Subordination and Arbitrariness in Citizenship Law

Farrah Ahmed 2024-04-10T16:40:56

In 2019, the Hindu nationalist Bharatiya Janata Party returned to power in India. Hindu nationalism generally includes a commitment to correct perceived historical injustices to Hindus, end what nationalists see as the 'appeasement' of Indian Muslims and turn India into a 'Hindu Rashtra' or a homeland for Hindus. The Bharatiya Janata Party oversaw the enactment of the Citizenship (Amendment) Act 2019 ('CAA') which gave Hindu, Sikh, Buddhist, Jain, Parsi and Christian (*but not Muslim*) migrants from Afghanistan, Bangladesh and Pakistan a fast-tracked pathway to Indian citizenship. Critics fear that the CAA forms part of a plan to exclude citizens, residents and immigrants the government disfavours (particularly Muslims) from citizenship.

The CAA faced widespread protests across the country, many appealing to constitutional values. This post argues that the CAA is unconstitutional, and uses it as an example to clarify two important under-theorised Indian constitutional principles: anti-subordination and arbitrariness.

Background

The Indian Constitution's provisions on citizenship were debated under the shadow of Partition. The Constituent Assembly broadly agreed on the basic principle of *jus soli*, that is citizenship comes from birth or connection to state territory. But the constitutional provisions were focussed on the immediate issues facing newly-independent India. So the Constituent Assembly gave Parliament broad powers to enact a more detailed citizenship regime later.

This enactment, the Citizenship Act of 1955, prevents 'illegal migrants' from acquiring Indian citizenship. The 2019 Citizenship Amendment Act ('CAA') amends the Citizenship Act of 1955 to provide that Hindu, Sikh, Buddhist, Jain, Parsi and Christian migrants from Afghanistan, Bangladesh and Pakistan are not to count as 'illegal migrants' and gives them a fast-tracked pathway to Indian citizenship. The CAA also reduces the residence requirement for these migrants. I have argued in other work that the government's defence of these provisions of the CAA is an instructive instance of the use of strategies of subterfuge (parasitism, camouflage, and pretense).

The CAA is said to be unconstitutional for a number of reasons. Some critics argue that its primary object is to exclude Muslims—both current citizens and immigrants—from citizenship through the roll-out of a nationwide process of verification of citizenship along the lines of the National Register of Citizens ('NRC') for Assam. The upcoming National Population Register ('NPR') is feared to serve the same

purpose. The fear is that the rule-making powers of the central government under the CAA will be (mis)used to 'filter out' citizens and immigrants that the government disfavours.

But even putting aside these fears about the NRC and NPR, taking the CAA on its own, others have argued that by drawing distinctions between (supposed) immigrants based on their religious identity and origin, the Act unconstitutionally discriminates and treats people unequally. The Act is also said to breach constitutional protections for religious freedom. Finally, and perhaps most significantly, by basing citizenship on religious identity, the Act is said to unsettle the secular foundations, part of the basic structure, of the Indian constitutional settlement.

I do not mean to downplay any of these reasons. But my argument is that the Act is *also* unconstitutional for two additional important reasons: it subordinates a class of citizens and it is arbitrary.

The Anti-Subordination Principle

Scholars and commentators describe the CAA as making Indian Muslims second-class citizens. Niraja Jayal notes:

> it is a threat to the idea of Indian citizenship per se. It is, in some senses, a body blow to the constitutional ideal of equality of citizenship regardless of caste, creed, gender, language, and so on… the worry is that the introduction of the religious criterion will yield, effectively, a hierarchy of citizens, a kind of two-tiered, graded citizenship.

Similarly, a former Chief Justice of the Delhi High Court argues:

> this law automatically makes Muslim immigrants second class priorities when they are on Indian soil, even though they may have made the long trek to India for the same reasons …that drove their Hindu or Christian neighbours out. If you expand the understanding of this law, as the government has overtly done (by linking the NRC to the CAA), it has implications of making all Muslims in India second class citizens.

But on its face, the CAA does not affect any Indian Muslim's legal status as a citizen, a point made by the Prime Minister.

