INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 3 | Issue 5

2020

Indian "Dreamers" and Citizenship Laws: A Tussle of Sovereignty and Human Rights

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ABSTRACT

The Citizenship (Amendment) Act, 2019 (CAA) has been the center stage of political debates and community protests. CAA was widely slammed for being anti-muslim in its scope and thus contrary to the secular ethos of the Indian State. However, a number of its wider and greater implications were overshadowed by the "majority-minority" aura surrounding it. The aim of the article is to analyse one of such implications of CAA which has not attracted much debate or thought. The "Dreamers" i.e. the innocent children of illegal immigrants [who in the USA were entitled to temporary permits to stay and work in the USA under a program called "Deferred Action for Childhood Arrivals" (DACA)] in India who will suffer under the dual hardships of CAA as well as the existing Citizenship Laws of India.

This article aims to analyse the human rights violations of such "dreamers" in India under CAA and citizenship laws in the light of their possible expulsion/deportation. It offers a perspective of USA's DACA and the surrounding human rights debate over its cancellation and the governing jurisprudence which Indian courts can rely upon in deciding the constitutionality of CAA and expulsion/deportation of "dreamers".

Research Question and Objective: Whether the international human rights regime and jurisprudence of American DACA, help in protecting the rights of "Indian dreamers" from being violated under CAA, and Citizenship Laws of India as far as their expulsion/deportation is concerned.

I. INTRODUCTION

International law recognises every individual's right to enjoy certain basic human rights irrespective of their status.[2] Protection against deportation[3], right to seek asylum[4], right of

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[2] Art. 2, The Universal Declaration of Human Rights, G.A. Res. 217 A(III), (10th Dec., 1948).

[3] OHCHR Discussion Paper, *Expulsions of Aliens in International Human Rights Law*, 1, OHCHR, https://www2.ohchr.org/english/issues/migration/taskforce/docs/Discussion-paper-expulsions.pdf -Last accessed on 18th Sep. 2020, 11:30 AM.

[4] Art. 14(1), The Universal Declaration of Human Rights, G.A. Res. 217 A(III), (10th Dec., 1948); Art. 1(1) Declaration on Territorial Asylum, G.A. Res. 2312 A16912, (1967); Art. 12(2), The International Covenant on Civil and Political Rights, G.A. Res. 2200A(XXI), U.N.T.S. vol. 999 (16th Dec. 1966).

 [ISSN 2581-5369]

non-refoulement[5] are entrenched as the basic human rights essential for life, liberty, security and dignity of an individual. These are not only conventional rights under international law but form part of the customary international law and hence all States are equally bound by these norms irrespective of their ratification status. However, every State enjoys sovereignty over its territory and is thus empowered to make legislations regulating the population on its territory as an incidence of its sovereignty.[6]

With this back drop, the article shall first discuss the citizenship laws governing "dreamers" in India currently and then proceed to discuss the effect of CAA, 2019 on such "dreamers". It shall than evaluate the validity of CAA in respect of its treatment of "dreamers" under international law obligations relating expulsion/deportation binding India. The article shall then discuss cancellation of DACA in the USA and if any jurisprudence in this regard can help Indian courts while dealing with CAA's constitutionality. Finally, the article shall aim to offer certain suggestions in this regard on the basis of the conclusions arrived from the research and comparison.

II. THE INDIAN CITIZENSHIP (AMENDMENT) ACT, 2019: THE ASKEW LANDSCAPE OF CITIZENSHIP IN INDIA

a. Citizenship from Jus Soli to Jus Sanguinis

The Citizenship Act of 1955, envisaged citizenship by birth, registration, naturalization, descent and acquisition of foreign territory. The concepts of "Overseas Citizen of India Cardholder" was introduced who were entitled to certain rights that central government may notify from time to time, other than the rights to hold certain specified constitutional offices and voting rights.[7]

India recognised citizenship by birth i.e. *jus soli* prior to amendment of 2004 whereby, any person born in India after 26th January 1950 was considered to be the citizen of India regardless of whether one or both of the parents were illegal immigrants. Post the amendment[8] a change was brought about pursuant to which only those who were born after 26th January 1950 but prior to 1st July 1987 were regarded as citizens of India regardless of

