Recent Trends and Challenges in Law

Recent Trends and Challenges in Law

Edited by

Baidya Nath Mukherjee
and Shilpi Sharma

Cambridge
Scholars
Publishing

Recent Trends and Challenges in Law

Edited by Baidya Nath Mukherjee and Shilpi Sharma

This book first published 2024

Cambridge Scholars Publishing

Lady Stephenson Library, Newcastle upon Tyne, NE6 2PA, UK

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

ISBN: 978-1-0364-0908-1
ISBN (Ebook): 978-1-0364-0909-8

TABLE OF CONTENTS

CONTRIBUTORS

Chapter 1:
Anshuman Shukla - OP Jindal Global University, Haryana, India
Ipsita Ray - Christ University, Delhi-NCR Campus

Chapter 2:
Anubhav Tyagi - Guru Gobind Singh Indraprastha University, New Delhi, India

Chapter 3:
Namrata Babhulkar - Singhania University ,Rajasthan, India
Dr .S. Mukundrajan - Singhania University ,Rajasthan, India

Chapter 4:
Dr Pallavi Bajpai - The Northcap University, Gurugram, India
Ashwini Garg - The Northcap University, Gurugram, India

Chapter 5:
Hima Swetha A - IFIM Law School, Bengaluru, India
Ruchit Singh - Zopsmart, Bengaluru, India

Chapter 6:
Radhika Ajaybhai Sharma - Auro University, Gujarat, India
Dr Vrushti Patel - Auro University, Gujarat, India

Chapter 7:
Aakriti Beri - Auro University, Gujarat, India
Ammar A. Pahadwala - Auro University, Gujarat, India
Saiyam Shah - Auro University, Gujarat, India

Chapter 8:
Anu Singh - Invertis University, Uttar Pradesh, India

Chapter 9:
Akansha Gupta - Christ University, Bangalore, India
Kritika Kakkar - K.R. Mangalam University, Haryana, India

Chapter 10:
Biswadeep Dutta- Sushant University, Haryana, India
Dr Sulakshana Banerjee Mukherjee - Sushant University, Haryana, India

Chapter 11:
Shilpi Burman - Auro University, Gujarat, India
Dr Shilpi Sharma- Auro University, Gujarat, India

Chapter 12:
Mr. Deepak Singh - Bharati Vidyapeeth (Deemed To Be University), New Delhi, India
Dr. Jatin Sharma - Noida International University, Uttar Pradesh, India
Mr. Gaurav Gupta - Bharati Vidyapeeth (Deemed To Be University), New Delhi, India

FOREWORD

"If you have knowledge, let others light their candles in it". The upcoming book titled "Recent Trends and Challenges in Law" is an honest attempt to share the finest chapters authored by esteemed academicians and research scholars dealing with a variety of subjects ranging from 'State of Women' to 'Artificial Intelligence'.

> *"We don't stop playing because we grow old. We grow old because we stop playing"*
> —George Bernand Shaw

"We stop growing when we stop reading/learning". Knowledge is the foundation of wisdom and self-discipline. One of the modes of acquiring knowledge is to read books and understand life in its correct perspective.

AURO believes in imparting knowledge and skills so that in a practical world, problems can be dealt with easily and smoothly. Publication of this Book is one of the milestones in the said direction. I'm sure, the upcoming book will prove rewarding to its readers in terms of enhancement of knowledge.

V. K. SHUKLA
Former Judge of
Allahabad High Court

CHAPTER 1

CITIZENSHIP AND TRANSFORMATIVE CONSTITUTIONALISM: THE EVOLUTION OF POLITICAL PARTICIPATION FROM COLONIAL INDIA TO THE CITIZENSHIP AMENDMENT ACT 2019

ANSHUMAN SHUKLA[1] AND IPSITA RAY[2]

Abstract

Transformative constitutionalism is the defining feature of postcolonial constitutions, which were born in the mid-20th century. Its dominant constitutional paradigms are grounded in welfare, affirmative action and activism in judicial review. These qualitative features are geared towards enhancing the quotient of citizenship through effective political participation in public policy. This paper explores the iterative and dialectic nature of the Indian constitutional identity as dictated by the project of transformative constitutionalism. It analyses the dual nature of citizenship as adopted under the Indian Constitution. Canonical citizenship is generalist in scope, with minimal qualifications of birth, descent, and naturalisation. Welfarist citizenship is more particularistic across religion, caste, and gender. The essay traces the origins, sources, and evolution of these two paradigms of citizenship, beginning from their politico-legal modes of historical evolution since British colonialism. Classical citizenship was the mark of city republics in Greco-Roman Antiquity, who proudly distinguished their free "citizens" from the unfree "subjects" of the surrounding despotic regimes. "Citizen proper" was an active participant in public affairs. The Enlightenment and Liberalism, since the 18th century onwards, have fused

[1] OP Jindal Global University, Haryana, India
[2] Christ University, Delhi-NCR Campus

these two concepts of "citizen" and "subject", leading to the notions of the modern citizen as an active voter but also the beneficiary of government largesse. This dualistic framework of "citizen proper" and "citizen beneficiary" collided in the recent controversy of the Citizenship (Amendment) Act 2019. The prevailing conflict intersects the traditional grounds of birth and descent with the emerging crisis of migration, refugee rights and religious minorities.

