
Citizenship and Illegal Migrants: A Review on Contesting Trend from India

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Abstract

There has been a lot of uproar with regard to recent amendments to citizenship laws. On the one hand, such changes in citizenship laws has generated the concern among scholars how India has granted citizenship status to illegal migrants of certain religious minority community. Such move was viewed as exclusionary where religion is considered as the basis to grant citizenship status which has historically seen to be antithetical to the tenets of liberal democracy. On the other hand, thoughts have also expressed that this amendment has not taken away anybody's rights. While taking into account the logic of both sides of the debate, this paper consider such development as relevant to the understanding of contesting nature of citizenship which has once again reinforced through the recent amendments in India. One may trace its extent through different dimensions of citizenship. This paper has made an attempt to discuss how the egalitarian prospect of citizenship has been contested through its membership dimension in recent times in India. In this context, this paper discusses that how the rights of individual as universal personhood to become a member citizen as a trend has becomes secondary in comparison to national citizenship.

Key Words: citizenship, migrants, law, community & democracy

INTRODUCTION

Conventionally, migration has always been considered as a process for searching new opportunities. However, to what extent such aspiration satisfies the requirement of both individual and communities who are migrating found to be uneven. In case of migrated communities, it is found to be more complex as their integration or assimilation to the host communities has always not reciprocates to the aspiration of former. In fact, many narratives persists how migrant communities still considered as 'other' or minority irrespective of their long generational staying or living at host nations (Oommen 116). Moreover, such concern has largely been discussed in the context of nationalities who have migrated from one

state to another. The migrant communities have always counters problem not only with their assimilation to the host states but also to their inclusion as an equal member. Notwithstanding the above, migration has been considered to be natural and ongoing human activity. However, there is a difference between voluntary and involuntary migration. In this context, concern usually occurs how this act has its implication on shaping the content of citizenship. In recent years, India has also experienced the above concern.

This concern not only attracts our attention about the qualification to identify someone as citizen but also how nation-states continue to be critical in granting membership status of citizenship to the

concerned individual or groups. Moreover, both of the trends have got dominant attention through several amendments to Indian citizenship act in recent times. These are relevant to understand as incorporation of 'illegal migrant' as a category has reinforced the contestation to the membership dimension to the Indian citizenship. In the dominant narrative, contention has emerged with the inclusion of certain groups where government took religion as the basis to provide citizenship to those illegal migrants who belongs to certain religious minority communities.¹ In fact, a lot of discussion has been made about the conditions of their inclusion. While aware about the nature of this ongoing discussion, this paper deals into the concern how such changes once again reinforced about the contesting nature of citizenship as a concept. This has been examined through the membership dimension of the citizenship.

The paper consisted of three sections. The first section has provided an understanding how citizenship has been studied through different dimensions and *membership* is one among them. A critical reading of different dimensions not only suggest about complex character of citizenship but also point out that each of its dimensions could be contested. This has been analysed in the context of citizenship as *membership* in a political community. While explaining the above, the point is made that how membership dimension of citizenship is critical in drawing distinction between citizens and non citizens. In between this wall of separation, how 'illegal migrants' has frequently appeared as a critical category in opposition to legal citizens. Moreover, the above narration has

been substantiated through a critical reading on recent amendments to Indian citizenship act with regard to illegal migrants and their selective inclusion as citizen of India in the second section. In this process, attempt has been made to discuss how contestation once again surfaced with an idea of membership dimensions of citizenship. Citizenship status to illegal migrants may appear to be inclusive but the possibility of contestation could not be escaped. This has been experienced through the massive uproar in the form of protest against the said amendment. No doubt, such shift has generated the discourse about the extent of discriminatory aspect of citizenship laws. While not denying the logic of this discourse, the paper ends with the observation that though membership in a political community bestows formal status but qualifying principle towards its access may not be available in an even manner to those who aspire to achieve a legal citizenship status within a nation-state. Further, nation-states do play a crucial role to determine how the terms of inclusion as citizen to be granted. The above observation has been substantiated through discussing the case of illegal migrants and their inclusion as citizen in India.

Citizenship as membership:

A lot of understanding persist how citizenship has to be studied or understood. One among them is about different dimensions of citizenship which has attracted scholars to engage with this concept. Here, the beginning point has been taken from Stokke's fourfold dimensions of this concept (Stokke 193). They are membership, formal status, rights and participation. In fact, all these four

dimensions found to be overlapped or discussed in a congregated manner by other scholars as well. Like, Jayal has discussed different dimensions of citizenship through three forms. It could be understood as a *legal status* or *bundle of rights and entitlements* or *with a sense of identity and belonging*. The most crucial thing is that each of its dimensions is contested in India (Jayal 12). It may be contested within itself and also among themselves. In assessing the sphere of such tensions one may counter a crucial challenge on who needs to be identified as a citizen and who determines it.

