International Journal for Multidisciplinary Research (IJFMR)
E-ISSN: 2582-2160 ● Website: www.ijfmr.com ● Email: editor@ijfmr.com

From Jus Soli to Jus Sanguinis: The Changing Contours of Indian Citizenship

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Abstract

The Indian law of citizenship has undergone a fundamental change since the Constitution came into force in 1950. The 2019 Citizenship Amendment Act (CAA) is the latest in a series of amendments to the Citizenship Act, 1955, which have moved Indian citizenship away from its original footing in the inclusive, territorially-based principle of jus soli (citizenship by place of birth) to jus sanguinis (citizenship by descent or bloodline) and ultimately to religious differentiation. This paper critically examines the trajectory of this shift drawing upon Niraja Gopal Jayal's analysis in the Oxford Handbook of the Indian Constitution, relevant judicial precedents and contemporary debates around the NRC (National Register of Citizens) and the NPR (National Population Register).This paper argues that the move from jus soli to jus sanguinis is not merely a technical legislative change but a substantive departure from the secular, egalitarian and pluralist vision of the framers of the Constitution. It further examines the constitutional implications of this transformation, particularly for marginalized communities, undocumented persons and religious minorities, and questions whether the current legal framework still conforms to the guarantees of fundamental rights under articles 14 and 21 of the Indian Constitution.

Keywords: Citizenship, Jus Soli, Jus Sanguinis, Citizenship Amendment Act 2019, NRC, Indian Constitution, Secularism, Fundamental Rights

Introduction

Citizenship is one of the most consequential legal status an individual can hold. It shapes access to rights, entitlements, political participation and finally legal recognition of belonging to a nation state. Historically, citizenship in the Indian Constitution has been seen as secular term, that does not differentiate between religions, caste, ethnicity or descent. The inclusive vision has, however, been slowly fading from the Indian citizenship law in the past four decades, revealing an increasing shift towards a jus sanguinis (right of blood) system.

This change can be traced back to the basic architecture of the Indian Constitution itself. The articles on citizenship (Article 5-11) in the constitution were formulated for a special historical context, as Niraja Gopal Jayal notes in her chapter on 'Citizenship' in the Oxford Handbook of the Indian Constitution: the extraordinary, turbulent circumstances. Citizenship is one of the most consequential legal status an individual can hold. It shapes access to rights, entitlements, political participation and finally legal recognition of belonging to a nation state. Historically, citizenship in the Indian Constitution has been seen as a uni- and non-secular term, that does not differentiate between religions, caste, ethnicity or descent. The inclusive vision has, however, been slowly fading from the Indian citizenship law in the past four decades, revealing an increasing shift towards a jus sanguinis (right of blood) system. This change can be

traced back to the basic architecture of the Indian Constitution itself. The articles on citizenship (Article 5-11) in the constitution were formulated for a special historical context, as Niraja Gopal Jayal notes in her chapter on 'Citizenship' in the Oxford Handbook of the Indian Constitution: the extraordinary, turbulent circumstances of Partition, when millions of people were uprooted between the nation-building wars of the two newly-formed states. These measures were expressly and intentionally of a transitional and limited nature. Articles 10 and 11 indicated that Parliament would eventually pass a more comprehensive and permanent citizenship law, which was partially done with the Citizenship Act of 1955. But the way Parliament has wielded its discretionary authority over citizenship has raised significant constitutional questions. The Citizenship Act, 1955, and its subsequent modifications in 1986, 2003, 2005 and most notably in 2019, have increasingly focused on the concept of parentage, religion and ethnicity as citizenship attributes. The Citizenship Amendment Act 2019 (CAA), which provides an exception for citizens based on religion, for migrants from three neighbouring countries who are not Muslim, has been met with widespread criticism on the grounds that it infringes on the constitutional guarantee of equality before law under Article 14, and that it clashes with the secular nature of the Constitution of India.

This paper thus addresses the research problem in two ways. First, it considers whether the evolution of Indian citizenship law from jus soli to jus sanguinis is legitimate parliamentary discretion or an unconstitutional change of the constitutional values. Second, it examines the implications of this change in reality: risks of statelessness, exclusion, and discrimination that marginalised communities, undocumented persons and religious minorities encounter in today's India.

