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## Constitutionality of the Citizenship Amendment Act, 2019

**NAME:** Abhyuday Tripathi

**DESIGNATION:** BBA.LLB (H), 7<sup>TH</sup> SEMESTER,

**ADDRESS:** Ward- 13 Tripathi Clinic, Main Road, Gunderdehi, Balod, Pin Code- 491223

**UNIVERSITY NAME:** Amity Law School, Amity University, Raipur, Chhattisgarh

### **Abstract:**

The Citizenship Amendment Act, 2019 of the parliament basically amended the provisions of The Citizenship Act, 1955. Section 2(b)<sup>1</sup> of the mentioned Act provides the definition of “Illegal Immigrants” and prohibits anyone who is an illegal migrant from acquiring citizenship in India, however, by section 2 of the Citizenship Amendment Act, 2019, a proviso, to the provision of section 2(b) of the principal Act (The Citizenship Act, 1955), has been added, which excludes, 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 doesn't have a valid documents to have entered India or remain in India, from the definition of “Illegal Immigrants”. The Citizenship Amendment Act, 2019 is a clear violation of fundamental principles of Constitution. It disrupts the norms of equality and promotes religious based discrimination and segregates people belonging to the Muslim community from those who belong to other religions as it confines people only belonging to Muslim community to be the citizens of India who have migrated to this territory on or before 31<sup>st</sup> December 2014. This paper checks the constitutional validity of the impugned Act and puts prominence on how it violates the fundamental right to equality, embodied under Indian Constitution, and certain provision of International Laws.

<sup>1</sup> “illegal migrant” means a foreigner who has entered into India—

(i) without a valid passport or other travel documents and such other document or authority as may be prescribed by or under any law in that behalf; or

(ii) with a valid passport or other travel documents and such other document or authority as may be prescribed by or under any law in that behalf but remains therein beyond the permitted period of time;]

For the sake of convenience, this paper has been divided into V parts. Part I gives an outline of the paper. Part II puts a light on how the Citizenship Amendment Act, 2019 violates the basic principle of equality embodied under Article 14 of the Indian Constitution. Part III discusses on how the Citizenship Amendment Act, 2019 intrudes upon the secular nature of the nation, which has been also declared as a basic feature of the Constitution by the Indian Judiciary. Part IV puts emphasis on how the impugned Act violates Article 51 of the Constitution by violating some International Conventions and Treaties and conclusion in Part V.

**Keywords:** Citizenship Amendment Act, Indian Constitution, Right to equality, Secularism,

## I

### Introduction

The Citizenship Amendment Act, 2019 is invalid and antithetic to the paramount provisions of the Constitution as it violates the provisions augmented in the preamble, part III and part IV of it. The right reckoned under Article 14<sup>2</sup> safeguards the concept of egalitarianism and rule of law and ensure equality and fairness to every person. Under Article 13<sup>3</sup> of the Constitution, any law, whether made by Parliament or a state legislature, will be void if it takes away or abridges one or more of the fundamental rights that the Constitution guarantees. Even a law made by Parliament as envisaged in Article 11 will have to necessarily yield to the provisions of Article 13. Parliament in India is not absolutely sovereign. Its powers are not unqualified; they are limited by the provisions of the Constitution, Article 13 of the basic law of the land settled the fundamental rights that are enlisted in Part III, of the Constitution, beyond the hand of the Parliament. Therefore, the above-mentioned Act of the parliament is doubtful upon its validity as it curtails the basic rights of equality delimited under Article 14 of the basic Law of the land. Furthermore it is violative of part IV of the Constitution as well which provides for Directive Principles of State Policies as it is inconsistent with the provisions Article 51(c)<sup>4</sup> which puts an obligation upon the State that it shall make an effort to respect International laws and also obliged to the treaties and conventions in which it is a party. The impugned Act of the parliament basically amended the provisions of The Citizenship Act, 1955. Section 2(b)<sup>5</sup> of the mentioned Act provides the definition of “Illegal Immigrants”

<sup>2</sup> **Equality before law**-The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

<sup>3</sup> **Laws inconsistent with or in derogation of the fundamental rights**

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void

(3) In this article, unless the context otherwise requires law includes any Ordinance, order, bye law, rule, regulation, notification, custom or usages having in the territory of India the force of law; laws in force includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas

(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368 Right of Equality

<sup>4</sup> **Promotion of international peace and security**

The State shall endeavour to foster respect for international law and treaty obligations in the dealings of organised peoples with one another.

