2024 INSC 789

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

Writ Petition (C) No 274 of 2009

IN RE : SECTION 6A OF THE CITIZENSHIP ACT 1955

With

Writ Petition (Civil) No. 916 of 2014

With

Writ Petition (Civil) No. 470 of 2018

With

Writ Petition (Civil) No. 1047 of 2018

With

Writ Petition (Civil) No. 68 of 2016

With

Writ Petition (Civil) No. 876 of 2014

With

Writ Petition (Civil) No. 449 of 2015

With

Writ Petition (Civil) No. 450 of 2015

And With

Writ Petition (Civil) No. 562 of 2012

J U D G M E N T

Dr Dhananjaya Y Chandrachud, CJI

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1. Section 6A of the Citizenship Act 1955[1] confers citizenship on a specific class of migrants from Bangladesh to Assam. In **Assam Sanmilita Mahasangha** v. **Union of India[2]**, a two-Judge Bench referred the issue of the constitutional validity of Section 6A to a Constitution Bench. The petitioners have assailed the constitutional validity of Section 6A on the ground that it violates Articles 6,7,14, 29 and 355.

2. I have had the benefit of the opinions of my learned brothers, Justice Surya Kant and Justice J B Pardiwala. Having regard to the constitutional importance of the issues raised, I deem it necessary to author my own opinion.

A. Background

3. The judgment of Justice Surya Kant traces the background and the submissions of the counsel with sufficient clarity. To avoid prolixity, I will briefly advert to the background.

4. In 1985, the Citizenship (Amendment) Act 1985 was enacted to include Section 6A to the Citizenship Act[3]. The provision grants citizenship to persons of

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[1] "Citizenship Act"
[2] (2015) 3 SCC 1
[3] "6A. Special provisions as to citizenship of persons covered by the Assam Accord.—
(1) For the purposes of this section—
(a) "Assam" means the territories included in the State of Assam immediately before the commencement of the Citizenship (Amendment) Act, 1985 (65 of 1985);
(b) "detected to be a foreigner" means detected to be a foreigner in accordance with the provisions of the Foreigners Act, 1946 (31 of 1946) and the Foreigners (Tribunals) Order, 1964 by a Tribunal constituted under the said Order;
(c) "specified territory" means the territories included in Bangladesh immediately before the commencement of the Citizenship (Amendment) Act, 1985 (65 of 1985);
(d) a person shall be deemed to be Indian origin, if he, or either of his parents or any of his grandparents was born in undivided India;
(e) a person shall be deemed to have been detected to be a foreigner on the date on which a Tribunal constituted under the Foreigners (Tribunals) Order, 1964 submits its opinion to the effect that he is a foreigner to the officer or authority concerned.
(2) Subject to the provisions of sub-sections (6) and (7), all persons of Indian origin who came before the 1st day of January, 1966 to Assam from the specified territory (including such of those whose names were

Indian origin who migrated to Assam from Bangladesh. The provision classifies the class of migrants into two categories based on when they entered Assam: those

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included in the electoral rolls used for the purposes of the General Election to the House of the People held in 1967) and who have been ordinarily resident in Assam since the dates of their entry into Assam shall be deemed to be citizens of India as from the 1st day of January, 1966.

(3) Subject to the provisions of sub-sections (6) and (7), every person of Indian origin who—

(a) came to Assam on or after the 1st day of January, 1966 but before the 25th day of March, 1971 from the specified territory; and

(b) has, since the date of his entry into Assam, been ordinarily resident in Assam; and

(c) has been detected to be a foreigner; shall register himself in accordance with the rules made by the Central Government in this behalf under section 18 with such authority (hereafter in this sub-section referred to as the registering authority) as may be specified in such rules and if his name is included in any electoral roll for any Assembly or Parliamentary constituency in force on the date of such detection, his name shall be deleted therefrom.

Explanation.—In the case of every person seeking registration under this sub-section, the opinion of the Tribunal constituted under the Foreigners (Tribunals) Order, 1964 holding such person to be a foreigner, shall be deemed to be sufficient proof of the requirement under clause (c) of this sub-section and if any question arises as to whether such person complies with any other requirement under this subsection, the registering authority shall,—

(i) if such opinion contains a finding with respect to such other requirement, decide the question in conformity with such finding;

(ii) if such opinion does not contain a finding with respect to such other requirement, refer the question to a Tribunal constituted under the said Order hang jurisdiction in accordance with such rules as the Central Government may make in this behalf under section 18 and decide the question in conformity with the opinion received on such reference.

(4) A person registered under sub-section (3) shall have, as from the date on which he has been detected to be a foreigner and till the expiry of a period of ten years from that date, the same rights and obligations as a citizen of India (including the right to obtain a passport under the Passports Act, 1967 (15 of 1967) and the obligations connected therewith), but shall not entitled to have his name included in any electoral roll for any Assembly or Parliamentary constituency at any time before the expiry of the said period of ten years.

(5) A person registered under sub-section (3) shall be deemed to be a citizen of India for all purposes as from the date of expiry of a period of ten years from the date on which he has been detected to be a foreigner.

(6) Without prejudice to the provisions of section 8—

(a) if any person referred to in sub-section (2) submits in the prescribed manner and form and to the prescribed authority within sixty days from the date of commencement of the Citizenship (Amendment) Act, 1985 (65 of 1985), a declaration that he does not wish to be a citizen of India, such person shall not be deemed to have become a citizen of India under that sub-section;

(b) if any person referred to in sub-section (3) submits in the prescribed manner and form and to the prescribed authority within sixty days from the date of commencement of the Citizenship (Amendment) Act, 1985(65 of 1985), or from the date on which he has been detected to be a foreigner, whichever is later, a declaration that he does not wish to be governed by the provisions of that sub-section and sub-sections (4) and (5), it shall not be necessary for such person to register himself under sub-section (3).

Explanation.—Where a person required to file a declaration under this sub-section does not have the capacity to enter into a contract, such declaration may be filed on his behalf by any person competent under the law for the time being in force to act on his behalf.

(7) Nothing in sub-sections (2) to (6) shall apply in relation to any person—

(a) who, immediately before the commencement of the Citizenship (Amendment) Act, 1985 (65 of 1985), is a citizen of India;

(b) who was expelled from India before the commencement of the Citizenship (Amendment) Act, 1985, under the Foreigners Act, 1946 (31 of 1946).

(8) Save as otherwise expressly provided in this section, the provisions of this section shall have effect notwithstanding anything contained in any other law for the time being in force."

who entered Assam before 1 January 1966 and those who came to Assam after 1 January 1966 but before 25 March 1971.

5. Section 6A(2) provides that a person would be deemed to be a citizen of India as on 1 January 1966 if the following conditions are fulfilled:

a. The person must be of Indian origin. A person is deemed to be of Indian origin if they or either of their parents or their grandparents were born in undivided India[4];

b. The person should have come to Assam from a 'specified territory' before 1 January 1966. 'Specified territory' is defined as territories included in Bangladesh immediately before the commencement of the Citizenship (Amendment) Act 1985.[5] All those persons who were included in the Electoral roll used for the purpose of the General Election to the House of People in 1967 must be considered; and

c. The person should have been an ordinary resident in Assam since the date of entry into Assam.

6. Section 6A(3) states that a person must register to secure citizenship in accordance with the rules made by the Central Government under Section 18 if the following conditions are fulfilled:

[4] Citizenship Act; Section 6A(1)(d)
[5] Citizenship Act; Section 6A(1)(c)

a. The person must be of Indian origin;

b. The person must have entered Assam on or after 1 January 1966 but before 25 March 1971 from the specified territory, that is, Bangladesh;

c. The person must have been ordinarily resident in Assam since the date of entry into Assam; and

d. The person must be detected as a foreigner in accordance with the provisions of the Foreigners Act 1946[6] and the Foreigners (Tribunals) Order 1964[7].[8]

7. The Explanation to Section 6A(3) stipulates that the opinion of the Tribunal constituted under the Foreigners Tribunals Order declaring a person to be a Foreigner is deemed as sufficient proof for requirement (d). Whether the person satisfies the other requirements must be decided on the basis of the opinion of the Tribunal, if there is a finding in the opinion with respect to that requirement. If the opinion does not have a finding with respect to the other requirement(s), the registering authority must refer the questions to the Tribunal.[9]

8. Section 6A(4) states that if the person who has registered under sub-Section (3) is included in the electoral roll for any assembly or parliamentary constituency, their name must be deleted from the roll for a period of ten years from the date of detection as a foreigner. However, a person who has been registered will have the same rights and obligations as a citizen of India except having their name included

[6] "Foreigners Act"
[7] "Foreigners Tribunals Order"
[8] Read with Section 6A(1)(b) of the Citizenship Act 1955
[9] Citizenship Act 1955; Explanation to Section 6A(3)

in the electoral roll for ten years.[10] They will also have the right to obtain passport under the Passport Act 1967. Upon the completion of ten years from the date of detection as a foreigner, a person who has registered would deemed to be a citizen of India.[11]

9. The petitioners[12] initiated proceedings under Article 32 of the Constitution, *inter alia*[13], for challenging the constitutional validity of Section 6A of the Citizenship Act. By an order dated 17 December 2014, a two-Judge Bench of this Court referred the following thirteen issues to a Constitution Bench:

> a. "Whether Articles 10 and 11 of the Constitution of India permit the enactment of Section 6A of the Citizenship Act in as much as Section 6A, in prescribing a cut-off date different from the cut-off date prescribed in Article 35 Page 36 6, can do so without a "variation" of Article 6 itself; regard, in particular, being had to the phraseology of Article 4 (2) read with Article 368 (1);
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> b. Whether Section 6A violates Articles 325 and 326 of the Constitution of India in that it has diluted the political rights of the citizens of the State of Assam;
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> c.What is the scope of the fundamental right contained in Article 29(1)? Is the fundamental right absolute in its terms? In particular, what is the meaning of the expression "culture" and the expression "conserve"? Whether Section 6A violates Article 29(1);
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> d. Whether Section 6A violates Article 355? What is the true interpretation of Article 355 of the

[10] Citizenship Act 1955; Section 6A(4)
[11] Citizenship Act 1955; Section 6A(5)
[12] WP (C) 562 of 2012; WP (C) 274 of 2009; WP (C) No. 876 of 2014
[13] In WP (C) No. 876 of 2014, the prayer included (a) challenging the constitutional validity of Rule 4A of the Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules 2003 as ultra vires Section 6A of the Citizenship Act; (b) direction to complete fencing of the entire stretch of the Border with Bangladesh; (c) to step up the process of identification, detection and deportation of foreigners in the State of Assam in accordance with the provisions of the Foreigners Act 1946 and constitute more Tribunals under the Foreigners (Tribunals) Orders 1964; and (d) direction to remove encroachers from protected tribal lands. In WP 562 of 2012, the prayer included a direction that the National Register of Citizens with respect to Assam.

Constitution? Would an influx of illegal migrants into a State of India constitute "external aggression" and/or "internal disturbance"? Does the expression "State" occurring in this Article refer only to a territorial region or does it also include the people living in the State, which would include their culture and identity;

e. Whether Section 6A violates Article 14 in that, it singles out Assam from other border States (which comprise a distinct class) and discriminates against it. Also whether there is no rational basis for having a separate cut-off date for regularizing illegal migrants who enter Assam as opposed to the rest of the country;

f. Whether Section 6A violates Article 21 in that the lives and personal liberty of the citizens of Assam have been affected adversely by the massive influx of illegal migrants from Bangladesh;

g. Whether delay is a factor that can be taken into account in moulding relief under a petition filed under Article 32 of the Constitution;

h. Whether, after a large number of migrants from East Pakistan have enjoyed rights as Citizens of India for over 40 years, any relief can be given in the petitions filed in the present cases;

i. Whether section 6A violates the basic premise of the Constitution and the Citizenship Act in that it permits Citizens who have allegedly not lost their Citizenship of East Pakistan to become deemed Citizens of India, thereby conferring dual Citizenship to such persons;

j. Whether section 6A violates the fundamental basis of section 5 (1) proviso and section 5 (2) of the Citizenship Act (as it stood in 1985) in that it permits a class of migrants to become deemed Citizens of India without any reciprocity from Bangladesh and without taking the oath of allegiance to the Indian Constitution;

k. Whether the Immigrants (Expulsion from Assam) Act, 1950 being a special enactment qua immigrants into Assam, alone can apply to migrants from East Pakistan/Bangladesh to the exclusion of the general Foreigners Act and the Foreigners (Tribunals) Order, 1964 made thereunder;

> l. Whether Section 6A violates the Rule of Law in that it gives way to political expediency and not to Government according to law; and
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> m. Whether Section 6A violates fundamental rights in that no mechanism is provided to determine which persons are ordinarily resident in Assam since the dates of their entry into Assam, thus granting deemed citizenship to such persons arbitrarily."

10. On 13 December 2022, the Constitution Bench directed the counsel to jointly formulate issues which arise for the consideration of the Bench. On 10 January 2023, the Constitution Bench framed the following primary issue for determination: "Whether Section 6A of the Citizenship Act suffers from any constitutional infirmity."

11. The issue of the constitutional validity of Section 6A of the Citizenship Act is the only issue which falls for the consideration of this Bench.

B. Issues

12. The challenge to the constitutional validity of Section 6A of the Citizenship Act gives rise to the following issues:

a. Whether the grant of citizenship to migrants from Bangladesh to Assam was within the legislative competence of Parliament under Article 11 of the Constitution;

b. Whether Section 6A of the Citizenship Act adopts unreasonable cut-off dates and singles out the State of Assam thereby violating Article 14 of the Constitution;

c. Whether Section 6A of the Citizenship Act can be regarded to be violative of Article 355 on the ground that the provision does not curb undocumented immigration which amounts to 'external aggression';

d. Whether Section 6A of the Citizenship Act is violative of Article 29(1) of the Constitution on the ground that the Assamese cultural identity is lost as a direct consequence of granting citizenship to migrants from Bangladesh residing in Assam;

e. Whether Section 6A(3) of the Citizenship Act is unconstitutional on the ground of temporal unreasonableness; and

f. Whether Section 6A(2) of the Citizenship Act is unconstitutional on the ground that it neither provides a method for implementation nor empowers the executive to implement the provisions.

C. Analysis

i. Legislative competence of Parliament to enact Section 6A

13. The petitioners submitted that Parliament did not have the competence to enact Section 6A because: (a) the legislative field with respect to granting citizenship to migrants from Bangladesh to India is occupied by Articles 6 and 7; and (b) any alteration of the cut-off date prescribed by Articles 6 and 7 for migrants from Bangladesh could only be through a constitutional amendment and not by parliamentary legislation. The respondents submitted that even if it is accepted that Section 6A amends Articles 6 and 7, the amendment is permissible in view of Article 11.

a. The scope of the constitutional provisions on Indian citizenship

14. Section 6A confers citizenship to migrants of Indian origin from the specific territory of Bangladesh. The legal regime on citizenship, in particular the provisions governing citizenship status to migrants from East and West Pakistan in the aftermath of the partition of India must be laid bare to understand the context in which Section 6A was inserted in the Citizenship Act.

15. The Constitution of India upon its adoption guaranteed fundamental rights to the **citizens** of India.[14] It is but natural that the provision on who would be citizens of the newly independent nation produced one of the most contentious of discussions in the Constituent Assembly.[15] On 30 May 1947, Mr BN Rau, the Constitutional Advisor prepared the Memorandum on the Union Constitution and Draft Clauses. The Part on Citizenship consisted of three provisions. The first provision prescribed who would be citizens of India on the date of the commencement of the Constitution.[16] The second provision stipulated who would be citizens **after** the commencement of the Constitution.[17] The provision

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[14] Articles 14, 20, 21, 22,25,27, 28 guarantees rights to persons. Articles 15,16, 19, and 29(2) guarantees rights to citizens.

[15] BR Ambedkar in Constituent Assembly Debates (10 August 1949). "Except one other Article in the Draft Constitution, I do not think that any other article has given the Drafting Committee such a headache as this particular article. I do not know how many drafts were prepared and how many were destroyed as being inadequate to cover all the cases which it was thought necessary and desirable to cover."

[16] B Shiva Rao, The framing of India's Constitution: Select Documents (Part II), 472
"At the date of commencement of this Constitution:-
Every person domiciled in the territories subject to the jurisdiction of the federation-
(a) Who has been ordinarily resident in those territories for not less than five years immediately preceding that date, or
(b) Who, or whose parents, or either of whose parents, was or were born in India,
Shall be a citizen of the Federation.
Provided that any such person being a citizen of any State may, in accordance with Federal law, elect not to accept the citizenship hereby conferred."

[17] B Shiva Rao, The framing of India's Constitution: Select Documents (Part II), 472
"After the commencement of this Constitution-
(a) Every person who is born in the territories subject to the jurisdiction of the federation;
(b) Every person who is naturalized in accordance with Federal law; and

recognised citizenship by birth, citizenship by naturalization and citizenship by descent. The third provision stipulated that **further** provisions governing the acquisition and termination of federal citizenship may be made by Federal law.[18] It was, however, observed in the Note appended to the Memorandum that the second clause was not necessary since (a) it would be impossible to exhaustively define the conditions of nationality, birth or naturalisation in the Constitution; and (b) there may be some difficulty in the interpretation of the provisions of legislation on citizenship if the provisions were entrenched in the Constitution.[19] The ad-hoc Committee on Citizenship slightly altered the first clause[20], agreed to the second clause and recommended that in addition to the law making power on acquisition and termination of citizenship, a provision for avoiding dual citizenship may be included in the third clause.[21]

16. The provision on conditions for acquiring citizenship after the commencement of the Constitution, that is, the second clause in the memorandum, was not included in the Draft Constitution of India 1948[22] submitted by the Drafting Committee on 21 February 1948. The Draft Constitution only included provisions on who would be citizens on the date of the commencement of the Constitution,[23]

(c) Every person, either of whose parents was, at the time of such person's birth, a citizen of the Federation"

[18] B Shiva Rao, The framing of India's Constitution: Select Documents (Part II), 473
"Further provisions governing the acquisition and termination of Federal citizenship may be made by Federal Law."

