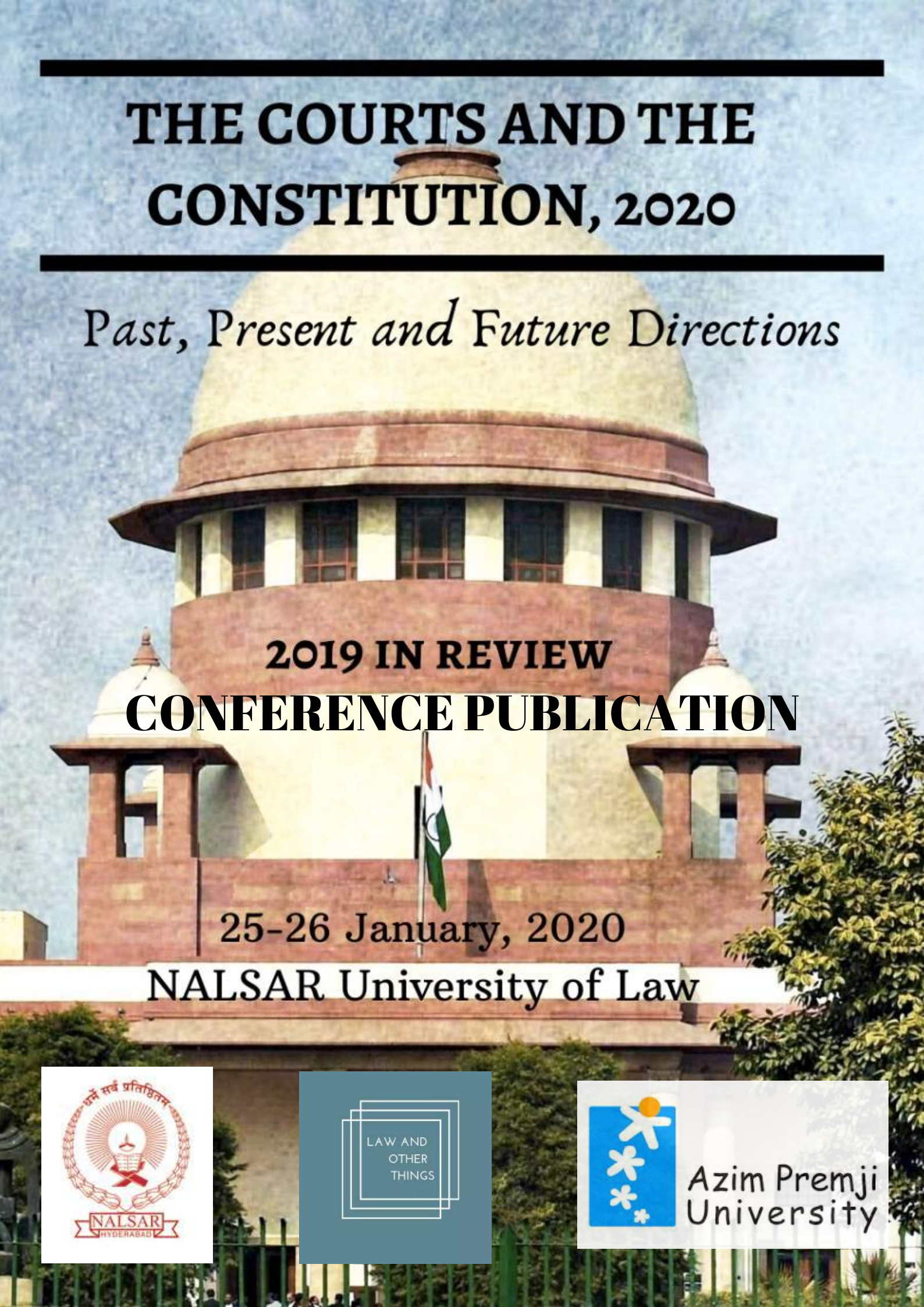
THE COURTS AND THE CONSTITUTION, 2020

Past, Present and Future Directions



2019 IN REVIEW

CONFERENCE PUBLICATION

25-26 January, 2020

NALSAR University of Law

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NALSAR HYDERABAD

LAW AND OTHER THINGS

Azim Premji University

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2019 IN REVIEW

EDITORIAL NOTE

It is with great pleasure that we release this publication developed from the proceedings of the second edition of *The Courts and the Constitution Conference.* The Conference was organised by the NALSAR University of Law, Hyderabad, in association with the School of Policy and Governance, Azim Premji University and the editorial team of the Law and Other Things Blog from 25-26 January, 2020.

The idea behind this annual conference is to take the opportunity of the Republic Day weekend to have a *Year-in-Review* exercise to analyze some of the key constitutional law judgments delivered in the preceding year and discuss their long-term impact. The Conference also provides an opportunity to bring members of academia, bar and the bench together to discuss and deliberate upon these decisions which have a bearing upon the future of the Republic, its citizens and its governance.

In this year's editions, the Conference had seven substantive sessions which thematically discussed the judicial developments in 2019.

The Opening Session on 25th January was a tribute to the memory of Dr. N.R. Madhava Menon, whom we lost in 2019. Prof. Faizan Mustafa, the Vice-Chancellor of NALSAR welcomed everyone to NALSAR and declared the Conference open. He expressed his disappointment that the year 2019 will not be remembered for what the Court *did do*, but for what all it *did not do*. Prof. N. Vasanthi gave an overview of the conference agenda. Prof. Sitharamam Kakarala, Director, School of Policy and Governance, Azim Premji University then took the opportunity to share his anecdotal experiences of having worked alongside Dr. N.R. Madhava Menon. He exhorted the need to move from Legal Education 2.0 to Legal Education 3.0 where NLUs must start paying more attention to their postgraduate programmes. Finally, Vikram Raghavan informed the audience of the objective behind the Law and Other Things Blog and the Conference to facilitate judges, lawyers, litigants, academics and students from across India to engage with the courts and the constitution.

The first substantive panel on the *Institutional Developments in the Judiciary* was opened by its moderator Sidharth Chauhan. Dr. Arghya Sengupta touched upon questions of accountability and independence in the form of appointments, in-tenure transfers, and post-tenure retirement appointments in the higher judiciary. Apurva Vishwanath narrated in detail

the Supreme Court's failure to secure justice to one of its staffer who had accused the former Chief Justice of India of sexual harassment. She discussed how the higher courts have failed at addressing issues of sexual harassment not just in this case but similarly in the past and noted that this must be addressed as a failure in the responsibility of not just those involved but the institution as a whole. Venkat Venkatesan expounded on the role of a legal journalist in holding the judiciary accountable and Anuj Bhuwania talked about how the Supreme Court was merely granting rights without remedies in 2019.

The second panel, moderated by Prof. Arun Kumar Thiruvengadam, dealt with *Federalism* where the focus shifted from courts to other constitutional actors. Prof. Anthony Blackshield AO, Emeritus Professor, Macquarie Law School opened the discussion by explaining unique features of federalism in different jurisdictions. Alok Prasanna Kumar explained the issues with fiscal federalism in India and discussed the issues with the functioning of the GST Council. Malavika Prasad took the session's attention to the issue of de-operationalization of Article 370 of the Constitution *vis-à-vis* Jammu and Kashmir's special status. Suchindran Baskar discussed about the complicated role of governors in a quasi-federal country like India. Lastly, Prof. Rohit De gave a historical context to federalism in India since 1940s and explained the political reluctance to federalism.

The third panel chaired by Prof. Amita Dhanda was devoted to Prof. Shamnad Basheer, another luminary whom we lost in 2019. She opened with a poignant account of her memory of Prof. Basheer. The panel was titled *Emerging Voices* where some of the work carried out by young and emerging scholars was presented. The panel consisted of Dr. Chintan Chandrachud, Kanika Gauba and Manav Kapur, all of whom spoke on the theme of the current tides against the Citizenship Amendment Act, 2019 with a focus on the history of India and its partition in 1947. Dr. Chandrachud analysed the TADA Act through the *Kartar Singh* case and brought out the importance of scholarship that takes a step farther from just focusing on the text and instead looks at the performance.

Day two of the conference witnessed four panels. The first one pertained to *Citizenship* and was opened by the moderator Arvind Narrain. Justice Swaminathan commented upon the importance of engaging with people in order to facilitate a conversation. Aymen Mohammad discussed the refusal of states to enforce union laws. He drew upon federalism and Article 355 of the Constitution so as to point out how the Union was wrongly justifying its protection of the federal units. Dr. Mohsin Alam Bhat drew upon his experiences from Assam so as to

enlighten the audience about the *twilight of citizenship* by explaining the inhumane functioning of foreigners' tribunals. Thereafter, Nizam Pasha stressed upon the need to examine citizenship, the right to rights, in the larger constitutional framework.

The panel on *Law and Religion* saw Professor Faizan Mustafa critiquing the Supreme Court's judgment in the Ayodhya dispute. Sruthisagar Yamunan highlighted the inconsistencies in courts' attempt to strike a balance between social reforms and religious rights of communities. Suhrith Parthasarthy drew the audience's attention to the problematic nature of the Supreme Court's order to review its judgment in the *Sabrimala* case. Professor N. Vasanthi, who was moderating the session concluded by emphasizing the need to have a proper relationship between law and religion.