So, are those who are concerned that the Act creates second-class citizens wrong? I do not think so. But I think that their concern needs unpacking in order to understand it better. And it needs unpacking for us to understand its relevance for the constitutionality of the Act.

The concern about second-class citizenship of Muslims is a concern about *social* and *civic* status, not just about formal legal status. It is important to remember that the law can change not just legal status, but social status as well. And when the

law changes social status, it may do so indirectly and implicitly, and not directly and explicitly.

For instance, in the American South, 'Jim Crow' laws segregated black and white people on public transport and made it illegal for them to sit together. Even though the law said nothing explicitly about the social and civic status of black people, its implications for that status were impossible to miss. The law *demeaned* black people.

Here, 'demeaning' is what philosophers call a speech act. A speech act, very roughly, does not describe the way things are, but rather makes things a certain way. For instance, when a marriage celebrant pronounces a couple married, they are not describing something; they are giving people a status they did not have before. If a king or queen created knights with special words, those words do not describe something; they are giving someone a new status—of knight. Jim Crow laws similarly demeaned black people, lowering their social and civic status.

We can now be more precise about the concern about second-class citizenship. The concern is that the CAA Act is a speech act which lowers Indian Muslims' social and civic status, relegating them to the status of second-class citizens. This lowering of the social and civic status of groups through speech acts may be described as *subordination*.

Subordination is legally significant because, as others have argued, the equality protections of the Indian Constitution, including Articles 14, 15, 16 and 17, give effect to what might be described as an 'anti-subordination principle.' The anti-subordination principle forbids laws and practices that "reduce groups to the position of a lower or disfavored caste" or "aggravate or perpetuate the subordinate status of a specially disadvantaged group".

The Citizenship Amendment Act is therefore unconstitutional, I would argue, because it breaches this anti-subordination principle and, therefore, Article 14 of the Constitution.

Someone might say at this point: "but how do we know that the CAA, or any Act for that matter, subordinates, and breaches the anti-subordination principle?" Elsewhere, I have proposed a test for subordination, based on scholarly work on speech acts, which allows us to identify subordinating state action.

An important part of the test for whether a law subordinates asks whether the law is *recognisable* as a subordinating speech act. Take, for instance, Martha Nussbaum's example of subordination from feudal England. She says that "a [literal] slap in the face that a noble gives a vassal… both expressed and constitutes a hierarchy of ranks". What she means is that the slap was able to create or reinforce a social hierarchy where the noble was on top and the vassal was at the bottom. That is, the noble *subordinated* the vassal through the slap.

But the noble could only do this because in feudal England, people understood that this kind of slap had the aim of subordinating the vassal. Today, if some Lord walked up to some vassal and slapped them, people would not know what that was about!

Similarly, Jim Crow laws were recognisable as speech acts that subordinate black people in the context of the American south. In a completely race-unconscious society, Jim Crow laws might not have been *understood* in this way, so they might not have succeeded in subordinating.

So, is the Citizenship Amendment Act recognisable as subordinating Muslims? Well, when we say that legislation subordinates, it is important to appreciate that this subordination may take subtle forms.

Citizenship is the preeminent good distributed by the state. So, when the CAA excludes a major religious group from a pathway to citizenship, which includes *all* other major religious groups in the country, I would argue that it is recognisable as a subordinating speech act.

It is particularly recognisable as a subordinating speech act against a background nationalist narrative in which the paradigm or central case of a citizen is not Muslim. In this narrative, Indian Muslims may have many of the legal benefits of citizenship, but are only citizens in an attenuated and marginal sense. Against this familiar narrative, the Act is recognisable as a subordinating speech act.

So I argue that since the Citizenship Amendment Act satisfies the test for subordination, it breaches the anti-subordination principle inherent in the Constitution, particularly in Article 14. The CAA, in fact, serves as a good illustration of how legislation might subordinate, in an implicit indirect way.

The Anti-Arbitrariness Principle

The CAA also offers an illustration of the kind of manifestly arbitrary legislation prohibited by the Constitution. The Supreme Court has recently reconfirmed that ‘manifestly arbitrary’ legislation contravenes Article 14 of the Constitution, which guarantees equality before the law and equal protection of the laws. However, critics of the Supreme Court’s ‘arbitrariness doctrine’ have long complained that it is not clear what the court means when it says state action is ‘arbitrary.