[19] See the Constitution of the Irish Free State; Article 3

[20] B Shiva Rao, The framing of India's Constitution: Select Documents (Part II), 683
"At the date of commencement of this Constitution, every person who:
(a) Who or whose parents or either of whose parents, was or were born in the territories of the Federation and subject to its jurisdiction, or
(b) who is domiciled in the territories subject to the jurisdiction of the federation." The clause granting citizenship to those who have been ordinarily resident for five years was removed.

[21] B Shiva Rao, The framing of India's Constitution: Select Documents (Part II), 683

[22] "Draft Constitution"

[23] Draft Constitution of India 1948, Article 5

and granted Parliament the power to make provision on acquisition and termination of citizenship and "all other matters relating thereto".[24] Article 5 of the Draft Constitution 1948 included provisions for refugees from East and West Pakistan. Clause (b) of Article 5 provided that every person who or either of whose parents or any of whose grandparents were born in India as defined in the Government of India Act 1935 or in Burma, Ceylon or Malaya and who is domiciled in the territory of India as defined by the Constitution will be a citizen upon the commencement of the Constitution, provided that the person has not acquired the citizenship of any foreign State. The explanation to the provision stated that a person is deemed to be domiciled in the territory of India on depositing a declaration to acquire such domicile after having resided for at least one month in the territory of India.[25] According to the explanation, the declaration had to be deposited before the commencement of the Constitution. Thus, migrants from East or West Pakistan to India could be citizens by virtue of Article 5(b) of the Draft Constitution if they submitted a declaration after having resided in India for a month.

17. Dr Ambedkar, as the Chairperson of the Drafting Committee introduced amendments to draft Articles 5 (corresponding to Article 5 of the Indian Constitution) and 6 (corresponding to Article 11). He further introduced Articles 5-A (corresponding to Article 6), 5-B (corresponding to Article 7) and 5-C (corresponding to Article 10) which provided separate provisions for migrants to acquire citizenship.[26] While introducing these amendments, Dr Ambedkar noted that the object of the above provisions was not to lay down a permanent law of

[24] Draft Constitution of India 1948, Article 6.
[25] Draft Constitution of India 1948, Explanation to Article 5(b)
[26] Constituent Assembly Debates (10 August 1949)

citizenship but to decide who would be citizens as on the date of the commencement of the Constitution.[27] The drafting history of the provisions on citizenship (in particular the deletion of clause 2 of the Memorandum) elucidates that after extensive deliberation in the Constituent Assembly and the Drafting Committee, it was decided that the Constitution would only stipulate who would hold citizenship "on the commencement of the Constitution". This is also clear from the language and the substantive portions of the provisions included in Part II of the Constitution, which deals with Citizenship.

18. Article 5 of the Constitution deals with "Citizenship at the commencement of the Constitution". The Article stipulates that every person who has their domicile in the territory of India will be a citizen of India at the commencement of the Constitution, if any of the following criteria is fulfilled:

a. The person was born in the territory of India; or

b. Either of their parents were born in the territory of India; or

c. The person was ordinarily resident in the territory of India for not less than five years immediately preceding the commencement of the Constitution.

19. Articles 6, 7 and 8 of the Constitution begin with a non-obstante clause, overriding the provisions of Article 5. Articles 6 and 7 recognise the largest

[27] BR Ambedkar, Constituent Assembly Debates (10 August 1949) "Now, Sir, this article refers to, c**itizenship not in any general sense but to citizenship on the date of the commencement of this Constitution.** It is not the object of this particular article to lay down a permanent law of citizenship for this country. The business of laying down a permanent law of citizenship has been left to Parliament, and as Members will see from the wording of article 6 as I have moved the entire matter regarding citizenship has been left to Parliament to determine by any law that it may deem fit."[emphasis supplied]

migration in human history[28] following the partition of undivided India into India and Pakistan. Article 6 deals with the citizenship of those who migrated from Pakistan to India. The provision states that notwithstanding anything in Article 5, a person who migrated to the territory of India from Pakistan would deemed to be a citizen of India at the commencement of the Constitution if the following two conditions are satisfied[29]:

a. he or his parents or grandparents were born in India as defined in the Government of India Act 1935 (which included the present Pakistan and Bangladesh) [Article 6(a)]; and

b. if (i) he migrated before 19 July 1948, he must have been an ordinary resident since then [Article 6(b)(i)]; or (ii) he migrated on or after 19 July 1948, he must register as a citizen of India on an application made by him before the commencement of the Constitution in the manner prescribed. A person can be registered under this provision

[28] UNHRC, The State of the World's Refugees 2000L Fifty Years of Humanitarian Action (Oxford University Press) 59

[29] "6. Rights of citizenship of certain persons who have migrated to India from Pakistan

Notwithstanding anything in article 5, a person who has migrated to the territory of India from the territory now included in Pakistan shall be deemed to be a citizen of India at the commencement of this Constitution if—
(a)he or either of his parents or any of his grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted); and
(b)(i)in the case where such person has so migrated before the nineteenth day of July, 1948, he has been ordinarily resident in the territory of India since the date of his migration, or
(ii)in the case where such person has so migrated on or after the nineteenth day of July, 1948, he has been registered as a citizen of India by an officer appointed in that behalf by the Government of the Dominion of India on an application made by him therefore to such officer before the commencement of this Constitution in the form and manner prescribed by that Government:
Provided that no person shall be so registered unless he has been resident in the territory of India for at least six months immediately preceding the date of his application."

only if he has resided in the territory for at least six months before the application. [Article 6(b)(ii)][30].

20. A brief historical background is necessary to understand the objective of this provision and in particular, the division of the migrants into two classes: those who migrated before and after 19 July 1948. The significance of the date 19 July 1948 can be traced to the provisions of the Influx from West Pakistan (Control) Ordinance 1948[31]. The West Pakistan Ordinance which came into force on 19 July 1948 introduced a system by which any person from West Pakistan could enter the territory of India only on the possession of a permit.[32] Thus, while persons who entered India before the permit system was introduced could become Indian citizens if they were domiciled in India, those who entered after the cut-off date had to satisfy the following criteria:

a. They must have resided in India for six months since 19 July 1948; and

b. They had to make an application upon the completion of six months but before the commencement of the Constitution.

21. Article 394 provides when different provisions of the Constitution commence. The provision states that Article 394 and Articles 5,6,7,8,8,9,60,324,366,367,379,380,388,391,392 and 392 will come into force "at once" and the remaining provisions will come into force on 26 January 1950. The

[30] This provision is a modification of Article 5(b) of the Draft Constitution.
[31] "West Pakistan Ordinance"
[32] Pakistan also enacted a similar legislation introducing the permit system for anybody to enter into Pakistan from India; See the Pakistan (Control of Entry) Ordinance 1948

provision also states that the commencement of the Constitution, where used in the Constitution means 26 January 1950. In terms of Article 394, Article 6 came into force on "at once", that is, immediately after the Constitution was adopted. The Constitution was adopted on 26 November 1949. Thus, for migrants after 19 July 1948 to secure citizenship in terms of Article 6, the application ought to have been filed before 26 January 1950. Since the application could only be filed if the person had resided in India for at least six months before that, the provision only covered those who migrated to India after 19 July 1948 but before 26 July 1949. The ad-hoc/temporary nature of the provision is evident from the provision itself. In addition to the use of the phrase 'at the commencement of the Constitution', the substantive portion also prescribes a temporal limit.

22. Article 6 grants citizenship to all persons who migrated from Pakistan to India till 26 July 1949. Article 7 carves out an exception to Article 6.[33] The provision stipulates that notwithstanding the provisions of Articles 5 and 6, any person who migrated from India to Pakistan after 1 March 1947 shall not deemed to be a citizen. 1 March 1947 signifies the date from when the intense communal violence broke out in India, particularly in Punjab.[34] Article 7 deals with re-migration. That is, the deeming citizenship conferred by Article 6 shall not apply to a person who before migrating from Pakistan to India had earlier migrated from India to Pakistan

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[33] "7. **Rights of citizenship of certain migrants to Pakistan**.- Notwithstanding anything in Articles 5 and 6, a person who has after the first day of March, 1947, migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India:
Provided that nothing in this article shall apply to a person who, after having so migrated to the territory now included in Pakistan, has returned to the territory of India under a permit for resettlement or permanent return issued by or under the authority of any law and every such person shall for the purposes of clause (b) of Article 6 be deemed to have migrated to the territory of India after the nineteenth day of July, 1948."

[34] Yasmin Khan, The Great Partition: The Making of India and Pakistan (Penguin India) 168

immediately after partition. The proviso to Article 7 provides an exception to those who remigrated to India under a 'permit for resettlement or permanent return issued by or under the authority of any law'. According to the proviso, irrespective of the date when persons entered the Indian territory, it shall be deemed that they entered after 19 July 1948 for the purposes of Article 6(b). Thus, any person who falls under this category (migration must be completed between 1 March 1947 and before the commencement of the Constitution[35]) would have to register as citizens upon the submission of an application as prescribed by Article 6(b)(ii) of the Constitution.

23. Thus, the following conditions must be fulfilled to secure citizenship in terms of the proviso to Article 7:

a. The person must have migrated from the Indian territory to the territory of Pakistan after 1 March 1947;

b. The person must have migrated back from the territory of Pakistan to the Indian territory under a permit for resettlement or permanent return issued under the authority of any law; and

c. The person, in terms of Article 6(b)(ii), must apply for citizenship to such officer of the Government before the commencement of the Constitution (that is, 26 January 1950). The person must have resided in India for a minimum of six months before the application. Thus, the proviso covers those who remigrated to India between 1 March 1947 and 26 July 1949.

[35] See Kulathil v. State of Kerala, AIR 1966 SC 1614 [Justice Shah, 32]

24. The distinction between Article 6 and Article 7 is that the former provision does not specifically refer to the permit system while the latter does. Though the significance of the date 19 July 1948 is traceable to the permit system, Article 6 does not mandate that citizenship would be granted only if the person entered the Indian territory on a permit. As opposed to this, Article 7 provides citizenship only to those who entered India through a valid permit. Article 7, like Article 6 is temporary in nature because (a) persons covered by the proviso to Article 7 must have registered as a citizen under Article 6(ii)(b) which prescribes a time limit; and (b) the guarantee is dependent on a parliamentary legislation (that is, the permit must be issued under authority of law) which itself indicates that it is not a permanent code.

25. The legislation(s) which introduced the permit system must be referred to understand the scope of the proviso to Article 7. On 26 July 1949, the Governor General promulgated the Influx from West Pakistan (Control) Ordinance 1948. The Ordinance stipulated that persons can enter India from any place in West Pakistan only if they are in possession of permits. 'Permit' was defined as a permit for the time being in force issued or renewed by the prescribed authority after satisfying the described conditions relating to the class of permits to which it belongs.[36] The Central Government was conferred the power to issue rules, *inter alia,* prescribing the authorities by whom permits may be issued or renewed and the conditions to be satisfied for such permits. It is crucial to note that the Ordinance only applied to the influx from the part of Pakistan which lies to the west of India (that is, the

[36] West Pakistan (Control) Ordinance 1948, Section 2(c)

present day Pakistan).[37] It did not apply to migrants from East Pakistan (that is, present day Bangladesh). On 7 September 1948, the Government of India in exercise of its power under the West Pakistan Ordinance issued rules for the implementation of the permit system. The rules introduced three kinds of permits: the permit for temporary visits, the permit for resettlement or permanent return and the permanent permit. The proviso to Article 7 only covers those who remigrated to India under the resettlement or permanent return permit.[38]

26. On 10 November 1948, the Governor General promulgated the Influx from Pakistan (Control) Ordinance 1948 by which a permit system was introduced for a person from 'any' place in Pakistan to enter India. This Ordinance introduced a permit system for persons entering India from East Pakistan also (that is, present day Bangladesh). The Ordinance also repealed the Influx from West Pakistan (Control) Ordinance 1948. The Pakistan (Control) Ordinance 1948 was repealed and replaced by the Influx from Pakistan (Control) Act 1949 which contained provisions *pari materia* to the Pakistan (Control) Ordinance 1948. Section 4 of the Influx from Pakistan (Control) Act 1949 conferred the Central Government the power to make Rules prescribing, among other things, the conditions to be satisfied by applicants for permits. On 20 May 1949, the Central Government issued Rules

[37] West Pakistan (Control) Ordinance 1948, Section 3(2)

[38] See Speech by Dr BR Ambedkar and Pandit Jawaharlal Nehru in the Constituent Assembly on 12 August 1949: [Nehru]"There are three types of permits, I am told. One is purely a temporary permit for a month or two, and whatever the period may be, a man comes and he has got to go back during that period. This does not come into the picture. The other type is a permit, not permanent but something like a permanent permit, which does not entitle a man to settle here, but entitles him to come here repeatedly on business. He comes and goes and he has a continuing permit. I may say; that, of course, does not come into the picture. The third type of permit is a permit given to a person to come here for permanent stay, that is return to Indian and settle down here."

in exercise of the power conferred by Section 4. The Rules called the 'Permit System Rules 1949' prescribed elaborate provisions only regarding the permit system introduced between Western Pakistan (that is, current day Pakistan) and India. Though the Influx from Pakistan (Control) Act 1949 applied to the whole of Pakistan (including the current day Bangladesh), the Central Government did not frame any Rules to implement the permit system for the movement from East Pakistan to India.

27. The reason for not implementing the permit system for the migrants from East Pakistan to India was explained by Mr. Gopalaswami Ayyangar while introducing the Undesirable Immigrants (Expulsion from Assam) Bill 1950[39]. The Immigrants (Expulsion from Assam) Bill granted the Central Government, the power to expel persons who come into Assam. Mr. Ayyangar stated that the Central Government examined the suggestion to introduce a permit system between East Pakistan and India but decided against it because it would restrict the freedom of movement of a large number of persons who, in their ordinary avocations, had to pass between East Pakistan and either Assam or West Bengal.[40] Thus, the geographical placement of Bangladesh (East Pakistan) prevented the Indian Government from replicating the permit system that was applied for movement in

[39] The word undesirable was removed from the short title after extensive discussion.

[40] Shri Gopalaswami while introducing the Undesirable Immigrants (Expulsion from Assam) Bill, Parliamentary Debates: Official Report (Volume 1, 1950), 313 "The obvious suggestion that was put forward at the beginning was that we should introduce a permit system as between Assam and East Pakistan. The Central Government examined this suggestion and studies its repercussions on other parts of India particularly on West Bengal and the restrictions it would impose on the freedom of movement of a large number of persons who, even in their ordinary avocations, had to pass between East Pakistan and either Assam or West Bengal. If restrictions by way of a permit system had been imposed, it was feared that there would have been difficulties experienced which it would not have been easy to get over, and after further discussions with the Government of Assam, it was settled in consultation with them that instead of introducing a permit system which would control the entry of outsiders into Assam, we might take power to expel from Assam such foreign Nationals who entered that State and whose continuance was likely to cause disturbance to its economy."

the Western border. The proviso to Article 7 which dealt with persons who remigrated to India did not apply to those who came from East Pakistan because the permit system was not implemented there.

28. On 1 January 1952, the Influx from Pakistan (Control) Act was repealed[41] putting an end to the permit system governing the travel between West Pakistan and India. In October 1952, the India-Pakistan Passport and Visa Scheme regulated the travel between India and Pakistan. The scheme proposed a specific passport system between India and Pakistan.[42]

b. Section 6A of the Citizenship Act 1955 does not conflict with Articles 6 and 7 of the Constitution

29. It is in the above background that the argument of the petitioners that Section 6A is unconstitutional for prescribing a cut-off date different from the date in Articles 6 and 7 has to be decided. Two issues arise for the consideration of this Court: (a) whether Section 6A prescribes a cut-off date different from that prescribed by Articles 6 and 7 for migrants from Bangladesh to Assam; and (b) if (a) is in the affirmative, whether Article 11 of the Constitution confers Parliament with the power to 'alter' the provisions in Part II of the Constitution conferring citizenship.

[41] See the Influx from Pakistan (Control) Repealing Act 1952; the Statement of Objects and Reasons stated that it was agreed "with the Government of Pakistan that with effect from prescribed date, the permit system should be replaced by a system of passports."
[42] See paper Rights: The emergence of Documentary Identities in Post-Colonial India, 1950-67 (2016), *History Faculty Publications*.129

PART C

30. The following position emerges from our discussion of Articles 5, 6 and 7 in the preceding section:

a. The Constitution only prescribes who would be citizens upon the commencement of the Constitution. This is evident from the language of Articles 5 and 6 which uses the phrase ‘at the commencement of the Constitution’ and the drafting history of the provision;

b. Article 6 covers a limited class of migrants from both Pakistan and Bangladesh to India (including Assam). The provision only covers those who migrated to India till 26 July 1949 (based on the six months residence requirement);

c. The benefit of citizenship to the class covered by the proviso to Article 7 depended on the permit system prescribed by law. The Permit System Rules 1949 framed in exercise of the power under the Influx from Pakistan (Control) Act 1949 did not cover those who remigrated from East Pakistan (today’s Bangladesh) to India. It only covered those who remigrated from West Pakistan (today’s Pakistan) to India. Thus, though the proviso to Article 7 does not distinguish between migrants from West Pakistan and East Pakistan, migrants from the latter were unable to secure the benefit of citizenship in the absence of Rules on the implementation of the permit system along the eastern border. Thus, the proviso to Article 7 only covered those who remigrated to India from West Pakistan after 1 March 1947 but before 26 July 1949; and

d. Article 6 and the proviso to Article 7 confer citizenship on a limited class upon the commencement of the Constitution: (i) migrants from West Pakistan and East Pakistan till 26 July 1949; and (ii) persons who re-migrated from West Pakistan to India (who had earlier migrated from India to Pakistan after partition) under the permit system till 26 July 1949.

