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## India's Citizenship Amendment Act Violates International Human Rights

Talia Lewis

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## INDIA'S CITIZENSHIP AMENDMENT ACT VIOLATES INTERNATIONAL HUMAN RIGHTS

By Talia Lewis\*

### ABSTRACT

*The Citizenship Amendment Act, recently passed legislation, comes on the heels of a very tumultuous number of years, months, and weeks in India. Most notably, Muslim communities and citizens fear the upheaval of their way of life due to the decisions of the Hindu-majority who controls the political actions of the democratic republic. These Muslim groups are not the only worried parties. International humanitarian bodies have spoken out against various recent actions of India's government. The Citizenship Amendment Act, if considered in the context of other actions by the governing party in India, should be understood as violative of International human rights laws and norms. India is subject to the standards set in United Nations (UN) documents because it is party to covenants and declarations. This paper discusses the formation of the UN bodies, which later promulgated such treaties and declarations. It discusses the evolution of UN human rights law, how it has applied in the past, and how it could be applied to the current situation in India and its enactment of the Citizenship Amendment Act. Moreover, this paper will review the India's current events and how recent history gave rise to the issues of religious intolerance that exist there, at present. In short, this paper concludes that there is a persuasive argument that India's Citizenship Amendment Act violates international human rights laws and norms.*

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## I. INTRODUCTION

Presently, India is in turmoil. Protesters inhabit the streets, lawmakers are overturning decades-long policies with the support of the nation's highest court, and citizens have begun to question whether they will be rendered stateless by the nation they consider home.<sup>1</sup> The central controversy provoking the unrest is India's Citizenship Amendment Act. Opposition to the Act claims it discriminates against the country's Muslim minority population.<sup>2</sup> Supporters, on the other hand, claim that the Act offers specific religious groups who face discrimination and violence in neighboring countries, a necessarily quicker route to Indian citizenship.<sup>3</sup>

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<sup>1</sup> Joanna Slater, *Why protests are erupting over India's new citizenship law*, WASH. POST (last visited Dec. 19, 2019), [https://www.washingtonpost.com/world/asia\\_pacific/why-indias-citizenship-law-is-so-contentious/2019/12/17/35d75996-2042-11ea-b034-de7dc2b5199bstory.html](https://www.washingtonpost.com/world/asia_pacific/why-indias-citizenship-law-is-so-contentious/2019/12/17/35d75996-2042-11ea-b034-de7dc2b5199bstory.html).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

Because India is subject to the jurisdiction of International Human Rights governing bodies regarding the violations of treaties and covenants it signed, the Citizenship Amendment Act must not only comport to national legal standards, but also specific international law. This note argues that the Citizenship Amendment Act is a violation of International Human Rights. Part II reviews how international human rights bodies and instruments regulate religion. Part III reviews India's recent history and the discriminatory implications of the Citizenship Amendment Act. Part IV explains how India's Citizenship Amendment Act arguably violates three international human rights instruments: The Universal Declaration of Human Rights; The International Covenant on Civil and Political Rights; and The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

## II. BACKGROUND ON INTERNATIONAL HUMAN RIGHTS & HOW INTERNATIONAL HUMAN RIGHTS COMMUNITIES, LEGISLATION, AND INSTRUMENTS REGULATE RELIGION

International human rights cannot be fully understood without first discussing the United Nations (UN), what led to its creation, and how it has evolved over time. The UN was Franklin Delano Roosevelt's brainchild.<sup>4</sup> He envisioned four freedoms that would facilitate peacefully co-existing nations after World War II's devastation: "freedom of speech and expression, freedom of worship, freedom from want, and freedom from fear."<sup>5</sup> These freedoms lay the groundwork for the UN, which was formally chartered in 1945, shortly after Roosevelt announced his vision.<sup>6</sup>

Of course, Roosevelt was not solely responsible for the UN and its Charter. In 1945, fifty delegates from many different nations came together to determine how the UN would operate. They determined that it would be an international governing body, and just as Roosevelt envisioned, human rights and freedoms would be central to its focus. The delegates aimed to create a better version of the failed League of

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<sup>4</sup> LAURENCE PETERS, *THE UNITED NATIONS: HISTORY AND CORE IDEAS* 58 (2015).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*; UNITED NATIONS, <https://www.un.org/en/sections/about-un/overview/index.html> (last visited Dec. 30, 2019).

Nations. They chartered the UN with new information: human rights were a matter of international concern, and therefore should not be left solely to regulation by the sovereign states.<sup>7</sup> World War II was proof positive of that. The Charter tasked the UN's General Assembly with promoting international cooperation to further human rights and required the "creation of a commission for the promotion of human rights."<sup>8</sup> These assignments paved the way for the UN to later build on human rights in its founding Charter; among them, religion.

The UN establishes international human rights standards through the drafting of declarations and conventions. Although the instruments may be drafted through nuanced approaches, both instruments are sourced from the human rights community in general.<sup>9</sup> In other words, good, old-fashioned collective action usually spurs the relevant UN body to begin the drafting process. Usually, after activists have collectively lobbied the UN branch at issue, different contributors are sought out to create a draft of the covenant or declaration.<sup>10</sup> Contributors take many shapes and forms, including individuals, organizations, and members of the UN.<sup>11</sup> The main attribute is that these contributors are authorities on information salient for the creation of the instrument at hand. Once a final draft is created, the document is presented to the UN General Assembly.<sup>12</sup> There, differing, international governments weigh in to determine whether to accept, or reject, the proposed instrument.<sup>13</sup> Treaties, not declarations, when ratified, are then offered for signature, ratification, or accession.<sup>14</sup> The process to finally accept and certify a human rights declaration or covenant is one "of innovation and improvisation,

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<sup>7</sup> DINAH SHELTON, *Introduction to THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 2* (Dinah Shelton ed., 2013).

<sup>8</sup> HELGE ARSHEIM, *MAKING RELIGION AND HUMAN RIGHTS AT THE UNITED NATIONS* 34-35 (Gustavo Benavides et al. eds., 2018).

<sup>9</sup> BERTRAND G. RAMCHARAN, *The Law-Making Process: From Declaration to Treaty to Custom to Prevention*, in *THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW* 499, 501 (Dinah Shelton ed., 2013) [hereinafter RAMCHARAN].

<sup>10</sup> *Id.* at 499.

