

# Citizenship, Constitutionalism and Civil Liberties

## A Briefing Note on Recent Developments in India

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India's Constitution commits it to democracy, equality, secularism, asymmetrical federalism and the protection of civil liberties, including freedom of speech and religious freedom. Nevertheless, each of these commitments is now under threat from authoritarian nationalism.

This note offers a brief summary of developments in India, primarily over 2019-2020, relating to (I) risks of statelessness and (II) authoritarian nationalism.

### **I. Risks of Statelessness**

Historically, the north-eastern Indian State of Assam has witnessed a steady inflow of migrants for various political and economic reasons.<sup>1</sup> In the mid-twentieth century, the Indo-Pak war and the subsequent creation of Bangladesh in 1971 led to another round of migration into Assam.<sup>2</sup> As a result, the State has long seen strong political movements towards the detection of suspected foreigners within the State. This demand gained impetus in 2013, when a Supreme Court bench presided over by the ex-Chief Justice of India, Ranjan Gogoi, decided to actively oversee a citizenship verification process in Assam.<sup>3</sup>

Based on the Supreme Court's directives, in 2015, a citizenship verification process, to update a National Register of Citizens ('NRC')<sup>4</sup> - a list containing all those who have been deemed Indian citizens - commenced in Assam. When this process concluded in August 2019, 1.9 million people had been excluded from the NRC.

In order to be included on the NRC, residents had to produce official documents demonstrating a connection to India prior to 24 March 1971. Many vulnerable people, including impoverished residents, transgender people and minorities, are unable to provide these documents.<sup>5</sup>

Persons excluded from the NRC may appeal against their exclusion to so-called 'Foreigners Tribunals'. However, there are significant flaws in this system of review, the most notable being that approximately 64,000 people have been declared foreigners without being given an opportunity to be heard.<sup>6</sup> National and international experts and organisations have consistently raised serious concerns about the competence of tribunal members, existence of due process, and the fact that the burden of proving citizenship falls solely on the individual.<sup>7</sup> It is also alleged that Bengali Muslims have been 'disproportionately affected and targeted' by Foreigners Tribunals.<sup>8</sup>

Large numbers of people declared to be foreigners by these Tribunals are now held in detention centres, often within prisons, in harmful conditions and with limited legal rights.<sup>9</sup>

## II. Authoritarian Nationalism

India's Constitution commits it to democracy, equality, secularism, asymmetrical federalism and the protection of civil liberties, including freedom of speech and religious freedom. Nevertheless, each of these commitments is now under threat from authoritarian nationalism.

This section offers a brief summary of some of these developments in India, primarily over 2019-2020:

- (a) Indian Parliament has enacted legislation - the Citizenship (Amendment) Act, 2019 - which discriminates on the grounds of religion in the provision of citizenship;
- (b) Protests and dissent have been met with an authoritarian government response and civil liberties have been dramatically curtailed.

These are best understood as part of the Hindu nationalist commitments of the Bharatiya Janata Party, which leads India's federal government and shows increasing disregard for India's constitutional order.<sup>10</sup> Although these commitments take various forms, including the reversal of a number of perceived historical injustices to Hindus<sup>11</sup>, they broadly aim to convert India into a 'Hindu Rashtra' or a homeland for Hindus.<sup>12</sup>

### **(a) The Citizenship (Amendment) Act 2019**

The Citizenship (Amendment) Act 2019 ('CAA'),<sup>13</sup> passed in December 2019, discriminates between migrant religious groups in the provision of citizenship.<sup>14</sup> The CAA amends the definition of "illegal migrant" in the Citizenship Act 1955 to create a fast-tracked pathway to Indian citizenship for Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan. Thus, the CAA may allow persons who have been excluded from the NRC to gain citizenship if they belong to some religious communities, while explicitly providing no avenue for Muslims who are in otherwise identical circumstances. The CAA thus signifies a shift away from India's commitments to equality, non-discrimination, secularism and religious freedom.<sup>15</sup>

