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# **CITIZENSHIP (AMENDMENT) ACT 2019 AND INTERNATIONAL LAW**

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**1<sup>st</sup> APRIL 2021**

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### I INTRODUCTION

1. This legal brief considers the *Citizenship (Amendment) Act 2019* ('CAA') and its compliance with India's international legal obligations. India's treaty and customary obligations will be outlined, with a primary focus on the conflict between the CAA and the principles of non-discrimination and the prohibition on arbitrary deprivation of nationality.
2. As background to the legislative development of the CAA, amendments made in 2004 to the Indian *Citizenship Act 1955* ('*Citizenship Act*') explicitly excluded 'illegal migrants' from applying for naturalization as Indian citizens.<sup>1</sup> An 'illegal migrant' is defined under s2(1)(b) of the *Citizenship Act* to be a foreigner who had entered India either
  - (i) without a valid passport or other travel documents and such other document or authority as may be prescribed by or under any law in that behalf; or
  - (ii) with a valid passport or other travel documents and such other document or authority as may be prescribed by or under any law in that behalf but remains therein beyond the permitted period of time'.<sup>2</sup>
3. In July of 2016 the *Citizenship (Amendment) Bill 2016* was introduced into the Lok Sabha. The 2016 Bill followed the introduction of the *Passport (Entry into India) Amendment Rules 2015* made under the *Passport (Entry into India) Act 1920*. The Rules exempted persons of Hindu, Sikh, Buddhist, Parsi, Jain and Christian faiths from Bangladesh and Pakistan, 'who were compelled to seek shelter in India due to religious persecution or fear of religious persecution and entered into India on or before the 31<sup>st</sup> December 2014' from the requirement to possess valid travel documents to enter and remain in India.<sup>3</sup> This same group of persons was, through the *Foreigners (Amendment) Order 2015*, exempt from the provisions of the *Foreigners Act 1946* which provide the Central Government broad powers to make orders in respect to freedom of movement, deportation, and other

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<sup>1</sup> See *Citizenship Act 1955* (India) (as amended 2004) s 6(1).

<sup>2</sup> *Ibid* s 2(1)(b).

<sup>3</sup> *Passport (Entry into India) Amendment Rules 2015* (India) r 2.

limitations on foreigners' rights.<sup>4</sup> By an order of 18<sup>th</sup> July 2016 both of these exemptions were extended to members of the enumerated religions from Afghanistan.<sup>5</sup>

4. The 2016 Bill defined the groups who were to be excluded from the definition of 'illegal migrants' under the *Citizenship Act* by reference to persons of the enumerated religions from Afghanistan, Bangladesh and Pakistan, who were exempt under the *Foreigners Act 1946*, and the *Passport (Entry into India) Act 1920* (and orders and rules made thereunder).<sup>6</sup> The Bill was referred to review by a Joint Parliamentary Committee, which published their report in January 2019.
5. The *Citizenship (Amendment) Bill 2019* was subsequently introduced in December 2019 and was approved by the Indian Parliament on 11 December 2019.
6. Through the application of the CAA, the definition of 'illegal migrant' was amended to exclude from that definition persons belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian faiths from Afghanistan, Bangladesh or Pakistan who had entered India on or before the 31<sup>st</sup> of December 2014.<sup>7</sup> Thus, a person meeting this criteria shall not be treated as an illegal migrant.
7. This amendment has the effect of granting the right to apply for citizenship to persons of one of six religions from three specified countries but effectively withholds the opportunity for citizenship acquisition from persons from other religions (most notably Muslims) and those from other countries.
8. By enshrining this differential treatment in law, the CAA impacts India's international legal obligations.
9. India is a party to the following relevant treaties:
  - 9.1. International Covenant on Civil and Political Rights ('ICCPR')<sup>8</sup>
  - 9.2. International Convention on the Elimination of Racial Discrimination ('ICERD')<sup>9</sup>
  - 9.3. Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW')<sup>10</sup>
  - 9.4. Convention on the Rights of the Child ('CRC')<sup>11</sup>
  - 9.5. Convention on the Rights of Persons with Disabilities ('CRPD')<sup>12</sup>

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<sup>4</sup> *Foreigners (Amendment) Order 2015* (India) ord 2.

<sup>5</sup> See *Passport (Entry into India) Amendment Rules 2016* (India) r 2; *Foreigners (Amendment) Order 2016* (India) ord 2.

<sup>6</sup> See *Citizenship (Amendment) Bill 2016* (India) s 2.

<sup>7</sup> *Citizenship (Amendment) Act 2019* (India) s 2(1)(b).

<sup>8</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

<sup>9</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) ('ICERD').

<sup>10</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('CEDAW').

<sup>11</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CRC').

<sup>12</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('CRPD').

10. India is not party to the 1954 *Convention relating to the Status of Stateless Persons*,<sup>13</sup> the 1961 *Convention on the Reduction of Statelessness*,<sup>14</sup> or the 1951 *Convention relating to the status of Refugees* and/or its 1967 Protocol (together ‘*Refugee Convention*’).<sup>15</sup>
11. Analysis of India’s international obligations is relevant to the current litigation before the Indian Supreme Court because article 51 (c) of the *Constitution of India* requires that the State ‘foster respect for international law and treaty obligations in the dealings of organized peoples with one another’.<sup>16</sup> Indian Courts have consistently interpreted this obligation in an expansive manner, and have chosen to incorporate India’s international treaty obligations and international customary law norms, even in the absence of appropriate domestic legislation to give effect to these norms.<sup>17</sup>
12. The CAA has enlivened concern from key actors within the United Nations human rights system, including the Office of the High Commissioner for Human Rights<sup>18</sup> and the United Nations Special Rapporteur on Minority Issues.<sup>19</sup>

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<sup>13</sup> *Convention relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) (‘*Convention relating to the Status of Stateless Persons*’).

<sup>14</sup> *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975) (‘*Convention on the Reduction of Statelessness*’).