This paper is organized as follows. Section 2 places the discussion in the context of the appropriate scholarly and legal literature. In section 3, the analytical framework used in this study is presented. In Section 4, the constitutional provisions, judicial precedents and legislative amendments are discussed and analysed in detail to address the research problem. The findings and conclusions are presented in Section 5, which contains normative recommendations for a constitutionally consistent framework of Indian citizenship. of Partition, when millions of people were uprooted between the nation-building wars of the two newly-formed states. These measures were expressly and intentionally of a transitional and limited nature. Articles 10 and 11 indicated that Parliament would eventually pass a more comprehensive and permanent citizenship law, which was partially done with the Citizenship Act of 1955. But the way Parliament has wielded its discretionary authority over citizenship has raised significant constitutional questions. The Citizenship Act, 1955, and its subsequent modifications in 1986, 2003, 2005 and most notably in 2019, have increasingly focused on the concept of parentage, religion and ethnicity as citizenship attributes. The Citizenship Amendment Act 2019 (CAA), which provides an exception for citizens based on religion, for migrants from three neighbouring countries who are not Muslim, has been met with widespread criticism on the grounds that it infringes on the constitutional guarantee of equality before law under Article 14, and that it clashes with the secular nature of the Constitution of India. This paper thus addresses the research problem in two ways. First, it considers whether the evolution of Indian citizenship law from jus soli to jus sanguinis is legitimate parliamentary discretion or an unconstitutional change of the constitutional values. Second, it examines the implications of this change in reality: risks of statelessness, exclusion, and discrimination that marginalised communities, undocumented persons and religious minorities encounter in today's India. This paper is organized as follows. Section 2 places the discussion in the context of the appropriate scholarly and legal literature. In section 3, the analytical framework used in this study is presented. In Section 4, the constitutional provisions, judicial precedents and legislative amendments are discussed and analysed in detail to address the research problem. The

findings and conclusions are presented in Section 5, which contains normative recommendations for a constitutionally consistent framework of Indian citizenship.

This paper uses a doctrinal methodology by systematically studying the constitutional provisions, statutory texts and judicial decisions. The critical dimension lies in considering these legal materials in the context of the normative commitments of the Indian Constitution, in particular those of equality, secularism and fundamental rights. The article is divided into three parts that address question in relation to citizenship. First, Jayal's (Jayal, 2016) analysis of extraordinary and ordinary times offers a temporal lens to examine the development of Indian citizenship law. Second, the comparison of jus soli and jus sanguinis allows a structural examination of the evolution of the concept of citizenship. Third, a normative standard is applied to assess the legislative changes, namely the law of constitutional rights, such as the principles of reasonable classification under Article 14, and the right to life and personal liberty under Article 21.

Jayal's Framework: Citizenship in Extraordinary and Ordinary Times

The core of this paper is the framework laid out by the Oxford Handbook of the Indian Constitution put together by Niraja Gopal Jayal. According to Jayal, there are two different registers of citizenship in the Indian Constitution. The first relates to citizenship on the very special day of constitutional founding, that is, the articles in the Constitution (Articles 5-7) establishing citizenship on the date of coming into force. These were stipulated in the context of the mass displacement and violence of Partition and were specifically directed at the specific context in which they were made. The second register is a continuum of citizenship in peacetime, which was delegated to Parliament by Articles 10 and 11, that is, the process of gaining and losing citizenship in the future and the present. The main problem with this delegation, Jayal argues, is that it has not been invoked to strengthen the jus soli, or "right to the land," principles of the constitutional text. In contrast, since the inception of Parliament it has increasingly developed a framework which gives preference to descent, parentage and more recently religious identity rather than territorial belonging. (Jayal, 2016)