As has been noted by Ms. Michelle Bachelet Jeria, the United Nations High Commissioner for Human Rights, in her Application before the Indian Supreme Court, the CAA violates international law norms regulating states' powers to grant citizenship, particularly the international human rights of all migrants to equality before the law, equal protection of the law and the right to non-discrimination, including on the grounds of religion.<sup>16</sup>

Given the discriminatory nature of the CAA, which provides a potential avenue to citizenship for most non-Muslims left out of a citizenship verification process, there are concerns that this legislation is part of a systemic plan to revoke citizenship from Muslims and vulnerable populations.<sup>17</sup> These concerns have been exacerbated by the Government's decision to introduce a modified 'National Population Register' of its residents,<sup>18</sup> which, unlike its predecessor, has explicit questions on a person's ancestry.<sup>19</sup> There are also concerns that this exercise may be a precursor to an all-India National Register of Citizens,<sup>20</sup> and will be used to filter out 'undesirable' citizens, possibly over 100 million of them.<sup>21</sup> This threatens to become the world's largest exercise risking mass statelessness.<sup>22</sup> As criticism mounted over the possible creation of a nation-wide citizenship register, the Prime Minister has denied any such plans. This, though, stands in contrast to the position taken by the Home Minister earlier, as well as the ruling party's own election manifesto.<sup>23</sup>

Although the Central Government had initially indicated that the National Population Register will be rolled-out from 1 April 2020, the exercise has been postponed for the time being due to COVID-19.

### **(b) Crackdown on dissent**

The enactment of the CAA was met with widespread protests across India, with their initial epicenter in North-Eastern India, particularly the State of Assam.<sup>24</sup> Although the protests in the North-East continued unabated, protests spread to other parts of the country too, including Delhi.<sup>25</sup> The Government's response to these protests was criticised for police brutality,<sup>26</sup> an overt anti-Muslim bias,<sup>27</sup> as well as the alleged involvement of ruling party leaders in the incitement of violence.<sup>28</sup> Supporters of the Government clashed with anti-CAA protesters in Delhi. This soon turned into a full-blown riot - one of the worst in Delhi's recent past<sup>29</sup> - with predominantly Muslim victims.<sup>30</sup> The investigation into the riots has been allegedly vitiated by bias.<sup>31</sup> The riots have been described as a "pogrom" given alleged inaction on the part of the police to check the violence against Muslims<sup>32</sup>

The silencing of dissent and targeting of dissenters is a theme which transcends the anti-CAA protests. The suppression of dissenting views has taken various forms, including internet bans,<sup>33</sup> arbitrary arrests of dissenters under repressive laws,<sup>34</sup> attacks on press<sup>35</sup> and academia,<sup>36</sup> among others. Many of these forms of suppression were seen in the recent events in Jammu and Kashmir. In August 2019, the Union Government revoked the semi-autonomous constitutional status of Jammu and Kashmir<sup>37</sup> - the only Muslim-majority state in India at the time. In the process, the Government not only took away Jammu and Kashmir's special status on specious legal grounds<sup>38</sup>, but also split it into two federally controlled territories.<sup>39</sup> Although these changes were approved by the Union Parliament, they were brought into effect without consulting either the Jammu and Kashmir State Government - which was at the time under the President's rule<sup>40</sup> - or the people of the State. Other than its constitutional impropriety, the decision has also been criticized as breaking a sacrosanct historical arrangement between the State and the Union.<sup>41</sup>

Numerous regional leaders were detained preemptively, ostensibly to prevent protests against revocation of the special status.<sup>42</sup> The revocation was also followed by the longest ever internet shutdown in a democratic state.<sup>43</sup> Even as Jammu and Kashmir continues to reel under its worst internet shutdown,<sup>44</sup> new domicile rules were introduced in the State. These are thought to be an attempt to meddle with the State's social and religious composition.<sup>45</sup>

