The legality and morality of the Citizenship Amendment Act, 2019

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ABSTRACT

The Indian Parliament passed the Citizenship Amendment Act (CAA) of 2019 on the 11th of December 2019. The Act is an amendment to the Citizenship Act 1955, which confers citizenship upon Hindus, Sikhs, Buddhists, Jains, Parsis, and Christian religious minorities from the countries of Afghanistan, Pakistan, and Bangladesh who had fled from persecution from their respective countries before the 31st of December in 2014.

The Act does not include other minorities from these countries; additionally, it also excludes other neighboring countries with persecuted minorities from its ambit. The Act does not entail any intelligible differentia between those minorities and countries included in the law, and those excluded from it. It fails to establish a nexus between the objective of the law and the differentia; it is fundamentally arbitrary. The CAA of 2019 is against the secular nature of the country, as it uproots the foundation and principles upon which the Constitution was drafted.

Although legal academia has witnessed some discussion on the repercussions of the CAA-NRC in India and its practical implications, this paper will exclusively analyze the change in Indian constitutional values through this Act, and whether or not it is violative of Article 14, arguably the most basic of the Fundamental Rights. In addition to marring the Basic structure of the Constitution, the Amendment of 2019 also creates a monumental shift in the epistemology behind Indian citizenship and the basis upon which citizenship is granted in India (Jus Soli to Jus Sanguinis). The constitutional morality has been challenged numerous times throughout history, but arguably none have shaken the cornerstones of the Constitution on a fundamental level, like the CAA of 2019.

Keywords

CAA- 2019, Article 14, Citizenship Law, Basic Structure Doctrine, Arbitrariness

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INTRODUCTION

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC

-The Preamble to the Constitution of India

The Citizenship Amendment Act of 2019 is an amendment to the Citizenship Act, 1955. The First Amendment is in Section 2(1)(b)[1], which essentially defines who qualifies to become an 'illegal immigrant'. The Amendment of 2019 excludes from this definition, any person belonging to the Hindu, Sikh, Buddhist, Jain, Parsi, or Christian community from Afghanistan, Bangladesh, or Pakistan, who entered India on or before the 31st of December, 2014[2]. The Amendment, however, does not include Muslim minorities from these countries. The '*Ahmadiyyas*' of Pakistan, the '*Hazaras*' of Afghanistan, or the *'Rohingya'* Muslims of Myanmar, who face the brunt of severe religious persecution.

The Passport Act of 1920 provides the Central Government with this authority to exempt 'any person or class of persons' from having to be in possession of a passport to enter India.[3] The Amendment, in essence, allows for the naturalization of persecuted minorities from the Muslim majority countries of Afghanistan, Bangladesh or Pakistan who have entered India before the 31st of December in 2014. However, it does not allow for the naturalization to persecuted Muslim minorities from the same countries. This raises a more important question as to why citizenship should be granted based on religion and as to whether this Amendment is *ultra vires* of the Constitution and therefore, void.

This question investigates the very fabric of this law and thereby, the epistemology behind citizenship in India. This paper will not only put the CAA of 2019 through the various tests of Article 14 (intelligible differentia, rational nexus, and manifest arbitrariness). It will also investigate how the act alters the most essential constitutional morals set by the makers of the constitution, i.e., Basic Structure Doctrine and shift from *Jus Soli* to *Jus Sanguinis*. The CAA of 2019 enforces a parameter for citizenship that is far from secular. It prioritizes certain persecuted minorities from select religions over others with no ascertainable justification for the same. This selected sculpturing of India's demography is not only violative of Article 14 of the Constitution but is also against those features that are considered the ideological and legal crux of the Indian Constitution.

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[1] The Citizenship (Amendment) Act, 2019, § 2, No. 47, Acts of Parliament, 2019 (India).
[2] *Id.*
[3] Passport (Entry into India) Act, 1920, § 3, No. 34, Acts of Parliament, 1920 (India).

LEGALITY

Article 14 of the Constitution of India reads as under: *"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."* While Article 14 prohibits discrimination, the concept of 'equal protection of the laws' requires the State to give special treatment to persons in different situations to establish equality amongst all. Therefore, the necessary corollary to this would be that equals would be treated equally, whilst un-equals would have to be treated unequally.[4] This is the basis on which reservations exist in India and, is also the basis on which persecuted religious minorities are given preference for citizenship by naturalization. However, it cannot serve as the basis for certain persecuted religious minorities given preference over other persecuted religious minorities.

All persecuted minorities are equal, irrespective of their religion, as long as they face class-based discrimination and are underprivileged as compared to the majority of the country. Considering that these minorities have been living in India since the 31st December 2014, the sole difference between these persecuted minorities is their faith. Therefore, the very article that this Amendment claims to take its authority from, is inherently against it. Although these articles bestow upon the legislature, the right to provide citizenship to persecuted minorities, it does not provide them with the authority to provide this citizenship to selected religious minorities and exclude others from its ambit. Citizenship must be granted to persecuted minorities, irrespective of the religion they identify with, or whether they identify as atheists or agnostic.