The panel on *Developments in Equality Jurisprudence* was moderated by Dr. Sudhir Krishnaswamy who posited some grilling questions to the panelists. Arundhati Katju discussed the strategy behind shifting the conversation through *Navtej Johar* and for the bringing out the need on looking at the equality jurisprudence in a broader manner than the Courts have been currently able to do. Dr. Anup Surendranath pointed out how the Supreme Court failed in its application of the test of manifest arbitrariness in the *Bombay Dance Bar* Case and discussed the issue of importing creamy layer into SC/ST reservation jurisprudence. Alok Prasanna Kumar sought to explain how the 103rd Constitutional Amendment fell afoul of the Basic Structure doctrine and confused the objective of reservations as one of handing out charity.

The last session on *Reforming Tribunals* was moderated by Vivek Reddy. He prompted the speakers to speak on the possibility of removing tribunals, instead of reforming them. T. Prashant Reddy and Arun Thiruvengadam discussed the existing inefficiency of tribunals and the Court's decision in *Rojer Mathew* case. The conference ended with a vote of thanks by Sidharth Chauhan.

We found immense value in the ideas discussed during the panels held at the Conference and felt that they must be made available to a larger audience, hence this publication. We hope you enjoy reading this report, which seeks to share the collated learnings from the conference with law students and legal fraternity in order to further the discourse on major legal developments taking place in India and the role played by the Indian judiciary.

We are currently releasing this report Panel by Panel and will soon make available the compiled version. We also plan to release a special publication expanding upon the themes

which were discussed during the Conference. We hope you find this publication as a useful resource.

This Publication would have obviously been impossible without those who made the Conference possible in the first place. The dedicated team of student volunteers that we have is the backbone of our organizing team. Beyond us students and our faculty, what really makes this Conference possible is the dedicated staff at NALSAR to whom we are extremely grateful. We would like to particularly thank the IT Department led by B Md Irfan Sir for their constant support.

We are grateful to our dedicated team of rapporteurs without whose assistance and excellent transcribing this publication could not have been developed. We would also like to acknowledge Gitika Lahiri for her assistance in the design of this publication and Vishal Rakhecha for his technical assistance towards the digital release of this report.

We are also extremely grateful to our speakers who took the time out of their schedules to go over these transcripts and dealt with our multiple emails. Finally, we would like to acknowledge the constant support and encouragement of Prof. Arun Kumar Thiruvengadam, Prof. Sidharth Chauhan, Vikram Raghavan and our Vice Chancellor, Prof. Faizan Mustafa without whom neither the Conference nor this publication would have been possible.

Any errors are of course, ours and ours alone.

Best,

Dayaar Singla and Gayatri Gupta

Editors

THE COURTS AND THE CONSTITUTION

CITIZENSHIP, RESIDENCY & THE CONSTITUTION

Moderator
Arvind Narrain
ARC International

Justice G.R. Swaminathan
High Court of Madras, Madurai Bench

Aymen Mohammed
PhD Candidate, NALSAR

Mohsin Alam
Assistant Professor, O.P. Jindal Global University

Nizam Pasha
Supreme Court of India & High Court of Delhi

2019 IN REVIEW

INTRODUCTION

One of the most awaited panels for *The Courts & The Constitution* Conference focused on the question of Citizenship, Residency and The Constitution.

Arvind Narrain, the panel moderator, started the discussion by introducing the panellists and setting the stage. He summarised the major issues spoken by all the speakers at the end of the discussion, which has been presented in the end of this transcript. Arvind Narrain invoked Hannah Arendt 'right to have rights' conception of citizenship and hoped that the Court would uphold the substantive understanding of Article 14, which has already been reflected in the popular protests against Citizenship Amendment Act ("CAA").

Justice Swaminathan gave a brief overview of his judgment in *P. Ulaganathan v. UOI* wherein he observed that statelessness is a violation of Article 21. He commented on the legislative competence of the Parliament to enact Citizenship Amendment Act, 2019, and advised for an engagement with the views of those supporting the CAA in order to facilitate a conversation.

Aymen Mohammad then drew upon federalism and Article 355 of the Constitution so as to point out how the Union was wrongly justifying its protection of the federal units. He also elaborated upon the procedural shortcomings of National Population Register (NPR) and found the trio of CAA-NPR-NCR to be incorrigibly violative of individual privacy.

Mohsin Alam Bhat drew upon his experiences from Assam so as to enlighten the audience about the twilight of citizenship by explaining the inhumane functioning of Foreigners' Tribunals. He observed that a culture of fear, excess of law, and mass suspicion were being furthered by the current Union government.

Thereafter, Nizam Pasha discussed in depth the *Sarbanda Sonowal I & II* judgments and showed how the Court was acting as an administrative authority, rather than a constitutional court examining the question of citizenship. He focused upon the procedural and substantive lapses while dealing with the entire NRC process, including the lax appointment procedure for Foreigners' Tribunal members, disproportionate burden of proof etc. He also questioned the use

of the doctrine of under-inclusion in the context of citizenship and the Ambedkarite idea of constitutional morality that can be invoked to challenge CAA.

We hope that you find these speeches as useful and insightful as we did! We would like to acknowledge the assistance of Dhananjay Dhonchak & Sai Preetham in performing an excellent job in transcribing the proceedings for this panel. You may also access the video of this panel discussion on the NALSAR University of Law YouTube channel.

ARVIND NARRAIN[1]

Introduction of panellists

We are here for the panel in which we will look at the CAA, NPR and the NRC debates in the country. These debates are of great relevance for everybody in this room and everybody really around the country. What we hope to get during this panel is that we are able to shed some more light on some of the complexities and the nuances around these issues, and why they matter so much. For that we have an excellent panel before us. I will just introduce the four speakers, and then we will proceed directly into this session.

First, we have Justice Swaminathan who is very well known, at least in the NALSAR context. He is well known as a judge of the Madras High Court, and we also know him as someone who is very interested in this field of academia. He sits and listens intently to all that is said in the course of these proceedings, and we know that what he hears during the course of these proceedings becomes a part of his world view, and we hope that it sometimes becomes a part of the way he thinks. So, we really welcome him on that particular point. The second speaker will be Aymen Mohammed, who is a Ph.D. candidate at NALSAR. He will explore one particular dimension which I think is crucial at the moment, which is the entire issue on what is the obligation of states to enforce union laws keeping in mind the idea of the preamble and the preamble of the promise of fraternity. We look forward to hearing what he has to say on that point. Then we have Mohsin Alam Bhatt, who is an assistant professor at the Jindal University and a former alumnus of NALSAR. He is also a co-founder of this initiative called PARICHAY, which is a legal collective which aims to provide legal representation to persons at risk of statelessness. He has done a lot of work in the context of Assam, so he is going to tell us a little more about the Assam and NPR, NRC process, and its implications. We will end with Nizam Pasha, who is a practicing advocate at the Supreme Court, and he will address the role of the Supreme Court in the entire NRC-CAA process. Without further ado, I will hand it over to Justice Swaminathan. We have a time of 15 minutes per speaker.

[1] Cite as Arvind Narrain, *Citizenship, Residency, and The Constitution*, The Courts & The Constitution- 2019 in Review, NALSAR University of Law, 26th January, 2020.

JUSTICE SWAMINATHAN[1]

Good Morning everyone. Since everyone is training their guns on CAA, I offered to play the role of a devil's advocate. Arvind was a little scared yesterday that I may stir the proverbial hornet's nest.

My engagement with this issue of citizenship took place sometime in the middle of last year. A group of Sri Lankan refugees had filed a writ petition way back in the year 2009 seeking citizenship. You will not believe that for 10 long years neither the State nor the Centre filed any written response. I had to adjourn the case on 3-5 occasions just to make the State and Central governments file their counters. Ultimately when they filed their counters, I found that the stand of the Central and State governments was one and the same. For all the shedding of tears by the Tamil Nadu government, it took the stand that for someone to get citizenship, either by registration or by naturalisation, one must not be an illegal immigrant. The Act defines an illegal immigrant as somebody who does not have a visa or any other travel document. Since the Sri Lankan refugees do not fulfil this threshold condition, their application for grant of citizenship will not even be considered. This was the stance taken by the Tamil Nadu government. I felt aghast. See, these people hail from Tamil Nadu, in fact they could even name the village from which their grandfather or great grandfather hailed from. They went to Sri Lanka as workers in the tea estates. All of us know post 1947, ethnic riots broke out and in order to save their lives and honour, they had to take a ferry boat and rush to India. They have been housed in camps for more than 30-35 years. I think the current fashionable term is 'detention centres'. In Tamil Nadu, we call it 'refugee camps' and the conditions they have in these camps are hellish. So, I said, 'this is not fair, they are not going to be sent back to Sri Lanka and they are not going to be given citizenship here, where else will they go'. I felt this condition of statelessness is a clear infringement of their right under Article 21. I held that Article 21 applies not only to citizens but also to refugees, immigrants, asylum seekers etc. Therefore, I held that the petitioners' case for citizenship must be considered. I would have granted them final relief but then I thought my order will be overturned by the division bench or the Supreme Court. Therefore, I decided to play safe and stop at that level. This is my judgment

[1] Cite as Justice Swaminathan, *Citizenship, Residency, and The Constitution*, The Courts & The Constitution- 2019 in Review, NALSAR University of Law, 26th January, 2020.
* Transcribed by Dhananjay Dhonchak, Edited by Gayatri Gupta.

in *P. Ulaganathan v. UOI*. Therefore, I was deeply disappointed when the present Citizenship Amendment Act ("CAA") did not include Sri Lankan refugees.