These Government actions are just a part of a larger systemic suppression of press<sup>46</sup> and academic freedom<sup>47</sup> in India. While the decline in free speech is evident from India's fall in the Press Freedom Index,<sup>48</sup> individual cases bring to light the severity of the crackdown. Specifically, the invocation of repressive Unlawful Activities (Prevention) Act, 1967<sup>49</sup> and sedition provisions<sup>50</sup> against activists, including students, and academics offer examples of the severity of the current threats to civil liberties. While dissenting voices have been muted, the Government and ruling party leaders have been accused of supporting disinformation campaigns demonising political opponents, Muslims<sup>51</sup> and dissenters<sup>52</sup>.

### **(c) Conclusion**

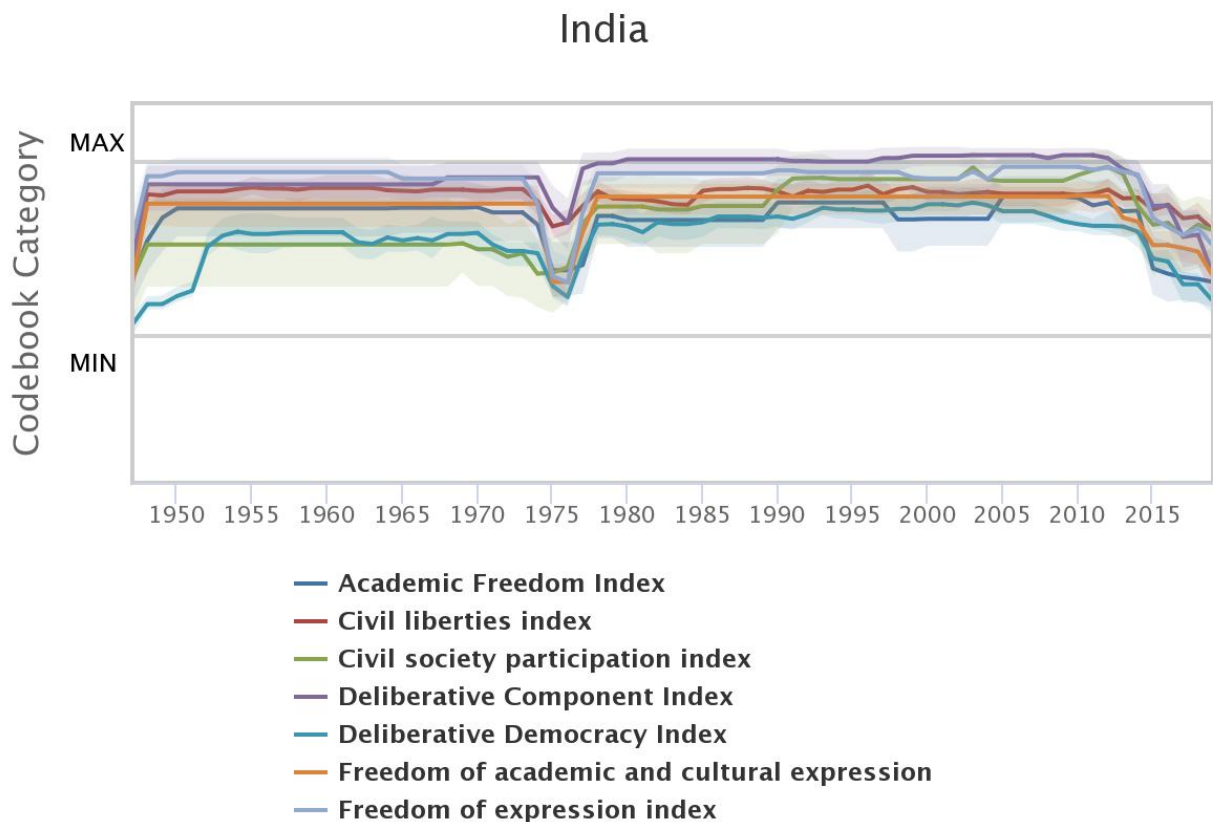
The COVID-19 pandemic has further strengthened the hands of the Government. Under the cover of the pandemic, when courts are functioning at a reduced capacity, it has been pursuing and detaining dissenters,<sup>53</sup> even after the Supreme Court suggested decongesting prisons.<sup>54</sup>