Article 14 prevents class legislation. However, it does allow for classification as long as it is based on the grounds of reasonable distinction. This test is based on the principle that identical laws and rules for unequal citizens would, in turn, lead to inequality. The test calls for a substantial difference between the classes that can be unequivocally demarcated and differentiated. This is the test of 'Intelligible Differentia'. Furthermore, the differentiation should also serve the objective of the legislation, *i.e*. there should be a rational nexus between the objective of the law and the differentiation of the classes. This is the test of the 'rational nexus'. These two tests of reasonable classification were laid down by the court in the case of ***State of West Bengal Vs Anwar Ali Sarkar***.[5] Any legislation must pass these two tests to differentiate itself from class legislation.

INTELLIGIBLE DIFFERENTIA

The Citizenship Amendment Act differentiates between classes based on their religion and based on the assumption that they are persecuted minorities in Muslim majority countries. However,

[4] *UPR National Report* (UNHRC 2017) URL:https://iitr.ac.in/internalcomplaintscommittee/annexure.pdf last accessed on 18 August 2020.
[5] The State of West Bengal v. Anwar Ali Sarkarhabib, (1952) AIR 75.

these Muslim majority countries also persecute Muslim minorities.[6][7] To assume that only minority religions are persecuted in a country where the majority religion is another, is a logically flawed notion. The fact that there is caste hierarchy and innumerable sects in every religion is a reality that cannot be denied.

The CAA presumes that all members of the majority religion in a country are part of the dominant 'upper class' and that they cannot be susceptible to persecution. If that were truly the case, Hindu Dalit's and Adivasi's whose caste struggle is inseparably entwined with the history of every Indian class, and reservations for whom, were the cornerstone of class and caste-based reservations in India, would not be considered as persecuted minorities. Similarly, persecuted minorities from the Muslim community exist in Pakistan, Afghanistan, and Bangladesh as well. The following arguments evidence the existence of such persecuted minorities in all three countries.

Pakistan

The Second Amendment of the Constitution of Pakistan declares the '*Ahmadis*' (nearly five million in population) to be non-muslims as they do not believe Prophet Muhammad to be the final prophet. Ordinance XX which prevents them from using Islamic titles, praying books and even salutations such as '*As-salamu alaykum'* is evidence of state-sanctioned persecution of the Ahmadis.[8][9] From the 1974 riots to the 2010 Lahore massacre where ninety-three people were killed[10] and over a hundred injured[11], the Ahmadis faced religious persecution by way of criminalization of their very existence. Abdus Salam, a Pakistani physicist and Nobel laureate, is a case in point.[12] His mere allegiance to the Ahmadiyya community lead to his ostracization from the Islamic community, and the word Muslim was erased from his gravestone.

Bangladesh

There is also blatant ignorance of the '*Rohingya'* Muslims, their crisis and the atrocities committed on them based on their class, which have forced the international community to start a discussion on the matter. The Myanmar government classifies the Rohingya Muslims as illegal

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[6] Sadanand Dhume, *'Pakistan Persecutes A Muslim Minority'* , WALL STREET JOURNAL (Aug. 19, 2020, 09:30 PM), https://www.wsj.com/articles/pakistan-persecutes-a-muslim-minority-1512087028.
[7] MOHSIN HABIB, ET AL., FORCED MIGRATION OF ROHINGYA: THE UNTOLD EXPERIENCE (2018).
[8] Religious and Ahmadi-Specific Laws, No. 20 of 1984, THE GAZETTE OF PAKISTAN EXTRAORDINARY, Apr. 26, 1984.
[9] Prerna Katiyar, *In Their Prophet's Shadow: Ahmadis And Their Plight As A Community,* THE ECONOMIC TIMES, (Jan. 04, 2020, 11:00 PM), https://economictimes.indiatimes.com/news/politics-and-nation/in-their-prophets-shadow-ahmadis-and-their-plight-as-a-community/articleshow/73100973.cms.
[10] *Lahore Ahmadi Mosque Dead Buried,* BBC NEWS, (May 28, 2010), https://www.bbc.com/news/10181380.
[11] *Pakistan: Massacre of Minority Ahmadis*, HUMAN RIGHTS WATCH, (Jun. 01, 2010, 12:25 AM), https://www.hrw.org/news/2010/06/01/pakistan-massacre-minority-ahmadis.
[12] Aastha Singh, *Pakistan's First Nobel Winner Was Shunned For Being Ahmadi. A Documentary Brings Him Back,* THE PRINT, (Nov. 21, 2018, 02:26 PM), https://theprint.in/features/pakistans-first-nobel-winner-was-shunned-for-being-ahmadi-a-documentary-brings-him-back/152494/.

immigrants from Bangladesh.[13][14][15] The Bangladesh Government also refuses to recognize them as citizens, and thereby they are stateless and are in desperate need of a country to call home. Studies show that 24,000 '*Rohingya'* Muslims were killed by the Myanmar police and resident Buddhists, 18,000 women and children raped and 36,000 '*Rohingya'* were burnt alive.[16] India is currently home to almost 40,000 Rohingyas[17], and the Government has pledged to deport them back to Myanmar where they will be in danger of being made victim to gross human right violations and possible government-sponsored violence as in 2013[18], to once again coerce them to relocate. Even though Bangladesh may not be involved in active and systematic violence against the '*Rohingya'* Muslims, they refuse to provide them with a sanctuary and the government's intention to remove them from the Bangladeshi mainland is evident.[19]

Afghanistan

Similarly, the '*Hazara'* people from Afghanistan are from the Muslim community, who have been facing religious persecution since the 13th century. [20] Although their position has improved post the Taliban era, the group has witnessed massive migration towards Sweden due to rampant poverty and violence along with continued attacks from ISIS and persecution from local warlords.

