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Research Article

Citizenship and the judicial intervention: comparative study in India and USA*

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Abstract

In today's globalized world citizenship is considered as method of inclusion which acts as a status of a person,[1] and that status brings along with it, exclusive rights and obligations. Often the concept of citizenship is generally confused with that of nationality, but nationality is associated with membership of a community on the basis of cultural similarities whereas citizenship is membership of a state.[2]

Right of citizenship brings with it bundle of other rights,[3] it is used as a sorting device for allocating human population to a particular state. Citizenship acts as a filter in two ways: states are obligated to admit their nationals into their territory and they may levy restrictions (e.g. visa requirements) on other nationals. Citizenship is neither a purely subjective nor purely objective criteria. It is not subjective as there is no sense of belonging and neither is it objective because it cannot be inferred by looking at the person's circumstances. Citizenship is more of a discriminating concept than a concept that ties people. It marks a boundary between outsiders and insiders, this boundary may be flexible or rigid and may keep changing, but it still exists as a demarcation.

INTRODUCTION

In today's globalized world citizenship is considered as method of inclusion which acts as a status of a person,[4] and that status brings along with it, exclusive rights and obligations. Often the concept of citizenship is generally confused with that of nationality, but nationality is associated with membership of a community on the basis of cultural similarities whereas citizenship is membership of a state.[5]

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[1] Markus Pohlmann, Jonghoe Yang, Jong Hee Lee, 60, https://www.asia-europe.uniheidelberg.de/fileadmin/Pictures/Publications/springer_books/transcult_pohlmann_yang_lee_978-3-642-19738-3.pdf, (last visited June 24, 2021).
[2] Ibid.
[3] Trop v. Dulles, 356 U.S. 86, 101–02 (1958)
[4] Markus Pohlmann, Jonghoe Yang, Jong Hee Lee, 60, https://www.asia-europe.uniheidelberg.de/fileadmin/Pictures/Publications/springer_books/transcult_pohlmann_yang_lee_978-3-642-19738-3.pdf, (last visited June 24, 2021).
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admit their nationals into their territory and they may levy restrictions (e.g. visa requirements) on other nationals. Citizenship is neither a purely subjective nor purely objective criteria. It is not subjective as there is no sense of belonging and neither is it objective because it cannot be inferred by looking at the person's circumstances. Citizenship is more of a discriminating concept than a concept that ties people. It marks a boundary between outsiders and insiders, this boundary may be flexible or rigid and may keep changing, but it still exists as a demarcation.

In India Part II of the constitution of India and Citizenship Act, 1955 deal with the citizenship law but neither of them defines terms which are crucial for understanding the law with regard to citizenship, such word may include citizen, domicile, nationality and subjects, Article 5 of the constitution mentions the term domicile but neither this Article nor any other provision of the constitution or subsequent legislation defines domicile, which makes the law of the citizenship ambiguous and unsettled that's how the role of judiciary becomes important, as it interpret these terms in the light of the constitution and its basic structure. Given the importance of judicial interpretation to the provision of citizenship law in this Article we will deal with the cases related with citizenship decided by the constitutional courts along with that, we will also discuss the approach of judiciary in the USA after the fourteenth amendment.

CONSTITUTIONAL PROVISIONS THROUGH THE LENSES OF JUDICIARY IN INDIA

The Constitution of India under Article 5 confers citizenship by the domicile but the term as above mentioned not defines under constitution further other Article also require domicile with one or more ancillary conditions such as domicile and born in India, not born in India but have Indian domicile along with fact that their parents were Indian citizens, those who are ordinarily residing in India for last five year but are not born in India and those who are migrants of Pakistan but came India after 19th July 1948 and are domiciled in India by registering themselves for more than six months, hence understanding the domicile through judicial lenses becomes necessary.

Initially court was of opinion that minor child should take on the domicile of his/her father[7] whereas married women shall considered having domicile of her husband[8] but further this was changed in the case of *State of Bihar v. Kumar Amar Singh and Others*[9] where Supreme Court has discussed the domicile in the light of Article 5 and Article 7 in this case a lady Kumari Rani who was Indian born and wedded to Indian citizen who was domiciled in India as well, created a wakf and appointed herself mutwali and her three sons joint mutwali. In the month of July 1948 is visited Pakistan but by December of the same year she came back to India on temporary permit but next year in the month of April she again went to Pakistan and meanwhile in September, 1949 by the notification of deputy custodian Evacuee her property which was under the wakf was vested in custodian as she was considered to be migrated to Pakistan but on 14th may 1950 she returned India on the permanent permit which was cancelled and due to this cancellation, she was ordered to leave India by the end of the month.

