restrict the practice of religion to the private realm. He said, "this is a secular State, and a secular state should not have anything to do with religion. So I would request you to leave me alone, to practice and profess my own religion privately". Such an extreme view would lead him to move another amendment to

[36] Dr. Gajendragadkar as cited by Tanya Bansal, Indian Secularism: Theory and Practice,*(*2019*)(* LLM Dissertation, National University of Law, Delhi), at 1.

prohibit a person from having any visible sign or mark or name or even from wearing any dress whereby his religion may be recognized. This, he justified by pointing to the English History, where at one point there was no uniformity in dressing and an Act of Parliament by which uniformity was brought about. Needless to say, his amendments did not materialize. Loknath Misra, towards the end of the discussion that day, referring to the use of the word 'propagate' in the then Article 19, called the article 'a Charter for Hindu enslavement'. He was of the view that propagation of religion is not to be permitted once we agree to set up a secular state. He said,

> 'We have declared the State to be a Secular State and for good reasons we have so declared. Does it not mean that we have nothing to do with religion?... we have rightly tabooed religion... Why do we make it a Secular State? The reason may be that religion is not necessary or it may be that religion is necessary, but as India has many religions, Hinduism, Christianity, Islam and Sikhism, we cannot decide which one to accept. Therefore let us have no religions'.

He saw Secular State in partitioned India as a generosity of a Hindu dominated territory. He was not personally in favour of secularism as he felt that life cannot be compartmentalized. Secular state, to him, was a 'slippery phrase, a device to by-pass the ancient culture of the land'.[37] On the other hand, H.V.Kamath while advocating for disestablishment and the impartation of spiritual training by way of a single amendment, said that the state being required to keep from identifying with any religion in particular did not mean that it should be 'anti-religious' or 'irreligious'. In his words, "We have certainly declared that India would be a secular State. But to my mind a secular state is neither God-less nor an irreligious State."[38]

2.6.3. **Invocation of 'God' in the preamble:**

That same day (17th October, 1949), there were attempts to invoke the word 'God'[39] in the preamble. This met with serious criticism on a variety of grounds. Smt. Purnima Banerjee asked for the President to see that the matter of God was not made the subject of discussion between a majority and minority. Shri A. Thanu Pillai countered the motion on the ground that a man had a

[37] *see* speech of LoknathMisra, Constituent Assembly Debates on December 6, 1948
[38] *see* speech of H.V.Kamath, *id.*
[39] while the amendments moved by Shri Brajeshwar Prasad and Prof. Saksena used the word 'God' itself, Pandit Govind Malaviya used the words 'Parameshwar, the Supreme Being, Lord of the Universe'.

right to believe in God or not, according to the Constitution. Pandit Hirday Nath Kunjru expressed his objection to imposing the collective view on an individual "in a matter that vitally concerns every man individually". He said, "We invoke the name of God, but I make bold to say that while we do so, we are showing a narrow, sectarian spirit, which is contrary to the spirit of the constitution...". None of the three amendments materialised[40]. This shows the zeal of the constitution makers to protect the secular framework and the freedom of conscience not only of those who believe in God but also those of the atheists.

2.6.4. **Separation of Church and State:**

On December 3, 1948, Shri H.V. Kamath sought to introduce an amendment to the then Article 19, for the disestablishment or separation of church from the state. In explaining the need for the amendment, he said, "I need only observe that the history of Europe and of England during the middle ages, the bloody history of those ages bears witness to the pernicious effects that flowed from the union of Church and State." Though at the time of Ashoka's rule the state identified with Buddhism, there was no civil strife. But he opined that this eventually led to the banishment of Buddhism from India. He expressed that when a state identifies with a religion, it leads to a rift in the state. As it represents all its inhabitants, it must not identify with the religion of any section of the population.

2.6.5. **Nationalism - a new identity:**

At the time of discussion of the Objectives Resolution, Sir. S. Radhakrishnan expressed that for modern life, the basis is not religion, but nationalism. Referring to some trends in various places, he observed that the days of religious states are over. On the other hand, these are the days of nationalism. Hindus and Muslims had lived together in the Indian soil for over 1000 years and they share a common destiny. He expressed, "Even if we have two states, there will be large minorities and these minorities, whether really oppressed or not will look across their frontiers and ask for protection"(This speech was before the partition). Dr.B.R.Ambedkar was an advocate for the rights of all kinds of minorities. He criticised the idea of the nation identifying itself with the majority religion. He said,

[40] While the amendment moved by Shri Brajeshwar was voted upon and negatived, that of Prof. Saksena was withdrawn. Pandit Govind Malaviya's motion was held by the President as covered by the already defeated amendment.

> Unfortunately for the minorities in India, Indian Nationalism has developed a new doctrine which may be called the Divine right of the Majority to rule the minorities according to the wishes of the majority. Any claim of sharing of power by the minority is called communalism, while the monopolising of the whole power by the majority is called nationalism.[41]

2.7. Constitutional framework for secularism:

Though the Constitution when it was first adopted, neither mentioned nor defined the words 'secular' or 'secularism', the features of the Indian secular state can been culled out from its various provisions. For, as seen above, secularism was in the mind of the framers at the time of making of the constitution.

Part III is the greatest contributor to the 'secularism' ideal in India. Articles 25 to 28 of the fundamental rights exclusively deal with freedom of religion. Article 25 guarantees equal entitlement of all persons to freedom of conscience and the right to freely profess, practice and even propagate religion. This is subject only to public order, morality, health and other rights in Part III. Para (2) to this article is unique, in that, it allows the state to interfere in the secular activities associated with the religion. It also brings in an element of reforms, by permitting the state to make laws to throw open Hindu religious institutions to all classes of citizens. Thus, the state is allowed to interfere for the purpose of reforms. Article 26 guarantees religious denominations the right to establish and run institutions. Article 27 provides for disestablishment: no person may be compelled to pay a tax to be used for the sole purpose of a particular religion. Article 28 deals with religious instruction. In educational institutions wholly run by the state, no such instruction is to be given. In the institutions recognised by the state, thought the institution may impart religious instruction, no person is to be compelled to attend such instruction.

Other fundamental rights include Article 15(1), 15(2) and 16(2) which prohibit the state from discriminating against a citizen on the ground of religion.

[41]Dr.B.R.Ambedkar in a Memorandum on the Rights of States and Minorities, dated March 24, 1947, which he submitted to the sub-committee on Fundamental Rights set up by the Constituent Assembly's Advisory Committee on Fundamental Rights.

Article 29 ensures that no one be denied admission in an educational institution solely on religious grounds. Article 30 guarantees minorities, including religious minorities, the right to establish educational institutions. In order to make this right effective, the state is also prohibited from discriminating against such institutions while granting aid. This is a kind of affirmative action that the state engages in to bring true equality between persons of all religions.

Article 325 provides for a general electoral roll and every citizen who complies with the requirements is eligible to have his name included in it. This is irrespective of religion. The colonial practice of separate electorates for religious groups was abolished. Thus, equality in the political realm has also been ensured.

2.7.1. **Insertion of the word 'secular':**

While it did not need mention that India is secular, in 1976, the 42nd Amendment to the Indian Constitution amended the preamble to expressly include the word 'secular', so that it now reads 'sovereign socialist secular democratic republic'. This only made explicit what was already implicit. So, it did not bring about any particular change in the position which existed earlier. While this amendment was invited by many, it was not without criticism. Prof. D.D.Basu opined that a clarification of meaning of the term would have served a better purpose than mere inclusion of the technical word in the preamble, which only leads to further confusion. In July 2020, a petition was filed before the Supreme Court to remove the words 'secular' and 'socialist' from the preamble. The petition is on the ground that no one can be forced to be secular when the constitution itself guarantees the freedom to practice religion. The petition seems to be on the mistaken premise the secularism means irreligion.

2.8. The Supreme Court on Secularism:

The Supreme Court has played a major role in safeguarding the secularity of the Indian State. In *Keshavananda Bharati v. State of Kerala,*[42]Justice Sikri referred to the 'Secular Character of the Constitution' as part of the basic structure.[43] It was observed that 'the secular character of the state according to which the state shall not discriminate against any citizen on the ground of

[42] (1973) 4 SCC 225; AIR 1973 SC 1461
[43]*see id.* para.316 of the Leading opinion.

religion only cannot likewise be done away with'[44]. Thus, the Supreme Court has placed 'secularism' above the amending powers of the Parliament and, thereby, secured it.

Later in 1974, in *Ahmedabad St.Zavier's College v. State of Gujarat*[45], Justice Mathew expressed doubts regarding the secular nature of our constitution. He observed,

> 'Our Constitution has not erected a rigid wall of separation between church and state. We have grave doubts whether the expression "secular state" as it denotes a definite pattern of church and state relationship can with propriety be applied to India. It is only in a qualified sense that India can be said to be a secular state. There are provisions in the Constitution which make me hesitate to characterize our state as secular.'

S. R. Bommai v. Union of India[46], a decision of a nine judge Constitutional Bench of the Supreme Court, was the landmark pronouncement of the Supreme Court on secularism. Justice Sawant expressed that "religious tolerance and equal treatment of all religious groups and protection of their life and property and of the places of their worship are an essential part of secularism enshrined in our Constitution". Justice Jeevan Reddy held that "Secularism is thus far more than a passive attitude of religious tolerance. It is a positive concept of equal treatment of all religions. This attitude is described by some as one of neutrality towards religion or as one of benevolent neutrality." The Court made it clear that a state government could not follow any particular religion.

Again, in *M. Ismail Faruqui v. Union of India*[47], Justice Verma opined,

> "It is clear from the Constitutional Scheme that it guarantees equality in the matter of religion to all individuals and groups irrespective of their faith emphasizing that there is no religion of the state itself. The Preamble of the Constitution read in particular with Articles 25 to 28 emphasizes this aspect and indicates that it is in this manner the concept of secularism embodied in the constitutional scheme as a creed adopted by the Indian people has to be understood while examining the constitutional validity of any legislation on the touchstone of the Constitution. The concept of secularism is one facet of the right

[44] *id.* para.1480.
[45] (1975) 1 S.C.R. 173
[46] AIR 1994 SC 1918; (1994) 3 SCC 1
[47] AIR 1995 SC 604 at para. 630.

to equality woven as the central golden thread in the fabric depicting the pattern of the scheme in our Constitution".

In the recent judgment in the Ayodhya land dispute *M. Siddiq (D) Thr LRs v. Mahant Suresh Das & Ors,*[48]the Supreme Court discussed secularism as a constitutional value. In para.800, it observed, "The constitution postulates the equality of all faiths. Tolerance and mutual co-existence nourish the secular commitment of our nation and its people". It also referred to itself as a 'secular institution'.

2.9. Criticism of the concept:

As any concept, the idea of secularism also has its critics. The concept seeks to establish a direct relationship between the individual and the state. It tries to keep away the religious identity of a member of the state. It is argued that religious identity serves its own societal purpose and it is not to be slighted.

The other major criticism is that the idea has its philosophical foundations on the principles of Christianity and Christ's exhortation to give to Caesar what is Caesar's and to God what is God's. The argument is that this is suitable only in Christian nations. Rajeev Bhargava counters this criticism with his argument that the 'link between secularism and Christianity has been exaggerated if not mistaken'[49]. He agrees that the traditional secularism with an emphasis on church state separation is almost entirely derived from Christianity. But, this condition of separation is a necessary though not sufficient condition. He says, "The Christian secularism is a sufficient but not necessary part of the background condition of modern secularism. Modern secularism may be emboldened by its presence but it can also be nourished by other traditions of peace and toleration."[50]

Finally, it is criticized by some as being unsuitable to Indian conditions. This argument is especially raised by those who believe that the Indian culture is homogenous and there is no need to derive any new identity. They fail to recognise that with so many settlers since ancient times, the Indian culture is now a composite one.

[48] (2019) 4 SCC 641
[49] Rajeev Bhargava, *supra* note 2, at 37.
[50] *Id. at 38.*

2.10. Conclusion:

Though our Constitution does not define the terms 'secular' or 'secularism', the model of secularism that the Constitution makers envisioned can be derived from the provisions of the Constitution. Indian secularism departs from the common version in some ways. But, whatever may be the type of secularism a nation adopts, the basic minimum is that there is atleast some degree of separation between the religion and state. A secular state cannot identify with a religion or a sect. When a state shows favouritism to a religion (except by way of affirmative action), it identifies with that religion and departs from secularism. Similarly, when it discriminates against a religion, again, it departs from secularism.

Prof.K.T.Shah said in the Constituent Assembly,

> "The secularity of the state must be stressed in view not only of the unhappy experiences we had last year (partition and it's aftermath) and in the years before and the excesses to which in the name of religion, communalism or sectarianism can go, but I intend also to emphasis by this description the character and nature of the state which we are constituting today, which would ensure to all its peoples, all its citizens that in all matters relating to the governance of the country and dealings between man and man and dealings between citizen and Government the consideration that will actuate will be the objective realities of the situation, the material factors that condition our being, our living and acting"[51].(emphasis supplied)

This shows the importance of securing secularism in India. In realisation of this, the makers of our Constitution were committed to the principle. Secularism ensured that the new identity of being Indians had nothing to do with one's faith. It was unmistakably part of the idea of India. The outcome of departing from secularism can be catastrophic. It is therefore very important to address the issues that come by way of a threat to secularism.

[51]Speech of Prof. K. T. Shah, Constituent Assembly Debates on 15 November, 1948.

Chapter 3

THE CONCEPT OF CITIZENSHIP

3.1. Introduction:

There are various ideas surrounding the concept of citizenship. The ideas that prevailed earlier are undergoing rapid change. The concept adopted by a country for its citizenship, determines the criteria that it places for admitting an individual as its citizen. For the purpose of this study, it would be of much benefit to understand the theories and concepts related to citizenship. This chapter attempts to bring out the meaning of the term citizenship and its historical development. This is followed by an analysis of the various schools of thought on citizenship, including ethno-nationalism, liberalism and republicanism. The types of criteria for classification for the purpose of citizenship are examined. Then, certain legal systems of significance in this area, are analysed to understand the concept of citizenship that they have chosen to adopt. And, finally, the growing application of international law to the subject of citizenship is discussed.

3.2. Meaning:

There are various dimensions to citizenship. Some regard it as a question of belonging. In this dimension, citizenship is **an identity**. Another dimension is that it is a legal status, **a status** of membership in a political society. The treatment of a citizen by a state, is largely dependent on his status, that is, whether he is a citizen or non-citizen. Another way of looking at citizenship is to regard it as **a bundle of rights**. By virtue of a person's citizenship, he enjoys certain rights not only in his country, but even abroad.[52] Various rights, political, civil, social and economic, flow from a person's status. Others would emphasise on the duty aspect of a citizen, by defining citizenship in terms of loyalty to a nation and the fulfillment of certain responsibilities, like participation in political process, and civic awareness.

Veera Ilona Iija defines the term as follows: "The concept of citizenship includes the legal status and the political recognition as a member of a community as well as the specific rights and

[52]Veera Ilona Iija, An Analysis of the Concept of Citizenship: Legal, Political and Social Dimensions, (Dec. 2011) (Master's Thesis submitted to University of Helsinki)(available at http://core.ac.uk/download/pdf/14922693.pdf), at 5.

obligations associated with membership"[53]. Citizenship may be defined as a relationship that certain persons enjoy with relation to a state.

Citizenship as an identity can either be an independent identity, or an identity based on some other identity. As will be seen in the coming paragraphs, there is an increasing push for nations to not base their citizenship law on criteria indicative of any other identity, like religion, race, etc. Talking about citizenship and other forms of socio-political identity, Derek Heater states,

> "Sometimes it has lived in harmony with other forms, sometimes in competition; sometimes it has been the dominant form of identity, sometimes it has been submerged by others; sometimes it has been distinct from other kinds, sometimes subsumed into one another"[54]

According to Peter Spiro, "Nationality has been equated with identity, in most cases coinciding with ethnic, religious, or other socio cultural community markers, which, in turn, have more or less mapped onto territorial spaces".[55]

Citizenship and nationality are sometimes considered to go together, while held distinct at other times. Nationality tends to bring in ascriptive elements and makes membership more exclusive. Membership to a nation is ordinarily on non-voluntary criteria. A recent trend in the international context is that the term 'nationality' is often being replaced with the usage of the term 'citizen', which is more liberal. Citizenship is associated with the concept of nation state, which emphasizes the idea that the members of the polity must have shared cultural values. There are arguments that these shared values need not always be ethnic in nature, but could even be political values, as was the case in the USA. However, the effectiveness of political values in bringing about solidarity is questionable, although, again, the example of the US indicates otherwise. Nowadays, nationality, with its emphasis on common ethnicity, is decoupled from citizenship.

In a republic, the term 'citizen' is an equivalent of the term 'subject' used in a monarchy.[56] Western political discourse connects citizenship to the idea of a self-governing

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[53] *id., at* 9

[54] DEREK HEATER, A BRIEF HISTORY OF CITIZENSHIP(Edinburgh University Press Ltd , 2004).

[55] Peter J. Spiro, *A New International Law of Citizenship,* 105AM. J. INT'L L., NO.4, 694 (2011). Available at www.jstor.org/stable/10.5305/amerjintelaw.105.4.0694 .

community.[57]Members of a political community in which the people hardly engage in political activity, cannot therefore be described as citizens.

As for the rights dimension of citizenship, T.H.Marshall is popular for his identification of three elements of citizenship, namely the civil, political and social element. The civil element refers to the protection of personal freedom of individuals. The political element is about the right to participate in the political process of decision making in a state. Right to vote and right to participate in election would come under this. The third element, that is, the social element, refers to principles of economic welfare, right to education, healthcare, etc.[58] He argued that, in history, these three classes of rights developed in the above order.[59] Usually, citizenship is a bundle of all these rights. However, states have at times excluded some of its citizens from political rights.

A question that has been a subject of debate is whether citizenship is exclusivist in nature, that is, whether exclusion is inherent to citizenship. This question arises because citizenship performs the function of defining the boundaries of membership. From this angle, citizenship becomes "a mechanism of closure". It "distributes people to just one of the world's many states".[60] Immigration and the challenges posed by it have led to seeing citizenship as a right that "excludes rather than includes people".[61]

States usually confer citizenship through two modes: by birthright and by naturalisation. The other mode is the grant of citizenship to enable 'return' of 'nationals' who were born and resident abroad.

