

## THE CITIZENSHIP (AMENDMENT) ACT, 2019: A CRITICAL ANALYSIS THROUGH HUMAN RIGHTS PERSPECTIVE

*Nikhil Jain*\*

### Abstract

The right to nationality is indispensable in establishing other fundamental human rights. The states must act in accordance with international human rights obligations while granting or withdrawing nationality. This article discusses how the implementation of the Citizenship Amendment Act violates India's international legal obligations. It elaborates on the possible effect of the Citizenship Amendment Act when combined with the proposed National Register of Citizens. Keeping our customs, practices, and traditions in mind, it becomes shocking that India has still not drafted a comprehensive refugee policy. The article discusses that even though India is not a signatory to the Convention on statelessness and Convention on Refugees, it must still abide by the international legal standards which provide for the prevention of statelessness. The article aims to analyse how the CAA is against the spirit of international conventions or treaties, international customary laws, and internationally recognized principles.

*Keywords* : Human Rights, CAA, NRC, ICCPR, ICERD

- I. Introduction
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### I. Introduction

“There is no greater sorrow on earth than the loss of one's native land.”

- Euripides, 431 B.C.

IT IS A well-known fact that there exists a strong nexus between the subject matter of refugees and human rights. India does not have any parliamentary legislation that exclusively regulates

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\* Student, Amity Law School, Guru Gobind Singh Indraprastha University, New Delhi.

and recognizes the arena of refugees. India is neither a party to the UN Refugee Convention of 1951 nor its 1967 protocol.<sup>2</sup> The rights of refugees in India are governed under entry 17, entry 18 and entry 19 of the Union list under the Seventh Schedule of the Indian Constitution.<sup>3</sup> This shows that in India there is no legal distinction between the term ‘refugees’ and ‘illegal migrants.’ As a result, the subject matter of refugees is presided over by central legislation like the Citizenship Act<sup>4</sup>, the Passports Act<sup>5</sup>, the Passport (Entry into India) Act<sup>6</sup>, the Registration of Foreigners Act<sup>7</sup> and the Extradition Act.<sup>8</sup>

The Citizenship Amendment Act 2019 (CAA) which received the President’s assent on December 12, 2019, and came into force on January 10, 2020 amends the Citizenship Act of 1955.<sup>9</sup> This amendment gives citizenship rights to illegal migrants, belonging to certain religious communities, who have entered India on or before the 31<sup>st</sup> day of December 2014.<sup>10</sup> These religious communities are Hindu, Parsi, Jain, Christian, Sikh, and Buddhist.<sup>11</sup> The law only protects illegal migrants who are from Pakistan, Afghanistan, and Bangladesh.<sup>12</sup> This act has relaxed the duration for these illegal migrants to acquire citizenship by naturalization from eleven years to five years.<sup>13</sup>

With the Act facing strong opposition and criticism in India, it has gained recognition across international platforms as being controversial and violative of human rights. In India, the CAA is being opposed because of various reasons. A considerable section of India’s population thinks that the act is communal in character and violative of the Indian Constitution. The indigenous people of Assam believe that this legislation is against the Assam Accord of 1985 and is a threat to their cultural and linguistic identities of the state. Apart from this, the biggest fear among the Indian Muslims is that the act could be the first step in stripping the rights of millions of Muslims residing in India when viewed through the lenses of the proposed nation-

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<sup>2</sup> Devirupa Mitra, “Modi Government Affidavit on Rohingya Refugees Reverses India’s Long-Held Stand on Non-Refoulement”, *The Wire*, available at: <https://thewire.in/diplomacy/indias-statement-rohingya-refugees-reversal-long-held-stance-non-refoulement> (last visited on Oct. 18, 2020).

<sup>3</sup> The Constitution of India.

<sup>4</sup> The Citizenship Act, 1955 (Act 57 of 1955).

<sup>5</sup> The Passports Act, 1967 (Act 15 of 1967).

<sup>6</sup> The Passport (Entry into India) Act, 1920 (Act 34 of 1920).

<sup>7</sup> The Registration of Foreigners Act, 1939 (Act 16 of 1939).

<sup>8</sup> The Extradition Act, 1962 (Act 34 of 1962).

<sup>9</sup> Shemin Joy, “Citizenship Act comes into force from Jan 10”, *Deccan Herald*, available at: <https://www.deccanherald.com/national/national-politics/citizenship-act-comes-into-force-from-jan-10-793378.html> (last visited on Oct. 18, 2020).