Keywords: Citizenship Amendment Act; colonialism; postcolonial constitutions; transformative constitutionalism.

Introduction

India witnessed a national-scale protest upon the enactment of the Citizenship Amendment Act 2019 (CAA). This legal intervention seeks to alter the regime of the existing Citizenship Act of 1955 by incorporating a mechanism to establish a National Register of Citizens (NRC). The NRC has dual aspirations of documenting eligible citizens for the efficient administration of public services and identifying and possibly deporting illegal immigrants from neighbouring countries. In this context, the CAA seeks an exception in favour of specified religious minorities from the neighbouring states of Pakistan, Bangladesh and Afghanistan. This exceptional support is sought through the legal formalisation of citizenship for applicants of asylum who experience persecution on religious grounds.

The widespread protest against the CAA and NRC is primarily due to the exclusion of Muslim immigrants from its protective clauses. This has led to charges of unconstitutionality and Islamophobia. While the original constitutional clauses [Articles 5-11] do not factor in religious identity as a mark of citizenship, they acknowledge the religion-based partition of India in 1947 as a dominant factor. This is relevant because the Union Government defends the CAA regime as the realisation of the founding promises made by the Indian political leadership to the persecuted minorities of twin partitions in 1947 (Pakistan) and 1971 (Bangladesh). The timing of CAA-NRC has further intensified the debate as the new regime was enacted amidst other religious controversies, like the dilution of the special status of Jammu & Kashmir under Article 370, the abolition of Triple Talaq in Muslim matrimony, and judicial findings in favour of Ram Mandir in the Ayodhya district.

Such an arc strengthens the ideological critique of the Indian state and its policies towards forest dwellers, migrant labour and those without property.

However, the Union Government justifies this intervention as not altering the status of existing citizens, including the Muslim citizens of India. India had previously implemented similar agreements for the return of Indian-origin people from Sri Lanka, Myanmar, and Africa (Ratha 2021). India has been particularly favourable to the plight of Tibetan refugees. The 1971 partition of Pakistan and the consequent creation of Bangladesh has particularly strained the demography and public services in the northeastern states like Assam. The controversy highlights the surveillance and documentary nature of the modern state with a specific focus on the extensive use of the Aadhar (Unique Identification Number) proposed under the CAA-NRC policy.

Citizenship in constitutional politics is not just a mark of legal entitlements but also a ground for substantive political participation. Classically, a citizen is a person who is the ruler and the ruled at the same time. This dictum of Aristotle regards a citizen as eligible for public office and also a participant in public affairs of the country. The modern and liberal mark of citizenship draws from the 18th century Enlightenment to pit the citizens' claims of rights against the governmental authority. This creates a private sphere of civil and political rights in favour of citizens. The rise of the welfare state and its extensive administrative apparatus during the post-World War II reconstruction adds another dimension by earmarking the citizen as a legitimate beneficiary of governmental entitlements, public services and allowances. A citizen, therefore, has a public character (Classical Antiquity, Renaissance), a private character (Classical Liberalism and Enlightenment), and a client character (administrative and welfare state). These three attributes of citizenship, as drawn from divergent epochs, signify the ethical claims of political participation and citizenship as ruptured by the controversy of the CAA-NRC regime.

Review of Literature

Constitutional and Legal Contradictions

Scholars have conceived the CAA-NRC regime as part of a larger assault upon constitutional institutions, like the judiciary, policing and Election Commission. It is criticised for undermining the secular and pluralistic values of the Indian Constitution by invigorating the slide towards Hindutva nationalism (Misra and Viens 2020). The rise of authoritarian politics compounds such deterioration of constitutional ideals. The exclusion of specific religious communities, i.e., Muslims, has also invoked the claims of impinging the right to equal protection of laws under Article 14. This

clause prohibits unreasonable classifications, and religious factoring is deemed under prohibited constitutional categories for the enforcement of specific state policies (Dhoop 2020). The new law proposes to classify beneficiary immigrants exclusively based on religion and nationality. However, it attempts a balance with constitutional history by grounding the classification in partition-era atrocities, together with material standards of persecution and specific religious identity as minorities.

The constitutionality and legality of CAA are challenged for assuming persecution in favour of designated minorities, like Hindus and Sikhs, while excluding Muslims from its purview. It is argued that such a presumption ignores contrary fact-finding in the form of documentary evidence and think tank reports, for instance, the persecution of *Madhesis* (Nepal), *Rohingyas* (Myanmar), *Tamils* (Sri Lanka), etc. However, such criticism disregards the technical mode of positive law, which makes extensive use of legal presumptions across a wide range of legal fields. Presumption of the parentage of a child or presumption of lack of consent in rape charges are some of the common legal fictions which are deployed by legal regulations as norms in the interest of the victim.

Similarly, another set of legal criticisms claims that the CAA regime lacks coherent compliance with a pre-existing legal framework regarding ancillary rights of citizens, e.g., the rights of citizens to own immovable property (Dhoop 2020). The Foreign Exchange Management Act 1999 (FEMA) prohibits non-citizens from exercising such rights. This critique of an incoherent statutory regime again misses the conceptual contours of citizenship. It is an essential mark of citizenship to be bestowed with core civil and political rights, including the right to own property. Common law adjudication and legal doctrines are sufficiently robust to harmonise the numerous statutory regimes under this dominant principle of the citizen as a bearer of rights. Most ancillary laws, like civil procedure, personal laws, or even FEMA 1999, do not require significant adjustment in this regard.