3.3.History:

The ancient system of membership in the political systems of Greece and Rome are of relevance in understanding the concept of citizenship today. The earliest history of citizenship is usually traced to the City state of Sparta. The elite citizenry class of Sparta was called the 'Spartiates'.

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[56]*see* P. Ramanatha Aiyar's *Concise Law Dictionary*, fifth Edition, Lexisnexis.;(meaning given under 'Citizen and Subject)

[57]Iija, *supra* note 52

[58]T.H.Marshall as cited by NIRAJA GOPAL JAYAL, CITIZENSHIP AND ITS DISCONTENTS: AN INDIAN HISTORY, (Permanent Black, Ranikhet, 2013)

[59] see HEATER,*supra* note 54, at 3.

[60] Christian Joppke, *How Immigration is changing Citizneship: A Comparative view*, ETHN. RACIAL STUD., 22, 4, 629, at 629 (1999).

[61]*Id.*, at 630.

Some of the facets of the Spartan citizenship were, "the principle of equality", "ownership of public land", "a rigorous regime of upbringing and training", "the taking of meals in common messes", "military service", "civic virtue" and participation in the government.[62] This class of the persons weas put through a strict program of training called the '*agoge'*. However, the training was mainly physical and to build determination.[63] Plato commended this system for its orderliness. The citizenry of Plato's state was composed of the Guardians (to govern), the soldiers (to defend) and the producers (all working men). The last of these were a second class of passive citizens.[64]

Aristotle, the student of Plato, defined a citizen as one both of whose parents are citizens and who participates in the administration of the State[65]. According to Aristotle, a good citizen is one who possesses the fourfold content of civic virtues, namely, "temperance" (that is, 'the avoidance of extremes), "justice", "courage, including patriotism" and "wisdom".[66]

Ancient Rome followed a graded system of citizenship. The Roman citizenship had implications of both rights and duties. The ideal of civic virtue was also regarded as an obligation in Rome. The eligibility for Roman citizenship was a ceremony where a citizen father picks up his new born child. Since 44 BC, the local magistrates had to maintain a full list of citizens for taxation and military service. In 4 BC, it was made compulsory for children of citizens to be registered by an official within 30 days of birth.

A comparison of the above historic narrative with that of the concept in the present times reveals the truth in the view expressed by Laborde and Maynor, that 'citizenship used to be something acquired by your status in society, when nowadays it is citizenship that guarantees the status.'[67] Thus, it is citizenship that determines the position of a person today.

Another observation is how citizenship has ceased to be a localised concept, dealing with membership to small city states. Now, "the framework of citizenship has widened from being

[62]HEATER, *supra* note 54, at 7-8.
[63]*Id.*, at 8.
[64]*Id.*, at 14-15.
[65]Iija, *supra* note 52, at 8.
[66] Aristotle as cited in HEATER, *supra* note 54, at 16-20.
[67] Laborde and Maynor, as cited by Iija, *supra* note 52, at 5.

local into a state-wide institution".[68] As will be seen in the coming paragraphs, the concept has been extended to beyond the level of state with ideas like global citizenship.

The concept has attained much significance in the recent days. Niraja Gopal Jayal identifies three factors for this: firstly, the emergence of the idea of a civil society. The advantages of political membership in placing oneself at a position to participate in the political endeavours of the state became obvious. Secondly, the realisation that welfare state could result in parasitism. Thirdly, the rediscovery of civic republicanism with its emphasis on civic participation.[69]

3.4. Ideas on citizenship:

3.4.1. **Ethno-national citizenship:**

Ethnicity refers to the common past of a community or group of people. Ethno-national concept of citizenship leads to the placing of ascriptive criteria[70] on the basis of which membership to the political community is defined. This theory argues that a common past alone can create solidarity. A nation conceived on this would be a homogenous one with the entire population composed of persons who share a common past. While this was the most common conception in the early days, when nations were often composed of descendants from a common ancestor, it is much condemned in the present times. The liberal and republican ideas came to replace it.

3.4.2. **Liberal citizenship:**

The Enlightenment brought about a liberal concept of citizenship. In this view, the individuals and not groups, are the ultimate units. Group identity of a person has no relevance as far as citizenship is concerned. Thus, in a country with liberal values, at least in principle, citizenship rights include "everyone regardless of their gender, race or wealth".[71] In the late twentieth century, T.H.Marshall conceived citizenship as "expanding categories of rights (not duties), equally bestowed on expanding categories of persons, without consideration of their inherent characteristics".[72] As indicated by this statement, there is an expansive tendency in a liberal

[68]*Id.*
[69]NIRAJA GOPAL JAYAL, CITIZENSHIPAND ITS DISCONTENTS: AN INDIAN HISTORY 6-8(Permanent Black, Ranikhet, 2013).
[70] For description of 'ascriptive criteria', *see* 3.3.6.
[71]*see* Iija, *supra* note 52, at 11.
[72]Joppke, *supra* note 60, at 629.

citizenship on two aspects. One, with regard to the persons who are to be given the status of citizenship. Two, with regard to the rights that are to be guaranteed to a citizen. Due to the first aspect, the liberal idea of citizenship is "the most inclusive and universalistic"[73]. Soon after its conception, this idea held the field for some time now. Liberal political theory argues for minimal barriers to naturalisation.[74] It promotes diversity.

3.4.3. **Civic Republicanism:**

This is a theory that emphasizes on the contribution of the citizen to the State. Rights are defined based on that. Unlike the liberal idea, the republic concept places the common good above the individual and his freedom. This "creates the scope for a strong sense of solidarity, a sense of belonging and security, which can contribute to the individual's self-fulfillment".[75] This idea allows stratification on the basis of contribution. Republicanism came as a response to the evils of social citizenship in a welfare state, which led to parasitism and a loss of civic sentiments.

3.4.4. **Transnational citizenship:**

With globalization, citizenship has also extended beyond the level of a nation state. Thus, the discussion on citizenship has extended to the transnational level and has led to concepts like, 'multinational citizenship'[76], 'supranational citizenship'[77] and 'postnational citizenship'.[78] In these concepts, the term 'citizenship' is no longer indicative only of the relation between a citizen and a state. Recently, there is much scholarly discussion on the protection of human rights beyond the boundaries of a nation state. After the World Wars, Hannah Arendt famously brought out the crisis of lack of a mechanism to protect the human rights in the case of those persons who are not members to any political society. For, traditionally, human rights were to be protected by the state. During the world wars, denationalization had become, "a powerful weapon of totalitarian politics".[79] She herself was a Jew deprived of German citizenship. She said, "....the right to have

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[73]Ornit Shani, *Citizenship Conception: The 'Muslim Question'*, 44(1)MOD. ASIAN STUD., 145, at 152 (2010).
[74] p. 6, Spiro, *supra* note 55, at 6.
[75] Shani, *supra* note 73, at 152.
[76] Which may be defined as "citizenship in a polity consisting of several distinct national communities"; *see*RAINER BAUBOCK, TRANSNATIONAL CITIZENSHIP AND MIGRATION1 (Routledge, Taylor & Francis Group, 2017)
[77] which may be defined as "individual membership and rights in a union of independent states", *id.*
[78] which may defined as articulating "the idea of citizenship 'beyond' rather than 'above' the nation, i.e., a transformation through which state-based citizenship becomes dissociated from national identity altogether", *id,* at 1-2.
[79]HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 269 (New York: Harcourt, 1973).

rights, or the right of every individual to belong to humanity, should be guaranteed by humanity itself"[80]. Describing the plight of the stateless, she said,

> "Once they had left their homeland they remained homeless, once they had left their state they became stateless; once they had been deprived of their human rights they were rightless, the scum of the earth. Nothing which was being done, no matter how stupid, no matter how many people knew and foretold the consequences, could be undone or prevented"[81]

This shows how the absence of protection of rights beyond the state boundaries leads to much difficulty. A good solution to this problem could be a global citizenship regime, where the protection of rights will not depend upon membership to a nation state.

3.4.5. ***jus soli*** **and** ***jus sanguinis*** **citizenship:**

In a *Jus sanguinis* system, citizenship is based on blood ties. Such criteria is especially found in historic states. These are states which had their origin in "a pre existent, or pre-political, ethnic or 'primordial' community".[82] In this system, the citizenship is transmitted from citizens to their children. Their place of birth is of no significance. *Jus Sanguinis* could be justified on the basis of the argument that it promotes solidarity among the members of the political community. The number of generations upto which this happens varies between states. *Jus soli* criteria on the other hand, is found in settler states, which are countries where, the State itself had played a very significant role in the formation of the nation.[83] In multiethnic societies, *jus sanguinis* is not feasible. *Jus soli* based citizenship is more suitable in such states. Nowadays, many States are moving from *jus sanguinis* to *jus soli.*

3.4.6. **Ascriptive and Functional criteria:**

There could be two types of criteria for classifying person for the purpose of granting citizenship. Ascriptive criteria refers to criteria which confer citizenship on persons based on some other group identity. Some such criteria are race, descent, and religion. In early times, citizenship was

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[80] *Id.*, at 298.
[81] *Id.*, at 267.
[82] p. 314, William Safran, *Citizenship and Nationality in Democratic Systems: Approaches to Defining and Acquiring Membership in the Political Community,*18 INT'L POLITICAL SCI. REV. 313, 314 (1977)
[83] *Id.*

usually based on ascriptive criteria. Such criteria were earlier used because the society was more organic, having "evolved from extended families and tribes held together by blood ties and other inherited connections."[84] Functional criteria, on the other hand, are voluntary in nature. Nations which keep functional criteria are open to outsiders. Such criteria could take the form of a requirement to subscribe to some national values and do not insist on past affinities. Ernest Renan combined both of these criteria when he said,

> "A nation is a soul, a spiritual principle. Two things… constitute that principle… one is in the past, and the other in the present. One is the common sharing of a rich legacy of memories, and the other is mutual consent, the desire to live together, and the will to continue to emphasize the heritage one has received altogether".[85]

The move toward liberal citizenship has necessarily been a move from ascriptive to functional criteria.

3.5. Conception of citizenship - Comparative analysis:

As seen above, there could be various conceptions to citizenship. Different nations give different meanings to citizenship and the criteria for determining citizenship varies accordingly. William Safran, in the article "Citizenship and Nationality in Democratic Systems: Approaches to Defining and Acquiring Membership in the Political Community", attributes these variations to the varied historical experiences of each country, and circumstances in which the political community was built.[86]

3.5.1. France:

The French Revolution led to a conception that citizenship is sharing of sovereignty. All inhabitants of the territory who comply the law of the land would qualify as citizens. The French nation was defined in political terms such that "*state* and *nation* were congruent and coextensive".[87]There was a lot of scope for outsiders to join the community. However, with time, knowledge of the French language became necessary. During the 1789 Revolution, France was

[84] *Id.*
[85] Ernest Renan, as quoted in *Id.,* at 316.
[86] Safran, *supra* note 82, at 313.
[87] *Id,* at 315.

the centre of a larger state. Thus, French citizenship was universal in nature. Anyone who would subscribe to the revolutionary cause could gain French citizenship. But, some categories were excluded, including, women, Jews, serfs, etc. Briefly, during the vichy regime, Jews who were recently naturalized were deprived of their citizenship rights. They also had to leave the territory. Again, for a brief time there was a return of ethno-national ideas when North African Muslims migrated to France.[88] Since 1945, France has been following the principle of "double *jus soli"*, that is children of parents born in France were considered to be citizens provided the children were themselves born in France. Thus, France seems to have been primarily aligned to a republican concept of citizenship with some liberal flavour.

3.5.2. **USA:**

The US is known for a voluntary citizenship policy. Several ethnic groups which had immigrated, came together to form America. There were no historical constraints in inviting outsiders. Unlike the European nations that were '"socio-biological" and tradition bound', the American society was '"contractual" and therefore "rational"'.[89]
The following statement accurately describes US citizenship:

> '"Americanness" was defined in terms of commitment to democracy, equality and other values, as anchored in the US Constitution; consequently, membership in the American polity was, in principle, open to all who shared that commitment'.[90]

However, later, there were departures from this policy in that, discrimination against some racial and religious groups, and favoritism towards others, became evident.[91] With the pressure created by mass immigration, there were outright departures, a significant one being, the passing of the Chinese Exclusion Act in 1882, which barred Chinese workers from being admitted. This was later extended to other Asians as well. Such policies were also upheld by the Supreme Court of the USA in *Chae Chan Ping v. U.S.,* in 1889.[92] In the twentieth century, US began to have ideology based criteria to exclude some from citizenship. This includes measures like the

[88] *Id.,* at 316.
[89] *Id., at* 317.
[90] *Id.*, at 318.
[91] For instance, in the 1840s and 50s there was an "America for the Americans" movement which was against the Blacks, Irish, the Catholics and the Jews. *see id.* at 318.
[92] *Id,* at 318-319.

Anarchist Act of 1903 which banned anarchists from entering. On the other hand, political refugees from Communist states were welcomed with open arms. After the World Wars, the United States has become more inclusive by accommodating migrants from Vietnam, Cambodia, Arab states and Philippines. However, William Safran remarks that, 'The widely accepted existence of all these "hyphenated Americans" reflects the continuing disjunction between "nationality" and citizenship, the former referring to ethnic origins... and the latter to political values, rights and obligations'.[93] According to Christian Joppke, though US is open to migrants and they are also granted much protection by the state, the concept of citizenship as an identity is under fire.[94]

3.5.3. **Germany:**

Germany, for a long time, was known for its *jus sanguinis* oriented citizenship policy. Much importance was given to the *Volksgeist*, which meant the spirit of the German people which was found in their language, culture, and customs. This reached its climax during the Nazi rule, when Jews and Gypsies were excluded as racially unfit. Their citizenship was taken from them. On the other hand, people of German descent who were resident in Easter Europe were granted citizenship.[95] Citizenship in Germany is described as "a thick concept of citizenship, which is genealogical rather than territorial, and thus normally closed to non-nationals".[96] Eventually, Germany moved away from such policies and has become more liberal in its approach.

3.5.4. **Great Britain:**

The citizenship related questions of Great Britain are different from that of any other, due to the historical fact of the colonies that it had made. These colonies were eventually liberated, but the inhabitants of colonies continued to have to right to enter Britain till the passing of the Common Wealth Immigrants Act in 1962. There were grades of citizenship in Great Britain. The members of colonies were "subjects" of the British crown.[97]

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[93] *Id*, at 320.
[94] Joppke, *supra* note 60, at 633.
[95] Safran, *supra* note 82, at 321.
[96] Joppke, *supra* note 60, at 637.
[97] Safran, *supra* note 82, at 324-25.

3.5.5. **Israel:**

Israel follows *jus sanguinis* for Jews and *jus soli* for everyone else. The state of Israel has an orientation towards welcoming the Jewish exiles back to occupy Israel. The Law of Return reveals the concept of citizenship, where Jewish immigrants could immediately be granted citizenship, while non-Jewish migrants had to undergo naturalisation. Jewishness is defined in terms of descent, thus displaying a clear tendency towards *jus sanguinis.* It is also defined in terms of conversion, thus introducing a religious criteria for citizenship acquisition.[98] Inspite of the departure from the general idea that citizenship, in order to be considered progressive, had to be based on *jus soli* and non-ascriptive criteria, it is justified due the historical fact of the holocaust and the anti-semiticism that brought out the need for a nation for the Jews. Moreover, in practice, Israel is quite liberal in admitting non-Jewish immigrants.[99]

3.6. Citizenship in International Law:

For a long time, the law of citizenship was entirely left to the sovereign discretion of the nation states. They had full sovereignty to decide on who will be their members. They often related nationality with other identities. Globalization, acting along with other factors has now led to a need to 'decouple citizenship status from other metrics of identity'.[100] Earlier the controversies that arose as to a state's policy of citizenship were considered as issues of private international law. But, lately, norms to regulate both birthright citizenship, and citizenship by naturalization have risen in International Law. There are norms as to the extension of citizenship based on birth in the territory of a State. Also, the discretion in placing criteria for naturalization have been sought to be regulated by evolving norms in International Law. Peter J. Spiro, in his article, "A New International Law of Citizenship", has made a detailed study as to how International Law is slowly trying to bring citizenship under its fold. It began with addressing the problem of double nationality. After the world war, in view of the acute concerns raised by statelessness, some advocated for an International norm against arbitrary deprivation of citizenship.[101]

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[98] *Id.*, at 325- 26.
[99] *Id., at* 326.
[100] Spiro, *supra* note 55, at 1-2.
[101] *Id*, at 31-33.

The concept of 'access to citizenship' is slowly gaining ground. Also, non-discrimination norms are evolving which question racial, ethnic and gender based classification in birthright citizenship, in naturalization, in denationalization and in state succession.[102] There is also a norm that requires that residents in the territory of a nation should not be indefinitely denied citizenship.[103] For, granting them citizenship is necessary for the full realisation of their rights. Germany, for instance, had to change its law accordingly.[104] While earlier, International Law limited itself to what a state must not include, now it has ventured into mandating what a state must include. Further, various International Institutions, like the Human Rights Committee, the Committee on Rights of a the Child and the Committee on Elimination of Racial Discrimination, which earlier maintained a hands-off approach as far as state discretion regarding citizenship was concerned, have now become more aggressive in scrutinizing discriminatory conduct of states.[105] Many of these are still soft law, but state practices as well as treaties have been moving toward these norms, indicating that they may soon attain the status of *jus cogens.*

3.7. Conclusion:

Various concepts of citizenship exist. Ornit Shani argues that a state need not hold on to one concept alone, but could have a combination of more than one or all the concepts. State practice reveals that this is true: that states have not only shifted from one concept to another, but have also kept a combination of more than one concept at the same point in time.

It is the liberal concept of citizenship which is most suitable in this globalised era, in view of the mass migrations and the statelessness issue that would otherwise follow in the world. Also, because equality and inclusion are intrinsic to democracy, progressiveness demands for universal citizenship. Civic republicanism is also acceptable to some extent, as the criteria it recommends are usually functional. But, ethno-nationalism is increasingly condemned. The pressure is not only from the scholarship on the subject and pressure groups, but even International Law has started on the path of testing the rationality of criteria adopted by states in determining its citizens. Departure from the liberal concept is permissible only when there is very strong

[102] *Id.*, at 43.
[103] *Id.*, at 49.
[104] *Id.*, at 66.
[105] *Id.*, at 51,59.

historical justification for the need for placing ethno-national, racial, religious or other ascriptive criteria (as in the case of Israel).