These understanding inform about the contesting nature of citizenship (Stokke 194; Roy 6; Jayal 13). If we consider how citizenship has been defined, multiple meanings have identified by different scholars. The meanings of citizenship are identified as legal, political and civic. This has emerged not only over multiple definitions of the concept (Weil 616). It has also visible through its different dimensions. Moreover, many scholars do agree that it is about membership in a political community.ⁱⁱ This membership has primary in determining the status of citizen as legal one. Commonly, understood as an ideal type or status, the concept of citizenship has been expanded through the legal relationship between an individual and the state in liberal capitalist democracies. It evolved as a status which passed to any individual automatically with the birth independent to the choice or wealth of their parents. Such status has been valued as it necessitates the availability certain rights which only ensures through the birth status within a state. Herein, the state plays a crucial role in extending equal rights to its citizens which

distinguishes their status from non-citizens. The integrating effect fosters a sense of community having a common heritage where everyone, irrespective of their social differences, feels united. Thus emerges an idea of citizenship based on this premise of unity, which is defined by a sense of equality among individual members. Historically, the above distinction have been considered as a ground to describe the conceptual extent of citizenship as exclusionary. Such concern with citizenship has led to develop the foundational understanding that nation-state is crucial in fulfilling one's aspiration as citizen. The above requirement to extend citizenship has got its legal support through the constitutions of nation-states. India is also part of this tradition. Along with birth and decent criteria, Indian constitution has also provided three other methods to acquire citizenship. They are through the naturalization, registration and occupation of territory. Moreover, naturalization component has got most attention with the commencement of globalization when entire world witnessed huge migration across the territorial boundaries of different nation-states. Further, major shift in rights based understanding of citizenship has also compelled many nation-states to revisit their citizenship laws. Such process has brought the increasing importance of naturalization principle in acquiring citizenship status where issues of migrants could be addressed. It has provided an alternative to the conventional way of looking at different attributes of citizenship. In fact, the validity of above understanding sustained through the dominant attributes which generally followed in granting citizenship status. These attributes are widely referred as *jus*

solis and *jus sanguine*. Both of them have advocated for citizenship of somebody through ones birth status. However, domicile as a requirement of getting citizenship considered to be secondary in comparison to the above attributes.

It was with the commencement of globalization realization develop at the nation-state level to extent citizenship status to not only to emigrants but also to those migrants who continues to stay at host nations for economic opportunities. Such trend has brought a new shift in granting *membership* status to both of these groups of population. The above process has opened the drive of inclusion for getting membership to a political community. But it is to be noted that in determining the terms of such inclusion the nation-state has played a critical role. Further, the logic of inclusion has also not equally followed across the categories. However, in practice, mere proclamation of equality does not guarantee equal rights to all or an equal relationship among all members of that political community.

As citizenship status matters in availing different kinds of rights like civil, political and social, inclusion of migrant as citizen continues to be a bigger concern. In fact, scholars do have a shared consensus the validity of above thought especially in case of refugees and migrants (Jayal 82). As their concern always lies with how to secure their membership status in the host state, they are also narrated as aspirational citizen. And global process of migration has opened up the prominence of naturalization principle. Such context has also evolved in case of India. Notwithstanding the above, Indian constitution acknowledges naturalization as

one of the way to acquire its citizenship. Concern occurs over here about the recent amendments in citizenship laws. If India extends its citizenship through the naturalization principle beyond birth or decent criteria, why huge uproar occurs in case of recent changes in citizenship laws? In this regard, a lot of observation has been made which will be presented in the next section. While not denying the logic of these arguments, this paper emphasizes that how the recent changes in citizenship law has sustained the contesting nature of it.

