Arbitrariness, Subordination and Unequal Citizenship*

I. Introduction

The Citizenship Act, 1955 prevents 'illegal migrants' – defined as foreigners who entered India without required documents or overstayed their visit — from acquiring Indian citizenship. The Citizenship (Amendment) Act 2019 ('the Act') provides that Hindu, Sikh, Buddhist, Jain, Parsi and Christian migrants from Afghanistan, Bangladesh and Pakistan are not to count as 'illegal migrants' and gives them a fast-tracked pathway to Indian citizenship.[1]

The Act is patently unconstitutional. Some critics argue that its primary object is to exclude Muslims – both current citizens and immigrants – from citizenship through the roll-out of a nation-wide process of verification of citizenship along the lines of the National Register of Citizens ('NRC') for Assam.[2] While the Prime Minister walks back the government's proposal for a nation-wide NRC,[3] the upcoming National Population Register ('NPR') is expected to serve the same purpose.[4] It is feared that the rule-making powers of the central government will be (mis)used to 'filter out' citizens and immigrants that the government disfavours.[5] These fears are exacerbated by the current legal regime which places the burden of proof on individuals to prove that they are not foreigners.[6]

Even taken on its own, by drawing distinctions between (supposed) immigrants based on their religious identity and origin,[7] the Act unconstitutionally discriminates and treats people unequally. It fails the Supreme Court's classification test for compliance with Article 14 of the Constitution which guarantees to all persons, equality before the law and the equal protection of the laws within the territory of India. This test requires that any legal classification be based on intelligible differentia and have a reasonable nexus with the object

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[1] Citizenship (Amendment) Act 2019, s 2. This applies as long as they entered India on or before the 31st day of December, 2014 and have been exempted by the Central Government from the application of some other immigration-related legislation.

[2] Anil Varughese, 'India's New Citizenship Act Legalizes a Hindu Nation' *The Conversation* (19 December 2019) <https://theconversation.com/indias-new-citizenship-act-legalizes-a-hindu-nation-129024> accessed 09 January 2020;

[3] Cf Home Minister Amit Shah's statements: 'Explained: What is the Citizenship Amendment Bill?' *Indian Express* (New Delhi, 23 December 2019) <https://indianexpress.com/article/explained/citizenship-amendment-bill-2019-parliament-winter-session-nrc-6122846/> accessed 09 January 2020; Rahul Tripathi, 'First National Population Register, then National Register of Citizens' *Economic Times* (21 December 2019) <https://economictimes.indiatimes.com/news/politics-and-nation/first-national-population-register-then-national-register-of-citizens/articleshow/72911072.cms> accessed 09 January 2020.

[4] India National Population Register: Database Agreed Amid Protests' *BBC News* (24 December 2019) <https://www.bbc.com/news/world-asia-india-50903056> accessed 09 January 2020.

[5] ibid; 'National Population Register: First Step to NRC' (*Deccan Herald*, 24 December 2019) <www.deccanherald.com/opinion/comment/national-population-register-first-step-to-nrc-788461.html>; 'Citizenship Amendment Bill: India's New "Anti-Muslim" Law Explained' *BBC News* (11 December 2019) <https://www.bbc.com/news/world-asia-india-50670393> accessed 09 January 2020.

[6] Foreigners Act 1946, s 9.

[7] The exclusion of Tamil refugees is particularly noteworthy in this regard: Ashna Ashesh and Arun Thiruvengadam, *Report on Citizenship Law: India* (European University Institute, July 2017) <cadmus.eui.eu/handle/1814/47124> 19.

of the law.[8] By excluding a major religious group from its protections and restricting the pathway to only some neighbouring states, the Act fails the classification test, as many have already persuasively argued.[9]

Further the Act breaches constitutional protections for religious freedom. Article 25 of the Indian Constitution declares that "all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion".[10] The Act denies people their constitutionally-protected entitlement to *equal* freedom of conscience and religion. There are also questions about whether and how the provisions of the Act that require religious identification can be practically and lawfully administered.[11] Perhaps most significantly, by basing citizenship on religious identity, the Act unsettles the secular foundations, part of the basic structure,[12] of the Indian constitutional settlement.

These are some of the reasons why the Act is obviously unconstitutional. This paper will argue that the Act is unconstitutional for further, equally significant (but perhaps more complex), reasons as well. The equality provisions of the Constitution proscribe legislation that is arbitrary as well as legislation that subordinates. The Citizenship (Amendment) Act 2019 is unconstitutional because it is arbitrary and subordinating. The tests for arbitrariness and subordination are currently unclear. This paper articulates a test for arbitrariness, making sense of the doctrine of manifest arbitrariness under Article 14, using philosophical literature on arbitrary decision-making. The paper similarly draws on comparative constitutional law and philosophical analysis to articulate a test for the anti-subordination principle inherent in the equality provisions of the Constitution. The paper then demonstrates how the Citizenship (Amendment) Act 2019 is unconstitutional when

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[8] *The State Of West Bengal v Anwar All Sarkar* 1952 AIR 75, 1952 SCR 284; The requirement that the law not be arbitrary is sometimes seen as part of this test: Shankar Narayanan, 'Rethinking "Non-Arbitrariness"' (2017) 4 NLUD Student Law Journal 133.

[9] Bhadra Sinha, '"Proviso in Amended Citizenship Legislation is Unconstitutional": Justice Lokur' (*Hindustan Times*, 23 December 2019) <www.hindustantimes.com/india-news/proviso-in-amended-citizenship-legislation-is-unconstitutional-justice-madan-lokur/story-sgh0kvlDkeKk4gdv4WzzXK.html>; Alok Prasanna Kumar, 'Citizenship (Amendment) Act: An Unconstitutional Act' (*Deccan Herald*, 15 December 2019) <www.deccanherald.com/specials/sunday-spotlight/citizenship-amendment-act-an-unconstitutional-act-785638.html>; Farheen Ahmad and Anmolam, 'An Act That Fails the Constitutional Test' (*The Hindu*, 26 December 2019) <www.thehindu.com/opinion/op-ed/an-act-that-fails-the-constitutional-test/article30397556.ece>; Varun Kannan, 'The Constitutionality of the Citizenship (Amendment) Act – A Rejoinder' (*Indian Constitutional Law and Philosophy*, 03 Friday Jan 2020; CR Sukumar, 'Citizenship Law Fails Three Tests of Classification: Faizan Mustafa, VC, NALSAR University of Law' *Economic Times* (15 December 2019) <https://economictimes.indiatimes.com/news/politics-and-nation/citizenship-law-fails-three-tests-of-classification-faizan-mustafa-vc-nalsar-university-of-law/articleshow/72656501.cms> accessed 09 January 2020. For the argument that religious classifications do not meet the first prong of the test based on Malhotra J in *Navtej Singh Johar* [14] and [15], Niveditha K, 'Guest Post: The Citizenship (Amendment) Bill is Unconstitutional' (*Indian Constitutional Law and Philosophy*, 5 December 2019) <indconlawphil.wordpress.com/2019/12/05/guest-post-the-citizenship-amendment-bill-is-unconstitutional>. For an international law analysis: Mihika Poddar, 'The Citizenship (Amendment) Bill, 2016: International Law on Religion-Based Discrimination and Naturalisation Law' (2018) 2 *Indian Law Review* 108; <https://indconlawphil.wordpress.com/2020/01/03/guest-post-the-constitutionality-of-the-citizenship-amendment-act-a-rejoinder/>

[10] The Constitution of India 1950, art 25.

