



## THE CONSTITUTION OF INDIA AND INDIAN CITIZENSHIP AMENDMENT ACT, 2019 - A BRIEF ANALYSIS

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### ABSTRACT

The Citizenship Amendment Act 2019, which created a furor across the country was passed by Indian Parliament on December 11, 2019 and came into force on January 10, 2020. Citizenship is a legal relation between an individual and his sovereign state where individuals have the capacity to defend their rights in the front of governmental authority. The 2019 amendment gives citizenship to illegal migrants who belong to these six communities i.e Hindu, Buddhist, Sikh, Christian, Jain, and Parsi and are from three neighboring countries i.e Afghanistan, Pakistan, and Bangladesh. This amendment is in issue because of religion is criteria for granting citizenship and includes only religious minority, not linguistic, ethical, and other type of minority. This paper gives an overview of the amendment and explains the concept of religious persecution. Further, it analyzes the essence of this law in the light of grundnorm i.e Constitution of India and its constitutionality.

[Keywords: illegal migrants, religion, religious persecution, well founded fear, constitutionality, essence of law, Article 14, International obligations]

### I. INTRODUCTION

The issue of citizenship in India is discussed in two places i.e. in Constitution of India and Indian Citizenship Act, 1955. Article 5 to 11 of Constitution of India deals with citizenship which says who born before 1950 is per se citizens of India. But the question of citizenship after 1950 or how anyone can acquire Indian citizenship is also of equal importance. These issues are discussed in Indian Citizenship Act, 1955. According to 1955 Act (hereinafter referred to as the Principal Act), citizenship may be acquired through 5 methods – by birth in India, by descent, through registration, by naturalization and by incorporation of the territory into India. There was a prohibition on illegal migrants from acquiring Indian Citizenship as per this Act.

### II. CITIZENSHIP AMENDMENT ACT, 2019: KEY FEATURES

The Citizenship Amendment Act, 2019 seeks to provide Indian citizenship to illegal migrants who are Hindu, Buddhist, Sikh, Christian, Jain, and Parsi coming from Pakistan, Bangladesh, and Afghanistan. There is no use of the word ‘persecution’ in the Amendment Act. For this, the 2019 Act changes the way of acquiring citizenship according to the Citizenship Act, 1955 by changing the definition of illegal immigrants and the process of acquiring citizenship.

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### **Change the Definition of Illegal Migrant**

Migrant means if any person leaves his country and starts living in other country permanently then he is an immigrant for that nation. Till now, illegal migrant defined in the Principal Act as – if any person who comes to India for living without having a valid passport or having fraud documents or he has exceeded the permission limit of staying in India, in that case that person will be called as illegal immigrant and he will be forced to leave the country.<sup>1</sup>

But this Amendment Act inserted a proviso in definition clause and says that before 31 December, 2014 any people who have come to India by any ways and if they are from Afghanistan, Pakistan and Bangladesh and they belong to these 6 communities i.e Hindus, Sikhs, Buddhists, Jains, Parsis, and Christians shall not be called as illegal immigrants. They will not be deported as illegal immigrants under the Passport (Entry into India) Act, 1920, and Foreigners Act, 1946<sup>2</sup>. Such persons shall be deemed to be citizens of India from the date of entry into India and all legal proceedings against them in respect of their illegal migration or citizenship will be closed.

### **Change in the Process of Acquiring Citizenship**

Before it was like, if you are coming from Pakistan and willing to take Indian Citizenship so for that you have to spend 11 years in India or have to do any Government service and after that you will get Indian citizenship. This amendment Act changes the whole process and says that if you are from Pakistan, Bangladesh and Afghanistan and belong to Hindus, Sikhs, Buddhists, Jains, Parsis, and Christians from these countries you have to spend only 5 years instead of 11 years to get Indian citizenship.<sup>3</sup>

The amendments on citizenship for illegal immigrants will not apply on two categories:

- a. State protected by inner line
- b. Areas covered under the sixth schedule of Constitution

### **III. RELIGIOUS PERSECUTION- INTERNATIONAL CONCEPT**

The simple meaning of persecution is to misbehave or doing violence or discriminating. If one group is doing violence or discrimination on other group is called persecution. Persecution could be of many types such as religious persecution, political, or being racist.

