The election of the Bhartiya Janata Party in 2014 brought a rightward shift in the popular political opinion in the country. While nationalist tendencies are common occurrences in almost every country in the world, India’s shift shows a worrying trend. The BJP, since entering into power has implemented a nationalist regime, based more on religion than on the lines of ‘national interest’. This is evident in almost all major legislations they have led and subsequently passed, and the Citizenship Amendment Act (CAA) is testimony to this.

The CAA has arguably created the most controversy amongst the other questionable legislations passed by the BJP. This is primarily because, although the CAA is inherently discriminatory and legally incompatible in nature, it has been rather successful in maintaining the façade of an ‘amnesty program’ in view of both the international community and, to some extent, the national population. The CAA, however, finds itself at odds with some of the founding principles of our democracy, and also fails to serve as a citizenship law under accepted customs of International Law. The CAA does not qualify as a just law as per principles of the rule of law. It also fails the test of constitutionality by not providing for a rational and reasonable justification for its differential treatment. Furthermore, it is severely flawed in its text vis-à-vis the provisions of International Law. It is, thus, my objective to prove how the CAA is an attempt not at active inclusion but at passive exclusion. I will argue the invalidity of the CAA vis-à-vis various elements. I will do so in two different manners. Firstly, I will address the CAA, on general, moral and philosophical grounds, and then proceed to analyse the legislation on specific facts regarding law and its visible impacts. I will also address some of the more long-term effects it will have on the nature of politics in the country, and the manner in which it will serve to derogate the nature of democracy in India.
The BJP has provided multiple rationales for justifying the enactment of the CAA. Supporters of the act have highlighted the *bonafide* intent of the CAA, in that all it merely does is expedite citizenship of migrants from persecuted minorities in certain other countries. Even if this argument were not built on a false basis, and presuming that the argument stands valid, there still exists a major misinterpretation of the moral principle of politics and law. Regardless of the act’s intent, the very criteria set out by the CAA is discriminatory and far from secular. The act of using religion as a criterion for eligibility under a law, goes against the principle of rule of law. Tom Bingham, a reputed scholar and English jurist, rightly mentioned the imperativeness of just and equal application of the law to all its subjects as an integral principle of the rule of law\(^1\), and it is this principle that the CAA so blatantly ignores. Determining whether or not a particular law is applicable to a person on the basis of his/her faith very explicitly lays out the asymmetric applicability of this law. Therefore, whatever proponents of this Act argue, I believe any rational analysis of the text as well as the spirit of the act will clarify, beyond doubt, that regardless of the intent behind the CAA, its effects will have a negative impact on the rule of law in the country.

The BJP has managed to survive on technicalities of the law and has completely disregarded the spirit of the laws of the meticulously constituted Republic. Citizenship laws are, more than the government is willing to accept, the foundational stone and representative of all laws in the country, and thus integral to the representation of a country. This foundational role of the citizenship laws can be realised by understanding the two primary roles of a citizenship law. First, it must clearly and justly set out the rules by which a person may obtain citizenship of the country. Second, it must represent the political aspirations and nature of governance in the country. The second criterion, which may although seem quite unrelated to the question of citizenship, is intricately linked to the purpose of such laws. Citizenship laws lay out the kind of citizens a nation wants to have. Since every democracy exists not for rulers, but for its own
citizens; the kind of citizens a country wants, also determines the political aspirations and national identity of the country. In this respect, citizenship laws define the country’s political and constitutional identity. With reference to the two aspects I mentioned above, CAA fails India in both of them. The CAA by outlining specifically which religions may benefit from expedited citizenship, fails to create a law which is justly applicable to all. In regards to the second criterion, the CAA is a gross misrepresentation of the founding principles of India. An act, which so explicitly prioritises the granting of citizenship on the basis of religion, undermines the principles on which our laws are constituted. The CAA, instead, represents a government with a strong religious-nationalist agenda, which wishes to establish clear inter-religious domination of the majority.

Another prominent defence of this act is that it doesn’t apply and, therefore, doesn’t affect the citizens of India. This statement, is a desperate and shallow argument made in favour of a law for which not many defences exist. While it may not apply to Indian citizens, it certainly affects the masses. India has time and again, proven to be a country where people often have strong attachments to their religious identity – sometimes these attachments being stronger than those with their national identity. The CAA, to any layman, would without doubt cast a strong inference of religious discrimination towards the Muslim community. It certainly may not apply to the Muslim citizens of India, however, these deep attachments to their religious identity result into them concluding it as an attack against their community and thus, them. One may consider it as an emotional cloud to judgement, but in a country like India, where more than 10 religions co-exist, it is a responsibility of the government to accommodate conflicting faiths. An accurate example of the impact of the CAA on the people of India would be the Shaheen Bagh protests. The BJP and its allies have discarded the protests by claiming, and also to an extent demonstrating, that a number of protestors were not even minutely aware of what the CAA is. A live interview with some protestors also showed that some of them weren’t even
aware of the full form of CAA or what it is about. While many use this evidence to show how frivolous the protests are, I argue otherwise. This evidence, goes to show the strong emotions people attach to their religious community in India. The fact is, that many protestors (they were mostly Muslim) turned up to protest in spite of having little to no knowledge of the act, but merely because they were certain that it was discriminatory towards their religion. Therefore, the BJP’s argument that the CAA doesn’t negatively affect the Indian citizens is myopic and fails to take into account the true nature of Indian democracy.

