

Citizenship

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SINCE time immemorial, humans came together in societies and sought to bestow identities on themselves. The Code of Hammurabi (circa 1750 BC) talked of patricians, plebeians and the slaves; so did Aristotle's *Politics* (340 BC) – of citizens, aliens and slaves. Kautilya's *Arthashastra* spoke of Aryans of the four varnas and non-Aryans of various categories. Beyond these preliminaries, it was Aristotle who raised the critical question: who is a citizen, and what is the meaning of the term? His answer was emphatic: he who has the power to take part in the deliberative or judicial administration of any state is said to be a citizen of that state.

Throughout history, geographical entities also developed methods of signalling for themselves and for others the limits of their areas of influ-

ence and allegiance. These came to be known as boundaries and within them affiliation and allegiance of individuals and groups was signalled through symbolic and concrete acts in acknowledgement of authority.

In the case of India and notwithstanding our antiquity as a civilization, these boundaries varied with the fortunes of empires. It was the freedom movement and its outcome in August 1947 that paved the way for the transition to a nation state in the modern sense.

The period of British rule also created an existential reality in the shape of those Indians who were descendents of persons who had emigrated in the 19th century mostly as indentured labour to different parts of the British empire. These were principally in Ceylon, Burma, Malaya,

South Africa, Zanzibar and Fiji. They numbered around four million. Gandhi ji had lived and worked among those in South Africa and leaders of the freedom movement were at all times supportive of their cause but also advised them to integrate in their host societies on the basis of equality.

When the Constituent Assembly commenced its work in December 1946, it premised its approach on a single citizenship for the Union of India. Some months later, the Partition and its aftermath of large-scale violence and displacement of multitudes compelled attention to its implications. Competing visions of an emerging India and its citizen body were thus intensely debated in the Constituent Assembly; the Constitution proclaimed on 26 November 1949 was its outcome. Its Preamble enunciated the guiding principles and moral values; the opening phrase *We the People* signalled the identities embedded therein. The task before the constitution makers was to spell out the ambit of these opening words. How, specifically, is the circle to be drawn?

Consequently, it was essential to dwell on the concept of citizenship and spell out the normative principles for defining national identity through the circles of inclusion and exclusion. The national movement had formulated a concept of citizenship that was differentiated. Every dimension of it was contested and bore the imprint of recent happenings, particularly of the Partition and its aftermath. Records show a new way of thinking about the relationship between the individual and the state.

In legal terms and in international practice, citizenship of a modern state is determined on the basis of two principles: *jus soli* (by birth) and *jus sanguinis* (blood-based descent). In actual practice, and in many states, rules

governing citizenship by marriage or naturalization have tended to dilute the applicability of these principles.

India chose the *jus soli* principle. However, and 'given its multiethnic society and the absence of a single ethno-cultural basis for nationhood' and because 'the Indian nation was substantially a political entity under construction', dilutions followed. The debates in the Constituent Assembly showed that 'an ultimately progressive settlement in favour of *jus soli* could not eliminate the ever present threat of encroachment from *jus sanguinis*.' As a result, 'the Indian Constitution adopted a secular *jus soli* conception of citizenship but the idea of the "natural" citizens, usually Hindu and male, strongly inflected the debate on it.'¹ This is clear from the wording of Articles 5, 6 and 7: 'If Article 5 was an enunciation of citizenship for ordinary times, Article 6 and 7 were articulations of citizenship for extraordinary times' with the former applicable to those who migrated to India from Pakistan and the latter (with some exceptions) to those who migrated from India to Pakistan.'²

The Constitution prescribed the citizenship status at its commencement and left it to Parliament under Article 11 to regulate the right of citizenship. The final shape to these contestations thus emerged in the Citizenship Act, 1955. It indicated five processes by which citizenship could be acquired: by birth, descent, registration, naturalization, and incorporation of territory. A sixth type was added in August 1985 after the Assam agitation. The act defined 'illegal immigrant'; it

1. Niraja Gopal Jayal, *Citizenship and Its Discontents: An Indian History*. Harvard University Press, Cambridge and Permanent Black, Delhi, 2013, pp. 52-3 and 80.

2. Niraja Gopal Jayal, 'Citizenship' in *The Oxford Handbook of the Indian Constitution*. Oxford University Press, Delhi, 2016, p. 166.

provides for termination of citizenship as also for conditions under which its deprivation can be undertaken.