<sup>15</sup> *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954); *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (together ‘*Refugee Convention*’).

<sup>16</sup> *Constitution of India 1950* (India) art 51(c).

<sup>17</sup> *Vishaka v State of Rajasthan*, (1997) 6 SCC 241; *Vellore Citizen’s Welfare Forum v Union of India*, (1996) 5 SCC 647. Of pertinence here is the Gujarat High Court’s decision in *Kiaer Abbas Habib Al Qutaifi v Union of India* (1999) CriLJ 919, where the court read the principle of non-refoulment (drawn from the *Refugee Convention*, to which India is not a signatory) into Article 21 of the Indian Constitution (Right to Life). In doing so, the Court went as far as to note that this principle “is binding on all states, independently of specific assent”.

<sup>18</sup> Office of the United Nations High Commissioner for Human Rights, ‘Application for Intervention’, Submission in *Deb Mukharji, IFS (Retd.) & Ors v Union of India & Ors*, Writ Petition (Civil) No. 1474 of 2019.

<sup>19</sup> Noting that the proposed amendment to the Citizenship Act of 1955 would ‘facilitate eligibility for citizenship for most religious groups, but exclude the Muslim minority’, the Special Rapporteur noted that ‘[f]ears have been expressed that that situation would lead to millions of Muslims in India being unable to formalize their citizen status, thus leaving them stateless: *Report of the Special Rapporteur on minority issues Statelessness: a minority issue*, UN Doc A/73/205 (20 July 2018) [35], available at: <https://undocs.org/A/73/205>.

## II STATE DISCRETION IN NATIONALITY MATTERS v INDIVIDUAL RIGHT TO NATIONALITY

13. Under international law, states have traditionally been granted broad discretion in the regulation of nationality matters.<sup>20</sup> This is not, however, an absolute discretion. States' prerogative in nationality matters has been gradually limited by the evolution of human rights law.<sup>21</sup>

14. As the Inter-American Court of Human Rights has explained:

It is generally accepted today that nationality is an inherent right of all human beings. Not only is nationality the basic requirement for the exercise of political rights, it also has an important bearing on the individual's legal capacity.

Thus, despite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each state to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the states in that area, and that the manner in which states regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; those powers of the state are also circumscribed by their obligations to ensure the full protection of human rights.<sup>22</sup>

State regulation of nationality must therefore be exercised in compliance with relevant provisions of international human rights law, including those relating to the right to a nationality and the principle of non-discrimination. Thus, we disagree with the Indian Government's submission to the Court that 'the very nature of the question regarding citizenship of the country and issues pertaining thereto, the said subject matter may not be within the scope of judicial review and may not be justiciable'.<sup>23</sup> On the contrary, we submit that the Court is entitled to scrutinise this legislation by reference to its compliance with India's international law obligations.

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<sup>20</sup> For an overview of the history and development of the relationship between international law and nationality matters see, Peter Spiro, 'A New International Law of Citizenship' (2011) 105(4) *American Journal of International Law* 694.

<sup>21</sup> See Alice Edwards, 'The Meaning of Nationality in International Law in an Era of Human Rights' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press, 2014) 11.

<sup>22</sup> *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica (Advisory Opinion)* (Inter-American Court of Human Rights, Series A No 4, 19 January 1984) [32].

<sup>23</sup> *Preliminary Counter Affidavit on Behalf of the Union of India*, Submission in the matter of *Indian Union of Muslim League v Union of India*, Writ Petition (C) No. 1470 of 2019, [14] ('Counter Affidavit'); see also at [15] referring to these matters as an 'incident of sovereignty'.

### III INDIA'S HUMAN RIGHTS OBLIGATIONS AND NATIONALITY

15. Article 15 (1) of the *Universal Declaration of Human Rights* ('UDHR') provides that: 'Everyone has the right to a nationality'.<sup>24</sup>
16. As outlined above India is a state party to the following relevant treaties: *ICCPR*, *CEDAW*, *ICERD*, *CRC*, and the *CRPD*. India has entered reservations and/or declarations in relation to each of these treaties, apart from the *CRPD*, but not to the provisions relevant for present purposes.<sup>25</sup>
17. These instruments all seek to implement article 15(1) in binding form. They provide important protections in relation to the right to nationality:
- 17.1. The *ICCPR*, article 24(3): 'Every child has the right to acquire a nationality'.<sup>26</sup>
- 17.2. *ICERD*, article 5(d)(iii): 'States Parties undertake to prohibit and to eliminate racial discrimination in all its forms...notably in the enjoyment of the following rights.....The right to nationality'.<sup>27</sup>
- 17.3. *CRC*, article 7 (1): 'The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality'.<sup>28</sup>
- 17.4. *CEDAW*, article 9(1): 'States parties shall grant women equal rights with men to acquire, change or retain their nationality'.<sup>29</sup>
- 17.5. *CRPD*, article 18(1)(a): Persons with disabilities '[h]ave the right to acquire and change a nationality and not to be deprived of nationality arbitrarily or on basis of disability'.<sup>30</sup>

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<sup>24</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948) art 15 ('UDHR').

<sup>25</sup> See 'Status of Treaties: International Covenant on Economic, Social and Cultural Rights', *United Nations Treaty Collection* (Web Page, 27 September 2020)

<[https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-3&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en)> (nb. India's reservations for both the *ICCPR* and the *International Covenant on Economic and Social Rights* are contained on this page); 'Status of Treaties: Convention on the Elimination of All Forms of Discrimination against Women', *United Nations Treaty Collection* (Web Page, 27 September 2020)

<[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-8&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&lang=en)>; 'Status of Treaties: International Convention on the Elimination of All Forms of Racial Discrimination', *United Nations Treaty Collection* (Web Page, 27 September 2020)

<[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-2&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en)>; 'Status of Treaties: Convention on the Rights of the Child', *United Nations Treaty Collection* (Web Page, 27 September 2020) <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en)>.

<sup>26</sup> *ICCPR* (n 8) art 24(3).