The countries of Pakistan, Afghanistan, and Bangladesh contain Muslim minorities that are severely persecuted and have faced centuries of oppression and class discrimination. The Shia sect in all three countries is a minority and has faced class discrimination, as it does in most Muslim communities across the world.[21] No parameter differentiates these persecuted minorities from those of Hindu, Sikh, Buddhist, Jain, Parsi, or Christian other than that of religion. Hindus, Sikhs, Bahais, and Christians make up a mere 0.3% of the Afghanistan population[22], while the '*Hazara*'s constitute 20% of their total population. In Pakistan, the '*Ahmadi's* are the biggest minority group and the majority of blasphemy cases have been filed against them and other Muslims, owing to

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[13] Vol. 12., No. 3 (C), *Burma/Bangladesh: Burmese Refugees In Bangladesh - Discrimination In Arakan*, (May 2000) https://www.hrw.org/reports/2000/burma/burm005-02.htm.
[14] *Myanmar's 1982 Citizenship Law And Rohingya,* BURMESE ROHINGYA ORGANIZATION UK, (Dec.2014), https://burmacampaign.org.uk/media/Myanmar%E2%80%99s-1982-Citizenship-Law-and-Rohingya.pdf.
[15] Burma Citizenship Law, 1982, Act of Socialist Union of Republic of Burma, 1982 (Burma).
[16] HABIB ET AL.*, supra note 7.*
[17] Ashley Kinseth, *India's Rohingya Shame*, AL JAZEERA, (Jan. 29, 2019)https://www.aljazeera.com/indepth/opinion/india-rohingya-shame-190125104433377.html.
[18] Afroza Anwary, *Atrocities Against the Rohingya Community of Myanmar,*31 IND J ASIAN AFF. 91-102 (2018).)
[19] *Rohingya Face Move to Bangladesh Island,* BBC NEWS, (Jan. 30, 2017) https://www.bbc.com/news/world-asia-38799586.
[20] Sarah Hucal, *Afghanistan: Who Are The Hazaras?* AL JAZEERA, (Jun. 26,2016) https://www.aljazeera.com/indepth/features/2016/06/afghanistan-hazaras-160623093601127.html.
[21] Tom Lantos, *Briefing On Religious Freedom And Human Rights For Shia Communities In Sunni Countries,*HUMAN RIGHTS WATCH, (Jun. 26, 2018, 12:00 AM) https://www.hrw.org/news/2018/06/26/briefing-religious-freedom-and-human-rights-shia-communities-sunni-countries
[22] EHSAN SHAYEGAN ET AL.,, SURVEY OF THE AFGHAN HINDUS AND SIKHS (Poresh Research & Studies Organisation 2019).

Pakistan's vague blasphemy laws.[23] In the case of the '*Rohingya'* Muslims, 67% of their refugee population are women and 20% of them are estimated to be pregnant or new mothers.

The rising pregnancy rates are due to increased sexual attacks, child marriages, and exploitation against '*Rohingya'* women. Approximately 90% of their female population has been victim of rape.[24] Although Article 14 does not require the intelligible differentia to be evidenced on a mathematical basis, these statistics point out that these Muslim minorities face equal, if not worse forms of persecution and class-based discrimination in Pakistan, Afghanistan, and Bangladesh than those from religions included in the Act. Minorities who are persecuted equally are treated as unequal and as such, the CAA does not pass the doctrine of equality before the law and equal protection of the law. Therefore, the intelligible differentia is far from secular.

The sole differentiating criteria between those minorities included in the Act, and those which are not included in the Act, are only that of religion. They are not based on any other ascertainable pro-rata basis. This does not qualify as a reasonable qualification as, the parameter used for the qualification is arbitrary. The same is further iterated in ***Madhu Limaye vs The Superintendent,***[25] Tihar Jail**,** where the jail was practicing 'artificial discrimination between Indian and European prisoners in the matter of treatment and diet'. Since the prisoner had already been released from the jail and the Solicitor General assured them that he would draw the attention of the Punjab Government to the need for revision of the impugned rules on the lines of racial equality. The court did not decide upon the issue. However, it did hold that "it is obnoxious that racial discrimination, smacking of a colonial hangover, should stubbornly resist arts. 14 & 15 of the Constitution and survive in the Punjab Jail Manual. If it were so, it was a matter to blush for".[26] In the case of the CAA, it is not discrimination based upon nationality or ethnicity, but that which is based upon religion. Therefore, the ratio decidendi of the case is still applicable to the CAA. Instead of a colonial hangover of Europeans being considered a superior race, in the case of the CAA, it is a 'pre-Mughal' hangover of a saffron-clad 'Akhand Bharat' stemming from the Hindutva ideology.[27] The Paradigm of the 'Hindu Rashtra' propagated by right-wing activists like Savarkar talks about the merits of the political, economic, and cultural unity of Hindus, Buddhists, Sikhs, and Jains in the Indian subcontinent and the expulsion of Christians and Muslims back to their middle-eastern origins[28][29] is the foundation upon which the CAA rests. It is not a mere coincidence

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[23] *'Is India's Claim About Minorities True?'* BBC NEWS (2019), https://www.bbc.com/news/world-asia-50720273,last accessed 19 August 2020.

[24]. Susan Hutchinson, Gendered Insecurity in the Rohingya Crisis, 72 AUST. J. INT. AFF. (2017).