<sup>10</sup> The Citizenship Amendment Act, 2019 (Act 47 of 2019), s. 2.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Id.*, s. 6.

wide exercise i.e. National Register of Citizens (NRC). This legislation is facing international opposition because the international community views this Act as an instrument that may create the largest statelessness crisis in the world and cause immense human suffering.

This legislation is against the spirit of the Constitution of India, Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, Convention against Torture and the International Convention on the Elimination of all Forms of Racial Discrimination. UN High Commissioner for Human Rights has described the act as “Fundamentally Discriminatory” and filed an intervention application as *amicus curiae* in the Supreme Court of India, seeking to intervene in Writ Petition in *Deb Mukharji v. Union of India*.<sup>14</sup> This application was filed to ensure the implementation of India’s international legal obligations. International organizations like Human Rights Watch have also criticized the Citizenship Amendment Act by stating that it violates international agreements. Moreover, more than 140 petitions have already been filed before the Supreme Court of India challenging the Constitutional validity of CAA.<sup>15</sup>

## II. CAA & India’s Obligation Towards International Legal Standards

### Universal Declaration of Human Rights

In 1948, the United Nations General Assembly adopted the Universal Declaration on Human Rights which stands as a milestone document for the international community on the standards it should set for the protection and promotion of human rights. India was a signatory to the declaration.<sup>16</sup> This declaration does not impose any legal obligation on the states to give legal effect to its provisions<sup>17</sup> and is only persuasive in value. However, if a resolution is adopted by the majority of the General Assembly then it can also constitute generally accepted principles of international law that have legal value.

Though this declaration is non-binding, it has inspired several declarations, international and regional conventions, resolutions of the General Assembly, national Constitutions and various

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<sup>14</sup> Writ Petition (Civil) No. 1474 of 2019.

<sup>15</sup> Aneasha Mathur, “No stay on CAA, larger Supreme Court bench to hear 144 petitions; Centre gets four weeks to reply”, *India Today*, available at: <https://www.indiatoday.in/india/story/no-stay-on-cao-larger-supreme-court-bench-to-hear-140-petitions-1639020-2020-01-22> (last visited on Oct. 18, 2020).

<sup>16</sup> Dr. H.O. Agarwal, *Human Rights* 42 (Central Law Publications, 16<sup>th</sup> edn., 2016).

<sup>17</sup> *Id.*, at 39.

national legislations. This shows that the declaration has always served as a foundation upon which the human rights treaties rest.

The Citizenship Amendment Act when read with the Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003 which seeks to differentiate between illegal immigrants and citizens through the preparation of the National Register of Citizens (NRC) may result in rendering millions of people stateless. Article 15(2) of the Universal Declaration of Human Rights (UDHR) states “no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality”.<sup>18</sup> The two terms, nationality and citizenship, are frequently used interchangeably under international law. These two terms are different but related concepts. For instance, an individual can be the national of a state without being a citizen.<sup>19</sup> The International Court of Justice, in the *Nottebohm* case, has defined nationality as “a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.”<sup>20</sup> It establishes a legal link between an individual and a state. The scope of the notion of arbitrariness with reference to deprivation of nationality includes two facets, namely the prohibition against discrimination and the prohibition against statelessness. The UN Commission on Human Rights has affirmed that the right to a nationality is a fundamental human right and that “arbitrary deprivation of nationality on racial, national, ethnic, religious, political or gender grounds is a violation of human rights and fundamental freedoms.”<sup>21</sup> The cut-off set at 1971, as spelled out in Assam Accord, amounts to arbitrary deprivation of nationality since many migrants who have been raising their families in Assam and earning their livelihoods for decades suddenly find themselves at the peril of becoming stateless.<sup>22</sup> Therefore, any such act of mass-arbitrary deprivation of nationality that results in statelessness can be deemed as violative of article 15(2) of UDHR.

### **International Covenant on Civil and Political Rights**

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<sup>18</sup> The Universal Declaration of Human Rights, 1948, art. 15(2).

<sup>19</sup> Hudson, Manley, *Nationality Including Statelessness* (Special Rapporteur appointed by the International Law Commission) Doc. A/CN.4/50 (1952).

<sup>20</sup> *Nottebohm Case (Liechtenstein v. Guatemala)* (Second Phase) [1955] ICJ.

<sup>21</sup> UN Commission on Human Rights, *Resolution 2005/45 on Human Rights and Arbitrary Deprivation of Nationality*, Res. 2005/45, UN Doc. E/CN.4/RES/2005/45 (Apr. 19, 2005).

