Chapter 2
Constitutional Identity vs. Cultural Identity: Emerging Citizenship Debates in India

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Abstract

Even though the debate regarding multiculturalism took centre stage in European countries by mid of 20th Century, the Indian Constitution enacted in 1950 has prominent features regarding multiculturalism reflecting the historical inclusive nature of Indian society. After independence in a conflict between political nationalist and cultural nationalist, led to changes in legal framework with regard to constitutional identity of citizenship in India. The frequent changes in the citizenship acts in India reflect the changing political conditions and its implications. The recent Citizenship Amendment Act 2019 has created more political struggles as the cultural nationalist vision of creating an exclusive nationalist discourse got strengthened by this amendment. This paper will explore these changes to understand its implications in India.

Introduction

Indian society is varied, mixed and diverse accommodating various social identities cutting across religion, caste, ethnicity, language and other distinctive social identities. Historically due to migration and various interventions, every identity has institutionalized itself through their cultural and social practices gaining its own cultural and political space. Thus, rather than tracing any single identity for the people of this land from history, which is difficult to discern, a multicultural identity has to be developed to build a stronger and united political unit. The contested nature of citizenship in contemporary India due to various political reasons has not only excluded people based on religious identity, but also created fear for different cultural groups. Various dimensions of

contestations include citizenship as a legal status, as a bundle of rights and entitlements and also as a sense of identity and belonging (Jayal, 2013). The state's policies and its outcomes have a major impact based on citizenship as identity and entails right to access resources and benefits.

Idea of Citizenship

The political identity of citizenship overrides the cultural identity of different groups and giving equal access to rights and resources, assigns corresponding duties within a political community. Traditionally, the debates regarding citizenship revolve around two models: the republican and the liberal model. The Greek city states following republican model emphasized on civic self-rule, rotation of offices of power, where everyone gets opportunity to be ruled and also to rule. Aristotle's politics and Rousseau's "general will" reflect the republican model of citizenship rights. The liberal model emphasizes on extending the protection of law to everyone protecting their rights and liberties (Walzer, 1989). Liberal model focuses more on protection than participation, where even in recent times the citizenship debates in Indian context revolves around protection or exclusion of citizenship rights to diverse communities.

According to Kymlicka (2000), the idea of citizenship involves legal rights, political rights and representational rights. The legal status as enshrined in the constitution, guarantees civil, political and social rights. These rights are common to all the citizens cutting across the social and cultural diversity. The state not only guarantees these rights, but also provides remedy if any of them are violated. As a political agents, they claim their political rights through participation in the political institutions and the decision making process. Their whole identity is derived by being part or representing the political community as its member.

TH Marshall in his *Citizenship and Social Class, and Other Essays* (1950), based on the evolution of citizenship in England has identified civil, political and social rights as three important elements of citizenship. Freedom, liberty, equality before law, justice, property, speech, expression, contractual relations are some of the important aspects to be protected through civil rights. Political rights ensure participation and representation. The welfare and social security aspects of citizens can be protected by social rights. Thus the idea of citizenship has been mix of legal, political and social cross cutting various aspects and securing the rights of an individual in a political community. The idea of citizenship during the Indian independence struggle was divided between the secularist and communalist, where communalist favoured exclusive citizenship based on cultural identity, which was opposed by the secularist in the political arena and also in the constituent assembly.

Indian Independence and Citizenship Question

From 1885, when Congress party was formed, the national consciousness among the people slowly started rising towards demanding dominion initially and independence later. The western education played a significant role in orienting the freedom fighters with the western liberal political values, which enlightened them to slowly demand rights from the colonisers. After 1905, the Bengal partition, radical nationalist forces emerged based on the communal divide and finally culminated in the form of partition (Dincsahin & Arslan, 2013). The cultural nationalist insisted on dividing the nation based on religion, wheareas the secular nationalist wanted to have a united nation, where religion will be separated from politics. Cultural nationalism was keen in excluding or creating a hierarchy based on the cultural identity, which will be detrimental to the minorities, who are part of this territory similar to the people belonging to the majority religion.

The secular nationalist, based their ideology on the geographical integrity of India including all ethnic and religious groups representing their beliefs and cultures. The national identiy could be built based on diversity and such inclusive identity is the basis of nation building process in India. Thus all religious, ethinic and other social categories were automatically part of the political community without any exclusion. The cultural/hindu nationalist derived their source of identity from the majoritarian religion of Hinduism. Savarkar, one of the the ideological father of Hindu nationalism attributed two imporatant criteria for being part of the political community. They are 'Holyland' and 'Fatherland'. The fatherland explains the territorial inclusivity between the Indus and the seas and the holyland explains the religious inclusivity, where the community should genealogically trace their source of religion in this land. Hindus, Sikhs, Jains and Buddhist are part of the holyland as they trace their religion within Indian territory, but Christians, Jews, Parsis and Muslims were excluded from the political community as they trace their source of religion outside Indian territory. Except the exterme Hindu nationalist, other moderate Hindu nationalist doesn't want to exclude the Muslims, but want them to be assimilated within the larger Hindu civilization. The conditions for assimilation include accepting centrality of Hinduism, accepting Hindu mythological figures, critically look at Muslim rulers invasion and does not demand any special privileges (Varshney, 1993).