31. As opposed to Articles 6 and 7, Section 6A confers citizenship on those who migrated from Bangladesh to Assam until 24 March 1971. Article 6 and the proviso to Article 7 confer citizenship on a limited class. Section 6A deals with those who are not covered by the constitutional provisions, that is those who migrated (or re-migrated) after 26 July 1949. The provision also covers those who migrated in the period covered by the constitutional provisions but who were not covered by the substantive stipulations in the provisions. For example, Article 6 does not cover a person who migrated from east Pakistan to Assam after 19 July 1948 but did not apply to register as a citizen before the commencement of the Constitution. Section 6A confers citizenship on such persons. There is thus, a certain degree of overlap between Section 6A and the constitutional provisions. However, that does not amount to an 'alteration or amendment' of the constitutional provisions. This is for the simple reason that Article 6 and the proviso to Article 7 confer citizenship on the 'commencement of the constitution'. That is, they only deal with who shall be citizens on 26 January 1950. In contrast, Section 6A confers citizenship from 1 January 1966 to those who migrated before that date. Those who migrated between 1 January 1966 and 24 March 1971, are conferred citizenship upon the completion of ten years from the date of detection as a foreigner. Thus, Section 6A

confers citizenship on a later date to those who are not covered by Articles 6 and 7. Section 6A could be interpreted to alter or amend Articles 6 and 7 only if it conferred citizenship retrospectively, as at the commencement of the Constitution which is not the case.

c. The scope of Article 11 of the Constitution

32. Article 11 stipulates that the provisions of Part II shall not 'derogate' from the power of Parliament to make any provision with respect to (a) acquisition of citizenship; (b) termination of citizenship; and (c) all other matters relating to citizenship:

> "11. Parliament to regulate the right of citizenship by law.- Nothing in the **foregoing provisions** of this Part shall **derogate** from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship."
>
> (emphasis supplied)

33. Article 10 is also related to Parliament's law making power on citizenship. The provision provides that every person who is or is deemed to be a citizen under the provisions of Part II of the Constitution shall continue to be so, subject to the provisions of any law made by Parliament:

> "10. **Continuance of the rights of citizenship.-** Every person who is or is deemed to be a citizen of India under any of the **foregoing provisions** of this Part shall, subject to the provisions of any law that may be made by Parliament, continue to be such citizen."
>
> (emphasis supplied)

34. Article 246[43] read with Entry 17 of List I of the Seventh Schedule to the Constitution confers Parliament the power to make laws with respect to 'citizenship, naturalisation and aliens'. What then is the purpose and scope of Article 11? The earlier draft of Article 11 read as follows:

> "**Further** provisions governing the acquisition and termination of Union citizenship, and avoidance of double citizenship may be made by Union law."
>
> (emphasis supplied)

When the draft of Article 11 read as above, there was also a provision on who would hold citizenship 'after' the commencement of the Constitution.[44] Thus, in the earlier scheme, the Constitution was to stipulate the conditions for securing citizenship and Parliament was conferred with the power to make 'further' provisions. However, the Draft Constitution of India 1948 did not consist of a provision on acquisition of citizenship after the commencement of the Constitution. Part II of the Draft Constitution only consisted of provisions on citizenship at the commencement of the Constitution and Parliament's power to make "further" provisions.[45] Dr BR Ambedkar introduced an amendment to draft Article 6 (as Article 11 exists in the current form) when it was taken up for discussion. The phrase "further provision" was used when the Draft dealt with the acquisition of

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[43] "Subject matter of laws made by Parliament and by the Legislatures of States: (1) Parliament has the exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule.[…]"

[44] B Shiva Rao, The framing of India's Constitution: Select Documents (Part II), 683
See BN Rao, Memorandum on the Union Constitution and Draft Clauses (May 30 1947); and Ad-hoc Committee on Citizenship (12 July 1947)

[45] Draft Constitution of India, 1948; Article 6 "Parliament may, by law, make further provision regarding acquisition and termination of citizenship and all other matters relating thereto".

citizenship after the commencement of the Constitution. However, once that was deleted, the language of Article 11 was amended.

35. Article 246 read with the Seventh Schedule delimits the legislative competence of Parliament and the legislature of the States. The inference that can be drawn from the inclusion of Entry 17 in List I of the Seventh Schedule is that Parliament (and not the state legislatures) has the legislative competence to enact laws with respect to citizenship. The legislative subject to enact laws on citizenship is thus, traceable to Entry 17. Provisions of Part II (Articles 10 and 11, in particular) do not confer Parliament the **power** to enact laws relating to citizenship. The provisions operate in a different sphere. The provisions clarify the **scope** of the legislative power.

36. The question is whether Parliament's power under Article 11 is restricted by other provisions in Part II. The provision stipulates that "nothing in the foregoing provisions of this Part", meaning Articles 5-10, shall **derogate** from the power to make any provision with respect to citizenship. The word 'derogate' may have two meanings: (a) to diminish or reduce; and (b) to diverge or depart.[46] The phrase "derogate" is used in six other instances in the Constitution. In one of the instances (Article 13[47]), the phrase takes the meaning of diverge or depart. In all the other usages,[48] the provision takes the meaning of 'diminish or reduce'.

[46] P Ramanatha Aiyar, Advanced Law Lexicon (6th Edition Volume 2 D-1)1587, (a) Derogate: to lesson in estimation; to invalidate; degenerate; degrade; (b) Derogation: Derogation is the partial repeal or abrogation of a law by a later act that limits its scope or impairs its utility and force.
[47] The heading to Article 13 states "laws inconsistent with or in derogation of the fundamental rights".
[48] See second proviso to Article 200, Article 226(4), Article 239AA(3)(b), Article 241, Article 371-F(m)

37. The distinction between a non-obstante clause and the words 'shall not derogate from' lies in the fact that the former is used as an expression providing overriding effect while the latter is used as a clarificatory expression. The non-obstante clause is used when there is a link between two clauses/provisions and the link is sought to be detached by carving out an exception. For example, if the provision states that notwithstanding A, B has the power to do action C, it means that the provision confers power on B to do C, and this is an exception to provision A. In contrast, the phrase 'shall not derogate from' is used to indicate that certain provisions do not reduce the effect or scope of the provision, thereby, de-linking the two provisions. For example, a provision which states that A shall not derogate B's power to do C is used when B's power to do C is conferred elsewhere and it is clarified that the scope of A and the scope of B do not overlap. This is evident on an analysis of the provisions which use the phrase 'shall not derogate'. The usage indicates that (a) the Constitution confers power elsewhere; and (b) another provision does not override or in any manner impact the power. For example:

a. Clause (4) to Article 226 stipulates that the power conferred upon High Courts to issue certain writs shall not be in derogation of the powers conferred on the Supreme Court by Article 32(2)[49]. It provides that the former shall not have an impact on the later since they operate in separate fields;

b. Article 239-AA(3)(a) provides the Legislative Assembly of the National Capital Territory with legislative competence over certain

[49] "(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32."

matters in the State List and the Concurrent list. Article 239-AA(3)(b) states that nothing in sub-clause (a) shall derogate from the powers of Parliament to make laws for the Union territory. This provision must be read in the context of Article 246(4) which provides Parliament the power to enact laws on matters enumerated in all three lists for Union territories. Article 239-AA(3)(b) states that the power conferred in clause (a) shall not impact the law making power of Parliament with respect to Union territories;

c. Article 241(1) stipulates that Parliament may by law constitute a High Court for a Union territory. Clause (4) of Article 241 stipulates that nothing in the Article shall derogate from the power of Parliament to extend or exclude the jurisdiction of a High Court to, or from any Union territory. This provision must be read in the context of Entry 79 of List I which provides Parliament the power to legislate on the "extension of the jurisdiction of a High Court to, and exclusion of the jurisdiction of a High Court from, any Union territory." Clause (4) states that Clause (1) does not impact the legislative competence exercised by Parliament under Article 245 read with Entry 79 of List I; and

d. Article 371F(m) provides that no court would have the jurisdiction to deal with any dispute arising out of an agreement or treaty relating to Sikkim but that nothing in the provision shall be 'construed to derogate from the provisions of Article 143'. Here, the phrase is used to ensure

that the provision does not have any impact on the power under Article 143.

38. Thus, the use of the phrases 'notwithstanding' and 'shall not derogate from' produce different effects. Article 11, when interpreted on the basis of the above analysis produces the following meaning:

a. The legislative competence of Parliament to enact laws related to citizenship is traceable to Entry 17 of List I and not Article 11; and

b. The provisions in Part II do not impact or limit the **legislative competence** of Parliament.

39. A non-obstante clause cannot be artificially read into Article 11. In **Izhar Ahmed** v. **Union of India**[50], the constitutional validity of Section 9(2) of the Citizenship Act and Rule 3 in Schedule III of the Citizenship Rules 1956 were challenged. Before dealing with the challenge, Justice Gajendragadkar writing for the Constitution Bench delineated the scope of the provisions in Part II of the Constitution. With respect to Article 11, the learned Judge observed that the provisions of the parliamentary law on citizenship cannot be challenged on the ground of a violation of the provisions in Part II. The relevant part of the observations is extracted below:

> "11. That takes us to Article 11 which empowers the Parliament to regulate the right of citizenship by law. It provides that nothing in the foregoing provisions of Part II shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters

[50] 1962 SCC OnLine SC 1

> relating to citizenship. It would thus be noticed that while making provisions for recognising the right of citizenship in the individuals as indicated by the respective articles, and while guaranteeing the continuance of the said rights of citizenship as specified by Article 10, Article 11 confers and recognises the power of the Parliament to make any provision with respect to not only acquisition but also the termination of citizenship as well as all matters relating to citizenship. Thus, it **would be open to the Parliament to affect the rights of citizenship and the provisions made by the Parliamentary statute in that behalf cannot be impeached on the ground that they are inconsistent with the provisions contained in Articles 5 to 10 of Part II.** In this connection, it is important to bear in mind that Article 11 has been included in Part II in order to make it clear that the sovereign right of the Parliament to deal with citizenship and all questions connected with it is not impaired by the rest of the provisions of the said Part. Therefore, the sovereign legislative competence of the Parliament to deal with the topic of citizenship which is a part of Entry 17 in List I of the Seventh Schedule is very wide and not fettered by the provisions of Articles 5 to 10 of Part II of the Constitution. This aspect of the matter may have relevance in dealing with the contention raised by the petitioners that their rights under Article 19 are affected by the impugned provisions of Section 9(2) of the Act."
>
> (emphasis supplied)

40. By the above observations, the Court did not read in a non-obstante clause in Article 11. This is clear from the observations in the subsequent paragraph where this Court discusses the alleged conflict between Article 9 of the Constitution and Section 9 of the Citizenship Act. Section 9 of the Citizenship Act provides that any person who has acquired citizenship of another country between the commencement of the Constitution and the commencement of the Act shall cease to be a citizen of India. While dealing with Section 9, this Court observed that Article

9 dealt with the acquisition of citizenship of a foreign State prior to the commencement of the Constitution. As opposed to Article 9, Section 9 dealt with the acquisition of citizenship after the commencement of the Constitution.[51] Thus, the possibility of the provisions of parliamentary law conflicting with Article 9 (and other provisions of the Constitution) would not arise.[52] In **Izhar Ahmed** (supra), the observations that statutory provisions on citizenship cannot be challenged on the ground of violation of provisions in Part II cannot be interpreted as a reading in of a non-obstante clause in Article 11. Provisions of the Parliamentary law on citizenship cannot be challenged on the ground of violation of the provisions of Part II because the constitutional provisions on citizenship are redundant for all purposes after the commencement of the Constitution. Though in the context of Article 11 the use of the non-obstante clause and the phrase 'shall not derogate from' will produce the same result, it is important to clarify the distinct usage of the phrases.

41. Similarly, the reason that Article 11 does not include a clause (similar to Article 4(2)) that the law shall not be deemed to be an amendment of the Constitution for the purpose of Article 368 is because there is no possibility of the

[51] Also see State of UP v. Shah Mohammed, (1969) 1 SCC 771 [5]

[52] "12. […] There is no ambiguity about the effect of this Section. It is clear that the voluntary acquisition by an Indian citizen of the citizenship of another country terminates his citizenship of India, provided the said voluntary acquisition has taken place between 26th January, 1950 and the commencement of the Act or takes place thereafter. **It would thus be seen that whereas Article 9 of the Constitution dealt with the acquisition of citizenship of a foreign State which had taken place prior to the commencement of the Constitution, Section 9 of the Act deals with acquisition of foreign citizenship subsequent to the commencement of the Constitution. There is, therefore, no doubt that the Constitution does not favour plural or dual citizenship and just as in regard to the period prior to the Constitution, Article 9 prevents a person who had voluntarily acquired the citizenship of foreign country from claiming the status of an Indian citizen, so does Section 9(1) make a similar provision in regard to the period subsequent to the commencement of the Constitution.** [Emphasis supplied]

law amending the constitutional provisions in Part II in view of the temporal limit of all the provisions.

42. In view of the discussion above, I have reached the following conclusions: (a) Section 6A of the Citizenship Act does not have the effect of amending Articles 6 and 7; and (b) Article 11 is not a non-obstante clause. However, since the Constitution confers citizenship only at the commencement of the Constitution, the law enacted in exercise of the power under Article 246 read with Entry 17 of List I and the constitutional provisions on citizenship operate in different fields.

ii. Section 6A is not violative of Article 14 of the Constitution

43. The petitioners submitted that Section 6A is violative of Article 14 on three grounds: (a) Section 6A is under-inclusive because it confers citizenship only to migrants to Assam; (b) there was no justification to single out Assam to the exclusion of other border States that border Bangladesh since they all form a homogenous class; and (c) the provision prescribes a different cut-off date for granting citizenship to migrants who enter Assam as opposed to other States.

44. Thus, while deciding the Article 14 challenge, this Court must decide on the following three issues:

a. Whether Section 6A is underinclusive because it grants citizenship only to migrants from Bangladesh to Assam;

b. Whether all Indian States bordering Bangladesh form a ‘homogenous class’ for the purposes of the law such that Assam alone could not have been singled out; and

c. Whether the cut-off date of 25 March 1971 is arbitrary.

a. The legal regime under the Citizenship Act 1955 governing migrants

45. In this section, I will discuss the provisions of the Citizenship Act, in particular the provisions relating to migrants of Indian origin. There was a legal limbo on the acquisition of citizenship between the commencement of the Constitution and the enactment of the Citizenship Act in 1955. Parliament enacted the Citizenship Act to provide for the acquisition and determination of Indian citizenship. The Citizenship Act provides the following methods for acquiring citizenship, namely by: (a) birth[53]; (b) descent[54]; (c) registration[55]; (d) naturalisation[56]; and (e) incorporation of territory[57]. Section 5(1) provides a fairly simple and easy method for acquiring citizenship. Citizenship could be acquired through registration if **any** of the following conditions are satisfied:

a. Persons of Indian origin who are ordinarily resident in India and have been so resident for six months immediately before making an application for registration;

b. Persons of Indian origin who are ordinarily resident in any country or place outside undivided India;

c. Women who are, or have been, married to citizens of India;

d. Minor children of persons who are citizens of India; and

[53] Citizenship Act 1955; Section 3
[54] Citizenship Act 1955; Section 4
[55] Citizenship Act 1955; Section 5
[56] Citizenship Act 1955; Section 6
[57] Citizenship Act 1955; Section 7

e. Persons of full age and capacity who are citizens of a country specified in the First Schedule.

According to the provision, a person shall be deemed to be of Indian origin if he, or either of his parents, or of his grand-parents were born in undivided India.[58] Thus, refugees from either West or East Pakistan would undoubtedly be covered within the meaning of the word 'Indian origin'. Section 5(1) creates two classes with respect to persons of Indian origin. Section 5(1)(b) deals with persons of Indian Origin who are ordinarily resident in undivided India. Any person of Indian Origin who is an ordinary resident of any country other than West and East Pakistan can acquire citizenship through registration in terms of Section 5(1)(b). Indian origin migrants from either West or East Pakistan who were ordinarily resident in India for six months could acquire citizenship through registration in terms of Section 5(1)(a). Section 5(1)(e) enables a citizen of any of the countries listed in the First Schedule of the Act to acquire citizenship through registration. Pakistan was one of the countries listed in the Schedule. Section 5(1)(e) read with the First Schedule enabled a migrant who was a citizen of Pakistan to acquire citizenship. Thus, migrants from Pakistan could acquire citizenship in terms of Section 5(1)(a) and Section 5(1)(e).