Up to this point, my arguments have had a primarily moral premise in opposition to the CAA. I have discussed the context of the CAA in general terms explaining its impact on the rule of law, the legal importance of CAA and its legal invalidity, and finally its effect on the Indian people. I will now proceed to discuss the CAA in more specific terms with regards to its actual content, and its incompatibility with the Constitution, International law, and politics.

Before I proceed to address the constitutional invalidity of the CAA, I will first explain why the Supreme Court of India may rule in favour of the Central Government and why that does not definitively decide the true constitutional validity of the CAA. With regards to judicial review, in practice, the judiciary’s powers are very limited. The judiciary is limited only to deciding whether or not it violates any fundamental right as stated in the Constitution. Judiciaries all over the world are most careful about not being accused of judicial overreach. This, for courts, is a major accusation which they don’t risk under any circumstances, because it deems the guardians of the constitutions as not complying with the organisation of power in the constitution themselves. Moreover, it implicitly gives the Parliament more value whilst decreasing the credibility of the judiciary, thus widening their ambit to legislate on matters that may violate the constitutions. In this sense, the judiciary in its review of the Act, are limited to adjudicate upon its validity based only on the text of the fundamental rights, thus limiting the Court from considering strongly the spirit of the law as they normally do. Upon rational
analysis of the Act, one will find that it does not violate the fundamental rights based solely on its explicit text. Therefore, any ruling that the apex court makes, although being the final decision, does not serve as a definitive answer to the constitutional case of the CAA.

To understand and assess the compatibility of the CAA with the fundamental rights, we must in particular, assess it vis-à-vis Article 14 of the Indian Constitution. Articles 14 and 21 are the only two fundamental rights which extend to all people within the territory of India i.e. non-citizens as well. Article 14 states that all persons within the territory of India are equal before the law. Differential treatment, however, has formed an integral part of justice in India since Independence; rightly assuming that not all people require similar treatment as certain people may require positive discrimination to achieve an equal status. Article 14, therefore, allows such differential treatment. However, for differential treatment to be constitutional, it must also be justified and reasonable. As stated by M. Mohsin Alam Bhat in his article, Indian jurisprudence requires that no statute must be “capricious, irrational or without adequate determining principle”. This means, that for the CAA’s differential treatment to be constitutional, it must also have a factual basis and must meet the test of equal protection. The BJP defends the CAA by calling it an amnesty program, meaning that it protects persecuted minorities in the neighbouring countries. The CAA assumes that Islam is not a persecuted minority in these primarily Muslim majority countries, and thus they cannot be granted amnesty on ground of persecution or fear of persecution. The fact is, however, that Islam has several sects and it happens to be a religion with a high degree of intra-religion inequality. Ahmadiyyas in Pakistan, and the Shias and Hazaras in Afghanistan, are just few of the Muslim persecuted communities in the countries which the CAA covers under its ‘amnesty program’. To meet the test of equal protection in differential treatment, the CAA must also grant asylum to the persecuted communities of these persecuted sects of Islam. Moreover, the Muslim Rohingyas in Myanmar, and Muslim Uighurs in China, are also persecuted minority in India’s
neighbouring countries. The CAA, however, has no mention of China or Myanmar in its list of countries from which India will take persecuted minorities. Therefore, it is clear that the CAA, beyond reasonable doubt, fails the test of *equal protection* in differential treatment. Moreover, if the CAA were truly an amnesty program it would’ve taken into consideration the above facts of other persecuted minorities in India’s neighbouring countries. Furthermore, the CAA fails in assessing the meaning of persecution as stated by the United Nations High Commissioner for Refugees⁴, and generalisation of the term is incompatible with its proclaimed purpose. These factors, show that differentiation under the CAA have no factual basis either. Therefore, since the CAA meets neither criteria to be considered a just and reasonable differentiation, it can be concluded that the Act is not concurrent with Article 14 of the Constitution and thus is incompatible with the fundamental rights.

