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THE PLIGHT OF OVERSEAS CITIZENS OF INDIA, ARE THEY CITIZENS OR NOT?

AUTHORED BY - VAIBHAV S

ABSTRACT

This paper critically examines the Overseas Citizenship of India (OCI) scheme and its constitutionality, tracing its origins from the demands for dual citizenship in the 1990s to the enactment of the Citizenship Amendment Acts of 2003 and 2005, following the LM Singhvi Committee's recommendations. The paper explores the plenary powers of the Indian Parliament under Article 11 to regulate citizenship matters, emphasizing that the Constitution does not explicitly bar dual citizenship. It argues that the classification of OCI cardholders under Section 7B of the Citizenship Act violates Article 14 by creating two classes of citizens and reducing OCIs to second-class status, especially after the 2021 MHA notification, which restricted their educational rights. The paper also invokes the doctrine of non-retrogression, asserting that once rights are conferred, the State cannot arbitrarily retract them. Through a detailed analysis, it contends that such measures undermine the objectives of the original amendment and the progressive realization of rights for the Indian diaspora, thereby questioning the constitutional validity of the current OCI framework.

KEYWORDS: Dual citizenship, non-retrogression, plenary powers, second- class, arbitrary

RESEARCH QUESTION

Whether Overseas Citizens of India are Citizens by virtue of the Rights granted to them

Whether Overseas Citizens of India can claim parity with Citizens of India

Whether the OCI scheme is violative of Article 14, 19 and 21

STATEMENT OF PROBLEM

The OCI scheme offers certain privileges to individuals of Indian origin abroad in order to foster a sense of belonging and connection to India with an aim to enhance cultural exchange and economic ties. However, it does not confer full citizenship rights, which leads to concerns regarding equal treatment under the law, and whether they are entitled to equal treatment as

Citizens of India.

RESEARCH METHODOLOGY

This Article will employ a doctrinal methodology in order to assess the relevant laws granting these rights and their consonance with the Constitution.

INTRODUCTION

The Indian Diaspora during the 1990s fashioned a demand for granting dual citizenship. These demands were also reiterated and supported by NRI's, Goan resident Citizens and other professionals who thought it fit considering India's International Obligations and friendly ties. Considering these demands, the Indian Government realized the potential benefits of dual citizenship and henceforth constituted a High-Level Committee, under the chairmanship of Dr. LM Singhvi, to make recommendations on the aspect of dual citizenship. The committee submitted a report in 2002 that concluded that Dual Citizenship ought to be granted to persons of Indian origin or Non-Resident Indians who were nationals of a specified list of countries.¹ The Committee observed that,

“Dual citizenship would also help to perpetuate and cement the links of the younger generation of the Diaspora with India as they will be keen to keep in touch with their elders in India as well as relate to their roots. There is much to be gained by the introduction of dual nationality. The Diaspora in North America, Europe, Australia, New Zealand and Singapore yearns and longs for it. It will create a climate conducive to Diaspora's fuller participation in philanthropy, economic developments, technology transfer, cultural dissemination and overseas political advocacy on behalf of India.”²

Pursuant to the recommendations of the LM Singhvi committee, the Central Government enacted the Citizenship Amendment Act, 2003, which added Sections 7A to 7D under the heading Overseas Citizens. The object and reasons of the Amendment were to explicitly “provide for the grant of dual citizenship”.³ The specific objective of “Overseas Citizenship” being to grant dual Citizenship and the recommendations of the HLC to grant dual citizenship was again affirmed by the Citizenship Amendment Act, 2005 which sought to extend OCI eligibility to all Persons of Indian Origin other than PIOs from Pakistan and Bangladesh.⁴

THE PLENARY POWERS OF THE PARLIAMENT ON MATTERS RELATING TO CITIZENSHIP

The Constitution of India deals with Citizenship under Articles 5 to 11. However, there exists a special law relating to citizenship which provides how citizenship can be acquired, renounced and terminated. Article 9 of the Constitution barred dual citizenship at the time of the commencement of the Constitution. Article 9 provides:

*“Person voluntarily acquiring citizenship of a foreign State not to be citizens: No person shall be a citizen of India by virtue of Article 5, or be deemed to be a citizen of India by virtue of Article 6 or Article 8, if he has voluntarily acquired the citizenship of any foreign State”.*⁵

However, the Parliament under Article 11 is vested with the plenary power to make laws with respect to citizenship, which provides that:

*“Nothing in the foregoing provisions of this Part shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship.”*⁶

This power becomes plenary when read with Articles 245, 246 and Entry 17 of Union List under the seventh schedule. The idea of dual Citizenship is not one that is expressly barred under the Constitution as it was clearly not the intention of the drafters to bar the same, this can be evidenced by Dr. B.R Ambedkar’s explanation to Article 11:

*“It is not the object of this particular article to lay down a permanent law of citizenship for this country. The business of laying down a permanent law of citizenship has been left to Parliament, and as Members will see from the wording of article 6 as I have moved, the entire matter regarding citizenship has been left to Parliament to determine by any law that it may deem fit. The effect of article 6 is this, that Parliament may not only take away citizenship from those who are declared to be citizens on the date of the commencement of this Constitution by the provisions of article 5 and those that follow, but Parliament may make altogether a new law embodying new principles. That is the first proposition that has to be borne in mind by those who will participate in the debate on these articles. They must not understand that the provisions that we are making for citizenship on the date of the commencement of this Constitution are going to be permanent or unalterable. All that we are doing is to decide ad hoc for the time being”*⁷

ARE OCI'S CITIZENS OR NOT

The OCI's are granted rights under Section 7B of the Citizenship Act, which provides:

"7B. Conferment of rights on Overseas Citizen of India Cardholder (1) Notwithstanding anything contained in any other law for the time being in force, an Overseas Citizen of India Cardholder shall be entitled to such rights [other than the rights specified under sub-section (2)] as the Central Government may, by notification in the Official Gazette, specify in this behalf.

(2) An Overseas Citizen of India Cardholder shall not be entitled to the rights conferred on a citizen of India- (a) under article 16 of the Constitution with regard to equality of opportunity in matters of public employment;

(b) under article 58 of the Constitution for election as President:

(c) under article 66 of the Constitution for election of Vice-President;

(d) under article 124 of the Constitution for appointment as a Judge of the Supreme Court;

(e) under article 217 of the Constitution for appointment as a Judge of the High Court;

(f) under section 16 of the Representation of the People Act, 1950 (43 of 1950) in regard to registration as a voter;

(g) under sections 3 and 4 of the Representation of the People Act, 1951 (43 of 1951) with regard to the eligibility for being a member of the House of the People or of the Council of States, as the case may be;

(h) under sections 5, 5A and 6 of the Representation of the People Act, 1951 (43 of 1951) with regard to the eligibility for being a member of the Legislative Assembly or the Legislative Council, as the case may be, of a State; (i) for appointment to public services and posts in connection with the affairs of the Union or of any State except for appointment in such services and posts as the Central Government may, by special order in that behalf specify.

(3) Every notification issued under sub-section (1) 18 shall be laid before each House of Parliament."⁸

Section 7B doesn't provide an exhaustive list of rights available to OCI's rather it provides those rights which aren't available to OCI's. The above-mentioned provisions under Section 7B do not exclude right to freedom of speech and expression. However, it is pertinent to note that Article 19(1) is exclusively available only to citizens. Therefore, the reasonable interference from the conferment of rights under Article 19 is that OCI's are deemed to be citizens and are placed on similar footing as citizens.