<sup>22</sup> Vijaita Singh, “Nationwide NRC: Centre has to set common cut-off date”, *The Hindu*, available at: <https://www.thehindu.com/news/national/nationwide-nrc-centre-has-to-set-common-cut-off-date/article29620839.ece> (last visited on Dec. 12, 2020).

International Covenant on Civil and Political Rights (ICCPR) is an international treaty adopted by United Nations General Assembly in 1966,<sup>23</sup> and it came into force in 1976.<sup>24</sup> It allows people to enjoy a broad range of human rights. State parties to the ICCPR have an obligation to respect human rights, protect human rights against violations by third parties and fulfill individuals' rights. It is a legally binding treaty and India has ratified this treaty in 1979.<sup>25</sup>

The Citizenship Amendment Act entitles certain religious communities, non-Muslims, to some exclusive benefits of citizenship.<sup>26</sup> It strictly excludes Muslims from its ambit. The CAA makes 'religion' a prerequisite for the enjoyment of the right to a nationality. Article 2(1) of ICCPR requires its member states to respect and ensure the rights, of all the individuals within its territory, without any distinction as to religion, race, and so on. The International human rights law does not distinguish between citizens and non-citizens or between different groups of non-citizens within the jurisdiction of a state party in their equal right to enjoy protection from discrimination. The Human Rights Committee, the authoritative body responsible for monitoring the implementation of the ICCPR, has stated that "the general rule is that each one of the rights of the ICCPR must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike"<sup>27</sup> and that "aliens are entitled to equal protection by the law."<sup>28</sup> It implies that the rights enumerated in the Covenant are not limited to the citizens of state parties but also available to all individuals irrespective of their nationality or statelessness, such as migrant workers, refugees or asylum seekers. Therefore, the Act undoubtedly violates article 2(1) of ICCPR.

Article 26 provides that everyone is equal before the law and is entitled to equal protection of the law without any discrimination i.e., if any right enumerated in this treaty is violated, then every human being is entitled to equal protection of the law.<sup>29</sup> The Indian Constitution has also incorporated this provision within article 14 i.e., right to equality and equal protection of law within the territory of India.

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<sup>23</sup> *Supra* note 15 at 49.

<sup>24</sup> *Id.*, at 50.

<sup>25</sup> Bimal N. Patel, IV *The State Practice of India and the Development of International Law* 168 (Martinus Nijhoff 2016).

<sup>26</sup> *Supra* note 9, s.6.

<sup>27</sup> CCPR General Comment No. 15: The Position of Aliens Under the Covenant, 1986, *available at*: <https://www.refworld.org/pdfid/45139acfc.pdf> (last visited on Dec. 11, 2020).

<sup>28</sup> *Ibid.*

<sup>29</sup> The International Covenant on Civil and Political Rights, 1966, art. 26.

Before CAA, the Citizenship Act, 1955 provided that any legal migrant, irrespective of religion, having resided in India for an aggregate period of at least twelve years would be qualified for the grant of Indian citizenship.<sup>30</sup> Further, the Citizenship Act nowhere provides for the grant of citizenship to illegal migrants, i.e., migrants who entered India without any valid visa and passport. The Citizenship Amendment Act has altered the provisions and procedures related to the grant of citizenship. According to the CAA, migrants belonging to Jain, Sikh, Hindu, Christian, Parsi, and Buddhist faith, irrespective of whether they are legal or illegal migrants, who have entered India from Pakistan, Bangladesh, or Afghanistan before December 31, 2014, are qualified for the grant of citizenship. The CAA has reduced the period of naturalization from twelve years to five years for these migrants.

The intention of the legislation presumably is to provide citizenship to certain classes of migrants, more specifically non-Muslims, who have suffered religious persecution in the above-mentioned selected countries owing to their minority status. Here, the CAA fails to fulfill the criteria for reasonable classification and reflects an arbitrary method of selecting the beneficiaries of the Act. It violates article 26 of ICCPR as it fails to explain the exclusion of Rohingyas Muslims from Myanmar, and Ahmadiyya and Shias from Pakistan, who have suffered religious persecution, from its ambit if the intention of the legislature was to provide citizenship to persecuted minorities. Moreover, the Human Rights Committee has pointed out the right to equality before the law under article 26 of the ICCPR:<sup>31</sup>

It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.

Considering against the above-mentioned background, the Human Rights Committee has examined the compatibility of states' actions and omissions, including the legislations put forward by policymakers, with respect to a number of issues, including citizenship.<sup>32</sup> The

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<sup>30</sup> *Supra* note 3, s.6.

<sup>31</sup> UN Human Rights Committee, *CCPR General Comment No. 18: Non-discrimination*, UN Doc. HRI/GEN/1/Rev.7 (Nov. 10, 1989).