The judicial system - often seen as the last resort of justice in India - has failed to rise up to the challenges to India's constitutional scheme posed by recent government actions. Although the Supreme Court heard arguments against the Jammu and Kashmir internet ban, its judgment provided no effective relief,<sup>55</sup> leaving the final decision on internet restoration to the executive itself. Similarly, the Supreme

Court declined to hear the question of the constitutionality of the CAA as a matter of priority.<sup>56</sup> These decisions are in stark contrast to the Court’s global image as a pro-active guardian of constitutional rights<sup>57</sup> and raise questions about its independence.<sup>58</sup>

Thus, India appears to be at historical crossroads, with 2019-2020 seeing significant developments towards an authoritarian and Hindu nationalist state, raising important concerns around human rights and the preservation of India’s constitutional order.

**Appendix: Fall in India’s democratic values (from V-DEM database)<sup>59</sup>**



Highcharts.com | V-Dem data version 10.0

**Notes**

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<sup>2</sup> See resources in Anindita Kar, Shreedhar Manek, and Kieran Lobo ‘The Curious Case of Citizenship in Assam: A Look at the 1980s Agitation’ *EPW Engage* <<https://www.epw.in/engage/discussion/citizenship-in-assam-1980-agitation-nrc>>; Anupama Roy, ‘Ambivalence of Citizenship in Assam’ (2016) 51 *Economic and Political Weekly* 45.

<sup>3</sup> *Assam Public Works v. Union of India*, Writ Petition (Civil) No. 274/2009, 2 August 2013 (Supreme Court of India); Mohsin Alam Bhat, ‘On the NRC, Even the Supreme Court is Helpless’, *The Wire* (online), 7 January 2019

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<sup>4</sup> Government of Assam: Office of the State Coordinator of National Registration (NRC), Assam, *NRC in a nutshell*, <<http://nrcassam.nic.in/nrc-nutshell.html>>.

<sup>5</sup> Rohini Mohan, 'Inside India's Sham Trials that could Strip Millions of Citizenship', *Vice News* (online), 29 July 2019 <[https://news.vice.com/en\\_us/article/3k33qy/worse-than-a-death-sentence-inside-indias-sham-trials-that-could-strip-millions-of-citizenship](https://news.vice.com/en_us/article/3k33qy/worse-than-a-death-sentence-inside-indias-sham-trials-that-could-strip-millions-of-citizenship)>; Jessica Field et al, 'Bureaucratic Failings in the National Register of Citizens Process have Worsened Life for the Vulnerable in Assam', (Report, O.P. JGU in association with Development and Justice Initiative, 2019) <<http://hdl.handle.net/10739/2812>>.

<sup>6</sup> Government of India, Ministry of Home Affairs, *Lok Sabha Unstarred Question No. 1724*, Lok Sabha Question and Answer Portal <<http://164.100.24.220/loksabhaquestions/annex/171/AU1724.pdf>>.

<sup>7</sup> 'Designed to exclude: How India's courts are Allowing Foreigners Tribunals to Render People Stateless in Assam', (Report, Amnesty International India, 2019) <<https://amnesty.org.in/wp-content/uploads/2019/11/Assam-Foreigners-Tribunals-Report-1.pdf>>; Letter from the Working Group on Arbitrary Detention, the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression; The Special Rapporteur on Minority Issues; the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance and the Special Rapporteur on Freedom of Religion or Belief, to the Government of India, 27 May 2019 <<https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=24614>>; Talha Abdul Rahman, 'Identifying the 'Outsider': An Assessment of Foreigners Tribunals in the Indian State of Assam', (2020) 2(1) *Statelessness and Citizenship Review* <<https://statelessnessandcitizenshipreview.com/index.php/journal/article/view/141>>.