<sup>11</sup> *Id.* at 499-500

<sup>12</sup> *Id.* at 500

<sup>13</sup> *See id.*

<sup>14</sup> *Id.* at 506.

bearing the imprints of the members of the international human rights movement.”<sup>15</sup>

Differing instruments import different obligations on to the international community. Some instruments impose new norms and customs by which nations must abide their behavior. Other instruments impose legal obligations on the nations that choose to adopt them. Generally, it is thought that sweeping documents, such as the UN Charter, serve to create international norms.<sup>16</sup> Norms may be binding. For example, Article 55 of the UN Charter states that members of the body must promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, and religion.”<sup>17</sup> Article 56 states that “all members pledge to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.”<sup>18</sup> Taken together, these provisos establish a legally binding obligation for UN Member States. However, according to the International Court of Justice, peremptory norms are the only ones which are binding on their face. These norms are non-derogable because they are fundamental. Not every peremptory norm is explicitly stated, nor is it required that every state is in agreement about the status of a certain right.<sup>19</sup> It is necessary that “the norm is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”<sup>20</sup> To determine if a norm is peremptory, the collective will of the group can overrule the individual will of a sovereign.<sup>21</sup> Notably, the Inter-American Court of Human Rights on Undocumented Migrants has concluded that the obligation of non-discrimination is a peremptory right.<sup>22</sup>

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<sup>15</sup> RAMCHARAN, *supra* note 9, at 500.

<sup>16</sup> *Id.* at 516.

<sup>17</sup> *Id.* at 508; U.N. Charter art. 55;

<sup>18</sup> U.N. Charter art. 56; RAMCHARAN, *supra* note 9, at 508.

<sup>19</sup> ERIKA DE WET, *Jus Cogens and Obligations Erga Omnes*, in THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 541-45 (Dinah Shelton ed., 2013).

<sup>20</sup> *Id.* at 541.

<sup>21</sup> *Id.* at 543.

<sup>22</sup> *Id.* at 544.

Charters, which are treaties, are usually legally binding only if sovereign states choose to sign and adopt them.<sup>23</sup> Even when states choose to do so, they may sign with contingencies that allow more variance in their laws than the international instrument would support.<sup>24</sup> Charters that have not been adopted by sovereign states, and norm-establishing instruments can create binding customary international law by which every sovereign must comport their behavior.<sup>25</sup> However, there are specific factors that must be met for charters to be considered as such, and it is not a commonly awarded status.<sup>26</sup>

The UN, as a “non-state international organization” that regulates religion and other fundamental human rights at the international level, promulgated three main instruments during its lifetime which establish and elaborate on the right to religious freedom.<sup>27</sup> Those instruments are: the Universal Declaration of Human Rights (UDHR); the International Covenant on Civil and Political Rights (ICCPR); and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.<sup>28</sup> For each instrument, different protocols exist that govern who is subject to jurisdiction by the body assigned to oversee alleged violations of said document, and different standards exist to determine if a violation occurred.

Considered a foundational element of human rights, the UDHR serves as the seed that spawned what we understand as international human rights law today. This instrument is legally binding in some ways but is better understood as setting forth international human rights customs and norms. Its progeny includes the ICCPR, which elaborated on, with much more specificity, religious rights of individuals and groups, and the obligations of sovereigns to protect those rights. This instrument is legally binding. Finally, the

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<sup>23</sup> RAMCHARAN, *supra* note 9, at 510.

<sup>24</sup> *Id.* at 511-12.

<sup>25</sup> *Id.* at 514.

<sup>26</sup> *Id.*

<sup>27</sup> See ARSHEIM, *supra* note 8, at 29.

<sup>28</sup> THE UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <https://www.ohchr.org/EN/Issues/FreedomReligion/Pages/Standards.aspx> (last visited Jan. 01, 2020).

Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, although drafted initially to serve as a treatise similar to the International Convention on the Elimination of All Forms of Racial Discrimination, is part of the body of international human rights norms. There have been a few other instruments that broadened and clarified the scope of religious rights following the promulgation of these three documents. Still, today, many years following the creation of the Declaration, the universal human rights body of law has yet to furnish a treatise specific to the prohibition on religious discrimination. The three main instruments enumerated above serve as the chief international human rights legal standards to adjudge possible human rights violations regarding discrimination against religious minorities.

### III. INDIA STEPS AWAY FROM ITS DEMOCRATIC HISTORY: THE DISCRIMINATORY IMPLICATIONS OF INDIA'S CITIZENSHIP AMENDMENT ACT

Discrimination against Muslims is hardly a new phenomenon on the global or the national scale. India, with the world's third-largest Muslim population, and the world's *most populous* democracy, has proven not to be immune to these same discriminatory impulses.<sup>29</sup> India's most vocal critics of its minority Muslim population are right-wing Hindu extremists who have either controlled or served in India's parliamentary government for decades.<sup>30</sup> Recent events have spurred the conflict between these two groups, which has gone more or less unnoticed on a global stage for years, to surface. Of course, the Hindu-Muslim divide could be blamed as the reason for the partition between India and Pakistan in the mid-1900s.<sup>31</sup> However, since the violence that erupted during the events of that time, Hindu and Muslim citizens of India have lived largely without conflict—at least *less extreme* conflict.<sup>32</sup>

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<sup>29</sup> MARTHA C. NUSSBAUM, *THE CLASH WITHIN: DEMOCRACY, RELIGIOUS VIOLENCE, AND INDIA'S FUTURE* i, 1 (Harvard University Press, 2009).

<sup>30</sup> *See id.*

<sup>31</sup> Dexter Filkins, *Blood and Soil in Narendra Modi's India: The Prime Minister's Hindu-Nationalist Government has Cast Two Hundred Million Muslims as Internal Enemies*, *THE NEW YORKER* (Dec. 2, 2019), <https://www.newyorker.com/magazine/2019/12/09/blood-and-soil-in-narendra-modis-india>.

<sup>32</sup> *Id.*

However, recent events, have disrupted that, more or less, peaceful co-existence. The result is visible internationally via news-media outlets, and the blame has been laid at the feet of both citizens and lawmakers, depending on who is asked. The Citizenship Amendment Act seems to be the biggest provocateur of the conflict between the Bharatiya Janata Party (BJP), the right-wing Hindu nationalist-led government, and protesters (both Muslim and otherwise).<sup>33</sup>

The legislation comes on the heels of numerous events, including conspicuous anti-Muslim legal decisions, incidents, and rhetoric. In early November, India's Supreme Court, its highest court, ruled unanimously that a Hindu temple would be built in the spot where riots by Hindu extremists in 1992 destroyed a 16<sup>th</sup> century mosque.<sup>34</sup> The ruling casts renewed light on the violent ideology, once unconventional, which can now be seen practiced by India's highest-ranking politicians.<sup>35</sup> India's Prime Minister Narendra Modi, an observer of Hinduism, has mastered the anti-Muslim rhetoric. His dialogue takes aim at illegal immigrants and pro-terrorist groups, but he couches the messages in anti-Muslim language, sometimes explicitly and sometimes through allusions.<sup>36</sup> His political platforms has always been pro-Hindu, and his actions effectively anti-Muslim, but since he elevated to India's highest elected office, the impacts of his policies are being felt throughout the whole of the democratic republic.<sup>37</sup>

In August 2019, Modi took aim at Kashmir, India's only Muslim-majority state, withdrawing its autonomy and detaining

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<sup>33</sup> Helen Regan, Swati Gupta & Omar Khan, *India Passes Controversial Citizenship Bill that Excludes Muslims*, CABLE NEWS NETWORK (Dec. 17, 2019), <https://www.cnn.com/2019/12/11/asia/india-citizenship-amendment-bill-intl-hnk/index.html>.