[11] Douglas McDonald-Norman, The Citizenship Amendment Act and 'Persons Belonging to Minority Communities' (*Law and Other Things*, December 28, 2019) <https://lawandotherthings.com/2019/12/the-citizenship-amendment-act-and-persons-belonging-to-minority-communities/>

[12] See generally *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225.

measured against these tests. The argument relating to subordination demonstrates why, contrary to common assumption, the Act implicates Article 15, as well as Article 14, of the Constitution.

To begin with, the section below offers a brief introduction to the legal context of the Citizenship (Amendment) Act 2019.

II. Legal Context of the Citizenship (Amendment) Act 2019

The Indian Constitution's provisions on citizenship were debated under the shadow of Partition. The Constituent Assembly broadly agreed on the basic principle of *jus soli*.[13] Thus Article 5 of the Constitution recognises as a citizen, everyone who was domiciled in India at the commencement of the Constitution, *and* who was born in India, or either of whose parents were born in India, or who has lived in India for five years. Article 6 applied a more generous regime to those who migrated to India from Pakistan, who were deemed citizens of India if they, their parents, or grandparents, were born in *undivided* India (i.e. including Pakistan) as long as they met certain residence and registration requirements.

Migrants to Pakistan from India[14] were excluded from Articles 5 and 6, and not deemed to be Indian citizens.[15] However, if those migrants returned to India, under a permit of resettlement or permanent return from the Indian government, the Constitution (after much debate) gave them a pathway to citizenship.[16] While the Constitutional provisions do not mention religion, Niraja Jayal has argued that religion was implicitly relevant in debates about citizenship in independent India, referring to language used in the Constituent Assembly debates as well as the differential treatment of mostly Hindu migrants from Pakistan (in one time period) and mostly Muslim returnees from Pakistan (who originally lived in India).[17]

The constitutional provisions are focussed on the immediate issues facing newly-independent India and govern citizenship at the time of the commencement of the Constitution. Parliament was given broad powers to enact a citizenship regime for the period after the commencement of the Constitution.[18] This enactment, the Citizenship Act, 1955, recognised different sources of citizenship: by birth, descent, registration, naturalization, and incorporation of territory.[19] The Act saw significant amendments, including in response to political movements around migration into the state of Assam. [20] While immigration into Assam has a long and complex history,[21] concerns about migration from Bangladesh into Assam, especially in 1971, have been particularly politically

[13] Niraja Gopal Jayal, *Citizenship and its Discontents: An Indian History* (Harvard University Press 2013) 57.
[14] After 1 March 1947.
[15] The Constitution of India 1950, art 7.
[16] ibid; Jayal (above n 13) 58-60.
[17] Jayal (above n 13) 51-82; see also Abhinav Chandrachud, 'Secularism and the Citizenship Amendment Act' Indian Law Review (forthcoming).
[18] See Ashesh and Thiruvengadam, (above n 7).
[19] Citizenship Act 1955, ss 3-7.
[20] Including the Citizenship Amendment Act, 1985.
[21] Walter Fernandes, 'IMDT Act and Immigration in North-Eastern India', (*Economic and Political Weekly*, 23 July, 2005) p. 3237, 3238-3240.

significant.[22] The political discourse is said to 'mark out the illegal alien ("Bengali-speaking, Muslim, Bangladeshi infiltrator") as the constituent other.'[23] A 2004 amendment to the Citizenship Act, modified the provision of citizenship by birth to exclude those born in India after 1987 to a parent identified as an 'illegal migrant' by the 1955 Act.[24] Since the relevant 'illegal migrants' were 'impliedly Bangladeshi Muslim',[25] this amendment is considered a precursor to the 2019 Citizenship Amendment Act.[26]

While the 2019 Act's treatment of religion as *explicitly*[27] relevant for the grant of citizenship is unprecedented in Indian primary legislation, religion has long been an explicitly relevant factor for immigration status in delegated legislation. For instance, a 2004 amendment to the Citizenship Rules 1956 made by the central government under the rule-making of the Citizenship Act 1955, delegated to District Collectors in Rajasthan and Gujarat, the authority to grant citizenship to particular "Pakistan nationals of minority Hindu community".[28] Rules made by the central government in 2015 under the Foreigners Act, 1946 and the Passport (Entry into India) Act, 1920[29] exempt 'persons belonging to minority communities in Bangladesh and Pakistan, namely, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians who were compelled to seek shelter in India due to religious persecution or fear of religious persecution' from some adverse consequences of those enactments.[30] Both rules appeal to religious identity in very similar terms to the Citizenship (Amendment) Act 2019. (While the point cannot be defended here, these rules are unlawful on administrative law and constitutional law grounds; however the rules are currently in effect).[31]

Such administrative discrimination on the basis of religion to grant immigration status is a continuity from post-Independence practice. As the preeminent scholar of Indian citizenship, Niraja Jayal, writes:

> Notwithstanding the provisions being written into the Constitution, officials were already engaged in scripting exclusions, suggesting a contrast between the conception of legal citizenship—in its pristine borrowed form— in the

[22] See resources in Anindita Kar, Shreedhar Manek, and Kieran Lobo 'The Curious Case of Citizenship in Assam: A Look at the 1980s Agitation' <https://www.epw.in/engage/discussion/citizenship-in-assam-1980-agitation-nrc>; Anupama Roy, 'Ambivalence of Citizenship in Assam' (*Economic and Political Weekly*,25 June 2016) p. 45.

[23] Anupama Roy, 'Ambivalence of Citizenship in Assam' (*Economic and Political Weekly*,25 June 2016) p. 45.

[24] The Citizenship Act, 1955, s 3.

[25] Niraja Gopal Jayal, 'The Misadventure of a New Citizenship Regime' *The Hindu* (27 November 2019) <https://www.thehindu.com/opinion/lead/the-misadventure-of-a-new-citizenship-regime/article30090226.ece> accessed 09 January 2020.