[5] Art. 33(1), The Convention Relating to the Status of Refugees, 189 U.N.T.S. 137, (28th July 1951); Art. 6 and 7, The International Covenant on Civil and Political Rights, G.A. Res. 2200A(XXI), U.N.T.S. vol. 999 (16th Dec. 1966).
[6] HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 368 (Cambridge University Press, 1st ed. 1958).
[7] Sec. 7A-7D, Citizenship Act, 1955, No. 57, Acts of Parliament, 1955.
[8] Citizenship (Amendment) Act, 2004, No. 6, Acts of Parliament, 2004.

whether one or both of the parents were illegal immigrants.[9] A person born in India after 1st July 1987 but before 3rd December 2004 would be considered citizen of India provided at least one of his/her parent was an Indian citizen and not an illegal immigrant.[10] Those born after 3rd December 2004 are entitled to Indian citizenship only if both parents are citizens of India or even if one of them is not an Indian citizen he/she must not be an illegal immigrant at the time of birth of such person (i.e. the child).[11] These amendments fortify the gradual shift in Indian citizenship from birth to descent.[12] Furthermore, 2004 amendment also derecognized registration and naturalization as means of securing citizenship to "illegal migrant"[13] who is defined as a foreigner who enters India illegally, i.e., without a valid travel document.[14]

In addition to this there are also separate provisions for those born outside India to claim citizenship by descent. There are complicated rules governing this path of acquiring citizenship.[15] Citizenship by registration to pave a way for those who have Indian origin, or the spouses and children of Indian citizens.[16] Naturalization, was an avenue for those who had no ancestral ties with India.[17] The act also recognises citizenship in cases where India acquires foreign territory by way of government notification to all those connected with such territory.[18]

b. How CAA affects "many" but not "few" similarly placed "Dreamers"?

CAA, 2019[19] adds to this complex citizenship milieu by allowing certain specific religious communities from Pakistan, Afghanistan and Bangladesh who have entered India illegally before 31st December, 2014 fearing religious persecution, to claim citizenship of India by naturalization or registration. This creates a situation of the following nature:

[9] Phuntsok Wangyal v. Ministry of External Affairs, (2016) S.C.C. Online Del. 5344; Tenzin Tselha v. Union of India, (2016) S.C.C. Online Del. 6127; Karma Gyaltsen Neyratsang v. Union of India, (2017) S.C.C. Online Del. 10163.
[10] Government of India, *Notification dated 3rd December 2004 of the Ministry of Home Affairs*, EGAZETTE NIC, http://egazette.nic.in/WriteReadData/2004/E_1031_2011_005.pdf. - Last accessed on 19th Sep. 2020, 10:00 PM.
[11] Sec. 3, Citizenship (Amendment) Act, 2004, No. 6, Acts of Parliament, 2004.
[12] Mihika Poddar, *The Citizenship (Amendment) Bill, 2016: International Law on Religion-Based Discrimination and Naturalisation Law*, 2 ILR, 108, 110-11 (2018); Niraja Gopal Jayal, *Faith-based Citizenship: The Dangerous Path India is Choosing*, THE INDIA FORUM, https://www.theindiaforum.in/article/faith-criterion-citizenship. -Last accessed on 20th Sep. 2020, 08:00 PM.
[13] Sec. 5 and 6, Citizenship (Amendment) Act, 2004, No. 6, Acts of Parliament, 2004.
[14] Sec. 2(1)(b), Citizenship (Amendment) Act, 2004, No. 6, Acts of Parliament, 2004.
[15] Sec. 4, Citizenship Act, 1955, No. 57, Acts of Parliament, 1955.
[16] Sec. 5, Citizenship (Amendment) Act, 2004, No. 6, Acts of Parliament, 2004.
[17] Sec. 6, Citizenship Act, 1955, No. 57, Acts of Parliament, 1955.
[18] Sec. 7, Citizenship Act, 1955, No. 57, Acts of Parliament, 1955.
[19] Sec. 2(1)(b), Citizenship (Amendment) Act, 2019, No. 47, Acts of Parliament, 2019.

 [ISSN 2581-5369]

- In the light of 2004 Amendment if Citizenship Act, all those who were "illegal migrants" can now claim citizenship under CAA only if they belong to the said religion and have come to India fearing religious persecution from the given States prior to 31st December 2004.
- "Illegal Migrant" not eligible under CAA will continue to remain disentitled for Indian citizenship.
- Children born after 1st July 1987 whose both parents are illegal immigrants, and if such parents are not entitled for citizenship under CAA then even the children will be disentitled from citizenship.