<sup>8</sup> Letter from the Special Rapporteur on Minority Issues; the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance; the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression; and the Special Rapporteur on Freedom of religion or Belief, to the Government of India, 11 June 2018 <[https://www.ohchr.org/\\_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/Issues/Racism/SR/Communications/OL\\_IND13\\_2018\\_Jun18.pdf&action=default&DefaultItemOpen=1](https://www.ohchr.org/_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/Issues/Racism/SR/Communications/OL_IND13_2018_Jun18.pdf&action=default&DefaultItemOpen=1)>.

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<sup>10</sup> Vasanthi Venkatesh and Fahad Ahmad, 'Rewriting India: The Construction of the 'Hindutva' Citizen in the Indian State', (2020) *Third World Approaches to International Law Review* <<https://twailr.com/rewriting-india-the-construction-of-the-hindutva-citizen-in-the-indian-state/>>.

<sup>11</sup> Some of these commitments include the building of a Hindu temple at the disputed site of Babri Masjid, a 16<sup>th</sup> century mosque, the imposition of a common family law called the 'Uniform Civil Code', and the revocation of the special status of the state of Jammu and Kashmir.

<sup>12</sup> Edward Anderson and Christophe Jaffrelot, 'Hindu Nationalism and the Saffronisation of the Public Sphere: An Interview with Christophe Jaffrelot' (2018) *Contemporary South Asia*, 468-482; Christophe Jaffrelot, 'The Fate of Secularism in India' in Milan Vasihnav (ed.), *The BJP in Power: Indian Democracy and Religious Nationalism*, (Carnegie Endowment for International Peace, 2019) 51-62.

<sup>13</sup> For full text of the *Citizenship (Amendment) Act 2019*, see, <<http://egazette.nic.in/WriteReadData/2019/214646.pdf>>; 'Citizenship Amendment Bill: India's New 'Anti-Muslim' Law Explained', *BBC News* (online), 11 December 2019 <<https://www.bbc.com/news/world-asia-india-50670393>>.

<sup>14</sup> Farrah Ahmed, 'Arbitrariness, Subordination and Unequal Citizenship', (2020) *Indian Law Review* <<https://www.tandfonline.com/doi/full/10.1080/24730580.2020.1761142>>.

<sup>15</sup> Niraja Gopal Jayal, 'Faith Based Citizenship: The Dangerous Path India is Choosing', *The India Forum* (online), 13 November 2019 <<https://www.theindiaforum.in/article/faith-criterion-citizenship>>.

<sup>16</sup> These rights are contained in the ICCPR, ICESCR, and the CRC, which are prominent human rights conventions that India is a signatory to; Also, see, IA in *Deb Mukharji v. Union of India and Ors.*, WP (Civil) No. 1474 of 2019, <[https://scobserver-production.s3.amazonaws.com/uploads/case\\_document/document\\_upload/1193/Intervention\\_Application\\_by\\_UNH\\_CR.pdf](https://scobserver-production.s3.amazonaws.com/uploads/case_document/document_upload/1193/Intervention_Application_by_UNH_CR.pdf)>.

<sup>17</sup> Jayal, above n 15.