Administrative and Pragmatic Constraints

A recent field study coupled with social media analysis highlights a range of pragmatic constraints flagged by the CAA respondents (Roy et al. 2021). The documentary burden is generally skewed against females, illiterates, and unorganised or informal workforces. This problem of furnishing legal proof is particularly entrenched in the state of Assam, which has experienced large-scale demographic shifts since the 1971 creation of Bangladesh and the consequent migration across the eastern borders of India. The hardened

bureaucracy creates perverse incentives for officials to harass and abuse applicants. The significant participation of women in the CAA protests reflects upon its severe consequences for impoverished women who lack recognised identification markers, like immovable property, birth certificates, marriage certificates, etc. The study claims female sensitisation is linked to this lack of documentary evidence.

Documentary harshness of the CAA-NRC has been likened to colonial repression, whereby judicial precedents and state policies have increasingly restricted citizenship quotient and widened the scope of an alien or foreigner (Chatterjee and Raheja 2020). The Supreme Court of India has exacerbated the plight of disadvantaged sections by imposing a burden of documentary proof upon the claimant in a legal dispute. In this context, the CAA extends the deployment of suspicion against a specific community akin to that used by administrative machinery against migrant poor and is prevalent in cosmopolitan cities like Mumbai (P. Chatterjee 2004). CAA enactment compounds the restrictive documentation with institutionalised alienation to particularly bear upon the Muslim urban poor. Documentary strictures are further worsened by administrative lapses or a lack of institutional mechanisms for evaluating and settling claims of religious persecution. Such institutional laxity aggravates the potential for abuse and fraudulent applications. This is further significant because the claimant cannot be deported under the legal presumptions of CAA (Dhoop 2020).

Ethics of Persecution, Xenophobia and Constitutional Patriotism

The exclusion of Muslim refugees from the beneficiary class of the CAA has been compared to the seclusion of the Jewish community in Nazi Germany (Dhoop 2020). However, such a comparison seems to be a case of overdetermination, as the enactment itself is safeguarding the status of distinct religious minorities in Muslim-majority neighbouring countries. The Act itself does not diminish the status of citizenship for Indian Muslims. Therefore, none of the state policies of Nazi Germany are comparable to this experiment. An analysis of social media activity over the relevant period also reveals that CAA has caused a schism within the Indian community on the lines of sectarian and communal sentiments (Roy et al. 2021).

It is further claimed that CAA-NRC has inflamed xenophobic elements under the guise of hyper-nationalism. This is reflected in the targeted undermining of centres of critical thinking, like urban universities and the coopting of mass media. This repression only adds to the sedition laws,

censorship, internet blockade, and use of detention centres for illegal immigrants (Misra and Viens 2020). Scholars have championed the CAA protests and resistance as a reflection of civic patriotism in the cause of safeguarding the constitutional values of pluralism, inter-faith inclusivity, and Gandhian non-violence.

Implications of International Relations

CAA invokes humanitarian grounds to permit Indian citizenship for victims of religious persecution. While India is not a signatory to the Refugee Convention of 1951, its international standing is implicated in those humanitarian standards involving the CAA controversy. This has sensitive implications for India's diplomatic relations with its neighbouring countries, especially Pakistan, Bangladesh and Afghanistan (Dhoop 2020). The convention seeks to entrench iterative rights for refugees based on their integration within the host country. This includes basic rights against discrimination and access to the judicial system of the host country. The convention seeks to ameliorate the refugee status by providing alternate solutions through third-party resettlement, host country naturalisation, or repatriation to the country of origin (I. Chakrabarty 2021).

The Indian protest has been contextualised within the series of similar populist uprisings against governmental excesses across other regions of the world. For instance, Hong Kong's refusal to extradite its residents for trial to mainland China or protests organised by citizens of Chile to demand affordable transportation. Lebanon experienced similar mass mobilisation as resistance against tax hikes on fuel and energy consumption. Nevertheless, the specific mode and ethos of these protests and mobilisations is grounded within its unique cultural context (Chatterjee and Raheja 2020).

Research Methodology

This essay employs a historical method to trace the evolution of transformative constitutionalism concerning political participation in India. This historical survey contextualises the significance and future contours of the CAA-NRC protests and claims. The uniqueness of India's constitutional identity is often characterised in terms of its radically transformative nature (Bhatia 2019). This attribute extends beyond the rule of law paradigms of liberal constitutionalism and requires a more substantive relation between the government and citizens through the implementation of socio-economic rights. Public education, public health and environmental justice are

configured as concrete sets of entitlements for citizens' participation in public affairs. Such an inverted paradigm of citizenship and constitutional justice, compared to Western liberal constitutionalism, also reimagines the role of constitutional courts as active participants in state policy.