At the same time while observing the nature of engagement going on, I do feel constrained to say that whatever sentiments that are expressed by the proponents of CAA, you will find them expressed in far more aggressive terminology and phrases by some of the members during the Constituent assembly debates. I also want to draw your attention to what Dr. Ambedkar said in the Constituent assembly. He said, 'we are not here to make a permanent law of citizenship, that business is left future parliaments'. That is why Article 11 says that Articles 5 to 10 will not derogate from the power of the parliament to make any law regarding acquisition, termination and for any matter connected with citizenship. Therefore, I feel the legislative competence of the Indian parliament to make the amendments cannot be in any doubt. I am sure some of you would have listened to Suhrith Parthasarthy's and Harish Salve's presentation in one of the media channels. I would request everyone here to see the presentation of Harish Salve on CAA, which says that the amendment CAA will not fall foul of Article 14 or Article 21. I would fully concur with that reasoning. Of course, one should also see Suhrith's strong response to it.

But my primary purpose here is only one thing. We must engage with both the sides. There must be a proper engagement.

I would narrate one story on the importance of proper engagement. I do not know if it is real or apocryphal. All of you have heard of Justice Markandey Katju. He would always address the counsel only in Hindi. This situation was becoming so intolerable that some people went to the then senior counsel and now Justice Rohinton Nariman who said that he will take up the matter. After listening to a long question put up by Katju in Hindi, he gave a long answer in Gujarati. I am told that Katju got reformed from the very next day itself. What this story illustrates is that conversation is important. Even for confrontation to take place, common ground is essential. Therefore, I feel the people who are opposing CAA must understand the psyche and world- view of the proponents of CAA.

I will just say 2 or 3 points. Point No.1- The opponent group who are very strong in number, to them the Indian State was formed during the period from 25th August, 1947 to 26th January, 1950. According to the proponents, the Indian nation predates the formation of the Indian State.

So, the distinction between nation and State has to be understood. And I think those who are opposing the CAA must appreciate this distinction. Point No.2- the emotional aspects. When *'Jana Gana Mana'* is sung, the pro-CAA will stand up erect in respect but when *'Vande Mataram'* is sung, their hearts melt. Point No.3- for them India is not a constitutional formation or entity, it is *Bharat Mata* and they are not able to come to terms with the vivisection of *Bharat Mata* in the name of religion. So, this being their world view, unless you get into their psyche and understand, you will not be able to engage with them. However, I believe it is possible to engage with them by invoking the concept of *'Akhanda Bharat'*.

Personally, I am a follower of J.C Kumarappa who was a greater Gandhian than Gandhi himself, an uncompromising Gandhian. And I just assume if he were in this position, he would talk in the language of *'Akhanda Bharat'*. He would say that people all over the '*Akhanda Bharat*' are also our people. Then how can one distinguish on the basis of religion. Merely because they are on the other side of the Radcliffe Line border, how will they become somebody else. As a strategist, I feel it would make greater sense if the cause of Rohingyas, Ahmadias and Sri Lankan tamils is taken up first. Certainly, Nizam Pasha will agree with me, a law cannot be struck down on the ground of under inclusion. The Parliament will have the final say in the matter of conferring benefits. If one group is denied a benefit and other groups are given that benefit, the court will hold it to be a case under-inclusion and it will refuse to strike down the law. Therefore, to advance the cause of love, secularism and tolerance in which I firmly believe in, a different mode of engagement is called for. And this I thought I should make clear in my presentation.

Q. [Malavika Prasad] *My question is for Justice Swaminathan. I think that it is possible for the government of the Union as well as the government of the State to take the same position about Sri Lankan refugees because of the success of the narrative building exercise of the dispensation at the moment which is that they have made it seem like refugees or stateless people will be saved by the conferral of citizenship. So of course, the Union and the State will both argue that citizenship cannot be granted to these people because the very idea of citizenship has been built as an opposition to a foreigner who is illegally in India. It is a binary that is created by the Citizenship Act. With respect, I feel that if the question is really about refugees, it must not go as far as*

citizenship. It must be, 'As the Union and the State government, what are you doing for refugees?'. You can just grant them asylum; you can just give them a long-term work visa. These are all options validly recognized in international law that most countries in the world. I mean at least most refugee friendly countries in the world follow and that is a good way to welcome back refugees. But the present dispensation has so successfully constructed this narrative that a refugee can only be given protection in India if you confer citizenship. But this is several leaps in terms of legal constructs. So, I feel like that is why both governments are able to take that position and I wonder what your thinking is on why they make that leap and why courts are allowing them to make that leap. There are several intermediate protections that are possible. Thank you.

A. I must confess the options suggested by Ms. Malavika did not occur to me.

Dropping this topic of citizenship, I want to refer to the sealed cover jurisprudence about which Yesterday, quite a few speakers spoke. Pasha also today spoke about it. I was the standing counsel for a prosecuting agency and I had to handle a very sensational anticipatory bail petition was filed. The prosecuting official instructed me to just pass on the sealed cover to the Judge stating it contained explosive material i.e, it implicates one Supreme Court judge. I told the judge whatever was instructed to me verbatim. That judge got scared and without even receiving the sealed cover dismissed the petition for anticipatory bail. Then after a month or so, that same accused filed another petition and again the prosecuting official a very high ranking officer came to me and asked me to pass on the sealed cover and this time it was before another Judge. This time I was wiser. I said I will open the sealed cover and see for myself and only if I am convinced, I will pass on. The official said OK. He told me that this accused had given money to a Supreme Court judge. When I opened, I was shocked to see that some ten years after that supreme court Judge retired, he had sat in some arbitration case and this accused was a party to that. It was a legitimate arbitration fee that a litigant can and should pay to the arbitrator. This prosecuting agency mistook that bribe money had been paid by the accused to a sitting Supreme Court judge. They thought that the judge who retired some ten years ago continued to be a sitting Supreme Court judge and that is how this sealed cover thing is operating.

AYMEN MOHAMMED[1]

I am going to be looking at one very specific aspect of the CAA, NRC, NPR issue, which is the refusal of states to enforce union laws. In this case, it is slightly different because there are two states i.e. West Bengal and Kerala, who have refused to enforce the NPR. Statements by Chief Ministers saying that one does not have to worry about NRC is not something we can really assess against a constitutional text. But these two stay orders are slightly similar in the sense that they are made as a circular and they are at a very low level of official functioning. More importantly, NPR is not a law made by the parliament. It functions solely through rules made under the Citizenship Amendment Act of 2003 which is actually the motherlode of the Citizenship Act of 2019. The key difference between NPR and any other law made by parliament is the fact that even the Citizenship Amendment Act of 2003 does not discuss it in any detail. So, this is completely the creation of the executive in the Union Government without an express power delegated to it to conduct this exercise.

Under the Act, you have the 2003 rules. The 2003 rules look at three things: the first is the enumeration exercise known as the National Population Register ("NPR"). This is then used to create a second procedure which is known as the National Register of Indian Citizens and the third procedure is the issue of NRIC cards to citizens. Now, this is something that was very frequently confused with Aadhar by Mr. Chidambram, but the NRIC cards are back in discussion. Amit Shah has mentioned it a few times that we have too many documents apparently and now we just need one card that will also work as a passport, which is slightly doubtful, but this is NPR in a nutshell.

Now what it actually does is, unlike Assam's NRC, NPR's purpose- the sole reason why you are being enumerated is so that your citizenship can be verified. There is no other reason why a household enumeration has to be conducted. Especially if you look at the rules, the sort of questions that are being asked, they are all geared towards knowing who you are and whether you can definitely prove you are Indian citizens. There is no other purpose for the NPR as such now.

[1] Cite as Aymen Mohammed, *Citizenship, Residency, and The Constitution*, The Courts & The Constitution- 2019 in Review, NALSAR University of Law, 26th January, 2020.
* Transcribed by Dhananjay Dhonchak, Edited by Gayatri Gupta.

The Union government has repeatedly said that they need this information because they are going to develop schemes on that basis. NPR has some questions regarding the number of toilets or the number of rooms a household has. All of these questions are already answered by the National Family Health Survey, National Sample Survey Organization reports and also, it is not a very difficult thing to collect data on these grounds.

But the key with NPR is that your data is not anonymized. It is possible that in one local jurisdiction everyone would know who is on the list and who is not. Now this basically means that I can be identified at a level less than even a city. So, a zone within a city possibly. In villages, it will mean that you will be able to identify whole families, you will be able to identify that one family that does not belong to your community and it makes exclusion easier. But more importantly with the NPR, what is not very frequently discussed is the fact that it is not on individual basis. It is not counting you as a person, it is counting a household. So, it is completely possible that you may say *Kaagaz nahi dikhayenge* but your head of the household, which is mostly going to be the father or the male in-charge, can report you as a person who has to be listed.

