

Eroding Pluralism: Legal Mechanisms and the Marginalization of Religious Minorities in India

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*For my dad,
Justin Boyd Vasey (1972-2011)*

ABSTRACT

India has been experiencing considerable democratic decline in the last decade. The BJP's tenure, embodied by Narendra Modi, has been at the centre of this democratic backsliding. While democratic institutions have been formally kept in place, the norms and practices underpinning democracy have been significantly eroded. Democratic principles have been substantially replaced by the BJP's quest for Hindutva, or Hindu-ness, a Hindu nationalist ideal of creating an India only for Hindus, at the expense of religious pluralism. This thesis examines the marginalisation of religious minorities through legal mechanisms, addressing the research question: How have legal mechanisms under the BJP government contributed to the erosion of pluralism and the marginalization of religious minorities in India since 2014? To answer this, the study conducts a qualitative legal analysis of constitutional amendments, legislative texts, court rulings, reports from human rights organizations and academic scholarship. The findings will demonstrate how legal mechanisms have played a central role in India's democratic decline, allowing for the systematic exclusion of religious minorities, especially Muslims.

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List of Abbreviations

AFSPA Armed Forces (Special Powers) Act
AMU Aligarh Muslim University
BJP Bharatiya Janata Party
BJS Bharatiya Jana Sangh
CA Citizenship Act
CAA Citizenship Amendment Act
CAB Citizenship Amendment Bill
CAG Comptroller and Auditor General
CIC Central Information Commission
CJI Chief Justice of India
FIR First Information Report
HC High Court
IMDT Illegal Migrants (Determination by Tribunals) Act
IoA Instrument of Accession
J&K Jammu and Kashmir
JKRA Jammu and Kashmir Reorganisation Act
JMI Jamia Millia Islamia University
LG Lieutenant Governor
MLA Member of Legislative Assembly
MP Member of Parliament
NDA National Democratic Alliance
NRC National Register of Citizens
PSA Public Safety Act
RSS Rashtriya Swayamsevak Sangh (National Volunteer Association)
SC Supreme Court
UPA United Progressive Alliance
VHP Vishva Hindu Parishad (World Hindu Organization)

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Introduction

In the last decade, India has been experiencing extensive democratic backsliding. In 2018 India was regarded as a ‘free’ country, scoring 77 out of 100 in political rights and civil liberties, according to Freedom House.¹ Since then, a steady decline has been taking place, with the country now classified as ‘partly free’, scoring 63 out of 100.² Similarly, according to all five types of V-Dem democracy indexes, namely Electoral, Egalitarian, Liberal, Participatory, and Deliberative, India, starting from 2013-2014, has registered a constant decline in its democratic practices,³ as shown in Figure 1. Starting from the first half of the 1950s, the early years of independence, India has maintained a rather stable democratic political environment, especially if we exclude the abrupt dip in 1975-77 during the state of emergency declared by then Prime Minister Indira Gandhi, where civil rights and liberties were almost entirely suspended.⁴ After that, India returned to its previous levels and did not register any major decline of its democratic principles, actually improving its democratic values throughout the 1990s and 2000s. Nevertheless, as mentioned above, in recent years the trend has taken a strong inverse turn, with values almost reaching all-time lows in India’s history. The decline is evident starting from the early 2010s, which is when the Bharatiya Janata Party (BJP) started its run of three consecutive terms that see it still in power to this day under the leadership of Narendra Modi. In fact, during Modi’s tenure as Prime

