
CITIZENSHIP AMENDMENT ACT, 2019: A CRITIQUE

Manish Kumar*

Abstract

The research paper traces the legislative history of citizenship in India. Post this the authors have delved into the provisions of the Citizenship Amendment Act to outline the core sentiments laid out in it. However, the authors have mainly aimed to deduce the constitutionality or unconstitutionality of the Act. Post this the authors have argued as to whether the Act has any scope of rectification or must be done away with completely. The authors have also invoked international law to fully assess whether such policy decisions would be globally approved or not. At last, the authors in their concluding remark have argued that this constitutionally unpalatable legislation is ultra vires as it transgresses from the Basic Structure Doctrine - Secularism and Equality as engraved in our Constitution and must be repealed before we go back to the India of 1947 – politically divided with a wildfire blazing all around.

Introduction

December 2019 saw paranoia amidst a certain section of society. This paranoia led to an eruption of wide-scale protests wherein policemen, students and citizens were clashing almost regularly, leaving several fatalities and many more injured as the Citizenship Amendment Bill, 2019 made way for the Citizenship Amendment Act, 2019.¹ Indian Muslims have watched with trepidation as the ruling party relentlessly

* Assistant Professor of Law

¹ Jayshree Bajoria, "Shoot the Traitors" Human Rights Watch (April 27, 2022, 6:30 p.m.), <https://www.hrw.org/report/2020/04/09/shoot-traitors/discrimination-against-muslims-under-indias-new-citizenship-policy#>.

pursues its "*Hindutva social agenda*."² The fears are not completely baseless – in concert with the exercise of the National Register of Citizens, Indian Muslims expect the ramifications to include denigration of latter to second-class citizens and in all probability, the ouster of the same from the Indian soil.

Even before the 2014 Lok Sabha elections, the Bharatiya Janata Party's (BJP) election manifesto assured welcoming Hindu brethren who have acquired the status of refugees or illegal immigrants. Illegal migrants have been defined as "*any person from the Hindu, Sikh, Buddhist, Jain, Parsi or Christian communities from Afghanistan, Pakistan or Bangladesh, who had entered into India without valid travel documents or expired valid documents and who are ineligible to apply for Indian citizenship under section 5 or section 6 of the Citizenship Act, 1955*."³

In the 17th Lok Sabha on 9th December 2019, the Bill was presented by the Minister of Home Affairs and was subsequently passed on 10th December 2019. Then on 11th December 2019, the bill was passed by the Rajya Sabha.⁴ On December 12, 2019, President Ram Nath Kovind by signing it, breathed life into the Bill that would come to be certified as one of the most controversial legislations of recent times.

History of Citizenship in India

Citizenship in India has been a contentious topic even to the framers of the Constitution, to the point wherein Dr Ambedkar had declared it as giving the Drafting Committee maximum headache.⁵ While *jus soli* confers citizenship based on place of

² NH Desk, "CAA, an outcome of BJP's Hindutva agenda: US commission," National Herald (April 27, 2022, 6:40 p.m.), <https://www.nationalheraldindia.com/flick-past/caa-an-outcome-of-bjps-hindutva-agenda-us-commission>.

³ The Citizenship (Amendment) Bill, 2019, Clause 3 of the Statement of Objects and Reasons (Bill No. 370 Of 2019).

⁴ Parliament passes the Citizenship (Amendment) Bill 2019, Pib.gov.in, (April 27, 2022, 7:00 p.m.), <https://pib.gov.in/newsite/PrintRelease.aspx?relid=195783>.

⁵ Parliament of India, Constituent Assembly Debates, Volume IX (August 10, 1949) (speech of Dr. Ambedkar).

birth, *jus sanguinis* gives recognition to blood ties. It was this principle of *Jus soli* that the Assembly adopted.⁶

The 1947 partition happened in two phases: the first phase of immigration occurred in March 1947 when large numbers of Hindus and Sikhs arrived in India from West Pakistan. Again in 1948, several Indian Muslims returned to India from West Pakistan.⁷ Several issues cropped up – property disputes, poor living conditions, separation of family members etc. The second migration created more trouble as Hindus and Sikhs were being housed in the properties left behind by the Muslims who had earlier evacuated to Pakistan but now returned to claim what was rightfully theirs.⁸ A tense law and order situation was created and in the apprehension of communal tensions which may arise, the Indian Government introduced a system on July 19, 1948, by which no person could migrate from West Pakistan into India without a permit issued by the Indian High Commission in Karachi or Lahore. Thus, while establishing the citizenship of Hindus and Sikhs migrating from West and East Pakistan was relatively easy without any arduous procedure or inquiry, almost automatic, Muslims had it harder – having to seek permanent resettlement permits⁹ which weren't doled out easily.