The amount of discretion in the second component of the process is related to enumerating and identifying citizens. In Assam, the case was that all of you were required to go file documents to prove your citizenship. Here, the burden of filtering citizens is on that local Babu who is to be designated or appointed by the State government. This is very important because if a State government is appointing an officer, then necessarily these are people who are going to come from the state administrative services. The description within the 2003 rules clearly explain the sort of position that this officer would be holding. When we look at this information together, what we basically have is a procedure that requires this local officer to go through this list and mark out people as doubtful citizens. Now, these people are going to be issued notices who will have to explain how they are or are not citizens.

If you think your problem is solved if you are included in the list after this doubtful citizenship exercise is over, it is not. A draft list is published in your local area and literally anyone can object to your name's inclusion in that list. These are the NPR 2003 rules. It is still on the Ministry of Home Affairs website now. This basically means that for an officer filtering is not only a discretionary job, but also one driven by mobs or by groups with prejudices. There are no checks on who or why someone can file an objection.

In Assam alone there were three lakhs objections filed before the objection deadline, these included objections over children. So, you clearly know where this is coming from. It is not very easy to fill out standard forms and push them through a digital platform. This is the broad logic of why these two states decided to stay NPR because they connected it with NRC.

Now what I am looking at is slightly connected to my PhD topic, which is understanding fraternity in the Preamble and using its meanings to interpret provisions and understand other provisions better. How is it that fraternity can help us improve our understanding of Centre- State relations, how is it that fraternity can provide us with new insights on how we interpret Schedule VII and inter-state relations.

One of the things that I am looking at as part of my research is the idea of an asymmetric federal constitution. This allows diversity of not only communities, but also arrangements. So, you have states that have sub-regional entities, you have states that have interstate entities and these explain complex federal structures. So clearly, Federalism is not just about having an office at a local level where the Union instructs and the State has to comply. Federalism clearly is a manifestation of India's diversity and of how many communities feel part of this Indian Union and what is required of them and what is to be offered to them.

In this case, it is very easy for the Union government to say that we have passed this law and have made these notifications through rules and now you are going to enforce them and implement them. States are constituent political units- India, that is Bharat is a Union of States. So, if there are no constituent political units, then there is no Union. This is very important because it tells us that States not only have a right to object and seek remedy before court, but they also have a right to interpret the Constitution because they are working the Constitution. It is not just judges who interpret and apply the Constitution. Rather each one of us administering or being appointed by the Constitution is required to interpret it and see whether their own constitutional obligations are in place.

Since both Kerala and West Bengal have used public order as the basis of staying this exercise, I would explain what possible explanations there could be. One that I clearly see is that NPR is an undue burden not only on the State, but also on its people because this undue burden is through an arbitrary exercise. It is an arbitrary exercise where the Union has not provided enough information on why it is needed in the first place, the Union is not asking the State why it is

mandatory and why an officer of the State government can be penalized for not cooperating, why all of this is being done through rules. If the Union is not forthcoming, then States do have the right to at least seek more clarity before they proceed.

I am going to look at how Constitutional provisions work out against this. The history of the Constitution with respect to federalism is very interesting because you can clearly see in the Constituent assembly and outside that there were very serious anxieties in the Indian elite that India is going to Balkanise. India's balkanization is not only of geographical entities, but they were very worried that disparate groups cannot stay together and this will result in what the Constituent assembly members used to constantly refer to as 'fissiparous tendencies'. This is a very frequently used word in the 1950s and it just points to the fact that one always assumes that the States are going to be the problem. Which is why you have Article 256, Article 257, Article 355 and of course the gem Article 356.

Article 355 is a very interesting provision. It says that the duty of Union is to protect the States from external aggression and internal disturbance and ensure that the governance of every State is carried on in accordance with the provisions of this Constitution. Now the remedy is that if a government of a State is not functioning in accordance with the Constitution, then you have Article 356 to dismiss it and impose President's rule. But clearly our Constitution makers never thought that the Union could be neglecting internal disturbances in a State. Clearly, our founding parents did not think that it would be possible for the Union to start acting in a manner that is not constitutional. States, apart from Article 131, do not really have many remedies. So, it is not interfering with the Union's work, but it is also saying that we are not going to assist you right now, which is one of the only possible ways a State can function.

Now the key difference between a State and a Union Territory is this: that if a Home Ministry orders a Lieutenant Governor to do something, they are effectively bound to do, there may be certain layers between them but effectively that happens. A State is an entity with full-blown organs. It has a judiciary, it has a legislature and an executive and it is given an exclusive scope of legislative and administrative competence. Which is why public order matters.

Now NPR is clearly going to burden people, especially marginalized people the most. It will also immensely burden people who have to simply now prove their citizenship. Purely in

terms of law and order, we can imagine how social frictions and social fissures will be used advantageously through an NPR procedure. We already see it in the criminal justice system where criminal defamation is frequently misused to chill free speech. Now in this case your citizenship is at risk, so clearly there is a possibility of a public order issue. So, I do believe that when Union compels the State to act in a manner that infringes on their own powers, that infringes on their own administrative and legislative competence, there is a case to be made for at least withdrawing support from the Union to the extent of implementing a particular provision.

Lastly, I would like to go through how comparative federalism works in this case. In the United States, you have a whole jurisprudence that is developing on the question of sanctuary jurisdictions. You have cities and states and multiple levels of government that refuse to cooperate with the federal laws on very varied issues. Now these refusals are not always saying no. In some cases, they are also restricting it. The sanctuary cities movement was basically based on the idea that we will not cooperate with federal laws on immigration, especially where laws required police officers to find immigrants and deport them. A lot of cities effectively have said that we will not cooperate with federal anti-immigration laws. Apart from just anti-immigration, you have pot legalization, gun laws and various other issues on which states and cities refuse or restrict cooperation with the federal government.

Similarly, on the question of citizenship there are a few interesting examples that I wanted to discuss. One of them is community sponsorship of refugees that is very common in Scotland, UK and Canada. Going way back to the 1970s, it has a five-person rule i.e. five people can get together and sponsor a refugee. Now the government is obligated to permit and process this refugee because the presumption is that it is that community or those five people who are responsible for this refugee's integration. Interestingly in Scotland what is now happening is that provinces are coming together to sponsor refugees and to expand on their immigration policies.

What I basically wanted to argue is that we frequently think of immigration and citizenship as questions that the Union can settle a law on and the States are supposed to comply with. But there are States, where because of our history of being *Akhanda Bharat*, there are states that have no history or documentation of people's movements. These are not small groups of people. The case of Hajom Chakma is clearly shocking. Even now after the Supreme Court's judgment, you have not offered them citizenship. So, there is a case to be made that States need to be proactive

in discussing these issues and just because it is not a topic listed under the State list, it does not mean that they cannot raise issues on the same.

Thanks.

Q. *I had a question regarding the role of State. You had talked about how States should have a greater role in interpretation of the Constitution. With regard to that, whether the resolutions passed by state assemblies are constitutional in light of Article 258 - and does this itself mean that this becomes a ground for the Center to claim that there is a breakdown of the constitutional machinery in this State when the state assembly has passed such a resolution.*

Secondly, with regard to Article 131 petition, how do you think that is going to play out especially because the CAA is not within the legislative competence of the State assembly. So how much of the scope under Article 131 does a State have to challenge the constitutionality of laws where it is not legislatively competent to enact those laws or it falls within its field, and the law does not necessarily affect the relation between Center and State as we know it.

My last follow-up to this entire debate on the role of states is, if it cannot be done through resolutions, if it cannot be done through a direct court challenge, how much of scope does a state have to interpret the Constitution or was it a deliberate idea of the founders to restrict the scope of states to even interpret the Constitution.

A. On the question of whether what states can interpret is restricted, I mentioned this in the discussion also, that every time a district magistrate issues a Section 144 order, he or she is interpreting the Constitution. So, we have to get out of this idea that constitutionality is something that only judges decide and all of us follow it. If you were to look at any judgement, the rhetoric of those judgments rarely corresponds to the effective orders that those judges pass. But if you were to look at electoral mandates, how your DPSPs are implemented, or how your fundamental rights are protected, it is an area that a lot has been written on about.

Similarly, I do not think only state entities get to interpret the Constitution, citizens do it too. We assume that regional parties have created at least a de facto federalism in the sense that the power imbalances improve. But I think we have to be cautious about regional identities.

Especially in Assam's case, sub-regional identity was always xenophobic and ethno-fascist and it persecuted not only Bengalis or Bengali Muslims. It created little nationalisms of all sorts including Bodo nationalism which again came after Bengalis and Bengali Muslims. So, we do need to worry about what sort of federalism we imagine and what sort of sub-regional identity we recognize. I think we have to be very conscious of the fact that a powerful state does not by itself mean that you will not have an NPR or an NRC or a CAA. Let us remember that it was Assam that created this. It was Assam, literally Assam that pushed the NRC again and again. I think it is very important for us to think about sub-regional identities and how they inform federal conversations and conversations at the Union level.