Having studied the various ideas surrounding the concept of citizenship, the following chapters will indicate the various conceptions that India has identified with till now.

Chapter IV

SECULAR CITIZENSHIP: DEBATES DURING THE MAKING OF THE CONSTITUTION

4.1. Introduction

Part II of the Constitution of India, comprising of Article 5 to 11, deals with citizenship. Much care went into the making of the provisions on citizenship. Though they were provisions of a temporary nature only, the Constituent Assembly devoted more than nine hours of debate before adopting the draft[106]. This would indicate the importance that was attached to the making of the citizenship provisions. The drafting of our Constitutional provisions happened in the backdrop of the partition and the mass migrations as a result of it. This chapter begins with an overview of the historical background in which citizenship to the Indian polity was debated. The provisions themselves are then analysed. This is followed by an examination of the discussions in the Constituent Assembly that led up to these provisions.

This exercise is carried out with a view to understand the ideas, principles and concepts that governed the minds of the framers with regard to citizenship. The ultimate purpose is to find out if there is any light in this for the current citizenship crisis.

4.2. Historical Background:

Several events happened in our history which had a bearing on how the Constitution envisions citizenship. As Sir S. Radhakrishnan said, "The Hindus and Muslims have lived together in this country for over a thousand years. They belong to the same land, speak the same language. They have the same racial ancestry. They have a common destiny to work for. They interpenetrate one another".[107] Inspite of this, in some areas, tension prevailed all along. Towards the end of the British rule, the majority of the Muslim community went on a path of isolation. In 1905, Bengal was partitioned on religious lines. By way of the Lucknow Pact of December, 1916, the Indian National Congress and the Muslim League agreed on religion based representation in Provincial Legislatures. All these events ultimately led up to the partition of India.

[106] *see* speech of the President of the Constituent Assembly, Constituent Assembly Debates on Aug. 12, 1949.
[107] *see* speech of Dr. Radhakrishnan on the Objectives Resolution, Constituent Assembly Debates on Jan. 20, 1947.

4.2.1 Partition

The partition of India and Pakistan was grounded in the 'two nations theory'. From 1940 onwards, the Muslim population in India started insisting on their demand for a separate place for themselves.[108] There came a proposal for Pakistan as a 'Muslim Homeland'.[109] On 24 March 1940, the Muslim League came up with a resolution demanding the establishment of 'a separate and independent sovereign Muslim State[110]. According to Mohammed Ali Jinnah, as there were two nations in India, there needed to be a dissolution of the unitary centre.[111] The Congress was against the idea and every effort was made to keep India one united whole. But, a lot of communal violence was happening in various places in India. By May 1947, the Congress party had to agree that it was no longer possible to deny the demand of the Muslim League.[112] The Partition was a historic event by which the Territory of India was divided into India and Pakistan. The Indian Independence Act of 1947 divided British India into the Dominion of India and the Dominion of Pakistan from 15th August, 1947. The problem with the partition (as far as Indian citizenship is concerned) is the resulting tendency to 'model Indianness on religious lines and to treat India as a default homeland for some identities-but not others'.[113] Ornit Shani remarks that, at partition, "an ethno-nationalist citizenship discourse gained currency".[114]

4.2.2. Mass Migration:

The partition of India did not happen in a quiet way. Violence abounded everywhere. So many people lost their lives because of this. Migrations happened on a large scale. It is estimated that around 14.5 million people migrated within four years of the partition. It is regarded as one of largest migrations in the history of humanity.[115] While with some, there was a deliberate shift in loyalty and a feeling that Pakistan was their homeland, it was not so with the majority who fled merely out of fear of the violence and blood-shed that threatened them and their loved ones.

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[108]V.D.MAHAJAN, MODERN INDIAN HISTORY 356 (S.Chand & Co. Pvt Ltd, 2012).
[109] Shani, *supra* note 73.
[110]B.M.Niranjana Murthy, The Nation's Partition: A Study of Partition Stories (Oct. 2007)(Ph. D. Thesis submitted to Kuvempu University) (available at http://hdl.handle.net/10603/84041)
[111]*Id.*, at 45.
[112]V.D.MAHAJAN, *supra* note 105, at 359.
[113] Gautam Bhatia, *Citizenship and the Constitution, (*March 31, 2020*)* (available at SSRN: http://ssrn.com/abstract=3565551)
[114]Shani, *supra* note 73, at 153.
[115] Prashanth Bharadwaj, Asim Khwaja& Atif Mian, *The Partition of India: Demographic Consequences* (June 2009),(available at SSRN: http://ssrn.com/abstract=1294846)

Many fled from either side leaving their possessions too. Now, the status of such migrants had also to be considered under the citizenship laws. This led to a lot of complication and gave rise to a necessity for complex provisions in the Constitution replacing the simple clause that was previously under consideration.

4.3. Constitutional Provisions:

The Constitutional provisions need examination to understand the nature of citizenship that the framers contemplated in Part II. As mentioned already, they were only temporary in nature and limited to defining who all would be citizens of India at the commencement of the Constitution, that is, on January 26, 1950. After that date, citizenship was left to be determined by the Parliament by ordinary legislation. Dr.B.R.Ambedkar would remark that the Constituent Assembly was deciding only in an 'ad hoc' manner and 'only for the time being'.[116] The provisions regarding grant of citizenship have been categorised in many ways. M.P.Jain categorises the citizens as per Part II into three categories[117], namely, citizens by domicile, citizens by migration and citizens by registration.

4.3.1. Citizenship by domicile:

Article 5 contains the general principle regarding citizenship at the time the constitution came into force. There are three conditions, one of which should be present to make a person a citizen of India at the commencement of the Constitution. In addition to these, domicile is a necessary condition for citizenship. Domicile conveys the idea of a permanent home.[118] It has two elements, namely, residence and intention. Residence "need not be continuous but it must be indefinite".[119] The intention required is "a permanent intention to reside forever in the country where the residence has been taken up".

Therefore, a person must have his domicile in the territory of India and fulfill one of the listed conditions to qualify for citizenship. The three disjunctive conditions are:

1. He must be born in the territory of India; or

[116]*see* Speech of Dr.B.R.Ambedkar, The Constituent Assembly Debates on Aug. 10, 1949
[117]M.P.JAIN,INDIAN CONSTITUTIONAL LAW 311 (Lexis Nexis, 2014).
[118]*Id.* at 312.
[119]J.N.PANDEY, CONSTITUTIONAL LAW OF INDIA42 (Central Law Agency, 2014).

2. Either of his parents must have been born in the territory of India; or

3. He had been ordinarily resident in the territory of India for not less than five years immediately preceding the commencement of the constitution.

The first clause provides for citizenship by birth, thus basing citizenship in India on the principle of *jus soli.*[120]Whoever is born within the territory of India has a right to citizenship. But, if a person is travelling and happens to cross India and she gives birth to a child in the Indian soil, such birth does not qualify the child for Indian citizenship. This is because of the domicile requirement.[121]

The second clause brings within the fold of Indian citizenship all those whose parents or at least one parent was born in the territory of India. Thus, even if the concerned person is not born in India, the birth of parents within the Indian territory can give rise to citizenship. In a sense, this is on *jus sanguinis* principle which emphasises on blood bonds for citizenship. This would cover those who were born while their parents went abroad for trade, business or any other reason.

The third clause combines a requirement of residence with the domiciliary requirement. To qualify, the person must have been 'ordinarily resident' in the Indian territory for a minimum of five years soon before January 26, 1950. The purpose of this clause was explained by Shri Alladi Krishnaswami Ayyar[122] who pointed to 'the peculiar position of this country' and the foreigners who have come to India and settled down in the outlying tracts like Goa and the French settlements. They 'contributed to the richness of the life in this country' and saw India as their permanent home. This clause was meant to cover them as they are an asset to the nation. So, our constitution was broad enough to cover even these persons who would otherwise have been regarded as foreigners, provided, of course, the domicile requirement is fulfilled.

4.3.2. Citizenship by migration:

The Partition resulted in a lot of disturbances and mass migration across the Indo-Pakistan borders. Muslims from the Indian territory travelled to Pakistan and Hindus from the territory of

[120] which means right by birth.
[121] This question of the absurdity caused by accidental citizenship repeatedly came up in the Constituent Assembly during the discussion of the provisions of these articles. But these apprehensions were cleared by pointing out to the domicile requirement.
[122]*see* Speech of Shri Alladi Krishnaswami Ayyar,The Constituent Assembly Debates on August 12, 1949.

Pakistan migrated to India. Some migrated as a matter of choice. Others migrated due to the fear arising out of a situation of violence. The constitution deals with the migrants in both directions:

1. Article 6 deals with migrants from Pakistan to India. These are individuals who were in the pre partition territory of India, which now became part of Pakistan. They travelled to India during partition. Though such persons are not covered by article 5, they are 'deemed to be' citizens provided they fulfilled certain conditions. The person concerned or his parents or his grand-parents must have been born in the pre-partition territory of India.[123] Those who had migrated before July 19, 1948 needed no registration. They just had to be ordinarily resident in the territory of India from the date of their migration.[124] But those who migrated on or after that day were deemed to be citizens only if they had been registered as a citizen of India by an officer appointed by the Government of India on an application made before the commencement of the Constitution[125]. July 19, 1948 was the date from which the permit system was introduced in India by way of an ordinance. According to this ordinance, no person could enter India without a permit.[126] Based on this, July 19, 1948 was fixed as the date from which registration would be a necessary condition.

2. Article 7 deals with migrants from India to Pakistan. These persons were born within the territory of India by virtue of Article 5(a), and therefore would otherwise be citizens of India. But they are excluded from citizenship by Article 7 according to which, they are deemed not to be citizens of India. However, there is a proviso to this Article in recognition of the fact that many of those who fled did not do so as a matter of conviction and a shift in loyalty to the newly created state of Pakistan. On the other hand, most of them fled in panic due to the disturbances that prevailed and the violence that was inflicted against their community. Such people returned back to India when they got the opportunity. It is for the purpose of protecting them that this proviso was introduced. According to this proviso, the exclusion under the main provision of Article 7 was not applicable to those who returned to India under a permit for resettlement. Such persons would be covered by Article 6(b)(ii). The drafters defended this proviso on the one hand

[123] India Const. art. 6, cl. (a).
[124] Indian Const. art. 6, cl.(b)(i)
[125] *Id.* art. 6, cl (b)(ii)
[126] *see* Speech by Dr.B.R.Ambedkar, The Constituent Assembly Debates, on August 10, 1949.

by the argument that many had fled only due to the adverse circumstances[127] and on the other hand, by the fact that, by granting permanent permits, the Government of India had allowed them to come from Pakistan and settle here in India.[128] It was estimated that only a very small number of two thousand or three thousand migrants would benefit from this.[129]

Though Article 6, in effect, covered the migrants from Pakistan to India who were mainly Hindus, and Article 7 similarly covered migrants from India to Pakistan who were mainly Muslims, the words of the provisions make no mention of any religion. And in fact, a migrant identifying with any religion was covered.

4.3.3. Citizens by Registration

The third category of citizens are defined in Article 8. This provision covers persons from Indian origin who are settled elsewhere. There are two conditions for a person ordinarily residing abroad to claim citizenship. Either he or one of his parents or any of his grandparents must have been born in the territory of India. Secondly, that on an application made by him, he has been registered as a citizen of India by the diplomatic or consular representative of India in the country where he is residing. Such application could be either before or after the Constitution commenced.

4.3.4. Article 11:

Article 11 of the constitution confers powers on the Parliament to make any provision regarding the acquisition, termination or any other matters concerning citizenship. It is up to the Parliament to come up with a permanent law of citizenship. Going by the words of Article 11, there are no limitations on the powers of the Parliament. The article begins as "Nothing in the foregoing provisions of this Part shall derogate from the power of the Parliament to...". Thus, the Parliament could even undo what has been done by the Constitutional provisions from Articles 5 to 10. Making a remark on the draft Article 6, which corresponds to the current Article 11, Dr.B.R.Ambedkar said,

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[127] see for instance the speech of Shri Jawaharlal Nehru, Constituent Assembly Debateson 12th August 1949.
[128] see last para. in the speech of Dr.B.R.Ambedkar, Constituent Assembly Debateson 12th August 1949.
[129] This was the approximate number given by Shri. N. GopalaswamiAyyangar to the Constituent Assembly. *see* Constituent Assembly Debateson 12th August 1949.

> "The effect of Article 6 is this, that Parliament may not only take away citizenship from those who are declared to be citizens on the date of the commencement of this Constitution by the provisions of Article 5 and those that follow, but Parliament may make altogether a new law embodying new principles"[130]

In furtherance of this power, the Parliament has passed the Citizenship Act of 1955 and made amendments thereon from time to time. In *Izhar Ahmad Khan v. Union of India,*[131]the Supreme Court examined the scheme of the Citizenship provisions in the Constitution and concluded that the status of citizenship can be adversely affected by a statute made by the Parliament under its powers under Article 11. Deprivation of citizenship by the statute to a person on whom citizenship is conferred by the Constitution does not amount to breach of his fundamental right, as citizenship is not granted in the constitution as a fundamental right.

The power conferred by this provision is a subject matter of debate as it raises questions as to how far the powers of the Parliament extend and whether there are implied limitations to it. If there are limitations on it, what would be the limitations? Whether the principles followed in the citizenship provisions of the Constitution impose any limitations on the law making power of the Parliament under Article 11 is a question, the answer to which has much bearing on the Citizenship (Amendment) Act, 2019.

4.3.5. Other Provisions:

- **Voluntary acquisition of citizenship elsewhere**

Article 9 of the Constitution ensures that one who has voluntarily acquired the citizenship of a foreign state does not continue as a citizen of India as well. Sometimes, due to some reason, the laws of a country may operate in automatically granting citizenship on a person. Such conferment does not result in the loss of citizenship under Article 9. Commenting on the draft provision[132], Shri Alladi Krishnswami Ayyar said

> If citizenship is cast upon a person irrespective of his volition or his will, he is not to lose the rights of citizenship in this country, but if on the other hand he has voluntarily

[130] see speech of Dr.B.R.Ambedkar, Constituent Assembly Debates on August 10, 1949
[131] AIR 1962 SC 1052
[132] In the draft Constitution, this clause was part of the Draft Article 5(c).

acquired the citizenship of another State, then he cannot claim the right of citizenship in this country. That is the object of the latter part of article 5 (which has now become a separate provision in the form of Article 11)[133](emphasis supplied).

- **Continuance of citizenship**

According to Article 10, a person who is a citizen as per the provisions of Article 5, or deemed to be a citizen under Article 6 and Article 8, continues to be such citizen. The Article, however, makes this rule subject to the provisions of any law made by the Parliament. Thus, the continuance of citizenship rights on a person on whom the constitution confers citizenship is dependent on its not being taken away by the Parliament. This exception confirms the right of the Parliament to take away the citizenship conferred by the constitution.

The above provisions, with the emphasis on domicile and the conferring of citizenship based on birth, all indicate that it is not so much the connection in the past but an affiliation towards the country and an allegiance to it, that determine Indian citizenship. Even an alien who came to India for trade, settled and set his heart on the country as his permanent home, and adds to its richness has been accommodated by Article 5(c). It is only Article 8 which comes closest to a blood based criteria for grant of citizenship. But even here, Indian origin is not on vague grounds of 'indianness', but based on the birth of either parents or any of the grandparents in Indian Territory coupled with the registration requirement. Further, Indian origin does not indefinitely act as a criteria for grant of citizenship based on descent as with some of the other countries. It is only limited to three generations, that is, up to grandchild of an Indian born person. Thus, the citizenship provisions in the Constitution tend towards democratic and progressive principles like, the *jus soli* principle and away from ascriptive criteria like ethnicity, or religion of a person.

4.4. The Constituent Assembly Debates:

As already mentioned, the Constituent Assembly devoted considerable time debating on these provisions in spite of their temporary nature. Debates on citizenship in the new India happened both before and after partition.

[133]*see* Speech of Shri Alladi Krishnaswami Ayyar, The Constituent Assembly Debates, on August 12, 1949.

4.4.1. Pre-Partition debate:

The initial meetings of the Constituent Assembly were in December, 1946 and January, 1947. After a three month break from 25th January, they reassembled on 28th April. An Advisory Committee to examine the question of fundamental rights had been established with Sardar Vallabai Patel as its head. The Advisory Committee's draft fundamental rights was considered by the Constituent Assembly from 28th April, 1947 onwards.[134] On 29th April, the Citizenship provision, which was then a part of the Advisory Committee's draft fundamental rights, was taken up for consideration. This initial round of discussion took place before the partition of India and Pakistan. Clause 3, which was the citizenship provision, was simple and read as follows:

> "Every person born in the Union or naturalised in the Union according to its laws and subject to the jurisdiction thereof shall be a citizen of the Union.
>
> Further provision governing Union citizenship may be made by the laws of the Union."[135]

Mr.B.Das objected to this saying that the opening phrase "Every person born in the Union..." would include non-Indians like Germans and Japanese as well. He pointed out that nationality had not been defined. He expressed a fear that this could lead to the exploitation of Indian citizens by 'aliens' or 'alien-born'.[136]

Shri Alladi Krishnaswami Ayyar, who was part of the Advisory Committee which submitted the draft explained that there could be two ideas of citizenship. One idea is citizenship based on race and the Continental countries follow this idea. Here, the place of birth or the place where that person resides, has no relevance, and citizenship is conferred based on blood and race. The Anglo-American system, however, associates citizenship with place of birth. The principle underlying the clause was that a person must get citizenship if born in Indian soil "even if he is a foreigner". Thus, it is based on the principle followed by England, America and other countries

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[134] Gautam Bhatia, *How to read the Constituent Assembly Debates - I,* available at http://www.google.com/amp/s/indconlawphil.wordpress.com/2018/06/27/how-to-read-the-constituent-assembly-debates-i/ (last visited on 4th Oct, 2021)

[135] *see* Speech of Dr.B.R.Ambedkar, The Constituent Assembly Debates, on April 29, 1947.