  Eg. Children born to illegal Jewish immigrants after July 1987.
- Children born after 3rd December 2004 whose none of the parents are Indian citizens or either of them are illegal migrants and if these parents are not eligible for protection under CAA these children are disentitled from Indian citizenship.
- Children who accompanied their illegal immigrant parents and have only known India as their homeland, grown up in this country but may not belong to the countries and religions specified in CAA will be rendered stateless.
- While those among the above specified who may otherwise be illegal but satisfy requirements of CAA can claim citizenship by registration or naturalization.

  Eg. Children of illegal Muslim immigrants from Bangladesh or Pakistan who accompanied their parents post July 1987.

The existing Citizenship Laws together with the CAA, 2019 create a cauldron full of groups within similarly placed individuals treating them differently. This not only classifies as arbitrary and against the Constitutional guarantee of equality but also results in lot of confusion as to the status of such children i.e. whether they will also be called "illegal migrants" or not is unclear.[20] Furthermore, those children who are not entitled for citizenship but have been born in India or accompanied their parents (who are illegal migrants) under the existing system will be rendered stateless or may be deported respectively.

"Indian dreamers" seem to be in this unique position where their fate is dependent on their religion and the country from which they immigrated to India for otherwise they are likely to be left in a legal limbo.

[20] Dr. Abhinav Chandrachud, *Secularism and the Citizenship Amendment Act,* 4 ILR, 138, 146 (1964).

 [ISSN 2581-5369]

An argument on constitutionality of CAA is beyond the scope of this research paper as it only aims to argue the possible breaches India is likely to commit of International Human Rights Instruments towards its "dreamers".

III. INTERNATIONAL HUMAN RIGHTS OBLIGATIONS TOWARDS "DREAMERS": CAN INDIA SHRUG THEM THROUGH CAA?

The notion of deporting or rendering stateless some of the "dreamers" who have only known India to be their homeland or who, were born in India but owing to some bright-line rules of date of birth are not qualified to be citizens, *prima facie* seems outrageously inhuman. These individuals seem to be the victims of the constant tussle existing between sovereignty of State and its International Law obligations. However, it is argued here that basic human rights of individuals must not be allowed to succumb to this tussle of power and politics. This is premised on the very fundamental basis of these rights which are essential and inherent to an individual and, ensuring that 'non-deprivation of it' is a non-derogable State function, irrespective of the status of individual under its national or international laws.

a. Forcible Removal from Territory: How far permissible?

As has been noted previously that regulating the population on its territory forms a limb of sovereignty of the State.[21] No State may expel its nationals however, it will be within its sovereign prerogative to regulate foreigners and illegally present people on its territory. However, it is a misconception that such power is unfettered for there exist in place certain international human rights restrictions.[22] There exists under international law three types of checks over State's power of removal of people from its territory namely the substantive protection against return to face grave human rights violations, procedural safeguards during deportation and protection regulating methods of expulsion.[23] We will be discussing only the substantive human rights protections against expulsion and deportation on the premise that these "dreamers" are Indian Citizens who must be protected against the arbitrary laws depriving them of their status and who have no other place to be deported to.

As per the CAA and Citizenship Amendment of 2004, the "Indian dreamers" will be either considered "illegal migrants/foreigners" (who accompanied their parents to India) or "stateless" (being unable to prove citizenship by birth and fail to acquire by registration or

[21] OHCHR Discussion Paper, *Expulsions of Aliens in International Human Rights Law*, 1, OHCHR, https://www2.ohchr.org/english/issues/migration/taskforce/docs/Discussion-paper-expulsions.pdf -Last accessed on 18th Sep. 2020, 11:30 AM.
[22] *Id.* at 1.
[23] *Id.* at 1.

naturalization). Given that, the Supreme Court has also upheld the discretion of the Government under the Foreigner's Act, 1946 to expel foreigners from India[24] and in the light of section 2(a) of the Act defining "foreigner" as a person who is not a citizen of India, they can be deported or expelled from India under the Passport (Entry into India) Act, 1920.[25] Hence, no amount of government placations and assurances can suffice to cloak the legal uncertainties, justifying the need to seek intervention of international human rights regime.