While such discrimination at the outset of Independence is telling us that the framers of the Constitution had a tougher time deciding the grounds for citizenship. It was a dilemma to decide whether citizenship should be granted on grounds of religion or

⁶ Faizan Mustafa, Assam NRC: Who is an Indian citizen? How is it defined? The Indian Express, (April 26, 2022, 7:00 p.m.), <https://indianexpress.com/article/explained/assam-nrc-citizenship-amendment-bill-indian-citizen-5924953/>.

⁷ Abhinav Chandrachud, 'The Origins of Indian Citizenship,' Bloomberg Quint (April 26, 2022, 8:00 p.m.), <https://www.bloombergquint.com/opinion/citizenship-amendment-act-the-unsecular-origins-of-indian-citizenship-by-abhinav-chandrachud>.

⁸ Vazira Fazila & Yacoobali Zamindar, *The Long Partition and the Making of Modern South Asia: Refugees, Boundaries, Histories* (2007), Columbia University Press, pp. 85-86.

⁹ Permit System Rules, 1948 (August 7, 1948), <https://archive.org/details/in.gazette.e.1948.84?q=Influx+from+Pakistan+%28Control+%29+Ordinance>

the universal approach must be adopted. After all it was argued that Muslims had a nation carved out for them. Hence its only right that Hindus and Sikh have India to themselves.¹⁰ Secularism might have been declared as a Basic structure in the landmark Keshavanada Bharti case, but it was only two years later when the word would be officially engraved in the Constitution by virtue of the 42nd Constitutional Amendment, 1975.¹¹

Indian Constitution on Citizenship

Articles 5 and 8 of the constitution categorizes the individuals entitled to hold Indian citizenship. Article 5 deals with citizenship by domicile.¹² According to Article 5 of the Constitution, *“all those domiciled and born in India are entitled to Indian citizenship. Also, persons who were domiciled but not born in India, although either of whose parents were born in India is given citizenship. Lastly, anyone who has been an ordinary resident for more than five years may apply for citizenship.”*

Furthermore, Article 6 of the Constitution categorises individuals for the purpose of Citizenship of migrants to India from Pakistan.¹³ According to Article 6 of the Constitution, there are two categories of persons who have migrated from Pakistan to India:

- i. **Those who came to India before July 19, 1948, and**
- ii. **Those who came on or after July 19, 1948.**

¹⁰ Parliament of India, Constituent Assembly Debates, Vol. IX (August 11, 1949) (speech of P.S. Deshmukh).

¹¹ Adrija Roychowdhury, 'Secularism: Why Nehru dropped and Indira inserted the S-word in the Constitution,' The Indian Express (April 28, 2022, 7:00 p.m.) <https://indianexpress.com/article/research/anant-kumar-hegde-secularism-constitution-india-bjp-jawaharlal-nehru-indira-gandhi-5001085/>.

¹² The Constitution of India, 1950, art. 5.

¹³ The Constitution of India, 1950, art. 6.

Persons who have migrated to India preceding July 19, 1949, would by default become Indian citizens if either of their parents or grandparents was born in India. But those who entered India after this date needed to register themselves, after residing for at least six months immediately before the date of applying for registration, by an officer appointed by the government of India.

Article 7 of the Constitution also deals with the Citizenship of migrants of Pakistan.¹⁴ According to Article 7 of the Constitution, *"all the persons who had migrated to Pakistan post-March 1, 1947, but afterwards returned on resettlement permits were also included in the citizenship ambit after registering her/himself as a citizen of India. He/she can do so after residing for at least six months immediately before the date of applying for registration."* Whereas Article 8 of the Constitution deals with citizenship of persons of Indian origin residing outside India whereby, *"any Person of Indian Origin residing outside India or either of whose parents or grandparents were born in India could register himself/herself as an Indian citizen with the diplomatic or consular representative."*¹⁵

Article 9 of the Indian Constitution states that *"on voluntarily acquiring the citizenship of a foreign State, an individual will lose his citizenship."*¹⁶ Whereas Article 10 of the Constitution provides that *"every person who is/is deemed to be a citizen of India under any of the provisions of Part 2 shall, subject to the provisions of any law that may be made by Parliament, continue to be such citizen."*¹⁷ Lastly, Article 11 of the Constitution authorises the Parliament to make provisions concerning the acquisition and termination of citizenship and all matters relating to it.¹⁸

¹⁴ The Constitution of India, 1950, art. 7.