It has been observed that the Citizenship Act and the Rules and Orders pursuant to it indicate an effort to use it as a tool 'to construct a uniform pan-Indian identity.' However, it also shows that 'a citizenship that was deeply marked by ethnic and majoritarian ascriptions was becoming the order of the day and the central government authorized to arbitrate on this issues was increasingly conceding the ground towards such an end.'³ Subsequent developments made this evident. Thus the Act of 1955 has been amended by the Citizenship Amendment Acts of 1986, 1992, 2003, 2005 and 2015; the changes and modifications to them together shed much light on the direction being taken.

The emerging pressures manifested themselves on the periphery of the nation state. The most significant amendments to the Citizenship Act have been to Sections 3 (citizenship by birth) and 6 (citizenship by naturalization); these were to address concerns about illegal immigration from Bangladesh. Section 7 (citizenship by incorporation of territory) has been amended to provide for overseas citizenship of India. After the turn of the century they are also reflective of the developing self-perception of the Indian state in the comity of nations.

The first impulse for accommodation emanated from the situation in Assam following the massive wave of immigration from Bangladesh that impacted on the demographic structure of the state in religious terms. A report by the Governor of Assam in

3. Valerian Rodrigues, 'Citizenship and the Indian Constitution' in Rajeev Bhargava, *Politics and Ethics of the Indian Constitution*. Oxford University Press, Delhi, 2009, pp. 174-75.

1998 citing threat from ‘almost exclusively Muslim’ illegal migrants from Bangladesh was cited as the reason.⁴ The agitation by the All Assam Students’ Union brought forth the IMDT – Illegal Migrants (Determination by Tribunal) Act 1983 – which provided for the detection and expulsion of illegal immigrants. Its political objective was to check unrest in sections of the public and address the vulnerabilities of Muslim migrants. It achieved limited success, did not check the agitation, and was struck down for being discriminatory by the Supreme Court in 2006 in *Sarbananda Sonowal v Union of India*. The reasons cited in the judgment, including reference to Article 355 of the Constitution, are emphatic.

Earlier, an amendment in 2003 to section 3(2)(ii) of the Citizenship Act denied citizenship rights to children of illegal immigrants. It has been opined that in these amendments to rules ‘religion was made an explicit ground for granting citizenship.’⁵

A different approach was adopted in the case of Hindu migrants from Pakistan coming into Rajasthan and Gujarat in 1965, 1971 and 1992; the number of the latter was around 17,000. ‘Citizenship Camps’ were held by District Collectors for them and Rule 8A of the Citizenship Rules 1956 was specifically amended to accommodate ‘minority Hindus with Pakistan citizenship.’

Another dimension to the citizenship debate was added by the question of overseas Indians, recent migrants as well as descendents of those who went earlier and now numbering around 31 million. These have

come to the notice of public opinion and have been articulated upon by public figures. Around the turn of the century a political input added to it and the NDA government set up a committee to examine all aspects of the matter. Its report concluded that:

‘India, because of its size, population and strategic location is ambitious to establish itself as a global player. In this context the role played by Indian Diaspora has, over the period of time, become important and is emerging as an important factor in promoting certain foreign policy goals. Initially, the Indian government was conscious of the potential of PIOs. Till 2000 there was no definite policy vis-a-vis the Indian overseas. Recent initiatives taken by the government have given strong signals of the Indian government’s intentions to continue to engage the Indian Diaspora giving it a vanguard role in India’s quest to emerge as a regional and global power.’⁶

The report went on to suggest ‘dual citizenship in a limited form with limited rights and to specific countries.’ These aspects were reflected in the Citizen (Amendment) Act 2003 and invited criticism on ground of ‘class bias’ in favour of recent migrants to the developed countries.⁷ The underlying politics came to the fore after the general election of 2004. Addressing the Pravasi Divas gathering at Mumbai in January 2005, Prime Minister Manmohan Singh announced that the government would amend the 2003 amendment to the act and ‘extend ‘the facility of dual citizenship to all overseas Indians who migrated from India after January 26, 1950’ instead of restricting it to the 16 mentioned in the 2003 amendment, subject to the same

condition that their countries allowed it under their laws.

This was reflected in the Amendment Act of 2005. This enlargement of the ambit was immediately criticized by the principal opposition on the ground that it ignored ‘national security consideration’ by opening the door to those Indians who migrated to Pakistan and Bangladesh after 1950 and to Bangladeshi infiltrators.⁸

The change of government in 2014 brought forth the Citizenship (Amendment) Bill, 2016. Its unstated major premise was the assertion in BJP’s 2014 Election Manifesto (page 40) that ‘India shall remain a natural home for persecuted Hindus and they shall be welcome to seek refuge here.’ This seems to reflect in some measure Israel’s Law of Return for the Jewish people and its opening proclamation that ‘every Jew has the right to come to this country as *Oleh* (an immigrant)’⁹

The primary objective of the present bill is (a) to provide for the acquisition and determination of Indian citizenship by a certain category of illegal immigrants: ‘persons belonging to minority communities, namely, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan’; (b) to amend the residence requirement from eleven to six years for this category; and (c) make possible cancellation of OCI cards if its holder violates a law of India.