46. In exercise of the power conferred by Section 18 of the Citizenship Act, the Central Government notified the Citizenship Rules 1956[59]. The 1956 Rules prescribed a form in which an application for registration as a citizen of India under Section 5(1)(a) would have to be made. The form requested the submission of,

[58] Citizenship Act 1955; Explanation to Section 5(1)
[59] "1956 Rules"

inter alia, passport and visa details, if any.[60] The form had a separate part (Part II) for migrants from Pakistan. It requested, *inter alia,* the following details: (a) profession or occupation while residing in Pakistan; (b) whether the applicant applied for long term visa for permanent resettlement earlier; (c) whether the applicant was residing in the territory now included in India or Pakistan at the time of partition; and (e) places of residence in India prior to migration. The 1956 Rules (in particular the details required in the Part II of Form I) make it clear that migrants from East and West Pakistan could apply for citizenship under Article 5(1)(a). Even before the 1956 Rules were framed, the Deputy Secretary (Home Affairs) issued 'urgent' instructions to the various state governments directing them to make 'immediate arrangements for registration of 'displaced persons' under Section 5(1)(a) of the Citizenship Act.[61] In 1958, another notification was issued by the Ministry of Home Affairs that it was not necessary to insist on acceptance of surrender of Pakistani passports before registration is made.[62] In a reply issued in 1958 to a query, the Ministry of Home Affairs also clarified that authorities can register minorities without Pakistani passports or travel documents.[63] Thus, Section 5(1)(a) along with the 1956 Rules and the various executive notifications facilitated

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[60] Requests the name of the father, mother, address of ordinary residence, profession, description of immovable property(s) and details of family members who are staying in India.

[61] See the Executive instructions issued in the letter from the Deputy Secretary (Home) dated 14 June 1956. File no. 10/1/56, MHA-IC, NAI. Also see Anupama Roy, Mapping Citizenship in India,

[62] See Express letter dated 11 April 1958 from the government of West Bengal to the Minisitry of Home Affairs, IC Section. File no. 4/65/58, MHA-IC, NAI

[63] See Note dated 18 July 1958, Ministry of Home Affairs (IC Section) File no. 4/65/58, MHA-IC, NAI

"the persons about whom the present reference has been made belong to the minority community in Pakistan and are stated to have sworn declarations renouncing their Pakistani nationality. It is also stated in the M.E.A.'s letter no. F6(44)/57-PSP, dated 14.4.58 that in most of these cases their permanent settlement in India would eventually be granted. Their present ineligibility for registration under section 5(10(a) of the Citizenship Act is therefore only technical… in cases where the applicants belonging to the minority community in Pakistan are staying on in India swearing affidavits that they have surrendered/lost their Pakistani passports, it was for the authorities to satisfy themselves that the intention was to permit the persons concerned to stay on indefinitely in India or the applicants have severed all connections with Pakistan and intend to settle down permanently in India; and in cases where the authorities are so satisfied, the applicants can be registered under section 5(1)(a)."

the registration of migrants (including undocumented migrants) from East and West Pakistan as citizens. The 1956 Rules did not prescribe Rules for registration under Section 5(1)(e) of the Citizenship Act. Irrespective of the manner in which Section 5(1)(a) and Section 5(1)(e) of the Citizenship Act were implemented, the provisions enabled the registration of both documented and undocumented migrants to India from East and West Pakistan.

47. In fact, the Citizenship Act was viewed by the members of the Parliament as an enactment that would put an end to the limbo on granting citizenship to migrants from East and West Pakistan. Sentiments that refugees should not even be required to register also prevailed in Parliament. Thakurdas Bhargava noted that "registration is only for those who are not real citizens of India nor are rooted in the land of India not having a domicile in this country, not wanting to return to any other country."[64] HN Mukherjee, a member from north-east Calcutta claimed that registration would involve substantial cost and travel which would create difficulties for refugees.[65]

48. In **National Human Rights Commission** v. **State of Arunachal Pradesh**[66], proceedings under Article 32 were initiated, *inter alia,* claiming that the citizenship applications under Article 5(1)(a) of persons belonging to the Chakma group were not being processed. The people belonging to the Chakmas were migrants from Bangladesh. The Union Government had conveyed its decision to confer citizenship to persons belonging to the Chakma group under Section 5(1)(a) of the

[64] Citizenship Bill, Parliamentary Debates, New Delhi, 3 December 1955, p.1176.
[65] Ibid, p. 1089; See Haimanti Roy, Partitioned Lives: Migrants, Refugees, Citizens in India and Pakistan, 1947-1965 Pg. 134-135
[66] (1996) 1 SCC 742

Citizenship Act. A three-Judge Bench observed that they can seek citizenship under Article 5(1)(a) and directed that the applications must be forwarded by the Collector to the Registering Authority. In **Committee for Citizenship Rights of the Chakmas of Arunachal Pradesh** v. **State of Arunachal Pradesh**[67], proceedings under Article 32 were instituted requiring the State to comply with the earlier directions on grant of citizenship to Chakma and Hajong refugees who migrated from Assam to Arunachal Pradesh. The petition was allowed directing the Government of India and the State of Arunachal Pradesh to finalise the conferment of citizenship rights to persons of the Chakmas and Hajong groups.[68]

49. This was the position of law until the enactment of the Citizenship (Amendment) Act 2003[69] which was notified on 7 January 2004. The 2003 Citizenship Amendment Act amended Section 2(1)(b) to define the term illegal migrant[70]. An illegal migrant was defined to mean a foreigner who entered India (a) without a valid passport or other travel documents prescribed by law; or (b) with a valid passport and travel documents but has overstayed. The 2003 Amendment Act also amended Sections 5 and 6 of the Act to exclude illegal immigrants from acquiring citizenship by naturalisation and registration. Sections 5 and 6 of the Citizenship Act, after the amendments introduced by the 2003 Amendment Act now expressly bar illegal migrants from acquiring citizenship by registration or

[67] (2016) 15 SCC 540

[68] Also see the decision of the Gauhati High Court in Shah Muhammad Anwar Ali v. State of Assam, 2014 SCC OnLine Gau 103. The High Court held that Section 5(1)(a) of the Citizenship Act permitted the registration of the undocumented migrants of Indian Origin until the amendment in 2003.

[69] "2003 Amendment Act"

[70] "illegal migrant means a foreigner who has entered into India- (i) without a valid passport or other travel documents and such other document or authority as may be prescribed by or under any law in that behalf; or (ii) with a valid passport or other travel documents and such other document or authority as may be prescribed by or under any law in that behalf but remains therein beyond the permitted period of time."

naturalisation.[71] In addition to the amendments excluding illegal immigrants, the enactment also deleted Section 5(1)(e) which permitted the registration by citizens of countries specified in the First Schedule.

50. It is clear from the above discussion that undocumented migrants could be registered as Indian citizens under the Citizenship Act until the enactment of the 2003 Amendment Act which came into force on 3 December 2004 by which the class of 'illegal immigrants' was excluded from acquiring citizenship.

b. The legal regime governing migrants from East and West Pakistan to Assam

51. The legal regime on citizenship must be read alongside other laws that deal with migrants. On 23 November 1946, the Foreigners Act 1946[72] was enacted to confer upon the Central Government certain powers in respect of foreigners. A 'foreigner' was defined as a person who is not a natural born British subject as defined in Sub-sections (1) and (2) of Section 1 of the British Nationality and Status of Aliens Act of 1914 or who was not granted a certificate of naturalization as a British subject under Indian law.[73] Section 3 conferred the Central Government the power to make provisions for prohibiting, regulating or restricting the entry of foreigners to India.[74] In exercise of the power under Section 3, the Central

[71] Citizenship Act 1955; Section 5: "Subject to the provisions of this section and such other conditions and restrictions as may be prescribed, the Central Government may, on an application made in this behalf, register as a citizen of India any person not being an illegal migrant […]"; Section 6" Where an application is made in the prescribed manner by any person of full age and capacity not being an illegal migrant […]"
[72] "Foreigners Act"
[73] The Foreigners Act 1946, Section 2(a)
[74] Section 3(2): In particular and without prejudice to the generality of the foregoing power, orders made under this section may provide that the foreigner—
(a) shall not enter [India] or shall enter [India] only at such times and by such route and at such port or place and subject to the observance of such conditions on arrival as may be prescribed;
(b) shall not depart from [India], or shall depart only at such times and by such route and from such port or place and subject to the observance of such conditions on departure as may be prescribed;
(c) shall not remain in [India] or in any prescribed areas therein;
[(cc) shall, if he has been required by order under this section not to remain in India, meet from any resources at his disposal the cost of his removal from India and of his maintenance therein pending such removal;]

government notified the Foreigners Order 1948[75]. In terms of the Foreigners Order, foreigners can enter India only at such port or other place of entry on the borders of India as the registration officer having jurisdiction at that port or place may appoint.[76] The Order also provides that a foreigner can enter only with the leave of the civil authority having jurisdiction[77] and leave will be refused if the foreigner is not in possession of a valid passport or visa[78]. Thus, every migrant without a valid visa, irrespective of the country from which they migrated and the Indian State to which they have migrated, was refused permission to enter India.

52. However, the Foreigners Act when it was enacted did not apply to migrants from West and East Pakistan since they were also British subjects. The definition of 'Foreigner' in the Act was amended by Act 11 of 1957 to mean a person who is not a citizen of India. This amendment came into force from 19 January 1957.[79] Thus, until 1957, the Foreigners Act which provided the Central Government with the power to remove a migrant without legal documentation from the soil of India

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(d) shall remove himself to, and remain in, such area in [India] as may be prescribed;
(e) shall comply with such conditions as may be prescribed or specified— (i) requiring him to reside in a particular place; (ii) imposing any restrictions on his movements; (iii) requiring him to furnish such proof of his identity and to report such particulars to such authority in such manner and at such time and place as may be prescribed or specified; (iv) requiring him to allow his photograph and finger impressions to be taken and to furnish specimens of his handwriting and signature to such authority and at such time and place as may be prescribed or specified; (v) requiring him to submit himself to such medical examination by such authority and at such time and place as may be prescribed or specified; (vi) prohibiting him from association with persons of a prescribed or specified description; (vii) prohibiting him from engaging in activities of a prescribed or specified description; (viii) prohibiting him from using or possessing prescribed or specified articles; (ix) otherwise regulating his conduct in any such particular as may be prescribed or specified;
(f) shall enter into a bond with or without sureties for the due observance of, or as an alternative to the enforcement of, any or all prescribed or specified restrictions or conditions;
[(g) shall be arrested and detained or confined;] and may make provision [for any matter which is to be or may be prescribed and] for such incidental and supplementary matters as may, in the opinion of the Central Government, be expedient or necessary for giving effect to this Act. 4 [(3) Any authority prescribed in this behalf may with respect to any particular foreigner make orders under clause (e) 5 [or clause (f)] of sub-section (2).]

[75] "Foreigners Order"
[76] Foreigners Order 1948; Clause 3 (1)(a)
[77] Foreigners Order 1948; Clause 3 (1)(b)
[78] Foreigners Order 1948; Clause 3(2)(a)
[79] Act 11 of 1957, Section 2

did not apply to migrants from West and East Pakistan. However, even before the immigrants from West and East Pakistan were considered 'foreigners' for the purpose of the Foreigners Act, Parliament enacted the Immigrants (Expulsion from Assam) Act 1950. The Statement of Objects and Reasons states that the Immigrants (Expulsion from Assam) Act 1950 was enacted to deal with the large scale immigration of migrants from East Bengal to Assam:

> "During the last few months a serious situation had arisen from the immigration of a large number of East Bengal residents into Assam. Such large migration is disturbing the economy of the Province, besides giving rise to a serious law and order problem. The Bill seeks to confer necessary powers on the Central Government to deal with the situation."

53. The enactment granted the Central Government the power to remove any person or class of persons who came into Assam and whose stay is detrimental to the interests of Assam[80]. The enactment carved out an exception with respect to any person who was displaced from any area in Pakistan (which includes the present day Pakistan and Bangladesh) on account of civil disturbances or the fear of it.[81] It is crucial to note that this Act only applied to immigrants in Assam and not the rest of India. Shri Gopalaswami, while introducing the Bill, explained the objective for singling out Assam as follows:

> "The Bill itself is a simple one. In the State of Assam, particularly after the Partition, the influx of persons from outside Assam into that State has been assuming proportions which have caused apprehensions to the Government and the people of Assam as to the disturbance that such an influx would cause to their economy. The Assam Government brought this fact to the notice of the

[80] The Immigrants (Expulsion from Assam) Act 1950; Section 2
[81] The Immigrants (Expulsion from Assam) Act 1950; proviso to Section 2

> Central government in 1949, and since then, the matter has been under examination; a number of conferences and discussions have been held, some with Pakistan, others between central Government and the State Government. Various suggestions were considered. […] it was finally settled in consultation with them that instead of introducing a permit system which would control the entry of outsiders into Assam, we might take power to expel from Assam such foreign nationals who entered that State and whose continuance was likely to cause disturbance to its economy."

54. The earlier draft of the Bill did not include an exception for 'refugees' from East and West Pakistan. However, members of Parliament felt that the enactment must only cover those who migrate for "economical" reasons and not refugees who migrate because of civil disturbance caused due to the political instability in the aftermath of the partition.[82] The Parliamentary debates on the Bill elucidate that: (a) there were more migrants from Bangladesh because of the absence of a permit system for travel between East Pakistan and India; and (b) the influx was most profound in the Indian State of Assam compared to the other bordering states. It is crucial to note that the Immigrants (Expulsion from Assam) Act 1950 was enacted because the Foreigners Act did not include immigrants from Pakistan.[83]

55. The provisions of the Foreigners Act before the amendment in 1957 and the Immigrants (Expulsion from Assam) Act 1950 indicate the lenient policy of India towards the refugees of West and East Pakistan in the aftermath of the partition of India. This must be read along with the legal regime governing citizenship in India

[82] Shri RK Choudhuri (Assam), Parliamentary Debates: Official Report (Volume 1, 1950), 318
[83] See the response of Shri Gopalaswami to the question from Dr Deshmukh, Parliamentary Debates: Official Report (Volume 1, 1950), 336

upon the enactment of the Citizenship Act 1955 that permitted the registration of migrants from East and West Pakistan as citizens.

56. However, the huge influx of migrants from East Pakistan to Assam was not receding. On 25 December 1983, the Illegal Migrants (Determination by Tribunals) Act 1983[84] came into force. The preamble to the Act stated that the Act provided for the establishment of Tribunals to determine illegal immigrants. The Act was deemed to have come into force in Assam on 15 October 1983 and in any other State on such date as may be notified by Central Government.[85] Thus, unlike the Immigrants (Expulsion from Assam) Act 1950, the IMDT Act applied to the whole of India. Section 3(c) of the IMDT Act defined an illegal migrant as a person who has satisfied each of the following criteria (a) entered India on or after 25 March 1971; (b) is a foreigner; and (c) entered India without being in possession of a valid passport or other travel document or any other lawful authority. The date on which a person becomes an illegal immigrant according to the IMDT Act, that is 25 March 1971 is the same as the date prescribed in Section 6A of the Citizenship Act for acquiring citizenship. Section 4 gave the IMDT Act overriding effect notwithstanding anything in the Passport (Entry into India) Act 1920, the Foreigners Act 1946, the Immigrants (Expulsion from Assam) Act 1950 or the Passports Act 1967. In terms of Section 1, the Act applies to the whole of India. The Central Government in exercise of the power under Section 1 of the Act, however, did not enforce the Act in any other Indian State. The special provisions in the form of the

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[84] "IMDT Act"

[85] The Illegal Migrants (Determination by Tribunals) Act 1983; Section 1(3): "It shall be deemed to have come into force in the State of Assam on the 15th day of October, 1983 and in any other State on such date as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different States and references in this Act to the commencement of this Act shall be construed in relation to any State as reference to the date of commencement of this Act in such State."

Immigrants (Expulsion from Assam) Act 1950 and the IMDT Act clearly elucidate that the huge influx of migrants from Bangladesh to Assam has always been a 'cause for concern' and Parliament has taken steps to address the issue previously.

57. The above discussion of the provisions governing migrants, and in particular, migrants from Bangladesh elucidates the balance that Parliament has sought to draw between its humanitarian view towards migrants of Indian origin from Bangladesh and the impact of the huge influx on the economic and cultural resources of Indian States. With this background, I proceed to determine the constitutional validity of Section 6A on the anvil of Article 14.

c. The scope of judicial review under Article 14

58. Before I proceed to deal with the issues, it is necessary that I summarise the scope of judicial review under Article 14. Courts have traditionally tested laws and executive actions for violation of Article 14 on the grounds of unreasonable classification[86] and arbitrariness[87]. Courts have adopted the two-prong test for unreasonable classification[88] and the manifest arbitrariness standard[89]. In **Association for Democratic Reforms** v. **Union of India**[90], writing for three other Judges of the Constitution Bench, I explained that the test of manifest arbitrariness includes the following two applications:[91]

[86] See Shri Ram Krishna Dalmia v. Shri SR Tandolkar 1958 SCC OnLine SC 6; Moorthy Match Works v. CCE, (1974) 4 SCC 428; State of West Bengal v. Anwar Ali Sarkar (1952) 1 SCC 1
[87] EP Royappa v. State of Tamil Nadu, (1974) 4 SCC 3; Ajay Hasia v. Khalid Mujib Seheravardi, (1981) 1 SCC 722; State of Andhra Pradesh v. McDowell, (1996) 3 SCC 709
[88] Anwali Ali Sarkar (supra)
[89] Shayara Bano v. Union of India, (2017) 9 SCC 1; Navtej Singh Johar v. Union of India, (2018) 10 SCC 1
[90] 2024 INSC 113
[91] 2024 INSC 113 [194-195]

a. The determination of whether the provision lacks an "adequate determining principle" or if the adequate determining principle is not in consonance with constitutional values; and

b. If the provision does **not** make a classification by identifying the degrees of harm.