[26] Jayal (above n 25); Anupama Roy, 'The Citizenship (Amendment) Bill, 2016 and the Aproria of Citizenship' (*Economic and Political Weekly*, 14 December 2019) p. 28; Tania Midha, 'Citizenship Act: Govt Changes Criteria Qualifying a Person as a Citizen of India' *India Today* (15 December 1986) <https://www.indiatoday.in/magazine/indiascope/story/19861215-citizenship-act-govt-changes-criteria-qualifying-a-person-as-a-citizen-of-india-801552-1986-12-15> accessed 09 January 2020.

[27] See generally Jayal (above n 13) 51-82.

[28] Gazette notification dated 1.3.2004 amendment of Citizenship Rules 1956, Rule 8A. Quoted in Anima Sutradhar v Union of India (unreported, WP(C) 2730 of 2013, 13/09/2013) available here: <http://ghconline.nic.in/Judgment/WPC27302013.pdf>

[29] Gazette of India, 7 September 2015 <indianfrro.gov.in/frro/Notifications_dated_7.9.2015.pdf>

[30] ibid s 2.

[31] For some of the issues see Talha Abdul Rahman, 'India's Administrative Citizenship Regime' (*Admin Law Blog*, 26 March 2020) < http://adminlawblog.org/?p=1392>.

> constitutional citadel, with another demotic version being enacted outside, by official agencies and civil society…Framed in this way, the incipient conception of legal citizenship in the Constitution conceals a deep tension, suggesting different ways in which even straightforward doctrinal conceptions of citizenship—such as the principle of *jus soli*—may be appropriated, transformed, and translated in the rules, practices, and discourses of official agencies, courts of law, and civil society.[32]

Since the new citizenship regime is at least ostensibly based on concerns about persecution, it is also important to appreciate that, while India hosts diverse groups of refugees, domestic protections for refugees and asylum-seekers is limited. There is no national-level legislation on refugees; legal and policy regimes do not apply uniformly across groups of refugees or asylum seekers;[33] and India is not a signatory to the 1951 Convention on Refugees[34] or the 1967 Refugee Protocol.[35] Contemporary Indian law, including constitutional law, offers very limited protections to refugees and asylum seekers; even the principle non-refoulement is not consistently respected.[36]

Against this legal and policy background, as already mentioned, the Citizenship Amendment Act 2019 amends the definition of 'illegal migrant' in Citizenship Act, 1955 to create a fast-tracked pathway to Indian citizenship for Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan.[37] The Act provides for the abatement of immigration-related legal proceedings pending against such migrants once they are conferred citizenship; [38] this conferral may be retrospective, from their date of entry into India.[39]

The Act further amends a provision in the Citizenship Act 1955 which required applicants to have lived in India or 'been in central government service for the last 12 months and at least 11 years of the preceding 14 years'.[40] The Act reduces this requirement to five years for Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan. [41]

The Act also gives the Central government powers to revoke the status of Overseas Citizen of India Cardholders [42] who have violated prescribed laws, and gives them the right to be heard before this revocation.[43]

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[32] Jayal (above n 13) 62.
[33]); BS Chimni, 'The Legal Condition of Refugees in India' (1994) 7 Journal of Refugee Studies p. 378.
[34] *Convention relating to the Status of Refugees,* entered into force 22 April 1954, 189 UNTS 137
[35] *Protocol relating to the Status of Refugees,* entered into force 4 October 1967, 606 UNTS 267.
[36] Douglas McDonald-Norman and Arun K. Thiruvengadam, 'Blinkered, Compromised and Scared: Rohingya Asylum Seekers and the Limits of Constitutional Protections in India' (Working paper; on file with author, 13 February 2020); BS Chimni, 'The Legal Condition of Refugees in India' (1994) 7 Journal of Refugee Studies p. 378.
[37] See n 1 above.
[38] Citizenship (Amendment) Act 2019, s 3(3).
[39] Citizenship (Amendment) Act 2019, s 3(2).
[40] Citizenship Act 1955, Third Schedule (d).
[41] Citizenship (Amendment) Act 2019, s 6.
[42] Citizenship (Amendment) Act 2019, s 7D.
[43] Citizenship (Amendment) Act 2019, s 4.

III. The Arbitrariness Doctrine

The jurisprudence on Article 14 of the Constitution, which protects equality before the law and the equal protection of the law, has seen twists and turns.[44] But for over four decades now, ever since *EP Royappa v State of Tamil Nadu*[45], Article 14 has been understood to include protections from arbitrary state action. While there was some doubt about whether legislation could also be invalidated on the grounds that it was arbitrary,[46] this doubt has now been put to rest.

In 2018, each of the judges on a 5-judge bench of the Supreme Court in *Navtej Singh Johar* v *Union of India*[47] confirmed that 'manifestly arbitrary' legislation would contravene Article 14.[48] The applicability of the Court's 'arbitrariness doctrine' to legislation, is therefore, now clear, in large part due to the judgments of Justice Rohinton Nariman.[49] Less clear however, is the content of the arbitrariness doctrine itself. Critics of the Court's 'arbitrariness doctrine' have long complained about its emptiness, lack of clarity and uncertain legal content.[50]

This paper responds to these criticisms by introducing an account of arbitrariness which illuminates and sharpens the arbitrariness doctrine, as it applies to legislation. This account helps us see how the Citizenship (Amendment) Act 2019 is unconstitutional for manifest arbitrariness.

The Nature of Arbitrariness

Most accounts of arbitrariness focus on what it means for a *power* to be arbitrary. Christopher McCammon, for instance, argues that arbitrary power is a function of the extent to which you can use that power in 'deliberative isolation', i.e., 'without being accountable to anyone else'.[51] Timothy Endicott argues that arbitrary power is a power that

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[44] Tarunabh Khaitan, 'Equality: Legislative Review under Article 14' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016); Vanshaj Jain, 'Symposium – Interpreting Equality Rights in India's Constitution: the Manifest Arbitrariness Test' (*IACL-AIDC Blog*, 17 September 2018) <https://blog-iacl-aidc.org/blog/2018/9/17/symposium-interpreting-equality-rights-in-indias-constitution-the-manifest-arbitrariness-test> accessed 09 January 2020.

[45] 1974 AIR 555.

[46] Jain (above n 44); *State of Andhra Pradesh v. McDowell* 1996 AIR 1627, 1996 SCC (3) 709; *Rajbala v. State of Haryana* (2016) 1 SCC 463.

[47] *Navtej Singh Johar* v *Union of India* AIR 2018 SC 4321.

[48] ibid [238] per Dipak Misra CJ (for himself and Khanwilkar J); [379] per Chandrachud J; [336] per Nariman J; [522] per Malhotra J.

[49] E.g. his judgment in *Shayara Bano v. Union of India* (2017) 9 SCC 1.