In this case the fundamental question was raised as to the continuance of Kumar Rani's citizenship status as she went to Pakistan after 1st march, 1947 and as per Article 7 she ceases to be citizen but the proviso of the Article provides few exception such as return on permit and permanent return and keeping in mind this law and fact that she was born in Indian territory and her husband was domiciled in India High court allowed her application because as per English law husbands domicile is

[7] Dowood Mohd v.UoI, AIR 1969 Guj 79.
[8] Karinum Nisa v. State of Madhya Pradesh, AIR 1955 Nag 6.
[9]AIR 1955 SC 282.

considered wife's domicile and state filed appeal against this in the Supreme court, court giving effect to the non-obstacle clause of Article 7 held that,

> *"if the wife migrates to Pakistan after the date mention under Article 7 leaving her husband in India she should not be considered citizen of India for the purpose of Article 5 and though proviso provides for the exception but this case does not fall under that exemption, hence court denied the citizenship to her on the basis of her husband's domicile and created a clear demarcation between domicile of husband and wife."*[10]

Now the other question was, is domicile and citizenship one and same thing or not, and can one person have more than one domicile or not as we have concept of single citizenship Supreme Court in the case of *Radhabai v. Bombay* held that,

> *"common citizenship is different from the common domicile and one must not get confused between them domicile is the place (state) where a person is residing and have intention to continue such residence and citizenship is concerned with the political allegiance with the country."*[11]

But this case was overruled by the judgment of *State v. Narayandas Mangilal*[12] court was of opinion that in India there is single citizenship and hence there shall be one domicile of India as well. State domicile was disregarded by the justice Bhagwati in the case of *Pradeep Jain v. UOI*, he was of opinion that India is indivisible and hence have just one citizenship[13]Article 5 of the constitution confer citizenship on the basis of domicile of territory of India but domicile is not only criteria but in addition to this place of birth and residence is also required.

In *Central bank of India v. Ram Narain*[14], principle question was, a person who by birth is citizen of Pakistan and subsequent to crime done in Pakistan acquired Indian domicile can be tried by Indian court, court held that as the domicile is intention to reside forever at a place and there should be sense of perpetuity hence he cannot be tried under Indian Police Code by the courts in India. In *Louis De Raedt v. UOI*[15] a foreigner was residing in India with residential permit for his missionary work for a considerable period of time, in 1985 an order of expulsion was passed by the government which was challenged by him stating that, he resided in India for more than 5 years prior to the commencement of Constitution and as per Article 5, he was eligible for the citizenship by domicile. Court here in this case discussed the domicile by birth and domicile by choice, domicile by birth shall be unhindered until person acquires domicile by choice and to acquire it person must have intention to settle and reside there permanently mere residence is not sufficient for the acquisition of citizenship but it must be accompanied by the intention. Further for the purpose of the Article 5 of the constitution, in the opinion of justice Bhagwati there shall be just one domicile as it gives status of citizenship to all those who after the independence choose to stay back in the territory of India. When a domicile of minor is concerned for the purpose of Article 5 it would be associated with the domicile of father[16] But when father migrates to the territory of Pakistan leaving his children here and child still fulfills

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[10] Ibid.
[11] AIR 1955 Bom 439.
[12] AIR 1958 Bom 68.
[13] 1984 AIR 1420.
[14]AIR 1955 SC 36.
[15] 1991 AIR 1886
[16] UoI v. Md.Ayub AIR 1972 Gauhati 56.

all the requirement of citizenship of Article 5 he shall be considered as Indian citizens irrespective of his parents domicile.[17]

Gujarat High Court, in *Kulathil Mammu v State of Kerala*[18] defined term migrated in the view of Article 6 and 7 and held,

> *"if a person voluntary choose to leave for Pakistan after 1947 and then visits India and found shall be considered as migrant within the meaning of Article 7 and not citizen of India and treated as per the foreigners (entry into India) act, 1920. If a person visits India under Pakistani passport and have residential permit for few days but fails to leave India in the specified time then that person shall be considered as foreigner and shall be punished under section 14 of the foreigner's act,1946."*[19]