i. Non-refoulement: A Human Right Responsibility

The principle of Non-refoulement forms the cornerstone of refugee law regime. It provides for non-returning/transfer/removal of individuals from the jurisdiction or effective control of State when there are substantial grounds for believing that the person would be at risk of irreparable harm upon return.[26] This is not an exclusive conventional obligation binding only the State parties to refugee convention. It has been considered as a norm of customary international law.[27] This is further strengthened by the inclusion of non-refoulement under international human rights instruments like Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED).[28] Additionally, it also forms a part of number of regional human rights instruments as well including Inter-American Convention on the Prevention of Torture, the American Convention on Human Rights, and the Charter of Fundamental Rights of the European Union.[29]

Principle of non-refoulement is not only a procedural safeguard to be adhered to while expulsion but also a substantive right available to the individuals.[30] Hence, India can't argue that,

- It is not party to the Refugee Convention hence not bound by non-refoulement.
- It will give the "dreamers" the procedural right to challenge the expulsion/deportation orders as per non-refoulement because, the "dreamers" have known India to be their

[24] Hans Muller of Nuremburg v. Superintendent, Presidency Jail, Calcutta, A.I.R. 1955 S.C. 367.
[25] Sec. 5, Passport (Entry into India) Act, 1920, No. 34, Acts of Parliament, 1920.
[26] *Principle of Non-refoulement under International Human Rights*, OHCHR, https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf -Last accessed on 20th Sep. 2020, 09:00 PM.
[27] G. Goodwin-Gill, *Non-refoulement And The New Asylum Seekers*, 26 Virginia Journal of International Law 897 (1986).
[28] *Principle of Non-refoulement under International Human Rights*, OHCHR, (Sep. 20, 2020, 09:00 PM) https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf -Last accessed on 20th Sep. 2020, 09:00 PM.
[29] *Id.*
[30] Amnesty International, *Amnesty International's Legal Assessment of the Proposed Amendments to Slovenia's Aliens Law*, REFWORLD, https://www.refworld.org/docid/587f83384.html -Last accessed on 21st Sep. 2020, 11:00 PM.

only State and share a social fact of attachment and connection of existence with India. Hence, the very act of expulsion is violative of their human right to have nationality. The requirement of substantive right of non-refoulement does not require "dreamers" to prove "actual risk" but only "likelihood of real risk".[31] Likelihood/foreseeability of real risk does not require that "dreamers" prove high probability of its occurrence but that its more than a theory and suspicion.[32] The idea of expulsion with no other place to go and deportation to a country with which they have no legal bond increases their risk of facing hostilities and even non-admission to/detention in such States jeopardizing their life and freedom.[33]

ii. "Dreamers" entitled to protection as "Aliens Lawfully Present"

Aliens under international law refers to non-citizens.[34] It is very flawed notion to argue that exclusion of all aliens is an incident of a State's sovereign powers.[35] Tracing the genesis and modern rationale for such exercise of power comes from Vattel's concept of self-preservation by which a State may take all just measures that do not offend the law of nature.[36] But the question of what are these just or reasonable measures never seems to be given due regard.

Lawful presence of an alien is governed by domestic law however, under the ICCPR such domestic law must conform to a State's international obligations.[37] As per Human Rights Committee, once an unlawfully present alien has his or her status "regularized", such alien is then considered lawfully present[38] and to be treated at par with a national requiring any distinction so made to be justified.[39] Regularization of status of an alien has been seen not from the perspective of domestic immigration laws but factual existence and enjoyment with

[31] David Weissbrodt and Isabel Hortreiter, *The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties,* 5 BUFF. HUM. RTS. L. REV. 1, 66 (1999).

[32] General Comment No. 1, UN Doc. A/53/44, 16 September 1998, para. 6; Aemei v. Switzerland, Comm. No. 34/1995, 29 May 1997, para. 9.5.

[33] UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 14, UNHCR, https://www.unhcr.org/4d9486929.pdf -Last accessed on 21st Sep. 10:30 PM.

[34] Art. 1, UN Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live, G.A. Res. 40/144, (13th Dec. 1985).

[35] James A. R. Nafziger, *The General Admission of Aliens under International Law*, 77 AM. J. INT'L L. 804, 816, (1983).