[50] TR Andhyarujina, 'The Evolution of Due Process of Law by the Supreme Court' in BN Kirpal et al (eds), *Supreme but Not Infallible: Essays in Honour of the Supreme Court of India* (New Delhi, Oxford University Press, 2000) 206; Farrah Ahmed and Swati Jhaveri, 'Arbitrariness and Judicial Review in India' in Swati Jhaveri and Michael Ramsden (eds), *Judicial Review of Administrative Action: Origins and Adaptations Across the Common Law World* (Cambridge University Press, forthcoming 2020); Farrah Ahmed and Swati Jhaveri, 'Reclaiming Indian Administrative Law' in Devesh Kapur and Madhav Khosla (eds), *Regulation in India: Design, Capacity, Performance* (Hart, 2019); Khaitan (above n 44); Prateek Jalan and Ritin Rai, 'Review of Administrative Action' in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016).

[51] Christopher McCammon, 'Domination: A Rethinking' (2015) 125 *Ethics* 1028. Thanks are due to Adam Perry for pointing me to this literature and for some very helpful conversations about the nature of arbitrariness.

is not – but which ought to be – controlled by some other institution.[52] These views of arbitrariness take effective external constraints to be sufficient (Endicott) or both necessary and sufficient (McCammon) for a power to be non-arbitrary.

Administrators, it is commonly thought, should be checked and constrained, e.g. by legislatures, courts or other regulators. Where there are inadequate checks and constraints, administrative power may be thought of as arbitrary. Thus, administrative law, where judges hold administrators to their legal duties and the limits of their legal powers, is described as preventing arbitrariness.

But these accounts of arbitrary *power* are not salient when particular state *action* – including legislation – is condemned as arbitrary. When judges find that a particular administrative action or particular legislation is arbitrary, they are not concerned with the adequacy of constraints on administrator or legislature, they are concerned with the quality of the action itself.

To put it differently, if we want to understand the arbitrariness doctrine, we have to shift from the question of what makes a *power* arbitrary to what makes a *decision* arbitrary.

Consider some proposed examples of arbitrary decision-making in order to focus our attention on what makes some decision-making arbitrary:

(a) An official decides whether to grant a permit by roll of dice;
(b) A judge decides and justifies her decision by picking (at random) a legal argument in one of the briefs;
(c) A policymaker, ignoring the complex considerations relevant to decision, decides on the policy that brings in the highest bribes.

There are three hints from the Supreme Court jurisprudence that can help us understand why these are examples of arbitrary decision-making. Since all three hints have to do with *reasons*, to hone in on an account of arbitrariness, we need to distinguish between three kind of reasons: normative, motivating and purported reasons.

Normative reasons, roughly, are the reasons that (truly) count in favour of, or justify, a decision. Motivating reasons are, roughly, the reasons that motivate the decision-maker to take the decision.[53] Purported reasons are reasons that a decision-maker *claims* motivate their decision. For example, with respect to a decision to build a road in a particular area, the fact that the road will (truly) benefit residents is a normative reason to build it; the fact that the decision-maker was bribed may be their motivating reason for building the road; and the decision-maker may offer as their purported reason, the benefit to local business (because this is seen as an important issue in local politics, even though the decision-maker knows there is no such benefit).

There are cases where normative, motivating and purported reasons align. For instance, the fact that your friend needs your support is a normative reason to visit her. That same

[52] Timothy Endicott, *Administrative Law* (OUP 2015) 10.
[53] Maria Alvarez, 'Reasons for Action: Justification, Motivation, Explanation' (*Stanford Encyclopedia of Philosophy*, 24 April 2016) <plato.stanford.edu/entries/reasons-just-vs-expl/#ExplReas> section 3.2.

fact might be what motivates you (and what you claim motivates you) to visit her. But the important point for our purpose is that normative, motivating and purported reasons are conceptually distinct.

Keeping these distinctions in mind, we can first say, that arbitrary decision-making has something to do with how the decision-maker relates to the normative reasons that apply to the decision. The Supreme Court consistently connects arbitrariness to unreasonableness, irrationality and a lack of principled justification.[54] Joseph Raz says that arbitrary action is generally 'action indifferent to the reasons for or against taking it'.[55] Raz concedes that much more needs to be said here, but the key insight for our purposes is that we ought to understand arbitrary decision-making in terms of the decision-maker's *attitude(s) to the applicable normative reasons*.

Secondly, there is a common intuition that power is arbitrary to the extent you can use it at your whim or fancy. The Supreme Court repeatedly appeals to this intuition when it says that the legislature acts arbitrarily when it acts "capriciously",[56] "whimsically"[57] or "at pleasure".[58] One aspect of caprice, is that the decision-maker acts according to his or her will or wish. So an arbitrary decision may not be – usually will not be – completely random; rather the motivating reason for the decision is often the private wish, desire or the interest of the decision-maker rather than the (true) normative reasons (e.g. public interest) that apply to a decision.

Thirdly, and relatedly, an arbitrary decision – in the context of state action – will often be clothed in pretextual purported reasons. For public power will rarely be considered legitimate when exercised capriciously or with indifference to the applicable normative reasons. Thus, as the Indian Supreme Court has acknowledged in a different context,[59] a decision-maker making an illegitimate decision typically has to 'cloak'[60] or 'veil'[61] her motivating reasons with purported reasons[62] which are "a mere pretense or disguise"[63] so that the decision appears legitimate.

Putting this all together, we can say that a decision is arbitrary insofar as the decision-maker:

(a) is indifferent to the question of which normative reasons are relevant to the decision,
(b) is indifferent to the weight or force of normative reasons relevant to the decision,

[54] *Shayara Bano v. Union of India* (2017) 9 SCC 1 [281] – [282]; *Navtej Singh Johar* v *Union of India* AIR 2018 SC 4321.
[55] Joseph Raz, 'The Law's Own Virtue' (2018) Columbia Public Law Research Paper No. 14-609 <https://scholarship.law.columbia.edu/faculty_scholarship/2277> accessed 09 January 2020.
[56] *Navtej Singh Johar v. Union of India* [238] per Dipak Misra CJ (for himself and Khanwilkar J); *Shayara Bano v. Union of India* (2017) 9 SCC 1 [284].
[57] *Shayara Bano v. Union of India* (2017) 9 SCC 1 [284]
[58] *Shayara Bano v. Union of India* (2017) 9 SCC 1; *Navtej Singh Johar v. Union of India* [379] per Chandrachud J.
[59] The doctrine of colourable legislation discussed below.
[60] *Jagannath Baksh Singh* v. *The State of Uttar Pradesh* AIR 1962 SC 1563 (Gajendragadkar J's judgment for language of 'device and cloak') [22].
[61] *K.C. Gajapati Narayan Deo* v. *The State of Orissa* AIR 1953 SC 375 [9].
[62] ibid discussing "a statute ***purported*** to act within the limits of its powers, yet in substance and in reality it transgressed these powers."
[63] Ibid.