Jus Soli vs. Jus Sanguinis: Comparative Context

Jus soli and jus sanguinis is a basic concept in comparative citizenship law. The principle of Jus Soli or territorial citizenship, states that citizenship is automatically granted to anyone who is born on the territory of a state, regardless of their parents. It was traditionally linked to liberal, immigrant-receiving countries like the United States, Canada and France, and to ‘post-colonial’ constitutions that were attempting to break through ethnic and communal divisions. Jus sanguinis, on the other hand, makes citizenship dependent on citizenship of a parent. The principle is older than is generally recognized and has been more commonly found in countries with high levels of ethnic and/or cultural homogeneity that have an ethno-nationalist understanding of the nation state. This is a struggle between these two concepts in Indian law and much more is discussed around the globe about the nature of national belonging, the rights of immigrants and diaspora communities, and relationships between citizenship and identity. Linda Bosniak (Bosniak, 2006), Joseph Carens (Carens, 2013). and Seyla Benhabib (Benhabib, 2004), among others, have written extensively on the moral aspects of citizenship. In his book 'the citizen and the alien', Bosniak (Bosniak, 2006) addresses the issue of citizenship regimes engendering insiders and outsiders and questions fundamental questions of justice. Carens has claimed in a cosmopolitan way that citizenship laws based on birth are morally arbitrary. Benhabib's (Benhabib, 2004) research on democratic iterations

highlights the need for processes of inclusion to be used to re-invent citizenship norms in pluralistic societies.

Constitutional Foundations and Judicial Interpretation

The term 'domicile', which is of paramount importance in the citizenship provisions, is not defined in the Constitution of India and thus was left for the interpretation of the courts. The courts have defined domicile as having two parts: the factum (actual presence or residence) and the animus manendi (intention to remain). This is a two-part test, the details of which have been worked out in some landmark cases of Louis de Raedt (Louis de Raedt v. Union of India,1991) and Ram Narain (Central Bank of India v. Ram Narain, 1991). These decisions led to the conclusion that one should apply both the tests to decide an individual's domicile for the purpose of citizenship. In recent times, the validity of the Citizenship Amendment Act, 2019, has been subject to wide litigations. The IUML (Indian Union Muslim League vs. Union of India, 2019) before the Supreme Court of India brings together around 200 petitions that allege religious discrimination against, and violation of Articles 14 and 21 by the CAA (Citizenship Amendment Act, 2019). The IUML (Indian Union Muslim League vs. Union of India, 2019) case brings to the forefront basic issues regarding the permissible limits of the religious dimension in citizenship law, and how much Parliament can go beyond the secular nature of the Constitution when it legislates on citizenship.

NRC, NPR and the Politics of Exclusion

An extensive body of scholarship has developed on the two pillars of the National Register of Citizens (NRC) and the National Population Register (NPR), which are closely intertwined with the task of identification and exclusion of undocumented immigrants. It has been documented by scholars such as Anupama Roy (Roy,2010), Deepa Das Acosta (Das Acosta,2019) and Haimanti Roy (Roy, 2012) that citizenship verification exercises have exclusionary effects especially on the marginalised communities that may not have any documentation to prove their citizenship. The NRC exercise in Assam led to the exclusion of around 1.9 million people, and has been criticized for giving rise to a new form of statelessness among historically settled communities.

Citizenship at the Moment of Constitutional Founding

The provisions regarding citizenship i.e Articles 5-11 of the Indian Constitution should be interpreted in a historical context. In 1947 India gained independence, accompanied by the violent Partition of the subcontinent that resulted in the formation of two new states, India and Pakistan. What followed was the displacement of an estimated 14 to 17 million people, leaving them in a crisis of citizenship of which they were never prepared. Millions of people suddenly found themselves on the 'wrong' side of the new international border, and wondered where the law was to be found, and what their rights were.

This crisis was met with a set of constitutional amendments that were clearly transitional. The basic criterion for citizenship at the time the Constitution came into being was laid down by Article 5, that a person would be a citizen if he was domiciled in India and born in India or if either his father or mother was born in India or if he had been ordinarily resident in India for a period of 5 successive years prior to the commencement of the Constitution. The specific cases of migrants from Pakistan to India and vice versa are dealt with in Articles 6 and 7 respectively. Article 8 discussed the Indian people who were living outside India.