Analysis

Colonial Citizen as Participant in Public Affairs

This constitutional ethos of citizens as beneficiaries of state policy was not adopted as a discrete or episodic event in the Constituent Assembly. It is rather a historical product of long political experience, which was neither created nor discovered accidentally. It is an evolving process requiring a regular interface between the government, citizenry and society (Jacobsohn 2010). Colonial rule relied upon the categorisation and differentiation of cultural and religious communities. This legal mode was not a mere tactical choice for "divide and rule" but also an epistemological necessity for harmonising colonialism with its normative and liberal lineage. Colonialism was chartered from the same lands that celebrated their constitutionalist governance in the homeland. The iterative nature of Indian constitutional history, therefore, signifies the increasing citizenship quotient of political participation and political representation in public offices of colonial India. Indians' role in colonial public affairs did not compromise or impede their activism, resistance, and even legal countermeasures. British constitutional reforms in colonial India, on the contrary, were the product of such dialectic political participation and citizenry activism. Lawyerly leadership, combined with usage and training in juridical modes of participation, evolved the nationalist movement under the Indian National Congress (Mukherjee 2010).

This normative resistance and politico-legal participation of the Indian people is reflected in significant milestone events of colonial India, such as the impeachment trial of Warren Hastings and the notorious trial of Nand Kumar. Similar assumptions of legal personality and participatory citizenship were later asserted through the sedition trials of Tilak and Gandhi. The 1857 Revolt marked the radical transition from the economics of colonial administration to the ethics of constitutional politics. Such mass revolt caused substantive reforms in the British constitutional government and the consequent abolition of the East India Company rule in India. This earmarks the advent of the Indian national movement and the emergence of the political identity of modern citizenship in India. However, this participatory

mode of legal personhood has been criticised as an elite compromise on the part of the nationalist leaders.

Political and legal participation, in this assessment, was not reflective of some intellectual or ethical revolution. The participation mode transitioned into a resistance and disobedience ideal once the elite leadership realised its failure to prosper under British colonialism (Seal 1968). This critique, however, may not explain the simultaneous modes of participation and resistance that were achieved by the earliest phase of the nationalist movement around the partition of Bengal (1905). The realist evaluation based on interest-based politics may not be discounted, as it is an essential attribute of authority and power. Comparative studies have demonstrated how constitutional ethics of participatory rights are deployed as "politics by other means" to manage the relationship between constitutional courts and political elites (Hirschl 2013). Constitutional politics and ethics are complex enough, like the elephant before the blind friends, to be explained and justified by multi-modal frameworks. Elitist co-option and ethical vision may simultaneously inform the decisional choices made under conflict situations emerging over long periods and large territorial scales. Essentialising the politico-legal participation and the consequent emergence of a juristic personality in colonial India exclusively as elite compromise or pure virtue may lapse into reductionism.

Constitutional Citizen as Beneficiary of Public Affairs

The liberal strain of British colonialism drew from the Enlightenment values to inject and experiment with the ideals of the rule of law and human dignity on the Indian shores (B. Chakrabarty 2019). However, the founders were cognizant of the colonial categorisations on religious lines and their ultimate culmination with the religious partition of India. Citizenship clauses, in Part II of the Indian Constitution, reflect that tussle away from cultural or religious markers of citizenship, thereby adopting association with the land and territory as the benchmark eligibility. The Constituent Assembly acted as the centripetal forum to channelise the unification efforts of the nationalist movement. Modern citizen of liberal democracies is conceptualised, in political philosophy and constitutional law, as a holder of rights and beneficiaries of state policies.

The Indian Constitution adopted a non-religious attribute for citizenship so as not to reduce the person to their "ascriptive" site, as such ascription is bereft of any recognition for their agency and choice (Rodrigues 2008). It extended the beneficiary paradigm to facilitate the return of indentured

labourers as people of Indian origin. This was implemented by legitimising citizenship through the residential status of their parents or grandparents. The ethos of transformative constitutionalism or social justice evolved progressively along with the emergence of the political identity of Indian citizens engaged in the national movement. Post-independence jurisprudence of the Indian Supreme Court reflects a unique ordering of constitutional values, with the fierce primacy of territorial borders realised through a unitary and strong central government architecture. However, this priority of territorial security is nestled within the first ethical priority in social justice and citizens' distributive entitlements. Granville Austin describes this twin goal as the [territorial] "unity" strand and the "social revolution" strand of the Indian Constitution (Austin 1999).

This beneficiary concept of citizen is the predominant paradigm of rights adjudication and directive principles of state policy under the constitution. Affirmative action and land reforms have been two prominent constitutional interventions to realise the paradigm of the citizen as a beneficiary. The social justice, transformative, or beneficiary claimant mode of citizenship even dominates the secular or religious freedom ideals of the constitution. It is directly manifested in the design choice of the Freedom of Religion clause under Article 25, which subjects this freedom to substantive exceptions in favour of social reforms. Colonial engagement of the people was primarily through positivist and legalist modes of petitions and public offices. This formal participation was complemented by the quest and projects of social reform for the equality of people as citizens. Early interventions were directed against social practices of child marriage, widow alienation, polygamy, Sati suicide, etc. The beneficiary notion of citizenship as social equality was primarily informed by the values of humanism and transcendental individualism. Here, dignity and self-sufficiency became the ideals to challenge gender and caste inequality.