<sup>27</sup> *ICERD* (n 9) art 5(d)(iii).

<sup>28</sup> *CRC* (n 11) art 7(1).

<sup>29</sup> *CEDAW* (n 10) art 9(1).

<sup>30</sup> *CRPD* (n 12) art 18(1)(a).

#### IV NON-DISCRIMINATION IN ACQUISITION OF NATIONALITY

18. In addition to the provisions outlined above, all of the above-named treaties contain a general non-discrimination provision that prohibits discrimination on specified grounds in relation to the rights recognized in each treaty.<sup>31</sup> Discrimination on the basis of religion is explicitly mentioned in the *ICCPR*<sup>32</sup> and *CRC*.<sup>33</sup> However consideration should also be given in the present context to intersectional discrimination in the context of race (*ICERD*)<sup>34</sup> or gender (*CEDAW*) of persons belonging to certain religions, or possessing certain religious beliefs.<sup>35</sup> It has been recognized that the experience of discriminatory practices as well as the reason for discrimination is frequently influenced and compounded by multiple components of an individual's identity.<sup>36</sup>

19. In addition, article 26 of the *ICCPR* prescribes a freestanding right to equality. Article 26 provides that

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against

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<sup>31</sup> See *ICCPR* (n 8) arts 2(1), 26; *ICERD* (n 9) art 2; *CEDAW* (n 10) art 2; *CRC* (n 11) art 2; *CRPD* (n 12) art 4(1).

<sup>32</sup> *ICCPR* (n 8) art 2(1).

<sup>33</sup> *CRC* (n 11) art 2(1).

<sup>34</sup> As stated by the Committee on the Elimination of Racial Discrimination in its General Recommendation No 32,

The principle of enjoyment of human rights on an equal footing is integral to the Convention's prohibition of discrimination on grounds of race, colour, descent, and national or ethnic origin. The 'grounds' of discrimination are extended in practice by the noting of 'intersectionality' whereby the Committee addresses situations of double or multiple discrimination — such as discrimination on grounds of gender or religion — when discrimination on such a ground appears to exist in combination with a ground or grounds listed in article 1 of the Convention.

Committee on the Elimination of Racial Discrimination, *General Recommendation No 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms Racial Discrimination*, UN Doc CERD/C/GC/32 (24 September 2009) [7] ('*General Recommendation No 32*').

<sup>35</sup> The Committee on the Elimination of Discrimination against Women has, similarly contended that,

Discrimination against women based on sex and/or gender is often inextricably linked with and compounded by other factors that affect women, such as race, ethnicity, religion or belief, health, age, class, caste, being lesbian, bisexual or transgender and other status. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impacts on women concerned and prohibit them.

Committee on the Elimination of Discrimination against Women, *General Recommendation No 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women*, UN Doc CEDAW/C/GC/32 (14 November 2014) [6] (citation omitted). See further Committee on the Elimination of Discrimination against Women, *General recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc CEDAW/C/GC/28 (16 December 2010).

<sup>36</sup> *ICCPR* (n 8) art 2(1); *CRC* (n 11) art 2(1).

discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>37</sup>

20. Article 26 explicitly extends beyond the rights otherwise granted in the *ICCPR*, so that although the right to nationality is not explicitly set out in the *ICCPR* (other than in relation to children), Article 26 prohibits discrimination in the context of nationality law. The Human Rights Committee has found that the right to equality and non-discrimination applies to the context of naturalisation.<sup>38</sup>
21. Not every distinction or differentiation amounts to unlawful discrimination. Rather, in order to assess if a distinction amounts to discrimination, we must consider 1) the ground on which the distinction is made, 2) whether the measure has a legitimate objective and 3) whether the means chosen to pursue the objective are proportional.<sup>39</sup>

## V ARBITRARY DEPRIVATION OF NATIONALITY

22. In addition to the treaty obligations outlined above, there is strong international consensus that the prohibition of arbitrary deprivation of nationality, is a fundamental principle of international law.<sup>40</sup>

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<sup>37</sup> *ICCPR* (n 8) art 26.

<sup>38</sup> Human Rights Committee, *Views: Communication No. 2001/2010*, 113<sup>th</sup> sess, UN Doc CCPR/C/113/D/2001/2010 (19 March 2015) 11–12 [7.2]–[7.3]. In the context of a discriminatory refusal of an exemption from language requirements in an application for naturalization, it was stated that

The Committee recalls that article 26 provides an autonomous right prohibiting discrimination in law or in fact in any field regulated and protected by public authorities and that the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant. When legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory...

The Committee recalls that neither the Covenant nor international law in general spells out specific criteria for the granting of citizenship through naturalization and that States are free to decide on such criteria. 8 However, when adopting and implementing legislation, States parties' authorities must respect the applicants' rights enshrined in article 26. The Committee recalls in this respect that article 26 requires reasonable and objective justification and a legitimate aim for distinctions that relate to an individual's characteristics enumerated in article 26, 9 including 'other status' such as disability.

See also Human Rights Committee, *Views: Communication No. 172/1984*, UN Doc CCPR/C/OP/2 (1990) [12.4.].

<sup>39</sup> See Human Rights Committee, *General Comment No. 18: Non-Discrimination*, UN Doc HRI/GEN/1/Rev.9 (Vol.1) (10 November 1989) [7], [13] ('*General Comment No 18*').