Thus the conflict between the secularist and the cultural/Hindu nationalist during the independence struggle played an important role in shaping the citizenship debate in India. The secularists were very particular in maintaining the non-religious nature of Indian state as people from different communities participated and sacrified their life for the cause of Indian independence. The cultural nationalist, to a larger extent, not being part of Indian independece took

the historical arguments to exclude the minorities or degrade them to secondary citizen of the country. The Constituent Assembly, being a rational body representing people from different provinces and princely states supported the secularist position in accomodating all sections of the population and creating an inclusive India. Three important theoretical debates happened in Constituent Assembly with regard to the nature of political state. The first one was based on 'No Concern Theory', which wanted the state to practice a clear wall of separation between religion and state based on western secularism. Many people did not support this position, as religion being integral part of life of common people, it will be difficult to follow such strict separation in Indian context. The second theoretical deliberation was based on 'Religious Superiority Theory', where the members insisted on sepration of relion from state, as religion being superior institution cannot come under the control of state. The third theoretical position 'Equal Respect Theory', which was widely accepted by all members insisted that state should give equal respect to all religions, but at the same time it will not have any religion of its own (Jha, 2002).

The secular framework adopted by the Constituent Assembly inflenced all the provisions including citizenship rights in the Constitution. The partition of the country on communal lines and the status of minorities were key focus while the debates regarding citizenship took place in Indian Constituent Assembly. Even though partition made the debate more complex, the drafting committee and majority of memebers were clear in the approach to not associate religion with citizenship. The agreed provision were in line with secular constitutional principles, but also gave the parilament power to deal with all issues related to citizenship (Judge, 2022). During the Constituent Assembly debates, articles 5 and 6 were deliberated extensively. Article 5 lay down the conditions for Indian citizenship, which gave citizenship to those who are born in India, or either of parents born in India or who was a resident not less than 5 years at the commencement of the Constitution and not acquired citizenship of any foreign country. Article 6 (which later became article 11) empowers the parliament to make provisions regarding all matters related to citizenship (GOI, 2022). The Constituent Assembly adopted both principles of *jus soli* (birthright) and *jus sanguinis* (right through blood relations), which are reflecting in article 5 of the Indian Constitution. Thus the constitutional framework has laid a strong secular foundations for the future political state in India, but at the same time given the powers in the hands of the parliament to bring about any changes in future.

Post-Independence Developments

Indian constitution has incorporated provisions reflecting multicultural values based on the secular ideological stand taken by Constituent Assembly.

The affirmative action policies, reservation policies and protection of minority rights reflect these values. Even though separate electorate and reservations for minorities, which were there during colonial period, were discarded, the constitution protects the minorities and vulnerable groups through various provisions (Bajpai, 2019). This is reflected in the various legislative initiation by the government including the laws related to citizenship.

The Citizenship Act, 1995 was the first institutionalized legal framework based on Indian Constitution to define the procedures for acquisition and cancellation of citizenship rights in India. The act moved away from the principle of *jus soli* by removing the provision of citizenship by birth for those who are born after January 26, 1950. They will be considered for citizenship if any one of the parents is an Indian citizen. Various other ways of acquiring citizenship includes descent, registration, naturalization and incorporation of territory. The act empowers the executive to decide in case of doubt over anyone's citizenship. Also the act contradicted Foreigner's Act, 1946, which placed the obligation to prove on the individual whose citizenship is in question. The students' movement in Assam in 1980's has led to Assam Accord, which inserted Assam specific section 6A, which allowed those who migrated between 1966 and 1971 to be registered as foreigners. Those who migrated before 1966 were given citizenship and after 1971 were considered as illegal migrants. The 1987 amendment brought in the change that those who are born before 1987, were given citizenship based on the principle of Jus Soli and those born in 1987 and after were given citizenship based on Jus Sanguinis (Jayal, 2013).