[25] Madhu Limaye vs. The Superintendent, Tihar Jail, Delhi and Ors., 1975 AIR 1505.

[26] *Id.*

[27] Ulrika Mårtensson and Jennifer Bailey, *Fundamentalism in the Modern World*, 1 I.B.Tauris 97 (2011). .

[28] VINAYAK DAMODAR SAVARKAR, HINDU RASHTRA DARSHAN, (1949).

[29] Vikram Sampath, *Savarkar Wanted One God, One Nation, One Goal. Modi Has Fulfilled His Dream With Kashmir Move,* THE PRINT, (Aug. 07, 2019 12:46 PM), https://theprint.in/opinion/savarkar-wanted-one-god-one-nation-one-goal-modi-has-fulfilled-his-dream-with-kashmir-move/273447/.

that the makers of this legislation subscribe to this paradigm,[30] and that the institutions they hail from, are entwined with the rise and propagation of this ideology.[31]

In the case of ***Navtej Singh Johar v. Union of India,***[32] J. Indu Malhotra further laid down two sub-tests to the test of intelligible differentia that expanded on the test; 1) there must be a yardstick to differentiate between those included and excluded from the group, and 2) the yardstick must itself be reasonable.[33] She clearly demarcated what would qualify as intelligible differentia by adding the element of 'reasonability' to it. She further explained what qualifies as reasonable; 'Where a legislation discriminates based on an intrinsic and core trait of an individual, it cannot form a reasonable classification based on an intelligible differentia'. Therefore, for the differentia to be valid, it cannot be based on any intrinsic or core trait of an individual. She further noted: 'Race, caste, sex, and place of birth are aspects over which a person has no control, ergo they are immutable. On the other hand, religion is a fundamental choice of a person. Discrimination based on any of these grounds would undermine an individual's autonomy'. Since the CAA's differentia is solely based on religion, it does not meet the parameters laid down by J. Indu Malhotra, as she explicitly mentions that differentia based on religion is not valid.

Therefore, as evidenced by the judgments of ***Madhu Limaye vs The Superintendent, Tihar Jail,*** and ***Navtej Singh Johar v. Union of India,*** the CAA does not pass the test of intelligible differentia and is class legislation that is *ultra vires* to the Constitution concerning Article 14.

RATIONAL NEXUS

The second test the CAA has to pass is the test of rational nexus, i.e., there has to be a rational connection between the intelligible differentia and the objective of the law. The objective of the CAA is to provide citizenship to persecuted minorities. It has been established that the only parameter used to do so is that of religion. However, members of the Hindu, Sikh, Buddhist, Jain, Parsi, and Christian communities are also persecuted religious minorities.

Advocates of the CAA argue that the objective of the law is to provide asylum to persecuted minorities in neighboring countries and the current intelligible differentia achieves that as the listed religions are without any question, persecuted religious minorities in the countries mentioned in the Amendment. The argument claims that the mere exclusion of Muslim minorities from the Act's ambit cannot make the act *ultra vires* to the Constitution. The differentiation of the classes does

[30] Bibhudatta Pradhan and N.C. Bipindra, RSS *Will Decide If Modi Comes Back To Power Or Not,* THE PRINT, (Apr. 13, 2019, 11:17 AM), https://theprint.in/politics/rss-will-decide-if-modi-comes-back-to-power-or-not/221023/.
[31] Pieter Friedrich, *Cultural Malware: The Rise of India's RSS*, THE POLIS PROJECT, INC (Mar. 12, 2020), https://thepolisproject.com/cultural-malware-the-rise-of-indias-rss/#.X8drms0zbIU.
[32] Navtej Singh Johar and Ors. Vs. Union of India and Ors., (2016) 7 SCC 485.
[33] *Id.*

realize the intent of the Act which is, to provide asylum and citizenship by naturalization to persecuted religious minorities from Pakistan, Bangladesh, and Afghanistan.

Pro-CAA advocates claim that although excluding Muslim minorities from the law goes against the secular nature of India , It does not would disallow the law from realizing its intent. Advocates of the law such as Mr. Harish Salve claim that this is a 'policy issue' and does not violate any of the rights laid out by the Indian Constitution as general rules still apply to others seeking asylum and do not hinder their right to naturalization.[34] This argument is refuted by ***D.S. Nakara v. Union of India***.[35] The Government of India released an office memorandum with a liberalized pension scheme. However, only those who had retired after the 31st of March 1979 would be eligible for this pension. The Supreme Court held that the differentiation used was arbitrary and discriminatory. The classification was not reasonable and did not achieve the objective of a pension scheme. It gave those who had retired after 31st March 1979 an unfair advantage over those who had retired before the date. It was held that there was no rational nexus between the objective of the scheme and the criterion employed to differentiate between the two classes. In the case of the CAA, Hindus, Sikhs, Buddhists, Jains, Parsis, or Christians from Afghanistan, Bangladesh, or Pakistan are undoubtedly at a disadvantage as compared to most Muslims from these countries. However, the minority Muslims in these countries also face the brunt of similar religious persecution. Therefore, in the case of the CAA, minority Muslims are at a disadvantage, similar to that faced by those who had retired before 31st March 1979, in the case of **D.S. *Nakara v. Union of India*.** Since the objective of the CAA is to provide asylum to these minorities, there is no rational nexus between the classification and the intent of the law. Moreover, the Amendment also does not include in its ambit, minorities from the countries of Sri Lanka, Bhutan, or Myanmar. The Sri Lankan Elam Tamilians have faced the brunt of severe religious persecution, a struggle in which India was knee-deep in which even led to the assassination of its then Prime Minister.