<sup>34</sup> Helen Regan, Swati Gupta & Manveena Suri, *Hindus Allowed to Build on Disputed Holy Site, India's Supreme Court rules*, CABLE NEWS NETWORK (Nov. 9, 2019, 12:59 PM), <https://www.cnn.com/2019/11/08/asia/ayodhya-dispute-india-ruling-intl-hnk/index.html>.

<sup>35</sup> Sushmita Pathak, *Indian Supreme Court Rules Disputed Territory Belongs To Hindus*, NPR ASIA (Nov. 9, 2019, 10:51 AM), <https://www.npr.org/2019/11/09/777907491/indian-supreme-court-rules-disputed-territory-belongs-to-hindus>.

<sup>36</sup> Dexter Filkins, *Has Narendra Modi Finally Gone Too Far?*, THE NEW YORKER (Dec. 16, 2019), <https://www.newyorker.com/news/daily-comment/has-narendra-modi-finally-gone-too-far-india-protests>.

<sup>37</sup> *Id.*

many of its citizens.<sup>38</sup> Revocation of Kashmir's autonomy effectively dismantles the intention of the provision: "to help preserve the state's religious and ethnic identity," leaving its Muslim majority status on tenuous ground.<sup>39</sup> In order to safeguard Kashmir's residents and Muslim-majority status, the provision had prohibited (for the most part) individuals from India's Hindu majority from settling there.<sup>40</sup>

Modi is only one of the politicians propagating anti-Muslim rhetoric and ideology. BJP president Amit Shah referred to Muslim illegal migrants as "termites," subsequently vowing to dispose of them by throwing them into the sea.<sup>41</sup> Another BJP member, Yogi Adityanath, was temporarily banned from the campaign trail in April by India's election commission for his rhetoric.<sup>42</sup> In one speech, he described Muslim voters who supported the opposing party as a "green virus."<sup>43</sup> Even against the backdrop of these messages, Modi's spokespeople have outrightly denied targeting the minority Muslim population in India.<sup>44</sup> Furthermore, many news outlets have supported Modi's narrative of certain events, working to construe incidents as positive changes to what he and his party are calling the "New India."<sup>45</sup>

Featured prominently on the menu of anti-Muslim actions taken by the BJP is the Citizenship Amendment Act. The predecessor to the Act was proposed in 2016 but failed to pass the upper house of Parliament in India, which is composed of only a minority of BJP members.<sup>46</sup> This bill, slightly different from the one originally brought

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<sup>38</sup> *Id.*

<sup>39</sup> Filkins, *supra* note 31.

<sup>40</sup> *Id.*

<sup>41</sup> Devjyot Ghoshal, *Yogi Adityanath Temporarily Banned From Election Campaign After Anti-Muslim comment*, REUTERS (Apr. 15, 2019, 8:30 AM), <https://in.reuters.com/article/india-election-ban/yogi-adityanath-temporarily-banned-from-election-campaign-after-anti-muslim-comment-idINKCN1RR17U>.

<sup>42</sup> *Id.*

<sup>43</sup> *See id.*

<sup>44</sup> *Id.*

<sup>45</sup> Filkins, *supra* note 31.

<sup>46</sup> *Citizenship Amendment Bill: India's new 'anti-Muslim' law explained*, BBC NEWS (Dec. 11, 2019), <https://www.bbc.com/news/world-asia-india-50670393>.

before Parliament, was passed by both houses of Parliament on December 11, 2019.<sup>47</sup>

The Citizenship Amendment Act is an amendment to the pre-existing Indian Citizenship law that prohibits illegal immigrants from becoming citizens.<sup>48</sup> The law has been in place since 1955.<sup>49</sup> It was enacted in the years immediately following the partition of Pakistan and India, and citizenship conflicts between India and Bangladesh.<sup>50</sup> The 1955 Indian Citizenship Act's focus is on the prohibition on illegal immigrants becoming citizens.<sup>51</sup> The 2019 amendment to this Act utilizes religious and ethnic classifications to distinguish between groups whose privileges will be altered.<sup>52</sup> Specifically, the bill offers amnesty to people belonging to the Hindu, Sikh, Buddhist, Jain, Parsi, or Christian community from Bangladesh, Afghanistan, or Pakistan.<sup>53</sup> This means, individuals belonging to this group—that can *prove* they belong to this group—will not be deemed illegal immigrants in India.<sup>54</sup>

This changes their rights drastically because illegal immigrants can be detained or deported.<sup>55</sup> Moreover, the Act changes the residency requirements for individuals applying for Indian citizenship. Individuals belonging to the above groups are no longer subject to the requirement that they must live and work legally in India for the eleven years prior to application.<sup>56</sup> Now, they can apply for citizenship if they have lived and worked legally in India for six years.<sup>57</sup> For practical purposes, these two changes go together. If a person is not an illegal immigrant because they fit into one of the specific enumerated ethnic and religious classifications, then they have not been illegally residing in India, and therefore are more likely to meet the residency requirement set forth in the amendment.

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> See Filkins, *supra* note 31.

<sup>51</sup> *Id.*

<sup>52</sup> Citizenship (Amendment) Act, 2019, No. 47, Acts of Parliament, 2019 (India).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Citizenship Amendment Bill: India's new Muslim' law explained, supra* note 46.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

According to India's Prime Minister, and the Parliament, the reason for classifying groups according to religion and ethnicity are legitimate. Proponents of the legislation claim that these classifications go together because the Hindu, Sikh, Buddhist, Jain, Parsi, and Christian populations in Bangladesh, Afghanistan, and Pakistan are all minority groups.<sup>58</sup> Accordingly, these groups need protection in India because they are more likely to land there in an effort to avoid persecution in their home countries.<sup>59</sup> This explanation goes to the conspicuous absence of the Muslim community from the enumerated backgrounds afforded special rights under the new Amendment. Pakistan, Bangladesh, and Afghanistan are all Muslim-majority countries, and thus Muslim immigrants who hail from those lands are less likely to have left fleeing persecution or in pursuit of asylum in India. However, this excuse does not extend to Myanmar's Rohingya Muslims who, fleeing exploitation and massacre, have sought citizenship in neighboring countries like India for years.<sup>60</sup> Still, proponents claim that Rohingya Muslims are violent, and would put Indian citizens in danger if they were offered an expedited route to citizenship.