These two applications have in the past also been subsumed in the traditional two-prong Article 14 analysis. In **State of West Bengal** v. **Anwar Ali Sarkar**[92], Justice S R Das observed that there must be a yardstick to differentiate those included in and excluded from the class.[93] Since then, in addition to inquiring if there is a yardstick, this Court has also adopted a more intensive analysis of the yardstick adopted in the backdrop of constitutional values and provisions. For example, in the context of determining the backward class for the purpose of Article 15(4), this Court has held that a yardstick which measures social backwardness must be adopted.[94] The degree of scrutiny of the yardstick used hinges on the nature of the right alleged to be violated. For example, the legislature has a greater latitude to choose the yardstick for classification in fiscal matters.[95] However, the Court has adopted a stringent standard in determining the 'rationality' of the yardstick in matters which deal with constitutional rights.[96] The standard of review to be adopted by courts must thus depend on the nature of the right which is alleged to be infringed.

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[92] (1952) 1 SCC 1
[93] Anwali Ali Sarkar (supra) [66]
[94] State of Punjab v. Davinder Singh, 2024 INSC 562
[95] Kerala Hotel and Restaurant Association v. State of Kerala, (1990) 2 SCC 502
[96] Navtej Singh Johar (supra), See opinion of Justice Indu Malhotra [14.9]

59. A classification is constitutionally permissible if the following two prong test is satisfied: First, there must be an intelligible differentia between those forming a group and those left out. Second, the differentia must have a reasonable nexus with the object sought to be achieved. The Court now, within the traditional two-prong test has advocated for a more substantial inquiry that subsumes the following prongs:

a. Objective: The Courts test the (i) genuineness of the objective by making a distinction between the ostensible objective and the real objective[97]. The ostensible purpose is the purpose which is claimed by the State and the real purpose is the purpose identified by Courts based on the surrounding circumstances[98]; and (ii) unreasonableness of the objective by determining if it is discriminatory.[99]

b. Means: The Courts undertake the following analysis while identifying the means: (i) whether there is a yardstick (that is, the basis) to differentiate those included and others excluded from the group[100]; (ii) whether the yardstick is in compliance with constitutional provisions and values[101]; (iii) whether all those similarly situated based on the

[97] Joseph Shine v. Union of India, (2019) 3 SCC 39
[98] See Association for Democratic Reforms v. Union of India, 2024 INSC 113 [194]; Also see the opinions of Justice Chandrachud, Justice Malhotra and Justice Nariman in Navtej Singh Johar (supra) and Justice Chandrachud and Nariman in Joseph Shine (supra).
[99] See Nagpur Improvement Trust v. Vithal Rao, 1973 1 SCC 500 "26. […] The object itself cannot be discriminatory, for otherwise, for instance, if the object is to discriminate against one section of the minority the discrimination cannot be justified on the ground that there is a reasonable classification because it has rational relation to the object sought to be achieved."
[100] Anwar Ali Sarkar (supra) (1952) 1 SCC 1, [Das J, 66].
[101] See State of Punjab v. Davinder Singh, 2024 INSC 562; Opinion of Justice Malhotra in Navtej Singh Johar (supra)

yardstick have been grouped together[102]; and (iv) whether the yardstick has a rational nexus with the objective[103].

d. The scope of judicial review of under-inclusive provisions

60. To determine if Section 6A is violative of Article 14 on the ground of under-inclusiveness, the scope of judicial review on the ground of under-inclusion first needs to be set out.

61. A provision is under-inclusive if it fails to regulate all those who are part of the problem that the legislature seeks to address and is over-inclusive if it regulates somebody/something that is not a part of the problem.[104] That is, under-inclusiveness and over-inclusiveness depends on whether those who are similarly situated have not been included or those who are not similarly situated have been included. In **State of Gujarat** v. **Ambica Mills**[105], this Court dealt with the argument of under-inclusiveness for the first time. In this case, the definition of the phrase 'establishment' in the Bombay Labour Welfare Fund Act 1953 was challenged on the ground of under-inclusiveness. The enactment defined an 'establishment' to mean (a) a factory; (b) a tramway or motor omnibus service; and (c) any establishment including a society or a trust which employs more than fifty persons

[102] See Arun Kumar v. Union of India, (2007) 1 SCC 732; G Sadasivan Nair v. Cochin University of Science and Technology, (2022) 4 SCC 404
[103] Anwar Ali Sarkar (supra) (1952) 1 SCC 1
[104] See State of Tamil Nadu v. National South Indian River Inter-linking,(2021) 15 SCC 534 [32] ; State of Gujarat v. Ambica Mills, (1974) 4 SCC 656 [55] "A classification is under-inclusive when all who are included in the class are tainted with the mischief but there are others also tainted whom the classification does not include. In other words, a classification is bad as under-inclusive when a State benefits or burdens persons in a manner that furthers a legitimate purpose but does not confer the same benefit or place the same burden on others who are similarly situated. A classification is over-inclusive when it includes not only those who are similarly situated with respect to the purpose but others who are not so situated as well. In other words, this type of classification imposes a burden upon a wider range of individuals than are included in the class of those attended with mischief at which the law aims."
[105] (1974) 4 SCC 656

but not to include an establishment (not being a factory) of the Central or State Government. The enactment provided for the constitution of a Fund to finance activities to promote labour welfare. The definition of 'establishment' was challenged for being under-inclusive since it excluded places that employed less than fifty persons.

62. Justice K K Mathew, writing for the Constitution bench observed that to identify if a provision is under-inclusive or over-inclusive, the Court must determine if all persons similarly situated for the purpose of law have been grouped.[106] This Court observed that while dealing with a challenge on the ground of under-inclusiveness, the administrative convenience of the State must be taken into consideration. The learned Judge referred to the observations of Justice Oliver Wendell Holmes in **Missouri Kansas & Texas Railway** v. **May**[107] that the Courts must be deferential to under-inclusive legislation.

63. On the facts of the case, Justice Mathew observed that the justification of the State for under-inclusion, that unpaid accumulations will be less in establishments which employ less than fifty persons and it would not be sufficient to meet administrative costs, was fair and reasonable.[108] In **Ambica Mills** (supra), this Court tested whether the under-inclusiveness was **justified**.

64. The reference to **Missouri Kansas & Texas Railway** (supra) must not be read detached from the context.[109] In multiple places in the judgment, this Court

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[106] (1974) 4 SCC 656 [55]
[107] 194 US 297, 269
[108] (1974) 4 SCC 656 [69]
[109] (1974) 4 SCC 656 [56] […] "Mr Justice Holmes, in urging tolerance of under-inclusive classifications, stated that such legislation should not be disturbed by the Court unless it can clearly see that there is no fair reason for the law which would not require with equal force its extension to those whom it leaves untouched."

observed that a deferential approach must be adopted in challenges to laws dealing with economic activity.[110] This is also evident from the manner in which this Court dealt with the argument of over-inclusion. It was contended that the definition of 'establishment' was over-inclusive because it included tramways and omnibuses The Court rejected the argument on the ground that judicial deference must be shown in challenges dealing with economic policy.[111] Thus, the observations of this Court in **Ambica Mills** (supra) on judicial deference to under-inclusive provisions must be read in light of the established position of this Court that it must defer in matters relating to economic policy[112].

65. In **Missouri Kansas & Texas Rly** (supra), the constitutional validity of a Texas Statute[113] imposing penalty on railroad companies for permitting the spread of Johnson grass and Russian thistle was challenged. The law was challenged on the ground that it was under-inclusive since it only penalised railroad companies to the exclusion of others. Justice Holmes writing for the majority of the US Supreme Court observed that Court should interfere only when there is no fair reason for the under-inclusion. The Court then identified numerous reasons for why the Railway Company may be singled out when compared to owners of farms who have an element of self-interest.[114] Thus, **Missouri Kansas & Texas Rly** (supra) is also not

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[110] (1974) 4 SCC 656 [64-67]; "64. Laws regulating economic activity would be viewed differently from laws which touch and concern freedom of speech and religion, voting, procreation, rights with respect to criminal procedure, etc."

[111] (1974) 4 SCC 656 [72]; Also see John Sebastian, Underinclusive Laws and Constitutional Remedies- An Exploration of the Citizenship (Amendment) Act 2019, *Indian Law Review* [Volume 7 Issue 3 (2023)]

[112] Ugad Sugar Works Limited v. Delhi Administration, (2001) 3 SCC 635; State of Tamil Nadu v. National South Indian River Inter-linking,(2021) 15 SCC 534

[113] Fourteenth Amendment of chapter 117 of the Laws of Texas of 1901

[114] "But it may have been found […] that the seed is dropped in such quantities as to cause special trouble. It may be that the neglected strips occupied by railroads afford a ground where noxious strips occupied by railroads afford a ground where noxious weeds flourish, and that whereas self-interest leads to the owners of farms to keep down pests, the railroad companies have done nothing in a matter which concerns their neighbors only."

an authority for the proposition that the scope of judicial review for under-inclusive law is limited.

66. The degree of judicial deference to any provision, including under-inclusive provisions depends on the subject matter of the case. In **Joseph Shine** v. **Union of India**[115], the constitutional validity of Section 497 of the Indian Penal Code 1860 was challenged on the ground of violation of Articles 14 and 15. Section 497 defined the offence of adultery as when a person has sexual intercourse with a woman, whom he knows or has reason to believe to be the wife of another man, without the consent of that man. One of the contentions was that the provision was under-inclusive since it only dealt with a situation where a man had sexual intercourse with a married woman without the consent of the husband but not the other way around, that is a woman having sexual intercourse with a married man without the consent of his wife. The Constitution Bench tested the provision by applying a high standard of review. This Court held that there was no rational yardstick for the classification[116] and that the yardstick was steeped in gender stereotypes where a woman is considered to not have any agency[117]. In my concurring opinion, I noted that the problem with Section 497 was not just its 'under inclusion' but the impact of the under-inclusion of subjugating a woman to a position of inferiority.[118] A high standard of scrutiny was applied to test the validity of an under-inclusive provision.

[115] (2019) 3 SCC 39
[116] See (2019) 3 SCC 39 [Chief Justice Misra, writing for himself and Justice Khanwilkar [23]]
[117] (2019) 3 SCC 39 [Justice DY Chandrachud [35]]
[118] (2019) 3 SCC 39 [Justice DY Chandrachud [11]

67. In **Basheer** v. **State of Kerala**[119], the constitutional validity of the proviso to sub-Section (1) of Section 41 of the Narcotic Drugs and Psychotropic Substances (Amendment) Act 2001[120] was under challenge. By the 2001 Amendment, the sentence for offences under the NDPS Act was altered. Section 41, included by the 2001 Amendment, provided that the amended provisions shall apply to all pending cases before the court as on 2 October 2001 and all cases under investigation. The proviso to the provision excluded cases pending in appeal. The exclusion of the category of cases in the proviso was challenged on the ground of under-inclusiveness. Justice B N Srikrishna, writing for the two-Judge Bench observed that the classification could not be held to be unreasonable due to 'marginal over-inclusiveness or under-inclusiveness'.[121] This principle flows from the established judicial position that Article 14 does not require classifications with 'mathematical precision'.[122] This observation does not lead to the conclusion that under-inclusive provisions must be met with judicial deference. In **Basheer** (supra), this Court observed that the guiding principle of the provision was the conclusion of the trial since the application of the amended provision to pending appeals would reopen concluded trials.[123] In this case, the court determined the yardstick of classification based on the reading of the provision(s) and observed that the yardstick was reasonable. Based on the yardstick, it was concluded that there was no case for under-inclusion.

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[119] 2004 3 SCC 609
[120] "2001 Amendment"
[121] 2004 3 SCC 609 [20]
[122] Gauri Shanker v. Union of India, (1994) 6 349; Anant Mills v. State of Gujarat, (1975) 2 SCC 175
[123] 2004 3 SCC 609 [23].

68. The following principles emerge from the discussions above:

a. There is no general principle that the constitutional validity of under-inclusive provisions must be assessed with judicial deference;

b. The degree of judicial scrutiny of an under-inclusive provision depends on the subject matter. The Courts must adopt a higher degree of judicial scrutiny if the law deals with core rights of individuals or groups (as opposed to economic policy); and

c. The determination of the yardstick for classification will help in the assessment of whether a provision is under-inclusive or over-inclusive. The yardstick must have a nexus with the object and must be in consonance with constitutional principles. If the yardstick satisfies the test, then the State must determine if all persons/situations similarly situated based on the yardstick have been included. The State must on the submission of cogent reason justify if those who are similarly situated have not been included (under-inclusiveness) or those who are not similarly situated have been included (over-inclusiveness). The degree of justification that the State is required to discharge depends on the subject-matter of the law, that is whether the matter deals with economic policy or fiscal matters, whether it is a beneficial provision such as a labour provision or whether it deals with the core or innate traits of individuals. The degree of justification is the least for economic policy, higher for a

beneficial provision and the highest if it infringes upon the core or innate trait of individuals.

e. The legislative objective of Section 6A of the Citizenship Act

69. The preamble to the Citizenship (Amendment) Act 1985 by which Section 6A was included states that the amendment was made for the "purpose of giving effect to certain provisions of the Memorandum of Settlement relating to the foreigners issue in Assam (Assam Accord) which was laid before the Houses of Parliament on the 16th day of August 1985." The Assam Accord was entered into in the backdrop of numerous agitations led by All Assam Students Union[124] and All Assam Gana Sangram Parishad[125] against the migration from Bangladesh to Assam. The movement saw foreigners as a threat to Assamese political power and as contenders of the scarce economic opportunities.[126] In January 1980, the student leaders met Ms Indira Gandhi, the then Prime Minister of India for negotiation talks and demanded the detection and deportation of foreigners who had come to live in Assam since 1951.[127] On 15 August 1985, the Union Government and the leaders of the movement signed the Assam Accord.[128]

70. The preamble to the Accord stipulates that the settlement was reached "keeping all aspects of the problem including constitutional and legal provisions, international agreements, **national commitments** and **humanitarian consideration**". On the foreigners issue, the following settlement was arrived at:

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[124] "AASU"
[125] "AAGSP"
[126] Arupjyoti Saikia, The Quest for Modern Assam, Penguin and Allen Lane, 455
[127] Ibid, 449
[128] Ibid, 489

"5.1 For purposes of detection and deletion of foreigners, 1.1.1966 shall be the base date and year.

5.2 All persons who came to Assam prior to 1.1.1966, including those amongst them whose names appeared on the electoral rolls used in 1967 elections, shall be regularised.

5.3 Foreigners who came to Assam after 1.1.1966 (inclusive) and upto 24th March, 1971 shall be detected in accordance with the provisions of the Foreigners Act, 1946 and the Foreigners (Tribunals) Order 1964.

5.4 Names of foreigners so detected will be deleted from the electoral rolls in force. Such persons will be required to register themselves before the Registration officers of the respective districts in accordance with the provisions of the Registration of Foreigners Act, 1939 and the Registration of Foreigners Rules, 1939.

5.5 For this purpose, Government of India will undertake suitable strengthening of the governmental machinery.

5.6 On the expiry of a period of ten year following the date of detection, the names of all such persons which have been deleted from the electoral rolls shall be restored.

5.7 All persons who were expelled, earlier, but have since re-entered illegally into Assam, shall be expelled.

5.8 Foreigners who came to Assam on or after March 25, 1971 shall continue to be detected, deleted and expelled in accordance with law. Immediate and practical steps shall be taken to expel such foreigners.

5.9 The Government will give due consideration to certain difficulties expressed by the AASU/AAGSP regarding the implementation of the Illegal Migrants (Determination by Tribunals) Act, 1983."

71. The provisions of Section 6A of the Citizenship Act are traceable to the Assam Accord. The Assam Accord, as explained above, was a political settlement between the Union of India ('the executive') and students groups in Assam. In an Article 14 challenge to a legislative provision, the court must identify the 'legislative' objective. The objective, against which this Court must test the validity of the law must be identified based on the circumstances surrounding the Assam Accord and the enactment of the legislation. Section 6A was included with the objective of reducing the influx of migrants to India and dealing with those who had already migrated. The Assam Accord was a political solution to the issue of growing migration and Section 6A was a legislative solution. Section 6A must not be read detached from the previous legislation enacted by Parliament to deal with the problem of influx of migrants of Indian Origin that I have traced in the preceding sections. Section 6A is one more statutory intervention in the long list of legislation that balances the humanitarian needs of migrants of Indian Origin and the impact of such migration on economic and cultural needs of Indian States.

f. Section 6A is not violative of Article 14

72. Section 6A confers citizenship to migrants from Bangladesh to Assam before 25 March 1971. Two yardsticks are discernible from Section 6A: (a) migrants must have entered Assam; and (b) the entry of migrants must be before the cut-off date of 25 March 1971. It first needs to be determined if the above two yardsticks are reasonable, have a nexus with the object and are in compliance with constitutional principles.

73. Parliament, even before the enactment of the Citizenship (Amendment) Act 1995 has treated migration to the State of Assam as a cause of concern. Previous sections of this judgment trace the enactment of the Immigrants (Expulsion from Assam) Act 1950 and the IMDT Act which dealt with the specific problem of undocumented migration to Assam. The Central Government could have extended the application of the IMDT Act to any other State by a notification. However, no such notification was issued indicating that the immigration to Assam presented the Union with a unique problem in terms of magnitude and impact. Though other states such as West Bengal (2216.7 km), Meghalaya (443 km), Tripura (856 km) and Mizoram (318 km) share a larger border with Bangladesh as compared to Assam (263 km), the magnitude of influx to Assam and its impact on the cultural and political rights of the Assamese and Tribal populations is higher. The data submitted by the petitioners indicates that the total number of immigrants in Assam is approximately forty Lakhs, fifty seven Lakhs in West Bengal, thirty thousand in Meghalaya and three Lakh and twenty five thousand in Tripura.[129] The impact of forty lakh migrants in Assam may conceivably be greater than the impact of fifty seven lakh migrants in West Bengal because of Assam's lesser population and land area compared to West Bengal.