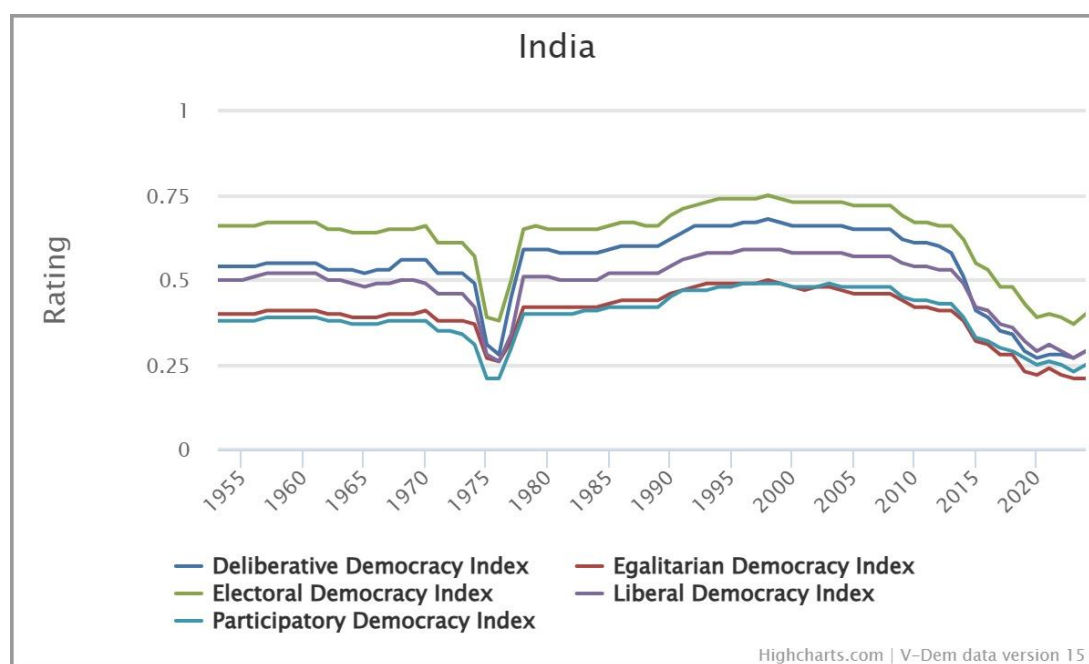


Figure 1. Democratic trends in India from 1953 to 2024 according to the V-Dem index (including electoral, liberal, participatory, deliberative, and egalitarian components).

¹ Freedom House, *Freedom in the World 2018: India*, 2018, <https://freedomhouse.org/country/india/freedom-world/2018>.

² Freedom House, *Freedom in the World 2025: India*, 2025, <https://freedomhouse.org/country/india/freedom-world/2025>.

³ V-Dem Institute, *Country Graph: India*, accessed 28/03/2025, https://v-dem.net/data_analysis/CountryGraph/

⁴ Christophe Jaffrelot and Pratinav Anil, *India’s First Dictatorship: The Emergency, 1975–77* (Oxford: Oxford University Press, 2021).

Minister of India, started in 2014, while key democratic institutions have been formally kept in place, the norms and practices sustaining democracy have been considerably undermined.⁵

India's democratic regression cuts across several dimensions, from the limitation of free media to the decline of judicial independence. Because India's democratic regression is extremely complex and involves a wide array of factors, to address it in its entirety would be extremely lengthy and not fitting for this thesis. This work focuses on a peculiar dimension of India's democratic backsliding, that being the marginalization of religious minorities through legal mechanisms, as can be evinced by the title.

To introduce the issue and grasp the threat posed to religious pluralism in India, it is useful once again to start from independent reports and data. In fact, even though India remains formally a secular state, as enshrined in its Constitution,⁶ according to the latest publications by Freedom House, in recent years the country has developed and deepened strong deficiencies regarding freedom of belief, association, and expression, with Indian Muslims being the main targets of repression.⁷ Figure 2 shows the recent trend of two indicators, "freedom of religion" and "religious organization repression", from the 1950s up to 2024. Again, both indicators were rather constant throughout India's independent history, if we exclude the authoritarian experience of the 1970s, and maintained a rating well above 3, which means that freedom of religion was mostly respected by public authorities apart from minor isolated cases, and that religious organizations very