Those who oppose the Amendment claim that these explanations do not hold water. They argue that considered in light of recent political events in India, and the actual impact the amendment will have, the true intent of the legislators is clear: to offer citizenship rights to only some individuals, leading to the further oppression of India's Muslim population and further prohibition on Muslim migration to India. One Indian human rights activist described the Act as a "most dangerous piece of legislation" because "it amounts to truly destroying the character of the Indian state and the Constitution."<sup>61</sup> This argument is not remarkable. Individuals in India and internationally fear that the Citizenship Amendment Act will only serve to further marginalize Muslims in the country. Chief among the

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<sup>58</sup> Sagameel Sinha, *India's Citizenship Act is Not Discriminatory*, ASIA TIMES (Dec. 19, 2019), <https://www.asiatimes.com/2019/12/opinion/indias-citizenship-act-is-not-discriminatory/>.

<sup>59</sup> *Id.*

<sup>60</sup> *Citizenship Amendment Bill: India's New Muslim' Law Explained*, *supra* note 46; *contra* Sinha, *supra* note 58.

<sup>61</sup> *Citizenship Amendment Bill: India's New Muslim' Law Explained*, *supra* note 46.

arguments against the Citizenship Amendment is that it violates international human rights laws; “while inclusionary in its stated objective, [the Act] is exclusionary in its structure and intent.”<sup>62</sup>

The alleged violation is made more urgent due to India’s ongoing census project: the National Register of Citizens (NRC). The NRC was created in 1951 and, for the most part, was left untouched until 2015 when the government began updating the list.<sup>63</sup> The BJP-led government focused the update on Assam, a northern Indian state that borders Bangladesh.<sup>64</sup> Individuals were required to show they were not illegal immigrants by going through an arduous process aimed at proving to government officials that they, and their ancestors, migrated to India before March 24, 1971.<sup>65</sup> The process, which was ongoing until the final list came out in July 2019, has been exhausting to many. Families fear they will be broken up; individuals who may have fled persecution in their home countries have none of the required documentation and wonder if their expulsion from India will be the consequence. These fears are compounded because no one knows what will happen once they have been declared non-citizens.<sup>66</sup> Suicides have climbed since the initiation of the process.<sup>67</sup> When the list was finally published, many were overjoyed, but the majority were not. Families were split down the middle with some being declared Indian citizens, and others not: brothers, sisters, parents, aunts, uncles, and cousins were given a different status.<sup>68</sup> Ultimately, 1.9 million people were left off the registry.<sup>69</sup> The majority of those left without Indian citizenship were Bengali people, but there did not seem to be a

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<sup>62</sup> Sanya Mansoor & Billy Perrigo, ‘*This Is Not Just a Muslim Fight.*’ *Inside the Anti-Citizenship Act Protests Rocking India*, TIME WORLD (Dec. 19, 2019), <https://time.com/5752186/india-protests-citizenship-act/>.

<sup>63</sup> Rohini Mohan, *A Crackdown on Minorities in Northeast India Threatens to Strip 4 Million People of Citizenship*, TIME WORLD (Aug. 14, 2018), <https://time.com/5366462/india-assam-citizenship/>.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Assam NRC: What next for 1.9 million ‘stateless’ Indians?*, BBC NEWS (Aug. 31, 2019), <https://www.bbc.com/news/world-asia-india-49520593>.

<sup>67</sup> *Id.*

<sup>68</sup> *See Assam Children Left out of NRC Won’t be Separated From their Families: Centre to SC*, SCROLL.IN (Jan. 06, 2020, 5:20 PM), <https://scroll.in/latest/948916/assam-children-left-out-of-nrc-wont-be-separated-from-their-families-centre-to-sc>.

<sup>69</sup> *Assam NRC: What next for 1.9 million ‘stateless’ Indians?*, *supra* note 66.

disparity between the Hindu Bengali and Muslim Bengali populations left without statehood, or at least without Indian citizenship.<sup>70</sup> India's governing party left a route for appeal, but it looks like a disorganized process. The number of days allotted for appellate procedures seems unrealistic in the face of the number of individuals who are likely to appeal, and in the face of the multi-pronged procedure the appeal will necessitate if implemented as described.<sup>71</sup> As it stands, many have already been detained in detention centers.<sup>72</sup>

The NRC and its effects paved the way for the Citizenship Amendment Act, and the danger that it poses to Muslims as opposed to other groups. On the one hand, the Amendment Act would allow those individuals of specified descent and affiliation that were declared non-citizens an expedited, clear method of re-achieving citizenship. In fact, Amit Shah, a minister, and BJP member told the Times of India, that every "refugee - Hindu, Buddhist, Sikh, Jain, Christian and Parsi - would be granted citizenship under a new bill," just before the Amendment was introduced and ultimately passed by Parliament.<sup>73</sup> Muslims, on the other hand, will be left securely *without* a route to citizenship. Under the prior Citizenship Act-which is still legally binding-illegal immigrants are prohibited from applying for Indian citizenship. Moreover, the government has permission to detain and deport any illegal immigrants they find. So, with the danger of being declared stateless by way of the NRC, and then foreclosed from any method of applying for citizenship, all the while being exposed to the probability of arrest and deportation, Muslims in India, and human rights activists have cause to be concerned. The unrest instigated by these circumstances is no surprise.

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<sup>70</sup> *Id.*

<sup>71</sup> Amit Chaudhuri, *The BJP wants to silence Indian voices. But we will only grow louder*, THE GUARDIAN (Dec. 22, 2019), <https://www.theguardian.com/commentisfree/2019/dec/22/bjp-citizenship-amendment-act-indians>.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

IV. INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND THEIR  
APPLICATION TO INDIA'S CITIZENSHIP AMENDMENT ACT

The right to religious freedom underscored the very creation of the UN. The UN body was preceded by, and influenced by, Roosevelt's ideals: creating a united, international league of sovereign states that would work together with the aim to achieve and maintain peace on a global scale, all the while reinforcing freedoms. Religious freedom was among the four freedoms Roosevelt envisioned. Thus, it is unsurprising that religious freedom was, in fact, baked into the UN's founding Charter. The founding Charter makes a clear allusion to equal freedoms for all or said succinctly: promoting anti-discriminatory policies by protecting and developing friendly relations and respect between nations.<sup>74</sup>

The Charter places development of said respect on the "principle of equal rights and self-determination of peoples."<sup>75</sup> It also sets the aims of the United Nations: "achieve[ing] international cooperation in solving international problems of an economic, social, cultural, or humanitarian character," and "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction."<sup>76</sup> Article 55 of the UN Charter refers directly to religious freedom.<sup>77</sup> It states: "With a view to creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction to race, sex, language, or religion."<sup>78</sup> With such a foundation, it is unsurprising that the UN has continued to create and enforce international instruments and bodies aimed at promoting equal freedoms, anti-discrimination, and fundamental human rights, like religion.