On the political front, the CAA will prove to be a unique type of electorate manipulation in the long run. The CAA takes a step towards portraying a religiously nationalist country which will have severe effects on the demographics and electorate of India. By stating explicitly that India will provide asylum to Hindus but not Muslims, the Act invites mass migrations of Hindus from Afghanistan, Bangladesh and Pakistan. It is very likely that a majority of the Hindu population in these countries will, in the near future, look to migrate to India because to them, India is now being portrayed as the ‘promised land’ of the Hindus. Consequently, the CAA will be serving a dual purpose for the BJP. First, this mass migration of Hindus will affect significantly the demographics of states like West Bengal, where a majority of migrants are highly likely to settle. By doing so the BJP will successfully increase the Hindu Population in these states and thus be able to propagate strong religious nationalist sentiments across the states. Second, the CAA will also be successful in ‘buying’ the votes of a large population of the Hindu community and certainly those migrants who are granted expedited citizenship. In the long run, therefore, the CAA will go a considerable way in strengthening the nationalist
wave in India, thus fortifying the BJP’s position in Indian Politics for a foreseeable period of time.

The addition of *Section 6B* to the Citizenship Act also reverses the effects and prospected outcomes of the *Assam Accord*. The Assam Accord was drawn up after a prolonged struggle by the All Assam Students’ Union and its purpose was to conserve and strengthen the state’s native population, culture and political identity by identifying and deporting illegal migrants in the state. Section 6A of the Citizenship Act reflects this purpose and recognises the Centre’s role in executing the provisions in the Assam Accord. Section 6B, however, grants expedited citizenship to those non-Muslim migrants who have been in India since before December 2014. By doing so, therefore, the CAA reverses the effects of the Assam Accord by legitimizing the large population of illegal migrants, thus inviting further political and civil unrest in Assam.

The CAA’s most glaring flaw in the actual wording of the Act is in its definition of an illegal migrant. The standards for the correct definition of a migrant and a refugee must be drawn from International law. The *UNHCR Guide to International Refugee Protection and Building State Asylum Systems* defines a migrant as “someone who chooses to move, not because of a direct threat to life or freedom, but in order to find work, for education, family reunion, or other personal reasons”\(^{vi}\). The term ‘illegal migrant’, therefore, means a migrant who enters the country for the same reasons, but illegally i.e. without legitimate papers, whereas, a refugee is someone who migrates due to persecution or a fear of persecution. This is the most important difference between an illegal migrant and a refugee. It means that an illegal migrant has no fear of persecution in his/her home country. The BJP has termed the CAA as an amnesty program; however, it does not qualify as one because it extends clearly to *illegal migrants* and not *refugees*. Therefore, the reason that the CAA gives expedited citizenship to those fearing persecution in their own country is invalid, because a migrant, illegal or legal, has no fear of
persecution. This means, that the CAA does not provide a support system for refugees, but instead implies religious exceptions on being an illegal migrant.

Even if one is to ignore the incorrect usage of the term migrant in the act, the CAA falls short of several provisions under International Law. To further my argument, I will use the terms ‘illegal migrant’ and ‘refugee’ interchangeably as the primary purpose in the paragraph is to prove the CAA’s violation to International Law and not its incorrect usage of the term ‘illegal migrant’. Although the principle of *lex specialis* states that national law supersedes international law, that does not go for the CAA as it can be found in violation of customary international law under certain provisions of the *1951 Convention relating to Status of Refugees*. India, therefore, owes a certain responsibility to adhere to those provisions of the 1951 Convention which are considered to be customary. Firstly, the CAA implies that those Muslim migrants who have entered the country illegally will continue to be identified and deported. However, the principle of *non-refoulement* under Article 33(1) of the 1951 convention (which is universally accepted as customary international law), prohibits a nation to deport a refugee if he/she faces a threat of persecution in his/her home country\(^\text{vii}\). Therefore, the CAA cannot, under law, choose which illegal migrant must be deported and which not, as a country is required to grant asylum to any migrant facing threat of prosecution irrespective of religion. Second, the 1951 Convention is also based heavily based on Article 14(1) of the *Universal Declaration of Human Rights* which recognizes the right of any persons to seek asylum from persecution in other countries. The CAA by putting a condition on who, since December 2014, will receive asylum from persecution is in stark violation of the UDHR. Moreover, the CAA and its religious criteria for determining the status of a migrant is also in violation of principle of customary law under the *International Covenant for Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and *General Recommendation No. 32*. 
The CAA, therefore, is not only an Act that goes against the very heart and soul of a modern India, it is also an Act that will have severe consequences on the political front as well as on the International Stage. The fallout from the opposition to this Act will create waves of unrest all throughout India, and an immediate major civil unrest was halted only by the Coronavirus scare. The CAA, although worded with great ingenuity, is against the spirit of our Constitution and stands at odds with universally accepted principles of International Law.

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1 Bingham, Tom; The Rule of Law, Penguin Books Limited, 2011: Bingham in his book defines the theory and meaning behind the rule of law and attempts to give a single-sentence definition, which is underpinned by the principle of just and equal applicability of the law to all.


vii Article 33(1) of the 1951b Convention : No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.