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- <sup>47</sup> As per the report of the Global Public Policy Institute titled 'Free Universities: Putting the Academic Freedom Index into Action', India is one of the countries where the Academic Freedom Index score has deteriorated by at least 0.1 points in the last five years: <[https://www.gppi.net/media/KinzelbachEtAl\\_2020\\_Free\\_Universities.pdf](https://www.gppi.net/media/KinzelbachEtAl_2020_Free_Universities.pdf)>.
- <sup>48</sup> 'Modi Tightens His Grip on Media' above n 35.
- <sup>49</sup> Unlawful Activities (Prevention) Act, 1967 is primarily employed as an anti-terror legislation; nevertheless, it is increasingly being used against dissenters. See for instance, 'Delhi Riots: Police Now Book Jamia Students, Umar Khalid under UAPA', *The Wire* (online), 21 April 2020 <<https://thewire.in/government/delhi-riots-meeran-haider-safoora-zargar-umar-khalid>>.
- <sup>50</sup> Aman Sethi, 'Another Indian Student Arrested on Charges of Sedition', *The Guardian* (online), 23 February 2016 <<https://www.theguardian.com/world/2016/feb/23/india-student-arrested-sedition>>.
- <sup>51</sup> Hannah Ellis-Petersen and Shaikh Azizur Rahman, 'Coronavirus Conspiracy Theories Targeting Muslim Spread in India', *The Guardian* (online), 13 April 2020, <<https://www.theguardian.com/world/2020/apr/13/coronavirus-conspiracy-theories-targeting-muslims-spread-in-india>>.

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<sup>52</sup> Meenakshi Ganguly, *Dissent is Anti-National in Modi's India* (13 December 2019) Human Rights Watch <<https://www.hrw.org/news/2019/12/13/dissent-anti-national-modis-india>>.

<sup>53</sup> Betwa Sharma, 'Delhi Riots: How the Police is Using FIR 59 to Imprison Students and Activists Indefinitely', *Huffpost* (online), 16 June 2020 <[https://www.huffingtonpost.in/entry/delhi-police-riots-students-anti-cao-activists-arrest\\_in\\_5ee7ab99c5b651a404b0591a](https://www.huffingtonpost.in/entry/delhi-police-riots-students-anti-cao-activists-arrest_in_5ee7ab99c5b651a404b0591a)>; Sruthisagar Yamunan, 'As Delhi Police Use Lockdown to Arrest Anti-CAA Activists, Courts Must Act to Check Abuse of Power', *Scroll.in* (online), 26 May 2020 <<https://scroll.in/article/962930/as-delhi-police-use-lockdown-to-arrest-anti-cao-activists-courts-must-act-to-check-abuse-of-power>>.

<sup>54</sup> *In Re: Contagion of COVID 19 virus in prisons*, Suo Motu Writ Petition (c) No.1 of 2020 <[https://scobserver-production.s3.amazonaws.com/uploads/beyond\\_court\\_resource/document\\_upload/393/Suo\\_Motu\\_Petition\\_on\\_Prison\\_-\\_23.03.2020.pdf](https://scobserver-production.s3.amazonaws.com/uploads/beyond_court_resource/document_upload/393/Suo_Motu_Petition_on_Prison_-_23.03.2020.pdf)>.

<sup>55</sup> Mihir Naniwadekar, 'The Supreme Court's 4G Internet Order: Evasion by Abnegation' on *Indian Constitutional Law and Philosophy* (11 May 2020) <<https://indconlawphil.wordpress.com/2020/05/11/the-supreme-courts-4g-internet-order-evasion-by-abnegation/>>.

<sup>56</sup> 'Supreme Court to Hear Pleas on CAA after Arguments in Sabarimala Related Matter are Over', *The Indian Express* (online), 5 March 2020 <<https://indianexpress.com/article/india/sc-to-hear-pleas-on-cao-after-arguments-in-sabarimala-related-matter-are-over-6300382/>>.

<sup>57</sup> Subhankar Dam, '*Vineet Narain v Union of India*: A Court of Law and Not of Justice – Is the Indian Supreme Court Beyond the Indian Constitution', (Summer 2005) *Public Law* <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=969976](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=969976)>.

<sup>58</sup> Medha Srivastava, 'When the Judiciary Undermines Judicial Independence' on *Verfassungsblog* (8 October 2019) <<https://verfassungsblog.de/when-the-judiciary-undermines-judicial-independence/>>.

<sup>59</sup> Generated using V-DEM, <<https://www.v-dem.net/en/analysis/CountryGraph/>>.