<sup>32</sup> UN Human Rights Committee, *Views: Communication No. 2001/2010*, UN Doc. CCPR/C/113/D/2001/2010 (Apr. 1, 2015).

committee, for the cases related to naturalisation, has stated that the legislation must comply with the requirement of article 26 that its content should not be discriminatory.<sup>33</sup> Therefore, the use of religion as a deciding factor with regard to naturalisation of illegal immigrants is in clear violation of article 26 of the ICCPR.

The NRC exercise which was recently conducted in the state of Assam has excluded 1.9 million people from the final list.<sup>34</sup> Those excluded can file an appeal before the Foreigners Tribunal within the prescribed time and those who are declared as illegal migrants by the Foreigners Tribunal will be taken to detention camps and detained until deportation to their native country. India has a very weak documentation system and it may not be possible for backward and downtrodden people to produce documentary evidence during the NRC process.

It is to be noted that though the effect of CAA and NRC may render a large population on the verge of statelessness, India bears no legal obligation in this regard since India has neither ratified the Convention Relating to the Status of Stateless Persons (1954) nor the Convention on the Reduction of Statelessness (1964).<sup>35</sup> These two international conventions mandate the state to protect the stateless population. Here comes the role of ICCPR whose article 12(4) technically protects these stateless populations.

Article 12(1) of ICCPR provides that everyone has the liberty of movement within a territory. Article 12(3) provides that the above-mentioned right is restricted to the protection of national security, public order, public health or morals, according to the law. However, when article 12(4) comes into play it gives rise to the technical challenge. Article 12(4) of the ICCPR provides that no one shall be arbitrarily deprived of the right to enter his own country. According to ICCPR General Comment on article 12, it becomes clear that clause 4 of article 12 contains an implied restriction on mass deportations to other countries.<sup>36</sup> Apart from this, a plain reading of clause 4 makes it understandable, beyond doubt, that the provision does not distinguish between aliens and citizens.

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<sup>33</sup> UN Human Rights Committee, *Views: Communication No. 172/1984*, U.N. Doc. CCPR/C/29/D/172/1984 (Apr. 9, 1987).

<sup>34</sup> Rahul Karmakar, "Over 19 lakh excluded from Assam's final NRC", *The Hindu*, available at: <https://www.thehindu.com/news/national/over-19-lakh-excluded-from-assams-final-nrc/article29307099.ece> (last visited on Oct. 18, 2020).

<sup>35</sup> Sitharamam Kakarala, *India And the Challenge of Statelessness* 3 (National Law University Delhi Press, Delhi, 2015).

<sup>36</sup> UN Human Rights Committee, *CCPR General Comment No. 27: Article 12 Freedom of Movement*, UN Doc. CCPR/C/21/Rev.1/Add.9 (Nov. 2, 1999).

In *Stewart v. Canada*<sup>37</sup>, the UNHRC interpreted the phrase “his own country” and observed that there exists a category of individuals from whom their nationality has been withdrawn but they continue to retain a special bond with the country. Such a category has the right to enter and remain in their country as they are sheltered under article 12(4) of the ICCPR. Later on, in the case of *Nystrom v. Australia*<sup>38</sup>, the UNHRC again interpreted the phrase “his own country” in a broader sense and stated that there are several factors that determine “his own country”: language is spoken, duration of residence in the country and family ties. According to the UNHRC, even in the absenteeism of nationality, these factors create a powerful bond between the individual and the state.

It can be said that if the proposed CAA-NRC is conducted nationwide, it may result in large-scale deportation of stateless individuals which includes long-term residents who, because of their extended stay in India for decades, may have adopted the local languages and developed similar religious practices. They may lack official documents to prove their citizenship but it can be inferred that they may have created strong socio-cultural bonds with India. Keeping in mind the grounds set forth by UN Human Rights Committee, India could be deemed as its “own country” for such individuals and therefore article 12(4) can be used as a powerful instrument against statelessness.

### **Convention Against Torture**

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment popularly known as Convention Against Torture (CAT) was adopted by the United Nations General Assembly in 1984 which came into force in 1987.<sup>39</sup> It is an international human rights treaty that is created to prevent torture and other acts of cruel, inhumane or degrading treatment or punishment around the world. India has been a signatory to this convention since 1997.<sup>40</sup>

Article 3 of the CAT provides that no state party shall return, expel or extradite a person to another state when there are substantial grounds for believing that he would be in the menace of being exposed to torture. The Citizenship Amendment Act, when implemented with the

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<sup>37</sup> UN Human Rights Committee, *Views: Communication No. 538/1993*, UN Doc CCPR/C/58/D/538/1993 (Nov. 1, 1996).