This is further supported by a notification by the Ministry of Home Affairs on 11th April 2005, which granted life-long visa for visiting India for any purpose, insofar as economic, financial and educational fields, parity with Non-Resident Indians was provided, except for acquisition of agricultural or plantation properties.⁹

Further, by subsequent notification dated 05.01.2007 issued under Section 7B(1) of Act, 1955, though no right relating to the field of education was referred to, the OCI Cardholders were given similar treatment with Non-Resident Indians in the matter of inter-country adoption of Indian children and also to be treated at par with the Indian Nationals in the matter of tariffs in air fares and also for same entry fee being charged to domestic Indian visitors to visit National Parks and Wildlife Sanctuaries.¹⁰

Additionally, the MHA through a notification dated 05.01.2009, the OCI Cardholders were given the right to pursue the professions indicated therein, in India and also to appear for the All-Indian Pre-Medical Test or such other tests to make them eligible for admission in pursuance of the provisions contained in the relevant Acts.¹¹

Therefore, from the above three notifications and the rights granted to OCI's it is clear that they are similarly placed as citizens in all respects except for their incident of birth in a foreign nation, and in effect can be deemed to be Citizens.

CONSTITUTIONALITY OF THE OCI SCHEME

The Citizenship Amendment Act, 2003 was enacted with a specific object contained in its objects and reasons to "provide for the grant of dual citizenship".¹² This is in line with the L.M Singhvi committee recommendations to grant dual citizenship. However, the Union Government under Section 7B has chosen to provide certain rights and excluding certain rights. This is in clear contravention of Article 14 as the Constitution only envisages one class of citizens, who shall be accorded equal protection of laws and equality before the law.

Further such a scheme clearly falls foul of Article 14 as via a subsequent notification dated 4th March, 2021, under proviso to clause 4(ii) and Explanation (1), the Union government limited the parity between NRI's and OCI's only NRI seats and supernumerary seats.¹³ Through the impugned portion of the notification, the parity which existed with Non-Resident Indians including in the field of education has been modified to indicate their eligibility for admission

only against any “Non-Resident Indian seat” or any supernumerary seat.¹⁴ The provision contained in the impugned portion of the notification dated 04.03.2021 would indicate that the OCI Cardholders even if they have settled down in India and have undergone their entire educational course in India but not having renounced the citizenship of a foreign country and not having acquired the citizenship of India will now be denied the opportunity of securing a medical seat in the general pool of Indian citizens including NRIs and will have to compete only for the limited 27 seats available under the NRI quota.¹⁵

This notification by the Union Government and Section 7B are violative of Article 14 as they create two classes of citizens, degrading OCI's to second class citizens. Although, the Union Government has the plenary power under Article 11 to make laws on citizenship, this classification made between citizens giving only limited rights to OCI's does not amount to reasonable classification. For a classification to be reasonable it has to satisfy the twin test laid down in the case of *Anwar Ali Sarkar v. State of West Bengal*,¹⁶ which provides as under:

“There would be no discrimination where the classification making the differentia fulfils two conditions, namely, (i) that the classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) that that differentia has a rational relation to the object sought to be achieved by the impugned legislative or executive action.”¹⁷

In *Nagpur Improvement Trust v. Vithal Rao*,¹⁸ the court furthered the twin test to hold as under: *“It is now well-settled that the State can make a reasonable classification for the purpose of legislation. It is equally well settled that the classification in order to be reasonable must satisfy two tests (i) the classification must be founded on intelligible differentia and (ii) the differentia must have a rational relation with the object sought to be achieved by the legislation in question. In this connection it must be borne in mind that the object itself should be lawful. The object itself cannot be discriminatory, for otherwise, for instance, if the object is to discriminate against one section of the minority the discrimination cannot be justified on the ground that there is a reasonable classification because it has rational relation to the, object sought to be achieved.”¹⁹*

The notification dated march 2021, by the MHA reduces the OCI's to second class citizens, which is against the objects and reasons of introducing the Citizenship Amendment Act, 2003. The classification so created by the notification and Section 7B is in itself discriminatory and does not stand the test of reasonable classification.