Even though India is not a signatory of refugee conventions but rules of Amendment Act, 2019 will be derived from these guidelines because it is an international concept. So it is required to understand the concept of religious persecution at international level.

<sup>1</sup>The Citizenship Act, 1955, s 2 (1) (b).

<sup>2</sup>The Citizenship Amendment Act, 2019, s 2 (1) (b) proviso.

<sup>3</sup> The Citizenship Amendment Act, 2019, Schedule 3 (d) proviso.

The right to freedom of thought, conscience, and religion is one of the fundamental rights and freedoms in international human rights law. UNHCR issued Guidelines on International Protection Religion-Based Refugee Claims (hereinafter mentioned as Guidelines) under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees. It provides guidance in defining the term religion in the context of international refugee law and provides guiding parameters to facilitate refugee status determination and their religion - based claims.<sup>4</sup>

As per paragraph 3 of the Guidelines, the central element of religious persecution is 'well founded fear'. It has to be proved on the individual level, not collective. As per this rule, every individual who wants Indian Citizenship under Amendment Act, 2019, and he applies for it; he has to prove personally that he had a well founded fear. If he fails to prove at the individual level then he will not get Indian Citizenship and paragraph 14 of the Guidelines provides

"Every individual has to prove his claim and each claim require examination on its merits on the basis of the individual's situation. The area of enquiry includes claimant profile, personal experience, religious belief, identity and/or way of life how important this is for the claimant, what effect the restrictions have on the individual, the nature of his or her role and activities within the religion, whether these activities have been or could be brought to the attention of the persecutor and whether they could result in treatment rising to the level of persecution. In this context, there is no need to prove the "well founded fear" on claimant personal experience. What happened to his friends and relatives, other members of same group may well show his fear that sooner or later he also will become a victim of persecution. Mere membership of a particular religious community will normally not be enough to substantiate a claim to refugee status".

According to Paragraph 12,

"There may be various forms of religion persecution depending on particular circumstances of case. It could include prohibition of membership of a religious community, prohibition of worship with others in public or private, prohibition of religious instruction, serious measures of discrimination imposed on individual because they practice their religion, belong to or are identified with a particular religious community, or have changed their faith. Equally, in communities in which a dominant religion exists or where there is a close correlation between the State and religious institutions, discrimination on account of one's failure to adopt the dominant religion or to adhere to its practices, could amount to persecution in a particular case. Persecution may be inter-religious (directed against adherents or communities of different faiths), intra-religious (within the same religion, but between different sects, or among members of the same sect), or a combination of both. The claimant may belong to a religious minority or majority. Religion-based claims may also be made by individuals in marriages of mixed religion"

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<sup>4</sup>Religion based refugee claims under Article 1A(2)- UNHCR, available at : <https://www.unhcr.org/publications/legal/40d8427a4/guidelines-international-protection-6-religion-based-refugee-claims-under.html> ( visited on 30 June, 2020)

Further, according to paragraph 5 of the Guidelines, Claim based on 'religion' may involve one or more of the following elements:

- a) Religion as belief (including non-belief);

As per paragraph 6 of the Guidelines

"Belief should be interpreted so as to include theistic, non-theistic and atheistic beliefs. Beliefs may take the form of convictions or values about the divine or ultimate reality or the spiritual destiny of humankind. Claimants may also be considered heretics, apostates, schismatic, pagans or superstitious, even by other adherents of their religious tradition and be persecuted for that reason"

- b) Religion as identity;

As per paragraph 7 of the Guidelines,

"Identity is less a matter of theological beliefs than membership of a community that observes or is bound together by common beliefs, rituals, traditions, ethnicity, nationality, or ancestry. A claimant may identify with, or have a sense of belonging to, or be identified by others as belonging to, a particular group or community. In many cases, persecutors are likely to target religious groups that are different from their own because they see that religious identity as part of a threat to their own identity or legitimacy"

- c) Religion as a way of life.