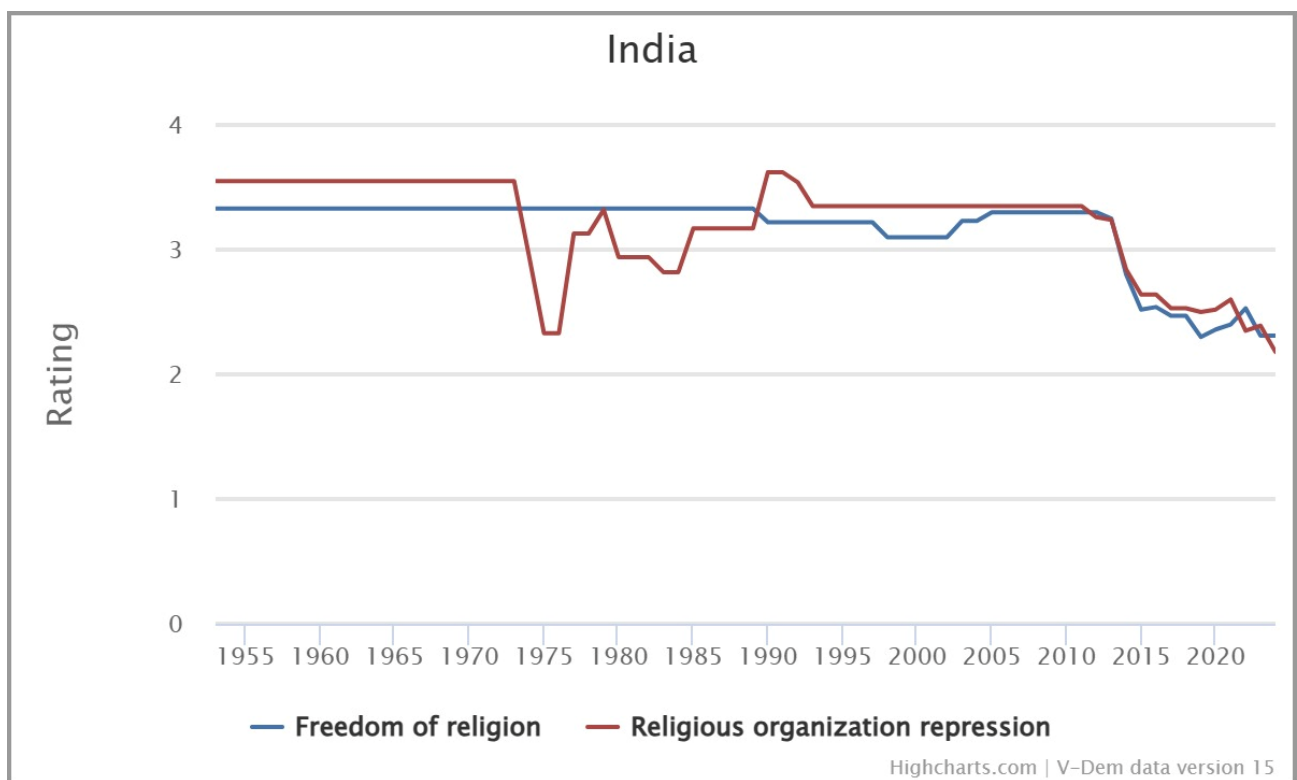


Figure 2. Trends in freedom of religion and repression of religious organizations in India, 1953–2024, based on V-Dem indicators.

⁵ Maya Tudor, Why India's Democracy Is Dying, *Journal of Democracy* 34, no. 3 (July 2023): 121–132, published by Johns Hopkins University Press, <https://doi.org/10.1353/jod.2023.a900438>.

⁶ Government of India, *The Constitution of India*, accessed January 15, 2025, <https://legislative.gov.in/Constitution-of-india/>.

⁷ Freedom House, *Freedom in the World 2025: India*.

rarely suffered from government repression, and if so, only through material sanctions or bureaucratic setbacks.⁸

A dramatic change can be seen starting from 2014, year of the first Modi BJP government. Freedom of religion and religious organization repression scores have since been declining, reaching all-time lows, dropping to a rating of 2. This evaluation entails that public authorities do not consistently respect freedom of belief and that minor religious communities are repressed, discriminated and marginalized. Regarding religious organizations, such a parameter indicates that the government engages in legal harassment, such as detentions or incarcerations, and several restrictions in order to dissuade religious groups from expressing themselves.⁹ This decline in religious freedom and tolerance, within the wider context of India's democratic backsliding, has been driven by Modi and the BJP's Hindu-nationalism.¹⁰ Particularly, the ruling party of India has continued its quest for "Hindutva", which literally means "Hindu-ness". As it will be discussed thoroughly further on, Hindutva may be defined as a right-wing ideology that ultimately aims at establishing Hindu hegemony in India, while framing non-Hindus as intruders.¹¹ This majoritarian approach to politics and the attempted construction of a Hindu-dominated society by India's ruling party has recently been defined by scholars as an "ethnic democracy".¹² Such a regime can be summarized as a political system where "some citizens do not have the same rights as others simply because of their religious identity"¹³. Legal frameworks like the Citizenship Amendment Act (CAA),¹⁴ the abrogation of Article 370 regarding the special status of Jammu and Kashmir (J&K),¹⁵ and the National Register of Citizens (NRC),¹⁶ implemented by the BJP administration in very recent years aim at legally, politically, economically, and socially marginalize religious minorities, especially Muslims.

