THE CITIZENSHIP AMENDMENT ACT AND THE CONSTITUTION

Relationship between the Citizen, State and Nation

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Seventy years back, in expressing their resolve to constitute India into a democratic society based on dignity and fraternity, the people of India committed themselves to creating a society in which equal citizenship would be possible. Competing ideas and claims to what it means to be a citizen and the relationship between the citizen, state and nation, have made citizenship deeply contested. The contemporary moment of citizenship in India is especially fraught, with the Citizenship Amendment Act (CAA), the National Register of Citizens (NRC), and the National Population Register (NPR) constituting an assemblage where disparate and adversarial political tendencies have coincided in their particularistic articulation of citizenship.



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A footbridge covered with anti CAA - NRC posters at Delhi's Shaheen Bagh.

It is often claimed that the CAA is the same old citizenship law since it does not deprive any section of Indians of their citizenship; the only change it makes is offering citizenship to Hindus, Buddhists, Jains, Sikhs, Parsis and Christians who fled Afghanistan, Pakistan and Bangladesh before December 31, 2014 because of religious persecution. The government has also assured that the NRC has been held in abeyance and that the NPR is a routine exercise of enumeration of resident population to facilitate the framing of appropriate welfare policies.

A 'law' according to Article 13 of the Constitution of India would have the force of law only if it is made by a competent authority like the legislature and is not inconsistent with or in derogation of Fundamental Rights in part III of the Constitution. Arguments in support of the CAA claim that it is incontrovertible since it was enacted by Parliament of India - the competent authority under the Constitution to legislate on citizenship - following the legislative procedure laid down in the Constitution. The question of pedigree or source of law is important for ascertaining competence and also for addressing the question why a law should be complied with.

While law making and eliciting obedience to law are central to the exercise of state sovereignty, the principle of 'rule of law' - which is deeply associated with constitutionalism - both defines and limits state authority. The limits imposed by the rule of law, brings into play questions of content of law, in particular the normative question of just law. Justice as a standard for evaluating a law raises concerns around the fairness of both procedure and content, and is distinct from questions of efficiency, which pertain to the appropriateness of the provisions of law for serving the purposes for which it was framed.

The Joint Parliamentary Committee (JPC) constituted in August 2016 to consider the implications of Citizenship (Amendment) Bill (CAB)

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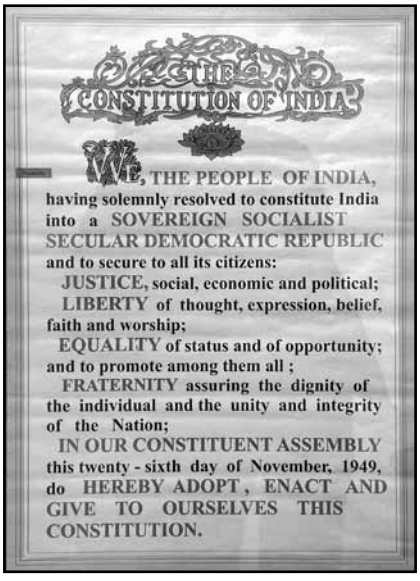
2016 by taking into account the interests of various stakeholders, submitted its recommendations to the Lok Sabha in January 2019. While recommending that the CAB be considered for enactment, the JPC invoked Article 11 of the Constitution which gives Parliament authority to 'regulate the right of citizenship by law.' It buttressed the ground of legislative competence with normative claims drawn from the Constituent Assembly which had preferred not to make permanent provisions for citizenship, leaving it to Parliament to frame a law for the acquisition and termination of Indian citizenship for all future contexts. The JPC considered this power unfettered since Article 11 states that nothing in Part II of the Constitution, that is, Articles 5 to 10, which pertain to determination of citizenship in the context of Partition, 'shall derogate from the power of the Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship.' In making this emphatic claim, the JPC overlooked the fact that even if Parliament's powers of regulating citizenship by law were not constrained by anything laid down in Part II, they were restrained by other parts of the Constitution, primarily Part III. These constraints apply on all law-making powers of Parliament, including those concerning citizenship. The JPC, however, prepared the ground for exceeding the scope of Article 11, to bring an amendment in the citizenship law that has changed the character of citizenship and belonging in India. By introducing religion as a criterion of distinguishability among persons, the CAA has introduced an entirely new principle in the citizenship law of India. Along with the NPR and the NRC it also produces the possibility that religion could become the ground for depriving people of citizenship.