(c) is indifferent to whether the relevant normative reasons justify the decision taken, all-things-considered,
(d) believes that purported reasons for the decision are not really relevant,
(e) believes that the purported reasons (though relevant) do not have the weight or force she claims they do, or
(f) believes that the purported reasons (though relevant) do not justify the decision all-things-considered.

(a) - (c) relate to the first feature of arbitrariness discussed above: that it has to do with the decision-maker's attitude towards normative reasons. (d) - (f) relate to the second and third features of arbitrariness discussed above: that an arbitrary decision may be motivated by the private interests of the decision-maker and may therefore be clothed in pretextual reasons.

Thus if any of (a) – (f) is true of the decision-maker, we can conclude that the decision is arbitrary.

This account of arbitrary decision-making has the advantage of making sense of the common intuition that arbitrary decision-making is different from mistaken decision-making. An official who honestly misjudges what the balance of reasons requires in a particular case does not decide arbitrarily; she does not have the attitudes – of indifference or belief – summarised above that make for arbitrariness.

At this point, someone might wonder how a court, reviewing legislation under Article 14, might test for the proscribed attitudes (a) – (f) that make a decision arbitrary. Three challenges are particularly prominent: the difficulty of determining the attitude of Parliament; the complications of attributing an attitude to a group agent (such as Parliament) and questions about whether Indian courts can test for legislative attitudes as the proposed test for arbitrariness requires.

In response to the first challenge, it is important to appreciate that the proposed test does not call for courts to determine the legislature's *true* attitude in enacting legislation. Courts should assess, based on the evidence before them, the decision-maker's *constructive* or *apparent* attitude, as this is the best they can do. Indeed, the Supreme Court's insistence that arbitrariness must be *manifest* highlights the need for the court to assess whether the decision *appears* (on the evidence) to have been made on the proscribed attitudes.

It is also important to acknowledge, with respect to the second challenge, that the attribution of attitudes to groups raises considerations beyond the attribution of attitudes to individuals. This is well-trodden ground as there is a sophisticated philosophical literature on when attitudes can be attributed to groups.[64] Drawing on this literature,[65] we can further specify how the test for arbitrariness above applies to legislation:

[64] eg Simon Blackburn, 'Group Minds and Expressive Harm' (2001) 60 *Maryland Law Review* 467; Margaret Gilbert, *On Social Facts* (Princeton University Press 1989).
[65] Particularly Simon Blackburn's credibility principle for when attitudes may be attributed to groups: Blackburn (above n 64).

> Legislation may be said to be arbitrary (i.e. a legislature may be said to have acted arbitrarily) if there is no *credible* way to make sense of the legislation without attributing to the legislature, the possession of one or more of the proscribed attitudes (a) – (f).

It should be clear, in light of this discussion, that the test for arbitrariness proposed here does not call for judges doing anything that they do not already do. Judges routinely attribute attitudes, including intentions and purposes, to Parliament (a group agent), and in some jurisdictions test for legislative animus.[66] The proposed test for arbitrariness – while requiring an assessment of the apparent attitudes of a group agent – raises no difficulties beyond these run-of-the-mill judicial activities.

At this point, some might raise the third challenge to the proposed test for arbitrariness, based on various statements from the Supreme Court on the relevance of legislative attitudes for constitutionality. This objection loses its force once when Indian jurisprudence on this point is examined more closely.

Many discussions in Supreme Court cases downplaying the significance of legislative mala fides were made in the context of the doctrine of colourable legislation. This doctrine denies legislatures of limited jurisdiction the power to enact legislation which 'purports' or 'pretends' to fall within its powers, though it does not 'in substance and in reality'.[67] Courts will interfere under the doctrine of colourable legislation when legislatures 'transgress[] [their] powers, the transgression being veiled by what appears, on proper examination, to be a mere pretense or disguise.'[68]

Jurisprudence identifies which judicial enquiries are necessary, and unnecessary, when adjudicating a question relating to colourable legislation. In *Narayan Deo and Ors. v. The State of Orissa*[69] the Court noted that it does not need to enquire into the legislature's (deeper) motive for engaging in the pretence, disguise or cloaking of their true purpose[70] and that they will avoid asserting mala fides on the part of the legislature.[71] None of this detracts from the fact that Indian jurisprudence is alert to the potential legal significance of legislative attitudes, including real and purported intentions and purposes, in line with the proposed test for arbitrariness.

Other cases establish that mala fides, as such, is not a ground of review for the constitutionality of legislation. Legislation, unlike administrative action, cannot be struck down using administrative law doctrines relating to mala fides.[72] A breach of constitutional

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[66] Susannah Pollvogt, 'Unconstitutional Animus' (2013) 81 *Fordham Law Review* 887.
[67] *K.C. Gajapati Narayan Deo* v. *The State of Orissa* AIR 1953 SC 375. [9]
[68] Ibid.
[69] Ibid.
[70] Ibid. [19]
[71] Ibid. [9]. Similarly, legislation with a disguised or "ulterior purpose" will not be struck down as colourable if that ulterior purpose is within its power; 'if a legislature is competent to do a thing directly, then the mere fact that it attempted to do it in an indirect or disguised manner, cannot make the Act invalid" [19].
[72] *K Nagaraj v State of Andhra Pradhesh* AIR1985 SC 551 [36] and *G.C. Kanungo v. State of Orissa* AIR 1995 SC 1655 [10].

law has to be demonstrated. These cases present no objection to the proposed test for arbitrariness, which is a test for breach of Article 14 of the Constitution.

But some might wonder if the proposed test – with its focus on legislative attitudes – is consistent with Article 14 jurisprudence. It is true that the Indian Supreme Court has been clear that proving legislative intent to *discriminate* is not *necessary* for a law to contravene the classification test under Article 14.[73] That is, an Act may contravene Article 14 even in the absence of such legislative intent. However, it does not follow that such an intent, if found, would be irrelevant to constitutionality. Courts have in fact suggested that legislative intent and legislative attitudes, like bias, are relevant for constitutionality under Article 14. In *Kathi Raning Rawat*,[74] Chief Justice Patanjali Shastri wrote "[d]iscrimination …involves an element of unfavourable bias".[75] In the same case, Mukherjea J suggests, drawing on US case law, that the "really hostile intention of the legislation"[76] is relevant to its constitutionality under Article 14. The least that can be said is that courts have left the possibility open that such intention – or other attitudes – might be *sufficient*, or at least a factor that points towards, a breach of Article 14.

Thus Supreme Court jurisprudence acknowledges, in many ways, that legislative attitudes may be relevant to constitutionality. Jurisprudence on colourable legislation acknowledges that judges must take notice when "the real purpose of a legislation is different from what appears on the face of it".[77] Indian jurisprudence is also alert to the legal significance of distinction drawn in the proposed test for arbitrariness between motivating reasons ("the real purpose") and purported reasons ("what appears on the face of it").[78] So the proposed test for arbitrariness is not dissonant with Indian jurisprudence on legislative attitudes.