[136] Speech of Mr. B. Das, The Constituent Assembly Debates on April 29, 1947.

where the Anglo American jurisprudence is in vogue.[137] This could lead to the problem of imposition of citizenship based on mere transient presence. To this, he said the Supreme Court of America had held that a casual visitor could be excluded. He said, providing an express exception in the constitution itself would necessitate a detailed provision inappropriate for a Constitution. When repeated objections came in, he said,

> "In dealing with citizenship we have to remember we are fighting against discrimination and all that against South Africa and other States. It is for you to consider whether our conception of citizenship should be universal, or should be racial or should be sectarian".[138]

Again, he asked "Are we going to bring in race idea, namely, only those who are born of parents--you call them Indians or other people--are entitled to citizenship or are you going to subscribe to the principle that birth settles citizenship...".[139]

Sardar Vallabhbhai Patel, the Chairman of the Advisory Committee justified the draft by explaining the two ideas about nationality in the modern world. It could be a broad-based nationality or narrow nationality. He pointed out, "Now, in South Africa we claim for Indians born there South African nationality. It is not right for us to take a narrow view". He asked the Assembly to consider how many foreigners would come to India to give birth to children in order to acquire Indian nationality. He went on to say that, "It is a curious idea that for that purpose you introduce racial phraseology in our Constitution". Thus, there was conscious choice to avoid 'racial phraseology'.[140]

Dr.Kailas Nath Katju also advocated the idea that whoever is born in Indian soil should be welcomed as subjects of the Indian Union. But, he was also of the opinion that the child of a 'subject of the Indian Union', wherever he may be born, must become a subject of the Indian Union.[141]

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[137]Speech of Shri. Alladi Krishnaswami Ayyar, The Constituent Assembly Debates, on April 29, 1947.
[138]*Id.*
[139]*Id.*
[140] Speech of Sardar Vallabhbhai Patel,Constituent Assembly Debates on April 29, 1947.
[141] Speech of Dr. Kailas Nath Katju, Constituent Assembly Debates on April 29, 1947.

The speech of Mr.K.M.Munshi is also of significance as he distinguished racial and democratic citizenship. He said,

> "The world is divided between the ideas of racial citizenship and democratic citizenship, and therefore, the words 'born in India' become necessary to indicate that we align ourselves with the democratic principle".

The above statement and other speeches show that the drafters were very much conscious about the perception that India would gain in the eyes of the world by the words of the constitution. They were cautious that we show our tendency towards democratic values. Patel would insist that the words used in the Constitution should be very clear in sending a signal that India is democratic in its citizenship policy. In his words,

> "Therefore, our general preface or the general right of citizenship under these fundamental rights should be so broad-based that anyone who reads our laws cannot take any other view than that we have taken, ***an enlightened modern civilised view".***[142]**(**emphasis supplied**)**

The assembly thought it better to postpone the consideration of the clause. A motion to that effect was adopted and it was felt that the matter should be further discussed by a technical Committee comprising of lawyers.

4.4.2. Post Partition debate:

After partition, a lot of things changed as far as citizenship was concerned. The initial leaning of the Constituent Assembly towards democratic and secular citizenship, was under stress by the bifurcation of the Indian Territory and the formation of Pakistan for communal reasons. It was further complicated by the large scale migrations that took place around the time of partition. The drafting Committee had to drift far from the simplicity of the clause initially debated upon. This drew a comment from the Chairman of the Drafting Committee, Dr.B.R.Ambedkar, who said, "except one other article in the Draft Constitution, I do not think that any other article has, given the Drafting Committee such a headache as this particular article".[143] The current Articles

[142]Speech of Sardar Patel at the end of the discussion on Citizenship, Constituent Assembly Debates, on April 29, 1947.
[143] Speech of Dr.B.R.Ambedkar, Constituent Assembly Debates, on Aug. 10, 1949.

5, 6, 7, 8, 10 and 11, were numbered as Article 5, 5A, 5AA, 5B, 5C and 6 in the Draft Constitution. The debate began towards the end of the sitting on 10th August and continued on the 11th and 12th of August. Various criticisms arose especially due to the situation created by the partition. Racial and religious criteria were suggested both to favor certain groups as well as to exclude some communities. Such objections are covered herein below along with the continued determination of the Assembly to hold on to the 'enlightened modern civilized view'[144].

4.4.2(a) Favouritism on ascriptive criteria:

The most radical argument asking for favourable treatment to certain communities was raised by Dr. Deshmukh. He termed Article 5 as 'the most ill fated article in the whole Constitution'. He came up with a suggestion that a new clause be included in Article 5 saying,

> "(ii) every person who is a Hindu or a Sikh by religion and is not a citizen of any other State, wherever he resides shall be entitled to be a citizen of India".[145]

Later in his long speech, he justified his above suggestion. Referring to the establishment of Pakistan, he said, "Why was it established? It was established because the Muslims claimed that they must have a home of their own and a country of their own." Criticizing the adherence to secular principles, he said,

> "...neither the Hindu not the Sikh has any other place in the wide world to go to. By the mere fact that he is a Hindu or a Sikh, he should get Indian citizenship because it is this one circumstance that makes him disliked by others. But we are a secular State and do not want to recognise the fact that every Hindu or Sikh in any part of the world should have a home of his own. If the Muslims want an exclusive place for themselves called Pakistan, why should not Hindus and Sikhs have India as their home?".[146]

Later on that day, Prof. Shibban Law Saksena argued on similar lines when he called the Constituent Assembly not to be ashamed in saying that every person who is a Hindu or Sikh by religion and who is not a citizen of any other country will be eligible for Indian citizenship.

[144] see the words of Patel quoted above.
[145] Speech of Dr. Deshmukh, Constituent Assembly Debates on August 11, 1949.
[146] *Id.*

Unlike, Dr. Deshmukh, he did not criticise the principle of secularism itself, but expressed that secularism need not keep us from making this kind of provision. He said, "the phrase 'secular' should not frighten us in saying what is a fact and reality must be faced".[147]

Referring to the amendment moved by Dr. Deshmukh, Shri. R. K. Sidhwa, conveyed that while he was not keen of that amendment being accepted, he wanted that if at all it is to be considered, the provision must not limit itself merely to Sikhs and Hindus. He then went on to point out various other communities that would be deserving of such treatment[148]. He said "we need not mention necessarily 'any community'; if we do so it would look as if we are ignoring other communities which do require attention...".[149]

4.4.2(b) Exclusionary ideas:

There was also a tendency to exclude certain groups from Indian citizenship. Many members of the Assembly felt that the draft provisions made Indian citizenship something very cheap[150]. Dr. Deshmukh felt it would make it the 'cheapest on earth'. The population problem in India was referred to in defense of the need to make it more exclusive.

Amendments were moved to limit citizenship to those born of 'Indian parents'. Thus, an ethnic or racial criteria was sought to be included in order not to include every person born in Indian soil. This suggestion of Dr. Deshmukh, invited a question from Prof. Saksena[151] as to how we would define 'Indian parents'. This was countered by pointing to the law in Poland, where the term 'Polish parents' was used. While it was argued that 'an Indian is a very recognisable person'[152], the difficulty in defining 'Indian parents' is obvious.

Others would argue for making the procedure for people of Indian origin who happen to be away, simple, so that they could choose to return.[153] Such arguments made reference to the discriminatory treatment that was afforded to many Indians who settled elsewhere, like in Burma, Ceylon and Malaya. Arguments for reciprocal treatment also were exclusionary in

[147]Speech of Prof. Shiban Lal Saksena, Constituent Assembly Debates, on August 11, 1949.
[148] He especially referred to the Parsis in Bombay who sometimes wanted to make India their home.
[149]Speech of Shri. Sidhwa, Constituent Assembly Debates on August 11, 1949.
[150]See speech of Dr. Deshmukh, Mr.Naziruddin Ahmad, Prof. Shiban Lal Saksena, Pandit Thakur Das Bhargava, Constituent Assembly Debates, Aug. 11, 1949.
[151] Speech of Prof. Saksena, Constituent Assembly Debates on Aug. 11, 1949.
[152]*see* Speech of Dr. Deshmukh Constituent Assembly Debates on Aug. 11, 1949.
[153]Speech of Prof. K. T.Shah, Constituent Assembly Debates on Aug. 11, 1949.

nature. To this, Mr. Mahboob Ali Baig Sahib would respond saying that when we are condemning the practice of such nations, it would not be appropriate for us to follow their bad examples.[154]

There was a also a similar opposition against clause (c) of the proposed Article 5 which entitles a person with Indian domicile who is for five years ordinarily resident in India a citizen. It was attacked on the ground that it had no reference to parentage, nationality or country; nor was there a reference to the purpose for which a person chose to reside in the country for those five years.[155] Dr. Deshmukh argued,

> "I do not side any ground whatsoever that we should- do it, unless it is the specious, oft-repeated and nauseating principle of secularity of the State. I think we are going too far in this business of secularity. Does it mean that we must wipe out Hindus and Sikhs under the name of secularity, that we must undermine everything that is sacred and dear to the Indians to prove that we are secular? I do not think that that is the meaning of secularity and if that is the meaning which people want to attach to that word 'a secular state'".[156]

But, more serious than these was the denouncement of the proviso to the draft Article 5AA, which was sought to be introduced in order to accommodate the migrants from India to Pakistan who returned to India under permanent permits. The proviso was neutral and could benefit migrants from any community, but it was in effect in favour of Muslim migrants returning back to India after fleeing to Pakistan. Much hatred was expressed against this idea. It was argued that the persons from the community who fled to Pakistan had chosen to transfer their loyalty.[157] Sardar Bhopinder Singh Man would go to the extent of calling this proviso 'absolutely obnoxious' and as doing 'injustice to the Hindu and Sikh refugees who have come here and are awaiting resettlement'.[158] Continuing his arguments the next day, he said "as usual, a weak sort of secularism has crept in and an unfair partiality has been shown to those who least deserve it". He referred to the Meos whom he said had involved themselves in serious rioting and yet returned under the permit system. He said,

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[154] Speech of Mr. Mahboob Ali Baig Sahib, Constituent Assembly Debates on Aug. 11, 1949.
[155] Speech of Dr. Deshmukh,Constituent Assembly Debates on Aug. 11, 1949.
[156] *Id.*
[157] Speech of Shri Jaspat Roy Kapoor, Constituent Assembly Debates on Aug. 11, 1949.
[158] Speech of Sardar Bhopinder Singh Man, *Constituent Assembly Debate* on Aug. 11, 1949.

> "This is secularism no doubt, but a very one-sided and undesirable type of secularism which goes invariably against and to the prejudice of Sikh and Hindu refugees. I do not want to give rights of citizenship to those who so flagrantly dishonoured the integrity of India not so long ago".[159]

Such arguments were toned down by those who would point out how many fled not by choosing to shift loyalty but out of fear.[160] After fleeing to Pakistan they found no place for them there and they returned at the earliest possible opportunity.

The proviso was opposed especially for the reason that these migrant returnees could claim back the property they had left in India. This was otherwise made available to the Hindu and Sikh refugees who initially migrated from Pakistan.

To the apprehension regarding the situation in Assam where it was felt that Muslim men from East Bengal migrated just for the purpose of electoral majority, the draftsmen said this problem was different from that being dealt in the current provisions.

4.4.2(c) Arguments for secular citizenship:

With all the above challenges having risen due to the partition, the policy of citizenship that the Constituent Assembly earlier leaned towards, was now under threat. On 12th August, Jawaharlal Nehru stood up to defend the provision. Regarding the provisions regarding migration, he said, "Now, all these rules naturally apply to Hindus, Muslims and Sikhs or Christians or anybody else. You cannot have rules for Hindus, for Muslims or for Christians only. It is absurd on the face of it".[161]

He supported the permit system, for, much scrutiny had taken place before the grant of those permits. In any case, only a few had received it. Regarding the constant reference to 'secularism', he said,

> "...it is brought in in all contexts, as if by saying that we are a secular State we have done something amazingly generous, given something out of our pocket to the rest of the

[159] Speech of Shri Bhopinder Singh Man,Constituent Assembly Debates, on Aug. 12, 1949.
[160] *see* for instance the point raised by Mr. Brajeshwar Prasad, Constituent Assembly Debates on Aug. 11, 1949.
[161] Speech of Jawaharlal Nehru,Constituent Assembly Debates, on Aug. 12, 1949.

> world, something which we ought not to have done, so on and so forth. We have only done something which every country does except a very few misguided and backward countries in the world. Let us not refer to that word in the sense that we have done something very mighty".[162]

Shri Alladi Krishnaswami Ayyar, member of the Drafting Committee, also argued in defense of the draft. He reminded the Constituent Assembly that the country is "plighted to the principles of a secular State". He also went on to state the implications of this as far as citizenship is concerned: any distinction between persons must be on non-ascriptive grounds. He said that we could choose to distinguish those who had 'voluntarily and deliberately chosen another country' from those who wanted to continue being connected with India. He pointed to the inconsistency of the ascriptive criteria to the policy of the nation by saying, "but we cannot on any racial or religious or other grounds make a distinction between one kind of persons and another, or one sect of persons and another sect of persons, having regard to our commitments and the formulation of our policy on various occasions."[163]

Shri Brajeshwar Prasad also defended the much contested proviso saying that it would be a tribute to the memory of Gandhi. He questioned how all the talk that Hindus and Muslims are 'blood-brothers' could be suddenly cast aside now by regarding each other as strangers and aliens. He argued that the Muslims of this country are as loyal as Hindus.

Finally, all the amendments aimed at favouritism and exclusion were voted down or withdrawn. The proposal of the Drafting Committee with its secular egalitarian features were adopted by the Assembly thus affirming that, in spite of the few communal voices, the Assembly was in favour of secular citizenship. Gautam Bhatia rightly remarks,

> "It is in the rejection of sectarian citizenship, at a moment when the fire of religious hatred and persecution was at its peak, that the universal humanism of the Indian Constitution's Citizenship chapter truly shines through"[164]

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[162] *Id.*
[163] Speech of Shri Alladi Krishnaswami Ayyar, Constituent Assembly Debates, on August 12, 1949.
[164] *see* Conclusion in, Gautam Bhatia, *supra* note 113.

4.5. Conclusion:

The citizenship provisions in the Constitution reveal that at the commencement of the constitution, Indian citizenship was not based on racial or religious lines. It did not necessitate a membership to any particular group. There was one uniform citizenship to all. Justice J.M.Shelat rightly remarked that the Articles 5 to 7 of the Constitution which deal with the citizenship are altogether secular in character having nothing to do with race, religion or creed.[165] Though it is limited to citizenship at the commencement of the Constitution, the provisions are relevant and give direction to the Parliament in exercising its power under Article 11. Though there is no express limitation on its power, the principles in Part II must always be kept in mind.

At the inception of its discussion, the Constituent Assembly committed itself to a democratic and non-discriminatory idea of citizenship. The Partition threatened the ability of the Assembly to continue with this idea. But when the detailed provisions once again came up for debate and discussion, it is clear that they persevered in holding on to the commitments which they held as precious.

The Assembly felt that the concept of secularism was applicable to the provisions on citizenship. The ideological orientations of the nation and the principles it is committed to, were no less applicable to citizenship provisions. In fact, citizenship being the route through which other rights could be claimed, these ideas and principles were regarded as even more important for determining citizenship rights. Another observable feature is that, citizenship being something about which the world is concerned, the framers were careful in how our provisions will be perceived internationally.

The Constitutional provisions on citizenship and the Constituent Assembly debates on these provisions, when seen in their historical context, show that the framers of our Constitution chose *jus soli* as against *jus sanguinis* citizenship; universal as against sectarian citizenship; broad based nationality as against a narrow view of nationality; democratic as against racial citizenship; and a non-discriminatory phraseology to racial phraseology. This choice at the height of communal tensions compels future Parliaments to stand by the principles of secular and egalitarian citizenship.

[165]Shelat J. M. as cited by Chaudhari, R.L., *supra* note 2, at 204.

Chapter V

CITIZENSHIP LAW FROM 1950 TO CAA, 2019

5.1. Introduction:

The Constitution provided for citizenship only at its commencement. All other matters regarding citizenship were left to the care of future Parliaments. Therefore, in 1955, Parliament enacted the Citizenship Act and subsequently made amendments to it from time to time. Various factors played a role in the shaping of the citizenship law. This chapter is an analysis of the citizenship law from the time the Constitution came into force, till the 2019 Amendment which is the subject of this thesis. While the citizenship law is broad and has many facets, this study is limited to an analysis of the law in areas relevant for the purpose of this study. The slow departure from the constitutional conception of citizenship has been traced. The gradual decline of the universal, cosmopolitan and secular values in the citizenship law has been analysed along with the circumstances leading to the same.

The chapter begins with a discussion of the Nehru-Liaquat Pact which was entered into as an attempt to put an end to the woes of partition. An overview of the Citizenship Act follows. The amendments to it in 1986 and in 2003 has been covered. The subordinate legislations that were made firstly in 2004, and thereafter in 2015 have been examined for the purpose of understanding the direction in which the law has proceeded after the Constitution was made.