Illegal migrant as a category under Indian citizenship Act:

‘Illegal migrant’ as a category under Indian citizenship laws have first identified under citizenship (amendment) Act, 2003. The huge uproar which has been appeared on the Indian landscape in the form National Register of Citizens (NRC) and to the recent Citizenship Amendment Act, 2019 got its genesis in the above category (Roy 28). The section 2(b) of the citizenship (Amendment) Act, 2003 provides that one would be identified as ‘illegal migrant’ under two circumstances. The first ground is the absence of valid document while entering into India. The second ground applies in case of overstaying beyond the permission period within India. Along with the above definition, it has also invoked ‘descent’ criteria for getting citizenship with a cutoff date for them whose parents must be the citizen of India during his/her birth.ⁱⁱⁱ Further, it has also provided that one would not be eligible for Indian citizenship if any of his/her parent was an *illegal migrant* at the time of birth. The above provision had invited critical concern as liberal approach to citizenship got undermined. One the one

hand, it explicitly focused on the *jus solis* and *jus sanguine* aspects of citizenship in determining the status of illegal migrants. On the other hand, it focused on establishing the procedure to probe someone as a legal citizen. This has appeared through the citizenship (Registration of Citizens and Issue of National Identity Cards) Rules 2003. It laid the provision to set up procedural requirement regarding the registration of citizen. It is mandated under section 14 A of the said act to make registration, issue of identity card, establishment of NRC by the central government. As a result, NRC has implemented which invited critical attention for initiating complex bureaucratic procedure to ascertain who is a citizen. The constitutionality of such exercise was also questioned at the court of law. Despite the above, the final draft of NRC had left 40 lakhs people who had aspired to be included.^{iv} This has led to massive resentment against the NRC exercise.

In fact, all these provisions had not invited protest or resentment at that time when provisions were made for it. It is only with the commencement of Citizenship Amendment Bill, 2016 and its subsequent consequences through Citizenship Amendment Act, 2019 which raised the contestation over insiders and outsider debate in India. It is also to be noted over here that the question of foreigners has largely centered over those illegal migrant who belongs to different religious minority groups. The contention has escalated with the commencement of Citizenship Amendment Bill which subsequently got its shape through the citizenship (Amendment) Act, 2019. This amendment has

incorporated the provision that any person belonging to Hindu, Sikh, Buddhist, Parsi or Christian community from Afghanistan, Bangladesh or Pakistan shall be granted citizenship status. However, concerned person must have entered into India on or before 2014. Along with the above, it provides necessary amendment to the other laws and rules which are necessary towards the inclusion of the above groups as citizen. It brought changes in Passport (Entry into India) Act and Foreigners Act, 1946 in order to ensure that the communities who have identified to grant legal citizenship status must not treat as illegal migrants under the above acts.

This amendment has been critically viewed as it explicitly taken religion as the basis to extend citizenship status to those minorities who counters religious prosecution in the neighbouring states of India. In a liberal democracy, the status of citizenship has been bestowed with the understanding that all of them are equal. This equal status has been determined among individual citizens irrespective of their socio-economic status. The 2019 amendment act generated the concern how religion has become the criteria to grant citizenship status. It only allows selected prosecuted religious minority of some neighboring states of India to grant citizenship status through naturalization principle. In this regard, government's standpoint came up with the logic that this amendment is not taking away anybody's rights. Taking into account all these developments, this paper intends to draw the attention that it has a substantive implication towards understanding of citizenship as a concept. As citizenship is an evolving

institution, its nature continues to unfold. In this process, different dimensions of it found be contested and particularly the membership one. Both the NRC exercise and Citizenship (Amendment) Act, 2019 have raised contestation to the membership dimension to Indian citizenship. Here, the contestation emerges with regard to the egalitarian prospect of citizenship where the qualifying criteria of membership and relationship among the member citizens must be determined on an equal basis. How such concern has emerged through recent amendments would be the focus of next section.

The contesting trend to membership status:

Citizenship offers the aspiration of free and equal membership in a political community. Such way of understanding implies that it could have egalitarian implications once somebody becomes a member to a political community. However, egalitarian prospect of citizenship historically found to be in crisis as its membership dimension makes the distinction between insiders and outsiders. Along with the above, criteria of inclusion for such membership also vary across time and space. The above understanding has substantive implication on egalitarian prospect of citizenship. The series of initiatives to bring amendment to Indian citizenship act has also reflected this trend. If we take into account the initial phase of economic globalisation, citizenship as a concept has been attracted scholarly attention for incorporating a de-nationalised trend to provide membership status (Weil 621). Such trend has also been valued for its egalitarian prospect. One of the ways such prospect has been enlarged through

inclusion of different groups of individual including immigrants as citizen in different state citizenship laws (Baubock).^v In this process, it is the expansive idea of rights considered to be significant where universal personhood has emerged as an alternative way to get citizenship than just nationality. It particularly evolves in the phase of globalization when massive immigration takes place. This trend has led to develop the argument that the most convenient way to settle the issue on getting citizenship status for migrants is through the naturalization.