Migration is just moving from one place to other without any intention but domicile was associated with the intention. In *the case of Smt. Shanno Devi v. Mangle Sain*,[20] apex court dealt with the art. 6 and specifically provided the meaning of words has "migrated to India" which means that person migrated India before the commencement of constitution and that is coupled with the intention of residing permanently. To become citizen he must satisfy the requirement of ordinary resident under Article 6(b)(i) and if any person fulfils all the requirement of the art. 6 he is deemed to be the citizen, for the purpose of art. 6 migrations can only means coming India from the foreign territory and pointed out that art. 6 and 7 are for the extraordinary situation created by the influx of migrants due to the conditions created by the partition.

Further in the case of *Lal Babu Hussain v. Electoral Registration office*[21] court considered presence of name in the electoral roll as proof of citizenship and if the name is already there is cannot be remove by the authorities stating the lack of citizenship as ground of removal of name but a due process should be followed and person should get reasonable opportunity to defend his case before such removal of name from electoral roll. Judiciary while dealing with Article 5,6, and 7 of the constitution have interpret the fundamentally important terms such as domicile, migration citizenship and nationality. Court has associated the domicile with the intention and migration with the movement of person from one place to another. In court's opinion one can reside in the territory of India and have civil right but do not have any political right owing to lack of citizenship.

INTERPRETATION OF PROVISIONS OF THE CITIZENSHIP ACT, 1955

Article 11 of the constitution confreres wide power in the hands of parliament with respect to legislating over citizenship laws and as per this power parliament enacted the Citizenship Act, 1955 which provides citizenship via five means: by birth, descent, registration, naturalisation and incorporation. Sec. 5 provides citizenship by registration which is discussed in the case of *Ghaural Hasan and others v. The State of Rajasthan*, Supreme Court held,

> *"once a person is registered as citizen of India his citizenship status can only be cancelled by the Government of India as per section 10 of the citizenship act on the ground of fraud, misrepresentation and concealment of fact by such person and nothing*

[17] Rashid Hasan Roomi v. UoI, AIR 1967 ALL 154.
[18] AIR 1966 SC 1614.
[19] State v Abdul Suttar Haji Ibrahim Patel, AIR 1963 GUJ 226.
[20] AIR 1961 SC 58.
[21] AIR 1995 SC 1189.

> *else. Collector under S. 21 of the general clauses Act have no power to cancel the citizenship by registration."*[22]

further in the case of *Hari Shanker Jain v. Sonia Gnadhi*[23] where Mrs. Gandhi's election of member of parliament from the district of Amethi was challenged on the ground of her citizenship status, though she acquired citizenship under section 5(1)(c) of the citizenship act. High court of Allahabad held citizenship granted under section 5 should not be questioned unless cancelled under section 10 of the act by the government.

CITIZENSHIP AND THE JUDICIAL INTERVENTION OF UNITED STATES SUPREME COURT

Fourteenth Amendment has been seen as a central engine behind the birthright citizenship of all the races born on American soil and assimilation of new immigrant populations into the United States as well, we can came into existence nearly after seven decades hence the history of citizenship in united states can be divided in pre- and post-fourteenth amendment.

The constitution of USA in 1789 under Article I empowers the federal government as a sole authority to make and regulate the immigration laws. The Naturalization act of 1790, granted the national citizenship to only white men who are essentially have free will and who are resided in USA for at least two years, further citizenship was extended to their children who were below 21 years of age.

The U.S. Supreme Court in the *Dred Scott v. Sandford*[24] had to answer the question about the right to citizenship of a slave, who was negro born on American soil with the African ancestry, here in this case the issue was whether a slave born in USA becomes entitle to all the rights and privileges guaranteed including right to sue in the court of law. Court denied the right to citizenship to Scott, stating his African descent and status of slave. The majority opinion of the judgment written by Chief Justice Roger B. Taney, rationalizes the denial of citizenship in the following words,

> *"'citizens' constitutes the political body which form the sovereignty and they hold the power and conduct of government through their representative hence every citizen is sovereign people whereas the negro who are descendent of Africa are not citizen of United States though born here but are subordinate and inferior class of beings who are subjugated by the dominant race and their authority."*[25]

This judgment is the constant reminder of embarrassment that was brought to the US Supreme Court by compromising the liberty and equality of individual, long battles was fought to undue to wrongs of these judgments in the form of civil war. Thirteenth amendment of US constitution, post war came as possibility of radical change and legal transformation as slavery was abolished, though the status of citizenship was not conferred upon the former slaves. Soon after the war Reconstructionist Congress enacted the Civil Right law, which provides the status of citizenship to all people born in the U.S. given they are subject of foreign power.