[36] Gordon, *The Immigration Process and National Security*, 24 TEMP. L.Q. 302, 319 (1951); E. DE VATELL, THE LAW OF NATIONS (J. Chitty ed. 1839).

[37] Human Rights Committee, *CCPR Gen. Comm. No. 27, Article 12 (Freedom of Movement), ¶ 4* (Nov. 2, 1999), https://www.refworld.org/pdfid/45139c394.pdf - Last accessed on 21nd Sept., 2020, 08:00 PM.

[38] Celepli v. Sweden, Communication 456/1991, Human Rights Committee, ¶ 9.2, U.N. Doc. CCPR/C/51/D/456/1991 (July 26, 1994).

[39] Human Rights Committee, *CCPR Gen. Comm. No. 27, Article 12 (Freedom of Movement), at ¶ 4* (Nov. 2, 1999), https://www.refworld.org/pdfid/45139c394.pdf - Last accessed on 21nd Sept., 2020, 08:00 PM.

local community. Furthermore, aliens who are not a threat to national security, public safety, order, health or morals are entitled to certain basic rights which includes liberty of movement and freedom to choose place of residence within borders and right of taking/enjoying a family.[40]

Indian "dreamers" have either been staying in India since their birth or have come at a very young age and are now inducted/integrated and part of India though they may not be so on paper. They have their own existence in India with a family, house, land etc. but may not have citizenship owing to the 2004 Amendment. Furthermore, since the time of their arrival and till 2004 Amendment it can very well be argued that such "dreamers" were regularized and hence were no longer unlawfully present. The 2004 Amendment can't deprive them of the same and then CAA, 2019 can't arbitrarily carve out some out of such "dreamers" and give them a path for citizenship while depriving others without giving due regard to individual cases of such "dreamers". It is difficult argue reasonability of such law which declares every "dreamer" a threat to national security and hence eligible for deportation based on bright line rules and religion.

iii. Right to Reside of Aliens

Expulsion of aliens is permissible but with certain limitations under international law and hence an expulsion can be unlawful[41] and arbitrary.[42] ICCPR[43] and UDHR[44] recognise the right of individual to enter his own country and not arbitrarily deprived of such right or expelled from his own country.[45] "Own country" in this case does not refer to citizenship/nationality as clear from explicit change of "country of his nationality" from ICCPR's provision to "his own country".[46] It signifies a genuine connection with the country which is independent of nationality[47] having certain special claims[48] adjudged under

[40] Art. 5-10, UN Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live, G.A. Res. 40/144, (13th Dec. 1985).
[41] Eritrea v. Ethiopia, 26 R.I.A.A. 195, 225 Partial Award, 79–82 (Perm. Ct. Arb. 2004).
[42] U.N. Human Rights Committee, *CCPR Views under article 5*, 21–22, CCPR/C/58/D/538/1993 (Dec. 16, 1996), https://www.refworld.org/pdfid/45139c394.pdf - Last accessed on 21nd Sept., 2020, 8:00 PM.
[43] Art. 12(4) The International Covenant on Civil and Political Rights, G.A. Res. 2200A(XXI), U.N.T.S. vol. 999 (16th Dec. 1966).
[44] Art. 13(2), The Universal Declaration of Human Rights, G.A. Res. 217 A(III), (10th Dec., 1948).
[45] Human Rights Committee, *CCPR Gen. Comm. No. 27, Article 12 (Freedom of Movement), at ¶ 4* (Nov. 2, 1999), https://www.refworld.org/pdfid/45139c394.pdf - Last accessed on 21nd Sept., 2020, 08:00 PM.
[46] MARK J. BOSSUYT, GUIDE TO THE "TRAVAUX PREPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 261 (1987).
[47] Human Rights Committee, *CCPR Gen. Comm. No. 27, Article 12 (Freedom of Movement), at ¶ 4* (Nov. 2, 1999) https://www.refworld.org/pdfid/45139c394.pdf - Last accessed on 21nd Sept., 2020, 08:00 PM; GUY S. GOODWIN-GILL, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES 255 (1978)
[48] *Id.*

international law.[49] It includes connection of history, family, ethnicity, habitual residence etc.[50] having substantive *de facto* if not formal bond.