Aware that the CAB, when enacted into a law, could face the charge of violating the Right to Equality under Article 14 and Right to Freedom of Religion under Article 25 of the Constitution, the JPC consulted legal and constitutional experts. In the opinion of the JPC, the CAB was sufficiently protected against the charge of violation of Article 25 since it did not prevent citizens from exercising their fundamental right to freedom of religion. It devoted its efforts, therefore, towards preparing a defense against the possible charge of violation of Article 14, which guarantees to all persons – citizens and aliens - equality before law and equal protection of law. In this context, the JPC considered the suggestion by constitutional experts that the broad category 'persecuted minorities' be used in the Bill instead of 'minority communities' identified on the ground of religion. Yet, the JPC rejected this proposal


THE CONSTITUTION OF INDIA

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity; and to promote among them all ;

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty - sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

in deference to the wishes of the legislative department, which advised against the incorporation of the category persecuted minorities, since it would lose sight of religious persecution as the primary objective of the amendment. The consideration of religious persecution for extending the protection of citizenship could not, in its opinion, be construed discriminatory, because the distinction among persons was being made on the grounds of both 'intelligible' differentiation and 'reasonable' classification. The two standards of evaluation – intelligibility and reasonableness – were laid down by the Supreme Court judgment in 1952 in the case *State of West Bengal v. Anwar Ali Sarkar*. Indeed, citing the judgment in *Sarbananda Sonowal v. Union of India & Anr. (2005)*, the JPC drew attention to the 'dangerous consequences of large-scale illegal migration' from Bangladesh to argue against

> ***"Competing ideas and claims to what it means to be a citizen have made citizenship deeply contested."***

'misconceived and mistaken notions of secularism' coming in the way of stopping this influx (JPC Report 2019, p.12).

The judgment in *Anwar Ali Sarkar* had, however, laid down substantive conditions which required that the criteria of intelligibility of differentia and reasonableness of classification must satisfy both grounds of protection guaranteed by Article 14, i.e., protection against discrimination (equality before the law) and protection against the arbitrary exercise of state power (equal protection of the law). In 2009, the Delhi High Court judgment in *Naz Foundation v. Government of NCT of Delhi* added a further test of reasonableness - requiring that the objective of classification in law must also be subjected to judicial scrutiny. The restraint on state arbitrariness, according to the judgment, was to come from constitutional morality, which as B R Ambedkar declared in the Constituent Assembly, was the responsibility of the state to protect. The code of constitutional morality constitutes critical morality by putting in place evaluative frameworks for substituting those standards which may be acceptable to the 'majoritarian' public, but are against the norms of constitutional democracy. Arguing that there exists close connection between the form of the Constitution and that of the administration, Ambedkar warned that the Constitution may be perverted without changing its form, by simply making administration inconsistent with the former. Ambedkar's call for a firm adherence to constitutional morality reflects his apprehensions about the uncertainty of executive decisions and mistrust of legislative power.

It is worth noting that the field-visits by the JPC in Rajasthan, Gujarat, Assam and Meghalaya yielded uneven findings. The 'refugees' in Rajasthan and Gujarat who had migrated to India from different parts of Pakistan, narrated their hardships and preferred changes in law to facilitate the acquisition of citizenship. They also asked that the social and economic conditions of those who had already become citizens be given attention. Apprehensive that the CAB would unsettle the peace in the region, especially in Assam following the 1985 Accord, depositions from Assam and Meghalaya were against the amendment. It is not clear why one set of concerns prevailed over the other, in the final recommendation of the JPC.

In the ultimate analysis, while judicial decisions have over the years enhanced judicial power, carving out a space for elaboration of constitutional politics in the domain of the state, it is important that Parliament's law-making functions be also understood with reference to its constitutional role and functions in a constitutional democracy. While Parliament enjoys enormous law-making powers, this power is coeval with other equally important roles that it performs – of representation, deliberation and accountability. Indeed, its law-making function can be performed effectively only in tandem with and simultaneous with its roles as a deliberative body. It is only as a deliberative body that Parliament can represent and encompass the diversity of interests, especially of the most vulnerable, and not only those of the majority. It is only through an effective performance of both these functions that it can hold the executive accountable. Not only should a law made by Parliament be reflective of the synchronous performance of all these functions, no law can be truly democratic unless it embodies the aggregate of all these roles of Parliament. The force of law is not the manifestation of Parliament's power to make laws. It is the outcome of a series of performances which inspire trust in executive decisions and legislative power for being consonant with the spirit of the Constitution.