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<sup>74</sup> ANNE-MARIE MOONEY CARTER, HEAVEN FORBID: AN INTERNATIONAL LEGAL ANALYSIS OF RELIGIOUS DISCRIMINATION 20 (Ashgate Publishing Ltd., 2009).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 21.

<sup>78</sup> *Id.* (quoting U.N. Charter art. 55).

In order to properly construe the instruments in the following analysis, it is important to consider the textual reading of what is included in each. There are different ways to understand how to apply the instructive provisos in each instrument. One method of interpretation is the textualist reading. Because this method construes language to mean literally what the text dictates, it is important to know *both* the definitional and normative understandings of the pertinent terms. These understandings can be ascertained from the UN, its bodies, and in the legal community in general. These terms include, but are not limited to: religion, belief, and discrimination.

Religion and belief, terms found in UN instruments, are defined differently. In some legal dictionaries, there are very specific definitions. For example, Stroud's Judicial Dictionary, elucidates: "The essential elements of religion are belief in and the worship of God."<sup>79</sup> Alternatively, in Black's Law Dictionary, religion is defined as "a [human's] relation to Divinity, to reverence worship, obedience, and submission to mandates and precepts of supernatural or superior beings. In its broadest sense [religion includes all forms of belief in the existence of superior beings exercising power over human beings by volition, imposing rules of conduct, with future rewards and punishments."<sup>80</sup> The general theme of these, and other, definitions of religion found in legal dictionaries is that religion is composed of several elements: (1) recognition in some form of supreme being; (2) this being exercises power in some way; (3) believers are expected to follow some sort of moral or philosophical code that comports with the teachings and beliefs promulgated by the supreme being; (4) believers are generally expected to express their belief, usually in some form of worship or prayer; and (5) sometimes there is an established place of worship, like a church, or some other institution or organization.<sup>81</sup>

The UN and its subsidiary bodies generally conceive of "religion" as the idea of "a cultural universal that exist[s]

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<sup>79</sup> NATAN LERNER, RELIGION AND HUMAN RIGHTS SERIES: RELIGION, BELIEFS, AND INTERNATIONAL HUMAN RIGHTS 3 (John Witte Jr., Abdullahi Ahmed An-Na'im & Emory University eds., 2000) (quoting *Religion*, STROUD'S JUDICIAL DICTIONARY (5<sup>th</sup> ed. 1986).

<sup>80</sup> *Id.* at 3-4. (quoting *Religion*, BLACK'S LAW DICTIONARY (6<sup>th</sup> ed. 1990).

<sup>81</sup> *Id.*

everywhere.”<sup>82</sup> It is loosely defined so as to allow application of the instruments governing it to transfer over into many different types of situations. In fact, modern human rights law views religion as applying to beliefs that are theistic, atheistic, and anywhere in-between.<sup>83</sup> Accordingly, the UN adopted a list of rights it views as belonging in the sphere of religion that its instruments protect.<sup>84</sup> The heading, “freedom of thought, conscience, and religion,” precedes its catalog of rights.<sup>85</sup>

This absence of a specific definition of religion should not affect the issue here because India’s Citizenship Amendment Act lists a number of specific religions within the Amendment. There is no argument that the groups, which will receive or be denied certain rights as a result of the Amendment, will be accorded said rights based on their religious affiliation.

Belief, as compared to the definitions of religion, is generally defined more broadly. Usually, its definition includes religious beliefs, but it also includes other beliefs. The legal definition is “a conviction of the truth of a proposition, existing subjectively in the mind, and induced by argument, persuasion or proof addressed to the judgment.”<sup>86</sup> Particular UN instruments have construed belief to “cover the rights of nonreligious persons such as atheists, agnostics, rationalists, and others.”<sup>87</sup> For example, Special Rapporteur Arcot Krishnaswami reportedly attempted to minimize controversy by including both theistic and non-theistic creeds in his report: he utilized the phrase “religion or belief”.<sup>88</sup> Although there is not one specific definition of religion in UN documents, the UN has made clear that it includes the concept of belief.<sup>89</sup> Thus, for the most part, states are left

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<sup>82</sup> ARSHEIM, *supra* note 8, at 40.

<sup>83</sup> NATAN LERNER, RELIGION, SECULAR BELIEFS AND HUMAN RIGHTS: 25 YEARS AFTER THE 1981 DECLARATION 5 (Martinus Nijhoff Publishers, 2006).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> LERNER, *supra* note 79, at 5 (quoting *Belief*, BLACK’S LAW DICTIONARY, 6<sup>th</sup> ed. 1990).

<sup>87</sup> *Id.* at 5-7.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

to define religion on their own, which has led to a diverse number of definitions.<sup>90</sup>

The term discrimination can be understood in various ways. Discrimination is a distinction based on prejudice, and it results in the unfair treatment of individuals or groups.<sup>91</sup> As it pertains to social groups, prejudice refers to an existing bias against members of one group, or another.<sup>92</sup> Quite often, prejudice is simply based on social stereotypes. At its worst, prejudice between social groups involves “denying groups benefits and rights unjustly or, conversely, unfairly showing unwarranted favor towards others.”<sup>93</sup> Most unlawful discrimination can be categorized in one of two ways: direct, or indirect discrimination.<sup>94</sup> To discriminate directly “involves treating someone less favorably, because of the possession of a prohibited attribute such as religion than they would treat someone without the prohibited attribute who was in the same circumstances.”<sup>95</sup> On the other hand, indirect discrimination “involves setting a condition or requirement that a smaller proportion of those with the prohibited attribute can comply with than those who do not have the prohibited attribute, without reasonable justification.”<sup>96</sup>

One category of discriminatory acts by the government applies well to the situation in India with the Citizenship Amendment Act. This category occurs if a government enacts legislation which ultimately favors majority religions, and disadvantages minority religion(s).<sup>97</sup> These situations are often the result of dominance by one majority religious group which overlaps with biases against one minority religious group.<sup>98</sup> This is a type of discrimination because “such a situation cannot be characterized as true freedom to choose one’s faith and worship freely.”<sup>99</sup> Moreover, this type of discrimination is extremely dangerous because linking the majority

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<sup>90</sup> *Id.*

<sup>91</sup> CARTER, *supra* note 74, at 7.

<sup>92</sup> *Id.* at 8.

<sup>93</sup> *Id.*

<sup>94</sup> *See id.* at 7.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> CARTER, *supra* note 74, at 13.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

religion to a national identity and scapegoating a minority group leads to racial and religious animus and can often lead to other abuses of human rights and discriminatory acts, on the part of the government or others.