¹⁵ The Constitution of India, 1950, art. 8.

¹⁶ The Constitution of India, 1950, art. 9.

¹⁷ The Constitution of India, 1950, art. 10.

¹⁸ The Constitution of India, 1950, art. 11.

The Forerunner of CAA: Citizenship Act, 1955.

India doesn't allow for dual citizenship. Any person by birth, descent, registration and naturalisation may acquire Indian Citizenship which is enumerated under the Citizenship Act, 1955. The Act has been amended four times since its enactment.

Section 3 of the Act states that *"every person born in India on or after 26.01.1950 but before 01.07.1987 is an Indian citizen, notwithstanding the nationality of his/her parents. If the person was born in India between 01.07.1987 and 02.12.2004, the individual is a citizen of India provided either of his/her parents is a citizen of the country at the time of his/her birth. Every person born in India on or after 3.12.2004 is a citizen of the country given both his/her parents are Indians or either parent is a citizen, and the other is not an illegal migrant at the time of his/her birth."*¹⁹

Section 4 of the Act deals with citizenship on grounds of descent.²⁰ According to Section 4 of the Act, a *"person born outside India on or after January 26, 1950, is a citizen of India by descent if his/her father was a citizen of India by birth. A person born outside India on or after December 10, 1992, but before December 3, 2004, is an Indian if either of his/her parents was a citizen of India by birth. If an individual born outside India on or after December 3, 2004, has to acquire citizenship, his/her parents need to make a declaration to the effect that the minor isn't the citizen of any other country and accordingly, his/her birth must be registered at an Indian consulate within a year of the minor's birth."*

Section 5 permits acquiring Citizenship by registration provided that:²¹

- A person of Indian origin has been a resident of India for 7 years before applying for registration. Or,

¹⁹ Citizenship Act, 1955, s. 3.

²⁰ Citizenship Act, 1955, s.4.

²¹ Citizenship Act, 1955, s.5.

- A person of Indian origin who is a resident of any country outside undivided India. Or,
- A person is married to an Indian citizen and is ordinarily resident in India for 7 years before applying for registration.
- Minor children born to persons who are citizens of India.

Section 6 of the Citizenship Act states that *“a person can obtain citizenship by naturalisation if he/she is ordinarily resident of India for 12 years (throughout 12 months preceding the date of application and 11 years in the aggregate) and satisfies all qualifications in the third schedule of the Citizenship Act, 1955.”*²²

When the 1986 amendment happened, it made Section 3 less exclusive. The amendment entailed that those who were born in India on or after January 26, 1950, but before July 1, 1987, shall be Indian citizens while those born post-July 1, 1987 but before December 4, 2003, can get citizenship only if he/she's born in India and either of his parents was an Indian citizen at the time of the individual's birth.²³

Again, in the 2003 amendment, immigrants from Bangladesh were targeted stating that those born on or after December 4, 2004, in India must also have both parents who are Indian citizens or one parent must be an Indian citizen and the other should not be an illegal migrant.²⁴ Thus, it is evident that India has wavered from the jus soli principle to jus sanguinis over time.

²² Citizenship Act, 1955, s.6.

²³ Press India, Those born before Jul 1, 1987 or whose parents born before that are Indian citizens: Govt, Business-standard (April 28, 2022, 7:00 p.m.) https://www.business-standard.com/article/pti-stories/those-born-before-jul-1-1987-or-whose-parents-born-before-that-are-indian-citizens-govt-119122001163_1.html.

<https://indiancitizenshiponline.nic.in/citizenshipact1.htm>.

²⁴ The Citizenship (Amendment) Act, 2003, <https://indiankanoon.org/doc/949775/>.