The amendment's reluctance to include these countries in its ambit, once again points towards the lawmakers' belief in the 'Akhand Bharat' and Hindutva ideology. Seeing as all three countries mentioned in the Act are Muslim Majority countries with a specified state religion, and that Pakistan and Bangladesh were once part of British India, it evidences the bias in the CAA. The Act's purpose is to serve as a home calling to the minorities that come under the wing of the Hindutva ideology, who are living in Muslim majority nations, with India acting as their 'savior' from them. This objective does not have any nexus with the objective of the law, which is to provide sanctuary to persecuted minorities from bordering nations. The CAA, therefore, does not surpass the test of rational nexus. Advocates of the law argue that the fact that minority Muslims who face severe persecution in these countries are not included in the ambit of this law points towards its mere under-inclusiveness and that it does not have any clout in determining the rational nexus as the objective of the law is not hindered by the exclusion of minority Muslims. The

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[34] 2019. *Harish Salve in Citizenship Bill 2019*. [video] Available at: <https://www.ndtv.com/video/shows/ndtv-special-ndtv-24x7/harish-salve-on-citizenship-bill-534837> [Accessed 11 December 2019].
[35] D.S. Nakara and Ors. Vs. Union of India, 1983 AIR SC 130

Supreme Court, in the case of the ***State of Gujarat and Ors. vs Shri. Ambica Mills Ltd. Ahmedabad and Ors***[36] defined under-inclusiveness as: 'when a State benefits or burdens persons in a manner that furthers a legitimate purpose but does not confer the same benefit or place the same burden on others who are similarly situated'.

In the case at hand, the State is providing a benefit to people from a certain faith, while denying the same privilege to those who are equally persecuted. The court laid down that under inclusiveness can be permitted, and held that 'legislative purpose, the overall statutory scheme, statutory arrangements in connected fields and the needs of the public' must all be taken into account while deciding whether or not an under-inclusive provision must be struck down. It held that 'Courts may reason that without legislation none would be covered and that invalidating the exemption, therefore, amounts to illegitimate judicial legislation over the remaining class not previously covered.' The stance of the Judiciary is further made clearer in the case of ***Smt. Sowmithri Vishnu vs Union of India & Anr***,[37] where the court held that 'an under-inclusive definition is not necessarily discriminatory, and that the legislature is entitled to deal with the evil where it is felt and seen the most.' In the case of the CAA, there is no evidence whatsoever on any ascertainable basis that the religions included in the Act face more 'evils'[38] than those not included. There is evidence to the contrary.[39] Moreover, the Court used this very rationale in the case of ***Joseph Shine vs Union of India***[40] to establish that section 497 of the IPC was violative of Article 14 as it does not allow for any agency to the wife to prosecute her husband or the women with whom her husband was involved in an extra-marital relationship. The law treated the wife as a mere property of the husband and thus, the court held that it violated her autonomy. In the case at hand, the CAA violates personal autonomy by way of religion. The law also does not meet any of the parameters laid down by the court in the ***State of Gujarat and Ors. vs Shri. Ambica Mills Ltd***;[41] it is against the legislative purpose of providing sanctuary to persecuted minorities as it does not include from its ambit a majority of the most persecuted and harshly treated minorities of the region.[42]

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[36] The State of Gujarat and Ors. v. Shri Ambica Mills Ltd., Ahmedabad and Ors., 1974 SCR (3) 760.
[37] Smt. Sowmithri Vishnu vs. Union of India and Ors.,1985 SCR Supl. (1) 741.
[38] Reality Check Team, *Citizenship Amendment Bill: Are India's claims about minorities in other countries true?* BBC NEWS, (Dec. 12, 2019), https://www.bbc.com/news/world-asia-50720273.
[39] 'Rohingya Refugee Crisis: Supporting the Stateless Minority Fleeing Myanmar | USA for UNHCR' (*Unrefugees.org*).
[40] Joseph Shine vs. Union of India, 2018 SC 1676.
[41] The State of Gujarat v. Shri Ambica Mills Ltd, 1974 AIR 1300.
[42] 'Rohingya Refugee Crisis: Supporting the Stateless Minority Fleeing Myanmar | USA for UNHCR' (*Unrefugees.org*)

MANIFEST ARBITRARINESS

In the case of ***Shayara Bano v. Union of India,***[43] the Supreme Court held that: 'The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally, and/or without adequate determining principle.' In the case of the CAA, there is no determining principle to include only the minorities of Hindu, Sikh, Buddhist, Jain, Parsi, or Christian communities from Afghanistan, Bangladesh, or Pakistan and exclude other persecuted minors as well as other minorities from other neighboring countries.

The CAA follows no rationality of any sort whatsoever to include select minorities from select nations. Therefore, it is a manifestly arbitrary law that is violative of Article 14. The court's stance on arbitrariness as a ground for striking down a law was made manifest through the case of ***Navtej Singh Johar v. Union of India***, where section 377 of the IPC was declared unconstitutional towards two consensual, homosexual adults, on account of it being manifestly arbitrary. Therefore, the CAA is also susceptible to be struck down on account of it being an arbitrary law. The Act also contains no intelligible differentia and nor does it have any rational nexus with its claimed objective. As such, it is violative of Article 14 of the Constitution. The exclusion of minority Muslims speaks to the secularity and the very nature of the Constitution. It raises the need for an investigation of the basic structure of the Indian Constitution and the complicated relationship between law and morality.