<sup>38</sup> UN Human Rights Committee, *Views: Communication No 1557/2007*, UN Doc CCPR/C/102/D/1557/2007 (Sept. 1, 2011).

<sup>39</sup> *Supra* note 15 at 89-90.

<sup>40</sup> *Id.*, at 94.



NRC on a nationwide scale, will result in large-scale deportation of people to their native countries. This can be anticipated from the fact that in October 2018 and in January 2019 India has deported two groups of Rohingya Muslims to Myanmar and these Rohingya Muslims are not only facing persecution but also alleged genocide in Myanmar.<sup>41</sup> In January 2020, the International Court of Justice, through a provisional order, has ordered Myanmar to protect the Rohingya minority from genocide.<sup>42</sup> Keeping this in mind, India's act of deporting foreigners to other countries where there are chances of their persecution or torture would violate article 3 of the CAT.

Though India has not ratified this convention<sup>43</sup>, India still has a legal obligation to abide by the provisions of the Convention Against Torture because of the existence of the principle of non-refoulement. This principle states that no state shall transfer or remove individuals from their respective jurisdiction when there are considerable grounds for believing that the person would be at risk of persecution, torture, or other significant human rights violations.

In 1951, the principle of non-refoulement was first enshrined in article 33 of the Convention Relating to the Status of Refugees<sup>44</sup>. Thereafter, this particular article has served as a model basis for many subsequent human rights treaties that have incorporated the principle of non-refoulement. India is not a contracting party to the Convention Relating to the status of Refugees, still India has a duty to uphold the principle of non-refoulement because of the existence of ICCPR to which India is certainly a signatory. The Human Rights Committee, while interpreting the scope of article 7 of the ICCPR, has stated that the covenant encompasses the obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm.<sup>45</sup> In *Monge Conteras v. Canada*<sup>46</sup>, the Human Rights Committee has stated that the principle of *non-refoulement* cannot be overridden on the grounds of national security.

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<sup>41</sup> Zarir Hussian, "India deports second Rohingya group to Myanmar, more expulsions likely", *Discover Thomson Reuters*, available at: <https://www.reuters.com/article/us-myanmar-rohingya-india/india-deports-second-rohingya-group-to-myanmar-more-expulsions-likely-idUSKCN1OX0FE> (last visited on Oct. 18, 2020).

<sup>42</sup> *Gambia v. Myanmar*, Press release 2020/4, International Court of Justice, available at: <https://www.icj-cij.org/en/case/178> (last visited on Oct. 18, 2020).

<sup>43</sup> *Supra* note 15 at 94.

<sup>44</sup> The Convention Relating to the Status of Refugees, 1951, art. 33.

<sup>45</sup> UN Human Rights Committee, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, U.N. Doc. HRI/ GEN/1/Rev.7 (Mar. 10, 1992).

<sup>46</sup> UN Human Rights Committee, *Views: Communication No. 2613/2015*, UN Doc. CCPWC/1 19/0/2613/2015, (Apr. 7, 2017). See also UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/HRC/37/50 (Mar. 5, 2015).

Any such threat would have to be addressed, if necessary, through other means that are compatible with the obligations under the covenant.

As per the United Nations High Commissioner for Refugees, the principle of non-refoulement has become a part of customary international law.<sup>47</sup> Article 38 of the International Court of Justice Statute provides that customs are to be treated as a source of law. Therefore, Customary International Law is legally binding on all the countries, unless a country has continuously expressed objections to the customary norms. Therefore, the principle of non-refoulement is also binding on India irrespective of whether India has acceded to the Refugee Convention of 1951 or not. From the above-mentioned texts, it can be concluded that India is technically bound to abide by the provisions of the Convention Against Torture.

The International Court of Justice in the case of *Belgium v. Senegal*<sup>48</sup>, where the question before the court was concerned with the obligation to prosecute or extradite, stated that “the prohibition of torture is a part of customary international law and it has become a peremptory norm or *jus cogens*”.<sup>49</sup>

### **International Convention on the Elimination of All Forms of Racial Discrimination**

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was adopted by the United Nations General Assembly in 1965 and it came into force in 1969<sup>50</sup>. The term ‘racial discrimination’ is a wider term which includes any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin...<sup>51</sup> These objectives of the ICERD are aimed at creating a world order that prohibits any form of citizenry discrimination or denial of religious and cultural freedom and ensures the recognition of human rights of all linguistic and religious groups. India has ratified this convention in 1968.<sup>52</sup> The legal method used by states to address the violation of this convention is known as an interstate mechanism.