Nationalist Citizen as 'Protestant' to Public Affairs

Mahatma Gandhi's entry into the nationalist movement resurrected the Protestant spirit of citizenship, which was previously invoked during mass movements against the Bengal Partition (1905). He led the early popular protests in Champaran (1917), Ahmedabad (1918), and Kheda (1918), covering wide Indian territory. The ethics of mass protest against public affairs was grounded in the republican ideal of self-reliance or Swadeshi and the Protestant demand for Satyagraha or truthful claims. Non-violent sit-ins and pamphlets modelled on literary discourses were its dominant modes. Interestingly, the CAA's modus operandi substantively adopts this

ethic of the Protestant citizen. This Protestant spirit is etymologically, historically and ideologically sourced from the 16th-century Reformation protests against the centralising, autocratic and doctrinal hegemony of the Roman Catholic Church (Skinner 1978).

The Protestant vision of citizenship reimagined political participation by merging the Aristotelian or republican standard of the citizen as "ruler and ruled" in political affairs, along with the modern resistance against centralising authority. The Protestant citizen is not pacified by the possibility of cooperating with state action. Such a person of the state seeks to expand the forum of positive legal authority beyond the formal institutions of legislature or judiciary. In the republican tradition, this participatory activism was conditioned by arms-bearing landowners. This constitutional ideal was realised in the Whig Revolution of England, which later translated into the American Revolution of 1776. However, the republican strand of participation, unlike popular Protestantism, conceived this armed landowner as a hedge against government excesses (Pocock 1975).

Armed landowners or the upper-class urbanites did not channel CAA protest; rather, people experiencing poverty, the landless and women and other marginalised sections were its leading participants. It reflected the ideal of social equality, with the disadvantaged as the model of citizens. This active citizenry, grounded in the modes of later nationalism and the original spirit of the 16th-century Protestant revolt against Rome, is antithetical to the xenophobic strain of nationalism. The Protestant citizen is not an atomic individual denuded from their cultural mores. Such protesting participant is marked by anthropological and ecological sensibilities (Jayal 2013) This ethics of citizenship is not limited by liberal constitutionalism, which legally restricts self-determination claims of select territories. The asymmetric status of the boundary regions in the northeast and Jammu & Kashmir signifies this protesting spirit that probes the separation wall between the foreigner and the citizen, or the refugee and the migrant.

Conclusion

India may not be a signatory to the Refugee Convention 1951 and other ancillary treaty regimes. Nevertheless, the ethical standard of the citizen as a protestor is fundamentally grounded in the first principles of public international law and international obligations. It is no coincidence that the CAA-NRC controversy invokes the legal categories of "refugee" and "migrant". The politico-legal status of refugees is the principal concern of

cosmopolitan ethics, which is itself based upon the ideals of human dignity and equality beyond conventional territorial borders (Nussbaum 2019). This tradition conceives the protesting citizen as torn between the legally enforceable claims of justice and ethically desirable claims of material care. Under such a classically established dichotomy of legal positivism, the citizen is limited by access to legally enforceable claims. However, the state would be justified to deny material support of shelter, primary health and education to all those people who do not meet the legal eligibility of rule-based citizenship. In this framework, the presence of the person within state territory or their dire needs and deprivations are not to be translated into a legal obligation upon the state.

The international regime has progressively adopted cosmopolitan ethics enabling the refugee to surmount the classical separation between duties of justice and duties of material care. The writings of Hugo Grotius, Adam Smith, and Immanuel Kant have contributed towards strengthening this cosmopolitan standard of refugee rights. In this context, the protestant citizen is not just seeking proximity with the constitutional and colonial citizens. They equally belong to that cosmopolitan community of disadvantaged and marginalised groups who are seeking similar recognition in their own country or other regions of the world. The essentialisation of communities created under the CAA-NRC regime is bereft of this intrinsic ethical quality. It freezes the communitarian identities across religious lines while ignoring other virtuous modes of belonging and identity, like the experience of suffering, torment and exodus. The refugee, as a Protestant citizen, is part of the same community of the tormented, whether marked by caste, gender, sexual identity, or even migrating across physical territories.

References

Austin, Granville. 1999. *The Indian Constitution- Cornerstone of a Nation.* Oxford University Press.

Bhatia, Gautam. 2019. *The Transformative Constitution: A Radical Biography in Nine Acts.* 1st Edition. Harper Collins India.

Chakrabarty, Bidyut. 2019. *India's Constitutional Identity: Ideological Beliefs and Preferences.* Routledge.

Chakrabarty, Ishita. 2021. "Show Your Religion, Claim Your Citizenship: The Citizenship Amendment Act, 2019." *Emory International Law Review* 35: 17-36.

Chatterjee, Partha. 2004. *The Politics of the Governed: Reflections on Popular Politics in Most of the World.* Columbia University Press.

Chatterjee, Syantani, and Natasha Raheja. 2020. "India's Citizenship Amendment Act (CAA): Citizenship and Belonging in India." *PoLAR: Political and Legal Anthropology Review* 1-6.

Dhoop, Prerna. 2020. "Citizenship (Amendment) Act: Enforcement Is Fraught with Legal Hurdles." *Economic and Political Weekly (Engage)* 55 (4): 2-7.

Hirschl, Ran. 2013. "The Strategic Foundations of Constitutions." In *Social and Political Foundations of Constitutions*, by Denis J. Galligan and Mila Versteeg, 157-181. Cambridge University Press.

Jacobsohn, Gary J. 2010. *Constitutional Identity.* Harvard University Press.