<sup>5</sup> “illegal migrant” means a foreigner who has entered into India—

(i) without a valid passport or other travel documents and such other document or authority as may be prescribed by or under any law in that behalf; or

(ii) with a valid passport or other travel documents and such other document or authority as may be prescribed by or under any law in that behalf but remains therein beyond the permitted period of time;]

and prohibits anyone who is an illegal migrant from acquiring citizenship in India, however, by section 2 of the Citizenship Amendment Act, 2019, a proviso, to the provision of section 2(b) of the principal Act (The Citizenship Act, 1955), has been added, which excludes, 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 doesn't have a valid documents to have entered India or remain in India, from the definition of "Illegal Immigrants". The Citizenship Amendment Act, 2020, also provides a fast-track for citizenship by naturalisation for such persons, allowing them to become citizens after five years of residing in the country instead of eleven years. Moreover, it does not cover people coming to India from other countries, even if they belong to the same communities, and does not extends its protection to persecuted Muslims from any of these countries either. Therefore, it discriminates, migrants who have settled in Indian Territory, based on their religion and opens the window for citizenship only to some religious sect (excluding Muslims). Therefore, such Act is contentious discriminatory, divisionary and also against the foundational philosophy of Constitution of India.

## II

### **An abridgement to the right to equality under Article 14**

The right to equality incorporates under Article 14 of the Constitution is a basic and fundamental right which guarantees equality to every person, including non-citizen, within the territory of the nation and also prohibits discrimination. The provisions of Article 14 expressly provide equality to all persons before the eye of law and implying absence of any special privilege in any individual. It means that equality for all is the law or standard norm of the land. Though Article 14 of the Constitution allows classifications which are reasonable and non-arbitrary, at very same time it prohibits class legislation. A legislative classification must always rest upon some real and substantial distinction bearing reasonable and just relation to the needs or purpose in respect of which the classification is made; however, the impugned Act (The Citizenship Amendment Act, 2020) is based on the whim of the parliament and it is arbitrary and unreasonable as neither it signifies any legitimate object nor it shows a rational or substantial relation between the object sought to be achieved and classification made

#### ➤ **Not Fulfil the Pertinent Requisites of Reasonable Classification**

The Citizenship Amendment Act, 2020 is class legislation and not a reasonable classification. It is well established by the continuous judicial pronouncement that in order to pass the test of permissible classification, three conditions must be fulfilled.

- 1) The object or aim sought to be achieved by the statute in question must be rational, just and lawful.
- 2) The classification must be founded on an intelligible differentia which distinguish persons or things that are grouped together from others left out of the group.
- 3) The differentia must have rational relation to the object sought to be achieved by the statute in question.

This test of reasonable classification was clearly expressed by Das J in *State of W.B. v. Anwar Ali Sarkar*<sup>6</sup> and has been repeated and approved in many cases. It was further held in *Kallakurichi Taluk Retired Officials Assn. v. State of T.N.*<sup>7</sup> that “A classification to be valid must necessarily satisfy two tests. Firstly, the distinguishing rationale must be based on just objective. And secondly, the choice of differentiating one set of people from another must have a reasonable nexus to the object sought to be achieved”. The impugned Amendment Act fails to fulfil those above-mentioned mandate conditions as there is no rational relation between all potential objects and the classification made. If the main aim or objective is to provide protection to persecuted people from neighbouring countries, then why does it restrict itself to only three neighbouring countries, and not expand its protection to Sri Lanka, Myanmar, Bhutan, Nepal, etc.?

If the objective is to help people from pre-Partition India, then why does it cover Afghanistan? And why doesn't it extend to people from Myanmar, which used to be part of British India till 1935?

If the objective is to deliver protection to victimised or persecuted persons from countries which have a state religion, then why it does not cover minorities from Sri Lanka and Bhutan, where Buddhism is the official state religion?

If the objective is to protect those facing religious persecution, then how can the classification exclude Muslims from its ambit? There are ‘Muslim’ communities like the Ahmadiyas and Shias in Pakistan and Bangladesh who are persecuted there for their faith as well.