5.2. The Nehru-Liaquat Pact:

While presenting the Citizenship Amendment Act, 2019 before the House, the Home Minister made reference to the Nehru-Liaquat Pact. This was a bilateral treaty between India and Pakistan regarding security and rights of minorities. It was signed on 8th April, 1950. Soon after the partition, while there was agitation on the Punjab side, the Bengal side remained peaceful. But not for long. In February, 1950, communal violence broke out in Dacca.[166] The result was a large scale migration of more than 11 lakh people to West Bengal.[167] The tendency was to prevent this. The need was felt for creating a conducive atmosphere where the minorities would opt for

[166]Subashri Ghosh, *The Working of the Nehru Liaquat Pact: A Case Study of Nadia District, 1950,* 68(1) Proceedings of the Indian History Congress, 853, at 854(2007) (Available at http://www.jstor.org/stable/44147893)
[167]*Id.*

returning back. In this context, the Prime Ministers of India and Pakistan, Jawaharlal Nehru and Liaquat Ali Khan respectively, met in April, 1950. After discussion, this pact was signed on the 8th. By way of this agreement, the two governments agreed that they will ensure

> "to the minorities throughout their territory, **complete equality of citizenship, irrespective of religion**, a full sense of security in respect of life, culture, property and personal honour, freedom of movement within each country and freedom of occupation, speech and worship, subject to law and morality. Members of the minority shall have equal opportunity with members of the majority community to participate in the public life of their country….".[168](emphasis supplied)

The treaty itself mentioned these rights to be considered as fundamental and that it will be effectively enforced. It was agreed that one Minister from each government will stay in the disturbed areas for a necessary period of time, "in order to restore confidence, so that the refugees may return to their homes…".[169] Minority Commissions were to be appointed to oversee the proper implementation of the Pact and to report on it. It could take cognizance of breaches and could also make recommendations.[170] Provision was also made for returning and restoring the properties of the returning migrants. In cases where this is impossible, the governments were made responsible to rehabilitate them.[171]

There are research studies[172] that reveal that the Pact was not fully successful in winning the confidence of the minorities on either side of the borders.[173]

The implication of the reference to this pact in the context of the Citizenship Amendment Act, 2019, is that the Hindu minorities in Pakistan had not been protected as agreed upon, and that

[168] Agreement Between the Governments of India and Pakistan Regarding Security and Rights of Minorities (Nehru-Liaquat Agreement) (New Delhi, 8 April 1950), para. A.
[169]*seeid.* para E.
[170]*see id.* para. F.
[171]*see id.* para B(v).
[172]*see* Subashri Ghosh, *supra* note 166, at 860-61.
[173] The primary argument of the article in the previous footnote, however, is that the Muslims in West Bengal suffered just as the East Bengali Hindus, though this was not much studied.

therefore, there was a need to allow them to come and settle in India. Whether or not such a reference to this pact was correct and relevant, is debatable.[174]

5.3. The Citizenship Act, 1955:

As discussed in the previous chapter, the Constitution provided only for citizenship at its commencement. Parliament was 'not only authorised, but also expected, to pass the law'[175] relating to citizenship. The migration across borders continued to happen. It took five years for Parliament to draft a legislation on Citizenship. During these years there was a "vacuum".[176] The provisions reveal that this Act was in line with the vision of the framers. As was pointed out by the then Home Minister who moved the Bill,

> "The mere fact of birth in India invests one with the rights of citizenship of India. That is a catholic provision, and it gives the opportunity to everyone who is born in this country to serve this country"[177]

They took up 'a liberal attitude in framing this law'.[178] The parliament recognised the Constitutional choice of *jus soli* citizenship and stuck to it. However, as in the Constitution, citizenship could be acquired by other means too. That is, by descent, registration, naturalization and incorporation of territory.

The debates in the Parliament reveal a constant reference to the Constitution as the reference point for deciding the course the citizenship law must take. Arguments for and against the Bill were made from the standpoint of the Constitution. For instance, Pandit Thakur Das Bhargava said in his speech that in India, "birth is the main point on which this citizenship rests".[179] He went on to say, that he should think that birth could not be of such a paramount nature to be the sole base of citizenship rights. He justifies this with an illustration of a foreign mother who gives birth to a child in India by 'accident'. Even then, he concedes,

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[174]*see* for instance, *What Experts have to say about Liaquat-Nehru Pact that found Resonance in Parliament during Citizenship Debate*, NEWS18. Available at http://www.news18.com/news/india/what-experts-have-to-say-about-liaquat-nehru-pact-that-found-resonance-in-parliament-during-citizenship-debate-2419489.html

[175]Pandit G. B. Pant, in his speech in the Lok Sabha while moving the Citizenship Bill, 1955, on Aug. 8, 1955, Official Report, Parliamentary Debates, at 9463.

[176]*Id*

[177]*Id.* at 9464.

[178]*Id.* at 9466.

[179] Speech of Pandit Thakur Das Bhargava, Lok Sabha, on Aug. 8, 1955, Official Report, Parliamentary Debates, at 9602.

> "Be as it may, yet I find that it is **too late to question this aspect of the matter**, because under the British Nationality Act, and under our constitution also we have accepted this position… I think, therefore, that it is too late, and I would not question this, though I do not understand the reason why the accident of birth should determine the status, the nationality or the citizenship of a person."[180] (emphasis supplied)

This shows that, even those who were opposed to *jus soli* citizenship, went with it, as it was seen as the choice of the Constitution makers.

The Bill was put through much discussion and debate in view of its importance. The secular idea of citizenship was preserved. No mention was made of any religion in the entire Bill.

Thus, by virtue of the Citizenship Act, 1955, till the Amendment of the Act which came to effect from 1987, any person born in India was entitled to citizenship. It is interesting to note that this statute went one step closer towards *jus soli* citizenship than the Constitution. For, even the Constitution put forth an additional requirement of domicile. But, the words of Section 3 of the 1955 Act gives no additional requirement apart from the fact of birth in order to qualify for Indian Citizenship. This Section 3, which is the height of recognition of *jus soli* concept, was the subject of many amendments in the later years through which one condition after the other was added to it.

5.4. Changes since 1955:

With the large scale migrations that continued to happen and other factors, the law of citizenship was amended from time to time. These changes are the subject of discussion herein. For some decades, the *jus soli* concept established by the Citizenship Act in its original form, reigned supreme. Later, the position changed.

5.4.1. The Assam Accord:

In the late 1970s, there was an agitation among the students of Assam, resulting in the Assam Accord of 1985. The agitation was against the large scale migration from Bangladesh to Assam,

[180] *Id.*

which arose as a result of the Bangladeshi war of independence.[181] This migration began in 1947. It reached its maximum in 1971. From then on, it continued this way.[182] There are estimates that the total number of persons who migrated from Bangladesh to Assam between 1971 and 1981 was around 1.8 million.[183] The scale of migration was so high that there was a fear that the very character of the region was under threat, for, the "whole character, cultural and ethnic composition of the area" was changed.[184] The situation in Assam was complex. In February 1980, the All Assam Students Union (AASU) expressed "their profound sense of apprehensions regarding the continuing influx of foreign nationals into Assam and the fear about adverse effects upon the political, social, culture and economic life of the State".[185] They sought for the migrants from Bangladesh to be deported. The Assam Accord was a memorandum of settlement between the Government of India and the representatives of the AASU and the All Assam Gana Sangram Parishad (AAGSP) who led the Assam agitation. In this, the Government committed itself to take Constitutional, legislative and administrative safeguards for the purpose of protecting and promoting the culture, social, linguistic identity and heritage of the Assamese.[186] It also promised to secure the international border against infiltration.[187]

Consequent to the Accord, two amendments were made to the Citizenship Act. An amendment in 1985 introduced a provision, i.e., Section 6A, specific to Assam. It excludes persons who enter Assam after 25th March 1971, from citizenship. Another amendment was made in 1986, which is discussed in the coming paragraphs.

With the passing of the Citizenship Amendment Act of 2019, protests have risen in Assam from a standpoint different from that of the rest of India. The grievance of the people of Assam lies in that the Amendment will lead to a dilution of the Assam Accord, under which the Government undertook to protect the state against infiltration.

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[181] Leah Varghese & Harish Narasappa, *Contestations over Indian Citizenship: An Analysis of the Citizenship (Amendment) Bill, 2016*, 31 NATL. LAW. SCH. INDIA REV.157, 165 (2019).
[182] JAYAL, *supra* note 69, at 63.
[183] *see* Pratik Dixit, *The Citizenship Debate in India: Securing Citizenship for the Stateless,* (April 4, 2021)(Available at SSRN: https://ssrn.com/abstract=3819159 or http://dx.doi.org/10.2139/ssrn.3819159), at 6.
[184] SarbanandaSonowal, as quoted in JAYAL, *supra* note 69, at 65.
[185] The Assam Accord, Aug. 15, 1985, at para. 3.
[186] *Id*, at para. 6.
[187] *Id*, at para. 9.1.

5.4.2. The Citizenship (Amendment) Act, 1986 :

The importance of the Assam Accord for the purpose of this thesis lies in the result that it had on the Citizenship Act of 1955. It led to a "significant restructuring" of the Act.[188] The citizenship law in India took a turn since 1986, when an amendment was made to the Citizenship Act by virtue of which, not all who were born in India were to be granted right to Indian citizenship. The citizenship law began to be tightened up and an attitude of drawing a narrower boundary became visible. There was a deliberate departure from the inclusive attitude which was existent at the time of making the Act in 1955. The large scale migration put pressure on the limited resources. In order to be more exclusive in its criteria, descent began to be made an additional requirement in addition to birth. According to Jayal, "since the mid-1980s, the laws on citizenship have been repeatedly amended moving it irrevocably in the direction of a more restrictive *jus sanguinis* principle of citizenship".[189]

The Citizenship Amendment Act of 1986 amended Section 3, the ultimate *jus soli* provision, by dividing the persons born in India into two categories, that is, those born before and those born after the commencement of the amendment Act. For those born before the amendment, the previous position continued, that is, mere birth was sufficient for citizenship. However, for those born after the commencement, an additional condition was imposed for citizenship by birth: either of his parents had to be an Indian citizen at the time of birth[190].

The Bill for amending the 1955 Act had been introduced with the explicit objective of making the citizenship law "more stringent".[191] This was criticised as a 'retrograde measure'[192]. The classification of people based on the date of commencement of the Act was argued to be arbitrary and repugnant to Article 14. It was condemned as a law which could result in

[188]Hilal Ahmed, *Making Sense of India's Citizenship Amendment Act 2019: Process, Politics, Protests,* 114Asie.Visions,Ifri, (June 2020), available at (http://www.ifri.org/sites/default/files/atoms/files/ahmed_amendment_act_complet_2020. pdf) at 15.
[189]JAYAL, *supra* note 69, at 22.
[190]*see* The Citizenship (Amendment) Act, 1986, S.2
[191] Speech of Shri P.Chidambaram, Lok Sabha, on 10th November, 1986, while moving the Bill for consideration by the House at Vol. XXI, No. 05 Lok Sabha Debates, Seventh Session, Eighth Lok Sabha, at 419.
[192] Speech of H.A.Dora, *Id,* at 420.

statelessness, which is "a very serious matter".[193] On the other hand, others supported it, and it was ultimately passed and became law.

5.4.3. The Citizenship (Amendment) Act, 2003:

The next major change in the law happened in 2003. It received presidential assent and became a law in 2004. The citizenship law was further tightened. It was in this Amendment that the concept of 'illegal migrant' was brought in. Section 3 was once again substituted, and a third additional class was created. Those born after the commencement of this Act could qualify for citizenship only on fulfillment of either of two conditions, namely,

(a) both of his parents are Indian citizens.

(b) either one of the parents is an Indian citizen and the other is not an illegal migrant.[194]

The effect of this is that children, either of whose parents is an illegal migrant will not qualify for citizenship if they were born after the commencement of this amendment. Thus, a more exclusionary criteria was introduced in order to deal with the pressure created by the large scale illegal influx of migrants. These persons were also kept from citizenship by naturalization and by registration. The impediment created by this amendment is indeed significant. For, it places membership in the Indian polity completely out of reach of the 'illegal migrants'.

Since many of those who would be defined an 'illegal migrant' were Muslims, there are views that, in effect, this amendment introduced a 'religion-based exception' to citizenship by birth.[195] The intention behind this amendment is not clear. Though it is hard to conclude with finality that the Amendment was a result of anti-secular ideas, it does appear to be so. However, any such idea behind the amendment could have only been clandestine. For, atleast in terms of express terminology, there was no mention of any religion.

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[193] Speech of Shri Somnath Chatterjee, *Id*, at 431.
[194] *see* Citizenship Act, as amended in 2003, S.3(1)(c).
[195] *see* Niraja Gopal Jayal, *Reconfiguring Citizenship in Contemporary India* 42 SOUTH ASIA: JOURNAL OF SOUTH ASIAN STUDIES, 33, at 35 (2019). (Available at http://doi.org/10.1080/00856401.2019.1555874)

5.4.4. 2004 Amendment to Citizenship Rules :

While the above changes to the citizenship law came by way of statutes, in 2004, the Citizenship Rules, 1956, made under the 1955 Act was amended. A new Rule 8A was introduced, which was to be applicable to the states of Gujarat and Rajasthan. It came as a result of several waves of migrations that happened into these two states[196]. This new rule, mentioned the district collector as the authority to register certain persons as citizens. Rule 8A(1)(a)(i) refers to "Pakistan nationals of minority Hindu community….". Rule 8A(1)(a)(ii) mentions "minority Hindus with Pakistan citizenship". Clause (2) uses similar terms. This was a very clear and sad departure from the practice of the Constitution makers and previous Parliaments, in avoiding explicit mention of any religion in provisions relating to citizenship.The effect of this provision was a 'special dispensation made for "minority Hindus with Pakistan citizenship" through the exceptional delegation of citizenship-conferring powers on District Magistrates'.[197]

The significance of this amendment in the context of this thesis lies in the explicit mention of religion as a factor in determining citizenship. In her article, *Reconfiguring Citizenship in Contemporary India,* Niraja Gopal Jayal writes,

> "Until 2004, the religious identity of migrants had only been implicitly signaled in the Citizenship Act; it was never explicitly mentioned. The 2004 Amendment to the Citizenship Rules dispensed with this coyness"[198]

All along, even when the intended beneficiaries of a legal provision were persons of one or more religions, no express mention was made of any particular religion.

Apart from the above, there were other amendments to the Act and rules. For instance, the 2005 Citizenship (Amendment) Act introduced the special status of 'Overseas Citizen of India'. These, however, are not directly related to the object of this work.

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[196] Leah Varghese & Harish Narasappa, *Contestations over Indian Citizenship: An analysis of the Citizenship (Amendment) Bill, 2016,* 31 NATL. LAW SCH. INDIA REV. 157, at 167 (2019).
[197] JAYAL, *supra* note 69, at 67-68.
[198] Jayal, *supra* note 195, at 36.

5.4.5. Amendments to allied Rules in 2015:

In 2015, the Government introduced changes in two rules, which are in almost similar terms as the Citizenship Amendment Act, 2019.

Firstly, Passport Rules were amended. Rule 4 of the Passport (Entry into India) Rules, 1950 lists certain classes of persons who were exempt from the requirement to be in possession of a valid passport. It was amended by way of a notification in September, 2015[199]. An additional class of persons was included, namely, "persons belonging to minority communities in Bangladesh and Pakistan, namely, Hindus, Buddhists, Jains, Parsis and Christians, who were compelled to seek shelter in India due to religious persecution or fear of religious persecution", if they had entered before 31st December, 2014. Thus, these persons could enter without valid passport.

Similarly, the Foreigners Order, 1946 was amended by way of the Foreigners (Amendment) Order, 2015[200]. Here again, the above quoted class of persons were held exempt from the application of the Foreigners Act and the orders made under it.

In this regard, Farrah Ahmed remarks, "While the 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."[201]

Thus, several years before the CAA, 2019, the subordinate legislations started making similar law, which brought religion based criteria in matters connected to citizenship.

5.5. Political philosophies of the period:

The idea of 'Hindu Nationalism' sometimes came to the fore during this period. As seen already, during the making of the Constitution, it was suggested by some, that persons of the Hindu religion must receive a preference in being granted citizenship status. This mellowed down for some time. But, Organisations like the Hindu Mahasabha, Rashtriya Swayamsevak Sangh and the Bharatiya Jan Sangh held on to the idea of religious nationality, with the consequent idea that, Hindus have a natural right to Indian citizenship. For instance, the Bharatiya Janata Sangh

[199] G.S.R. 685(E) Ministry of Home Affairs, Notification dt. 7th Sept, 2015.
[200] G.S.R. 686(E) Ministry of Home Affairs, Notification dt. 7th Sept, 2015
[201] Farrah Ahmed, *Arbitrariness, Subordination and Unequal Citizenship,* 4 INDIAN LAW REV. 121, at 124 (2020)

in its 1967 manifesto mentioned that there has been an exodus of 'non-Muslims, particularly Hindus' from Pakistan due to the anti-Hindu policy there. It promised to expedite the implementation of schemes to rehabilitate and 'compensate' them.[202] It further promised that citizenship rights would be conferred in the course of rehabilitation.[203] Migrants who were Hindus were treated differently from Muslims by the proponents of the Hindu Nationalist idea. In his article, *Making Sense of India's Citizenship Amendment Act, 2019*[204], Hilal Ahmed brings out the Hindu nationalist position from the 1950s to the 1990s and then in contemporary India. He says,

> Muslim migrants were addressed as *Pakistani infiltrators* while Hindus and Sikhs were addressed as *refugees.* This distinction underscored the Hindu nationalist argument that India was a natural homeland for Hindus… the plight of Hindus in Pakistan was used strategically to target Indian Muslims, who were called Pakistani spies or the fifth column.[205]

This seems to be the underlying philosophy leading up to changes in law from its initial secular position.

During the Assam movement, large scale migration was opposed, for the strain that it placed on the local resources. It was also condemned from a cultural standpoint for the dilution it brought about on the local culture. Religion of the migrants was irrelevant and it was not a matter of concern to the protesters. However, a religious flavour was given to this by political parties, which distinguished migrants into 'refugees' and 'infiltrators' (as mentioned above) on the basis of the religion of such migrants.[206] This way, the Hindu Nationalists made use of the situation for advancing their ideology. It is also alleged that they gave escalated figures regarding the number of migrants who are Muslims, in order to further their agenda.

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[202]*see* Bharatiya Jan Sangh, Election Manifesto 1967. (available at http//library.bjp.org/jspui/handle/123456789/2613), para. 58.
[203]*see id.* at para 59.
[204]Hilal Ahmed, *supra* note 188 .
[205]*Id.*, at 10.
[206]Dixit, *supra* note 183, at 8-9.

5.6. Conclusion:

After the constitution was made, the Parliament, by way of Citizenship Act, 1955, chose a very progressive concept of citizenship. The Constitutional vision was considered as the reference point. However, the amendments to this Act and to the rules relating to citizenship, were regressive steps. With every intervention after the making of the Citizenship Act in 1955, the tendency to exclude got higher and higher. This was always in response to the number of persons migrating illegally across the borders to enter India. As was repeatedly pointed out in Parliament, the better way to deal with this problem would have been to prevent such infiltration. Instead, the path chosen was to narrow down the borders of membership in the Indian political society. Such policies of exclusion led not only to a departure from the 'universal', 'cosmopolitan' and 'democratic' conception of citizenship that was emphasised by the framers, but also led to much ambiguity, leaving room for arbitrariness in the exercise of discretionary powers by the authorities on whom such decision making powers were vested.