On 6 January 2015 an Ordinance was issued on the ground that ‘pend-

8. L.K. Advani, ‘PM’s Ill-Advised Announcement on Dual Citizenship’ - BJP press release, 12 January 2005.

9. ‘This is not a Jewish state only because most of the inhabitants are Jews. It is a state for the Jews wherever they may be, and for any Jew who wishes to be here’ said PM Ben Gurion when this was debated in Israeli parliament in 1950. (Shlomo Sand, *The Invention of the Jewish People*. London, 2009, p. 287).

4. Jayal, op. cit., 2016, p. 175.

5. Lovish Garg, ‘If India Wants to Remain Secular, the New Citizenship Bill Isn’t the Way to Go’ – <https://thewire.in>, 21 September 2016.

6. *Report of the High Level Committee on Indian Diaspora*. 2003, p. 180.

7. Jayati Ghosh, ‘More Equal Than Others’, *Frontline* 19(2), 19 January-1 February 2002.

ing the consideration of the Bill circumstances exist which render it necessary to take immediate action' in regard to the required period for registration and naturalization and for Overseas Citizens of India and Persons of Indian Origin Schemes. The urgency of the matter, according to some comments in the media, emanated from a time-related commitment made by the prime minister during his US visit in 2014.

The bill has been referred to a Standing Committee for the Ministry of Home Affairs. Its report is awaited. In the meantime, opposition to it has emanated from various quarters on the ground that it makes illegal migrants eligible for citizenship on the basis of religion. This violates Article 14 of the Constitution which guarantees right to equality and violates the Basic Structure principle, and that while religious persecution could be a principle for differentiation, it cannot be articulated in a manner that dilutes the secular foundations of citizenship in India and goes against constitutional morality.¹⁰ The nobility of intent underlying the bill is belied by its selectivity in terms of neighbouring countries and religious minorities confronting difficulties; thus the rationale for leaving out Ahmadiyyas in Pakistan, Rohingyas in Myanmar and Uighur Muslims in China is unclear.

More specifically, public and student groups in the northeastern states (Assam, Arunachal Pradesh, Mizoram and Nagaland) have objected to it on the ground that it would upset the demographic balance and impact adversely on indigenous segments of the population in the region. Alongside is the highly emotive question of the

10. Apurva Thakur, 'Why the Citizenship Amendment Bill Goes Against the Basic Tenets of the Constitution', *Economic and Political Weekly* 53(13), 31 March 2018.

National Register of Citizens (NRC) and issue of the four million residents of Assam whose citizenship status awaits a decision.

It has also been observed that provisions for the cancellation of OCI are wide-ranging and could be susceptible to misuse.

Unlike a good majority of the countries of the world, India has not signed the 1951 UN Convention on Refugees and its 1967 Protocol and has, instead, dealt with refugee problems (including the massive inflow from East Pakistan in 1971) on an *ad hoc* basis. This, while facilitating political and administrative arrangements of the moment, does impact on a principled approach to the problem.

The resulting situation has been aptly summed up by a scholar: 'While *jus soli* remains the governing principle of citizenship in India, citizenship laws and jurisprudence have come to be manifestly inflected by elements of *jus sanguinis*. Whether it is the issue of "illegal immigrants" from Bangladesh on the eastern border of India, or that of "minority with Pakistan citizenship" on the western border, the law and the rules have tended to view these very differently seeing the latter (but not the former) as people with a rightful claim on Indian citizenship. This accenting of Indian citizenship with *jus sanguinis* is reflected also in the expansive approach latterly adopted towards the Indian diaspora.'¹¹

Behind and beyond these legal tweaking, the question of their impact on the core values of the Constitution and of the idea of India envisaged therein remains a disturbing one.

11. Jayal, *op. cit.*, 2016, p. 179. The use of the term 'diaspora' is now metaphoric in social science literature, as pointed out by William Safran in 'Disporas in Modern Societies: Myths of Homeland and Return', *Diaspora: A Journal of Transnational Studies* 1(1), Spring 1991, pp. 83-99.