On Article 131, again there is not a lot of litigation wherein States have gone and challenged things by the Union. But in my limited opinion, because I never actually participated in litigation, I do not understand how courts operate apparently neither do lawyers anymore, is that Article 131 does include determination of rights. Now this is not the same as competence or power. It is an assumption that states do enjoy certain rights or at least have a standing before court to question determination of rights. Now on the question of either enforcement of CAA, NPR or NRC, I think there is a very strong possibility of questioning the fact that there is an implicit infringement on the State's duty to protect public order. But that is just my academic opinion. I think on the question of Article 131, the court has an opportunity to expand and look at determination of rights in a more comprehensive manner, but I am personally not very hopeful.

MOHSIN ALAM BHAT[1]

Good morning everyone here, and thank you to all the organizers, Professor Chauhan, and all the student friends, Vikram, for this wonderful event. I am especially grateful because yesterday I had the great fortune of attending and just sitting and observing one of the sit-ins by the NALSAR minority forum here, and I must say it was one of the most touching moments of my life. I am grateful that I was invited here so that I could attend that. One of the most insightful experiences which I could have ever seen. So, thank you if there are people from the NALSAR minority forum here.

Now obviously the big debates around the citizenship amendment, NPR and NRIC are in front of us, and these have big constitutional implications. The first honourable speaker did talk about the complexities of these issues, and I think we should engage with that question in good faith. I will leave the question of the constitutionality of CAA and NPR and NRIC, perhaps to Nizam, who will be dealing with it in greater detail. I must thank Aymen for introducing the procedures involved in the NPR-NRIC process in the 2003 citizenship rules.

What I will try to do today is engage with one of the panels yesterday (Kanika and Manav's panel) and think of what kind of procedures are meant to be placed in order to make this NPR-NRIC process vivid. Because my concern is that in all these legal and constitutional debates around NPR-NRC, there is a possibility we do not see what this process may look like. To make it vivid, I seek to rely on the experience of very similar procedures in the case of Assam, both NRC in Assam and non-NRC processes in the state. These processes have a long history but I will rely upon my experience of the last few years based on multiple conversations with lawyers engaged in this process to bring to you what CAA, NPR, and NRIC really brings into existence. In some sense, I want to show you what this process will start looking like very soon if it is implemented.

Others, more qualified than me, have argued that CAA is a dramatic step to reconfigure the nature of citizenship in India by making religion a qualification. My tentative operating working hypothesis is that there is something more at play. I suspect that this combination of CAA,

[1] Cite as Mohsin Alam Bhat, *Citizenship, Residency, and The Constitution*, The Courts & The Constitution- 2019 in Review, NALSAR University of Law, 26th January, 2020.
* Transcribed by Sai Preetham.

NPR and NRIC pushes citizenship in India to the very brink. I call it the twilight of citizenship. It is the 'twilight of citizenship' because citizenship in many ways stops being what we ordinarily understand it to be, which is security of status and a cluster of rights. Rather citizenship and citizenship processes are brought to a brink because they allow political instrumentalization of the law at an unprecedented scale, particularly in terms of targeting and surveilling people.

In order to rely on the history of Assam, I should quickly flag some of the key elements in the context of the state. It is obviously a long history and I will not be able to go in great detail but I just wanted to flag three things.

The first is the 1985 Assam Accord, which emerged from a great anxiety in the State particularly among the Assamese speaking people that the State was being overrun by Bengali migrants. This was particularly in the wake of the atrocities committed by the Pakistani army in Bangladesh, in East Pakistan at that time. In 1985, there was a broad political agreement among the Assamese students' unions, other political elements and the central government, reflected in the 1985 Assam Accord. The Assam Accord has a variety of different provisions particularly attuned towards protection of the Assamese cultural identity.

One of the key features of it is citizenship, introduced in the form of Section 6A. It has been referred to a constitutional bench in the Supreme Court. Section 6A carves out an exception in the case of Assam in at least two ways. First, it gave citizenship to all the migrants who had come to Assam before 1967. Those who came between 1967 to 1971 were given a route to citizenship. So in a sense, Section 6A exists to facilitate citizenship for a class of people. One of the questions for the constitution bench is whether it was discriminatory to carve out a special regime in the case of Assam. Second, which also continues to be contentious, is the relationship between Section 3 of the Citizenship Act and Section 6A of the Citizenship Act. Section 3 provides a variety of different ways of birthright citizenship: people born in India before 1987 would be citizens by virtue of being born in this country; people born between 1987 to 2003 need to have at least one Indian parent; people born after 2003 cannot have any parent who is an illegal migrant. So, Section 3 provides forms of birthright citizenship. There continues to be a fair amount of debate and controversy about the relationship between Section 3 and Section 6A. This is significant and if I have time, I will come back to it. Despite this confusion, whether a person -- say who is born

after 1987 or after 2003 in the state of Assam -- will get citizenship in the state even if his or her parents are illegal migrants continues to be a controversial matter.

But in actual practice by and large there seems to be a political consensus or a legal practice in the state of Assam that does not apply the general rules of birth right citizenship in the state. Those people who claim descent from migrants after 1971, even if they are born in the state of Assam, will not be given citizenship. This is an alive controversy. So essentially what happens in ordinary cases which go in front of Foreigners Tribunals is that a person has to not only show that that person is born in the country (legacy), but also has to show a certain linkage, a certain descent from the people who were already in the state before 1967 or before 1971. When you go to Assam, these two words of legacy and linkage essentially determine who a citizen is. This is rather complicated. We should be considering the significance of this complexity that the plethora of laws and a plethora of legal regimes have brought up.

The way this legal regime has been operationalized is through Foreigners Tribunals ("FTs"). The Supreme Court has called them quasi-judicial, but in many ways, they are government committees. Their members are called members, they are not called judges. They do not necessarily even need to have judicial experience. These FTs receive cases either through what are called references by the police. The police can identify somebody and say that we suspect this person of being a foreigner, and that case goes in front of the member in the FT. OT there is a different route called the D-voters system. D-voter needs to be explained. In 1997, the Election Commission of India suddenly -- we do not know how or why -- declared hundreds and thousands of people as doubtful voters. Essentially when the voters looked at the electoral rolls, there were these big D's written next to their names. We still do not know what were the reasons for declaring people as D-voters. Election Commission has not told us whether it followed any procedure to identify more than three lakh people as D voters. But once these people were marked as 'D', this is the parlance in Assam, then those cases were referred to the FTs as well. Both these police reference cases and D-voter cases have gone to the Foreigners Tribunals, and the Foreigners Tribunals have been deciding whether there is linkage and legacy to determine whether that person is a citizen of India under the provisions of Section 6A.

Now what is happening in these Foreigners Tribunals. The first big concern is that the burden of proof of proving who is a citizen does not lie on the state. It lies on the individual in

front of the FTs. This is what the 2005 *Sonowal* judgment in the Supreme Court also held. It said that the burden of proof must lie on the individual, which essentially means that when a certain individual is brought to a Foreigners Tribunal that person has to produce documents and the burden will be on him/her to prove citizenship. What we have seen over a period of time is that the Foreigners Tribunals have been relying on extreme technicalities -- names, changes in spellings of names, change in the age of parents etc. All these small technicalities have become central to determining who is a citizen and who is not.

I will give you one example from a recent trip to Assam where I was talking to an FT lawyer. He told me that he was representing this person, and all his documents were in place. He had a school certificate which is a rarity and it had been laminated. Documents become really important when everybody in Assam feels the threat of losing their citizenship. I mean they will give up their lives but would still hold on to that document that they have laminated and kept securely in polythene bags since their whole life depends on that. Eventually, the FT declared this person to be a foreigner. They appealed to the High Court and were confident. The High Court realized that practically all the documents were there. What was the ground for the High Court to say that this person is a foreigner? The certificate had a stamp on it and the stamp was of a certain colour. The High Court ruled that at that time when the certificate was meant to be issued, the schools in Assam were not meant to use this stamp and therefore, they refused to recognize this document. I'm just giving you one example and there are hundreds and hundreds of such examples we can give.

The other concern with the FTs has been a perverse structure of incentives where numerous people have essentially suggested that the FT members are expected to pronounce as many people as foreigners as possible. So that is an institutional and cultural context in which this is operating. There are three implications that I want to draw from this, and which I think will be a learning experience as we move ahead if and when CAA and NPR-NRIC are implemented:

The first is a culture of fear which essentially is that anybody and everybody can be targeted especially if you are from a Bengali community or Bengali Muslim community. This has a severe impact on the legal process. There are numerous cases where family members have refused to come and testify for their relatives because they are worried that the moment they do that, they

open themselves to getting targeted. One example which recently one of the FT lawyers told me was that he was representing a person, a very old gentleman before a Foreigners Tribunal and he passed away during the proceedings. The lawyer filed an application requesting the FT to close the case since the proceedee passed away. In the closing, the FT member said that although this person has passed away and we cannot continue the proceedings against him, still, I have suspicions about his citizenship. So, all his family members must be brought in front of the Foreigners Tribunal and we will test whether they are citizens. In fact, in Assam, people who are 'D' or people who are declared foreigners by the FTs face exclusion akin to a caste system. People do not want to associate with them, they do not want to get married into those families because their future essentially is absolutely precarious.