However, at least the secular nature of citizenship was preserved to some extent till the 2004 amendment to the Citizenship Rules. The 2004 amendment to the Citizenship Rules, along with the 2003 amendment to the Citizenship Act (which excluded children of illegal migrants), according to Jayal, "draw our attention to the salience of religious identity in the construction of legal citizenship".[207][208] The intervention by means of the Citizenship (Amendment) Rules, 2004 acted as a precursor to Citizenship (Amendment) Act, 2019, for introducing religion as a criteria in determining citizenship. At this point, India departed from the constitutional choice of secular citizenship. The 2015 amendments to the Foreigners Order and the Passport Rules further threatened the secular character of our citizenship. This was the state of the citizenship law when the Citizenship (Amendment) Act, 2019 was enacted.

Clearly, the Citizenship Amendment Act, 2019,significant as it is, was not a sudden leap from the constitutional ideal of citizenship. On the other hand, it was preceded by various steps ultimately leading up to it.

[207] JAYAL, *supra* note 69, at 68.

[208] However, her argument is that religious identity was important for determining Indian citizenship all the time even at the time of making of the Constitution, though not in explicit terms.

Chapter VI

ANALYSIS OF THE CITIZENSHIP (AMENDMENT) ACT, 2019

6.1. Introduction:

The Government introduced the Citizenship (Amendment) Bill in Parliament with a view to accommodate persons who belong to Hindu, Sikh, Buddhist, Jain, Parsi or Christian Communities in Afghanistan, Bangladesh and Pakistan into India and fast tracking the procedure for grant of citizenship of such persons. This is one of the most controversial legislations of the century, inviting wide spread protests throughout the country for varied reasons. While exclusionary tendencies have been there in Indian citizenship law, this is the first time in Indian primary legislation that the Parliament has introduced explicit religion based criteria. This development has drawn the attention of many not only within India but also abroad.

This chapter begins with a description of the journey of the Citizenship Amendment Bill since its introduction in the Lok Sabha in 2016, until it was finally passed. The provisions in the amending act have been analysed to see how the citizenship law is modified by it. The government's defence of the CAA has been examined. The criticisms against the CAA have been explained especially in the way it contradicts the Constitution as well as International law. The CAA drew a reaction from various fronts. The responses of the common public, the state governments, the Supreme Court and the International civil society has been elaborated upon in this chapter.

6.2. The Making of CAA, 2019:

The Government first placed the Citizenship (Amendment) Bill before Parliament on 15 July, 2016. A motion was moved for referring the Bill to a Joint Committee composed of members of both Houses of Parliament on 11th August, 2016. A similar motion was moved in the Rajya Sabha on 12th August, 2016. As a result, the Bill was referred to a Joint Committee composed of 20 Lok Sabha members[209] and 10 Rajya Sabha Members[210] under the Chairmanship of Shri

[209] *see* Motion in Lok Sabha for Reference of Bill to Joint Committee, Appendix I, Report of the Joint Committee on the Citizenship (Amendment) Bill, 2016, at 84.

Rajendra Agrawal, with a mandate to report on it by the first day of the last week of the Winter Session that year. However, six times, the Committee sought extension of time[211].

The Committee obtained depositions from witnessed both official and non-official. It considered the Bill and gave its stamp of approval with only a few minor changes. The Committee, in its report, expressed satisfaction about the various defenses to the Bill raised by the Government. It expressed that the large scale migrations into India especially in the North Eastern States was leading to a visible impact on 'our demographic pattern'.[212]

The Report of the Joint Committee was presented before the Lok Sabha and laid in the Rajya Sabha on 7th January, 2019. On 8th January, the Lok Sabha considered the Bill. There was some criticism even then, with a request to make the Bill a secular one.[213] It was argued that the citizenship in a secular state could not be determined on the basis of religion.[214] While it was pending for consideration in the Rajya Sabha, the 16th Lok Sabha was dissolved. Therefore, the Bill lapsed.

After the Constitution of the 17th Lok Sabha, once again the Citizenship Amendment Bill was introduced with a few changes to it, on December 9, 2019. The lower House passed the Bill the next day. This time the Rajya Sabha also passed the Bill on 11th December. On 12th December, the President of India gave his assent to the Bill. By way of a notification,[215] January 10, 2020 was appointed as the day for the Act to come into force.[216]

6.2.1. **Dissent Notes of JPC Members:**

It is significant that the decision of the Joint Parliamentary Committee approving the Amendment Act with minor changes, was not unanimous. Several members of it disagreed with

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[210] Refer Motion in Rajya Sabha for Reference of Bill to Joint Committee, Appendix II, *id.*, at 85.
[211] 17 November, 2016; 27 March, 2017; 27 July, 2017; 29 December, 2017; 15 March, 2018; 31 July, 2018. *see id.* at 87.
[212]*see* Report of the Joint Committee on the Citizenship (Amendment) Bill, 2016 (January, 2019), at 11. (para. 1.6) (*hereinafter,* JPC Report)
[213]*see* for instance, Speech of Saugata Roy, Lok Sabha, on January 8, 2019, Lok Sabha Report, Sixteenth Series, Vol. XXXV, Sixteenth Session, 2018-2019/1940 (Saka), No. 17, Tuesday, January 08, 2019/Panusha 18, 1940 (Saka)
[214]*see id.* ,speech of Md. Salim, at 224.
[215] The Gazette of India, Extraordinary, CG-DL-E-10012020-215314, January 10, 2020.
[216]*Citizenship Amendment Act comes into effect from Jan. 10,* THE HINDU, Jan. 10, 2020, http://www.thehindu.com/news/national/citizenship-amendment-act-comes-into-effect-from-jn-10/article30537592.ece

the final report and gave their Dissent Notes which are annexed to the Report. These members objected to the passing of such a phenomenal measure without proper democratic processes of debate. Shri Bhartruhari Mahtab pointed out the implications of the Bill in the State of Assam. Two members[217] sent similar dissent notes. In this, they stated how an amendment to the Bill had been suggested by them, but which was defeated by vote. In his dissent note, Md. Salim raised several points. He pointed out that, a right cannot be religion or country or origin specific. Apprehension was expressed by some members that it could result in an ethnic division in the state of Assam and the North Eastern countries. Shri Adhir Ranjan Choudhary pointed out that the Statement of Objects and Reasons did not explain the rationale behind the various classifications in the Bill. It was argued by him to be contrary to our secular and republican foundations; and against constitutional morality.

The vindication of the CAB by the Joint Parliamentary Committee has been condemned as just an agreement to all the views of the government. Most of the reasons given by the government were blindly accepted and no proper reasoning has been given for many of the conclusions reached by it. As the Committee (as was the Lok Sabha) was primarily composed of persons from the ruling party, the differences of opinion, resolved through majority vote, resulted in the decision of the JPC being favourable to the Bill. The Committee which ought to have considered the Bill from a legal angle, seems to have considered it from a political angle.

6.3. Review of the Amendment Act:

The Bill touched upon two matters: fast tracking of citizenship for certain persons; and some changes to the procedure regarding Overseas Citizenship. It is the first aspect which is of relevance to the debate regarding the threat posed by the Bill on secularism. The provisions are analyzed herein.

6.3.1. Exception from the definition of "illegal migrants":

6.3.1(a) Pre-Amendment Position:

As mentioned in the previous chapter, in an amendment in 2003, the Parliament had brought in the concept of 'illegal migrant' into the Citizenship Law. An illegal migrant is a person who has

[217]Javed Ali Khan and Derek O' Brien.

either entered India without a valid passport, or a person who, though he was in possession of a valid passport while entering, overstays beyond the permitted time. The implications of being defined as an 'illegal migrant' are as follows:

1. Section 3 of the Act provides for citizenship by birth. Since 2004, if even one of the parents of a person born in India was an illegal migrant, he is excluded from citizenship by birth[218].

2. Section 5 deals with Citizenship by Registration to persons of Indian origin. The provision was also amended in such a way that only persons who are not illegal migrants are eligible for citizenship through this route. Thus, even if he is a person who is of Indian origin, as long as he is an illegal migrant, he is excluded from citizenship by registration.[219]

3. Section 6, dealing with citizenship by naturalization had also been amended in such a way that illegal migrants were excluded from citizenship by naturalization. The effect of this will be that, a person who is an illegal migrant is incapable of naturalization no matter how long he has stayed in India.

Thus, the 2003 Amendment placed the illegal migrants as well as their children completely outside the purview of membership to the political community of India.

6.3.1(b)**Post-Amendment position:**

By way of CAA, 2019, the definition of 'illegal migrants' has been changed by the exclusion of certain persons from it. A proviso has been introduced to Section 2(1)(b), which says,

> "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 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 or from the application of the provisions of the Foreigners Act,

[218] The Citizenship Act, 1955, Section 3(c)(ii).
[219] *id.* Section 5(1); it says "…any person not being an illegal migrant…"

1946 or any rule or order made there under, shall not be treated as illegal migrant for the purposes of this Act;"[220]

Thus, in order to be covered by this provision, a person should be: firstly, a Hindu, a Sikh, a Buddhist, a Jain, a Parsi or a Christian. Secondly, he/she should be a person from one of three countries (country of origin), namely, Afghanistan, Bangladesh, or Pakistan. Thirdly, he must have entered into India on or before the cut-off date, that is, 31st December, 2014. Fourthly, he must have been exempted by or under Section 3(2)(c) of the Passport (Entry into India) Act, 1920; or exempted from the application of the Foreigners Act, 1946, or any sub-ordinate legislation made under it. This last requirement makes the class of persons coming under the proviso a closed group.

Thus, this class of persons escape the implications of an 'illegal migrant' on themselves as well as their children.

6.3.2. **Conferment of Citizenship:**

Further, **a new Section 6B** was inserted. By virtue of this, an application could be made for the grant of a certificate of registration or certificate of naturalization by a person covered by the proviso to Section 2(1)(b) quoted above, to the Central Government or any authority which it may specify[221]. And, once such a person has obtained the certificate of registration or of naturalization, he is deemed to be a citizen from the date of his entry.[222] This way, the citizenship of this person relates back to the day he entered into India.

6.3.3. Abatement of certain proceedings:

As these persons were, till the amendment, 'illegal migrants', there is a possibility that they are involved in proceedings regarding their illegal migration or citizenship. In this regard, another privilege has been conferred on the persons excluded by the Proviso to Section 2(1)(b): once citizenship has been conferred by virtue of this amendment, proceedings as mentioned above stand abated.[223] The Act also ensures that the pendency of such proceedings does not lead to

[220] Inserted by Section 2 of the Citizenship (Amendment) Act, 2019.
[221] Section 6B(1) of the Citizenship Act, 1955, as amended in 2019.
[222] Section 6B(2) of the Citizenship Act, 1955, as amended in 2019.
[223] Section 6B(3) of the Citizenship Act, 1955, as amended in 2019.

disqualification from citizenship, resulting in the rejection of the application for citizenship made by such persons.[224]

6.3.4. **Fast tracking of citizenship by Naturalization:**

Another major change brought about by CAA, 2019 is that the grant of citizenship by naturalization has been expedited for the specified communities. According to Section 6(1) of the Citizenship Act, the persons who are qualified for citizenship by naturalization can apply for it. The necessary qualification for naturalization have been listed under the Third Schedule to the Act. Clause (d) of this Schedule puts forth the requirement that during the fourteen years immediately preceding the period of twelve months of mandatory residence in India[225] (which is immediately preceding the date of application), that person must have been residing in India or in the service of the Government of India, or a mixture of both, for not less than eleven years. That is, for a total of eleven out of the period of fourteen years, he must have been resident in India.

The CAA has introduced an amendment[226] to this by introducing a proviso in favour of the persons described in the proviso to Section 2 (1)(b). Through this proviso, the period of mandatory minimum aggregate residence for such persons has been reduced from eleven years to five years. For these persons, naturalization has been accelerated.

Thus the Amendment not only takes away the disadvantages of being an illegal migrant, but also confers special privileges on the persons covered by the newly introduced proviso to Section 2(1)(b). This way, they are at an advantage even in comparison with persons who are not illegal migrants.

The tribal area of North Eastern States, namely, Assam, Meghalaya, Mizoram and Tripura; and the area covered under the "Inner Line"[227] have been exempted from the application of Section 6B.[228]

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[224] Proviso to Section 6B(3) of the Citizenship Act, 1955, as amended in 2019.
[225] Clause (c) of the Schedule requires that throughout the period of twelve months immediately preceding the date of application, the applicant must have resided in India or been in the service of the government.
[226] Amendment inserted by way of Section 6 of the Amendment Act, 2019.
[227] notified under the Bengal Eastern Frontier Regulation, 1873.
[228] The Citizenship Act, 1955, S. 6B(4) as amended in 2019.

6.4. The case for CAA:

The Central Government defended its Bill through the statement of objects and reasons to the Bill; while presenting the Bill in the Houses of Parliament; and in its statements to the Joint Parliamentary Committee.

In its Statement of Objects and Reasons, the government said that transborder migration between India and areas now under Pakistan, Afghanistan and Bangladesh, is 'a historical fact'.[229] According to it, "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 case of the Government is that these persons belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community from Afghanistan, Bangladesh or Pakistan need a special regime for governing matters relating to their citizenship.[230] As they were not able to prove their Indian origin, they were not able to claim citizenship by registration under Section 5. As they otherwise had to wait for a long period to claim citizenship by naturalization, the government sought to reduce this period.[231]

Initially, the delegated legislations of 2015 made mention of persons only from Pakistan and Bangladesh. However, the CAA has included Afghanistan as well. This has been justified by the Home Ministry stating that multiple attacks have been made "in Indian interests in Afghanistan by Pakistan sponsored Haqqani Network, Taliban, etc", and that many from the minority communities had already come to India from Afghanistan due to religious persecution.[232]

This way, the government defended the mention of Bangladesh and Pakistan on the ground that they earlier constituted part of united India; and it defended the inclusion of Afghanistan, on another ground, that is, existence of persecution there.

Non-inclusion of Srilanka and Myanmar, that is, other neighbouring countries, was also defended on the argument that, such refugees would be sufficiently dealt with under the Standard Operating Procedure issued on 29th December, 2011.[233] This SOP dealt with foreigners who

[229] *see* Statement of Objects and Reasons to the Citizenship Amendment Bill, 2019, para. 3.
[230] *see Id.,* para. 5.
[231] *see Id.,* para. 6.
[232] *see supra* note 212, at 48.
[233] *see Id.,* para 2.6, at 36.

were persecuted on the basis of race, religion, sex, nationality, ethnic identity, membership of a particular social group or political opinion.

To the argument against exclusion of other types of persecution (like, persecution on the basis of gender orientation, political views, etc), once again the above stated SOP of December, 2011 was referred to as sufficient to deal with such cases.

The Ministry of Home Affairs opposed the argument that the Bill violates Article 25 & 14 (as it mentions only six communities), with the statement that before finalising the Cabinet Note, they had obtained the view of the Ministries of Law and Justice, External Affairs and Overseas Indian Affairs; and also, the Cabinet Secretariat (R & AW) and the Intelligence Bureau.[234] It is not clear as to how the mere act of obtaining the views of these bodies could justify this.

The Government constantly claimed that the Parliament had plenary powers under Article 11 with regard to deciding on any matter regarding citizenship. According to it, that there were absolutely no fetters on this power.

6.5. The Case against CAA:

The CAA has been criticised for various reasons, especially that it is not compatible with the principles of secularism and equality. This section is an analysis of the arguments against CAA. The amendment is analysed herein in light of Constitutional principles and International Law.

6.5.1. **Issues with the CAA:**

6.5.1(a)**Choice of Religion & Country of origin:**

In India, after Hinduism, Islam is the second in line with respect to the number of persons who follow it. Muslims constitute the largest minority community of India. The Amendment makes mention of persons who are Hindus, Sikhs, Buddhists, Jains, Parsis and Christians. The non-mention of the Muslim community alone technically amounts to an exclusion of it, as if by name.[235] According to Hilal Ahmed, exclusion of Muslims happens in two ways. Firstly, it

[234] *see* JPC Report, para. 2.43, at 50.
[235] An argument in this line was made by Shri P.K.Kunhalikutty in the Lok Sabha on Dec. 9, 2019, Seventeenth Series, Vol. Vi, Second Session, 2019/1941 (Saka) No. 16, Monday, Dec. 9, 2019, at 119.

"highlights the persecution of non-Muslims in neighboring Muslim countries and, at the same time, does not include Muslims in the list of preferred migrants".[236]

There are an increasing number of persons who are atheists and of those who do not follow any religion in particular. The non-inclusion of atheists has also been criticised by some.[237] Jews have also been left out.

Various assumptions underlie the Citizenship Amendment Act, 2019. For instance, there is an assumption that persons of Muslim community are nowhere persecuted. This, however, is not true. In this regard, one of the MPs in the Lok Sabha gave the illustration of Malaya and why she had to flee from her country.[238] Persons belonging to several Muslim communities face persecution. Some of such Muslim minorities are, the Ahmadis in Pakistan, Persian and Hazaras in Afghanistan and Rohingyas in Bangladesh.[239]

In its SOR, the Government has said that the mentioned countries had a specific state religion. But even Myanmar and Sri Lanka, also our neighboring states, have a specific state religion, namely, Buddhism. Yet, these countries have not been included.

Persecution on the basis of religion is not the only type of persecution. Some are persecuted for their political ideologies; some for their sexual orientation; and some on the basis of language and ethnicity. For instance, the Sri Lankan Tamil refugees faced persecution in Sri Lanka on the basis of their ethnic and linguistic affinities. Such categories of persecution have been left out.

As pointed out in the previous section, the government replied to the attack on the inclusion of only certain communities and the inclusion of only one kind of persecution, saying that the Standard Operating Procedure of 2011 would be sufficient for the rest. The question arises as to why then, the specified communities should be given special treatment. The SOP could very well suffice for the refugees from Afghanistan, Bangladesh and Pakistan as well.

[236]Ahmed, *supra* note 188, at 22.
[237]*see* for instance, speech of Dhayanidhi Maran in Lok Sabha, on Dec. 9, 2019, *supra* note 235, at 326.
[238] Speech of Shri S.Venkatesan in the Lok Sabha on Dec. 9, 2019,*supra* note 235, at 376.
[239]*see* Lok Sabha Debates, on Dec. 09, 2019, *id.*, at 485.