The most important declaration of birthright citizenship came in 1868, in the form of Fourteenth Amendment, which held that,

[22] AIR 1967 SC 107.
[23] AIR 2001 SC 3689.
[24] 60 U.S (19 How.) 393 (1856).
[25] Lawrence B.; Fenwick Evans, Charles G. Cases on American Constitutional Law (5)

> *"All persons born or naturalized in the United States and subject to the jurisdiction thereof.[26]"*

This amendment recognized the principle of *jus soli* for conferring the status of citizenship to the people born on American soil. This amendment was challenged in the case of *United States v. Wong Kim Ark,*[27] where a birthright citizenship of Wong Kim Ark Chinese-American, who was born to Chinese immigrants in the year 1873 on the American soil was in question, as Congress passed the Chinese Exclusion Act, 1882 which prohibited Chinese immigration and, by extension, the naturalization of Chinese citizens. But since his parents were not citizen of United states, it was disputed whether he was citizen or not, Wong was denied reentry into the U.S. after his china visit, he was restrained of his liberty for the deportation, further he filled a writ of habeas corpus in the United States district court where he was discharged.

Thereupon the United Sates appealed in the Supreme Court held that,

> *"Citizen in the United states, by virtue of the first clause of the Fourteenth Amendment of United States which in clear words and in manifest intent, includes the children born, within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States".*[28]

Further court interpreted the first clause of fourteenth amendment in the broader manner and held that, constitution of USA via fourteenth amendment provides two sources of citizenship first by birth and second through naturalization. Whereas the citizenship by naturalization is sole jurisdiction of legislature, and can only be acquired by fulfilling the law made by the government, citizenship by birth is a birthright of an individual given by the constitution itself on the basis of place of birth. Therefore no treaty or law of the congress can take away the birthright citizenship of the individual under any circumstances, given the clear and broad words of the constitution. Further court elaborating the reasoning that large population born in USA has foreign kinship held that,

> *"To excludes citizenship from the American born children, who are born to the subject of other countries would be to deny citizenship to thousands of persons of English, Scotch, Irish, German, or other European parentage who have always been considered and treated as citizens of the United States."*[29]

This case established a precedent and has since been used to defend the birthright citizenship rights of Americans, though in extraordinary circumstances like war the citizenship of people who have some connection with the foreign land is being questioned. In 1940, during the world war II United States enacted The Alien Registration Act, which required non-citizens to register themselves with the government and empowered the president to deport the foreigners who can be security risk for the nation, thousands of Japanese American were on verge of losing their birthright citizenship because of this act. In 1943, in the case of *Regan v. King*[30], the citizenship status of twenty-six hundred Japanese American who were born in America to the parents who were subject of Japan was in question. The plaintiff requested the court to reverse the judgment of Wong Kim Ark but in the light of clear wordings of fourteenth amendment court denied the appeal and restored the status of citizenship to Japanese American who was born on American soil.

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[26] U.S. CONST. amend. XIV, § 1.
[27] 169 U.S. 649 (1898).
[28] 169 U.S. 649 (1898).
[29] Ibid.
[30] 49 F. Supp. 222 (N.D. Cal. 1942).

In the Korematsuv case, extraction of Japanese American citizens in the name of national security was challenged.[31]Fred Korematsu, who was citizen of USA, thoroughly Americanized in culture and in fealty was by the exclusion order of 1942 demanded to report to a civilian control centre and this order was applicable to all the Japanese American even those who were born on the American territory. The entire foundation of the exclusion order was based upon the suspicion that they might be sympathetic to the Japan because of their ancestry, korematsu defied the order to report which had him arrested, and thereafter he appealed to the USA Supreme court and lost. US Supreme Court upheld the law under which he was convicted.