The second implication is the implication for law. Where is law in all this? One way to look at law obviously is the question of legality and the question of constitutionality. I would propose that we should also look at it from a law in society perspective. In fact, what I observe and I assume many others do, that this situation is not the absence of law. There is excess of law, there is too much law. There is law everywhere. Foreigner's Act, Foreigners Tribunals, their orders, Citizenship Amendment Act, NRC, Supreme Court's legacy documents etc. Anyone who is studying Assam will realize that it takes a lot of time to even wrap one's head around it. A lot of this excess of law is essentially unresolved. The Supreme Court order which initiated the NRC under Section 6A was the same bench which referred the constitutionality of Section 6A to a constitutional bench. The question of Section 3 and its application, which has huge implications for people in Assam, continues to be unresolved. If you go to Assam, these complicated legal languages are now part of ordinary people's parlance. Ordinary people will talk about linkage, family tree, legacy etc. This is the presence of law in this context, there is excess of law. This excess of law, in my tentative assessment, is doing two things: First, it is providing a veneer and appearance of legality. Because there is so much law this must be a rule of law situation. Ordinarily many people who are sympathetic to the process will tell you that this is being governed by law. So, law is providing a veneer of legitimacy, a veneer of legality. This perhaps connects to many of these post partition debates. The other is, I fear that law is also mystifying or obscuring the unfolding tragedy. The debates around detention centres for example quite often fall on the question whether there is law to do this or not; what does the foreigners tribunal say. I think we

should all be worried that these questions of humanity and these questions of human tragedy inevitably fall to the question of legality when there's so much law.

The third implication is what I call the culture of mass suspicion. Everybody particularly if they are Bengali or Bengali Muslim are under a suspicion of being a foreigner. The Supreme Court order in the *Sonowal* judgment was an expression of that. In that case the constitutionality of the Illegal Migrants (Determination by Tribunal) Act, 1983 was challenged. What the Supreme Court said in that case was that the burden of proof to prove citizenship must fall on the individual because there is practically an Islamic invasion from the east in India. There are millions and millions of infiltrators who have entered into the country and this is a situation of aggression. The state under Article 355 is under a duty to protect its people from aggression. Since the state is failing to do that, we will step in and we will say move the burden of proof in these Foreigners Tribunals. This has remained a way of thinking about this problem. There is this mass suspicion that anybody and everybody is a foreigner or could be a foreigner. One anecdote is that there is a legal debate around the question of *res judicata* in front of FTs. The same person would have many cases filed against him and he will be declared an Indian. Then there will be another case in the FT against him. Sometimes a case has been filed against him in one FT, which declares him to be an Indian. And another FT declares him to be a foreigner based on the same documents. So, this person appealed in the High Court and argued that this is an absurd situation and is unsustainable. I have one FT who has declared me an Indian, and on the same documents, another FT has declared me to be a foreigner. The High Court judge said that well for nationalism and national security, we have to make sacrifices. So even if you have to prove your citizenship 100 times, you should be ready to do it for the cause of the nation. If this is the institutional culture where anybody and everybody is a subject of suspicion to be a foreigner, then, nobody is safe.

To conclude, what does this story tell us about how the NPR-NRC-CAA debate flows out beyond the question of constitutionality? For me there is a clear link between what happened in the D-voter situation (where some official *babu* sitting in an office, looking at these lists looking at names, and then marking them as potential foreigners or doubtful citizens as per the 2003 rules and marking them as ‘D’) and the sociological implication and the expressive implication of a law like CAA. They create a culture of mass suspicion where there are certain kinds of people who

belong to this nation more, the others may be foreigners. When these elements come together, I think this would be an unravelling of a humanitarian disaster.

Thank You.

Comment [Mohsin Alam] I suspect, unfortunately, that this is ingrained in our constitutional culture. The most distinctive example in the case of citizenship is what happened in the detention centre's petition. In full disclosure, I was assisting in that petition. Harsh Mander was the special monitor from the NHRC, the report came out a year and half ago and recorded terrible conditions in detention centres. Children and women being detained for perpetuity. Ultimately, when the petition was filed in the Supreme Court, it went in front of Chief Justice's Gogoi's Bench. The argument, among other things, was that you cannot have imprisonment of people in jail complexes forever and that obviously violates Article 21. The first thing the Honourable Court did is ask how many people there were in the detention centres and how many people had been declared as foreigners. There were a bit over 1000 people detained at that time, who had been declared foreigners. On listening to this, the first step the Honourable Court did was to reprimand the government and ask- where are all the others and why have not they been detained in the detention centres. So, a petition which was filed to ask for fundamental rights under Article 21 immediately turned into a proceeding of mass incarceration. This is indicative of what all these proceedings are on the verge of happening. There is always a threat that a case has been filed and it is just turned upside-down and used precisely for the opposite things for which the petitioners have gone to the court. This has now practically become a part of litigation strategy. This is something institutionally that we should be worried about the court.

NIZAM PASHA[1]

I have to admit that I was hoping that the question of actual arguments on the constitutional validity and legality of the CAA would be taken up by Suhrith or another practicing lawyer so I could indulge in my favourite pastime of courtroom gossip, because 15 minutes is definitely not sufficient for an entire elaboration on what the challenge is to CAA, which so far in this panel we have not dealt with and I do not think we have another panel on this.

So, I am going to start with what I had originally intended which is a kind of a report card of the Supreme Court because my understanding of the conference is that we review the performance of the Supreme Court in the past year. So, I am going to just start with that and try to move through all of it quickly so that I can cover as much ground as possible, so forgive me for any lack of structure.

I start with *Sarbananda Sonowal* which Mohsin ended with and that case, I feel, is important because in that case you start thinking that perhaps we made a little too much of *ADM Jabalpur*, because there are a lot of other ADM Jabalpurs out there which we do not give enough importance to. In *Sarbananda Sonowal*, there is a Foreigners Act, there is a Foreigners Order, there is a procedure prescribed for identification and prosecution of illegal migrants under those provisions. The Illegal Migrants Determination by Tribunals Act of 1983 was an Act specific to Assam and it provided a procedure with certain procedural safeguards for this process.

I will just point out what those safeguards are. Now this Act is silent on the burden of proof but this is very different from the Foreigners Act Section 9, which specifically says that the burden of proof is on the person who is brought before the court. I will come to the question of burden of proof and what that means later. It requires affidavits by two persons in the same police station area to say that we believe this person is an illegal migrant. A reference then has to be made to the Central Government. The Central Government in this case under the rules constituted Screening Committees. So, the Screening Committees would receive these applications and conduct a preliminary enquiry on whether there is substance in the application, because a lot of these

[1] Cite as Nizam Pasha, *Citizenship, Residency, and The Constitution*, The Courts & The Constitution- 2019 in Review, NALSAR University of Law, 26th January, 2020.
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applications may be moved by enmity. The Screening Committee will then evaluate whether there is *prima facie* evidence of this person being an illegal migrant.

After that the matter will be referred to the Foreigners' Tribunal for consideration. In this, since the burden of proof is not mentioned, like any legal process it was assumed in this case, and I feel rightly so, that the person who is bringing forth the material will have to say that this is the material to indicate that this person is not a citizen, and that person will then have to defend themselves. One person could not make an application with respect to more than ten persons in his/her police station area. So, this idea of taking an NRC extract and identifying persons of a particular community and filing applications against all of them is something that was specifically excluded. You have to be living there and having been living there for a while and knowing that this person was not here till three years ago, this family has just come in. This is the kind of complaint that was contemplated. It is not like somebody sitting in Delhi is sending an application saying all Muslims in this list, I feel are doubtful so please examine this. There was prosecution prescribed for false complaints. So exactly for that kind of false complaint, where either on ground of enmity or just communal bias you are filing applications, there is prosecution provided for.

And there was an Appellate Tribunal - appeals from the Foreigners' Tribunal went to the Appellate Tribunal. The Supreme Court in a bench of three judges in which Justice Mathur has given the opinion, considered the constitutional validity of this Act, and the language that they use in striking down the provisions of this Act is what I want to focus upon. They say that these provisions, these procedural safeguards, are 'difficult', 'cumbersome' and 'time-consuming'. The IMDT Act and Rules have been *"purposely so enacted or made so as to give shelter or protection to illegal migrants ...rather than to identify and deport them"*. Of course, Mohsin has already mentioned that the court said it amounted to external aggression. They then describe these procedural safeguards as 'innumerable' and 'insurmountable' 'difficulties' in the Act and then review the performance of the Act and say that, as per the record, about three lakh cases have been examined by the Screening Committees, but there have been only about 12,000 deportations ordered by the Tribunals. So, in terms of efficiency, the figures "speak for themselves" that the Tribunals are not deporting enough and the Foreigners' Tribunal under 1946 Act has a far better efficiency rate because it has deported far more people, comparatively speaking.

And again, the words used are 'hurdle', 'impediment', 'barrier'. This is not a judicial decision. When I read *Sarbananda Sonowal,* I see an administrative authority speaking and saying that I am reviewing the efficiency and this is not efficient enough. It is like saying we constituted these tribunals to deport people and their deportation rate is not up to the mark. That is the sense that you get. So, this is not a constitutional court examining question of rights bearing in mind that citizenship is the right to have rights, and examining whether the taking away of the rights to have rights is by due process or not. They are saying this is too much due process; just get on with it and be quick about it. This was in 2005.