DOCTRINE OF NON-RETROGRESSION

In its purest form, the non-retrogression principle holds that government may extend protection beyond what the Constitution requires, but it cannot retreat from that extension once made.²⁰ The Government through the Amendment of 2003, extended OCI certain rights and by further notifications granted them parity with NRI's and Indian Citizens. This doctrine was used in *Navtej Singh Johar & Ors. vs. Union of India*,²¹ wherein it is observed as hereunder:

“199. What the words of Lord Roskill suggest is that it is not only the interpretation of the Constitution which needs to be pragmatic, due to the dynamic nature of a constitution, but also the legal policy of a particular epoch must be in consonance with the current and the present needs of the society, which are sensible in the prevalent times and at the same time easy to apply. 200. This also gives birth to an equally important role of the State to implement the constitutional rights effectively. And of course, when we say State, it includes all the three organs, that is, the legislature, the executive as well as the judiciary. The State has to show concerned commitment which would result in 29 concrete actions. The State has an obligation to take appropriate measures for the progressive realisation of economic, social and cultural rights. 201. The doctrine of progressive realisation of rights, as a natural corollary, gives birth to the doctrine of non-retrogression. As per this doctrine, there must not be any regression of rights. In a progressive and an ever-improving society, there is no place for retreat. The society has to march ahead. 202. The doctrine of non-retrogression sets forth that the State should not take measures or steps that deliberately lead to retrogression on the enjoyment of rights either under the Constitution or otherwise.”²²

Therefore, by taking away such a parity vide notification of 2021, it violates the doctrine of non-retrogression.

CONCLUSION

The existing framework of the Overseas Citizenship of India scheme, subsequent notifications, are constitutionally flawed. The classification of OCI cardholders as a separate class, stripped of rights otherwise available to citizens, undermines the principles of equality enshrined in Article 14 of the Constitution. The intent behind the Citizenship Amendment Acts of 2003 and 2005 was to grant dual citizenship in line with recommendations of the L.M Singhvi committee report. However, by restricting their rights through selective exclusions, the current legal framework is in violation of its objects and reduces OCIs to a second-class status. Further, the

doctrine of non-retrogression prohibits the State from retracting rights once conferred. The reduction in parity between OCIs and citizens through the 2021 notification violates this doctrine and disrupts the legitimate expectations of OCIs, who should be deemed citizens for most practical purposes. Therefore, OCI's are deemed to be citizens as the constitution does not envisage two classes of citizens and the existing framework under Section 7B is unconstitutional.

¹ High Level Committee Report on the Indian Diaspora, September 2002

² High Level Committee Report on the Indian Diaspora, September 2002

³ Dr. Radhika Thappeta and ors v. Union of India, WP(C) 62 of 2022

⁴ Dr. Radhika Thappeta and ors v. Union of India, WP(C) 62 of 2022

⁵ INDIA CONST. art. 9.

⁶ INDIA CONST. art. 11.

⁷ CONSTITUTIONAL ASSEMBLY DEBATES, Book No.1, Volume IX, 11th August 1949, Speech by Dr. B.R. Ambedkar

⁸ Section 7B, Citizenship Act, 1955

⁹ Ministry of Home Affairs, S.O. 542(E), (notified on 11th April,2005).

¹⁰ Ministry of Home Affairs, S.O.36(E) (on 5th January, 2007).

¹¹ Ministry of Home Affairs, S.O.36(E) (notified on 5th January, 2009).

¹² Ministry of Home Affairs, S.O. 1050(E), (notified on 4th March 2021)

¹³ Ministry of Home Affairs, S.O. 1050(E), (notified on 4th March 2021)

¹⁴ Ministry of Home Affairs, S.O. 1050(E), (notified on 4th March 2021)

¹⁵ Anushka Rengunthwar v. Union of India, 2023 SCC OnLine SC 102

¹⁶ State of West Bengal v. Anwar Ali Sarkar [1952] S.C.R. 284

¹⁷ State of West Bengal v. Anwar Ali Sarkar [1952] S.C.R. 284

¹⁸ Nagpur Improvement Trust v. Vithal Rao (1973) 1 SCC 500

¹⁹ Nagpur Improvement Trust v. Vithal Rao (1973) 1 SCC 500

²⁰ John C. Jr. Jeffries; Daryl J. Levinson, The Non-Retrogression Principle in Constitutional Law, 86 Calif. L. Rev. 1211, 1250 (1998).

²¹ Navtej Singh Johar & Ors. vs. Union of India ,(2018) 10 SCC 1

²² Navtej Singh Johar & Ors. vs. Union of India ,(2018) 10 SCC 1