6.5.1(b)**Combined effect of NRC & CAA:**

Another major criticism is that the combined effect of the CAA along with the NRC could be catastrophic. The CAA in itself, as claimed by the government, does not deprive anyone of their citizenship, but only grant it on some. But, there is a fear among the Muslim community that, if CAA is followed by NRC, many in the said community may get excluded due to all the evidentiary requirements. This is based on the experience in Assam, where the introduction of NRC led to a situation where a large proportion of its population was made stateless due to lack of documents to prove their citizenship. There is a fear that such a thing could happen in entire India. And when it happens, while the persons privileged under the CAA (Hindus, Sikhs, etc) will have a route to be protected, Muslims would be left out. However, this problem is not unique to Muslims, as not all persons of the other religious communities are eligible for protection under the CAA. That being so, this argument is not directly relevant in the analysis of CAA in the context of secularism.

6.5.1(c)**Miscellaneous:**

There are arguments that it is sufficient to provide asylum to these refugees and that it is not necessary to confer citizenship on them.[240]

Though the Statement of Objects and Reasons mentions that the persons of the specified communities were to be accommodated as they faced persecution in their countries of origin, the provisions as such, make no mention of 'religious persecution' as the reason due to which they could be excluded from being categorised as 'illegal migrants'. As a result, any person from the specified communities, even those who come to India for reasons other than religious persecution are covered by it.

The Bill has mentioned December, 2014 as the cut-off date. If the object of the Act is to protect persons affected by religious persecution, then there is no reason to afford protection only to those who entered before the cut-off date.

[240]*see* p.2, Dr. Nagendra Nagerwal, *Global Implications of India's Citizenship Amendment Act, 2019,* ResearchGate, January 2020, Available at http://www.researchgate.net/publication/338673204_Global_Implications_of_India's_Citizenship_Amendment_Act_2019

6.5.2. Departure from Constitutional values:

Any law passed by the Parliament must stand the test of fundamental rights and the basic structure of the Constitution. The argument that the power of the Parliament is absolute and unlimited in regard to citizenship matters, does not stand. The constitutional provisions on citizenship are not to be read in a vacuum. It is inextricably mixed with the general tone of the Constitution. Part II of the Constitution which defined citizenship at the commencement of the Constitution, went seamlessly with the overall spirit of the Constitution. Any addition or amendment to the citizenship law must also conform to the morality of the Constitution with all its provisions on equality, religious freedom and liberty. Article 11 does not have an overriding effect on all other constitutional provisions and its basic structure. The following argument was made by Shri Somnath Chatterjee in the Lok Sabha when the previous 1986 Bill was under discussion. It is relevant in the present context too. He said,

> "….. I said, it has to be subject to the Article 14 of the Constitution. Now, it says, notwithstanding anything in the foregoing provisions of this part, namely Part 2, Article 5 to 10, whatever is there laws can be made. But that does not mean that you pass any and every law. *The founding fathers of the Constitution did not contemplate that you will pass thoughtless inhuman and barbaric laws*"[241] (emphasis supplied)

The following are some of the ways in which the Constitution confronts the CAA with its values:

6.5.2(a) The Idea of India:

India was founded on the principles of liberty, equality and fraternity. The CAA is a threat to all three. The partition raised a question as to whether religion was relevant for Indian nationality. However, contrary to Pakistan, the choice of the Constitution makers in India is clear that the India would favour no particular religion. In this regard, the speech of Dr. Shashi Tharoor in the Lok Sabha is enlightening. He said,

> The nationalist movement did not divide on ideological grounds or on regional grounds or on geographical grounds or on linguistic grounds. It divided on one simple principle:

[241] Speech of Shri Somnath Chatterjee, in the Lok Sabha, on Nov. 10, 1986, Lok Sabha Debates (English Version), Eighth Series, Vol. XXI, No.05, at 434.

should religion be the determinant of our nationhood. The fact is, those who believe their religion should determine nationhood, they formed Pakistan. That was the idea of Pakistan.[242]

He went on to point out how our leaders, Gandhi, Nehru and Ambedkar all considered that religion cannot determine nationhood. He remarked that the effect of passing of such a Bill will be that "it will mark the victory of Mohammad Ali Jinnah's thinking over that of Mahatma Gandhi."[243]

India is a democracy, and a democracy necessitates the existence of values like inclusion and progressiveness. But, this amending legislation is exclusive and regressive. There may be some justification for an exclusionary policy, if such a step was necessary for socio-economic reasons. Therefore, there could be some justification for the exclusionary policies since 1980s. But, there could be no justification at all for an exclusionary exercise on the basis of religion.

6.5.2(b) Secular values

There is no doubt that the Constitution set up a secular state. This is clear from an analysis of its provisions, as well as from the Constituent Assembly Debates.[244]

The CAA promotes the Hindu nationalist idea that India is the natural home for the Hindus; that, therefore, the Hindus in any part of the world have a claim on Indian citizenship, irrespective of whether or not they are of Indian origin. As one of the members of Parliament pointed out in the debate, the Bill is "an open invite to all the Hindus living in the neighbouring countries to come to India". But on the other hand, it is "a threatening call to the Muslims living inside India".[245]

CAA was brought in at a point where, the minority communities in India are feeling threatened by the policies of the Government. It is an irony that the Government, while creating unease among its own minorities, shows concern for the minority communities in other countries.

According to **Article 25**, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion. This is subject only to public order, morality,

[242] Speech of Dr.Shashi Tharoor, in the Lok Sabha, on Dec. 9, 2019, *supra* note 235 , at 126.
[243] *Id.*, at 482.
[244] *see* Chapter 2, *supra,* for further discussion on secularism and the Constitutional choice of it.
[245] Speech of Shri S.Venkatesan in the Lok Sabha on Dec. 9, 2019, *supra* note 235, at p.377.

health and to the other fundamental rights. The words "all persons" and "equally" are notable here. The term 'persons' include citizens as well as non-citizens. Thus, the article guarantees the religious freedom of non-citizens too. Secondly, the phrase "equally entitled to", mandates that the government not show partiality to any particular religion or discriminate against the other. the CAA does exactly that. It treats persons of different religious communities in different ways.

6.5.2(c)Concept of Citizenship:

In stark contrast to the conception of citizenship at the time of making of our Constitution[246], the CAA, 2019 is "regressive", "diversionary" "exclusionary" and harmful to the unity and integrity of India.[247] As was pointed out in the previous chapter, this was the first time in Indian history when Parliament has brought in religion as a factor to determine citizenship.

The Constitution clearly chose *jus soli* citizenship as a more progressive and universal idea. But sadly, we have gradually departed from it[248] and the CAA is the ultimate step in this direction.

Also, the terminology of Part II indicates that the Constitution views citizenship as a right. The titles to Articles 6, 7, 8, 10 and 11, use the term "right(s) of citizenship". With this regime of exclusion based on ascriptive criteria, we seem to have moved away from this idea of citizenship as a right.

6.5.2(d) Equality

Article 14 of the Constitution guarantees to all persons, equality before the law and equal protection of the law. The courts, under this Article, have held arbitrariness to be opposed to the Constitution. Whenever a legislation makes some categorisation, two things must be proved for it be a sustained as permissible by the constitution: Firstly, classification must be on some reasonable basis. Secondly, the basis of such classification must have some nexus to the object sought to be achieved. If the object of government was to grant protection to the migrants who have entered India due to persecution in their counties of origin, then there is no reason to exclude many communities undergoing similar persecution.

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[246]*see* Chapter 3, *supra* for a detailed discussion on the concept of citizenship contemplated by the Constitution.
[247]*see* Speech of Shri Adhir Ranjan Chowdhury in the Lok Sabha on Dec . 9, 2019, *supra* note 235, at 117.
[248] see Chapter 5 for details as to how the gradual change took place.

In his paper, *Secularism and the Citizenship Amendment Act,* Dr. Abhinav Chandrachud brings out five reasons for the unconstitutionality of the CAA, four of which are based on grounds of equality. Firstly, it excludes other religious communities. Secondly, it excludes other countries. Thirdly, it excludes those who entered after the cut-off date. Fourthly, it excludes other forms of persecution.[249]

6.5.3. Departure from International norms:

For a long time, International Law left citizenship matters to be decided by sovereign states. Later, especially after the World Wars, this position has changed. Hannah Arendt's concept of 'right to have rights' has awakened the world to the woes of the stateless, which necessitated the entry of International law into citizenship related decisions of states.[250] "Access to citizenship" is an evolving concept in International Law. But, what is most important for the purpose of this research, is the entry of norms that prohibit discrimination in granting citizenship. Thus, customary international law is developing in these lines, challenging discriminatory practices of states which have ascriptive criteria[251] like race or religion for determining the boundaries of political membership.

6.6. Response to CAA:

6.6.1. Response of the general public:

The Citizenship Amendment Bill led to widespread protests throughout India. The introduction of religion as a criteria for citizenship has caused fear and discomfort among the common public of India. The protests started off with minority educational institutions like Jamia Millia Islamia and Aligarh Muslim University.

Several leaders of the protests were arrested on charges of inciting violence and 'hate speech'. Sharjeel Imam, a student of Jawaharlal Nehru University, was arrested on charges of sedition in

[249]*see* Dr. Abhinav Chandrachud, *Secularism and the Citizenship Amendment Act*, 4 INDIAN LAW REV. (Jan. 4, 2020), available at http://ssrn.com/abstract=3513828, at 18-21.
[250]*see* Chapter 3, *supra* at para. 3.5
[251]*see* Chapter 3, *supra* at para 3.3.6 (discussion on ascriptive criteria for citizenship)

January, 2020, after his speech in Aligarh Muslim University.[252] Dr. Kafeel Khan, a pediatrician, was also arrested following a speech he made in AMU on the CAA. He was alleged to have committed offences under Section 153A (promoting enmity between different groups), 153B (imputations, assertions prejudicial to national integration), 505(2) (statement creating enmity, hatred and ill-will between classes) and 109 (abetment of offence) of the Penal Code.[253] Recently cases against him were quashed on procedural grounds. Khalid Saifi, an activist, was booked under the Unlawful Activities (Prevention) Act, for participating in the riots that came as a result of CAA.[254]

The protesters were unrelenting to the efforts to stop them. As a result of the protests, several people lost their lives. Police fired at protestors and many died of bullet injuries.[255]

Though a majority of the protesters were Muslims, concerned non-Muslims also joined in. The protests were characterised by activities like "long marches, sit-ins, candle light vigils, to even reports of alleged stone-pelting and arson".[256] The police responded with various measures, including "detentions, arrests, custodial torture, by ruthless lathi charges and police bullets".[257] Police brutality has been reported in Delhi's Seelampur, Nehtaur in Bijnor, Muzaffarnagar, Meerut, Rampur and other parts of UP.[258] The reaction of the government in using force to handle dissent is indeed disheartening.

6.6.2. **Response of State Governments:**

Several states immediately expressed their opposition to the passing of the CAA. Several of them have passed resolutions against it. This started with the State of Kerala, where the government

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[252]*Who is Sharjeel Imam and why is he charged with sedition?* THE HINDU, Jan. 30, 2020. Available at http://www.thehidu.com/news/national/who-is-sharjeel-imam-and-why-is-he-charged-with-sedition/article30691202..ece/amp/

[253]*Anti-CAA speech: Allahabad HC quashes criminal proceedings against Kafeel Khan*. THE HINDU, Aug. 27, 2021. Available at http://www.thhindu.com/news/national/anti-caa-speech-allahabad-hc-quashes-criminal-proceedings-against-kafeel-khan/article36121753.ece/amp/ .

[254]*Owe no explanation to anyone for CAA protest: Activist Khalid Saifi*, THE TIMES OF INDIA, Aug. 26, 2021. Available at http://m.timesofindia.com/city/delhi/owe-no-explanation-to-anyone-for-caa-protest-activist-saifi/amp_articeshow/85639201.cms .

[255]*These are the 25 people killed during the Anti-Citizenship Amendment Act Protests*, THE WIRE, Dec. 23, 2019. Available at http://m.thewire.in/article/rights/anti-caa-protest-deaths/amp

[256]Tanweer Fazal, *Good Protestor, bad protestor: The uneven police response to anti-CAA demonstrations*, THE CARAVAN, Jan. 8, 2020. Available at http://caravanmagazine.in/amp/politics/good-bad-protestor-uneven-police-response

[257]*Id.*

[258]*Id.*

passed a resolution on 31st December, 2019, close on heel with the CAA, asking that the CAA be scrapped.[259]

Similarly, in the state of Punjab, the Legislative Assembly passed a resolution seeking the repeal of the Citizenship (Amendment) Act, 2019 on 17th January, 2020. The resolution requested that equality before law be ensured for all religious groups in India.[260] In the Assembly, it was referred to as 'inherently discriminatory'.

Later, the Legislative Assembly of Rajasthan passed a resolution on 25th January, opposing the Bill, pointing out, among other things, to the fact that no provision had been made for migrants from other neighbouring countries like Sri Lanka, Myanmar, Nepal and Bhutan.[261]

Following this, the West Bengal Legislative Assembly passed a similar resolution. It highlighted the violence that came about as a result of the amendment. It said, "religion has been used as yardstick to measure eligibility to apply for Indian citizenship".[262] The cabinets of Chattisgarh[263] and Madhya Pradesh[264] have also passed resolution likewise.

There arose a controversy whether states could pass such resolutions at all. The matter was taken before the Supreme Court by Samta Andolan Samiti. The court prima facie observed that such resolutions were in the nature of the opinion of such states and that it had no force of law.[265] It is now pending before it.

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[259]*Kerala Assembly passes anti-CAA resolution in Assembly,* INDIA TODAY, Dec. 31, 2019. Available at http://www.indiatoday.in/amp/india/story/kerala-cm-tables-anti-caa-resolution-in-assembly-1632845-2019-12-31

[260]*Repeal CAA, Punjab urges Centre in House Resolution,* THE HINDU, Jan. 17, 2020. Available at http://www/thehindu.com/mews/national/other-states/punjab-assembly-moves-resolution-against-caa/article30584806.ece/amp/

[261]*Rajasthan Assembly passes Resolution against CAA,* THE HINDU, Jan. 25, 2020. Available at http://www.thehindu.com/news/national/other-states/rajasthan-assembly-passes-resolution-against-caa/article30651563.ece/amp/

[262]The Resolution as quoted in the news article, *West Bengal Assembly passes resolution against CAA,* THE HINDU, Jan. 27, 2020. Available at http://www.thehindu.com/news/national/other-states/wesst-bengal-govt-tables-anti-caa-resolution-in-assembly/articel30664646.ece/amp/

[263]*Chattisgarh cabinet passes resolution against CAA, urges PM to withdraw it,* THE NEW INDIAN EXPRESS, Jan. 30, 2020. Available at http://www.newindianexpress.com.nation.2020/jan/30/chattisgarh-cabinet-passes-resolution-against-caa-urges-pm-to-withdraw-it-2096681.amp

[264]*Madhya Pradesh becomes sixth state to pass resolution against CAA,* THE TIMES OF INDIA, Feb. 6, 2020. Available at http://m.timesofindia.com/india/madhya-pradesh-becomes-sixth-state-to-pass-resolution-against-caa/amp_articelshow/73972009.cms

[265]*States can pass Resolutions against Central Laws: Supreme Court,* THE HINDU, Mar. 19, 2021. Available at http://www.thehindu.com/news/national/states-can-pass-resolutions-against-central-laws-supreme-court/article34112706.ece/amp/; The case before the Supreme Court is W.P.(C) No. 000193 of 2021 (pending)

The State of Kerala has also filed an original suit against the Union of India under Article 131 of the Constitution questioning the Constitutionality of the CAA, 2019 as well as that of the previous sub-ordinate legislations in 2016. The petition has listed out several people groups that have been irrationally excluded from being mentioned. It mentions the sad plight of the person seeking asylum/refugee who "will be put to a situation wherein he will have to choose either the State or his religion".[266]

Recently, on September 8, 2021, the Tamil Nadu Assembly also passed a resolution asking the Central Government to repeal the amendment, as it felt that it was "not in tune with secular principles", and "not conducive to communal harmony that prevails in India".[267]

6.6.3. **Response of the Judiciary:**

As soon as the Rajya Sabha passed the Bill (Lok Sabha having already passed it), a petition was made before the Supreme Court by the Indian Union of Muslim League (IUML)[268]. Once the President gave his assent to the Bill, in a matter of hours, several petitions were filed before the Supreme Court to challenge its constitutional validity. Various parties, Members of Parliament, activists and even academics are before the Supreme Court in regard to the CAA.[269] The Court refused to stay the amendment. The matters were not listed before the Supreme Court for a very long time, and this drew criticism for its indifference towards dealing with the CAA, as well as the riot situation (which was brought to the notice of the court).[270] By December 2020, more than hundred petitions were filed seeking the scrapping of the CAA, 2019.

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[266]*see* para. 25 of the petition in the matter of *State of Kerala v. Union of India* (ORGNL. SUIT No.000002/2020)(pending)

[267]*Tamil Nadu Assembly calls for Repeal of CAA,* The Hindu, Sept. 8, 2021. Available at http://www.thehindu.com/news/national/tamil-nadu-assembly-passes-resolution-urging-centre-to-repeal-caa/article36361094.ece/amp

[268]*IUML, P.K.Kunhalikutty and ors. v. Union of India*. W.P.(C) No. 001470/2019(pending)

[269]*SC issues notice in all 60 petitions challenging Citizenship Amendment Act. No stay.* Bar and Bench, Dec. 18, 2019. Available at https://www.barandbench.com/news/breaking-sc-issues-notice-in-all-60-petitions-challenging-citizenship-amendment-act-no-stay

[270]*see* the opinion of Justice Anjana Prakash, *In its Approach to the CAA Cases, the SC has failed its own Standards,* THE QUINT, 11 December 2020. Available at: https://www.google.com/amp/s/www.thequint,com/amp/story/voices/opinion/supreme-court-approach-to-caa-cases-failure-to-list-isfailure-of-its-standards (last accessed on 2nd September, 2021)

6.6.4. International Response:

As was pointed out by one of the members of the JPC which considered the Bill, with the introduction of the CAA, we would be "back-peddling on our own tradition of a visionary and inclusive international foreign policy".[271] It has been said that this has resulted in the melting down of "India's magnificent global prestige".[272]

The CAA has been compared with draconian laws like the Nuremberg Laws of Nazi Germany, including the Reich Citizenship Law and the Law for the Protection of German Blood and German Honor which brought in racial ideas into citizenship.[273]

Not only the passing of the Act, but also the response of the Government to those who protested against the law, came under criticism in the International front. Dr. Nagendra Nagarwal, in an article on the global implications of the CAA writes that the international media started characterizing India as

> some notorious "majoritarian state" of the world where no respect of human rights of minorities, massive restrictions on religious and cultural freedoms and rampant of ethnic violence is a routine phenomenon[274]

In a rare and significant step, the United Nations High Commissioner for Human rights has filed an application of intervention as an *amicus curiae* in a CAA related case pending before the Supreme Court. In this, the various ways in which the law contravenes Human Rights standards in International Law have been pointed out.