Once the Act is struck down, then the Central Government brings in another order by which safeguards and structures are provided within the limitations prescribed by the first *Sarbanda Sonowal* judgment of 2005. The amendment does away with Screening Committees because the Screening Committee procedure has been held to be unconstitutional. It said that the Tribunal will, before examining, consider whether there is a *prima facie* case made out by the complaint to even issue summons and call someone.

So, there are two levels of the examination, first, *prima facie* case of facts being made out and then a judicial examination of the citizenship question itself. There the Supreme Court sits again (*Sarbananda Sonowal (II)*) and this time two judges, Justice SB Sinha writing for the Court, gave a judgment saying that this is a violation of our first judgment because again you are providing too much procedural safeguards and this will defeat the purpose and illegal migrants will never be deported.

This is the vein of decisions thus far, and now, because we are reviewing 2019, we come to decisions in 2019. There is a judgment of *Abdul Quddus*, which examines a question relating to orders under the Foreigners' Tribunal Act. It examines whether if once there is an order against a person under the Foreigners' Tribunal Act, that person can or cannot be considered in the NRC. The question of burden of proof in the procedure under the Foreigners' Tribunal Act is re-examined. There is also a challenge to the fact that no appeal is provided under the Act. It is argued that it cannot be that in a question of this nature, Article 226 is the only remedy you have. The statute itself provides no adequate appellate remedy, and that is not permissible.

So, there are again three judges. Justice Sanjeev Khanna writes the judgment saying that this question has been already settled by three judges in *Sarbananda Sonowal* 2005 and by two judges in the following decision. And so, we find that there is nothing wrong with this procedure.

But again, when you read the reasoning, it is the reasoning which I find shocking because he compares it to the Consumer Protection Act and he says that this Court under Consumer Protection Act has already held that a summary trial is not necessarily a violation of natural justice and summary trial can also amount to procedural fairness. So just the fact that citizenship can be put in the same bucket as consumer protection in terms of evaluating whether this is adequate procedure before declaring someone to be a non-citizen, I find shocking.

Then, of course Aymen also mentioned that the Section 6A (of Citizenship Act, 1955) reference is pending. So, just a couple of lines more on that. One of the questions pending before the five judges bench in the Section 6A reference is, because the cut-off date is in 1971 and this reference order is in 2015, and they note that over 40 years have passed and so even people coming after 1971 have resided in India more than 40 years, so what becomes of such persons and what obligation do we have as a State towards persons who have been resident in the country for over 40 years. This is a question which has to be decided by the Constitution Bench.

Of course, the dates themselves are under challenge, 1966/1971, whether there can be separate dates for state of Assam. Assam Accord in fact, I find to be a fascinating piece of paper because it is an agreement between a sovereign government and a protesting student body on a question of citizenship promising to deport some other persons! So, it is not an issue like we will delay your examinations. This is not that kind of agreement. It is affecting the rights of third parties! So, Assam Accord I find to be an absurd document, but once it gets incorporated into Section 6A, then Assam Accord becomes the basis of Section 6A, which itself is under challenge before this bench.

Now as you all know, the NRC exercise has been conducted entirely on the basis of whether, you can prove your relationship with someone who came before 1971 or not, but if 1971 is a date which may not be constitutionally permissible then what becomes of this 500 odd crore rupee exercise which has been undertaken. What becomes of all the emotional hardship? There

have been suicides, there have been imprisonments, detentions. What becomes of all of that if ten or fifteen or twenty years later the Court decides in hindsight that this is all unconstitutional?

While Justice Gogoi was the Chief Justice and therefore the Master of the Roster, he still took up on priority the execution of the NRC practically as an administrative agency instead of prioritizing his judicial function of considering the question of constitutional validity. And even the constitutional validity of Section 3(a) of the Citizenship Act is referred to 5 judges, so, 1987/ 2003, these dates are also subject to challenge. So, without deciding those how can NRC or NPR proceed?

Coming to the question of Supreme Court acting as an administrative agency, now the role of the Judiciary and the debate as to its boundaries in terms of what is its judicial function and where it is outstepping the bounds, I feel this comes out more starkly in orders in the *Assam Public Works* case that were passed on a day-to-day basis. And I take the example of some of those orders - appointment and transfers of officials conducting the NRC, deployment of paramilitary forces. For instance in the 2019 general elections, the Election Commission said we need all paramilitary forces in the country to conduct elections, the Bench said you are trying to stall the exercise, there seems to be some oblique motive here, we are not going to spare the paramilitary forces who are engaged for the NRC exercise.

Qualification for appointment of Foreigners' Tribunal - because under the 1983 Act they had to be retired judges and for appellate tribunal they had to be retired High Court judges. Here they set the qualification for appointment as a lawyer 7 years standing. I mean if I was in a law firm, a lawyer of 7-year standing would not even be reporting to me and I am not so senior in the profession. So just the fact that they are doing this and the attitude with which they are coming to it I find deeply problematic.

Reports were submitted to the Court in sealed covers, the Attorney General and the Solicitor General were excluded from the proceedings saying this is strictly between us and the State Co-ordinator. And orders were passed saying Prayer A and B of his report are allowed, and nobody in the Court knows what prayers A and B were. There was often no hearing, the Bench assembled dictates the order and rises. And at the beginning and the end of each hearing, people are left saying I have an application... I am here for this... and no hearing is granted. Also, when

an application for early hearing was moved, they simply said we do not believe early hearing before the Constitution Bench matter is necessary, so that is so low on the priority list.

Justice Swaminathan mentioned Justice Nariman. So, this is what I call the curious incident of Justice Nariman on NRC bench. And if you remember that phrase, I believe, is from Sherlock Holmes where Holmes says to Watson, "*Did you notice the curious incident of the dog in the night-time?"* and Watson says, "*But the dog did nothing in the night-time"* and Holmes said "*that was the curious incident of the dog in the night-time.*"

I will agree with Justice Swaminathan on under-inclusion that the State cannot be questioned on under-inclusion. I agree with him entirely that under-inclusion as a doctrine does not leave subject to challenge anyone who is left out of a step which is taken to grant benefits. However, I would like to point out that the doctrine of under-inclusion so far has been laid down by the Supreme Court in the context of matters of economic policy and the reasoning given in each of those decisions is that the State must be allowed room for experimentation in matters of economic policy because it can never address all questions and give benefits to all persons at the same time. However, in a question of human rights and particularly, the right to have human rights, I would beg to say that perhaps the doctrine of under-inclusion cannot so readily be applied to say that okay, they may have been left out, we will consider them another day. This might not be in the same bracket.

Justice Swaminathan also mentioned Mr. Harish Salve and his argument. I have great respect for all seniors of the Courts that I practice in but the argument that Mr. Salve made in an interview that Muslims are saying that we will be left out of the NRC in any event, they have a problem with somebody else being granted citizenship. So, we may be deported, why is that person not being deported is their challenge. He said that this is like the case of complaining why does my brother's beer not have a rat in it.

So, first of course, the crudeness of it I will brush over but I think this is missing the fact that if you look at the politics of it, the BJP will never have the political capital to conduct an exercise where any person other than a Muslim in this country will be excluded purely on account of not being able to prove their citizenship. If something like the NRC in Assam was to be conducted in the rest of India where 20 lakh persons in one State have been left out, of which more

than 70% are said to be non-Muslims, if such an exercise is conducted anywhere else in the country, the BJP will be reduced to the status of a regional party by the time next elections come. They will never have the political capital to do that.

To say that Muslims will anyway be excluded from citizenship, so how can they object to somebody else being granted citizenship, is to miss the fact that it is because if that somebody else is not granted citizenship, the Muslims will not be excluded. This is the political reality of the country.

Just two more points, one on Akhand Bharat and the history of India. So just purely on the question of under-inclusion because we cannot question the policy priorities of the State, that is settled law, but once the policy objective is stated, then that can be questioned. And if you read the statement of objects and reasons of CAA, you will see numerous references to undivided India and our obligation towards persons of undivided India and then when you notice that Afghanistan which was never a part of undivided India is included, but Burma which was in fact governed by the Government of India Act 1935 and was only separated from India in 1937, which is facing a refugee crisis and a genocide which the world is talking about today, is excluded. If we ignore that and talk about our obligations toward Indic population of undivided India and our civilizational obligation and talk about Afghanistan, then I feel that on the reasoning you have given, having no nexus to either history you are citing or the object you are seeking to achieve, which is giving refuge to illegal migrants, your logic breaks down. And I believe that can therefore be subject to challenge under Article 14.

And now lastly Justice Swaminathan also mentioned that there is a sense of restlessness that comes about when *Vande Mataram* is sung, although *Jana Gana Man* everybody stands up in attention. I will just briefly mention, in conclusion, the last of the patriotic songs in this trilogy, which is *Saare Jahan se Achcha*. And in *Saare Jahan se Achcha* there is a, perhaps not fully understood, line which is,

Aye ab raud Ganga voh din hai yaad tujhko,
Utara tere kinare jab karvan hamara.