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<sup>47</sup> UNHCR Note on the Principle of Non-Refoulement, 1997, available at: <https://www.refworld.org/docid/438c6d972.html> (last visited on Oct. 18, 2020).

<sup>48</sup> *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) (Judgment)* [2012] ICJ Rep. 422.

<sup>49</sup> Jus Cogens forms a part of international law from which no derogation is possible. Marjorie M. Whiteman, “Jus Cogens in International Law, with a Projected List” 7 *Georgia Journal of International and Comparative Law* 609 (1977).

<sup>50</sup> The International Convention on the Elimination of All Forms of Racial Discrimination, 1965.

<sup>51</sup> *Id.*, art. 1, cl. 1.

<sup>52</sup> Shurvo Prosun Sarker, *Refugee Law in India: The Road from Ambiguity to Protection* 22 (Springer, 2017).

Article 1(2) provides that ICERD shall not apply to distinctions, restrictions, exclusion or preferences which is made by state parties between citizens and non-citizens. Article 1(3) provides that the ICERD shall not be interpreted to affect, in any way, the provisions of the state parties concerning nationality, citizenship or naturalization if they do not discriminate against specific nationality. The plain reading of article 5 shows that it prohibits state parties from discriminating based on nationality.<sup>53</sup> With reference to the above-mentioned articles the Citizenship Amendment Act becomes violative for applying only to illegal immigrants hailing from Pakistan, Afghanistan, and Bangladesh. The CAA discriminates between the individuals of these states and other states, including Nepal and Sri Lanka, by providing these states with special concessions on their religious minority status which is based on their nationality.

Therefore, by applying the Act to only three countries, the legislature has narrowed the scope of the Act and it has, knowingly or unknowingly, infringed upon the provisions of the ICERD. Hence, it has paved the way for other member states to address the violations of the provisions of ICERD by using inter-state mechanisms against India.

### **III. Citizenship Amendment Act and the UNHCR**

The United Nations High Commissioner for Refugees (UNHCR) functions under the umbrella of the United Nations Development Programme (UNDP) for safeguarding and assisting asylum seekers. Its primary role with regard to international protection is to make States aware of their obligations to protect refugees and asylum seekers. UNHCR supplies legal aid, guidance, and decisions on matters relating to refugee status and the rights and obligations of refugees in India.

Though India is not a party to the 1951 Refugee Convention India is still a member of the Executive Committee (ExCom) of the UNHCR which reviews the work and policies of the UNHCR.<sup>54</sup> The Executive Committee provides for some guidelines which, though not legally binding, are the interpretation of the 1951 Convention and have been issued as the 'Handbook on the Procedure and Criteria for Determining Refugee Status.' The Agency, on its own, steps forward to determine the status of refugees under its mandate in countries that are not a party to the refugee convention but seek the assistance of the UNHCR.

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<sup>53</sup> *Supra* note 49, art.5 cl.(d)(iii).

<sup>54</sup> *Supra* note 24 at 121.

According to the Handbook for Refugee Status Determination, “it will be necessary to take into account the personal and family background of the applicant, his membership of a particular racial, religious, national [...] in other words, everything that may serve to indicate that the predominant motive for his application is fear”.<sup>55</sup> On the other hand, the CAA does not impose any obligation on the government to check and investigate whether the applicant is the victim of any persecution. Even the word ‘religious persecution’ is not mentioned in the core Act but is only mentioned in the statement of reasons and objects of the statute.<sup>56</sup> So, no provision of the CAA provides for the determination of well-founded fear of persecution of the applicant, and thus, it breaches the central point of the guidelines given by the UN agency.

In addition to this, the CAA also fails to take into account the individuals who may have forcefully converted to another religion. Sometimes, the religious identity of some persecuted individuals may have also been blurred. The UNHCR also takes care of these above-mentioned situations and states that the mere identity attributed to a person may be sufficient for claiming refugee status.

Therefore, the Citizenship Amendment Act infringes upon the international standards set out in the UNHCR guidelines. It restricts authorities from distinguishing between bona fide refugees who have faced persecution or have well-found fear of persecution and those who assume certain religious identities to be granted asylum in India.