Over the years, the UN, an outgrowth, or rather, the progeny of the League of Nations, has continued to grow and evolve. Situated on a legacy and intention of promoting peace and creating links between democratic societies internationally, this body relied mainly on three instruments to regulate and set the standards for religion-based human rights, among other things. As the instruments have been created and enacted, other regulatory bodies have sprung up to preside over possible violations of said instruments. Over time, these bodies created precedents by which alleged violations may be measured. Thus, in order to do an analysis of the possible violations of international human rights via the enactment of the Citizenship Amendment Act in India, it is pertinent to review what each instrument contributes to the body of law and norms regulating religious equality and anti-discrimination and the bodies that oversee the alleged violations of these norms and laws.

#### A. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)

The UDHR was the first, and is widely conceived as the most important, document promulgated for, and by, the UN. It was signed in 1948, only three years after the UN was officially chartered.<sup>100</sup> The instrument was created by the Human Rights Commission, who furnished the document on the premise that “there [are] fundamental rights of man that supersede[] the rights of governments and those rights need[] to be enshrined for all the world to see in a legal document.”<sup>101</sup> It serves as part of an “international bill of rights.”<sup>102</sup> It is not technically law because it is not enforceable like a treaty or covenant, but neither is it quite as limited as a traditional declaration; it is more sweeping than a traditional declaration.<sup>103</sup> Instead, it is recognized as a “standard of achievement for all peoples of all

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<sup>100</sup> PETERS, *supra* note 4, at 8.

<sup>101</sup> *Id.* at 27, 79.

<sup>102</sup> *Id.* at 110.

<sup>103</sup> *Id.*

nations.”<sup>104</sup> In fact, the UDHR is held out as the *gold standard* for all human rights instruments. Accordingly, the UDHR “has been the foundation of much of the post-1945 codification of human rights, and the international legal system is replete with global and regional treaties. based, in large measure, on the Declaration.”<sup>105</sup>

Notably, in practice the UN and its organs are “guided in their conduct by [the UDHR’s] provisions.”<sup>106</sup> So, while not technically legally binding, it has influenced many decisions made by the UN in determining if its human rights standards and laws were violated.

Article 18 of the UDHR applies to freedom of religion. It reads in full: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”<sup>107</sup> There are two parts to this proviso. The first “guarantees the right to freedom of thought, conscience and religion.”<sup>108</sup> This part of the article is a very broadly constructed freedom.<sup>109</sup> It grants people permission and the privilege to believe in something, or not to. It includes the freedom of conscience, not just with belief.<sup>110</sup> Thus, “the article deals not only with religious but also with the philosophical, cultural, scientific, and political aspects of freedom of thought.”<sup>111</sup> The second part of the proviso is a non-exhaustive list of the freedoms guaranteed in the first part.<sup>112</sup> The list “contains only those detailed rights which the United Nations thought essential to include because their observance might not be universal at present.”<sup>113</sup>

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<sup>104</sup> *Id.* at 111.

<sup>105</sup> JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS ORIGINS, DRAFTING, AND INTENT* xi (University of Pennsylvania Press ed., 1999).

<sup>106</sup> NEHEMIAH ROBINSON, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ITS ORIGIN, SIGNIFICANCE, APPLICATION, AND INTERPRETATION* 67 (1950).

<sup>107</sup> G.A. Res. 217 (III) A, *Universal Declaration of Human Rights*, at 18 (Dec. 10, 1948).

<sup>108</sup> ROBINSON, *supra* note 106, at 128.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

Although the foremost proviso in the UDHR pertaining to religious freedoms is Article 18, there are other salient clauses in the document too. Article 2 declares that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of . . . religion.”<sup>114</sup> Thus, the UDHR prohibits distinctions of religion as reason for foreclosing the ability of a person to utilize a right set forth within the same document.<sup>115</sup> Also, Article 29 addresses “limitations in the exercise of proclaimed rights,” which is relevant “to those interested in protecting religious rights.”<sup>116</sup>

The Citizenship Amendment Act could be construed as a violation of the UDHR. The UDHR is applicable to India and its government because India is a member-state to the UN.<sup>117</sup> The Act arguably interferes with the freedom to choose and practice the religion of one’s choice. Because there is detriment to those individuals who are not of a specific religion—those religions enumerated in the Act—there is a lack of freedom of choice. Muslim citizens are left with the option to practice their religion or possibly face expulsion from the country they consider their home. If the act passes and the NRC declares a large populous of Muslims non-citizens, those citizens will be effectively without a route to citizenship. This choice is truly a lack thereof and could be understood as a violation of Article 18 of the UDHR, and thus a violation of international human rights law. Although there is question as to how influential the UDHR can be in a determination of whether or not there was a violation of human rights because the instrument is not technically legally binding, in practice the violation of the principles of the UDHR have served as a very powerful influence over the committees determining if violations occurred.

The UDHR provided the legal framework from which many other treaties and legal standards were generated. Specifically, the words in Article 18, deemed “one of the most influential statements of religious rights of mankind yet devised,” while not technically enforceable, are foundational for every human rights instrument

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<sup>114</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 2 (Dec. 10, 1948).

<sup>115</sup> See CARTER, *supra* note 74, at 23.; LERNER, *supra* note 83, at 13.

<sup>116</sup> LERNER, *supra* note 83, at 13.

<sup>117</sup> UNITED NATIONS, *Member States*, <https://www.un.org/en/member-states/> (last visited Jan. 16, 2020).

which proceeded them.<sup>118</sup> Generally, the UDHR “is one of the most important [] legal documents of our time, and most of its contents can now be seen as customary international law.”<sup>119</sup> One such document that utilized the legal framework provided by the UDHR in the context of religious freedom is the International Covenant on Civil and Political Rights (ICCPR).

#### B. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

Years following the drafting of the UDHR, the UN Subcommission on the Prevention of Discrimination appointed Special Rapporteur Ancot Krishnaswami to create a report regarding religious rights and make recommendations about how the UN could help end religious discrimination.<sup>120</sup> In 1959, three years following his appointment, Krishnaswami submitted a report based on information from 82 country studies he analyzed.<sup>121</sup> The report “includes a list of 16 principles for legislation on the topic of religion and belief, especially on the topic of acceptable manifestations.”<sup>122</sup> Also in the report were conclusions Krishnaswami reached regarding actions and legislation he thought might lead to possible violations or infringements on the right to religious freedoms. Krishnaswami’s report included: (1) that possible coercion to join organizations or communities by certain religious groups could become an “infringement of the right to freedom of thought, conscience, and religion;” and (2) “the freedom to maintain (or change) a religion or belief is less prone to restriction, the right to manifest it is often the subject of state regulation and limitations.”<sup>123</sup> Krishnaswami’s report was foundational to the creation of the ICCPR and the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.<sup>124</sup>

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<sup>118</sup> LINDE LINDKVIST, RELIGIOUS FREEDOM AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 4 (Stefan-Ludwig Hoffman & Samuel Moyn eds., 2017).

<sup>119</sup> LERNER, *supra* note 83, at 15.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> ARSHEIM, *supra* note 8, at 41.