The issue of migrants entering illegally from Bangladesh has been raised by the right-wing religion based Bharatiya Janata Party (BJP) for a long time and as it involves both illegal migration and the religious nature of migration. When they came to power, in the year 2003 an important amendment was made to the Citizenship Act trying to address this illegal migration of Muslims from Bangladesh. According to this amendment, anyone born before 2003, to acquire citizenship, either of his/her parents should have born in India. But those who are born after 2003, both his/her parents should be Indian citizen or one of his parents should not be illegal migrant at the time of his/her birth. Further amendment was made to section 6 of the act which deals with acquiring citizenship by naturalization. The original unamended section 6 gives citizenship to any person fulfilling required eligibility and not being citizen of another country as specified in first schedule. The government has specified the eligibility in the third schedule. If a person satisfies the eligibility/qualifications, he/she may be grated a certificate of naturalization according to third schedule. After satisfying the requirements of third schedule, he needs to take an oath of allegiance, based on second schedule to become eligible for citizenship. Section 6 also gives some exception. If a person is eminent, who has contributed in the fields of science, philosophy, art, literature, world peace or human progress, they can

be exempted from the third schedule (Ashesh & Thiruvengadam, 2017). The 2003 amendment for the first time introduced the world illegal migrants in the Citizenship Act. In the first schedule the words "who is not a citizen of a country specified in the First Schedule" was replaced by "not being illegal migrants" (GOI, 2003). The amendment specifically tries to restrict the movement of Muslims from the neighbouring countries to India adding a communal character to the existing citizenship act.

The citizenship Rules, 1956 were amended in 2004 to add more communal aspects by openly identifying the religious identity of the immigrants. Section 3(2) of the emended rules says that in case of minority Hindus with Pakistan citizenship, who have migrated to India more than five years back with an intention to settle down permanently, the collector of the district will be the authority to register such people as citizen of India. Article 7 of the Constitution deals with people who have migrated from Pakistan to India, without mentioning any religion, but the 2004 amendment specifically brought in the religious identity for acquiring citizenship and thus ignoring the Muslims (Jayal, 2013). The 2003 amendment granted overseas citizenship of India to persons of Indian origin, where they created a category Persons of Indian Origin (PIO). 2005 amendment reduced the requisite period for PIO from two years to one year and created another category Overseas Citizenship of India (OCI), where both these categories were merged in 2011. In 2015, the Citizenship Act was again amended to create a new term 'Overseas Citizen of India Cardholder' replacing the earlier terms. This amendment also relaxed the requirements of residence and gave scope for them to travel outside India even within the required one year of residence (Ashesh, & Thiruvengadam, 2017). The 2005 amendment did not create a dual citizenship, but only created a special status for persons of Indian origin. But according to this amendment the citizens of Pakistan and Bangladesh are not eligible to apply for OCI status.

Further the government of India made two significant amendments to Passport (Entry into India) Rules 1950 and Foreigners Order, 1948, which has further strengthened the movement from Jus Soli (Birthright) towards Jus Sanguinis (Right through Blood Relations) by including communities based on communal identity. These amendments were the foundation for the Citizenship (Amendment) Act, 2019, which created huge protests across India. The governemnt amended Passport (Entry into India) Rules 1950 and included in the exemption clause 4 the following information:

"*Persons belonging to minority communities in Bangladesh and Pakistan, namely, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians 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 31st December, 2014-*

(i) without valid documents including passport or other travel documents; or

(ii) with valid documents including passport or other travel document and the validity of any of such documents has expired" (GOI, 2015).

Similarly it amended the exemption clause of Foreigners Order, 1948 and inserted in the exemption clause 3 the following details:

"Persons belonging to minority communities in Bangladesh and Pakistan, namely, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians 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 31st December, 2014-

(a) without valid documents including passport or other travel documents and who have been exempted under rule 4 from the provisions of rule 3 of the Passport (Entry into India) Rules, 1950, made under section 3 of the Passport (Entry into India) Act, 1920 (34 of 1920); or

(b) with valid documents including passport or other travel document and the validity of any of such documents has expired,

are hereby granted exemption from the application of provisions of the Foreigners Act, 1946 and the orders made thereunder in respect of their stay in India without such documents or after the expiry of those documents, as the case may be, from the date of publication of this order in the Official Gazette". (GOI, 2015).

The above amendments made in 2015 have laid a foundation for a very significant transformation of Indian citizenship from a secular perspective, which the Constituent Assembly members envisaged towards a religious nature, which violates the Indian constitutional ideology. As we have seen earlier, Constitutional makers adopted the "Equal Respect" theoretical framework for adopting secularism in India. This is different from western perspective, which had the "Wall of Separation" theoretical framework for its secularism principle. The multicultural nature of Indian society requires a neutral state without any religious identity, but at the same time due to majority of Indian being religious and religion being embedded within the cultural practices in India, it will be difficult to adopt a hand off approach. Thus the Constitution gave the state a neutral position, but at the same time it can intervene in the religious affairs to protect the fundamental values of the Constitution. In this regard, the 2015 amendment was a major deviation from the existing secular principle, and moved away from the secular principles of Indian Constitution. The Citizenship Amendment Act, 2019 completed this task by bringing the religious principles as a basis from expediting the citizenship process for those who have come to India as refugees. This along with National Register of Citizens (NRC) has the potential to exclude people based on religion.