Jayal, Niraja Gopal. 2013. *Citizenship and Its Discontents: An Indian History.* Harvard University Press.

Misra, Devika, and Catherine Viens. 2020. "The Citizenship Amendment Act (CAA): The Struggle for India's Soul." *Revista Lūvo* 7 (1): 25-30.

Mukherjee, Mithi. 2010. *India in the Shadows of Empire: A Legal and Political History (1774-1950).* Oxford University Press.

Nussbaum, Martha. 2019. *The Cosmopolitan Tradition: A Noble But Flawed Ideal.* Harvard University Press.

Pocock, JGA. 1975. *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition.* Princeton University Press.

Ratha, Keshab Chandra. 2021. "Interpreting Citizenship Amendment Act: Its Content and Context." *Indian Journal of Public Administration 67(4)* 559-572.

Rodrigues, Valerian. 2008. "Citizenship and the Indian Constitution." In *Politics and Ethics of the Indian Constitution*, by Rajeev Bhargava (ed.), 164-188. New Delhi: Oxford University Press.

Roy, Souvik, and etal. 2021. *Exploring the dynamics of protest against National Register of Citizens & Citizenship Amendment Act through online social media: the Indian experience.* Research Findings, IMPRESS, ICSSR (P3271/220).

Seal, Anil. 1968. *The Emergence of Indian Nationalism: Competition and Collaboration in the Later Nineteenth Century.* Cambridge University Press.

Skinner, Quentin. 1978. *The Foundations of Modern Political Thought: The Age of Reformation.* Vol. II. Cambridge University Press.

CHAPTER 2

ETHICAL REFORMS IN LOAN RECOVERY PRACTICES: THE HAZARIBAGH INCIDENT

ANUBHAV TYAGI[1]

Abstract

Those in rural or semi-urban areas rely heavily on commercial equipment and vehicles for their livelihoods. The actions taken by the Reserve Bank of India (RBI) invoking its powers under the Reserve Bank of India Act, 1934, Section 45L(1)(b), are closely scrutinised to understand the justification behind the ban on third-party agents and its potential ramifications on Mahindra & Mahindra (M&M) Finance and the broader Indian economy. While some view the RBI's measures as stringent, we analyse the moral and legal dimensions to ascertain the appropriateness of these actions in combating unethical practices within the banking sector. The Hazaribagh incident serves as a poignant reminder of the dire need for ethical reforms in loan recovery and asset repossession practices. This paper underscores the significance of upholding morality and accountability, regardless of an institution's size or influence. The RBI's response marks a pivotal moment for effecting change, prompting a shift toward more ethical practices in the financial industry, ultimately benefiting borrowers, lenders, and the overall stability of the financial ecosystem.

Keywords: Banking Sector, Ethical Implications, Financial Ecosystem, Hazaribagh Incident, Loan Recovery, Non-Banking Financial Companies (NBFCs), Reserve Bank of India (RBI), Rogue Third-Party Agents.

[1] Guru Gobind Singh Indraprastha University, New Delhi, India

Introduction

The tale of rogue third-party agents has always been a woeful one, from using underhand techniques, abusive language, and misbehaviour to recover assets have been agonising to the creditors who have to deal with them. However, despite all this, third-party agents have always been favourites of NBFCs and other banking institutions for outsourcing their work whether it may be loan recovery or repossession, etc. The outsourcing aspect comes with its benefits as well as its shortcomings, such as with the Hazaribagh incident where a pregnant woman and her child were run over by a third-party agent while performing his duties under one such NBFC for a loan amount as low as Rs 120,000 (Shukla 2022). This incident sparked a quick response from both the local police and the RBI, where we saw an FIR against the four men who were accused of crushing a pregnant woman and her child and an ban from an RBI for M&M finance to ban them from using third-party agents for repossession Several economists have expressed their concerns over the actions of RBI and condemned the heinous act of the third party agent. The actions from RBI come from the exercising their power under section 45L(1)(b) of the Reserve Bank of India Act, 1934 ("The Reserve Bank of India Act, 1934), under which it has guided M&M finance to immediately cease performing any recovery or repossession activity through outsourcing arrangements until further orders. Although M&M Finance can perform its operation through its agent, this arrangement sparked a discussion about whether the order to cease is justified or not, considering that accidents can happen in any activity or business and whether it is acceptable to punish M&M Finance over the incident.

Background

The incident is reported to have happened at Hazaribagh involving a young pregnant woman and her child who were crushed while stopping the agents from taking away a tractor (Nair 2022) that was bought using the loan. The case may seem simple at first, where an NBFC had outsourced its work, and the agents acted for repossession, but due to their misconduct, a woman and her unborn child was injured; the case has several layers,

What has prompted NBFCs such as M&M Finance to speed up their recovery and repossession? The answer is simple: it is mostly because of the rise in the volatile asset quality of gross stage three assets or loans overdue for 90 days or more, which stood at 8.03%, higher than 7.66% as

of March[2],causing the financial company to recover and repossess its loaned out assets to maintain its financial state. M&M were repossessing somewhere between 4000 and 5000 vehicles per month, which then fell temporarily due to the cease of their outsourcing activities.