CONSTITUTIONAL PHILOSOPHY AND MORALITY

Friedrich Carl von Savigny first coined the term Volksgeist; it translates to 'the common will of the people'. Savigny believed that the law was a representation of the people and that it is derived from the consciousness of the general population. He was against the notion that law is derived from codified legislations. He suggested that the law is a continuously evolving and changing process, depending upon the consciousness of society at large.[44]

Advocates of the CAA argue that India is on the brink of cultural and religious awakening and that the Amendment is a manifestation of that transformation. However, such theories of law are fundamentally flawed as there is no rational way to decide who the 'common people' are and what their consciousness is. Moreover, the law is above the consciousness of the 'majority'. It applies to every citizen of a county, and in a democracy, it protects the interests of the minorities. This is an essential feature of any democracy. If the most fundamental features of the law can be altered as per the whims and fancies of the current political institutions that run the Government,

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[43] Shayara Bano and Ors. Vs. Union of India (UOI) and Ors., 2017 (9) SCC 1.
[44] Frank W. Elliot, *Volksgeist And A Piece Of Sulphur*, TEX. L. REV. (1964).

it would mean that the law is then contaminated with political ideology. Austrian jurist and philosopher Hans Kelsen was against such contamination of the law by politicizing or moralizing it. He proposed the Pure Theory of Law to shield it from being reduced to natural or social science. Kelsen argued that jurisprudence must not be reduced to other domains. He backed his theory by emphasizing the chain of authorization. Each law is given authority because the legislature passes it, the legislature derives its authority from a constitution. However, the Constitution does not have a source from where it derives its authority. Any document could claim that it is the 'supreme law of the land', yet only the Constitution of a country is recognized as having that power. Each legal norm is given authority by a higher legal normative; however, there is no legal norm which authorizes the Constitution. Kelsen, therefore suggested that the Constitution's legal validity is inherent and must be presupposed.[45] The Basic structure doctrine is a brainchild of such theories that the law is consistent within itself and cannot be altered.

The brilliance of the doctrine is that it is an improvement on Kelsen's Pure theory of law; while it limits the Parliament from altering such basic features of the Constitution which have presupposed legal validity upon themselves, it also permits the Parliament to take advantage of the dynamic and ever-changing nature of the Indian Parliament. This allows the legislature to fulfill its objectives in a democracy and establish an egalitarian state. The nature of determining who will be governed by such laws, i.e., who will be eligible for Indian citizenship is also part of the most essential and basic features of the Indian Constitution. The CAA radically changes the epistemology behind citizenship in India, as discussed in the constitutional assembly by the makers of our Constitution.

BASIC STRUCTURE DOCTRINE

"The State shall not make any law which takes away or abridges the right conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."- Article 13(2) of the Indian Constitution. Article 13 is based on the basic structure doctrine, which is based on the principle that the Indian Constitution has certain basic features and rights that cannot be altered or made invalid through any amendment**.** Justice Hans Raj Khanna is widely credited for authoring the Basic Structure Doctrine, although Justice Mudholkar first propounded it in the case of ***Sajjan Singh Vs State of Rajasthan***.[46] The cases of ***Golaknath v. State of Punjab***[47] and ***Kesavananda Bharati v. State of Kerala***[48] are both landmark cases of The Basic Structure doctrine. In ***Golaknath v. State of Punjab*****,** the court reversed its earlier ruling to hold that the Parliament could not curtail any of the fundamental rights of the Constitution. It held that every Amendment that is enacted by article 368 (which grants the authority to amend laws to the

[45] R.S. Clark, *Hans Kelson's Pure Theory of Law,* 22J. LEGAL EDUC.170 (1969).
[46] Sajjan Singh vs State of Rajasthan, 1965 SCR (1) 933.
[47] I.C. Golak Nath and Ors. Vs State of Punjab and Ors., 1967 SCR (2) 762.
[48] Kesavananda Bharati Sripadagalvaru Vs. State of Kerala, AIR 1973 SC 1465.

Parliament) would come under the ambit of Article 13 which secures the fundamental rights of the Constitution and prevents laws that invalidate or derogate them. After this judgment, the Parliament enacted the 24th Constitutional (Amendment), Act 1971, and the 25th Constitutional (Amendment), Act 1972. The main issue contended in the ***Kesavananda Bharati v. State of Kerala*** case was the constitutional validity of the 24th Constitutional (Amendment), Act 1971, and the 25th Constitutional (Amendment), Act 1972. His Holiness Sripad Galvaru Kesavananda Bharati was the religious head of a sect in Kerala. Certain lands which were under the name of the sect came under the ambit of Kerala Land Reforms (Amendment) Act, 1969, and were acquired by the Government.