Citizenship (Amendment) Act, 2019

The provisions of Citizenship (Amendment) Act, 2019 makes it easier for certain group of people in getting Indian Citizenship based on their religious identity. It also reduces the period of stay to claim citizenship through naturalization process based on religious identity. The statement of objects and reasons of the act states that since Pakistan, Bangladesh and Afghanistan have state religion, the minorities belonging to these countries from Hindu, Sikh, Buddhist, Jain, Parsis and Christian communities are facing religion based persecution and their right to practice, profess and propagate their religion is restricted. Since already the 2015 amendment to Passport (Entry into India) Act, 1920 and the Foreigners Act, 1946 has given scope for them to stay in India for a long term without being considered as illegal, now the present act will make them eligible for Indian citizenship. The Act further grants them immunity to stop any proceedings and make them eligible to apply for citizenship. The prescribed period for naturalization process to become citizen was also reduced from 11 years to 5 years for these religious minorities form outside India (GOI, 2019).

The Bharatiya Janata Party (BJP) government in 2003 introduced the National Register of Citizens (NRC), which is being revived now. NRC was aimed to create a register of all Indian citizens. Initially it had the objective of controlling the Bangladeshi migrants to Assam, now it could be extended to cover all parts of the country. This has a scope for establishing 'Foreigners Tribunals' and internment camps to keep the illegal migrants. The present government wants to expand the same to whole of the country in the name of National Population Register (NPR) (Jaffrelot, 2020). Since the recent amendments to the citizenship act and rules have already exempted the Hindu, Sikh, Buddhist, Jain, Parsis and Christian communities from the neighbouring three Islamic nations, the CAA and NPR will clearly exclude people belonging to Muslim communities. The persecution of Muslim sects within these countries, Rohingiyas in Myanmar and Tamils in Sri Lanka are not taken into consideration as we find that such migrants include Muslims. This clearly shows a religious polarization of the legal framework in being exclusive in treating people and by excluding Muslims. The persecution of people happens based on different political reasons; religion being one the reasons, but these legislative initiatives cast doubt on the intention of the government in trying to fulfil its larger ideological agenda.

Observations

India, being a secular country with liberal constitutional framework accommodating various cultural groups, without prioritizing any group has been a successful experiment in treating all communities with equal respect following constitutionalism. India being home of migrants from different ethnic

communities, has always been a place for multicultural society. Rather than trying to find the national identity from the past through cultural revival, the constitutional makers have created a multicultural framework for the future generations to build their political identity based on the constitutional framework. The trajectory of changes in Indian citizenship laws shows that the state is slowly moving from Jus Soli, which is progressive and inclusive of all cultural groups towards Jus Sanguinis, which is exclusive favouring certain cultural group and excluding others. This cultural nationalist framework was opposed even during the independence struggle and also during the debates in constituent assembly, where majority favoured a secular state, insisting on political identity of citizenship rather than any other cultural identity. Over the years, there has been lot of polarization based on religious identity and also political mobilization based on cultural identity, which is now reflecting in the legislative changes in India. There could be various reasons for polarization including the adoption of neoliberal political economy in 1990. With neoliberal political economy, the state slowly started withdrawing from providing social security protections and the communal solidarity started strengthening. The present government with ethno-religious political background has been active in pushing for a state with cultural identity than the constitutional identity. This has not only invited huge protest, but also created fear in the minds of minorities. There is an urgent need for a course correction to revive the secular credentials of India through secular laws and institutions, which will serve everyone without discriminating anyone.

Such right-wing populist governments are found all over the world as a consequence of contemporary neoliberal political economy and its resultant widening inequality. The withdrawal of welfare state and insistence on self-reliance and non-dependence over the state has made many to fall back into their cultural identity. Thus after 1990's in India, when formally started adopting neoliberalism, the cultural identity and groups have become more prominent. This cultural mobilization is not limited to demanding rights and opportunities from the state, but also directed against other cultural groups by the political class, who wants to maintain the divide, to avoid extending benefits. The withdrawal of state and certain ideologically oriented policies has created more animosity among different cultural groups; either based on religion, caste, language or ethnicity, and has further influenced the secular nature of the state. There is an urgent need to reinvigorate the constitutional principles to reclaim the secular space in India.

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