The predominance of immediacy is a central feature of these provisions, as Jayal (Jayal,2013) reminds us, which were statements of citizenship law in the context of 1950s, and not permanent or exhaustive. The tendency of Article 10 and Article 11 to be self-limiting affirmed that it would be Parliament's duty to create a more permanent citizenship structure.

As Jayal (Jayal,2016) points out, one of the most bitterly discussed matters in the constitutional clauses is that of domicile. The term was not defined in the Constitution and its use in the complicated situations arising out of Partition posed challenge questions. The Constitution and the Citizenship Act of 1955 make no direct reference to all cases, especially those of women and minor, and hence, there is a large measure of ambiguity. Some of these gaps have been picked up by the courts, but there are many uncertainties.

Treatment of women's domicile under the constitutional provision is of special significance. The rules were based on the assumption that a woman's domicile was derived from her husband's and a minor's domicile would be the same as his father's. Thus, a woman born in India and who resides in India but marries a man born in Pakistan was even stripped of her Indian citizenship by being transferred to Pakistan with her husband, even though the transfer might not have been voluntary or fully informed. The citizenship dependency model is based on the patriarchy of that time and has been partially rectified by subsequent laws, but there are still issues with citizenship law and its gender-based disparities.

The Citizenship Act of 1955 and the Jus Soli Foundation

The Citizenship Act of 1955 provided for five ways to become an Indian citizen: Naturalisation, by birth, by descent, by registration and incorporation of territory. The original Act was largely based on the jus soli principle. Section 3 of the Act provided that everyone born in India after January 26, 1950, was automatically an Indian citizen, whether or not one's parents were Indians. This kind of territorial citizenship was in tune with the Constitution's call for a national identity that was inclusive and post-colonial, and that would rise above communal and ethnic lines.

Under Section 4, those born outside the country were entitled to citizenship if their fathers were citizens of India upon their birth. While this aspect of descent citizenship was a feature of citizenship, it was not the most important one, because it was mostly used to extend citizenship to those of Indian origin, not to withhold it from those born in India. citizenship by naturalisation was also granted under the 1955 Act, which was obtainable after a certain period of stay in India and subject to specific conditions such as renunciation of the previous citizenship. This was an attempt to show that citizenship was a civic status, and that one could become a citizen through a commitment to the Indian nation, regardless of ethnic or religious affiliations.

With the Assam Accord, the first major exception to the principle of jus soli was made – the Citizenship Amendment Act of 1986. The Accord was a political deal between the central government and leaders of the Assam Movement who had protested against the illegal immigration from Bangladesh. The 1986 changes reduced citizenship by birth to those who were born after July 1, 1987, and had an Indian citizen parent at the time of their birth. This was a radical move since for the first time a blood-relation was added to citizenship through birth, which departed from the Act's original expansive jus soli concept.(Jayal, 2016)

The amendment of 2003 took much further in the direction of jus sanguinis (Citizenship Amendment Act, 2003). With the amendment to Section 3, those who were born after 3 December 2004 were eligible for citizenship only if both of their parents were citizens, or if one parent was an Indian citizen and the other was not an 'illegal migrant' . The children of undocumented immigrants would be ineligible for citizenship,

even if they were born in India and had no other country of nationality. This provision has a tremendous potential to contribute to the statelessness problem, especially given the high number of undocumented migrants living in India, who have long-term ties with the country and a strong social and economic integration.

The category of 'illegal migrant' was for the first time introduced in the Act in 2003, which is defined as a person who entered India without a valid passport or travel documents or who was staying in India for more than the permitted time. This classification was the foundation for future attempts to identify and deport undocumented immigrants through the NRC process, with wide repercussions for marginalized communities that may not have formal records of where they've lived.

Religion as a Criterion: Citizenship Amendment Act, 2019

The Citizenship Amendment Act, 2019 is the most Constitutionally challenging change in Indian citizenship law. The Act also expands the Citizenship Act of 1955 to give a speedy track to citizenship by naturalisation to those who have migrated from Afghanistan, Bangladesh and Pakistan and resided in India, but belong to one of the following religious communities Hindus, Sikhs, Buddhists, Jains, Parsis and Christians. These groups are allowed to have only the 5-year rule, as compared with the usual 11-year requirement. Most importantly, the Act is clearly limited to Christians.