<sup>40</sup> This status is supported by the UN Human Rights Council and the UNHCR: Human Rights Council, *Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary-General*, UN Doc A/HRC/13/34 (14 December 2009) [21]–[22] ('Human Rights Council 2009'); UN Human Rights Council, *Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary-General*, UN Doc A/HRC/25/28 (19 December 2013) [38] ('Human Rights Council 2013'); UNHCR, *Guidelines on Statelessness No 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1962 Convention on the Reduction of Statelessness*, UN Doc HCR/GS/20/05 (May 2020) [85] ('*Guidelines No 5*'). Further, a number of decisions by regional and international courts have referred to fundamental or customary position of the prohibition on arbitrary deprivation of nationality: *Anudo Ochieng Anudo v Republic of Tanzania (Judgment)* (African Court on Human

23. Importantly, the notion of ‘deprivation’ in this context includes both denial of and withdrawal of nationality (frequently referred to as ‘denationalization’). As stated by the UN Human Rights Council

it [deprivation] covers all other forms of loss of nationality, including those that *arbitrarily preclude a person from obtaining or retaining a nationality, particularly on discriminatory grounds*, as well as those that automatically deprive a person of a nationality by operation of the law, and those acts taken by administrative authorities that result in a person being arbitrarily deprived of a nationality.<sup>41</sup>

24. The Human Rights Council and the UN Secretary General have identified a number of principles that flow from this general prohibition. To comply with the obligation not to deprive a person of citizenship arbitrarily, the law must

- 24.1. serve a legitimate purpose;
- 24.2. be proportionate to that purpose; and<sup>42</sup>
- 24.3. be non-discriminatory.<sup>43</sup>

## VI ANALYSIS OF CAA IN LIGHT OF INTERNATIONAL LAW

25. As can be seen from above, the analysis of whether the CAA is discriminatory and whether it arbitrarily deprives of nationality (in the sense of arbitrarily precluding a person from obtaining nationality) follows a similar structure.

26. The CAA certainly introduces a distinction based on religion and country of origin; the question is whether this amounts to unlawful discrimination.

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and Peoples’ Rights, App No 012/2015, 22 March 2018) [76]; *Case of Expelled Dominicans and Haitians v Dominican Republic (Preliminary Objections, Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 282, 28 August 2014) [253]–[255] (‘*Case of Expelled Dominicans and Haitians*’); see also *United States Diplomatic and Consular Staff in Tehran (United States v Iran) (Judgment)* [1980] ICJ Rep 3, 42 [91]. Further a number of eminent academics support this principle, see James Crawford, ‘The Relations of Nationality’ in *Brownlie’s Principles of Public International Law* (9<sup>th</sup> edn, Oxford University Press, 2019) 495, 508; Oxford Public International Law, *Max Planck Encyclopedia of International Law* (online at 25 September 2020) ‘Nationality’ [32] (‘*Max Plank Encyclopedia of International Law*’); Kay Hailbronner, ‘Nationality in Public International Law and European Law’ in Rainer Bauböck, Eva Ersbøll, Kees Groenendijk and Harald Waldrauch (eds), *Acquisition and Loss of Nationality*, vol 1: Comparative Analysis (Amsterdam University Press, 2006) 35, 70; Hélène Lambert, ‘Comparative Perspectives on Arbitrary Deprivation of Nationality and Refugee Status’ (2015) 64(1) *International and Comparative Law Quarterly* 1, 10; Tamás Molnár, ‘The Prohibition of Arbitrary Deprivation of Nationality under International Law and EU Law: New Perspectives’ (2014) 2014 *Hungarian Yearbook of International Law and European Law* 67, 71; but cf. Spiro (n 20) 711.

<sup>41</sup> Human Rights Council 2009 (n 40) [23] (emphasis added). See also UNHCR *Guidelines No 5* (n 40) [9] citing in fn 8 *Case of Expelled Dominicans and Haitians* (n 40) [238], [318], [469].

<sup>42</sup> United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc. E/CN.4/1985/4, Annex (28 September 1984) [10]; Human Rights Council 2013 (n 40) [4].

<sup>43</sup> UNHCR, *Guidelines No 5* (n 40).

### A *Intention vs Effect?*

27. The Indian government's stated intention is benevolent, namely, to enable specified 'migrants [to be] eligible for Indian Citizenship'.<sup>44</sup> Those migrants are explicitly stated to be the 'many persons belonging to Hindu, Sikh, Buddhist, Jain, Parsi and Christian communities [from specified countries who] have faced persecution on grounds of religion in those countries'.<sup>45</sup>
28. There is no requirement at international law for a distinction to have a malevolent intent in order to constitute discrimination. As the Human Rights Committee has explained, 'discrimination' under the *ICCPR* covers 'distinctions, exclusions, restrictions or preferences based on any of the protected grounds in Article 2', which have 'the *purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms'.<sup>46</sup> This is the position adopted in relation to all relevant treaties.<sup>47</sup>
29. In this case the *CAA* makes an explicit distinction based on country of origin and religion. It has at least the *effect* of excluding from access to Indian citizenship persons who do not meet the criteria, namely, migrants from the specified countries who belong to non-protected religions and migrants from non-specified countries.
30. The *CAA* thus differentiates on protected grounds, namely religion, and country of origin.

### B *Legitimate End? Rationale/Justification: Refugee Protection?*

31. Regarding justified acts of discrimination, the Human Rights Committee has noted that '[n]ot every differential treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.'<sup>48</sup> Further for a measure to be legitimate it must be proportional to the achievement of this legitimate aim.<sup>49</sup>
32. The government's Statement of Objects and Reasons ('Statement of Objects') provides the following justifications:

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

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<sup>44</sup> Statement of Objects and Reasons, Citizenship (Amendment) Bill 2019 (India) [4] ('Statement of Objects'). In the Counter Affidavit (n 23), the government argues that, 'It is submitted that *CAA* is a benign piece of legislation...': at [8].

<sup>45</sup> Statement of Objects (n 44) [2]. See also Counter Affidavit (n 23) [8].

<sup>46</sup> Human Rights Committee, *General Comment No 18* (n 39) [7] (emphasis added)..

<sup>47</sup> See, eg. *ICERD* (n 9) art 1(1); Committee on the Elimination of Racial Discrimination, 'General Recommendation XIV on Article 1, paragraph 1, of the Convention' in *Report of the Committee on the Elimination of Racial Discrimination*, UN Doc A/48/18 (15 September 1993) 115 [1]; *CEDAW* (n 10) art 1.

<sup>48</sup> Human Rights Committee, *General Comment No 18* (n 39) [13] (emphasis added).