74. Similarly, the cut-off date of 25 March 1971 is also rational. Even before the enactment of Section 6A, the IMDT Act defined an 'illegal immigrant' as a person who entered India on or after 25 March 1971 without travel documents. As noted above, the IMDT Act was not specific in its application to Assam. The enactment

[129] See Report of Governor of Assam Lt. Col S.K Sinha dated 8.11.1998 and Statement of Indrajeet Gupta, Union Home Minister in the Parliament dated 14.07.2004

defined the phrase illegal immigrant for all States though the Central Government did not extend the provisions of the Act to other States. On 25 March 1971, the Pakistani Army launched Operation Search Light to curb the Bengali nationalist movement in East Pakistan.[130] The migrants before the operation were considered to be migrants of partition towards which India had a liberal policy. Migrants from Bangladesh after the said date were considered to be migrants of war and not partition. Thus, the cut-off date of 25 March 1971 is reasonable.

75. Having held that both the cut-off date and the singling out of Assam is based on rational considerations, the next question is whether the yardsticks have a rational nexus with the object of the provision. The answer is in the affirmative. Since the migration from East Pakistan to Assam was in great numbers after the partition of undivided India and since the migration from East Pakistan after Operation Search-Light would increase, the yardstick has nexus with the objects of reducing migration and conferring citizenship to migrants of Indian origin. Section 6A would be under-inclusive only when all those who are similarly situated with respect to the object and on the application of the rational yardstick are not included. Similarly, the provision would be over-inclusive only when those who are not similarly situated with respect to these two parameters are included. That not being the case, Section 6A is neither under-inclusive nor over-inclusive.

76. Over-inclusiveness and under-inclusiveness must be determined based on whether there are similarly situated persons/situations who or which have not been included or have been included based on the yardstick identified. The

[130] M Rafiqul Islam, A Tale of Millions: Bangladesh Liberation War, 1971 (Bangladesh Books International)

determination cannot be made with reference to the objective without a reference to the yardstick. Doing so would limit the ability of the Legislature to identify the degrees of harm. The yardstick can be challenged where another yardstick affects or is related to the objective in a comparable manner.[131]

77. The last question which is required to be considered is whether granting 'citizenship' has any relevance to the problem identified, that is, migration crisis. It was submitted that if Assam is facing a migration crisis, the State must focus on removing the migrants instead of conferring them citizenship. To elucidate this point, the petitioners submitted that undocumented migrants in other States will not receive the benefit of citizenship and this would lead to a situation where migrants in other states would also move to Assam to secure the benefit of citizenship. This, it has been argued would not satisfy the object of the provision.

78. In the preceding section of this judgment, I have held that the Citizenship Act and the notifications issued by the Ministry of Home Affairs allowed the acquisition of citizenship by undocumented citizens through registration under Section 5(1)(a). This was the position until Section 5(1) was amended by the 2003 Amendment Act to exclude applications from 'illegal immigrants'. Thus, the claim that undocumented migrants to other Indian States were not able to secure citizenship is erroneous. Section 6A carves out an exception in that regime for the State of Assam for the reasons discussed above. Even otherwise, conferring citizenship has a nexus since the legislative object of introducing Section 6A was

[131] See opinion of Roberts J in Williums-Yulee v. The Florida Bar, 575 US (2015)

not just to deal with the migration from Assam but to balance it with humanitarian considerations (including conferment of citizenship) for partition refugees.

iii. The challenge under Article 355

79. The petitioners urged that Section 6A violates Article 355 of the Constitution because: (a) Article 355 casts a duty on the Union to prevent external aggression; (b) the expression "external aggression" has been construed a three-Judge Bench in **Sarbananda Sonowal** v. **Union of India**[132] to include aggression caused due to external migration; and (c) Instead of preventing external migration, Section 6A induces more migration into Assam. The judgment in **Sarbananda Sonowal** (supra) was cited to support the submission that the constitutional validity of a provision can be challenged for violation of Article 355.

80. Article 355 provides that it is the duty of the Union to protect States against external aggression and internal disturbance and ensure that the Government of every State is carried on in accordance with the provisions of the Constitution.[133] In **Sarbananda Sonowal** (supra), proceedings were initiated under Article 32 to challenge the constitutional validity of the IMDT Act and the Illegal Migrants (Determination by Tribunals) Rules 1984[134]. Their validity was challenged on the ground that the enactment and Rules which dealt with the detection of undocumented migrants in Assam were not as effective as the Foreigners Act

[132] (2005) 5 SCC 665
[133] "355. Duty of the Union to protect States against external aggression and internal disturbance.- It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of this Constitution."
[134] "IMDT Rules"

which applied to the rest of India. A three-Judge Bench of this Court allowed the writ petition and struck down the provisions of the IMDT Act and the IMDT Rules.

81. This Court observed that the Union has a constitutional obligation (or 'duty') to protect states from external aggression in view of Article 355. The three-Judge Bench held that the expression 'aggression' in Article 355 is of wide import and includes actions other than war, such as the inflow of a large number of persons from a neighbouring country[135]. Referring to the Report of Lt. Colonel SK Sinha, the Bench observed that migration from Bangladesh to Assam has led to an alteration of the demographic pattern of the State, thereby reducing the Assamese into a minority in their own State. The Bench noted that since the State of Assam is facing "external aggression and internal disturbance" due to large-scale illegal migration of Bangladesh nationals, the Court must determine if the Union had "taken any measures for that purpose" in view of the constitutional mandate under Article 355.[136] This Court then held that the IMDT Act and IMDT Rules are unconstitutional for violating Article 355:

> "67. The above discussion leads to irresistible conclusion that the provisions of the IMDT Act and the Rules made thereunder clearly negate the constitutional mandate contained in Article 355 of the Constitution, where a duty has been cast upon the Union of India to protect every State against external aggression and internal disturbance. The IMDT Act which contravenes Article 355 of the Constitutional, is therefore, wholly unconstitutional and must be struck down."

[135] Referred to the Statement of Dr Nagendra Singh, India's representative in the Sixth Committee of the General Assembly on the Definition of Aggression; (2005) 5 SCC 665 [52-60]
[136] (2005) 5 SCC 665 [63] "Having regard to this constitutional mandate, the question arises whether the Union of India has taken any measures for that purpose."

82. The IMDT Act and Rules were held to be unconstitutional on the following grounds:

a. The procedure under the Foreigners Act and the Foreigners (Tribunals) Order 1964 is more effective for the identification and deportation of foreigners than the procedure prescribed by the IMDT Act and the Rules[137]. In particular, Section 9 of the Foreigners Act places the burden of proof of being an Indian citizen on the person concerned. The provisions of the IMDT Act and Rules are silent on the onus of proof;

b. In Assam, where the IMDT Act is applicable only 10,015 persons were declared illegal migrants until 30 April 2000 though 3,10,759 inquiries were initiated. However, in West Bengal where the Foreigners Act is applicable, 4,89,046 persons were deported between 1983 and November 1998. Thus, the numbers indicated that the implementation of the IMDT Act and Rules in Assam has made the identification and deportation of illegal migrants more difficult;[138] and

c. The IMDT Act superseded the Immigrants (Expulsion from Assam) Act 1950 and the Passport (Entry into India) Act 1920 which granted the Central Government the power to remove any person who

[137] (2005) 5 SCC 665 [64]
[138] ibid

entered Assam and who was detrimental to the interests of the State, and those who entered without a valid passport, respectively.[139]

83. In addition to the violation of Article 355, this Court also found the IMDT Act and Rules to be violative of Article 14 on the ground that if the purpose was to control the influx of Bangladeshi migrants to Assam, provisions which are more stringent would have to be made. This Court noted that, the provisions of the IMDT Act and Rules were more lenient than the Foreigners Act which applied to the rest of India, where the problem was not as grave as in Assam.[140] Thus, this Court held that there was no nexus between the object sought to be achieved and the means adopted by the enactment and Rules.

84. In **Naga People's Movement of Human Rights** v. **Union of India**[141], the constitutional validity of the Armed Forces (Special Powers) Act 1958[142] and the Assam Disturbed Areas Act 1955 was under challenge. ASFPA was enacted to confer special powers upon the members of the armed forces in the disturbed areas in Assam and Manipur. In terms of the Act, the Governor of the State had the power to issue a notification declaring the whole or any part of the State to which the Act applies as a disturbed area.[143] The Act was amended by Act 7 of 1972 by which the power to issue a notification was also conferred on the Central Government. The Statement of Objects and Reasons of the amendment Bill stated

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[139] (2005) 5 SCC 665 [65]
[140] "70. […] "In such circumstances, if Parliament had enacted a legislation exclusively for the State of Assam which was more stringent than the Foreigners Act, which is applicable to rest of India […] such a legislation would have passed the test of Article 14 as the differentiation so made would have had rational nexus with the avowed policy and objective of the Act."
[141] (1998) 2 SCC 109
[142] "AFSPA"
[143] AFSPA; Section 3

that it was important that the power to issue notifications is extended to the Central Government (in addition to the Governor) in view of the duty cast on the Union by Article 355.[144] One of the contentions of the petitioners for challenging the constitutional validity of the enactment was that Parliament has the competence to enact laws with respect to 'armed rebellion' only in exercise of emergency powers under Articles 352 and 356[145]. The Constitution Bench rejected this argument. Justice Agarwal, writing for the Bench observed that AFSPA was enacted to enable the Central Government to discharge its obligation under Article 355. The learned Judge observed that a proclamation under Article 356 has grave consequences and thus, it was open to Parliament to deal with external aggression and internal disturbances through legislation before the Governor exercises powers under Article 356.[146] Further, this Court also observed that the power of the Central Government to issue a notification under AFSPA does not violate the federal structure in view of Article 355.[147]

85. In **Naga People's Movement of Human Rights** (supra) and **Sarbananda Sonawal** (supra), this Court referred to Article 355 for the purpose of emphasising that one of the duties that is cast upon the Union is to protect States against external aggression and internal disturbance. In **Naga People's Movement of Human Rights** (supra), the legislative object of the 1972 amendment to ASFPA was traced to Article 355. Similarly, in **Sarbananda Sonawal** (supra), the legislative object of the IMDT Act and the IMDT Rules was traced to Article 355.

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[144] (1998) 2 SCC 109 [14]
[145] (1998) 2 SCC 109 [28]
[146] (1998) 2 SCC 109 [32]
[147] (1998) 2 SCC 109 [41]

Though the three-Judge Bench in paragraph 67 of the judgment held that the IMDT Act and Rules were unconstitutional for violation of Article 355 of the Constitution, the scrutiny of the legislation and Rules was on Article 14 grounds. The reasons summarised in paragraph 82 of this judgment elucidate that the framework of analysis was limited to a comparison of the provisions of the IMDT Act and Rules (applicable to Assam) and the Foreigners Act (applicable to the rest of India). On a comparison of the provisions, it was found that the provisions of the Foreigners Act were more effective for achieving the object (that is, the detection of migrants). The Court held the IMDT Act and the IMDT Rules unconstitutional on the ground that: (a) Undocumented immigrations impacted Assam on a much larger scale as compared to the other States in India.; (b) Since the State of Assam faces a graver problem, the provisions of the IMDT Act and the IMDT Rules ought to be more stringent than the Foreigners Act which applies to the rest of the States in India; and (c) The provisions of the IMDT Act and IMDT Rules were less effective compared to the provisions of the Foreigners Act. Thus, the classification effected by the IMDT Act and the IMDT Rules between the State of Assam and the other States in India was held not to have a nexus with the object.

86. Both in **Sarbananda Sonawal** (supra) and in **Naga People's Movement of Human Rights** (supra), this Court referred to Article 355 to test the validity of the means adopted to achieve the legislative object under Article 14 of the Constitution. The test of 'legitimate objective' is one of the prongs used by the Courts in its rights framework analysis. The first test that the Courts adopt to determine if the violation of fundamental rights is justified, based on the proportionality standard is to assess

if the law was enacted in pursuance of a 'legitimate object'.[148] The Constitution Bench in **Naga People's Movement of Human Rights** (supra) and the three-Judge Bench in **Sarbananda Sonawal** (supra), relied on Article 355 for this purpose, that is, to test the constitutional legitimacy of the object of the amendment and the enactment, respectively.

87. Article 355, couched in Part XVIII of the Constitution which deals with emergency powers stipulates that it is the **duty** of the 'Union' to (a) protect every State against external aggression and internal disturbance; and (b) ensure that the government of every State is carried on in accordance with the provisions of the Constitution. It is established jurisprudentially that the correlative of a duty is a right.[149] The question is, however, whether the duty vested in the Union in Article 355 confers a correlative right that a legislation can be challenged for violation of the constitutional provision.

88. Article 355 was absent in the Draft Constitution of 1948. Dr BR Ambedkar introduced the provision as a justification for the Union's interference in the administration of States in exercise of the emergency powers conferred by the Constitution.[150] Dr Ambedkar explained that in a federal Constitution such as the Indian Constitution where the States are sovereign since they also have legislative power in their own field, the Centre can interfere with the administration of States only when there is 'some obligation which the Constitution imposes upon the

[148] The first prong of the proportionality test. See Madhyamam Broadcasting Limited v. Union of India, (2023) SCC OnLine SC 366
[149] W.N Hohfeld, Fundamental Legal Conceptions as applied in Judicial Reasoning and other legal essays, (W.W. Cook ed., Yale University Press, 1919).
[150] See Constitution of India, Articles 352 and 356

Centre'.[151] In **SR Bommai** v. **Union of India**[152], Justice Sawant (writing for himself and Justice Singh) referring to the debates in the Constituent Assembly observed that Article 355 is not an independent source of power for interfering with the functioning of the State Government but is a **justification** for the measures adopted in Articles 356 and 357.[153]

89. The question is whether a legislative enactment can be challenged for contravention of Article 355 of the Constitution. For more than one reason, I think that such an interpretation would lead to disastrous consequences. Article 355 casts a duty on the Union to (a) protect every State against "external aggression"; (b) protect every State against "internal disturbance"; and (c) ensure that the "government of every State is carried out in accordance with the provisions of the Constitution". All these three phrases (internal disturbance, external aggression and government of the State to be carried out in accordance with the provisions of the Constitution) feature in Part XVIII of the Constitution which deals with emergency powers. If the duty of the Union to safeguard States against external aggression is justiciable in view of Article 355, then petitions could be filed claiming that the Union has not appropriately dealt with **'any'** of the situations referred to in Article 355. It could also be contended that emergency powers ought to have been invoked by the Union to deal with the situations appropriately. Reading the duty in Article 355 into a right would effectively place the emergency powers with citizens and courts. Such a consequence would be catastrophic for the federal structure of the Indian Constitution and would subjugate the constitutional status of States.

[151] Dr BR Ambedkar, Constituent Assembly Debates (Volume 9, 3 August 1949)
[152] (1994) 3 SCC 1
[153] (1994) 3 SCC 1 [57]

Article 355 cannot be elevated as an independent ground of judicial review in view of the purpose of the provision (as a justification clause) and the impact of such a reading on the federal framework of the Constitution.

90. The validity of the exercise of the Presidential power under Part XVIII (such as Article 352 and Article 356) has been held to be amenable to judicial review.[154] Proclamations under Articles 352 and 356 are amenable to review on the ground that the exercise of power is beyond the limits of the power prescribed by the constitutional provision. The petitioners in this case, however, seek to challenge the constitutional validity of a legislative provision (Section 6A) on the ground of Article 355. In doing so they seek to elevate Article 355 to an independent ground for judicial review of legislative action. This is beyond the scope of the provision. Besides a lack of legislative competence and a violation of Part III, legislation may be challenged for breach of a substantive limitation on legislative power, created by a constitutional provision. Article 355 is not however such a provision.

iv. Section 6A does not violate Article 29(1) of the Constitution

91. Article 29(1) of the Constitution provides that 'any section of citizens' residing in the territory of India or any part thereof and having a distinct language, script, or culture of their own shall have the right to conserve the same'. The claim of the petitioners is that Section 6A is violative of Article 29 because it permits people from Bangladesh who have a distinct culture to be ordinarily resident in Assam and secure citizenship which infringes upon their right to conserve Assamese culture.

[154] SR Bommai v. Union of India, 1994 3 SCC 1; In Re Article 370 of the Constitution, 2023 INSC 1058

92. The heading to Article 29(1) reads 'protection of interests of minorities'. However, the text of the provision is not limited to minorities. It confers the right to any 'section of citizens' having a distinct language, script or culture. Thus, Article 29 applies to non-minorities as much as it applies to minorities, provided that (a) the section is of citizens; and (b) that section has a distinct language, script or culture.[155] The right that is granted to this beneficiary class is the right to 'conserve' their language, script or culture. The people of Assam (the Assamese) are a section of citizens who have a distinct language, script of culture which they are entitled to conserve in terms of Article 29(1).

93. Two prominent points must be noted at the outset. First, Article 29(1) confers the right to 'conserve' culture, that is, the operation of the law must not interfere with the ability of the section to take steps to protect the culture from harm or destruction. Second, the provision must be read in light of the multi-cultural and plural nation that India is.