In any case, any judicial statements casting doubt on the relevance of legislative attitudes for doctrines like colourable legislation, mala fides in administrative law or even the classification test, should not limit how we understand the requirements of the doctrine of manifest arbitrariness under Article 14.

The Citizenship Amendment Act 2019 can now be considered in light of this test for arbitrariness.

The Citizenship Amendment Act 2019

According to its statement of objects and reasons, the purpose of the Act is to grant citizenship to persecuted religious minorities from these three countries. The relevant paragraph reads:

> It is a historical fact that trans-border migration of population has been happening continuously between the territories of India and the areas presently comprised in Pakistan, Afghanistan and Bangladesh. Millions of citizens of undivided India belonging to various faiths were staying in the said areas of Pakistan and Bangladesh when India was partitioned in 1947. The constitutions of Pakistan, Afghanistan and

[73] *State of West Bengal v Anwar Ali Sarkar* AIR 1952 SC 75.
[74] *Kathi Raning Rawat* v. *State of Saurashtra* AIR 1952 SC 123.
[75] *Kathi Raning Rawat* v. *State of Saurashtra* AIR 1952 SC 123 [7].
[76] Ibid [36].
[77] *K.C. Gajapati Narayan Deo* v. *The State of Orissa* AIR 1953 SC 375 [19].
[78] Ibid.

> Bangladesh provide for a specific state religion. As a result, many persons belonging to Hindu, Sikh, Buddhist, Jain, Parsi and Christian communities have faced persecution on grounds of religion in those countries. Some of them also have fears about such persecution in their day-to-day life where right to practice, profess and propagate their religion has been obstructed and restricted. Many such persons have fled to India to seek shelter and continued to stay in India even if their travel documents have expired or they have incomplete or no documents.[79]

The reasons for skepticism of this account are well-known and have been aired in public fora during the legislative process, including Parliament and the press.[80] If the rationale for the Act is to offer a pathway to citizenship to persecuted religious minorities, then it is hard to see why Bahais, Jews, atheists, members of persecuted Muslim groups such as Ahmadis, Rohingyas, Hazaras and Shias, are excluded.[81]

If the proposed rationale for the Act were taken seriously, it hard to see why migrants from Sri Lanka and Bhutan – both with persecuted religious minorities[82] – do not qualify. The proffered rationale for the exclusion of such migrants (that 'the constitutions of Pakistan, Afghanistan and Bangladesh provide for a specific state religion')[83] is not credible; the constitutions of both Sri Lanka and Bhutan give the majority religion a special status. Buddhism is the established religion and the "spiritual heritage of Bhutan".[84] Article 9 of the Sri Lankan constitution reads: "The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha *Sasana*…". [85]

In any case, if the Act is concerned to protect people without religious freedom from persecution, its presupposition that all and only states with established religions persecute minorities is palpably false.[86] A large number of states worldwide with established religions, including the Nordic states and the United Kingdom, have relatively good protections for religious freedoms.[87] It barely needs pointing out that some states, like China, without an

[79] Citizenship Amendment Act 2019, Statement of Objects and Reasons.
[80] E.g. 'P Chidambaram's Six Questions to Encapsulate Fundamentals of Opposition to Citizenship Amendment Bill' (*Firstpost*, 11 December 2019) <www.firstpost.com/politics/p-chidambarams-six-questions-encapsulate-fundamentals-of-opposition-to-citizenship-amendment-bill-7769661.html>.
[81] Kanika Gauba and Anshuman Singh, 'Voter, Citizen, Enemy' (2017) 52(23) Economic & Political Weekly <www.epw.in/journal/2017/23/commentary/voter-citizen-enemy.html>.
[82] E.g. Christians, see Meghan Fischer, 'Anti-Conversion Laws and the International Response' (2018) 6 *Penn State Journal of Law & International Affairs* 1, 38-44.
[83] Citizenship Amendment Act, 2019, Statement of Objects and Reasons.
[84] Article 3, Constitution of Bhutan.
[85] Article 8, Constitution of Sri Lanka; see generally Ben Schontal, *Buddhism, Politics and the Limits of Law: The Pyrrhic Constitutionalism of Sri Lanka* (CUP 2016). These provisions bear similarity to Article 2 read with Article 20 of the Constitution of Pakistan and Article 2 of the Constitution of Afghanistan.
[86] The Act also seems to presuppose that the constitutions of Afghanistan, Pakistan and Bangladesh do not protect religious freedom; in fact they do (Article 20 of the Constitution of Pakistan and Article 2 of the Constitution of Afghanistan). In the Constitution of Bangladesh, "Article 8 declares 'secularism' as a 'fundamental principle of state policy' and Article 12 defines 'secularism' to mean, among other things, the elimination of 'the granting by the State of political status in favour of any religion'". Tarunabh Khaitan, 'Constitutional Directives: Morally-Committed Political Constitutionalism' (2019) 82 *Modern Law Review* 603, 626.
[87] E.g. Constitution of the Kingdom of Norway 1814, Article 16.

established religion, are responsible for serious persecution of religious minorities.[88] Indeed, India has long offered asylum to persecuted minorities – especially Tibetan Buddhists - from China who have suffered not just political, but also religious persecution.[89]

If the rationale for the Act is to protect people from religious persecution, it is not clear why its provisions do not apply to tribal area of Assam, Meghalaya, Mizoram or Tripura and the 'Inner Line' areas.[90] It is also difficult to make sense of the Act's cut-off date of the end of 2014;[91] to state the obvious, people have fled due to religious persecution after that date.

All of this to say that, with reference to the test for arbitrariness proposed earlier, we cannot credibly make sense of the terms of the Citizenship Amendment Act 2019, including its statement of object and reasons, without attributing to the legislature at least some of the proscribed attitudes (a) – (f) of the test.

That is, we cannot credibly make sense of the Act without attributing to the legislature:

(a) indifference to the existence or force of normative reasons that count against restricting the pathway to citizenship as the Act does (e.g. the equal force of claims of religious persecution from Muslims, Jews, atheists, and those fleeing religious persecution in Sri Lanka, Bhutan or Myanmar); or
(b) belief that the purported reasons for the Act do not truly justify it (e.g. because the purported reasons are applicable to these other persecuted minorities; if the purported reasons truly motivated the Act, it would not have excluded these other minorities); or
(c) indifference to whether the Act (particularly its exclusions) is all-things-considered justified.

In other words, there is no credible way to make sense of the Act without condemning it as manifestly arbitrary. Thus the Art contravenes Article 14 due to its arbitrariness, in addition to the other reasons for its unconstitutionality outlined in the introduction.