<sup>49</sup> Human Rights Committee, *General Comment No 31*[80]: *The Nature of the General Legal Obligations Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [6]. NB. The need for a reasonable and objective criteria of differentiation, legitimacy in aim and proportionality to that aim has been reiterated by the Committee on the Elimination of Racial Discrimination, see Committee on the Elimination of Racial Discrimination, *General Recommendation No 32* (n 34) [7] – [8].

countries. Some of them also have fears about such persecution in their day-to-day life where right to practice, profess and propagate their religion has been obstructed and restricted. 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 illegal migrants who have entered into India up to the cut-off date of 31.12.2014 need a special regime to govern their citizenship matters.<sup>50</sup>

33. The legitimate aim of the CAA is therefore purported to be to (1) recognise the special needs of certain persecuted persons/refugees who have sought protection in India and (2) to respond to their predicament by facilitating their naturalization so that they may fully integrate into Indian society. The word 'refugee' is not explicitly invoked in the Statement of Objects, but it is referenced repeatedly in the Counter Affidavit and, in any event, persecution is a central refugee concept.
34. However, the difficulty with stating refugee protection as the objective is that the law does not define those who are eligible for naturalization by reference to their refugee status: it is silent on concepts of persecution or refugeehood. All of these matters are mentioned only in the statement of objects and counter affidavit.
35. Although India hosts a large number of refugees<sup>51</sup>, is a member of the UNHCR Executive Committee and permits the presence of the UNHCR, India is not a party to the *Refugee Convention* nor does it have a domestic procedure in place for determining refugee status. Hence there is no pre-existing lawful basis on which matters such as 'persecution on grounds of religion', 'persecution in their day to day life' or motivations for seeking 'shelter' in India can be objectively determined.<sup>52</sup> In other words, there is no requirement for a person to establish any of these matters in order to seek naturalization under the amendments.
36. If these matters are not part of the test, then there is surely doubt cast on the argument that the law can fairly be described as having the objective of protecting persecuted populations. How can the law be said to be about refugee protection if refugeehood is wholly irrelevant to qualification for the law's benefits? The only prerequisites to naturalization under these provisions are religion and country of origin; not protection needs.
37. If India was a party to the *Refugee Convention*, it might be arguable that compliance with this international treaty could constitute a legitimate objective, in this case the *Refugee*

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<sup>50</sup> Statement of Objects (n 44) [2], [5]. See also Counter Affidavit (n 23) [20]-[21].

<sup>51</sup> UNHCR, 'Fact Sheet: India' (31 January 2020)

<<https://reporting.unhcr.org/sites/default/files/UNHCR%20India%20factsheet%20-%20January%202020.pdf>>: India hosts 244,094 refugees and asylum seekers. Of these there are 108,005 from Tibet and 95,230 from Sri Lanka (these figures and populations are registered and managed by the Government of India. There are additionally 21,049 from Myanmar, 16,333 from Afghanistan and 3,477 from 'other' countries that are registered with the UNHCR.

<sup>52</sup> Statement of Objects (n 44) [2]. Note that UNHCR conducts RSD yet there is no domestic procedure on domestic legal status that flows from protection against refoulement.

*Convention's* requirement that states facilitate naturalization of refugees (article 34).<sup>53</sup> It arguably does exactly that — it reduces barriers, such as wait times and other conditions, in order to make it easier for specified persons to acquire citizenship.

38. However, article 3 of the *Refugee Convention* states '[t]he Contracting States shall apply the provisions of this Convention to refugees *without discrimination as to race, religion or country of origin*.'<sup>54</sup> Article 3 is one of few provisions in the *Refugee Convention* in relation to which states are prohibited from entering reservations,<sup>55</sup> indicating the importance of non-discrimination to the refugee regime. Hence the CAA is inconsistent with basic principles of refugee law, further undermining the purported legitimate objective.
39. Moreover, the government invokes by way of justification other concepts that are foreign to both refugee law and international legal principle. For example, the counter affidavit states, in defending the CAA's protection of persons from some religions but not others, that, 'intra-religious persecutions or sectarian persecution or persecution due to non-recognition of particular sects to be within the fold of majority religion in the said countries, cannot be equated with the persecution of religious minorities admittedly following and practicing a different and completely distinct religion than the majority religion in particular neighbouring countries.'<sup>56</sup> There is no authority in international law for such distinctions; on the contrary the ICCPR (to which India is a party with no relevant reservations) provides that '*Everyone* shall have the right to freedom of thought, conscience and religion',<sup>57</sup> and it is clear that such freedom is not confined only to some religions or dependent on minority status.<sup>58</sup> Nor is there any authority in refugee law for protecting only some types of religious persecution but not others.<sup>59</sup>
40. Finally, even if protection against persecution could properly be said to constitute a legitimate end in relation to the CAA, there is a question whether the measure adopted here, namely, to protect some groups but not others, could be considered proportionate to the achievement of that objective?

We submit that this measure is both overly broad in that it does not only protect those fearing persecution, as discussed above, and is under-protective in that it leaves out very significant populations who may fear persecution (for example, persons of Muslim faith in the named countries such as the Hazaras from Afghanistan, Ahmadis from Pakistan, Hazaras and Shi'a from Afghanistan, and Ahmadis and Shi'a from Pakistan. Baha'i or Shia from other neighbouring countries).<sup>60</sup> The government has

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<sup>53</sup> *Refugee Convention* (n 15) art 34: 'The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.'

<sup>54</sup> *Ibid* art 3 (emphasis added).

<sup>55</sup> *Ibid* art 42(1).

<sup>56</sup> Counter affidavit (n 23) at [34].

<sup>57</sup> ICCPR (n 8) art 18(1).

<sup>58</sup> Human Rights Committee, *General Comment 22: Article 18 (Freedom of Thought, Conscience or Religion)* UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) [1] – [2].

<sup>59</sup> UNHCR, *Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, HCR/GIP/04/06 (28 April 2004).