However, the rise of these unpaid loans has arisen not just because of the inability to pay loans but also because of the recent pandemic, which prompted little to no economic activity, considering the loans taken, for the most part, were for commercial equipment and vehicles such as those used in rural or semi-urban areas. Considering the agony of not being able to pay loans and then having their livelihood taken away might have prompted similar action to what happened in Hazaribagh.

The actions from RBI might seem almost too strict at first, considering that M&M Finance is only outsourcing, but this action from RBI repeats its stand on rogue and third-party agents. In June, Shaktikanta Das, the governor of RBI, issued a warning that the regulator would impose strict sanctions on lenders for using aggressive collection techniques. "We have received complaints of customers being contacted by recovery agents at odd hours, even past midnight. Complaints of recovery agents using foul language. Such actions by recovery agents are unacceptable and pose a reputational risk for the financial entities,"[3] Das said, adding that the RBI had taken serious note of such incidents and would not hesitate to take stringent action.

Morality and Business

The strict action and decease order imposed by the RBI by using its powers under the Reserve Bank of India Act 1934 was seen as a risky move considering the position of the Indian banking system, and this ban could negatively impact the performance of the Indian economy. Although everyone condemns the actions of the agents, punishing the master seemed a little too much of an overkill to the personalities in the banking sector, such as DK Mittal and TT Srinivasaraghavan.

However, the moral standpoint and the law seem to justify every action taken by the respective authorities and have shown a better side of the Indian judicial system and RBI in a long time. Although the event is unfortunate, this sparked a long-standing argument on behalf of the creditors against the

[2] Mahindra & Mahindra Financial Services Limited Quarter Result Update September, 2020.
[3] LIVE: RBI Rate Decision | Governor Shaktikanta Das' Speech 2022.

rogue recovery agents deployed to recover the assets from these banking institutions where the recovery agents use underhanded tactics and foul language to reach their goals. The question still lingers as if these actions were justified or not, and this time, the answers come from the apex authority in this matter, and they have certainly announced that morality shall prevail. Despite cold business tactics and crude methods, no matter how rich or powerful the institutions, they will have to face the consequences of their actions, whether they are done directly or through the use of third party agents.

Legal Remedies for Unethical Practices

In cases like the Hazaribagh incident involving rogue third-party agents working for financial institutions or NBFCs engaging in unethical practices causing harm or loss of life, various legal remedies are available to address the situation and ensure accountability:

1. **Criminal Prosecution:** When a third-party agent or anyone involved in loan recovery engages in criminal actions resulting in harm or property damage, they can face criminal charges such as assault, homicide, or property damage.
2. **Civil Lawsuits:** Victims or their families can file civil lawsuits seeking compensation for damages, including medical expenses, funeral costs, loss of income, emotional distress, and punitive damages to discourage similar behaviour.
3. **Consumer Protection Laws:** India's Consumer Protection Act 2019 empowers borrowers to file complaints against companies for deficient services, unfair practices, and negligence or malpractice that causes harm.
4. **RBI Regulations and Penalties:** The Reserve Bank of India (RBI) can impose penalties, fines, and restrictions on financial institutions and NBFCs in response to misconduct. These measures may include fines, banning third-party agents, or licence revocation.
5. **Employee Disciplinary Actions:** Institutions found responsible for employing rogue agents can take internal disciplinary actions, including employee termination or suspension, and implement stricter policies.
6. **Regulatory Framework for Third-Party Agents:** A robust regulatory framework for third-party agents can be established to ensure ethical conduct, adherence to fair practices, and respectful treatment of borrowers.

7. **Awareness and Training Programs:** Financial institutions can conduct awareness and training programs to educate employees, including third-party agents, about ethical practices, customer rights, and consequences of misconduct.
8. **Whistleblower Protection:** Legislation protecting whistleblowers can empower individuals to report misconduct without fear of retaliation, aiding in the exposure of rogue agents.
9. **Reforms in Asset Recovery Practices:** The Hazaribagh incident underscores the need for ethical reforms in asset recovery. Compassionate and considerate approaches, regulatory oversight, and rigorous monitoring of third-party agents can prevent such incidents, ensuring borrower and lender interests and financial industry stability are protected. The goal is to maintain integrity and accountability within the financial sector.

United States - Wells Fargo Unauthorized Account Scandal (2016)

In a major U.S. banking scandal in 2016, Wells Fargo faced backlash for unauthorised accounts[4]. Employees opened millions of accounts without customer consent due to aggressive sales targets, leading to unethical practices. This resulted in lawsuits, regulatory probes, and hefty fines, harming customers and the bank's reputation.

United Kingdom Payment Protection Insurance (PPI) Mis-selling[5]

The UK's PPI mis-selling scandal saw banks and institutions selling insurance without explaining terms or getting proper consent. This left many with unnecessary policies and caused billions in compensation and fines, emphasising the need for transparent dealings with customers.

[4] Wells Fargo Agrees to Pay $3 Billion to Resolve Criminal and Civil Investigations into Sales Practices Involving the Opening of Millions of Accounts without Customer Authorisation 2020.
[5] Georgosouli, Andromachi, Payment Protection Insurance (PPI) Misselling: Some Lessons From the UK. (2014). Connecticut Insurance Law Journal. 140").