Indian "dreamers" share a *de facto* bond with India since their childhood being either born or having migrated at young age. They have genuine connection formed by habitual residence, familial ties, ethnicity, culture etc. To arbitrarily deprive them of the same by making amendments to the citizenship laws and declaring them aliens thereby subject to expulsion is violative of their right to stay in their own country. A number of them may be students, working class or even retired with a place of their own and family. Furthermore, carving out certain "dreamers" through CAA, 2019 and allowing them to claim nationality is also violative of other's right to not be discriminated against and inherently arbitrary.

b. Statelessness: Not just about "Protecting" but also about "Preventing"

The major threat looming over "dreamers" in India currently is the possibility of them becoming stateless. The concoction of 2004 Amendment with the CAA, 2019 brews a legal uncertainty as their very identities as nationals is under scrutiny with a bleak future. This, also brings forth a very relevant discussion pertaining to the concept of nationality and its relevance for an individual.

i. Nationality: The right, to have rights

Nationality serves as a legal bond between an individual and the State.[51] However, its core importance lies in its ability to allow an individual to enjoy certain rights.[52] It is for this reason that, the UDHR recognises that everyone has a right to nationality.[53] The 1954 Convention Relating to the Status of Stateless Persons recognizing the vulnerability of people devoid of nationality guarantees them certain minimum rights. The 1961 Convention on Reduction of Statelessness is an instrument which obliges States by setting rules for conferral and non-withdrawal of citizenship to prevent cases of statelessness. It establishes a framework for operation of national laws in a manner that they do not allow a person to become stateless. International instruments like Convention of Child Rights[54], ICCPR[55],

[49] Human Rights Committee, *CCPR Gen. Comm. No. 27, Article 12 (Freedom of Movement), at ¶ 4* (Nov. 2, 1999) https://www.refworld.org/pdfid/45139c394.pdf - Last accessed on 21nd Sept., 2020, 08:00 PM.
[50] Johannes M. M. Chan, *The Right to a Nationality as a Human Right*, 12 HUM. RTS. L.J. 1, 12 (1991).
[51] UNHCR, *Protecting the Rights of Stateless Persons*, UNHCR, https://www.unhcr.org/en-in/protection/statelessness/519e20989/protecting-rights-stateless-persons-january-2014.html?query=Protecting%20Rights%20of%20Stateless%20Persons -Last accessed on 22nd Sept., 2020, 08:00 PM.
[52] *Id.*
[53] Art. 15(1), The Universal Declaration of Human Rights, G.A. Res. 217 A(III), (10th Dec., 1948).
[54] Art. 7, The United Nations Convention on Rights of the Child,1577 U.N.T.S. 44, (20th Nov. 1989).
[55] Art. 24, The International Covenant on Civil and Political Rights, G.A. Res. 2200A(XXI), U.N.T.S. vol. 999

International Convention on the Elimination of All Forms of Racial Discrimination[56], also play a pivotal role in prevention of statelessness.

ii. To Not Create Statelessness: Conventional Duty or Customary Responsibility?

Article 1 of the 1954 Convention Relating to the Status of Stateless Persons defines a 'stateless person' as a person who is not considered a national by any nation under the operation of its laws.[57] The said convention however recognises what is called as *'de jure'* statelessness (though not specifically mentioned) as an absence of a formal bond of nationality devoid of quality or effectiveness of citizenship.[58]

De facto statelessness refers to those who despite retaining a formal bond of nationality, are unable to benefit from the protection of their country of nationality.[59] It is recommended to treat *de facto* statelessness as *de jure* whenever possible[60] but the two international instruments governing statelessness do not in substance or form cater to the eventuality of physical statelessness.[61] India till date has not acceded to any of these conventions hence, no obligation under these conventions can be imposed on India.

The situation of "dreamers" in India falls in the latter category i.e. *de facto* statelessness for they have what the ICJ termed as a *"legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties".*[62] Their statelessness is owing to the refusal of India to recognise them as its nationals under the Citizenship Laws. Hence, their rights can be protected under the general international human rights law and not the conventions on statelessness.

However, I would like to make an argument that, obligation to not create statelessness derives it basis from international responsibility towards other States and customary human rights obligations to the people within its territory. The above sections have detailed discussions on

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(16th Dec. 1966).

[56] Art. 5, International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, (21st December 1965).

[57] UNHCR, *Expert Meeting The Concept of Stateless Persons under International Law*, REFWORLD, http://www.refworld.org/docid/4ca1ae002.html -Last accessed on 19th Sept., 2020, 09:00 PM.