94. This Court has not had the opportunity to deal with the scope of Article 29(1) elaborately in the past. The provision has been considered in a limited manner when this Court had to determine the issue of whether the right guaranteed by Article 30 to establish minority educational institutions must be limited to the purpose of conserving language, script or culture.[156] This Court held that a minority educational institution can be established for the purpose of conserving the language, culture and script but it is not necessary that it must be limited to that

[155] See Ahmedabad St. Xavier's College Society v. State of Gujarat, (1974) 1 SCC 717, (9J) [Chief Justice Ray writing for himself and Justice Palekar [5,6], Justice Khanna [73], Justice Mathew writing for himself and Justice YV Chandrachud [125, 126]; Rev. Father W Proost v. State of Bihar [5J] (1969) 2 SCR 73 [8,9]
[156] Rev. Father W. Proost v. The State of Bihar, (1969) 2 SCR 73; Ahmedabad St. Xavier's College Society v. State of Gujarat, (1974) 1 SCC 717

purpose.[157] This Court in the context of the scope of the right to establish and administer minority educational institutions under Article 30(1) also observed that the right would include the choice of the medium of instruction. The imposition of the medium of instruction by the State would be violative of the right of minority educational institutions under Article 30(1) read with Article 29(1).[158]

95. In **Jagdev Singh Sidhanti** v. **Pratap Singh Daulta**[159], the question before the Constitution Bench was whether appeals made to the electorate to vote or refrain from voting on account of language constitute a corrupt practice under Section 123(3) of the Representation of the People Act 1951[160]. The Constitution Bench held that the issue of whether any person was guilty of the corrupt practice under Section 123(3) must be determined in the backdrop of Article 29(1) of the Constitution. In this context, Justice JC Shah writing for the Bench observed that the right to conserve language includes the right to agitate for the protection of the language and that political agitation for that purpose cannot be regarded as a corrupt practice.

96. Article 29(1) confers the right to take steps (through positive action) for the preservation of culture, language and script. The phrase 'conserve' in the provision denotes positive action taken towards a specific end.[161] Article 29(1) guarantees a section of citizens, the right to take positive steps to protect their culture. The

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[157] ibid
[158] See DAV College, Bhatinda v. State of Punjab, AIR 1969 SC 465; and State of Karnataka v. Associated Management of English Medium Primary and Secondary Schools, (2014) 9 SCC 485 where the Constitution Bench held that imposing mother tongue as the medium of instruction in students infringes upon Article 30(1) read with Article 29(1)
[159] (1964) 6 SCR 750
[160] "The appeal by a candidate […] to vote or refrain from voting for any person on the ground of religion, race, caste, community or language […]"
[161] Oxford Dictionary defines the phrase as "to protect something and prevent it from being changed or destroyed".

provision protects those steps that have a nexus with the end of preservation of the culture. There is sound reason to provide a constitutional guarantee to conserve culture, language or script. It is a constitutional recognition of the fact that culture, language and script die a natural death if positive steps are not taken to promote and protect them.[162] This is particularly true in a multi-cultural and multi-linguistic country such as India.

97. The second principle is that a law or an executive action is unconstitutional to the extent that it prevents a section from taking steps to preserve their culture. At this juncture, it must be noted that it is now settled that the fundamental rights include both negative and positive rights. The negative right flowing from Article 29(1) prevents the State from interfering with the right of the section of citizens to conserve their culture. The Courts must adopt the well-established effects standard to test if the action of the State is violative of Article 29(1). The positive right flowing from Article 29(1) casts a duty on the State to create conditions for the exercise of the right to conserve culture.[163]

98. In **Jagdev Singh Sidhanti** (supra), this Court also observed that the right guaranteed by Article 29(1) is absolute.[164] It is true that Article 29(1), unlike Article 19 of the Constitution, does not prescribe grounds for the reasonable restrictions of the right. It must be noted that the decision in **Jagdev Singh Sindhanti** (supra) was rendered in 1964 when the opinion of this Court in **AK Gopalan** v. **State of**

[162] AIR 1950 SC 27
[163] For a detailed exposition on the positive and negative facets of a fundamental right, see the opinion of Chief Justice Chandrachud in Supriyo @ Supriyo Chakraborty v. Union of India, 2023 INSC 920 [156-158]
[164] "25 […] Unlike Article 19(1), Article 29(1) is not subject to any reasonable restrictions. The right conferred upon the Section of the citizens residing in the territory of India or any thereof to conserve their language, script or culture is made by the Constitution absolute"

Madras[165] held the field on the interpretation of fundamental rights. In **AK Gopalan** (supra), the majority of this Court observed that the fundamental rights operate in mutually exclusive silos. In 1970, the decision in **Rustom Cavasjee Cooper** v. **Union of India**[166], rejected this interpretation of Part III holding that fundamental rights are not water-tight compartments. Once this Court has held that fundamental rights are not-water right compartments, rights which are not expressly subject to reasonable restrictions can be restricted to give effect to other fundamental rights.[167] For example, Article 30 which guarantees the right to establish and administer educational institutions, similar to Article 29, is not subject to an express restrictions clause. This Court in numerous decisions has held that the absence of a subjection clause does not mean that a minority educational institution cannot be regulated.[168] Thus, the observation in **Jagdev Singh Sidhanti** (supra) that the right guaranteed by Article 29 is absolute is no more good law is view of the subsequent developments on the interpretation of Part III of the Constitution.

99. It is in this backdrop that the issue of whether Section 6A is violative of Article 29(1) of the Constitution must be decided. The petitioners' contention that Section 6A is violative of Article 29 is based on the following premises: (a) conferring citizenship to migrants from Bangladesh to Assam will increase Bengali population in Assam; and (b) the increase in Bengali population affects the culture of the Assamese population. The premise of the petitioners argument is not that the effect of the provision is that the people of Assam are **prevented** from taking steps to

[165] AIR 1950 SC 27
[166] (1970) 1 SCC 248; Also see Maneka Gandhi v. Union of India, (1978) 1 SCC 248
[167] See Indian Young Lawyers Association v. State of Kerala, (2019) 11 SCC 1 [217]
[168] See State of Kerala v. Very Rev. Mother Provincial, (1970) 2 SCC 417; Ahmedabad St. Xavier's College Society v. State of Gujarat, (1974) 1 SCC 717; TMA Pai Foundation v. State of Karnataka, (2002) 8 SCC 481

conserve their culture neither is it that the State is not taking effective steps to create conditions to enable groups to take steps to conserve culture. The argument of the petitioners is that the culture of Assam is infringed by the large influx of Bangladeshi immigrants who are conferred citizenship and Section 6A to the extent that it allows the influx is unconstitutional.

100. I am unable to accept this argument. First, as a matter of constitutional principle, the mere presence of different ethnic groups in a State is not sufficient to infringe the right guaranteed by Article 29(1). As explained above, Article 29(1) confers the right to 'conserve' which means the right to take positive steps to protect culture and language. The petitioners ought to prove that the necessary effect of the law that promotes the presence of various ethnic groups in a State is that another ethnic group is unable to take **steps** to protect their culture or language. The petitioner also ought to prove that the inability to take steps to conserve culture or language is attributable to the mere presence of different groups.

101. Second, various constitutional and legislative provisions protect Assamese cultural heritage. The Constitution provides certain special provisions for the administration of Tribal Areas in Assam. The Constitution (Twenty-second Amendment) Act 1969 included Article 244A of the Constitution. Article 244A stipulates that notwithstanding anything in the Indian Constitution, Parliament may by law form an autonomous State within Assam comprising wholly or in part of all or any of the tribal areas. Parliament may by law also create a body to function as a Legislature for the autonomous State. Article 330 provides that seats must be

reserved in the House of the People for the Scheduled Tribes in the autonomous districts of Assam. By the Constitution (Twenty-second Amendment) Act 1969, Article 371B was included in the Constitution which provides a special provision with respect to the State of Assam. According to the provision, the President may by an order provide for the constitution and functions of a committee of the Legislative Assembly of the State consisting of the members of the Assembly elected from the tribal areas and such number of other members of the Assembly. The Sixth Schedule to the Constitution consists of provisions regarding the administration of tribal areas in the State of Assam, among other States.

102. Article 345 of the Constitution provides that the State Legislature may by law adopt any one or more language as the language to be used for official purposes in the State. In exercise of the power under Article 345, the Legislature of the State of Assam enacted the Assam Official Language Act 1960[169]. The enactment adopts Assamese as the language for all official purposes of the State of Assam.[170] The enactment further safeguards the use of languages on the basis of usage within the geographical limits. Section 4 provides that only languages which were in use immediately before the commencement of the Assam Official Language Act shall continue to be used for administrative and other official purposes up to and including the level of the Autonomous Region or the Autonomous District.[171] The Assam Official Language Act also provides that the Bengali language would be used for administrative and other official purposes upto and including the “district

[169] “The Assam Official language Act”
[170] The Assam Official Language Act 1960, Section 3
[171] The Assam Official Language Act 1960, Section 4. The adoption of any other language for the administrative or official purposes of the region must be by a majority of not less than two-thirds of the members present and voting.

of Cachar until the Mohkuma Parishads and Municipal Boards of the district."[172] In addition to the above, the State Government also has the power to direct the use of the language in such parts of the State of Assam through notification.[173] The cultural and linguistic interests of the citizens of Assam are protected by constitutional and statutory provisions. Thus, Section 6A of the Citizenship Act does not violate Article 29(1) of the Constitution for the above reasons.

v. Section 6A(3) is constitutional

103. Justice Pardiwala in his opinion has concluded that Section 6A(3) is unconstitutional for the following reasons:

a. The low detection of immigrants who entered Assam between 1966-71 is attributable to the manifest arbitrariness of the mechanism prescribed by Section 6A(3);

b. Section 6A(3) requires the migrant to be detected as a foreigner, to register as a citizen. However, the mechanism does not provide for self-declaration or voluntary detection as a foreigner. The process of detection can only be set in motion by the State[174]. This is a clear departure from the scheme of the Citizenship Act and Articles 6 and 7 of the Constitution which allows acquiring citizenship through registration[175]; and

[172] The Assam Official Language Act 1960, "Section 5. The adoption of any other language for the administrative or official purposes of the region must be by a majority of not less than two-thirds of the members present and voting"
[173] The Assam Official Language Act 1960, Section 7.
[174] Paragraphs 166-168 of the judgment of Justice Pardiwala
[175] Ibid, 173

c. Section 6A(3) does not prescribe an outer time limit for the detection of an immigrant to Assam as a foreigner. This militates against the purpose of the provision and is arbitrary for the following reasons:

   i. The name of a person who is detected as a foreigner today would be deleted from the electoral rolls for ten years from the date of detection. This consequence is not in consonance with the object of the provision which was early detection, deportation and conferment of citizenship[176];

   ii. Placing the onus on the State to detect a foreigner coupled with the absence of temporal limit allows immigrants to continue to be on the electoral rolls and enjoy being de-facto citizens[177]; and

   iii. Section 6A(3) incentivizes undocumented immigrants from Bangladesh to stay in Assam indefinitely until they are detected as Foreigners since they will be able to acquire citizenship only if they are 'ordinarily resident' in Assam[178].

104. To recall, Section 6A(2) deems all persons of Indian origin who came to Assam from Bangladesh before 1 January 1966 to be citizens of India. Section 6A(3) prescribes a procedure for persons of Indian origin who migrated from

[176] Ibid, 191 "Thus, an immigrant whose name figures in the electoral roll, despite being a foreigner continues to be eligible to vote in the elections till that person is detected as a foreigner and the name of that person is struck off the electoral roll. There being no temporal limit to the applicability of Section 6A, this situation would continue in the years to come till the detection exercise is completed."
[177] Ibid, 194
[178] Ibid, 195

Bangladesh to Assam between 1 January 1966 to 24 March 1971 to acquire citizenship. The person must have been:

a. An ordinary resident of Assam since the date of entry; and

b. Detected to be a foreigner, for which the opinion of the Tribunal constituted under the Foreigners Tribunals Order will be deemed as sufficient proof.

The person who satisfies the above conditions must register in accordance with the Rules framed by the Central Government in exercise of the power under Section 18.

a. The interplay of NRC and the citizenship regime

105. The Central Government prepared the National Register of Citizens[179] in Assam in 1951 which consisted of information on all the citizens in Assam.[180] In exercise of the power under Section 18(1) and (3), the Central Government notified the Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules 2003[181].[182] Rule 3 of the Citizenship Rules 2003 provides that the Registrar General of Citizen Registration must establish and maintain the National Register of Indian Citizens. The register must contain, *inter alia,* the following particulars with respect to every citizen: name, sex, date of birth, place of birth, and national identity

[179] "NRC"
[180] See Anil Roychoudhury, National Register of Citizens 1951, (Vol 16, Issue no. 8, 21 Feb 1981); Home and Political Department (Government of Assam), White Paper on Foreigners Issue (October 20 2012). The gazette notification of the Ministry of Home Affairs directing the preparation of NRC in 1951 is not available in public domain.
[181] " The Citizenship Rules 2003"
[182] Vide G.S.R. 937 (E), dated 10th December, 2003, published in the Gazette of India, Extra., Pt. II, Sec.3 (ii), dated 10th December, 2003

number. Rule 4 deals with the preparation of the National Register of Indian Citizens. To prepare the National Register of Indian Citizens, the Central Government must carry a house to house enumeration for the collection of specific particulars relating to each individual, including the citizenship status.[183] The particulars collected are then required to be verified by the Local Registrar.[184] During the verification process if the citizenship of any person is doubtful, the Local Registrar must enter their details with appropriate remarks in the population registrar for further enquiry. The individual must be immediately informed of the doubtful citizenship.[185] Every person whose citizenship is doubtful would be given an opportunity of being heard before a final decision is taken to include or exclude their particulars in the National Register of Indian Citizens.[186] The Draft NRC must be published by the Sub-district or the Taluk Registrar for inviting objections or for corrections.[187] The Sub-district or the Taluk Registrar must consider the objections within a period of ninety days. The Rules also provide for an opportunity to appeal against the order to the District Registrar of Citizen Registration.[188]

106. On 9 November 2009, the Central Government notified the Citizenship (Registration of Citizens and Issue of National Identity Cards) Amendment Rules 2009[189] including Rule 4A to the Citizenship Rules 2003.[190] Rule 4A is a special provision for the preparation of NRC in the State of Assam.[191] By virtue of the

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[183] The Citizenship Rules 2003; Rule 4
[184] The Citizenship Rules 2003, Rule 4(3)
[185] The Citizenship Rules 2003, Rule 4(4)
[186] The Citizenship Rules 2003, Rule 4(5)(a)
[187] The Citizenship Rules 2003, Rule 4(6)(a)
[188] The Citizenship Rules 2003, Rule 4(6) and Rule 4(7)
[189] "2009 Amendment Rules"
[190] By G.S.R. 803(E) dated 9 November 2009
[191] "4A. Special provisions as to National Register of Indian Citizens in the State of Assam—
(1) Nothing in rule 4 shall, on and after the commencement of the Citizenship (Registration of Citizenship and Issue of National Identity Cards) Amendment Rules, 2009, apply to the State of Assam.

provision, the procedure prescribed in Rule 4 does not apply for the preparation of NRC in the State of Assam. Rule 4A(2) provides that the Central Government for the purpose of preparing NRC in Assam must invite **applications** from all residents including information on the citizenship status based on National Register of Citizens 1951 and the electoral rolls up to the midnight of 24 March 1971. The 2009 Amendment Rules included a Schedule to the Citizenship Rules 2003 prescribing the manner of preparation of the NRC in the State of Assam. The Schedule prescribes a different procedure for the preparation of the NRC in the State of Assam. For preparing the NRC for the rest of India under Rule 4, information on the citizenship status must be collected by the Central Government on door-to-door inspection.[192] However, in the case of Assam, an application must be made by the residents of Assam.[193]

107. According to the Schedule to the Citizenship Rules 2003, the procedure for the preparation of NRC in Assam is as follows:

a. The District Magistrate must publish the copies of NRC 1951 and electoral rolls up to the midnight of the 24th day of March 1971;[194]

(2) The Central Government shall, for the purpose, of the National Register of Indian Citizens in the State . of Assam, cause to carry out throughout the State of Assam for preparation of the National Register of Indian Citizens in the State of Assam by inviting applications from all the residents, for collection of specified particulars relating to each family and individual, residing in a local area in the State including the citizenship status based on the National Register of Citizens 1951, and the [electoral rolls up to the midnight of the 24th day of March, 1971.
(3) The Registrar General of Citizens Registration . shall notify the period and duration of the enumeration in the Official Gazette.
(4) The manner of preparation of the National Register of Indian Citizens in the State of Assam shall be such as specified in the Schedule appended to these rules."

[192] The Citizenship Rules 2003; Rule 4(1)
[193] The Citizenship Rules 2003; Paragraph 2(2) of the Schedule and Rule 4A(2)
[194] The Citizenship Rules 2003; Paragraph 2(1) of the Schedule

b. All residents of Assam must file applications to the Local Registrar of Citizen Registration[195];

c. The Local Registrar of Citizen Registration must scrutinize all the applications and prepare a consolidated list which must contain the names of (i) persons who appear in electoral rolls prior to the year 1971 or NCR 1951, and (ii) their descendants[196]; and

d. The name of a person who has been declared as an illegal migrant or a foreigner must not be included in the consolidated list[197].

108. The NRC consolidates together the names of all citizens in relation to the State of Assam. At the same time, it is a process for the detection of foreigners. The Citizenship Act and the Rules framed thereunder and the Foreigners Act form a scheme on Indian citizenship which must be read as a whole.

109. The Central Government notified the Citizenship Rules 2009 in exercise of the powers conferred by section 18 of the Citizenship Act 1955. Part IV of the Rules deals with the provisions for the citizenship of persons covered by Assam Accord. Rule 19(1) stipulates that the Central Government may for the purposes of Section 6A(3) appoint an officer not below the rank of Additional District Magistrate as the registering authority. Rule 19(2) states that an application must be made in Form XVIII[198] annexed to the Rules, thirty days from the date of receipt of the order from

[195] The Citizenship Rules 2003; Paragraph 2(3) of the Schedule
[196] The Citizenship Rules 2003; Paragraph 2(3) of the Schedule
[197] The Citizenship Rules 2003; Paragraph 3(2) of the Schedule
[198] The Citizenship Rules 2009

Sch. 1, Form XVIII

This Form when completed should be forwarded in triplicate to the Chief Secretary to the Government of the State in which the applicant is resident.