The Golaknath case restricted the power of the legislature, which did not agree with the policy of the Indira Gandhi-led Congress government at the time. To protect the amendments from the ambit of Article 13, the Parliament added to clause 3 to Article 368 through the 24th Amendment; 'Nothing in article 13 shall apply to any amendment made under this article.' The petitioners argued that the Constitution of India is what protects its citizens from reverting to things as they were during the colonial era. If these fundamental features of the Constitution are not protected from amendments, it could lead to the eventual erosion of the very nature of the Constitution of India. The State, on the other hand, contended that the power of the Parliament to amend the Constitution is absolute, unlimited, and unfettered. This is based on the principle of parliamentary sovereignty or supremacy that states that the legislative body is the supreme body in a democracy and that it is superior to both, the Judiciary and the Executive. The State argued that if what the petitioners were arguing for was to become the law, then it would hinder the role of the Constitution from being ever-changing and transitional concerning the current day socio-political scenario. This argument is essentially the state's stand on the issue from *Shankari Prasad v Union of India*[49] and *Sajjan Singh v. State of Rajasthan* to *Golak Nath v. State of Punjab.* In each case, the State's ability to alter the inviolable nature of the fundamental rights was questioned. In both Shankari Prasad and Sajjan Singh, the court held that the power to amend also includes the power to alter the fundamental rights. The Golaknath case was, therefore, a landmark judgment where the Judiciary changed its stance on the basic structure doctrine and gave a diametrically opposite judgment as compared to the previous cases. However, it had certain flaws and loopholes, which were further corrected in the Kesavananda Bharati case. The court held that neither did the Parliament have the power to amend the basic structure of the Constitution, nor could it restrict its obligations to construct a welfare state and an egalitarian society. The basic structure is explained in detail in the judgments of Hegde and B.K. Mukherjea. They subscribe to the principle that the basic structure is not a mere document but a social philosophy. Every philosophy entails basic as well as circumstantial elements. While the basic elements of any philosophy cannot be altered, these jurists proposed that certain features are circumstantial and adaptive concerning the relevant socio-political scenarios.

[49] Shankari Prasad Singh Deo vs. Union of India 1951 AIR 458.

The **Kesavananda Bharati case** was a further improvement on the **Golaknath's case** as it not only extended the ambit of what constitutes the 'Basic structure', but it also made the list inexhaustive. The judgment held that it is up to the court to decide on a case-to-case basis whether or not the feature at hand is an integral part of the basic structure of the Constitution. It went on to provide a list of features that are a basic structure of the Constitution, Free & Fair Elections, Supremacy of the Constitution, Independent Judiciary, Federal Character of Nation, Separation of Power, Republic & Democratic form of Government, and secularism. The Kesavananda Bharati case is a monumental precedent in the Indian Judiciary for this reason. It also went on to define what the word 'Amendment' means in terms of the Indian Constitution. (Something that the Golaknath case had failed to do) The judgment held that for an amendment to be passed, it must be subjected to the test of the Basic Structure Doctrine. The court upheld the 24th Amendment and the 1st part of the 25th Amendment. It held that the Parliament had the authority to amend any part of the constitutions, including the fundamental rights, as long as they are not a part of the 'Basic Structure'. The 2nd part of the 25th Amendment; 'no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy' was declared unconstitutional as it violates the constitutional right of legal remedy by barring the litigant from approaching the court of law.

The Kesavananda Bharati case was therefore, an extremely well-strategized case that showcased Indian legal creativity. It effectively ensured that the Parliament had the authority to function without any hindrance to its obligations, All the while, preventing parliamentary totalitarianism and ensuring the protection of the fundamental rights of the citizens. Most important to the case at hand, it explicitly spelled out that secularism is a feature of the basic structure of the Constitution and that it cannot be altered by any Amendment to the Constitution of India. It has since been used in cases that have defined Indian democracy such as ***Indira Nehru Gandhi v Raj Narain.***[50] The intelligible differentia of the CAA is biased and discriminates against minority Muslims. Secularism is a part of the basic structure of the Indian Constitution, as held by the Supreme Court in the case of ***S.R. Bommai vs Union of India***.[51] The court not only unequivocally held that secularism is a cornerstone of the basic structure of the Indian Constitution, but it also vehemently spoke out about how religion and politics should not be mixed. The judgment went on to talk about the Government should not favour any religion through its policies and held that all manifestos of political parties must also be secular. The S.R Bommai case not only evidence that the CAA is against the basic structure of the Indian Constitution, but also debunks claims from advocates of the Amendment that the exclusion of certain persecuted minorities can be allowed as it is a 'policy matter'. The guidelines laid out in the case for political parties, their manifestos, their policies as well as rules preventing them from invoking religion during elections make the stance of the Indian Judiciary very clear; no policy or action of the Indian Government or political party can be allowed to be non-secular. Therefore, the CAA 2019 violates

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[50] Indira Nehru Gandhi vs Raj Narain and Ors., 1975 SCC (2) 159.

[51] S.R. Bommai and Ors. Vs Union of India (UOI) and Ors., 1994 AIR 1918.

the basic structure of the Indian Constitution and is against the principles that were laid down by the makers of the Constitution as well as the secular ideology.

