Executive Summary

a. People are being declared to be foreigners, detained and left effectively stateless by Indian citizenship verification processes of questionable legality;
b. In a citizenship verification process in the north-eastern Indian state of Assam alone, 1.9 million people have been excluded from the citizenship register;
c. Those excluded from the register have no effective remedy as the fora for challenging exclusion – Foreigners Tribunals – are discriminatory and procedurally unfair;
d. It is feared that a citizenship verification process akin to the one in Assam will be rolled out in the rest of India, leaving millions more Indian residents vulnerable to statelessness;
e. India has enacted legislation - the Citizenship (Amendment) Act, 2019 - which discriminates on the grounds of religion in the provision of citizenship;
f. It is feared that the new discriminatory citizenship legislation and the national citizenship verification process will be used to effectively revoke the citizenship of religious minorities and will result in statelessness for many vulnerable and marginalized groups in India;
g. In another distinct, yet connected development, the special constitutional status of a Muslim-majority state – Jammu and Kashmir – was revoked in August 2019, on questionable legal grounds;
h. Protests against the discriminatory citizenship law, developments in Jammu and Kashmir, as well as various other government policies have seen an authoritarian response and dramatic curtailment of civil liberties;
i. The suppression of protest and dissent has taken various forms, including a long-standing internet shutdown in Jammu and Kashmir, arbitrary arrests of dissenters under repressive laws and attacks on press, students and scholars, among others.

Introduction

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 growing authoritarian nationalism.

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

a. Large numbers of people have been declared to be 'foreigners', detained, and left at risk of statelessness by citizenship 'verification' processes of questionable legality;
b. Indian Parliament has enacted legislation - the Citizenship (Amendment) Act, 2019 - which discriminates on the grounds of religion in the provision of citizenship;
c. Protests and dissent have been met with an authoritarian government response and civil liberties have been dramatically curtailed.
These developments 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. Although these commitments take various forms, including the reversal of a number of perceived historical injustices to Hindus, they broadly aim to convert India into a ‘Hindu Rashtra’ or a homeland for Hindus.

a. National Register of Citizens in Assam

Historically, the north-eastern Indian State of Assam witnessed a steady inflow of migrants for various political and economic reasons. 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. As a result, the State has long seen strong political movements dedicated to the detection and expulsion of suspected foreigners from the State. This demand received an unexpected boost 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.

Based on the Supreme Court’s directives, in 2015, a citizenship verification process, to update a National Register of Citizens (‘NRC’) - 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.

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. 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. It is also alleged that Bengali Muslims have been ‘disproportionately affected and targeted’ by Foreigners Tribunals.

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.

b. The Citizenship (Amendment) Act 2019 and the expansion of the NRC

A related development is the passage of the Citizenship (Amendment) Act 2019 (‘CAA’). The CAA discriminates between migrant religious groups in the provision of citizenship. 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 for 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 further shift away from India’s commitments to equality, non-discrimination, secularism and religious freedom.

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.

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, as well as the experience of the NRC process in Assam, there are concerns that this legislation is part of a systemic plan to revoke citizenship from Muslims and vulnerable populations. These concerns have been exacerbated by the Government’s decision to introduce a modified ‘National Population Register’ of its residents, which, unlike its predecessor, has explicit questions on a person’s ancestry. There are also concerns that this exercise may be a precursor to an all-India National Register of Citizens, akin to the Assam NRC, and will be used to filter out ‘undesirable’ citizens, possibly over 100 million of them. This threatens to become the world’s largest exercise risking mass statelessness. 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.

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.
c. Crackdown on dissent

The enactment of the CAA was met with widespread protests across India, with their epicenter in New Delhi. The Government’s response to these protests was criticised for police brutality, an overt anti-Muslim bias, as well as the alleged involvement of ruling party leaders in the incitement of violence. Supporters of the Government clashed with anti-CAA protestors in Delhi. This soon turned into a full-blown riot - one of the worst in Delhi’s recent past - with predominantly Muslim victims. The investigation into the riots has been allegedly vitiated by bias. The riots have been described as a “pogrom” given alleged State complicity in the violence against Muslims.

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, arbitrary arrests of dissenters under repressive laws, attacks on press and academia, 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, 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 spurious legal grounds, but also split it into two federally controlled territories. 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 - 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.

Numerous regional leaders were detained preemptively, ostensibly to prevent protests against revocation of the special status. The revocation was also followed by the longest ever internet shutdown in a democratic state. Even as Jammu and Kashmir continues to reel under its worst internet shutdown, 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.

These Government actions are just a part of a larger systemic suppression of press and academic freedom in India. While the decline in free speech is evident from India’s fall in the Press Freedom Index, individual cases bring to light the severity of the crackdown. Specifically, the invocation of repressive Unlawful Activities (Prevention) Act, 1967 and sedition provisions 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 State and ruling party leaders have been accused of supporting disinformation campaigns demonising political opponents, Muslims and dissenters.

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, even after the Supreme Court suggested decongesting prisons. 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, 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. These decisions are in stark contrast to the Court’s global image as a pro-active guardian of constitutional rights and raise questions about its independence.

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 statelessness, human rights and the preservation of India’s constitutional order.
Appendix: Fall in India’s democratic values (from V-DEM database)


This was achieved by way of the Jammu and Kashmir Reorganization Act, 2019 No. 34 of 2019 <https://rsf.org/en/india/india-52608589>; ‘Activists Condemn Naming Mander in Delhi Riots Case Charge Sheets’,


J&K Parties Fume over Mander’s New Domicile Order: Disenfranchising Kashmiris, One Step at a Time’,


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.pnp.org/media/KinzelbachEtAl_2020_Free-Universities.pdf>.

‘Modi Tightens His Grip on Media’ above n 33.