Therefore it would be right to construe that the Citizenship Amendment Act, 2020 has no consistent objective and the classification made is not even logically completed, moreover, the classification is also not based on “Intelligible differentia”, hence it is violative of Article 14 of the Constitution and must be declared as void and unconstitutional as it was held in the case of *Subramanian Swamy v. CBI*<sup>8</sup> that “The law may violate Article 14 if the object of law is discriminatory”. A legislation would be declared as unconstitutional and violative of Article 14 if it is found unreasonable in making a classification between two sets of persons,<sup>9</sup> The object of the Parliament for enacting this religion biased law is discriminatory as it provide citizenship on the basis of religion, which is prohibited by the provision of Article 14 unless the classification passes the test of reasonable classification laid down by Supreme Court, and the impugned Act fails to pass such test it goes against the basic tenet of equality in Article 14 by treating equal persons unequally. The object, which sought to be achieved by the Parliament by the impugned Act, is discriminatory, unjust and illegitimate and in the case of *Subramanian Swamy v. CBI*<sup>10</sup> it was held by the court that “If the object itself is discriminatory, then the explanation that the classification is reasonable having rational relation with the object sought to be achieved is immaterial”. The classification must be reasonable and just in all aspect, because in the case of *Mohd. Usman v. State of A.P.*<sup>11</sup> it was adjudicated by the court that “The validity of a law has to be judged by assessing its overall effect and not

<sup>6</sup> State of W.B. v. Anwar Ali Sarkar, AIR 1952 SC 75

<sup>7</sup> Kallakurichi Taluk Retired Officials Assn. v. State of T.N, (2013) 2 SCC 772

<sup>8</sup> Subramanian Swamy v. CBI, (2014) 8 SCC 682

<sup>9</sup> P.K. Tripathi, “The Fiasco of Overruling A.K. Gopalan”, AIR 1990 Jour 1

<sup>10</sup> Subramanian Swamy v. CBI, (2014) 8 SCC 682

<sup>11</sup> Mohd. Usman v. State of A.P., (1971) 2 SCC 188

by picking up exceptional cases. What the court has to see is: Whether after taking up all aspect into consideration, the classification is just.

➤ **Equality is Antithetic to Arbitrariness**

The Citizenship Amendment Act, 2019 was arbitrarily enacted as it fails to fulfil the test of reasonable classification and it also encroach upon the secular nature of the nation because it conceding citizenship to the illicit colonizers on the basis of their religion. Such enactment, though serve protection to persecuted migrants, at the same time, it discriminate them on the basis of their belief, faith and ethnicity and there is no lawful rationalization or justification which make the objective and classification made by that enactment just and reasonable, therefore, such inequitable and bigot commandment deserves to be held as unconstitutional. It has been always adjudged by the Court that “*Equality repels arbitrariness*”. Bhagwati J in *E.P. Royappa v. State of T.N.*<sup>12</sup> held that “*Equality is antithetic to arbitrariness. In fact, equality and arbitrary are sworn enemies: one belongs to rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14.* Article 14 strikes at arbitrariness in state action and ensures fairness and equality of treatment.<sup>13</sup> Therefore the Citizenship Amendment Act, 2019, is arbitrary in nature as it condenses the test of reasonable classification and in the case of *Ajay Hasia v. Khalid Mujib Sehravardi*<sup>14</sup> It was held that “if the classification is not reasonable and does not satisfy the two condition of reasonable classification [1) intelligible differentia [2) rational relation between differentia and object sought to be achieved], then the impugned legislation would plainly be arbitrary and the guarantee of equality under Article 14 would be breached. Therefore it would right to assume that Article 14 demands reasonableness and fairness in State action and classification doctrine is one method of meeting that demand, hence it is well-established by the continuous judicial pronouncement that an enactment which is arbitrary and repugnant to the test of reasonable classification is a rupture to the provision of Article 14 of the Constitution and must be declared as void and unconstitutional.

### III

#### **Intrusion to secular nature of the nation**

The Citizenship Amendment Act, 2019, is in clear violation of the principle of secularism embodied in our Constitution and deeply inserted into the framework of this republic by our founding fathers. India is a secular state<sup>15</sup> and cannot be transformed into a theocratic state by any means.<sup>16</sup> This has been repeatedly held in various case laws of this Hon’ble Court, that secularism is an unamendable basic structure of the Indian Constitution.<sup>17</sup> This definitely sets out a constitutional directive to the state and lays down a restriction to the

<sup>12</sup> E.P. Royappa v. State of T.N., (1974) 4 SCC 3, 84

<sup>13</sup> Bhagwati J in Maneka Gandhi v. Union of India, AIR 1978 SC 597

<sup>14</sup> Ajay Hasia v. Khalid Mujib Sehravardi, AIR 1981SC487

<sup>15</sup> Valsamma Paul v. Cochin University, AIR 1996 SC 1011.