<sup>123</sup> LERNER, *supra* note 83, at 16.

<sup>124</sup> *See id.* at 16-18.

Ultimately, the rights expounded in the UDHR were codified in two international covenants. Both were adopted in 1966 and became effective, legally, in 1976.<sup>125</sup> One of which, the ICCPR included provisos dedicated to religious rights and freedoms. The ICCPR is considered “the most comprehensive and well-established UN treaty on civil and political rights.”<sup>126</sup> These rights are “immediately binding” on parties to the covenant according to article 2(1).<sup>127</sup> The ICCPR is justiciable on an international level.<sup>128</sup>

The Human Rights Committee (HRC) is an arm of the UN that enforces the ICCPR. Specifically, it is “the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its State parties.”<sup>129</sup> The Committee was established by Article 28 of the ICCPR and consists of a panel of 18 human rights experts.<sup>130</sup> They accede to the panel after a nomination by the state of which they are a national, and then an election where a majority of all state parties vote them in.<sup>131</sup> Each member serves for four years, and elections are held every two years.<sup>132</sup>

The procedures in place that allow the HRC to enforce the ICCPR and allow the Committee to hold states accountable are both compulsory and optional.<sup>133</sup> Article 40 requires state parties to submit periodic reports regarding their implementation of the covenant.<sup>134</sup> Article 41 “provides for the Committee to consider inter-state complaints.”<sup>135</sup> Ultimately, after reviewing the reports or complaints it

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<sup>125</sup> LERNER, *supra* note 83, at 20.

<sup>126</sup> SARAH JOSEPH, JENNY SCHULTZ & MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 8* (Oxford Univ. Press, 2004).

<sup>127</sup> *Id.* at 7.

<sup>128</sup> *Id.* at 7-8.

<sup>129</sup> UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx> (last visited Jan. 16, 2020).

<sup>130</sup> JOSEPH ET AL., *supra* note 126, at 16.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 18.; UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, *supra* note 129.

<sup>134</sup> JOSEPH ET AL., *supra* note 126, at 18.

<sup>135</sup> UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, *supra* note 129.

receives, the Committee will furnish a type of report card including a list of things that must be addressed within the state, and likely there will be certain highlights, which represent what the Committee considers to be priority issues.<sup>136</sup> The Committee may require that the state provide certain follow-up information within a certain time period.<sup>137</sup> The Special Rapporteur, whose role was established in 2002, will generally review those follow-up reports and report back to the full Committee with his conclusions.<sup>138</sup> It is noteworthy that the Committee has faced Member States' noncompliance with requested reports, or follow-ups. In the face of noncompliance the HRC may "examine state reports in the absence of a State Party delegation if no delegation should present on the scheduled date, and will even be prepared to examine a State's ICCPR implementation record in the absence of a report after notifying the relevant State of the date of such examination."<sup>139</sup>

There are specific religious rights and freedoms included in the ICCPR. Article 18 of the instrument enumerates these rights and freedoms. It reads in full:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

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<sup>136</sup> JOSEPH ET AL., *supra* note 126, at 19.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 20.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.<sup>140</sup>

Interpreting these provisions, the HRC made a number of decisions based on the cases that came before them. By reviewing those cases one can discern how each provision may be practically applied to possible violations of human rights law.

One section of Article 18 declares that “no one shall be subject to coercion that would impair his freedom to follow or to adopt a religion or belief of his choice.”<sup>141</sup> Although coercion is not specifically defined, it has been interpreted to mean the use of force, threats, and also more subtle “forms of illegitimate influence.”<sup>142</sup> Accordingly, “one should suffer no detriment due to one’s adherence to a certain religion.”<sup>143</sup> This section has been applied in numerous ways. For example, in Germany, the Committee determined that there was a violation of the ICCPR when “membership of certain” religions “disqualified a person from holding certain public service positions.”<sup>144</sup> In short, this section of the ICCPR, “requires States to prevent private coercion of another to have or adopt a religion, belief, conscience, or opinion.”<sup>145</sup>

The clause regulating the establishment of religion is relevant here too. In General Comment 22, the ICCPR states, the fact that one religion’s “followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including article 18 or 27, nor in any discrimination against adherents to other religions or non-believers.”<sup>146</sup> The HRC usually interprets this proviso to violate rights when there is a state

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<sup>140</sup> G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966).

<sup>141</sup> *Id.*

<sup>142</sup> LERNER, *supra* note 83, at 20.

<sup>143</sup> JOSEPH ET AL., *supra* note 126, at 505.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966); JOSEPH ET AL., *supra* note 126, at 510.

religion, but it applies to majority religious groups in states too. For example, the HRC found a violation of international human rights when in Argentina, the Catholic Church was the recipient of “preferential treatment, including financial subsidies,” as opposed to other religious denominations.<sup>147</sup> This is considered a type of religious discrimination.<sup>148</sup>

The ICCPR provides binding international law that reveals India is violating international human rights by passing its Citizenship Amendment Act. It is certainly arguable that the BJP-led government in India is using coercive tactics to impair its citizens from following their religion of choice by way of the Citizenship Amendment Act. Because the Act unquestioningly subverts the rights of one religious group, the Muslims, in favor of a handful of others, the Act causes detriment to those who practice the Muslim faith. This, in itself, is enough according to the text of the ICCPR to find a violation. However, the argument is made stronger by drawing a parallel to the violation found by the HRC in Germany. There, individuals who practiced a certain faith were excluded from holding certain jobs. Here, and much more critically, individuals will be prohibited from pursuing a route to citizenship due to the Act in question. If the prohibition extended to groups of all faiths, it would not be violative, but the fact that it is exclusionary is explicitly the problem.

Furthermore, there is a good argument that the Citizenship Amendment Act violates the regulation in the ICCPR of the establishment of religion. Because the Act is oriented towards protecting the minority-religious groups rights, this proviso applies. The HRC found discrimination when the Catholic Church received preferential treatment by the Argentinian government. Here, there is likely the same, if not worse, discrimination because the Indian Government has extended preferential treatment to people of the Hindu faith through the Citizenship Amendment Act, thereby prohibiting people of other religions from exercising the same rights due only to their religious orientation. Moreover, since Muslims comprise a minority religious group in India, who by way of the

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<sup>147</sup> JOSEPH ET AL., *supra* note 126, at 511.

<sup>148</sup> *Id.*

Citizenship Amendment Act face discrimination, this is a violation of the ICCPR proviso regulating the establishment of state religions.