<sup>60</sup> Office of the United Nations High Commissioner for Human Rights, 'Application for Intervention' (n 18) [33].

not provided any clear or convincing justification for these differentiations. On the contrary it states in its counter affidavit that ‘conferment of citizenship is a sovereign function’.<sup>61</sup> And the government ‘...further submit[s] that inclusion of one particular country in the list and non-inclusion of other(s) cannot be subject-matter of judicial review.’<sup>62</sup>

41. In our view, the Supreme Court should consider the following factors in assessing whether the legislation is justified:

- 41.1. There is no evidence in the Act nor in the Statement of Objects and Reasons or Counter Affidavit to establish that the protected groups are empirically in greater need of protection than those who are not protected. On the contrary, India hosts over 200,000 refugees and asylum seekers, originating from Tibet and Sri Lanka, registered with the Government of India.<sup>63</sup> Additionally, there are 40,000 persons of concern registered by the UNHCR in 2019 within India; 60% are Rohingya (compared to 27% from Afghanistan, or 1.4% of the entire refugee and asylum seeker population within India).<sup>64</sup> Even in 2015 when the first amendment was made to the Passport (Entry into India) Act, there were 209,234 total persons of concern, and persons from Myanmar made up 54% of those assessed by UNHCR (and 9% of the total) while those from Afghanistan made up 38% (or 6% of the total).<sup>65</sup>
- 41.2. There is no evidence to support the notion that ‘[t]he illegal migrants [as confined by the CAA] who have entered into India up to the cut-off date of 31.12.2014 need a special regime to govern their citizenship matters’.<sup>66</sup> For example, there is no evidence that the specified groups are currently disproportionately excluded from naturalisation in India such that these provisions are necessary. On the contrary they have already been singled out as being provided with exemptions from the *Passports (Entry into India) Act 1920* and *Foreigners Act 1946*.
- 41.3. Further, there is no evidence that the key group that has been left out, namely people of the Muslim religion from the three countries and all those from other relevant countries such as Myanmar, have historically been given any form of advantage in terms of naturalisation in India.
- 41.4. Hence there is no rational connection between the stated aim, namely protection of those who have been persecuted, and the mechanism of the act, namely, facilitation of naturalisation to a sub-set of individuals who are defined neither by reference to their need for protection nor their historical disadvantage in their country of origin or indeed in India.

*C Legitimate End? Rationale/Justification: ‘Undivided India’*

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<sup>61</sup> Counter Affidavit (n 23) at [22].

<sup>62</sup> Ibid at [28].

<sup>63</sup> UNHCR, ‘Fact Sheet: India’ (31 January 2020) (n 51) 1.

<sup>64</sup> UNHCR, *2019 Year-End Report – Operation: India* (Report, 30 July 2020)

<<https://reporting.unhcr.org/sites/default/files/pdfsummaries/GR2019-India-eng.pdf>> 4.

<sup>65</sup> UNHCR, ‘Fact Sheet: India’ (February 2016) 1.

<sup>66</sup> Statement of Objects (n 44) [5].

*or Return to ‘country of origin’?*

42. The ‘Statement of Objects’ provides a further justification for the differential treatment in terms of determining the possible beneficiaries of the CAA. As per its terms, a distinctive feature of the beneficiaries of the special regime for obtaining Indian citizenship created by the CAA is that they are of ‘Indian origin’. It is implied that their shared historical belonging, as “citizens of undivided India”, also justifies their status as beneficiaries of the CAA from specific countries of origin.
43. However, this framing of the justification of historical association with “undivided India”, whereby their migration to India is said to take the form of a return or repatriation, as being complementary to the justification based on their status as refugees [thereby requiring protection], is contradictory in law. It is a well-established principle of international refugee law that refugee status is fundamentally characterized by the irrepatriability of the refugee.<sup>67</sup> This position is made clear by the simple fact that repatriation (or a return to one’s ‘country of origin’ or ‘homeland’) is one of the three established ‘solutions’ recognized under international refugee law, one that brings to an end the status of being a refugee.<sup>68</sup> Under international law there is no possibility to be simultaneously recognized as a refugee (i.e. one who lacks national protection) *and* as a returnee (one who is re-acquiring national protection).
44. Furthermore, if one is to consider this justification of the CAA as simply facilitating the return of persons of ‘Indian Origin’ (and not as being complementary to the justification of refugee protection), then one must contend with the fact that *not* all three named countries fall within the ambit of “undivided India”. “Undivided India”, as defined under Section 2 (1, h) of the Citizenship Act, refers to “India” as it was defined under the Government of India Act, 1935. While present day Pakistan and Bangladesh did indeed form a part of this pre-partition entity (and are successor states to it), this is not the case for Afghanistan.<sup>69</sup> In fact, at the time of the enactment of the Government of India Act of 1935, Afghanistan was an independent state, with its own Constitution, and maintaining control over its own international relations.<sup>70</sup>
45. Finally, taken as a measure for facilitating return of persons of ‘Indian Origin’, the CAA is under-protective in that it excludes persons belonging to the Muslim faith. This is particularly egregious for any measure fashioned to facilitate a right of return. In keeping with the established international practice on the right of return, it is most commonly

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<sup>67</sup> *Refugee Convention* (n 15) art 1 A.(2). See Katy Long, *The Point of No Return: Refugees, Rights and Repatriation* (Oxford University Press, 2013).

<sup>68</sup> *Refugee Convention* (n 15) art 1 C. The other two being naturalization, under Article 34 of the Convention on the Status of Refugees, and resettlement.

<sup>69</sup> Government of India Act 1935, s 311 (1).