[58] WASS, L., NATIONALITY MATTERS: STATELESSNESS UNDER INTERNATIONAL LAW 20 (Antwerp: Intersentia) (2008).

[59] *Id.*

[60] Massey, H., *UNHCR and De Facto Statelessness*, 61-65, UNHCR, https://www.unhcr.org/4bc2ddeb9.pdf - Last accessed on 22nd Sep. 2020, 09:30 AM.

[61] MCADAM, J., DISAPPEARING STATES, STATELESSNESS AND THE BOUNDARIES OF INTERNATIONAL LAW. IN: J. MCADAM, ED. CLIMATE CHANGE AND DISPLACEMENT: MULTIDISCIPLINARY PERSPECTIVES14 (Oxford: Hart Publishing) (2010).

[62] Nottebohm Case (Liechtenstein v. Guatemala), I.C.J. Rep. 1955, p.23.

the right of nationality[63] hence, this section will limit its scope to statelessness and why no individual should be deprived of citizenship to render him stateless.

All human right instruments provide that States are under an obligation to provide basic human rights including right to life, liberty, freedom of movement, protection against discrimination, right to be employed, to have a family etc. However, by rendering an individual stateless by arbitrary deprival of citizenship which, even though its sovereign prerogative, goes against its international obligations towards the people present on its territory irrespective of their status. In other words, all the human rights obligations discussed previously can collectively impose responsibility and obligation on the State to prevent statelessness.

States under international law are also required to exercise their sovereignty in a responsible manner so as not to affect the rights of other States breach of which, entails international liability.[64] Creation of statelessness by one State exudes a burden and responsibility on the rest of the international community and can cause strife. For, stateless people post expulsion will not disappear but move to other nations. It not only hampers rights of the individuals but, their expulsion also affects the sovereignty of other States.

Indian "dreamers" some of whom will be rendered stateless owing to their inability to prove citizenship of India and history of migration from other States, will be added to the current stateless population for whose rehabilitation international agencies and communities are working. Thus, it will not only violate their human rights but also be interference with sovereignty of other States. India by no means can claim such a right for itself under its sovereignty.

IV. USA'S DACA: A HIDDEN LESSON FOR INDIA?

a. What is DACA?

USA's Development, Relief, and Education for Alien Minors (DREAM) Act first introduced in Congress 2001 was to act as a pathway for those immigrant youth who were brought to USA as children below 31 years of age without documentation. They are American in every-way except on paper for lack of documents. In 2010 the Congress failed to pass the Act. Obama administration in 2012 introduced the Deferred Action Childhood Arrivals (DACA),

[63] Art.15(1), The Universal Declaration of Human Rights, G.A. Res. 217 A(III), (10th Dec., 1948); Art. 24(3) The International Covenant on Civil and Political Rights, G.A. Res. 2200A(XXI), U.N.T.S. vol. 999 (16th Dec. 1966).

[64] Sompong Sucharitkul, *State Responsibility And International Liability Under International Law*, 18 Loyola of Los Angeles Int'l. & Comp. L.J. 821, 832 (1996).

a temporary program permitting "Dreamers" to come forward and apply for work permits after passing a background check.[65] DACA however, does not provide for citizenship for such "Dreamers" being creature of an executive order of the President.

b. SCOTUS on DACA: Implicit Principles, Explicit Ruling!

Trump administration's announcement in 2017 about the DACA coming to an end, ensuing panic, confusion and protests among masses ultimately reached the US Supreme Court. The court in its 5:4 ruling of June 2020, held that the Trump administration illegally terminated DACA without providing good reason for the same. It relied on procedural fallacies to allow continued operation of DACA at the same time providing that Trump was free to make such attempts in future.

Some of the noteworthy observations of the SCOTUS are pertinent to be noted. The court regarded DACA as program for affirmative immigration relief for creating opportunities involving individual adjudications. The court also observed that the possibility of ensuring that the Department of Homeland Security was granting deferrals without the eligibility being inconsistent with Immigration and Nationality Act was not explored. It also raised the "serious reliance interests" of the DACA recipients, their families and communities which were ignored in deciding rescission of DACA. The court pointed out that such interest should have been considered, assessed as to their significance and weighed against competing policy concerns.[66]

It may be said that the SCOTUS though ruled explicitly on procedural grounds for setting aside the rescission it did, even though implicitly highlight the humanitarian character of DACA and its importance for the immigrants and their families. It was for this reason that the ruling was celebrated by immigration lawyers for it did not entirely ignore the underlying human interest.[67]

c. What is there for India?