Justice Hugo Black, who wrote for the majority in the 6-3 decision accepted that any law that curtails the civil rights of the single racial group are immediate suspect but not necessarily unconstitutional. And then he went on to say that,

> *"Pressing public necessity may sometimes justify the existence of such restrictions, racial antagonism never can".*[32]

In other words restrictions imposed by the exclusion order would have failed the test of constitutionality in the normal times but the wartime emergency justified the order, but the three dissents of this judgment describes the action racial in nature as it solely was based on the ancestry without any other evidence concerning his loyalty towards USA, which makes this case a dangerous precedent for future.

CONCLUSION

India and United States both the nations had adopted the principle of *jus soli* for the governance of citizenship as they were the British colony in the past and had major impact of common legal system which was governed by birthright citizenship (*jus soli*). while the constituent assembly of India presented Article 5 of the constitution as a foundational statement of *jus soli*, representing the modern, democratic and inclusive law, which was applicable to the individuals who were already living in the territory of India before the commencement of the constitution. Indian citizenship law gradually shifted from the lines of *jus soli* to *jus sanguine*.

Whereas in United States, after the declaration of independence Article I of the U.S. Constitution empowered the state to be the sole authority over the citizenship and by that authority the Naturalization Act of 1790 was enacted which conferred citizenship right to only "free white person" who lived in the country for two years. Though this principle had element of *jus soli* but it was highly inflicted by the racial discrimination further right to citizenship was denied to the slaves and limited citizenship right were conferred to the women, provision of naturalization act coupled with the ruling of supreme court in the Scott v. Sanford made the citizenship law in United States more exclusive in nature though it transformed radically after the fourteenth amendment. After the civil war fourteenth amendment came as a guiding light which solidified the principle of *jus soli* as the governing law of land by conferring citizenship right to all the person born in United States which was again upheld in the Wong Kim Ark case by the supreme court of United States.

In United States the citizenship law flows and governed by the constitutional provision as a result it is rigid in the nature, after fourteenth amendment no major change have been made, in the governing principle even after must debate the principle of *Jus Soli* is followed though few policy changes have

[31] Korematsu v. United States, 323 U.S. 214 (1944).
[32] Ibid.

been done in the immigration law. In India though the law was framed by the constituent assembly in the constitution regarding the citizenship law but the same constitution provides the unfettered power in the hands of parliament which is not subject to the citizenship provisions mentioned in the constitution. Because of this unfettered power in the hands of parliament we have witnessed such radical change in the citizenship law of India.

In both the countries though the citizenship law claims to be inclusive but at several occasion in the name of national security and state interest, it has shown the racial biasness and judiciary in the United States has up to some extend took the stand in the favor of inclusiveness by the means of fourteenth amendment whereas the Indian supreme court in absence of such strong protection, time and again failed in its attempt to guard the inclusiveness of the citizenship law.

BIBLIOGRAPGY

PRIMARY SOURCES

1. The Citizenship Act, 1955
2. The Constitution of India, 1950.

SECONDARY SOURCES

BOOKS

1. Anupama Roy, Mapping the Citizenship in India, (ed. 1st, 2010).
2. Niraja Gopal Jayal, Citizenship and Its Discontents, (ed. 1st, 2013).
3. Richard Bellamy, Citizenship A Very Short Introduction, Oxford University Press, (ed.1st ,2008).
4. The Oxford Handbook Of “The Indian Constitution”, (Ed. Sujit Choudhry, Madhav Khosla, And Pratap Bhanu Mehta, 1st, 2016).

ARTICLES

1. Citizenship: Critical Concepts, 4 Volumes, R. Bellamy & M. Kennedy-MacFoy, eds, Routledge, 2014.
2. Garrett Epps, The Citizenship Clause: A Legislative History, 31 IMMIGR. &NAT'lITY L.
3. Iris Marion Young, ([1989] 1995). ‘Polity and group difference: a critique of the ideal of universal citizenship.
4. Migration and Globalization, 8, Indiana Journal of Global Legal Studies, 241, (2000).
5. Ornit Shani, Conceptions of Citizenship in India and ‘Muslim Question’, 44(1), MOD N ASIAN STDIS, 145,152, (2010).

INTERNET SOURCES

1. Markus Pohlmann, Jonghoe Yang, Jong Hee Lee, 60, https://www.asia-
2. europe.uniheidelberg.de/fileadmin/Pictures/Publications/springer_books/transcult_pohlmann_yang_lee_978-3- 642-19738-3.pdf.