According to paragraph 8 of the Guidelines,

"For some individuals, 'religion' is a vital aspect of their 'way of life' and how they relate, either completely or partially, to the world. Their religion may manifest itself in such activities as the wearing of distinctive clothing or observance of particular religious practices, including observing religious holidays or dietary requirements. Such practices may seem trivial to non-adherents, but may be at the core of the religion for the adherent concerned"

#### **IV. CITIZENSHIP AMENDMENT ACT 2019 AND ITS CONSTITUTIONALITY**

If we interpret Citizenship Amendment Act 2019 in light of the essence of that law and essence of grundnorm i.e. Constitution of India, the objective is to give the Indian citizenship to persecuted minorities either it is religious or linguistic or ethnic from neighboring countries. It means who had suffered religious as well as linguistic persecution or fear of religious as well as linguistic persecution in their country of origin are eligible for Indian citizenship.

The soul of the amendment is to give citizenship to persecuted minorities because they suffered enormously in their countries. Minorities are subject to discrimination, humiliation, and persecution while majority enjoy special rights and privileges. Many have been forcibly

converted and women belonging to minority communities have been kidnapped, raped and forced into marriage with the majority. The spirit is to set an example for other countries that India stands with all persecuted minorities of all neighboring countries irrespective of their religion and language and we are against all kinds of discrimination, humiliation and persecution. We will not sideline the rights of minorities. The purpose of bringing amendment is to give more secured and dignified life to persecuted minorities by giving them Indian citizenship that would enable them to secure admissions in educational institution, gets jobs, buy property, and enjoy state welfare benefits. It will clearly shows to other countries that India is fully against any kind of discrimination and they all have freedom of thought, conscience and religion. They all have right to freely profess, practice and propagate their religion and right to conserve their distinct language, script and culture.

But in view of the author, this amendment Act is against the essence of this law and grundnorm as it gives citizenship on the basis of religion which belongs to selected countries. Article 14 deals with '*equality before law and equal protection of law*'.<sup>5</sup> This equality and protection apply equally to both citizens and foreigners. It clearly said there can't be any discrimination between individuals on any unreasonable grounds. There should be an equal treatment between individuals and the law should apply equally upon all. Article 14 permits reasonable classification only and forbids class legislation. Reasonable classification is constitutionally permissible as the laws can apply equally only upon the persons who are equally placed with respect to the purpose of that law and for that purpose the test of reasonable/ intelligible differentia has to be applied. However, class legislation in itself is arbitrary, discriminatory and against the principle of natural justice.

Now question is whether this amendment Act violates Article 14 and spirit of Constitution as it gives a different treatment to illegal migrants on the basis of:

1. Country of origin
2. Their religion
3. Date of entry into India
4. Place of residence in India

Now we have to examine whether these differentiating factors could fall in reasonable classification or not. It means whether they could serve a rational purpose for classification.

Firstly, this Amendment Act classifies the illegal migrants on the basis of their country of origin which includes Afghanistan, Pakistan, and Bangladesh. We have limited resources, so

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<sup>5</sup> The Constitution of India, 1950, Article 14.

it is not possible to include all countries of the world. Now the question is why we include only these 3 neighboring countries, not all neighboring countries. According to the Statement of Objects and Reasons(SOR), "India has had historic migration of people with Afghanistan, Pakistan, and Bangladesh and these countries have a state religion due to which there is religious persecution of minorities". But they did not consider the migrants from other neighboring countries such as Sri Lanka where Buddhist is State Religion and Myanmar where preference is given to Buddhist. Sri Lanka has had a history of persecution of linguistic minority, the Tamil Eelams and Myanmar also has had a history of persecution of a religious minority, the Rohingya Muslims. The Act does not cover Rohingya Muslim refugees from Myanmar, Hindu refugees from Sri Lanka, and Buddhist refugees from Tibet, China. It is not clear why they have been excluded from the Act, despite the objective of the Act is to provide citizenship to migrants escaping from religious persecution. It is not clear in the considered opinion of author as to why migrants from Pakistan, Afghanistan, and Bangladesh are differentiated from migrants from other neighboring countries

All persecution is solely based on religious grounds and do not cover the persecution on the basis of ethnicity, linguistic etc. This Act does not cover the ethnic issues of Balochs, Sindhis, Pakhtuns, Mohajirs in Pakistan, the Biharis in Bangladesh, ethnic, and linguistic issues of Tamils in Sri Lanka an ethnic Indians in Malaysia and Fiji who migrated there in search of work or brought therein as independent laborers when those were British colonies. Further, there is no reason to include Afghanistan while there is a reason that millions of citizens of undivided India were living in Pakistan and Bangladesh.