The battle against the CAA is the question whether this religious classification is reasonable in the sense of the Constitution's Article 14. All individuals in the territory of India are guaranteed equality before the law and equal protection of the laws by the Article 14. The Supreme Court has held that Article 14 allows for classification in the interest of 'legislation' which must have a 'rational nexus' to the object of the legislation and must not be arbitrary, capricious or be based upon an impermissible criterion.

The government's argument for the CAA is that the six communities listed in the Act are religious minorities, who are victims of persecution in the three Muslim countries referred to in the Act; it is thus a humanitarian measure aimed at helping persecuted minorities. But critics note that the Muslim minorities of Pakistan (the Ahmadis) who are also targeted, as well as Rohingyas in Bangladesh, Shia and Hazara communities in Afghanistan, are not included. The exclusion of the Jews, who are a recognised minority in these countries, further weakens the government's humanitarian argument.

The IUML's petition to the Supreme Court says that the CAA is an attack on the basic tenets of the Constitution, including its secular nature. The Supreme Court's interpretation in the Basic Doctrine Case (Kesavananda Bharati v. State of Kerala,1973) is that Parliament cannot make any changes to the Constitution that would take away or destroy its fundamental structure, such as secularism. Whether or not it otherwise meets the "Article 14" test, if the CAA is inconsistent with the secular nature of the Constitution, it would be subject to strike.

The CAA doesn't only apply to migrants for naturalisation. The introduction of religion as a condition of citizenship in the Act validates a vision of India as a Hindu majority state with a subordinate position for religious minorities. A majoritarian understanding of the nation's identity is fundamentally incompatible with the secular and pluralistic understanding of the Constitution as a document that treats every citizen and, in fact, all persons within Indian territory — as an equal rights holder, irrespective of his or her religion.

The NRC, NPR and the Risk of Statelessness

The CAA must be interpreted in the background of NRC and National Population Register (NPR). These

tools, used together, form a “whole of government” approach to the identification and possible exclusion of who they consider to be illegal immigrants or “undocumented.” The NRC was introduced in Assam under an order by the Supreme Court in Sarbananda Sonowal v. Union of India (2005) and was then suggested by the Central government for a pan-Indian exercise.

It is critics' opinion that NRC, along with the CAA, has the potential to create a discriminatory structure: while the non-Muslims who are not registered in NRC can be able to regularise their status through the CAA route, that is not the case for the Muslims. This inequality turns the NRC into an instrument of selective disenfranchisement of Muslim citizens, especially those from poor and marginalised communities who may not have documentary proof of their long-term stay.

It is also noteworthy that the NRC is linked to the NPR. The NPR is a mammoth data collection of all residents of India, giving the local administrators the power to identify someone as 'doubtful' citizen, which can lead to a cumbersome and sometimes discriminatory citizenship verification process. Creating and obtaining documentation to establish citizenship is difficult for people coming from disadvantaged socioeconomic backgrounds who work for daily wages, agricultural workers, and those living in informal settlements. The Assam NRC experience has been used as a warning example of these dangers. In August 2019, the final list of NRC was published, excluding around 1.9 million people. Many of those who have been barred from citizenship are Bengalispeaking hindus the very community the CAA was meant to safeguard – and long-settled Muslims. The experience has shown that the citizenship verification exercise carried out by the bureaucracy is susceptible to errors, discrimination and the arbitrary use of the official's discretion, especially when there are not adequate procedures in place to protect against such abuse.

The distinction of "domicile," which is central to the citizenship provisions of the Constitution, has been made by courts into two elements: "factum," (lived in) and "animus manendi," (the intention to stay). The two-part test was developed in cases like Louis de Raedt v. Union of India (1991) and Central Bank of India v. Ram Narain (1991), to represent the ‘subjective attachment to India' that forms the basis for the claim to citizenship. But the 'intention to settle' is a flexible and context-specific criterion. The political, economic and social turmoil that can plague a person can have a significant impact on his or her plans for where to live, and that is something that is not always in the individual's control. The political protests and student-led mobilisations in Bangladesh in 2024, the financial crisis in Sri Lanka and the current political situation in Myanmar are all cases wherein external events might compel a person to think again or give up on staying in the country, regardless of their initial commitment. In these kinds of settings, the 'intention to settle' standard for citizenship may not be an accurate or fair standard.