And that literally translated means Oh waters of the river Ganges, you remember the date on which our individual caravans landed and stopped on your banks.

And that is a national acknowledgement of the fact that we are a country of immigrants, there is no Indian nation when you look at the idea of a nation versus a state, there is no Indian nation that precedes us. We are not a religious nation, we are not a linguistic nation, we are not an ethnic-cultural nation, we have no other sense of identity other than our shared history, our shared freedom struggle and our shared belief in the State. So, there is a national acknowledgement that we are country of persons who have gradually assembled to form this country as a country of immigrants. *Log saath aate gaye aur Hindustan banta gaya.*

Q. *Thank you for the excellent panel. I have a question for Mr. Pasha. Could you share your thoughts a little bit on the challenge to the 2019 Amendments to the Foreigners' Tribunal Order, 1964? The Amendments pertain to the appeal process for Foreigners' Tribunals, say if you were excluded from the NRC, then obviously you would appeal to the Foreigners' Tribunals and my understanding is that the Amendments allow the Tribunals to dismiss an appeal without even hearing the appellant and I think the challenge is currently before the Supreme Court.*

A. So on the question of Foreigners' Tribunals, and the 2019 Amendments – the 2019 amendments to the Foreigners' Tribunal Order are of course deeply problematic, like some of the things that you mentioned, for example, that if the Tribunal finds merit in the appeal it will issue notice to the appellant and to the District Magistrate to respond. Which means that your citizenship may also, after you file an appeal, be decided without a hearing. And again, this is that same point of a summary trial and whether a hearing is required, natural justice has to be complied with; for a right of this nature, for the right to have rights.

But there are a lot of other issues also to do with these Foreigners' Tribunals because I mentioned the qualifications that are required- a lawyer with seven year of standing, a retired bureaucrat etc. Two hundred such Tribunals have been constituted and they have been very hurriedly put together. The orders of the Supreme Court passed was that they should be given a two-day training session to bring them up to speed with the regulations that they have to apply. So, we are talking about people who may not even have judicial experience, who have two days

of training and have been recruited hurriedly because after the NRC was published and before the hearing started, they needed enough tribunals to hear some 20 lakh applications.

The whole process is actually deeply problematic. The 2019 Amendment also says that if a Foreigners' Tribunal has earlier already found you to be a foreigner then you no longer have a right to appeal. And strangely enough the converse is not true. So, if a Foreigners' Tribunals earlier has found you to be a citizen, it is not as if you must of necessity be included in the NRC. You can still be left out of the NRC and in that case, you cannot go to the Foreigners' Tribunal and claim *res judicata*, that is not something that is provided for.

So then, there is a question that I have. I have no real answer to that question but the Citizenship Amendment Act, 2019 itself in Section 6(b)(3) says that *"On and from the date of commencement of the Citizenship (Amendment) Act, 2019, any proceeding pending against a person under this section in respect of illegal migration or citizenship shall stand abated on conferment of citizenship to him."*

The NRC exercise is also a proceeding under the Citizenship Act. So, if under the CAA an exemption is given to any person covered by the CAA from proceedings which are pending, then that is exactly the political worry, that in between the NRC and this deportation you insert this new amendment through which you have this exemption from prosecution which means that the proceeding, be it NRC related or before Foreigners' Tribunal, against you will abate the moment you apply for citizenship saying that I am a person from one of the covered countries and communities. And that is the worry, because there is no bar that you had earlier said that you are a citizen and you had applied for citizenship under NRC, so now this route of CAA is closed to you. That should, to my mind, have been the understanding of it, but in fact, it is the contrary because there is an exemption from prosecution.

Section 17 of the Citizenship Act says that any person who lies or misrepresents in the context of a citizenship related proceedings can be liable to five years imprisonment and a 50,000 rupee fine. That is also a proceeding under the Citizenship Act. So, when you talk about exemptions from prosecutions, you cannot perhaps even be prosecuted for having filed in a false application in the NRC. So, these hurriedly constituted Tribunals are hearing cases on the basis of these really problematic procedural rules with a really deeply problematic substantive law which

is applicable, which gives you this alternate route to come out of an NRC exercise based on your religion.

Just one thing which I forgot to mention. I will only take a minute on that. This very day last year Arvind had made a presentation on 'constitutional morality' wherein he had discussed the Ambedkarite idea of constitutional morality and his paper on what an Ambedkarite Constitution would look like. I must confess I went back to the recording of that and heard it while drafting my petition challenging the CAA. And I feel this is not spoken about enough, that 'constitutional morality' should be the bedrock of the challenge to the CAA. Because while we talk about ideas of the Preamble etc., what it all relates to is an Ambedkarite idea of 'constitutional morality' as a tool in the hands of a minority against the oppression of a tyrannous majority. And in all of those cases where 'constitutional morality' has been mentioned there were several other grounds also, but I feel that whether the Supreme Court and the Ambedkarite idea of constitutional morality will withstand and deliver when it is actually called to deliver, is something which will be tested in this case i.e. in the CAA challenges. Because leave aside everything else, manifest arbitrariness etc all of those doctrines, all of them may be invoked, but I feel where if all else fails, purely on the ground of constitutional morality, the CAA should be struck down as unconstitutional.

ARVIND NARRAIN[1]

Concluding Comments:

Thank You to all the speakers. I think we will all agree that it was a stimulating session with the range of perspectives that were presented. Mohsin's invocation of the idea of 'twilight citizenship' and how we are seeing the issue of citizenship through a new lens. That is a really crucial point. It links up in a sense to what Pasha concluded with, which is the question of whose citizenship is in doubt today. And this links up with Aymen's point on the idea of a doubtful citizen. All these three presentations can be read as a respectful dissent from Justice Swaminathan's presentation or maybe as a footnote to his presentation. The three combined presentations act like a footnote which overwhelms the main thesis, and says that the key issue here is the question of how citizenship is under challenge. Moreover, Pasha's invocation of a 'right to have rights; is critical and that may be a response to the Article 11 question that Justice Swaminathan raised. Article 11 basically says that determination of citizenship is left to the Parliament to decide i.e. it is a matter of executive discretion. But the question is that in a matter of executive discretion, can you violate the fundamental tenets or the thinking of the constitution itself.

And the point really is that when we go back to the 'right to have rights' the invocation is really of Hannah Arendt who originated this phrase. Why does she say, citizenship is about the 'right to have rights'? Citizenship as a 'right to have rights' can be seen in a recent case which came before the Karnataka High Court, to which Malavika can speak to much better.

The case dealt with a situation where a demolition began in a couple of slums on the grounds that they were inhabited by Bangladeshi immigrants. The police notice, which was put forward to justify the slum demolition, basically said that the Bangladeshi immigrants stay here, this factoid being based on a Whatsapp forward. It was based purely on this Whatsapp forward

[1] Cite as Arvind Narrain, *Citizenship, Residency, and The Constitution*, The Courts & The Constitution- 2019 in Review, NALSAR University of Law, 26th January, 2020.

that the demolitions were carried out. Although in theory non-citizens have rights under Article 14 and Article 21, in reality what the law has done is created a culture of fear, a culture of impunity which has allowed for a deprivation of the rights of the people, which should have been prohibited under a constitutional framework. The fundamental issue that we are really facing is how an entire grouping of people are deprived of rights based on mere rumour alone. To give you a sense of the high court proceedings, wherein the petitioners were challenging and asking for the basis on which these demolitions occurred, the advocates of the police and the advocate of the BPMP said that they were not behind these demolitions. So, the question is who was behind these demolitions and how did it really happen, and the way in which the chief justice put it said that it seems to be an invisible force that carried out these demolitions. The petitioners responded by saying that these demolitions were by an invisible force dressed in Khaki. People were deprived of their constitutional rights on the basis of Whatsapp forward, which indicates that the law's implications are sociological and are beyond the question of mere legality. This is the biggest danger that we face with the enactment of the CAA, which has created a climate of fear in the country today.

I will end with this question: At the end of the day, whether the entire debate around under-inclusion can be determined within the narrow framework of the test of reasonable classification and Article 14, or do we have a broader framework to think about this. For this, I will go back to Aymen's point on fraternity and the preamble and I will say that Article 14 cannot be restricted to the classification test because Article 14 is a preambular promise. Article 14 is there in the preamble of the Constitution, which means we have to think about it beyond the classification test alone. I think the understanding of equality and the rediscovery of the Constitution can be observed in the protests around the country. It shows that people have spontaneously understood that it is equality in a substantive sense which is being violated. What is our hope, what is our prayer, what is our expectation is that the Supreme Court also understands that it is beyond the classification test and it is really a fundamental and substantive violation of the principle of equality. Again, if we go back to the constituent assembly and if we go back to what Nehru said in the Objective's Resolution, it indicates that Nehru wanted us to understand this resolution not in a dry, lifeless sense as lawyers do, but in a substantive sense; to understand the spirit and the passion underlying the resolution. So, how do we understand the CAA? We should understand it not in the sense as mere classification/ under-inclusion alone, but in a more substantive sense- what is the damage it

does or the danger it poses to the idea of nation or the idea of equality under the Indian Constitution. This is the question which is really before us.