In previous work, I have used the CAA to illustrate an account of arbitrariness. I will not detail my account of arbitrariness in this summary but, very roughly, I think a decision is arbitrary when one of two following things is true.

- First, a decision might be arbitrary when the decision-maker is *indifferent* to the true reasons that apply for or against a particular decision. For instance, if a judge decides and justifies her decision by picking (at random, by the roll of the dice) a legal argument in one of the briefs, her decision is arbitrary in this way.
- A second way a decision might be arbitrary is when the decision-maker knows or believes that the purported reasons for a decision do not really justify the decision, but she makes the decision anyway. For instance, if a policymaker

> decides on the policy that brings in the highest bribes instead of the decision that is best justified, then his decision is also arbitrary.

I argue that we can say that legislation is arbitrary if there is no *credible* way to make sense of it without attributing to Parliament:

- Indifference to the true reasons that apply to questions addressed by the legislation or
- Belief or knowledge that the purported reasons for the legal provision do not really justify it.

To put it roughly, arbitrary legislation displays a kind of indifference to the relevant reasons and justifications that apply to the questions that the legislation addresses. Consider the CAA in light of this test for arbitrariness.

According to its statement of objects and reasons, the purpose of the Act is to grant citizenship to persecuted religious minorities from three countries. The relevant paragraph reads:

> It is a historical fact that trans-border migration of population has been happening continuously between the territories of India and the areas presently comprised in Pakistan, Afghanistan and Bangladesh. Millions of citizens of undivided India belonging to various faiths were staying in the said areas of Pakistan and Bangladesh when India was partitioned in 1947. The constitutions of Pakistan, Afghanistan and Bangladesh provide for a specific state religion. As a result, many persons belonging to Hindu, Sikh, Buddhist, Jain, Parsi and Christian communities have faced persecution on grounds of religion in those countries. … Many such persons have fled to India to seek shelter and continued to stay in India even if their travel documents have expired or they have incomplete or no documents.

The reasons for skepticism of this justification of the exclusions in the Act are well-known but I am going to rehearse some of them because they are relevant for the question of whether the Act is arbitrary.

If the rationale for the Act is to offer a pathway to citizenship to persecuted religious minorities, then it is hard to see why Bahais, Jews, atheists, members of persecuted Muslim groups such as Ahmadis, Rohingyas, Hazaras and Shias, are excluded.

Also, the purported rationale for favouring migrants from Pakistan, Afghanistan and Bangladesh is that “the constitutions of these states provide for a specific state religion”. If the proposed rationale for the Act were taken seriously, it is hard to see why migrants from Sri Lanka and Bhutan—both with persecuted religious minorities and both of whose constitutions have a special place for Buddhism—do not qualify.

In any case, if the Act is concerned with protecting people without religious freedom from persecution, its presupposition that all and only states with established religions persecute minorities is palpably false. A large number of states worldwide with established religions, including the Nordic states and the United Kingdom, have

relatively good protections for religious freedoms. It barely needs pointing out that some states, like China, without an established religion, are responsible for serious persecution of religious minorities.

It is also difficult to make sense of the Act's cut-off date of the end of 2014; to state the obvious, people have fled due to religious persecution after that date.

All of this to say that, with reference to the test for arbitrariness, we cannot credibly make sense of the terms of the Citizenship Amendment Act without attributing to the legislature:

- indifference to the equal force of claims of religious persecution from Muslims, Jews, atheists, and those fleeing religious persecution in Sri Lanka, Bhutan or Myanmar; or
- the belief that the purported reasons for the exclusions in the Act do not truly justify it or
- indifference to whether the Act (particularly its exclusions) is all-things-considered justified.

In other words, there is no credible way to make sense of the Act without condemning it as manifestly arbitrary.

Conclusion

The Supreme Court is yet to decide on the many petitions challenging the constitutionality of the Citizenship Amendment Act of 2019. In addition to finding the CAA unconstitutional, this case presents the court with an opportunity to clarify weighty constitutional principles.