#### **IV. Constitutionality of the Citizenship Amendment Act from the Perspective of the Indian Constitution**

The enactment of the Citizenship Amendment Act has led to widespread protest and severe criticism, mainly because it violates article 14 of the Indian Constitution and is against the principle of secularism. Article 14 of the Indian Constitution read as “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.” Thus, the protection guaranteed under article 14 applies to ‘any person’, i.e. both citizens and non-citizens. Equality is one of the magnificent cornerstones of Indian democracy.<sup>57</sup> The scope of article 14 is very wide and any treatment of equals unequally or

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<sup>55</sup> UN High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Apr., 2019).

<sup>56</sup> Citizenship Amendment Bill 2019 (Bill No. 370 of 2019), Statement of Objects and Reasons, available at: [http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/370\\_2019\\_LS\\_Eng.pdf](http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/370_2019_LS_Eng.pdf) (last visited on 8 May 2020).

<sup>57</sup> *Indra Sawhney v. Union of India*, AIR 1993 SC 477.

unequal as equals violate the objective of article 14.<sup>58</sup> The varying needs of the people lead to classification among different groups of persons, and which in turn, necessitates the application of reasonable classification. The Supreme Court of India has laid down twin requirements to be fulfilled by any law, distinguishing between individuals or classes, to satisfy the test of reasonable classification: (i) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped from others left out of the group; and (ii) the differentia must have a rational relation to the objects sought to be achieved by the Act.<sup>59</sup>

The ‘intelligible differentia’ mentioned in the first requirement forms the foundation of reasonable classification. The Act seeks to create two classes of migrants, legal and illegal, which are distinguishable from each other based on their religion and nationality.<sup>60</sup> A perusal of the Statement of Objects and Reasons appended to the bill reveals that it has established ‘religious persecution’ as the ground for classification.<sup>61</sup> The CAA seeks to form a group of religiously persecuted communities consisting of Hindus, Parsis, Jains, Buddhists, Sikhs, and Christians and carves out the Muslim community.<sup>62</sup> It distinguishes the migrants of Afghanistan, Bangladesh, and Pakistan belonging to the Hindu, Sikh, Buddhist, Jain, Parsi, or Christian community from the migrants belonging to the Muslim community.<sup>63</sup> Such exclusion of the Muslim community is solely based on the assumption that no member of such community could have face religious persecution due to the fact that the above-mentioned countries recognises Islam as the state religion.

However, such assumption is highly erroneous due to several reasons. One of the reasons is that it is a well-settled position that the Ahmadiyya community<sup>64</sup>, which is a member of the Muslim community, also faces religious persecution in Pakistan. It is significant to note that Ordinance XX<sup>65</sup> of 1984, which was promulgated by the President of Pakistan to amend the

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<sup>58</sup> *M.G. Badappanavar v. State of Karnataka* (2001) 2 SCC 666.

<sup>59</sup> *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75.

<sup>60</sup> *Supra* note 9, s.2.

<sup>61</sup> *Supra* note 55.

<sup>62</sup> *Supra* note 9, s.2.

<sup>63</sup> *Ibid.*

<sup>64</sup> Ahmadiyyas, also known as Qadianis, are followers of Mirza Ghulam Ahmad, who founded the sect in Qadian, India, in 1901. Hirza Ghulam Ahmad claimed to have received a revelation from God; hence, those who believe Mirza Ghulam Ahmad do not believe that Mohammed is the last Prophet, as do the Sunni and Shiite Muslims. Linda J. Berberian, “Pakistan Ordinance XX of 1984: International Implications on Human Rights” 9 *Loyola of Los Angeles International and Comparative Law Review* 661 (1987).

<sup>65</sup> The Anti-Islamic Activities of the Qadiani Group, Lahori Group and Ahmadis (Prohibition and Punishment) Ordinance, 1984 (Ordinance XX of 1984).

Pakistan Penal Code<sup>66</sup>, makes it a criminal offence for Ahmadiyya community to publicly practice their religion and to call themselves as Muslims.

The above-mentioned facts clearly show, with respect to religious persecution, that the position of Ahmadiyya Muslims is similar to that of members of Hindu, Sikh, Buddhist, Jain, Christian and Parsi communities. It can be concluded that if the objective behind the enactment of the Act is to grant citizenship to the members of religiously persecuted communities,<sup>67</sup> who had settled in any of these three countries specified in the Act, but later on, had fled to India due to fear of religious persecution, in such a scenario, the exclusion of the whole Muslim community seems to be arbitrary. Therefore, it can be stated that the Citizenship Amendment Act fails to clear the scrutiny under the doctrine of reasonable classification.

In addition to this, since the object of the Act seems to be against the international law by favouring one class of refugees over another based on their nationality and religion, it can be said that the Act violates non-discrimination norm of international refugee law<sup>68</sup> and hence, the said Act violates article 51 of the Indian Constitution which directs the state to respect the international treaty obligations.