<sup>16</sup> Shukla V.N. Constitution Of India, 13<sup>th</sup> Edition.

<sup>17</sup> S.R. Bommai v. Union of India, AIR 1994 SC 1918; M. Ismail Faruqui v. Union of India, AIR 1995 SC 605.

legislative power of the Parliament. An Act or amendment passed by the Parliament cannot violate the basic principles of the Constitution. The Indian secularism is different as compared to the concept of secularism in U.S.A which creates a wall of separation between state and religion and communist countries where the states are anti-religion. Indian secularism is based on equal respect for all religion. It is based on the vedic concept of sarva-dharma-sambhaav.<sup>18</sup> The whole concept of Indian republic is centered on the concept of secularism.<sup>19</sup>

On 6<sup>th</sup> December 1948, while discussing secularism as expressed in the Constitution, Mr. Laxmi Kanta Maitra, member of the Constituent Assembly, stated, “By secular State, as I understand it, is meant that the State is not going to make any discrimination whatsoever on the ground of religion or community against any person professing any particular form of religious faith. This means in essence that no religion in the State will receive any State patronage whatsoever. In other words, in the affairs of the State the professing of any particular religion will not be taken into consideration at all.”<sup>20</sup> This clearly explains the thought of the framers about the concept of secularism in India. Secularism means state shall not discriminate on the ground of religion and shall not segregate classes of people on religious grounds. This also means that the state shall not patronize any religion or shall not benefit any religion through its policies by restricting people belonging to other religions. The Citizenship Amendment Act, 2019, is in clear violation of the principle of a secular republic embodied in our Constitution. This Act restricts people only belonging to Muslim community to be the citizens of India who have migrated to this territory on or before 31<sup>st</sup> December 2014. This Act clearly segregates people belonging to the Muslim community from those who belong to other religions. This Act clearly violates the basic principle of our Indian republic. The framers of our Indian Constitution had a vision and aspiration about the future of this great nation and today it has been played with through this very Act. The judicial precedents also clearly establish India as a secular state and holds the principle of secularism very high. Any Act violating the principle of secularism has to be struck down by judicial intervention. Citizenship Amendment Act, 2019, attacks the basic framework of this nation on which this nation is build.

#### IV

### **Violation of directive principle of state policy (Article 51)**

The provisions of Article 51 of the Constitution put obligation upon the State to foster and respect the international law and treaties and to promote and encourage international peace. By enacting the Citizenship Amendment Act, 2019, and providing citizenship on the basis of religion to the persecuted migrants, it infringed various convention and treaties, which India has ratified and, therefore, the State miscarries and fails to accomplish the directives enlisted under the provision of Article 51(c) of the constitution.

<sup>18</sup> Shukla V.N. Constitution of India, 13<sup>th</sup> Edition.

<sup>19</sup> Shukla V.N. Constitution of India, 13<sup>th</sup> Edition.

<sup>20</sup> [https://www.constitutionofindia.net/constitution\\_assembly\\_debates/volume/7/1948-12-06](https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-12-06)

➤ **Encroachment upon the International Covenant on Civil and Political Rights**

The International Covenant on Civil and Political Rights is a multilateral treaty adopted by United Nation General Assembly Resolution 2200A (XXI) on 16<sup>th</sup> December 1966 and came in force in 23<sup>rd</sup> March 1976. The covenant obligates its parties, which India already is as it ratified the covenant on 10<sup>th</sup> April 1979, to respect the civil and political rights of every individual conscripted in the covenant itself. Article 26<sup>21</sup> of the Covenant entitles every person equal before law and delivers equal protection without any discrimination, further it protects and guarantees to all person equal and effective protection against discrimination on any ground such as race, colour, sex, language, “*religion*”, political or other opinion, national or social origin, property, birth or other status. Therefore, the covenant ensures the Right of equality to every person and further prohibits the discrimination on the ground of religion, etc. Additionally, Article 2(1)<sup>22</sup> of the same enactment safeguards all the rights solicited under it by prohibit, parties to this covenant, from discrimination on the above-mentioned ground on realization of rights enlisted in it. Therefore, by enacting the Citizenship Amendment Act, 2019, Parliament prima-facie disrupts and violates the provisions of the International Covenant on Civil and Political Right as it discriminates on the basis of religion, which is prohibited by ICCPR, for providing citizenship to the persecuted illegal migrants and with effect to that fails to comply with the directive procured under Article 51(c) of the constitution.