The next section demonstrates that the Act is also unconstitutional for breaching a different aspect of the constitutional equality provisions, the antisubordination principle.

IV. The Antisubordination Principle

[88] Ishaan Tharoor, 'The Stunning New Evidence of China's Dictatorial Repression' (*The Washington Post*, 18 November 2019) <www.washingtonpost.com/world/2019/11/18/stunning-new-evidence-chinas-dictatorial-repression/>.
[89] See above, Chimni n 33, p. 378; David Lague, Paul Mooney and Benjamin Kang Lim, 'The Politics of Tibet's Poisonous Religious Divide' (*Reuters*, 22 December 2019) <www.reuters.com/article/china-dalailama-divide/the-politics-of-tibets-poisonous-religious-divide-idINKBN0U41X120151221>.
[90] Citizenship Amendment Act 2019, s 4.
[91] For a response to the suggestion that the line must be drawn somewhere, see Abhinav Chandrachud, 'Secularism and the Citizenship Amendment Act' Indian Law Review (forthcoming).

Scholars and commentators describe the Citizenship Amendment Act as making Indian Muslims second class citizens.[92] As Niraja Jayal says about the Act:

> it is a threat to the idea of Indian citizenship per se. It is, in some senses, a body blow to the constitutional ideal of equality of citizenship regardless of caste, creed, gender, language, and so on. Ours is a secular constitution, and the worry is that the introduction of the religious criterion will yield, effectively, a hierarchy of citizens, a kind of two-tiered, graded citizenship.[93]

A former Chief Justice of the Delhi High Court and former Chairperson of the Law Commission of India, Ajit Shah argues:

> this law automatically makes Muslim immigrants second class priorities when they are on Indian soil, even though they may have made the long trek to India for the same reasons (poverty, political persecution, etc.) that drove their Hindu or Christian neighbours out. If you expand the understanding of this law, as the government has overtly done (by linking the NRC to the CAA), it has implications of making all Muslims in India second class citizens.[94]

On its face, the Act does not affect any Indian Muslim's legal status as a citizen, a point made by the Prime Minister.[95] So is the concern about second-class citizenship incorrect or legally irrelevant? It is neither. But the concern needs unpacking for its legal significance to be appreciated. This section elaborates on the nature of the concern, and then explains why it is relevant to the constitutionality of the Act.

First, putting aside the extremely important concerns relating to the NRC and NPR that this paper does not consider, the concern about second-class citizenship of Muslims is a concern about *social* and *civic*, not formal legal, status. For the law can change not just legal, but social, status. When the law changes social status, it need not do so directly and explicitly. For instance, 'Jim Crow' laws segregated black and white people on public transport and made it illegal for them to sit together.[96] Even though the law explicitly said nothing about the social and civic status of black people, its implications for that status were impossible to miss.

Expressivists like Deborah Hellman and Tarunabh Khaitan argue that such laws *demean* black people[97] where 'to demean' is a *speech act* which, when it succeeds, lowers the social standing of its object.[98] Such *speech acts* do not describe the way things are, but rather make

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[92] E.g. Anil Varughese, 'India's New Citizenship Act Legalizes a Hindu Nation' (*The Conversation*, 19 December 2019) <https://theconversation.com/indias-new-citizenship-act-legalizes-a-hindu-nation-129024> accessed 09 January 2020.

[93] Isaac Chotiner, 'India's Citizenship Emergency' (*New Yorker*, 18 December 2019) <www.newyorker.com/news/q-and-a/indias-citizenship-emergency>.

[94] Ajit Prakash Shah, 'In CAA Narrative, Finding the Judiciary's Lost Voice' (*The Hindu*, 28 December 2019) <www.thehindu.com/opinion/lead/in-caa-narrative-finding-the-judiciarys-lost-voice/article30415118.ece>.

[95] 'India Protests: PM Modi Defends Citizenship Bill Amid Clashes' (*BBC News*, 22 December 2019) <www.bbc.com/news/world-asia-india-50883819>.

[96] eg the Louisiana 'Separate Car Act' of 1890.

[97] Tarunabh Khaitan, 'Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea' (2012) 32 OJLS 1, 11.

[98] Deborah Hellman, 'Discrimination and Social Meaning' in Kasper Lippert-Rasmussen (ed), *The Routledge Handbook of the Ethics of Discrimination* (Routledge 2017) 103, 104.

them so.[99] When the Queen dubs someone a knight, she is not describing their status, but changing it through a speech act. Jim Crow laws similarly demeaned black people, lowering their social and civic status.

We can now be more precise about the concern with which we began: the concern is that the Citizenship (Amendment) Act 2019 is a speech act which lowers Indian Muslims' social and civic status, relegating them to the status of second-class citizens. This lowering of social and civic status of groups through such speech acts may be described as *subordination*.

Subordination is legally significant because the equality protections of the Indian Constitution, including Articles 14, 15, 16 and 17 and the preambular commitment to 'equality of *status'*, give effect to an 'antisubordination principle'[100] which forbids laws and practices that "reduce groups to the position of a lower or disfavored caste" or "aggravate or perpetuate the subordinate status of a specially disadvantaged group".[101] As one scholar put it: "India offers a working example of an antisubordination approach."[102] Another scholar characterises the Indian Constitution as "explicitly committed to an antisubordination principle".[103]

The antisubordination principle implicit in the Indian equality provisions have also been expressed in scholarship and judgments in terms of principles of dignity, inclusiveness and 'rights against hierarchy'.[104] Constitutional documents that predate the 1950 Constitution, as well as Constituent Assembly debates, offer evidence that the India's equality provisions are to be understood in terms of anti-subordination. As Gautam Bhatia writes, the equality provisions:

> aimed at the Constitution's transformative purpose – as invoked by several members of the Constituent Assembly – of doing away with the hierarchies of subordination and exclusion, based on personal characteristics that marked the pre-Constitutional polity.[105]

Comparative constitutional scholars of the principle in the US Equality Clause characterise Indian equality jurisprudence as exemplifying the antisubordination principle, and argue that "[a] careful reading of cases in which the Indian Supreme Court relies on U.S. precedents shows the Indian Court drawing from case law that rests on the articulation of

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[99] '[S]peech acts are those acts that can (though need not) be performed by saying that one is doing so': Mitchell Green, 'Speech Acts' (*Stanford Encyclopedia of Philosophy*, 3 July 2007) <plato.stanford.edu/archives/win2017/entries/speech-acts/>.