## V. Conclusion and Recommendations

The Supreme Court of India may pass the constitutionality of the Act as valid by narrowing the interpretation of the scope of the Act but, it has to keep in mind the various international conventions or treaties that India has signed or ratified by becoming a member of the international community. Article 51 read with article 253 provides for respecting international law and to draft legislation to give effect to international agreements.<sup>69</sup> The Act not only violates international legal standards but also the basic feature of Indian democracy i.e. 'secularism'.<sup>70</sup> It favours one religion over the other by granting citizenship to 'illegal migrants' from any of the six above-mentioned religions even though they have been residing in India for only five years. However, for a Muslim migrant who has legally migrated and has resided in India for five years and wishes to obtain citizenship as he fears persecution in his native state

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<sup>66</sup> The Pakistan Penal Code, 1860 (Act XLV of 1860).

<sup>67</sup> *Supra* note 55.

<sup>68</sup> Shivam, "Constitutionality Analysis of the Citizenship (Amendment) Bill, 2019 and Allied Subordinate Legislations" 2 *ILI Law Review* 68 (2018).

<sup>69</sup> The Constitution of India, arts. 51, 253.

<sup>70</sup> *S.R. Bommai v. Union of India* (1994) 3 SCC 1.

will have to wait for an additional seven years. This is unfair and arbitrary. Hence, the Act can be termed as draconian.

The provision of deporting the ‘illegal migrants’ would also require an international agreement with other neighbouring states. At present, there exists no such agreement. The fact that India can't establish the documentary proof of the nationality of the illegal migrants or declared foreigners creates big trouble because the neighbouring states like Bangladesh will have no responsibility to accept these so-called 'declared foreigners' who are going to be deported after the conduction of the proposed nation-wide NRC exercise. This will create a situation of large-scale statelessness and will be violative of international humanitarian law.

Moreover, as there is no international obligation on India to directly grant citizenship to illegal immigrants, there has been speculation as to why the CAA provides direct citizenship when the mere granting of refugee status would be sufficient and ideal, especially in India where the government is already struggling to provide necessities to its citizens.

The large-scale internet shutdowns ordered by Indian authorities, to curb anti-CAA protests and violence, was yet another violation of international human rights law.<sup>71</sup> The Indian government has the right to impose restrictions on internet access to maintain public order, peace and national security but it should not be used frequently and inappropriately. The incidents of internet shutdowns are almost always a blatant attack on international human rights law. The right to internet access has been recognized as a human right guaranteed under international customary law.<sup>72</sup> Moreover, in 2016, the UN Human Rights Council officially adopted a resolution that strictly condemns the use of a deliberate form of internet shutdowns.<sup>73</sup> Therefore, the increased use of internet shutdowns in response to protests against the Citizenship Amendment Act (CAA) is a clear violation of these international principles.

In conclusion, the Citizenship Amendment Act must be amended to bring it in consonance with international laws, to enable equal protection of genuinely persecuted persons, and to prohibit discrimination on the basis of nationality or religion. The amended framework should take into

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<sup>71</sup> The Print Team, “CAA internet shutdowns: Violation of basic rights or extension of law enforcement measures?”, *The Print*, available at: <https://theprint.in/talk-point/caa-internet-shutdowns-violation-of-basic-rights-or-extension-of-law-enforcement-measures/338536/> (last visited on Nov. 28, 2020).

<sup>72</sup> Molly Land, “Toward an International Law of the Internet” 54 *Harvard International Law Journal* 393-458 (2013).

<sup>73</sup> UN Human Rights Council, *The promotion, protection and enjoyment of human rights on the Internet*, A/HRC/RES/32/13, UN Doc A/HRC/32/L.20 (Jun. 27, 2016).

account "the persecuted and the refugees of all religions", as Swami Vivekananda has said at the Parliament of Religions in Chicago in 1893.<sup>74</sup> The accession to the UN Refugee Convention 1951 and its protocol of 1967 is the current need for India and it will be favourable for India to develop a comprehensive refugee law.

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<sup>74</sup> BS Web Team, "Full text of Swami Vivekananda's Chicago speech of 1893", *Business Standard*, available at: [https://www.business-standard.com/article/current-affairs/full-text-of-swami-vivekananda-s-chicago-speech-of-1893-117091101404\\_1.html](https://www.business-standard.com/article/current-affairs/full-text-of-swami-vivekananda-s-chicago-speech-of-1893-117091101404_1.html) (last visited on Dec. 11, 2020). leic