Note. – Serial No. in this register should correspond with the number l the registration certificate.

FORM XVIII
[See rule 19(2)]

THE CITIZENSHIP RULES, 2009

(To be filed in quadruplicate)

APPLICATION FOR REGISTRATION UNDER SECTION 6A OF THE CITIZENSHIP ACT, 1955

1. Name in full of applicant
   (Block Capitals, surname first)……...

2. Father's/ Husband's Name……....

3. Date and Place of birth…….…….

4. Sex, Height, Colour of eyes……

5. Whether of Indian origin-If so, how……..

6. Present Nationality……

7. Occupation or profession…….…….

8. Date and place of arrival in Assam from Bangladesh……..……..……..

9. First address in Assam after arrival…….……..

10. Present address in Assam……..

11. Date from which ordinarily resident in Assam……..……..

12. Date and place of detection as a foreigner……...

13. Name and address of the Tribunal declaring him
    as a foreigner; case number and date of order…….……

14. Name of husband/wife and children……

15. Physical identification marks of applicant……..……..

    (1)
    (2)

the Foreigners Tribunal declaring the person as a Foreigner. The period may be extended to sixty days by the registering authority after recording reasons.[199] Rule 19(2A) was included by a notification dated 16 July 2013.[200] Rule 19(2A) provides that a person who has been declared as a foreigner prior to 16 July 2013 and has not registered either because of the non-receipt of the order of the Foreigners Tribunal or the refusal of the registering authority to register such person as a Foreigner due to delay should make an application (in Form XVIII) within thirty days from the receipt of the order or from the date of publication of the notification. Form XVIII which is required to be filed by a person who is eligible to acquire citizenship under Section 6A(3) in terms of Rule 4 requires the submission of details relating to the order declaring such person as a foreigner.[201]

110. As explained above, the object of Section 6A is not limited to conferring citizenship but also extends to excluding a class of migrants from securing citizenship. Section 6A is one of the provisions in the larger citizenship project. The legal regimes on detecting foreigners and the citizenship law overlap at more than one point. Section 6A is one pea in the pod of a long-time redressal of issues. The

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16. Signature or thumb impression of applicant……..……...……

TO BE FILLED IN BY THE OFFICER OF THE REGISTERING AUTHORITY

1. Registered at……on……..20…….....

[199] The Citizenship Rules 2009, Proviso to Rule 19(2)
[200] G.S.R 488(E)
[201] "[…]
11. Date from which ordinarily resident in Assam
12. Date and place of detection as a foreigner
13. Name and address of the Tribunal declaring him as a foreigner; case number and date of order."

effectiveness (or the impact) of Section 6A must be viewed from this holistic perspective.

b. Section 6A(3) is not unconstitutional on the ground of temporal unreasonableness

111. The opinion of Justice Pardiwala refers to the doctrine of temporal unreasonableness to hold that even if Section 6A(3) was constitutional at the time of its enactment in 1985, it has **acquired** unconstitutionality by the efflux of time because the provision has not been effective enough to redress the problem.

112. One of the settled principles of judicial review is that an enactment which was reasonable and valid at the time of enactment, may become arbitrary over time. In **Motor General Traders** v. **State of Andhra Pradesh**[202], the constitutional validity of Section 32(b) of the Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act 1960 which exempted all buildings built on or after 26 August 1957 from the purview of the Act was challenged. The petitioners challenged the provision on the ground that it had become unreasonable over the course of time. This argument was accepted by a two-Judge Bench of this Court. Justice ES Venkataramiah (as the learned Chief Justice then was), writing for the Bench observed that a non-discriminatory provision may in the course of time become discriminatory and violative of Article 14.[203] The learned Judge noted that legislation may become arbitrary over the course of time if the classification does not share a nexus with the object anymore:

[202] (1984) 1 SCC 222
[203] (1984) 1 SCC 222 [22]

> "23. […] The long period that has elapsed after the passage of the Act itself serves as a crucial factor in deciding the question whether the impugned law has become discriminatory or not because the ground on which the classification of buildings into two categories is made is not a historical or geographical one but is an economic one. Exemption was granted by way of an incentive to encourage building activity and in the circumstances such exemption cannot be allowed to last for ever.
>
> 30. After giving our anxious consideration to the learned arguments addressed before us, we are of the view that clause (b) of Section 32 of the Act should be declared as violative of Article 14 of the Constitution because the **continuance of that provision on the statute book will imply the creation of a privileged class of landlords without any rational basis as the incentive to build which provided a nexus for a reasonable classification of such class of landlords no longer exists by lapse of time in the case of the majority of such landlords.** There is no reason why after all these years they should not be brought at par with other landlords who are subject to the restrictions imposed by the Act in the matter of eviction of tenants and control of rents.
>
> (emphasis supplied)

113. In **Rattan Arya** v. **State of Tamil Nadu**[204], the issue for the consideration of a three-Judge Bench of this Court was whether Section 30(ii) of the Tamil Nadu Buildings (Lease and Rent Control) Act 1960 is constitutionally valid. Section 30(ii) exempted the application of the Act to any residential building occupied by any tenant if the monthly rent was higher than Rupees Four Hundred. Relying on **Motor General Traders** (supra), this Court held that the provision was unconstitutional because the justification for imposing a ceiling of Rupees Four Hundred in 1973 had become unreal upon the passage of time because of the multi-fold increase in

[204] (1986) 3 SCC 385

residential rents.[205] The premise of the principle of temporal unreasonableness is that a classification which was reasonable when the law was enacted has become unreasonable over the course of time. Due to the change in circumstances with time, the classification may no longer have a reasonable nexus with the object sought to be achieved. In such a situation, the law attracts unconstitutionality.

114. As identified above, the purpose of Section 6A was to deal with the influx of undocumented immigrants from East Pakistan to Assam. Section 6A provides that only undocumented immigrants who entered Assam before the cut-off date of 25 March 1971 shall be given citizenship. The beneficiary class of migrants is further divided into two sections: those who entered before 1 January 1966 and those who entered after 1 January 1966 but before 25 March 1971. The difference between Section 6A(2) and Section 6A(3) is that in the case of the former, the migrants are deemed to be citizens while in the case of the latter, they acquire citizenship after ten years from the date of detection. In the interim period (ten years since the detection), they lose their electoral rights. The consequence of being detected to be a foreigner who entered between 1966 to 1971 is that they lose their right to political franchise for ten years. Upon their detection, they will have the same rights and obligations as a citizen of India including the right to obtain a passport under the Passports Act 1967. Thus, undocumented migrants who fall in this category will be citizens of India upon detection for all purposes except the exercise of electoral franchise. The legislature in its good wisdom has proceeded on the basis that a

[205] Also see Malpe Vishwanath Acharya v. State of Maharashtra, (1998) 2 SCC 1

consequence of such a great magnitude must only ensue upon detection as a foreigner through a quasi-judicial proceeding.

115. In exercise of the powers conferred by Section 3 of the Foreigners Act, the Central Government notified the Foreigners Tribunals Order. Once the question of whether a person is a foreigner is referred to the Foreigners Tribunal[206], the reference is decided based on the following procedure:

a. Upon receiving the reference from the Central Government or any competent authority, the Tribunal must serve a show-cause notice on the person to whom the question relates[207] within ten days from the receipt of the reference[208];

b. The notice must be served in English and the official language of the State. The notice must indicate that the burden is on the person proceeded against to prove that they are not foreigners[209];

c. The individual is given ten days to reply to the show-cause notice and an additional ten days to produce evidence to support their case;[210]

d. The individual must be given a reasonable opportunity to make a representation and produce evidence to support their case[211]; and

[206] The Foreigners (Tribunals) Order 1964; Clause 2
[207] The Foreigners (Tribunals) Order 1964, Clause 3(2)
[208] The Foreigners (Tribunals) Order 1964, Clause 3(3)
[209] The Foreigners (Tribunals) Order 1964, Clause 3(4)
[210] The Foreigners (Tribunals) Order 1964; Clause 3(8)
[211] The Foreigners (Tribunals) Order 1964; Clause 3(1)

e. The Tribunal must submit its opinion after hearing such persons who desire to be heard and after considering the evidence produced[212]. The case must be disposed of within a period of sixty days from the date of receipt of the reference[213].

116. In addition to the above, the Tribunals Order also prescribes detailed provisions regarding the service of notice indicating that the core tenets of natural justice must be provided to the person suspected to be a foreigner.[214] The Tribunals have the powers of a civil court while trying a suit under the Code of Civil Procedure 1908 and the powers of a Judicial Magistrate First Class under the Code of Criminal Procedure 1973[215]. The order of the Foreigners Tribunal, being an order of a quasi-judicial body is subject to judicial review before the High Court and then this Court.

117. Clause 5.4 of the Assam Accord states that the foreigners who were detected to have entered between 1966 to 1971 were required to register before the Registration Officers in accordance with the provisions of the Registration of Foreigners Act 1939 and the Registration of Foreigners Rules 1939. The Assam Accord devised a model in which upon detection as a foreigner, they would have to register in the existing mechanism.

118. However, Section 6A deviated from the Assam Accord in this regard. Section 6A(3) stipulates that upon detection, the person must register themselves in

[212] ibid
[213] The Foreigners (Tribunals) Order 1964; Clause 3(14)
[214] The Foreigners (Tribunals) Order 1964; Clause 3(5) (a) to (j)
[215] The Foreigners (Tribunals) Order 1964; Clause 4

accordance with the rules "made by the Central Government in this behalf under Section 18". The Citizenship Rules were amended by a notification dated 15 January 1987[216] including Rules 16D, 16E and 16F. These Rules implement the substantive provisions of Section 6A(3). 16D states a fresh reference must be made to the Foreigners Tribunal if the question of whether a person satisfies the condition under Section 6A arises. Rule 16E deals with the jurisdiction of Tribunals constituted under the Foreigners (Tribunals) Order 1964 to deal with references under Section 6A(3). Rule 16F provides for the registering authority and procedure for registration for the purpose of Section 6A(3).[217]

119. The legislature by adopting Section 6A(3) in the current form required the State to make rules for its implementation. As explained above, the detection as a foreigner is an elaborate process that required the State to build manpower and infrastructure for its implementation. The Legislature conferred the State with the duty to implement the provision after it had built sufficient infrastructure for the same. The purpose of Section 6A(3) was to provide a long term solution to the issue of the large influx of migrants from Bangladesh to Assam. While it is true that

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[216] See Notification No. GSR 25 (E), dt. 15.1.1987

[217] "16F. The registering authority for the purpose of section 6A(3) and form of application foe registration:
(1) The registering authority, for the purpose of sub-section (3) of section 6A of the Act shall be such officer as maybe appointed by each district of Assam by the Central Government.
(2) An application for registration under sub-section (3) of section 6A of the Act shall be filed in Form XXIII by the person with the registering authority for the district in which he is ordinarily resident-
    a. Whithin thirty days from the date ofhis detection as a foreigner, where such detection takes place after the commencement of the Citizenship(Amendment) Rules 1986; or
    b. Within thirty days of the appointment of the registering authority for the district concerned where such detection has taken place before the coomencement of the Citizenship (Amendment) Rules 1986
(3) The registering authority shall, after entering the particulars of the application in a register in Form XXIV, return a copy of the application under his seals to the applicant.
(4) One copy of every application received during a quarter shall be sent by the registering authority to the Central Government and the State Government of Assam along with a quarterly return in Form XXV.
(5) The period referred to in sub-rule (2) may be extended for a period not exceeding sixty days by the registering authority for reasons to be recorded in writing.

one of the causes of concern which led to the Assam Students' Movement (and culminated with the Assam Accord) was the dilution of the electoral right of those native to Assam because of the inflow of migrants, the purpose of Section 6A(3) cannot be limited to it. The objective behind the enactment of the Citizenship (Amendment) Act 1985 was to deal with the larger problem of whether Bangladesh migrants of Indian Origin could secure citizenship in India. The objective of the provision must be understood in the backdrop of the Indian policy on post-partition migration and the Assam movement. The provision strives to bring about a balance between both the objectives. Having said that, the concerns of the petitioners regarding the burden on the resources of the State and on its demographic identity due the influx of illegal migrants in large numbers is not lost to the Court and is a matter of serious concern. The State must effectively create adequate state capacity to deal with undocumented migrants who migrated after the cut-off date prescribed by Section 6A as well as those who have migrated before the cut-off date who do not fulfill the conditions for the grant of citizenship under the provision.

120. In view of the above discussion, I am unable with respect to agree with the observation of my learned brother, Justice Pardiwala that the purpose of Section 6A(3) is merely the speedy and effective identification of foreigners of the 1966-71 stream. The principle of temporal unreasonableness cannot be applied to a situation where the classification is still relevant to the objective of the provision. The process of detection and conferring citizenship in Assam is a long-drawn out process spanning many decades. To strike it down due to lapse of time is to ignore the context and object of the provision.

vi. Section 6A(2) cannot be held unconstitutional for not prescribing a procedure for registration

121. The petitioners submitted that Section 6A(2) is unconstitutional because the provision does not prescribe a procedure for conferring citizenship to those who migrated before 1 January 1966, unlike Section 6A(3) which prescribes a procedure for conferring citizenship to those who migrated between 1966-1971.

122. Section 6A is a substantive provision conferring citizenship on persons who migrated from Bangladesh to Assam. The provision provides that persons who migrated from Bangladesh to Assam before 1 January 1966 shall be **deemed** to be citizens of India from 1 January 1966. The import of the use of the legal fiction is that the law assumes a fact that does not exist.[218]

123. The provisions of the Citizenship Act do not require every person to register to acquire citizenship. Sections 5 and 6 of the Citizenship Act provide for acquiring citizenship through registration and naturalisation. These two provisions require the applicant to follow a process of application.

[218] See Justice GP Singh, Principles of Statutory Interpretation (15th edition, Lexis Nexis), 294; JK Cotton Sinning & Weaving Mills Ltd. V. Union of India, AIR 1988 SC 191

124. However, Sections 3 and 4 of the Act do not require registration for acquiring citizenship. Section 3 deals with citizenship by birth. Section 4 deals with Citizenship by descent. The law does not mandate that persons who are covered in the categories prescribed by Sections 3 and 4 must register to acquire citizenship. Thus, registration is not the de-facto model of securing citizenship in India. The use of the deeming fiction obviates the need for registration. Any person : (a) of Indian origin who migrated from Bangladesh to Assam before 1 January 1966; and (b) who has ordinarily been a resident in Assam since their date of entry is **deemed** to be a citizen of India. The provision does not contemplate a registration regime for persons who fall under this category, similar to Sections 3 and 4 of the Citizenship Act. Thus, Section 6A(2) cannot be held unconstitutional for the only reason that it does not prescribe a process of registration.

D. Conclusion

125. In view of the discussion above, the following are the conclusions:

a. Articles 6 and 7 of the Constitution prescribe a cut-off date for conferring citizenship for migrants from East and West Pakistan at the "commencement of the Constitution", that is 26 January 1950. Section 6A of the Citizenship Act confers citizenship from 1 January 1966 for those who migrated before that date. Those who migrated between 1 January 1966 and 24 March 1971, are conferred citizenship upon the completion of ten years from the date of detection as a foreigner. Section 6A confers citizenship from a later date to

those who are not covered by Articles 6 and 7 of the Constitution. Thus, Section 6A is not violative of Articles 6 and 7 of the Constitution;

b. Section 6A satisfies the two-pronged reasonable classification test:

    i. The legislative objective of Section 6A was to balance the humanitarian needs of migrants of Indian Origin and the impact of the migration on the economic and cultural needs of Indian States;

    ii. The two yardsticks employed in Section 6A, that is migration to Assam and the cut-off date of 24 March 1971 are reasonable. Though other states share a greater border with Bangladesh, the impact of migration in Assam in terms of numbers and resources is greater. Thus, the yardstick of migration to Assam is reasonable. The cut-off date of 25 March 1971 is reasonable because the Pakistani Army launched Operation Search light to curb the Bangladeshi nationalist movement in East Pakistan on 26 March 1971. Migrants before the operation were considered migrants of the Indian partition; and

    iii. Both the above yardsticks have a rational nexus with the object of Section 6A.

c. Undocumented migrants could be registered as citizens under Section 5(1)(a) of the Citizenship Act before it was amended by the Citizenship (Amendment) Act 2003 to exclude ‘illegal immigrants’.

Thus, the claim of the petitioner that Section 6A is unconstitutional because instead of preventing migration to Assam, it incentivizes migrants in other states to come to Assam to secure citizenship through Section 6A is erroneous;

d. The constitutional validity of a legislation cannot be tested for violation of Article 355. Article 355 was included in the Constitution as a justification for the exercise of emergency powers by the Union over States;

e. Section 6A does not violate Article 29(1) of the Constitution. Article 29(1) guarantees the right to take steps to protect the culture, language and script of a section of citizens. The petitioners have been unable to prove that the ability of the Assamese to take steps to protect their culture is violated by the provisions of Section 6A;

f. Section 6A(3) cannot be held unconstitutional on the ground of temporal unreasonableness; and

g. Section 6A(2) cannot be held unconstitutional for not prescribing a procedure for registration.

126. The reference is answered in the above terms.

127. The Registry is directed to obtain administrative instructions from the Chief Justice for placing the matters before an appropriate Bench.

.....CJI
[Dr Dhananjaya Y Chandrachud]

New Delhi;
October 17, 2024