The Ayub Khan’s case (Mohammad Ayub Khan v. Commissioner of Police Madras, 1952) is illustrative of the severe consequences that ensued from fixed "citizenship" requirements for those who migrated during the turmoil of Partition. The Madras High Court in this case ruled that Ayub Khan, who had migrated to Pakistan as a minor when he was 16 and later got a Pakistani passport, had voluntarily acquired Pakistani citizenship and thus had no right to be an Indian citizen when he came back. There is an interesting question as to the degree to which formal documentary acts can be considered conclusive evidence of subjective intent, especially in cases involving minors, since this is what the court emphasized in the present case.

Conclusion

This paper has discussed the history of Indian citizenship law from its inception as ‘jus soli’ to the ever-changing ‘jus sanguinis' framework that has been adopted through successive laws. The following are the

main findings of the analysis. The constitutional provisions concerning citizenship (Articles 5 to 11) were first explicitly transitional and self-limiting, as were intended to meet the particular needs of Partition; and secondly, they delegated to Parliament the ongoing regulation of citizenship. The delegation was based on the assumption that Parliament would create a framework in line with the values of the Constitution (secular, egalitarian). In significant respects, Parliament has not fulfilled this expectation.

The second is the movement from a jus soli to a jus sanguinis conception of citizenship that has occurred from the 1986, 2003 and 2019 Citizenship Act amendments.The second is the substantive shift from the inclusive, territorially-based conception of citizenship envisioned by the Constitution's framers to that of jus sanguinis, achieved through the Citizenship Act of 1986, 2003 and 2019. The amended Act places primacy to the concept of descent, parentage and religious identity over birth giving India an ethno-religious approach to nationalism, which is fundamentally contrary to the secular and pluralistic nature of the Constitution.

Third, the Citizenship Amendment Act 2019 explicitly includes religion as a criterion for granting citizenship, which allows for an unequal citizenship pathway where non-Muslim migrants but not Muslim migrants is eligible to citizenship in the same situation. This religious classification is serious question on articles 14 and 21 of the Constitution, and may be violation of the basic structure of the Constitution as explained in Kesavananda Bharati v. State of Kerala (1973).

Fourth, the CAA, NRC and NPR system have the potential to discriminate against Muslim citizens as well as against marginalized groups such as the poor, women and those who are otherwise unable to satisfy the exceedingly rigorous tests regarding their citizenship.

Fifth, the jurisprudence concerning domicile, especially the ‘intention to settle' test, is contextually flexible and adaptable, which may not fully capture the complex situations in which people make decisions about migration and residence. Courts and legislators should find more sophisticated ways to address these questions that recognize the structural conditions, such as those of a political, economic and social nature, that influence individual mobility. To conclude, the evolution of the Indian citizenship law in the last four decades points to significant questions of Indian constitutional values of equality, secularism and safeguarding of fundamental rights. The transition from jus soli to jus sanguinis and the incorporation of religious criteria into the law for citizenship also did not involve a mere technical modification of the law, but a complete rethinking of national belonging, in which, in place of territory or commitment to rights, emphasis was placed on descent and religious belonging.

A constitutionally coherent definition of citizenship in India would reaffirm the principle of jus soli as the main criterion of citizenship, leave such descent and lineage as subsidiary or ancillary criteria, and explicitly refuse to consider religious affiliation as a criterion of citizenship. It would also create strong safeguards for citizenship verification processes, ensuring that no one may be excluded arbitrarily, and include clear, compassionate rules and regulations for people, especially for women and minors, whose citizenship status might be impacted by factors outside their control. The controversy surrounding the IUML case pending in the Supreme Court is ripe to guide the courts on these issues. The adjudication of that case may be important not just with regard to the CAA's provisions, but also to the nature of India as a nation as a pluralistic and secular republic, where citizenship is based on civic, not ethno-religious grounds, or as a majoritarian nation in which national belonging depends on one's descent or religious identity.

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