[100] Scott Grinsell, 'Caste and the Problem of Social Reform in Indian Equality Law' (2010) 35 Yale Journal of International Law 199; Sean A. Pager, 'Antisubordination of Whom? What India's Answer Tells Us About the Meaning of Equality in Affirmative Action' (2007) 41 UC Davis Law Review 289; Clark Cunningham and Madhava Menon, 'Race, Class, Caste…? Rethinking Affirmative Action' (1999) 97 *Michigan Law Review* 1296; Laura Dudley Jenkins, 'Race, Caste and Justice: Social Science Categories and Antidiscrimination Policies in India and the United States' (2004) 36 *Connecticut Law Review* 747

[101] Reva Siegel, 'Equality Talk*:* Antisubordination and Anticlassification Values in Constitutional Struggles over Brown' (2004) 117 *Harvard Law Review* 1470, 1535 (internal quotes not included); Owen Fiss, 'Groups and the Equal Protection Clause' (1976) 5 *Philosophy and Public Affairs* 107, 157.

[102] Pager (above n 100) 302–03.

[103] Grinsell (above n 100) 229.

[104] Gautam Bhatia, 'Equal moral membership: *Naz Foundation* and the Refashioning of Equality under a Transformative Constitution, (2017) Indian Law Review 115, 116, 131.

[105] Ibid 135-136

antisubordination values in U.S. equal protection doctrine".[106] Scholars also find it "telling"[107] that the antisubordination is sometimes characterised at the "anticaste principle" in US, suggesting its connections with the Indian constitutional position.

To know whether the Act is unconstitutional on the ground of subordination, we need a test for subordination, ideally one that both court and citizen can use. I propose a two-fold test based on the scholarly work on speech acts, and apply it to the Citizenship (Amendment) Act 2019, in what follows.

First, *subordination requires that the lawmaker have the power to subordinate*. To adapt Deborah Hellman: "To [subordinate], the person or institution taking an action or adopting a policy must also have real power… the actor must have sufficient power such that her actions could lower the actual social standing of the people she affects".[108]

There is no doubt that Indian Parliament has this power to affect social standing. It is difficult to think of context in which legislatures do not have this power, though in theory a society may exist where the law is obeyed but does not influence relative social standing. Such a society marks a contrast with independent India, where law has demonstrated its power to change relative social standing – e.g. through anticaste measures.[109] It is important to emphasise that this first prong of the test does *not* require that Parliament succeed in subordinating all members of the group. As Hellman clarifies, all that is required is that the lawmaker has the capacity to demean; that capacity might not be realised in every case.[110]

The second prong of the test is that the law must be *recognisable* as a subordinating speech act. Martha Nussbaum argues that 'a [literal] slap in the face that a noble gives a vassal… both expresses and constitutes a hierarchy of ranks'.[111] This slap could only constitute (or maintain) a hierarchy of ranks because it was understood as doing so in feudal England. Even where such relationships of vassalage exist today – for example between a knight and the Queen - the nature of this slap would no longer be understood. Similarly, Jim Crow laws were recognisable as speech acts that subordinate black people, in their context. In a completely race-unconscious society, they might not have been so-understood.

The Citizenship (Amendment) Act 2019 meets this prong of the test easily. The recognition of citizenship is the preeminent good distributed by the state; the exclusion of a major religious group from a pathway to citizenship which includes all other major religious groups in the country,[112] cannot *but* be understood as a subordinating speech act. (Things

[106] Grinsell (above n 100) 229 ibid.
[107] Pager (above n 100) 330.
[108] Hellman (above n 98) 103.
[109] Marc Galanter, 'Law and Caste in Modern India' (1963) 3 Asian Survey 544.
[110] It is therefore no answer to the concern to say that the Citizenship Amendment Act has not succeeded in subordinating all Indian Muslims. Hellman (above n 98) 104 gives the counterexample of Rosa Parks (whose social standing was raised by the law). For Hellman, the law still demeans black people because all that is needed is for the police/law to have the capacity to lower standing.
[111] Martha Nussbaum. *Liberty of Conscience* (Basic Books 2008) 226.
[112] This is not to downplay the serious problems with the exclusion of Bahais, Jews and smaller faith movements.

might have been different if the exclusion was supported by credible reasons, but as discussed earlier, it is not).

When we say that legislation subordinates, it is important to appreciate that this subordination may take subtle forms. It may not involve yellow star badges.[113] The subordination effected by the Citizenship (Amendment) Act 2019 is consistent with formal legal recognition of Indian Muslims' legal status as citizens. The Act is recognisable as giving effect to a narrative in which Indian Muslims may have all or many of the legal benefits of citizenship, but are only citizens in an attenuated and marginal sense; the paradigm or central case of a citizen is not Muslim.[114] Against this familiar narrative,[115] the Act is recognisable as a subordinating speech act.

The Citizenship (Amendment) Act 2019, as it satisfies the two prongs of the test for subordination, can be said to "reduce groups to the position of a lower or disfavored caste" or (at the very least) "aggravate or perpetuate the subordinate status of a specially disadvantaged group.[116]

The Citizenship Amendment Act 2019 is therefore unconstitutional, not just because it discriminates and is arbitrary, but also because it subordinates. Since it subordinates not just migrants who are excluded from its protection, but also Muslim citizens, it offends not just Article 14, but also the equality protection available to citizens under Article 15.

V. Conclusion

The Citizenship Amendment Act 2019 is not just unconstitutional, but patently, manifestly and obviously unconstitutional. The recent protests – focussed on the Preamble to the Constitution – show that many ordinary citizens understand this. The Indian Supreme Court is currently facing extremely serious challenges to its legitimacy, particularly to perceptions of its independence and neutrality vis-à-vis the central government.[117] The Court's own role in the NRC has been criticised.[118] The Supreme Court's response to the current petitions challenging the constitutionality of the Citizenship Amendment Act 2019 will therefore be a crucial test of its legitimacy.

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[113] 'The Yellow Star' (*British Library*) <https://www.bl.uk/learning/histcitizen/voices/info/yellowstar/theyellowstar.html> accessed 09 January 2020.
[114] But rather 'the idea of the "natural" citizen [is] usually Hindu and male': Jayal (above n 13) 53.
[115] Christophe Jaffrelot (ed), *Hindu Nationalism: A Reader* (Princeton University Press 2007).
[116] Siegel (above n 101); Fiss (above n 101) 157.
[117] Anashri Pillay, 'Appointments, Accountability and Independence: The Indian Supreme Court at a Crossroads' (*IACL-AIDC Blog*, 30 May 2018) <blog-iacl-aidc.org/crisis-at-the-supreme-court-of-india/2018/6/2/symposium-appointments-accountability-and-independence-the-indian-supreme-court-at-a-crossroads>; Atul Dev, 'India's Supreme Court is Teetering on the Edge' (*The Atlantic*, 29 April 2019) <www.theatlantic.com/international/archive/2019/04/india-supreme-court-corruption/587152/>.
[118] V Venkatesan, 'The NRC Case: The Supreme Court's Role' (*Frontline*, 11 October 2019) <frontline.thehindu.com/cover-story/article29498707.ece>.