The SCOTUS's observation pertaining to the need for government to try and find ways of operating DACA within existing framework rather than cancelling it as well as looking at DACA not merely as a programme under executive order but as a programme for affirmative immigration relief to be evaluated on "reliance interest" in my opinion must be given due

[65] Matt Hildreth, *Immigration 101: What is a Dreamer?*, AMERICA'S VOICE, https://americasvoice.org/blog/what-is-a-dreamer/ - Last accessed on 21st Sep. 2020, 03:00 AM.
[66] Department of Homeland Security v. Regents of the University of California, No. 18-587, (June 2020).
[67] Meghan Downey and Adam Garnick, *Explaining the Supreme Court's DACA Decision*, THE REGULATORY REVIEW, https://www.theregreview.org/2020/07/07/downey-garnick-explaining-supreme-court-daca-decision/ - Last accessed on 22nd Sep. 11:30 AM).

regard in evaluating CAA, 2019 by Indian Supreme Court. SCOTUS recognised that DACA applied to all those who travelled as children under age of 31 years to USA and are now retired veterans, current students, employed in US and who are not convicted of any serious crimes can't be blanketly labelled as "threat to national security" and denied protection under DACA. CAA, 2019 does exactly what the SCOTUS condemned, it declares certain classes of individuals as "illegal migrants/foreigners" while those similarly situated as them are given a pathway based on their religion and countries from which they migrated to acquire citizenship by bypassing the restrictions/conditions placed by Citizenship (Amendment) Act, 2004.

Though the Supreme Court can't interfere in policy matters to advise government to enact legislations but it can surely consider the plight of Indian "dreamers" and their basic rights while adjudicating upon the constitutionality of CAA, 2019.

V. SUGGESTIONS

In the light of the above discussion, I would like to make following suggestions

- India must relook at its citizenship laws in totality and simplify the entire process.
- Instead of dividing population born from 1950-2004 into different groups and in the light of CAA, 2019 providing the cut-off date of December 31, 2014 which in a way defeats the 2004 amendment classification, one cut-off date of December 31, 2014 be used to regulate citizenship.
- The situation that CAA, 2019 creates for "dreamers" in India by segregating them into groups based on religion can be ameliorated by enacting a legislation in the nature of USA's DACA. This will allow "dreamers" in India to continue to remain within the State and work without threat of being deported or expelled.
- India can adopt DACA model but also incorporate pathway for citizenship through the same for "dreamers" overcoming the shortcoming of DACA and in spirit be based on USA's DREAM Act.
- Indian law based on the model of DACA will allow India to govern its immigration policies and even citizenship laws in an efficient manner.
- Indian law based on the model of DACA can be more comprehensive so as to include not only "dreamers" but also act as a protection for those excluded under CAA, 2019 who fear deportation and expulsion and create a path of citizenship through the same for them.

 [ISSN 2581-5369]

- Indian Supreme Court will have to view the CAA, 2019 in the light of Existing Citizenship Laws and also consider the human rights aspect of "dreamers" while deciding its constitutionality.

VI. CONCLUSION

CAA, 2019 is part of a much bigger problem in India and that is the arbitrary bright line rules drawn by the Citizenship (Amendment) Act, 2004. For, the act is based on a fallacious presumption that every illegal migrant and their accompanying children or children born to such people are a threat to security of India or are responsible for "aggression" against and "disturbance" in India. Furthermore, even assuming this is this the case, the 2004 Amendment of Citizenship Act, does not provide any assistance as it again punishes those who are born innocent simply by dividing the period from 1950 to 2004 into different intervals. CAA, 2019 then defeats the very purpose that 2004 was envisaged to achieve by simply allowing citizenship to some based on religion and nations from which they have migrated to India before 31st December, 2014. India will have to device simpler and much stronger laws to combat infiltrators rather than haphazardly label innocent immigrants as infiltrators. Being a signatory to major international human rights convention and with a Constitution that upholds fundamental rights not only of citizens but also those within its territory, India should attempt to exercise its sovereignty upholding human rights.

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 [ISSN 2581-5369]

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