However, *naturalisation* as a mode of acquiring membership in a political community has also not free from contestation. This was observed in case of foreign residents in Western Europe. Now this concern has also emerged in case of extension of citizenship status to illegal migrants of certain religious communities in India. Naturalization as a principle for getting citizenship status purely based on the residential requirement. However, selective approach of the government becomes a crucial concern for raising suspicion over the egalitarian implication of citizenship laws. As a result, contestation to membership dimension has emerged between insider and outsider and also within the category of illegal migrants as well.

The first contestation found to be visible through the massive protest against the Citizenship (Amendment) Bill 2016 in the North East. It has occurred with an apprehension on issues ranging from cultural estrangement to economic deprivation. Further, the situation in Assam becomes volatile with the concern that the said bill intends to violate Assam Accord of 1985. All such eventualities have been

already discussed by many scholars. Here, it is argued that how such initiative has been viewed with suspicion among the local communities of the concerned region as a threat not only to their culture but also to economic opportunities and resources. This suggests that citizenship as membership in a political community could exhibit egalitarian consequences when all the members including the one who are continuing with the said status and the new who are in the process of inclusion must be in a situation to appreciate/consider each other as equal. However, this normative idea of membership in social reality found to be contested while looking towards the ongoing massive protest where insiders of north-eastern states including Assam apprehends such move as a threat to their locality irrespective of their regional and religious affiliations.

Secondly, another form of contestation has emerged at the level of modes of acquisition to citizenship. It has been observed that the qualifying principle towards inclusion of citizenship found to be uneven. The concern has expressed over the logic of allowing citizenship status to certain religious minorities. Such move has questioned on the ground of equality before law and constitutional justice. In a liberal democratic state, it is assumed that equality before law must be the basis to determine someone as citizen. In this context, the principle equality must be followed not only to determine the qualifying criteria but also to consider the claims of each category in an equal manner. But the terms and conditions of acquiring such membership vary among the noncitizens which found to be sustained through the recent amendments. One may

offer the argument that non citizens are also not homogeneous category. While considering the claim of a particular category, it is expected that the principle of equality must be followed. In this context, deviation has occurred in segregating the citizenship claim not only among the religious minority communities but also with the naturalization criteria. Such deviation has put the question mark about the intention of continuing political regime to impose the idea of national citizenship in an authoritarian manner. While taking into account the citizenship claim of all the religious minorities are concerned, the 2019 amendment act only grant such status to those who are both minorities and facing religious prosecution in the neighboring states of India. In this process, it excluded Muslim community as it is not a minority in the neighboring states. So far as the naturalization criteria is concerned, the concerned amendment has relaxed the minimum period of residence in case of selected illegal migrants of those religious minority communities from twelve to six years.

As a result, entire focus of the dominant narrative has focused into the debate about discriminatory act of the concerned amendment act. But this move also reminds that citizenship as membership has always been found to be contested across the space and societies. The Indian context is merely a manifestation towards this understanding. The rights based conception of liberal citizenship is based on the assumption that the principle to acquire such membership must be same for all who are coming under non-citizens. However, amendments to Indian citizenship act have

essentially not moved in the above manner. It is essential to identify the trend which is critical to determine who is to be a member citizen in a particular nation-state. Besides, the ascriptive principle, individual choice has been emerged as another alternative to claim for citizenship. However, in regulating all these principles the political character of nation-state found to be the major trend. If one consider both the contesting aspects to the membership dimension inform that national citizenship still continue as the dominant trend in offering citizenship status than the rights of individual as universal personhood. This has been visible all the changes to citizenship laws in India. In this

Notes and References:

ⁱ The dominant narrative has been referred to groups of literature who have explained how the recent 2019 amendment is selective with regard to granting of citizenship status to certain religious minority communities.

ⁱⁱ Marshall conceptualized citizenship in terms of status availed only by the full members of a community. Subsequently, this understanding has been considered as the foundational definition to determine who is a citizen in a nation-state. For details see Marshall (1950).

ⁱⁱⁱ Sections 3 of the Citizenship (Amendment) Act, 2003 contains the provision about the qualifying criteria through the principle of birth and descend.

^{iv} The complete draft of NRC came out on 28th July 2018. Referring to the said draft, Roy claimed that it has excluded the claims of 40 lakhs people who have applied for the citizenship. However, actual figure with regard to rejection of claims found to vary. For details see Roy (2019), Kundu and Mohana (2020).

^v Cited by Weil (2011, p.621).

^{vi} Roy made the point that how Joint Parliamentary Committee has applied the conception of national citizenship while addressing issues associated the Citizenship (Amendment) Bill, 2019. This committee was headed by Rajendra Aggrawal. The final report of this committee was submitted on 7th January 2019. For details see Roy : 2019, p. 30-31.

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