Second, there is a classification based on their religion. According to SOR, there is religious persecution of minorities in Pakistan, Afghanistan, and Bangladesh. It is absolutely true. But the Act considers only certain minorities' i.e Hindus, Sikhs, Buddhists, Jains, Parsis, and Christians. There are other religious as well as linguistic minorities also who face religious persecution and they may have illegally migrated to India. But there is no cognizance on this. This Act includes only certain religious persecution, not include linguistic and other religious persecution. It should have included Ahmadiyyas – a Muslim sect who have been “viciously hounded in Pakistan as heretics”, and the Hazaras – another Muslim sect who have been murdered by the Taliban in Afghanistan. They should be treated as minorities. In Pakistan, Ahmadiyas Muslims are considered Non-Muslim and there has been report of their persecution and the murder of atheists in Bangladesh.

Third, there is a differential treatment of migrants based on their date of entry into India, i.e., whether they entered India before or after December 31, 2014. If you are from Pakistan,

Afghanistan and Bangladesh and you belong to Hindus, Sikhs, Buddhists, Jains, Parsis, and Christians from these countries then you have to spend only 5 years to get Indian Citizenship but if you are Muslim you have to spend 11 years. It is not clear what is rational behind this and why likes cannot be treated alike.

Hence, there is no reasonable classification and it seems to violate Article 14 of Constitution. It divides the migrants on the basis of religion that compromises the Constitution's basic structure i.e. secularism. It seems to make a line between Muslims and Non - Muslims which compromises the concept of fraternity and unity and integrity of the nation.

Suppose there is a reasonable classification but reasonable classification is not the end of equality rather it is a tool of equality as it was held by Bhagwati Justice in *Ajay Hasia v. Khalid Mujib*<sup>6</sup>. It was also held that now the test of reasonable classification is not the end of equality rather it is a tool of equality. The real test is to examine the essence of law and to see whether the law provides unreasonable and arbitrary powers. The moment it is found to be arbitrary the law itself would be struck down as being unconstitutional, even though it makes reasonable classification. After the *Kesavananda Bharti v. State of Kerala*<sup>7</sup> judgment the entire perception regarding constitutional interpretation is changed and now the test is that legality of any legal provision is to be checked in the light of the essence of that law and essence of the Constitution.

This amendment also seems to violate India's international obligations. Article 14 of UDHR<sup>8</sup> clearly said "everyone has the right to seek and to enjoy in other countries asylum from persecution", and according to Article 15, "everyone has the right to a nationality and no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality". Article 26 of ICCPR<sup>9</sup> says "all persons are equal before law and are entitled to equal protection of the law without any discrimination". There should be no discrimination on any ground such as race, color, sex, language, religion, political, or other opinion, national or social origin, property, birth, or other status.

## V. CONCLUSION

It must be pointed out that the national spirit of providing shelter and sanctuary to refugees is not new. In fact, India has a long history of doing so for victims of persecution. Whether it is

<sup>6</sup>*Ajay Hasia v. Khalid Mujib*(1981) 1 SCC 722.

<sup>7</sup>*Kesavananda Bharti v. State of Kerala*(1973) 4 SCC 225.

<sup>8</sup> Universal Declaration of Human Rights, 1948, Article 14.

<sup>9</sup> International Covenant on Civil and Political Rights, 1966, Article 26.

the Zoroastrians in the 12th century or the recent Tibetans, India has always demonstrated humanity and generosity and has opened its arms to those who seek asylum.

The Act must be viewed with a positive eye to legitimize its existence as an asylum-seeker in India. However, just as bitterness and cruelty are not partial to certain people, we cannot favor our generosity. The law should also find ways to accommodate Ahmadiyyas, Uighurs and Rohingyas who are also persecuted ethnic minorities, and have knocked on the door of India when needed.

We must reason and discover what the citizenship really means. Citizenship is not only a legal tie between the state and the individual, but also reflects a sense of belongingness and yearning. The amendment Act addresses people who are eager to live in an environment that free from the fear of persecution and those who can imagine a better future for themselves. This amendment Act fulfils the spirit of our Constitution if it does not discriminate persecuted minorities on the basis of religion and if all kinds of persecuted minorities of neighbouring countries are eligible for Indian Citizenship irrespective of their religion.