<sup>70</sup> It is pertinent to note that Afghanistan only gets included under any category of “undivided India” if one wholesale adopts the exclusivist geographical imaginary as expounded by extremist Hindu Nationalist discourses, wherein Afghanistan does indeed form a prominent part of the so called “*Akhand Bharat*” (i.e. “undivided India”). However, these are more akin to mythical imaginaries, and are not in keeping with the historical configuration and exercise of sovereign authority and territorial apportionments in the region. See Anustup Basu, *Hindutva as Political Monotheism* (Duke University Press, 2020).

offered to those communities who have historically been forcibly (and unlawfully) expelled from their ‘country of origin’.<sup>71</sup> When one considers the history of the Indian partition that the ‘Statement of Objects’ seeks to associate the CAA with, Muslims of ‘Indian Origin’ were the largest population group to be forcibly expelled (on account of large-scale ethno-religious violence or threats thereof) from Indian territory into the territories of present day Pakistan and Bangladesh.<sup>72</sup> Furthermore, it is notable that subsequent attempts by Muslims of ‘Indian Origin’ to return home in the aftermath of said partition violence were obstructed by the promulgation of legislation, including The Immigrants (Expulsion from Assam) Act, 1950.<sup>73</sup>

#### D Legitimate End? Rationale/Justification: Minorities Protection?

46. From the ‘Statement of Objects’ one also gleans an additional justification in terms of the CAA operating as legislation to protect religious minorities in India’s neighboring countries.<sup>74</sup> One finds that it is specifically the protection of religious minorities, as against those identifying as belonging to the majority religious denomination (which happens to be Islam, in the case of Pakistan, Afghanistan, and Bangladesh), that grounds the distinction made in terms of limiting the CAA’s beneficiaries from including Muslims.
47. In this regard, much like how this measure for protection is under-protective when it comes to refugee protection, it is also under-protective when it comes to minority protection, in that it leaves out very significant populations who may fear persecution as religious minorities in these named states (for example Ahmadis, who, while they are categorized as Muslims in India, as per constitutional amendments in Pakistan, are defined as not being Muslims, and are not permitted to self-refer as Muslims).<sup>75</sup>
48. Furthermore, when it comes to international minority protection, international law has consistently emphasized the need to prevent international conflict and preserve international peace and security through ensuring the protection of minority

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<sup>71</sup> See Long, *The Point of No Return* (n 67).

<sup>72</sup> While, on the other hand, Hindus and Sikhs were similarly forcibly expelled into the territory of India from Pakistan. See Vazira Fazila-Yacoobali Zamindar, *The Long Partition and the making of Modern South Asia: Refugees, Boundaries, Histories*, (Columbia University Press, 2007); Yasmin Khan, *The Great Partition: The Making of India and Pakistan*, (Yale University Press, New Edition, 2017).

<sup>73</sup> It is notable that said legislation was cited as a supportive historical precedent by lawmakers seeking the passage of the CAA in the Indian parliament. See Ram Madhav, ‘Citizenship Amendment Bill continues the long tradition of welcoming persecuted minorities’, *Indian Express*, (online, 12 December 2019) <<https://indianexpress.com/article/opinion/columns/a-law-that-includes-citizenship-amendment-bill6160580/>>.

<sup>74</sup> The ‘Statement of Objects’ (n 44) formulates said need for protection in terms of a response to purported violations of rights of minorities protected under Article 27 of the ICCPR (without actually citing said Article).

<sup>75</sup> *Constitution (Second Amendment) Act 1974* (Constitution of Pakistan). See Naveeda Khan, ‘Inheriting Iqbal: The Law and the Ahmadi Question’, in Naveeda Khan, *Muslim Becoming: Aspiration and Scepticism in Pakistan* (Duke University Press, 2012) 91. This practice of religious persecution prominently also includes other minority sects deemed to be ‘deviant’, including the *Shi’a*. See Zaman, ‘Religious Minorities and the Anxieties of an Islamic Identity’, in Muhammad Qasim Zaman, *Islam in Pakistan: A History* (Princeton University Press, 2018) 164.

communities.<sup>76</sup> Established international practice in this regard is that this is best achieved through internationalized assistance and cooperation to ensure such protection is provided to persons belonging to minorities by their state of nationality.<sup>77</sup> This practice is also in evidence in the history of India's own attempts at ensuring the protection of minority rights in Pakistan, through entering a minorities agreement with that country in 1950 [Nehru-Liaquat Pact].<sup>78</sup> As against this, it is also widely acknowledged that the practice of *unilaterally* seeking to protect the rights of particular minority groups, *in combination* with the restrictive (i.e. non-universal) formulation of this protection on the basis of a purported national kinship between said minority groups and the receiving state (e.g. as belonging to "Undivided India"), creates conditions which imperil international peace and security.<sup>79</sup> In the absence of any concrete attempts at pursuing the international, or even bilateral, protection of the rights of said persons belonging to minorities in these three named neighboring states, the CAA not only generates conditions that potentially threaten international peace and security in the region, it also potentially threatens the well-being of persons belonging to minorities in these three countries by espousing extra-territorial associations with them.<sup>80</sup>

#### E Arbitrary Deprivation of Nationality

49. While the prohibition on arbitrary deprivation of nationality derives from article 15(2) of the *UDHR* and is included in a number of international and regional treaties and instruments,<sup>81</sup> it is now broadly considered a *principle of customary international law*,<sup>82</sup> binding all states; not only those state parties to relevant treaties.

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<sup>76</sup> See Mohammad Shahabuddin, *Ethnicity and International Law: Histories, Politics and Practices* (Cambridge University Press, 2016); Patrick Thornberry, *International Law and the Rights of Minorities* (Clarendon Press, 1991).

<sup>77</sup> See *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135, UN Doc A/RES/47/135 (adopted 18 December 1992) arts 6, 7, and 8.

<sup>78</sup> *Agreement Between the Governments of India and Pakistan Regarding Security and Rights of Minorities (Nehru-Liaquat Agreement)*, [1950] INTSer 9 (8 April 1950). Pallavi Raghavan, *Animosity at Bay: An Alternative History of the India-Pakistan Relationship, 1947-1952* (Oxford University Press, 2020) ch 2.

<sup>79</sup> This practice is infamously associated with the instrumentalization of the protection of the rights of ethnic German minorities by Nazi Germany, especially from 1938 onwards, which is understood to be a prominent cause underlying the outbreak of the Second World War itself. See Inis L. Claude Jr., *National Minorities: An International Problem* (Harvard University Press, 1955).