Evolution of CAA

The Citizenship (Amendment) Act, 2019 comes as a salvation for the persecuted - or so the Government of India touts. However, salvation comes with a caveat. What the Act seeks to amend is the Citizenship Act, 1955. Under the new Act, Section 2 of the 1955 Act has been amended to state that *“any person who is a Hindu, Sikh, Buddhist, Jain, Parsi, and Christian who happen to be migrants from Afghanistan, Bangladesh, and Pakistan are eligible for citizenship of India.”*²⁵ Notably, Muslims, Jews and non-believers have been excluded from the list. The countries listed are Islamic Republics. No other country which happens to be the neighbour of India has made it into the list.

Also, the cut-off date for citizenship application has been kept at December 31, 2014, i.e., only immigrants of the mentioned religions, who have entered India on or prior to that date are entitled to this benefit.²⁶ These immigrants fleeing religious persecution and who have entered on or before the cut-off date shall be deemed to be citizens of India from the date which they enter into India and any legal action against them concerning their illegal immigration or citizenship will be terminated.

The law applies to only those who *“have faced persecution on grounds of religion in those countries.”*²⁷ It aims to protect people of the above-mentioned religions from proceedings of illegal migration. Thus, people fleeing only religious persecution (and not political or ethnic or racial persecution or any other!) are entitled to apply for citizenship. Fascinatingly, religious persecution finds no mention in the final Act. However, the Citizenship (Amendment) Bill, 2019 elaborates the objective of its genesis in its Statement of Objects and Reasons which was discussed by the Minister of Home Affairs. It is in that Statement of Objects and Reasons that persecution on the

²⁵ The Citizenship (Amendment) Act, 2019, No. 47 Of 2019, s.2.

²⁶ Id.

²⁷ The Citizenship (Amendment) Bill, 2019, Bill No. 370 Of 2019, Clause 2 of the Statement of Objects and Reasons.

ground of religion finds a citation.²⁸ It has been admitted that the rationale of this Bill/Act was to undo the wrongs of the 1947 Partition of India. It was to give a home to these religious communities who were obstructed and restricted from their right to practice, profess and propagate their religion in these predominantly Islamic states.²⁹

Before this amendment, the period of waiting for naturalization was 11 years. The principal prerequisite being offered by the Act is that it has reduced this period of wait for naturalization for migrants belonging to these particular communities, from 11 years to at least 5 years.³⁰

Another aspect of the Act would be the exclusion of seven Northeastern states from the implementation of the amended provisions. The Act categorically exempts the application of the act to tribal areas of Assam, Meghalaya, Mizoram or Tripura as included in the Sixth Schedule to the Constitution and all the areas covered under the 'Inner Line Permit' (ILP) notified under the Bengal Eastern Frontier Regulation, 1873.³¹ Interestingly, some of the most vehement protests have come from these NE states, mainly Assam which regards the amendment as a threat to their culture, economy and politics and a breach of the Assam Accord which is likely to occur from the influx of migrants from Bangladesh.

Lastly, the Act also talks about individuals holding Overseas Citizen of India (OCI) cards – a status of permanent residency allowing a foreign citizen of Indian origin to live and work in India indefinitely minus certain rights such as the right to vote or to hold government office. Post the enactment, there may be cancellation of the OCI registration if the individuals violate any provision of any law as would be

²⁸ Id.

²⁹ Id.

³⁰ The Citizenship (Amendment) Act, 2019, No. 47 Of 2019, s.6.

³¹ The Citizenship (Amendment) Bill, 2019, Bill No. 370 Of 2019, s. 3 (4) And Clause 10 of the Statement of Objects and Reasons.

notified by the Central Government.³² Notably, the provision is ambiguous as to what kinds of laws may be notified by the Central Government for the implementation of the provision. The Bill accepts that since there are redressal mechanisms available to such overseas citizens on cancellation of registration, they shall be given an opportunity to be heard before cancellation of such registration.³³

India's International Commitments

The parameters of securing global approval for a law as contentious as CAA are clear. Granting national citizenship to refugees is treated as matter exclusively within the competence of each nation. Granting asylum and non-refoulment of refugees might be *jus cogens* but granting of citizenship is a matter of discretion on part of the individual nations.³⁴ However, there are certain principles such as non-discrimination and non-arbitrary deprivation of citizenship which are considered to be part of customary international law and therefore, regarded as non-derogable to a great extent.³⁵ What are the other legal instruments that speak about granting refugees citizenship?