C. THE DECLARATION ON THE ELIMINATION OF ALL FORMS OF  
INTOLERANCE AND OF DISCRIMINATION BASED ON RELIGION OR  
BELIEF

The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief is considered the most important instrument expounding international rights and standards regarding the protection of religious beliefs and the prohibition of discrimination based on religious beliefs.<sup>149</sup> It is “by far the most developed and far-reaching concept of religion developed by any UN entity.”<sup>150</sup> The declaration was necessitated by an “outburst of antisemitic incidents that occurred in several places in 1959 and 1960.”<sup>151</sup> People, in general, and the UN, specifically, feared the resurrection of Naziism—the same fear that provoked the creation of the UN.<sup>152</sup>

The creation of the Declaration was a long and onerous one. In response to the UN General Assembly’s request for a declaration and treatise protecting religious freedoms, the UN Commission on Human Rights was commissioned to create the draft.<sup>153</sup> It took them upwards of nine years following the request to produce a draft, and even then, it was only a draft of the Declaration and not a treatise.<sup>154</sup> The draft convention is currently pending completion in the Committee.<sup>155</sup> The lengthy adoption process for the draft reflected the different notions and conceptions about religion and discrimination held by the different constituent states who contributed to its creation. The process concluded with a show of solidarity when there were no opposing

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<sup>149</sup> NAZILA GHANEA, *The 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief: Some Observations*, in *THE CHALLENGE OF RELIGIOUS DISCRIMINATION AT THE DAWN OF THE NEW MILLENNIUM 9* (Nazila Ghanea ed., 2003).

<sup>150</sup> ARSHEIM, *supra* note 8, at 34-35.

<sup>151</sup> LERNER, *supra* note 83, at 28.

<sup>152</sup> *Id.*

<sup>153</sup> GHANEA, *supra* note 149, at 11.

<sup>154</sup> *Id.*

<sup>155</sup> LERNER, *supra* note 83, at 28.

votes to adopting the draft Declaration by the UN Commission on Human Rights before sending it over to the General Assembly.<sup>156</sup> Ultimately, the Declaration was adopted by the General Assembly in 1981.<sup>157</sup>

The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief has many salient provisos. The first article, in a parallel structure to that of the UDHR, states:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others, and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.<sup>158</sup>

It includes a prohibition on coercion, which would inhibit individuals from practicing their religion freely, in a way that parallels the prohibition in the ICCPR.<sup>159</sup> Notably, the word “everyone” in the article extends its utility and application to even those who are not technically residents of a place.<sup>160</sup>

Article 2 prohibits religious discrimination clearly: “No one shall be subject to discrimination” by anyone “on the grounds of religion.”<sup>161</sup> This proviso is important because it imposes a prohibition on discrimination to any state or government or any actor at all: private or public, individual or group actors.<sup>162</sup> Moreover, the second part of Article 2 provides a definition for what intolerance and discrimination based on religion or belief means: “any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on

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<sup>156</sup> GHANEA, *supra* note 149, at 12.

<sup>157</sup> *Id.* at 11.

<sup>158</sup> G.A. Res. 36/55, The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Nov. 25, 1981).

<sup>159</sup> *Id.*

<sup>160</sup> GHANEA, *supra* note 149, at 13.

<sup>161</sup> The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, *supra* note 158.

<sup>162</sup> GHANEA, *supra* note 149, at 16.

an equal basis.”<sup>163</sup> Then, Article 3 underscores the importance of religious freedom,<sup>164</sup> representing a recognition that religious rights and freedoms are fundamental human rights.

Article 4 of the Declaration focuses on reminding States that they have an obligation to their citizens not to infringe on their religious freedoms, and also to protect them from other actors who may impose restrictions.<sup>165</sup> In fact, the second portion of Article 4 demands that States “shall make all efforts to enact or rescind legislation as necessary to prohibit discrimination, as well as taking other appropriate measures to combat intolerance on the grounds of religion or other beliefs.”<sup>166</sup> Thus, the legislature of every member-state to the UN has an obligation to comport their legislation to the requirements of religious freedom as set forth so specifically in this Declaration.

Finally, the last three articles include important provisions as to how to understand the Declaration. Article 6 enumerates freedoms accorded to every individual regarding their ability to practice religion.<sup>167</sup> Article 7 states that the “rights and freedoms set forth in the present Declaration shall be accorded in national legislation in such a manner that everyone shall be able to avail himself of such rights and freedoms in practice.”<sup>168</sup> And, Article 8 clarifies that all the provisions in the Declaration should be construed to fall in line with “any right defined in the Universal Declaration of Human Rights and the International Covenants on Human Rights.”<sup>169</sup>

The rights set forth in this Declaration provide clear guidelines to understanding how the Indian government is violating international human rights by enacting the Citizenship Amendment Act. The Declaration is applicable to India because it is a member-state to the UN.<sup>170</sup> Article 1 of the Declaration exposes a violation in a similar

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<sup>163</sup> The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, *supra* note 158.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> GHANEA, *supra* note 149, at 18.

<sup>167</sup> The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, *supra* note 158.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> UNITED NATIONS, *supra* note 117.

way to those violations of the ICCPR and the UDHR: the Citizenship Act imposes, at the very least, implicit coercion on Muslims in India not to continue practicing their religion because they fear deportation. This proviso may be even more salient here, in this Declaration, because its use of the word “everyone,” which extends the application of the Declaration to those Indian residents who may be declared non-citizens as a result of the determinations made in pursuit to publish an updated NRC. Moreover, Article 2 prohibits the same type of violation. It disclaims any discrimination which might stand in the way of an individual exercising their right to religious freedoms. In the same way the Amendment Act violates the first article of the Declaration, it also violates the second article.

Interestingly, Article 4 seems to prohibit the exact type of discrimination which will occur as a result of the enactment of the Citizenship Amendment Act. It proscribes legislation that will impose discriminatory effects on citizens of states and imports a burden on state legislatures to create laws that, in fact, will protect its citizens from religious discrimination. The Citizenship Amendment Act is discriminatory on its face because it affords certain rights and permissions to groups of one religion and not to others. Clearly, this type of legislation does not promote equality and therefore could be construed as violative of the Declaration’s Article 4.

The whole of the Declaration promotes a theme of religious freedoms and tolerance. The Declaration disallows the types of behavior displayed in India in recent years, and the Citizenship Amendment Act, when placed side by side with this instrument is a clear violation of numerous of its provisos.

#### CONCLUSION

India’s recent enactment of the Citizenship Amendment Act violates international human rights. The Indian government has disputed the discriminatory nature of the Act. However, after a review of international human rights instruments and prior UN findings of discriminatory conduct internationally, that this act discriminates against Muslims. The instruments that provide the standards and laws that are violated by the Citizenship Amendment Act are the UDHR, the ICCPR, and the Declaration on the Elimination of All Forms of

Intolerance and of Discrimination Based on Religion or Belief. Each instrument is nuanced, but all promote the same types of themes, and prohibit the same types of conduct. Chief among the prohibited conduct is discrimination on the basis of religion. By conspicuously discriminating against Muslims, India's government is violating international human rights norms and laws.