<sup>80</sup> This endangerment of the well-being and security of minority communities in these neighbouring countries on account of their association with 'national interests' of India is well documented by the Indian Government and its security agencies in their responses before the Joint Parliamentary Committee. In fact, such threats to the lives of Hindu and Sikh communities in Afghanistan in particular, arising on account of their association with "Indian interests" in the country, was provided as a justification for including Afghanistan as one of the three countries specified by the CAA. Lok Sabha, *Report of the Joint Committee on the Citizenship (Amendment) Bill 2016* (7 January 2019) 25, 28.

<sup>81</sup> *UDHR* (n 22) art 15(2). See, eg. *CRPD* (n 12) art 18; *Convention on the Reduction of Statelessness* (n 14) arts 8(1), 9; *CRC* (n 11) art 8; *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) art 20(3); *Arab Charter on Human Rights*, opened for signature 22 May 2004, 12 IHHR 893 (entered into force 15 March 2008) art 29; *European Convention on Nationality*, opened for signature 16 November 1997, ETS 116 (entered into force 1 March 2000) art 4.

<sup>82</sup> See (n 40) and citations therein.

50. As noted above, this prohibition extends not only to acts of non-voluntary loss or deprivation of nationality but to denial or preclusion from access to nationality.<sup>83</sup> As the Human Rights Council and the U. N. Secretary General have contended, while states maintain some discretion with regards to who may acquire the nationality of the state, ‘in order not to be arbitrary, denial of access to a nationality must be in conformity with domestic law and standards of international law, in particular the principle of proportionality.’<sup>84</sup>
51. This need for proportionality is one of the three key components of the minimum content of a non-arbitrary act of deprivation or denial, with the legitimacy of the purpose of the law and its non-discriminatory nature the other key requirements.<sup>85</sup> For a purpose to be legitimate it must not only align with domestic law but further be consistent with international law and the aims and objectives of international human rights law.<sup>86</sup> Proportionality requires the law to be the least intrusive means of achieving this legitimate aim and to be proportionate to the interest protected by the law.<sup>87</sup>
52. The CAA in its function precludes certain groups from the acquisition of nationality, both in its limitation of exemptions to individuals from certain faiths and nations but further through the imposition of the 31<sup>st</sup> of December 2014 cut-off date. For this preclusion not to be arbitrary it must be legitimate in its purpose, proportional to this aim and non-discriminatory.

#### *Legitimate Purpose?*

53. The question of proportionality and discrimination in relation to the differential treatment of different religious and national groups is discussed in the previous section.
54. Regarding the implementation of the 31<sup>st</sup> of December 2014 cut-off date, in the Report of the Joint Committee on the Citizenship (Amendment) Bill 2016, published in January 2019, the Ministry of Home Affairs stated that the choice of the cut-off date in each of the rules, orders and Bills outlined above, ‘has been decided for determining eligibility to prevent the possibility of vested interests in the neighbouring countries taking advantage of this provision for further influx into India.’<sup>88</sup>
55. As stated above, for a purpose to be legitimate (as a requisite component of non-arbitrariness) it must be ‘consistent with international law and, in particular, the objectives of international human rights law.’<sup>89</sup> However the implementation of the cut-off date and the aim to prevent further influx of those seeking asylum into the country seems to

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<sup>83</sup> See Human Rights Council 2009 (n 40) [23], [29]; Human Rights Council 2013 (n 40) [2]; UNHCR, *Guidelines No 5* (n 40) [9], [91]; Institute of Statelessness and Inclusion, *Principles on Deprivation of Nationality as a National Security Measure* (Report, 2020) [2.2.1].

<sup>84</sup> Human Rights Council 2009 (n 40) [29]. The prohibition on arbitrary deprivation of nationality and the principle of non-discrimination are seen to be some of the few restrictions set on the prerogative of States to deny or deprive individuals of nationality which in itself is ‘a corollary to the scarcely limited freedom of States with regard to their nationality laws’ see *Max Plank Encyclopedia of International Law* (n 40) [32].

<sup>85</sup> Human Rights Council 2009 (n 40) [25]; Human Rights Council 2013 (n 40) [4]; UHCR, *Guidelines No 5* (n 40) [91].

<sup>86</sup> Human Rights Council 2009 (n 40) [25].

<sup>87</sup> *Ibid.*

<sup>88</sup> *Report of the Joint Committee on the Citizenship (Amendment) Bill 2016* (n 80) 67 [5.13].

<sup>89</sup> Human Rights Council 2009 (n 40) [25].

undermine the fundamental aim and principle of responsibility sharing.<sup>90</sup> There is no basis in international law for confining protection obligations to a particular timeframe or introducing any other temporal limit.

## Conclusion

56. In light of the above analysis, we conclude:

- 56.1. The *CAA* on its face differentiates in providing access to naturalisation on the basis of religion
- 56.2. The stated legitimate objective, namely, refugee protection, is not supported by the text of the *CAA* given that satisfaction of refugee criteria or any other factual assessment of protection needs is irrelevant to the benefit provided.
- 56.3. Even if facilitation of naturalisation of refugees were a legitimate objective, there is no empirical evidence to support the need for the differentiation in this case.
- 56.4. The other stated objectives of repatriating citizens of ‘undivided India’ and ‘minorities protection’ have also been found to be without support in this case.
- 56.5. The *CAA* is therefore both under and over inclusive in relation to the stated objective and thus not proportional.
- 56.6. The *CAA* is in violation of India’s obligations in relation to;
  - 56.6.1. Article 26 of the *ICCPR*
  - 56.6.2. The prohibition on arbitrary deprivation of nationality, now recognised as a fundamental norm of international law.

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<sup>90</sup> See *Global Compact on Refugees*, GA Res 73/151, UN Doc A/RES/73/151 (10 January 2019, adopted on 17 December 2018).