The general rule is that States party to a convention or agreement must see through it in good faith (*Pact Sunt Servada*).³⁶ However, the agreements are not binding on States not party or signatory to it. Thus, India not being a party to the Vienna Convention on

³² The Citizenship (Amendment) Act, 2019, No. 47 Of 2019, s 4(I).

³³ The Citizenship (Amendment) Act, 2019, No. 47 Of 2019, s. 4(ii).

³⁴ Vani Manoj, *Refugee and the Non-Refoulement Obligation*, SSRN (April 28, 2022, 7:00 p.m.) <https://ssrn.com/abstract=3314297> or <http://dx.doi.org/10.2139/ssrn.3314297>

³⁵ Resolution 26/14 (2014) & Resolution 32/5 (2016), UN Human Right Council.

Right to a Nationality and Statelessness, Ohchr.org, <https://www.ohchr.org/EN/Issues/Pages/Nationality.aspx>.

³⁶ I. I. Lukashuk, *The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law*, *The American Journal of International Law*, Vol. 83, No. 3 (Jul., 1989), pp. 513-518, <https://doi.org/10.2307/2203309>.

the Law of Treaties implies that there might be difficulty in invoking India's internal legislation to observe international commitments.³⁷

Nevertheless, the UN Convention Relating to the Status of Refugees³⁸ and the Protocol Relating to the Status of Refugees³⁹ states that State parties are to grant refugee status to individuals who are persecuted or fear persecution on grounds of 'race, religion, nationality, membership of a particular social group or political opinion'. State parties are required to implement the provisions of the Convention without any discrimination based on an applicant's race, religion or country of origin.

Article 26 of the International Covenant of Civil and Political Rights prohibits non-discrimination to any person (including refugees/classes of refugees) and grants them equal and effective rights.⁴⁰ Article 2(1) requires the States to guarantee rights without distinction based on certain specified grounds.⁴¹ The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws limits the exclusive competence of States in nationality matters by providing that *"it is for each State to determine under its law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality."*⁴²

It is pertinent to note that the Indian Constitution recognizes right to equality and the equal application of the law. The 1948 Universal Declaration of Human Rights, which India is a signatory to, specifically prohibits arbitrary deprivation of nationality.⁴³ It is also interesting to note that India has ratified neither the UN Convention Relating to

³⁷ Rajeev Dhavan, *Treaties and People: Indian Reflections*, Journal of the Indian Law Institute, Vol. 39, No. 1 (January-March 1997), pp. 1-46, <https://www.jstor.org/stable/43951677>.

³⁸ UN Convention Relating to the Status of Refugees, 1950, 189 UNTS 137.

³⁹ Protocol Relating to the Status of Refugees, 1996, 606 UNTS 267.

⁴⁰ International Covenant of Civil and Political Rights, 1966, art. 26.

⁴¹ International Covenant of Civil and Political Rights, 1966, art. 2(1).

⁴² The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, art.1.

⁴³ Universal Declaration of Human Rights, 1948, art.15 (2).

the Status of Stateless Persons, 1954 nor the Convention on the Reduction of Statelessness, 1961.

Several Conventions and Agreements give directives on treatment of refugees but several experts - from Hailbronner (*"States remain under no obligation to grant asylum ... to refugees"*),⁴⁴ Morten Kjaerum (*"States have been unwilling to pledge themselves in international conventions to the individual's right to asylum"*);⁴⁵ David A. Martin (*"Classically, the right of asylum under international law belonged to states and not to individuals"*)⁴⁶; to Paul Weis (*"According to general international law as at present constituted, the so-called right of asylum is a right of States, not of the individual"*)⁴⁷ - most have conceded that when it comes to matters of granting asylum and citizenship to persecuted refugees, the international law falters before the will of the Nation.

Conclusion and Suggestions

The Apex Court of India in the case of *Budhan Choudhary v. State of Bihar*⁴⁸ has observed that there are two conditions which need to be fulfilled for passing the test of permissible classification. Firstly, the classification must be based on an intelligible differentia. Secondly, the difference needs to have a rational relation to the object sought to be achieved by the statute in question. It is also pertinent to note that Article 14 of the Indian Constitution 14 condemns discrimination not only by a substantive law but also by a law of procedure. the object of the law must itself serve a legitimate aim of the State.