➤ **Desecration of the International Convention on the Elimination of all Form of Racial Discrimination**

The Citizenship Amendment Act, 2019, violates the provisions of International Convention on the Elimination of all Form of Racial Discrimination. It is a United Nations convention. The Convention commits its members to the elimination of racial discrimination and the promotion of understanding among all races. The Convention also requires its parties to outlaw hate speech and criminalize membership in racist organizations. The convention was adopted and opened for signature by the United Nations General Assembly on 21 December 1965 and entered into force on 4 January 1969 and India ratified it on 3<sup>rd</sup> December 1968. Article 2<sup>23</sup> of the convention prohibits and convey some mandate parameters and strictures, for its parties, to condense racial

<sup>21</sup> **Article 26-** All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

<sup>22</sup> **Article 2(1)-** Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

<sup>23</sup> **Article 2(1) -** States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation; (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations; (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists; (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization; (e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

discrimination. Furthermore Article 5 of the same enactment expressly forbids racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law. Moreover Article 5 sub-clause d (iii)<sup>24</sup> deliberately prohibits racial discrimination on granting or any person's enjoyment of "**Right to Nationality**". Article 1(1)<sup>25</sup> of the covenant defines racial discrimination as any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. The term "ethnic origin" has not been defined in the covenant or any Indian statute, however, in a research, named, Ethnicity as a Variable in Epidemiological Research by NCBI defined ethnic origin as shared origins, social backgrounds, shared culture or tradition that are distinctive, maintained between generations, and lead to a sense of identity and group; a common language or a common religious tradition. Moreover, in the case of *Mandla v. Dowell-Lee*<sup>26</sup> the House of Lords by defining ethnic groups held "*Ethnic Group as a distinct community by virtue of certain characteristics which helps to distinguish the group from the surrounding community. They further held that a common religion different from that of neighbouring groups or from the general community surrounding it is one of the characteristics of ethnic group. They also held that Sikhs were a racial or ethnic group*". Therefore it would be right to construe Islam as an ethnic group and any discrimination on the ground of ethnic group is a racial discrimination, which is prohibited by the above mentioned convention, by virtue of Article 1(1) of International Convention on the Elimination of all Form of Racial Discrimination, and hence, the State acted in repugnant to the provisions of Article 51(c) of the Indian Constitution as by enacting the Citizenship Amendment Act it violates the provisions embodied under Article 2 and Article 5 of the International Convention on the Elimination of all Form of Racial Discrimination.

V

### Conclusion

Through various judicial pronouncements it has been settled undisputedly that the part of preamble of the Constitution, which declared India as a secular nation, is a basic feature of the Constitution and it cannot be changed by any law whatsoever. Conversely, by enacting the Citizenship Amendment Act, 2019 the Parliament outbreaks such basic feature as it restricts people only belonging to Muslim community to be the citizens of India who have migrated to this territory on or before 31<sup>st</sup> December 2014. This Act clearly segregates people belonging to the Muslim community from those who belong to other religions. The part III and IV of the Constitution together constitute and concretise the lofty goals of justice, liberty, equality, fraternity and the

<sup>24</sup> **Article 5 d(iii)** - In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment the right to nationality.

<sup>25</sup> **Article 1(1)** - In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

<sup>26</sup> [1982] UKHL 7



dignity of the individual. Former is negative obligation of the State to not interfere with the liberty of the individual and later is positive obligation of the State to take steps for the welfare of the individual. However, the State has abridged upon both the obligations. By enacting such a contentious and belligerent law parliament has attacked on the fundamental right of equality of the persecuted Muslim migrants and also ruptured the egalitarianism principle of the Constitution, moreover by violating international conventions and treaties the State condenses the onus bestowed to it by virtue of Article 51(c) of the Indian Constitution, for that reason it is necessary to struck down such an enactment for imparting utmost justice.