Australia Banking Royal Commission (2018)

Australia's Banking Royal Commission uncovered misconduct in the financial industry, including unwarranted fees, inappropriate advice, and aggressive loan recovery. The findings prompted reforms to protect consumers and rebuild trust.[6]

India Farmers Suicides and Microfinance Industry

In India, some micro-finance institutions faced criticism for their loan recovery practices, leading to tragic incidents of farmers resorting to suicide due to the pressure of debt and repossession. Accusations of coercive methods used by micro-finance institutions raised public outrage and called for stricter regulations. This case emphasised the need for a compassionate and considerate approach to loan recovery, especially for vulnerable borrowers[7].

Nigeria—Unethical Practices in Debt Recovery The Nigerian debt recovery industry has been criticised for its aggressive and unethical practices. Agents are accused of intimidating and harassing borrowers, leading to safety concerns. Calls for better regulation to ensure ethical behaviour and protect consumers' rights have emerged[8].

Learning from these examples and promoting transparency, accountability, and responsible conduct can help financial institutions rebuild trust. Effective regulation, transparent practices, and responsible conduct are essential for a stable and ethical financial system.

Measures For Preventing/Reducing Such Incidents in Future

The Hazaribagh incident is a stark reminder of the severe consequences of unethical loan recovery practices on borrowers and the financial sector's reputation. As we analyse similar global cases, the urgency for comprehensive ethical reforms becomes evident. By understanding

---

[6] ("Misconduct in the Banking, Superannuation and Financial Services Industry", n.d.).
[7] ("NAIR, TARA S. "Microfinance: Lessons from a Crisis." *Economic and Political Weekly* 46, no. 6 (2011): 23–26. http://www.jstor.org/stable/27918113").:
[8] Adewumi and Jolaosho, n.d.

international challenges and responses, we can offer meaningful suggestions for a better financial ecosystem, prioritising ethics and customer well-being.

1. Effective Regulatory Frameworks: A crucial step in enhancing loan recovery practices is the implementation of robust regulations. Governments and regulators should collaborate to establish stringent laws discouraging unethical behaviour and imposing hefty penalties. Stricter enforcement and regular institution audits can deter misconduct, ensuring adherence to ethical standards.
2. Customer Education: Boosting financial literacy and educating borrowers about their rights is vital for a fair financial ecosystem. Many borrowers, especially in remote areas, may be unaware of their rights, leaving them vulnerable to exploitation. Empowering consumers with knowledge about loan terms, recovery procedures, and recourse in case of harassment helps them make informed decisions and protect themselves.
3. Ethical Culture: Nurturing an ethical culture within financial institutions is essential to eradicate unethical practices at their core. Comprehensive ethics training for employees, including third-party agents, can instil a sense of responsibility and integrity. Incentive structures that reward ethical conduct and discourage aggressive sales targets shift the focus from profit-at-all-cost to customer satisfaction and long-term relationships.
4. Whistleblower Protection: Encouraging whistleblowers to report misconduct without fear of retaliation is crucial for early detection and prevention. Whistleblower protection laws and ensuring anonymity for reporters create an environment where individuals are more likely to expose wrongdoings, fostering transparency and accountability.
5. Technology for Responsible Practices: Leveraging technology can lead to innovative and ethical loan recovery practices. Automated communication systems and reminders can reduce reliance on third-party agents, mitigating the risk of abuse. AI-based algorithms for risk assessment and early intervention can identify borrowers in financial difficulty and offer suitable repayment solutions.

Challenges Faced by the NBFC

For NBFCs, maintaining ethical standards in loan recovery is crucial for financial stability. Rising non-performing assets (NPAs) and overdue loans can strain an institution's finances, making timely recovery essential to

avoid liquidity risks. NBFCs serve under-resourced and underserved populations, often lacking collateral or credit history. Recovering loans from these vulnerable borrowers requires ethical practices.

Outsourcing loan recovery to third-party agents enhances efficiency but poses monitoring challenges. NBFCs should ensure these agents follow ethical standards to ensure ethical conduct:

1. Stringent Vendor Selection and Monitoring: Careful selection of third-party agents based on ethical track records, with regular monitoring to rectify deviations.
2. Employee Training and Compliance: Comprehensive training for employees and third-party agents to instil ethics, including fair debt collection practices, customer rights, and consequences of unethical behaviour.
3. Customer-Centric Approaches: Adopting borrower-centric approaches, considering individual circumstances and financial constraints. Empathetic communication and negotiation can lead to mutually beneficial solutions.
4. Leveraging Technology for Transparency: Technology-driven recovery mechanisms enhance transparency. Automation and real-time borrower access to loan status build trust and reduce misconduct risks.

As an NBFC, maintaining ethical standards in loan recovery is crucial. Addressing the challenges and implementing stringent vendor selection, robust training, customer-centric approaches, and technology-driven transparency can foster ethical conduct, ensure financial stability, serve under-resourced communities, and rebuild public trust in the financial ecosystem.

Challenges Faced by Indian Farmers

The Hazaribagh incident and the discussion on ethical reforms in loan recovery practices have broader implications for Indian farmers, who are significant borrowers from NBFCs. This section examines Indian farmers' status in the context of the incident and explores how ethical reforms can impact their livelihoods and financial well-being. Understanding farmers' challenges in loan recovery and asset repossession is crucial for creating solutions that protect their interests and sustain the financial ecosystem.