⁴⁴ Molding a New Human Rights Agenda, 8 Wash. Q. 183 (1985).

⁴⁵ Article 14, In the Universal Declaration of Human Rights: A Commentary 220 (Asborn Eide Et Al. Eds., 1992).

⁴⁶ Reforming Asylum Adjudication: On Navigating the Coast of Bohemia, 138 U. Pa. L. Rev. 1247, 1253 (1990).

⁴⁷ Legal Aspects of The Convention Of 25 July 1951 Relating to The Status of Refugees, 1953 Brit. Y.B. Int'l L. 478, 481.

⁴⁸ *Budhan Choudhary v. State of Bihar*, AIR 1955 SC 191

There are the following loopholes in the Citizenship Amendment Act, 2019: -

- (i) **Other Religious Communities:** The Citizenship Amendment Act, 2019 is applicable only upon Hindu, Sikh, Buddhist, Jain, Parsi and Christian immigrants from the countries Pakistan, Afghanistan and Bangladesh. It does not take into consideration the Jews, Muslim minorities like Shias or Ahmadiyas, and atheists who are facing persecution on the grounds of religion, in Afghanistan, Pakistan or Bangladesh. The Citizenship Amendment Act, 2019 covers some religious communities while ignoring others thereby violating the principle of secularism enshrined in the preamble of our Constitution.⁴⁹
- (ii) **Selection of Countries:** The Citizenship Amendment Act, 2019 applies only to those refugees who are facing religious persecution in Pakistan, Bangladesh and Afghanistan. It ignores the victims of religious persecution from neighbouring countries like Myanmar, Sri Lanka, and Bhutan etc...It is pertinent to note that Rohingyas are facing persecution in Myanmar whereas Sri Lanka is not safe for Tamilian Hindus.⁵⁰
- (iii) **Cut-off Date:** The Citizenship Amendment Act, 2019 grants protection to only those refugees who have entered India before 31st December, 2014. Those refugees, who have entered this country after 31st December, 2014 will not be granted citizenship under the Citizenship Amendment Act, 2019 despite the fact that they have faced religious discrimination or may face religious persecution if they reside in those countries specified under the Citizenship Amendment Act, 2019. In the words of Dr. Abhinav

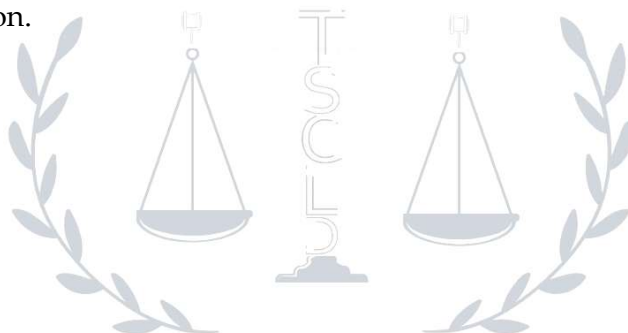
⁴⁹ Suhrith Parthasarathy, 'Why the CAA Violates the Constitution,' The India Forum (April 29, 2022, 8:00 p.m.), <https://www.theindiaforum.in/article/why-caa-violates-constitution>

⁵⁰ Id.

Chnadrachud, this cutoff date undermines the ostensibly humanitarian aim of the Citizenship Amendment Act, 2019.⁵¹

- (iv) **Non-Religious Prosecution:** The Citizenship Amendment Act 2019 do not take into account political persecution or persecution based on sexual orientation. It considers only religion a ground of persecution.⁵²

Due to the above-mentioned reasons, it is important that the Citizenship Amendment Act, 2019 needs to be opposed. In a democratic and Secular India which is governed by a liberal constitution, enactment of such law violates the right to equality and is also anti-thesis to the rule of law. Furthermore, the Citizenship Amendment Act also violates the principles of International Law. As a result, it is important that the Apex Court strikes down this legislation and reclaims its position as the guardian of the Indian Constitution.



⁵¹ Abhinav Chandrachud, 'The Origins of Indian Citizenship,' Bloomberg Quint (April 26, 2022, 8:00 p.m.), <https://www.bloombergquint.com/opinion/citizenship-amendment-act-the-unsecular-origins-of-indian-citizenship-by-abhinav-chandrachud>.

⁵² Id.