6.7. Conclusion:

By way of this Amendment, the Parliament has distinguished people on the basis of religion. Citizenship law of a country is of much significance. It defines the identity of the country. It demonstrates the values that the country stands for. In view of this, the Constitution makers were careful in ensuring that our citizenship laws leave an impression of justice and progressiveness. Sadly, the CAA has departed from this tradition by introducing religion as a criteria.

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[271] Dissent Note of Md. Salim to the Report of the JPC, *see supra* note 212, at 93.
[272] Nagerwal, *supra* note 240, at 6.
[273] *see id.*, at 7.
[274] *see id.* at 1.

If the ground for inclusion is 'the country of origin' being part of the territory of India, Afghanistan should not have been included. If the ground of inclusion is the Indian origin of the person concerned, there are such persons in other countries even from the Muslim community. In any case, such persons could easily be eligible for citizenship by registration, and there is no need to make special provisions for them. If the ground of inclusion is that they are from a 'neighbouring country', then there is no reason to exclude Myanmar and Sri Lanka.

The Constitution grants equality and religious freedom not only to its citizens, but to all persons. Therefore, it is imperative that any legislation on acquisition of citizenship should stand the test of fundamental rights especially under Articles 14 and 25. Article 11 does not grant powers to the Parliament to override Part III in matters regarding citizenship.

The harsh response of the government to the dissent expressed with regard to the CAA further adds to the problem.

This way, it appears that the Citizenship (Amendment) Act, 2019 is neither compatible with the Constitution, nor with International law.

Chapter VII

CONCLUSION

7.1. Conclusions:

This research has been an humble pursuit to understand the Citizenship (Amendment) Act, 2019, and analyse its compatibility with Indian secularism, as conceived by the Constitution makers. Towards this end, the researcher has attempted to understand the concepts of secularism and citizenship. With a view to compare the CAA with constitutional ideals and values, the relevant constitutional provisions have been elaborated upon along with a glimpse into the framers' mind by way of a survey of the related debates in the Constituent Assembly.

Chapter II analyses the concept of secularism. The history of the concept brings out its significance. There is no one single universal concept of secularism. Each secular state adapts the concept to its own circumstances. India has also developed its own model of secularism. Today, the idea of secularism is considered to be necessary for any democratic and progressive society. Since early times, India has had a tradition of tolerance and religious diversity, which is essential for a secular state. Not only this, but the vast diversity of India, necessitates secularism in order that the state is united and secure from rifts. Even most of the foreign rulers and the colonial government were conscious in not showing favoritism towards persons of any particular religion. Some communal ideas started infiltrating in the early 20th century, but the idea of secularism was once again reestablished in India by way of the Constitution. The Constitution makers were in full awareness of the fact that the age of nationalism had come to replace the age of religion based states. An analysis of the Constitutional text brings out a unique model of secularism most suited to India. Among other things, this model equally entitles all persons to freedom of conscience. Whether described as equidistance model or state neutrality model, it is clear that the intention was that the State will neither identify with any religion in particular, nor view any other religion with disfavour.

The CAA goes contrary to this model, by favouring persons of some religions, while seeming to distance itself from others. This is further intensified by the fact that this has happened in the crucial area of identifying persons for the purpose of granting citizenship. Of the three planes of

Donald Smith's Triangle of secularism[275] two are affected by the CAA: Firstly, the interrelationship between the state and an individual (the egalitarian component), wherein ideally, religion should be of no relevance. This aspect of secularism has been shaken by the CAA, as the state has considered religion to be relevant in relating with individuals. Secondly, the interrelation between state and religion, which ought to have been one of separation and non-interference, has also been attacked. Instead of keeping itself disconnected from all religions, the Indian state has chosen to associate itself with some of them. Thus, two of the three important aspects of a secular state are in threat.

In **Chapter III,** the concept of citizenship has been elaborated upon. Citizenship is increasingly becoming an independent identity: that is, an identity which is not dependent on any other group identity, like ethnicity, race, religion, etc. The shared values necessary for cohesion in a nation need not be ethnic. They could be political values as well. The solidarity found in the USA is an evidence to the fact that political values are strong enough to create unity among the people. Homogeneity or even a long common past are not necessary for the purpose of keeping a community together. Of the various conceptions on citizenship, the one which is most accepted today is the liberal one, which views individuals and not groups as the units of a society with which the state relates. It calls for universal citizenship, with no consideration of the inherent characteristics of a person. For two reasons liberal concept of citizenship seems better in today's context: firstly, globalization, along with ensuing mass migrations and statelessness; secondly, democratic values which call for inclusiveness and equality. Also, in a multicultural and multiethnic society, *jus sanguinis* citizenship is neither suitable nor possible. The liberal *jus soli* citizenship is the ideal one for such societies.

The CAA has brought in an ascriptive criteria (that is, religion) for determining citizenship. This is a retrograde step from the liberal conception which was embraced by the men behind our constitution. The circumstance in which the modern Indian political community came to be, is that of a unified revolt against colonial forces. Such a revolt was carried out together by persons of all religions. The historical experience of India also indicates that the Indian soil is fertile for diversity and the promotion of a composite culture. Further, the incomparable richness of our diversity necessitates *jus soli* citizenship more than any other country.

[275] For more details on Donald E.Smith's Triangle, refer para. 2.4.1 of Chapter 2, *supra.*

Any departure from a liberal *jus soli* idea will have to be justified by an undeniable historical fact which categorically calls for such departure (the kind of facts which justify Israel's Law of Return[276]). In India, there is no such justification. In an era where citizenship is an independent identity, neither dependent nor subordinate nor subsumed by any other, the conferment of citizenship based on religious identity, is not in tune with the accepted practice of the times.

The departure from the accepted norms of citizenship especially calls for attention because, it also amounts to a departure from the Constitutional conception of citizenship. For, as revealed by **Chapter IV** of this work, the Constitution makers were careful in basing citizenship on liberal and secular principles. This was especially so, because the identity of a nation is to a great extent determined by the laws as to the entry and exit of members into and out of it. The perception of the world was considered to be a relevant factor as far as citizenship policy was concerned. The pre-partition suggestion to include racial phraseology and the post-partition suggestion to explicitly mention certain religions, was rejected by the Constituent Assembly with no hesitation. The possibility of having a separate law for persons of different religions was considered to be 'absurd'. The importance of this choice of a secular citizenship comes out even more strongly when one recalls that the choice was made when the partition had just happened. The partition tested India's commitment to a secular citizenship. Inspite of several calls to favour some religious groups, while discriminating against others, the framers did not waver. And so, no religious or racial criteria is mentioned in any of the provisions of Part II. These provisions are secular, egalitarian, universal, progressive, modern and civilised. It was based on *jus soli* principle.

Though Part II is limited to citizenship at the commencement of the Constitution, and Article 11 confers wide powers on the Parliament to shape the citizenship policy, it must be remembered that, Article 11 permits departure only from the rules contained in Part II. It cannot be interpreted to permit the Parliament to depart from the values and principles contained in other parts, especially Part III. The citizenship laws passed by the Parliament do not have an overriding effect on the entire constitution, with its fundamental principles and values. Therefore, Article 11 does not allow contravention of the principles of secularism and equality which constitute the basic structure of our Constitution.

[276] For more details, see para. 3.5.5 and 3.7 of Chapter III *supra.*

The CAA is in stark contrast to many a conviction that were held precious at the time of making of the Constitution. It has chosen religion based phraseology in contrast to the neutral phraseology of Part II. The idea of having a separate law for the citizens, considered absurd by the Constituent Assembly, has been embraced and defended by way of this amendment. India has traded its 'modern', 'civilised' conception of citizenship, for a backward and primitive one. Surely though the CAA cannot be tested against the very rules of Part II, the principles on which this Part was framed binds future Parliaments. Therefore, even the present Parliament had no power to depart from these principles when it did so.

Chapter V provides an insight into the journey of the citizenship law since the Constitution came into effect. When the Citizenship Act, 1955 was made, the Constitution was constantly kept as the standard reference point. This Act was even more liberal than the Constitution's policy of citizenship. But, it did not remain the same. After three decades of a regime of cosmopolitan citizenship, several amendments of an exclusionary nature came to be made. The infiltration of the foreigners into Assam resulted in the Assam Accord, which further led to two amendments in the Citizenship Act in 1985 and 1986. The restrictive approach began due to the social and economic pressure created by the mass migrations. Another and more efficient way of handling the migrant issue would have been to prevent infiltration in the first place. But that course was not taken. Instead, the migrants who were not prevented from entering, were prevented from gaining membership in the political community. The concept of 'illegal migrants' entered with the amendment of the Act in 2003. From then on, our citizenship policy began even more to be on an exclusionary course. For, even one parent being an illegal migrant would exclude a child from Indian citizenship, though India was the only home the child ever knew. But in all this, atleast there was no departure from secularism. Unfortunately, this was not for long. Since the early 21st century, the secular nature of citizenship also started undergoing a change. This began with the 2004 amendment to the Citizenship Rules, 1956, whereby a special route for citizenship was created for 'minority Hindus with Pakistani citizenship'. From then on, citizenship was no longer a purely secular affair. As if emboldened by this first step, the usage of religion based criteria in subordinate legislation went a step further with the 2015 amendments to the Passport Rules and the Foreigners Order. Unlike the amendments before 2004, these exclusionary interventions can neither be defended on economic grounds, nor was an attempt made to defend them so. They were on explicit religion based criteria.

This chapter has given an important insight, that the CAA was not a sudden step. The usage of religious phraseology began many years back in the subordinate legislations relating to citizenship. The language of CAA is only a slight modification of the terminology of the 2015 amendments to the rules. It was not one big leap, but the last of a series of steps towards an exclusionary and non-secular citizenship.

Chapter VI of the thesis examines the CAA: its making, its provisions, and the responses to it. The CAA has primarily changed two things: Firstly, it has excluded persons belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community from Afghanistan, Bangladesh or Pakistan, from the definition of 'illegal migrants' (thus taking away the impediments to themselves and their children in acquiring citizenship by birth, citizenship by registration and citizenship by naturalization). It also accelerates the conferment of citizenship by naturalization to these persons, by decreasing the mandatory minimum aggregate period of residence in India from 11 years to 5 years. The object for this as revealed by the SOR, is to cover persons of Indian origin who are not able to prove such origin, and who are thereby unable to acquire citizenship by registration. Moreover, the date of conferment of citizenship would relate back to the date of entry into India. The government defended the move on historic grounds and on the existence of religious persecution in these countries.

The passing of the Act led to criticism from various quarters, within India and abroad. The civil society realised the challenge posed by the law to Indian secularism. Protests broke out throughout India. Also, India is losing its international prestige. The UN High Commissioner for Human Rights even filed a petition to intervene in a CAA related case before the Supreme Court.

In view of all this, the researcher concludes that **the CAA is not compatible with the Constitution**. The conclusion is based on the following reasons:

- The CAA runs contrary to the secular ideal of India. Except a few discordant voices, most of India still wants it to be secular. Citizenship in a secular country cannot be based on religious criteria.
- The 2003 amendment having placed the illegal migrants and their children completely outside the purview of political membership, it is not clear as to how the illegality of the migration could be removed for some, while retained for others in similar circumstances.

Further, not only the disadvantageous implications of an 'illegal migrant' have been removed, but also positive advantages (accelerated naturalisation) have been conferred on the specified communities which were otherwise 'illegal migrants'.

- The choice of 'countries of origin' (only Afghanistan, Bangladesh and Pakistan), of religion (only persons belonging to Hindu, Sikh, Buddhist, Jain, Parsi or christian community), of the type of persecution (only religious persecution) and the cut-off date are all arbitrary and against the principles of equality and secularism. The categorization has no reasonable nexus to the object of the provision.
- There is fear that CAA followed by NRC could result in exclusion of many muslims. The researcher however submits that this is not likely to be so, as only a small class of the persons within the mentioned communities will benefit from the CAA.
- The CAA seems to be based on the Hindu nationalist thought that India is the natural homeland of Hindus, which entitles persons following this religion to pre-eminence in matters concerning citizenship. The idea of India, as conceived by those who won our freedom is that, India, unlike Pakistan, was not to be aligned to any religion in particular. The CAA diverts from this noble idea.
- Article 14 and 25 are guaranteed to all persons and not only to citizens. Therefore, in a decision on granting citizenship, the law should be guided by principles of equality and equi-distance from all religions. If not so guided, it risks being held unconstitutional.
- By adopting the CAA, the state is identifying persons on the basis of their religious identity. This is contrary to the contemporary view of liberal citizenship which forbids the state from looking at an individual through any other group identity of his.
- Citizenship being the route to acquire many other rights, it is ironical to say that the guarantees in the Constitution are not applicable to the important area of law which regulates the entry into its political membership.
- The amendment destroys the communal harmony in the nation as was evidenced by the widespread protests after its passing.
- In citizenship matters, the founding fathers saw it important to guard the prestige of the nation in the international realm. The CAA has created an impression that India is a country with backward views.

- It goes against developing norms in international law which prohibit nations from introducing discriminatory criteria in deciding their citizenship questions.

7.2. Suggestions:

The founding fathers who purchased our freedom with much self-sacrifice, thought it important to make India a secular republic. Sadly, the CAA has departed from this vision. The Citizenship (Amendment) Act, 2019, in making religion a criteria in determining one's citizenship, goes against the secular fabric of the nation. Religion based citizenship is antithetical to secularism and there is no way to reconcile the two. It goes against the spirit of the Constitution and does not stand its test. It is only at the cost of the culture of equality and freedom created by our Constitution that this law can be sustained in its present form.

As the law in its present form is not in line with the Constitution, it appears that the only proper course now is to either remove the special privilege afforded to some, or extend it to all others who are in similar circumstances.In view of this, the researcher arrives at the following alternative suggestions:

7.2.1. **Suggestion 1: To repeal**

The provisions in Citizenship (Amendment) Act, 2019 which go against the secular spirit of the Constitution, **must be repealed**. The provisions which affect secularism are Sections 1 to 3 and 5 to 6 of the amending Act (which alter Section 2(1)(b), Section 7D, Section 18 and the Third Schedule of the Citizenship Act, and inserts a new Section 6B to it). Section 4 deals with a different subject (procedural safeguards to OCI cardholders) which is not a subject of this research. The abovesaid anti-secular provisions must be repealed and removed from the statute book.

Along with this, the 2015 amendments to the Passport Rules and the Foreigners Order, which use similar terminology and acted as a precursor to the CAA, must also be withdrawn.

By incorporating these suggestions, the special route afforded to the specified communities will be removed. They will then revert to their original position as illegal migrants [if they come

within the definition in Section 2(1)(b)] and their naturalization will happen at the same pace as any other person applying for citizenship by naturalization.

In this context, it must be remembered that the persecuted persons, though kept from citizenship (at least for sometime), may still be protected as refugees and receive protection under special SOPs for those entering India out of fear of persecution in their countries of origin.

7.2.2.Suggestion 2: To amend

The other alternative course is to **further amend the Citizenship Act to remove the infirmities** created by CAA, 2019. The protection afforded to the specified persons must be extended to all persecuted communities. For this, the Citizenship Act must be further amended along the following lines:

- The Act must be amended to remove the specific mention of certain religions. Persons of any religion or religious sect will thus be able to avail the benefit, provided, they migrate out of fear of persecution. This should be irrespective of whether or not it is minority community in the country of origin, and irrespective of whether or not the country of origin has a state religion.
- Specific mentioning of countries of origin which are exempted, must be avoided. If at all it is deemed necessary to allow this special route only to a few countries, the choice of countries must be such that there is intelligible differentia between the selected countries and others. Also, such categorisation must have a nexus to the object, that is, to protect those in fear of persecution.
- The cut-off date must be removed. Once it is made clear that the object is to protect those in fear of persecution, there is no justification for giving an arbitrary cut-off date for the purpose.
- The protection must be extended to other types of persecutions faced due to belonging to a certain community. This way, those fleeing ethnic persecution must also be granted citizenship through this special route.

By adopting either of these suggestions, the existing compromise on the secularity of Indian citizenship can be remedied.

7.2.3.Other suggestions:

In the future, it is suggested that the citizenship policy of India must be guided by the following principles:

- The Constitutional principles like secularism and equality must be adhered to in letter and spirit, in citizenship matters.
- Though Part II does not bind future Parliaments, the principles behind its provisions must govern all the laws made under Article 11.
- There must be absolutely no express mention of religion in any Act or rule or notification concerning citizenship and other allied laws.
- No citizenship policy should be based on the premise that any particular religion has a natural claim to Indian citizenship. For, this would greatly differ from the original idea of India.
- India must go back to the idea of 'citizenship as a right' as in Part II of the Constitution.
- The Indian conception of citizenship must be universal, cosmopolitan, liberal, and progressive. No ascriptive criteria must be employed in citizenship matters.
- Also, the liberal nature of our citizenship must be evident on the face of our policy. Because, perception has much significance as far as citizenship is concerned.
- There must be limited and more guided discretion to the government in deciding citizenship matters.
- International norms like non-discrimination must also be complied with while drafting citizenship related law.

As mentioned, the Supreme Court of India is seized of the matter. It is likely to proceed with the cases before it and authoritatively pronounce on the Constitutional validity of this amending Act.

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APPENDIX

CERTIFICATE ON PLAGIARISM CHECK

1	Name of the Candidate	Magdalin Sudhan
2	Title of Dissertation	The Citizenship (Amendment) Act, 2019: A Threat to Secularism in India?
3	Name of Supervisor	Dr.Sheeba S. Dhar
4	Similar content identified	6.7 %
5	Acceptable maximum limit	
6	Software used	Grammarly
7	Date of verification	10/10/2021