JUS SOLI AND JUS SANGUINIS

The two principles employed for granting citizenship are namely, Jus Soli and Jus Sanguinis. While Jus Soli confers citizenship based upon the place of birth, Jus Sanguinis recognizes citizenship by descent[52], It translates to 'law relating to blood' in Latin. The constituent assembly, while determining the basis for citizenship in India, rejected the idea of granting citizenship through the principle of Jus Sanguinis as it was against the Indian constitutional character. Considering the political atmosphere during the 1920s, the Motilal Nehru Committee report on citizenship was a pioneer on the subject and arguably quite ahead of its time. It thought of citizenship based on birth and not based on blood type or ethnicity.[53]

The topic of citizenship was brought to the limelight once again after the partition, in the constitutional assembly debates. PS Deshmukh then argued that since Muslims now had a country of their own, India must be a home to all Hindus and Sikhs, irrespective of where they lived. He claimed that; 'We have seen the formation and establishment of Pakistan. Why was it established? It was established because the Muslims claimed that they must have a home of their own and a country of their own. Here we are, an entire nation with a history of thousands of years, and we are going to discard it, despite neither the Hindu nor the Sikh has any other place in the world to go to.'[54] This argument advocates for citizenship based upon the principle of Jus Sanguinis and reflects the epistemology behind the CAA. However, this principle for granting citizenship was rejected by the constituent assembly. Dr. BR Ambedkar on the 2nd of May 1947 made the Indian position on granting citizenship clear. He said, "All persons born in India, as defined in the General Clauses Act and who are residing in the Union and subject to the jurisdiction of the Union, shall be citizens of the Union."[55] This statement evidences the claim that the makers of the Constitution envisioned Indian citizenship based upon the principle of Jus Soli. They further expanded upon this by passing the Citizenship Act of 1955. At the time of passing the Act, citizenship could be granted by birth, by descent, by naturalization, and by registration.[56] In 1986, the Act was amended to stipulate that it was no longer sufficient to be born in India to acquire Indian citizenship; at the time of birth, either one of the parents must be a citizen of India to acquire Indian citizenship.[57]

[52] https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100027515.
[53]Motilal Nehru, 'Nehru Report (Motilal Nehru,1928)' (Constituent Assembly 1928).
[54] *CONSTITUENT ASSEMBLY DEBATES (PROCEEDINGS) - VOLUME IX* (1949) <http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C03091949.html> accessed 19 August 2020.
[55] *CONSTITUENT ASSEMBLY OF INDIA DEBATES (PROCEEDINGS)- VOLUME III* (1949) <http://loksabhaph.nic.in/writereaddata/cadebatefiles/C02051947.html> accessed 19 August 2020.
[56] The Citizenship Act, 1955, § 3,4,5,6, No. 57, Acts of Parliament, 1955 (India).
[57] The Citizenship (Amendment) Act 1986.

The inclusive definition of the constituent assembly was further restricted by the CAA of 2003. The Amendment defined who an illegal immigrant was and made them eligible for citizenship by naturalization or registration. It also denied citizenship to children who were born in India but whose parents were illegal immigrants. While restricting citizenship to immigrants in this manner, the Act, however, introduced the Overseas Citizen of India (OCI) for citizens of other countries who are of 'Indian origin'.[58] The phrase 'Indian origin' itself is indicative of the nature of the Act and the importance it gives to the principle of Jus Sanguinis. While restricting citizenship based on place of birth, it expanded on granting citizenship based on descent. The CAA of 2019 further marks a significant shift from the principle of Jus Soli to Jus Sanguinis.

The Amendment allows for citizenship by way of naturalization to those persecuted minorities from select religions and countries, while excluding others from its ambit. It is providing citizenship by way of descent, ethnicity, and blood ties. The CAA's of 1986 and 2003 are testaments to the fact that India's citizenship laws have diverged from the principle of Jus Soli. The CAA of 2019 not only evidences a radical shift to citizenship based on Jus Sanguinis but also points towards the substantial shift in the epistemology behind the law. Although most civil law countries follow the principle of Jus Soli while granting citizenship, every country does have the autonomy to determine how it grants its citizenship. However, such a shift goes against the nature of the Indian constitutional ethos. It is not how the makers of the Constitution envisioned Indian citizenship, and it is fundamentally against the basic structure of the Indian Constitution due to its non-secular and inherently biased nature.

CONCLUSION

The CAA of 2019 is against the basic structure of the Constitution and violates the fundamental values laid down by the makers of the Indian Constitution. It is a class legislation that has no intelligible differentia or a rational nexus with its objective. The non-secular nature of the law flies in the face of what has been established through years of legal precedents as the Indian constitutional ethos. The CAA of 2019 is not merely an unconstitutional law, but it is also an amendment that alters the epistemology behind Indian law-making and speaks to the autonomy of the contemporary Indian Judiciary.

The Apex Court has upheld its integrity on numerous counts throughout history. The Keshavananda Bharathi scandal is a case in point. The case was also deeply entrenched in judicial as well as national politics at the time.[59] The Apex Court stood tall even after the dramatic tussle that ensued with the Indira Gandhi regime. The case showed that the Indian Judiciary would remain an autonomous body, despite attempts of political interference. The case was also nothing short of

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[58] The Citizenship (Amendment) Act, 2003, § 7, No. 6, Acts of Parliament, 2003 (India).

[59] T. R. ANDHYARUJINA, THE KESAVANANDA BHARATI CASE: THE UNTOLD STORY OF STRUGGLE FOR SUPREMACY BY SUPREME COURT AND PARLIAMENT, (2011).

judicial brilliance as it not only curbed the powers of the legislature, but it also ensured not to indulge in judicial overstepping. To this date, it is a monumental precedent that sheds light on the stance of the Indian Judiciary on such matters. With the extremely dynamic and volatile political sphere India is in right now, the Judiciary must prove to the people that it has remained unchanged and unfettered from any changes in political ideologies of the legislature.