The legislation mentioned, which will be the focus of this study, represents a clear break from India's political and legal tradition. In fact, India's 1947 Constitution was drafted in order to preserve and protect the country's multiethnic and multireligious identity. Articles 14 and 15 of the Constitution respectively defend equality before the law and the prohibition of discrimination based on religion, race, cast, sex or origin. Additionally,

⁸ V-Dem Institute, *Country Graph: India*.

⁹ Ibid.

¹⁰ Manoj Mate, "Constitutional Erosion and the Challenge to Secular Democracy in India," in *Constitutional Democracy in Crisis?* ed. Mark Graber, Sanford Levinson, and Mark Tushnet (Oxford: Oxford University Press, 2018), <https://ssrn.com/abstract=3250995>.

¹¹ Peter Speetjens, "Muslims Under Modi: The Dark Side of India's Prime Minister," Middle East Eye, accessed January 15, 2025, <https://www.middleeasteye.net/opinion/muslims-under-modi-dark-side-indias-prime-minster>.

¹² Christophe Jaffrelot, *Modi's India: Hindu Nationalism and the Rise of Ethnic Democracy* (Princeton: Princeton University Press, 2021).

¹³ Ibid., 156.

¹⁴ Amnesty International, "India: Citizenship Amendment Act Is a Blow to Indian Constitutional Values and International Standards," March 2024, accessed January 15, 2025, <https://www.amnesty.org/en/latest/news/2024/03/india-citizenship-amendment-act-is-a-blow-to-indian-constitutional-values-and-international-standards/>.

¹⁵ Meryl Sebastian and Sharanya Hrishikesh, "India's New Citizenship Law: What You Need to Know," BBC News, November 2023, <https://www.bbc.com/news/world-asia-india-67634689>.

¹⁶ Grant Wyeth, "The NRC and India's Unfinished Partition: The Ongoing Ideological Struggle over Indian Nationhood Surfaced with Assam's National Register of Citizens," *The Diplomat*, October 3, 2019, <https://thediplomat.com/2019/10/the-nrc-and-indias-unfinished-partition/>.

articles 25 to 30 delve deeper into religious freedom, and include cultural and educational rights for religious minorities.¹⁷ Although India's founding text did not make explicit mention of secularism as a foundational principle until its 42nd amendment in the 1970s, it is clear that the term was omitted with the intention to not recall a US or Western conception of secularism.¹⁸ Instead, the framers of the Constitution wanted to favour a model of "contextual secularism", also termed "protective" because it was meant to maintain communal harmony, national unity, and equality and avoid escalating into a spiral of societal violence and cruelty that resulted from the partition of India.¹⁹ The country, to this day, is home to more than 600 million Hindus, 100 million Muslims, more than 18 million Christians, 15 million Sikhs, 5 million Buddhists and others (these numbers refer to the adult population).²⁰

While the recent religious marginalization policies of the BJP have attracted some academic attention, a comprehensive analysis of the legal mechanisms in place to undermine India's pluralist society has not yet clearly surfaced. It is also for this reason that this thesis aims to study in-depth how the Modi and BJP administration, since 2014, has been attempting to consolidate a majoritarian Hindu-dominated India, in line with the Hindutva principle, through marginalizing and discriminatory legislation. It will do so by qualitatively analysing the most relevant legislative texts related to the three case studies mentioned above, the abrogation of Art. 370 in J&K, the 2019 CAA, and the NRC. The findings of this work will demonstrate that legal mechanisms have indeed played a central role in India's democratic decline, allowing for systematic exclusion while maintaining a democratic facade. Furthermore, it will attempt to demonstrate how the judiciary is shifting towards a majoritarian constitutional interpretation, marking in turn a transition towards an ethnic democracy.

For the sake of clarity, the work will proceed as follows. The next chapter will be dedicated to the review of the relevant existing literature, encompassing first though theories of democratic backsliding and ethnic democracy, followed by the centrality of legislation in democratic erosion. The third chapter will focus on the Indian context of secularism and minority rights. The fourth chapter will outline the theoretical framework and methodology. The fifth chapter will cover the most relevant legislative case studies regarding religious marginalization and pluralism erosion.

¹⁷ Government of India, The Constitution of India, accessed January 15, 2025, <https://legislative.gov.in/Constitution-of-india/>.

¹⁸ Mate, "Constitutional Erosion and the Challenge to Secular Democracy in India."

¹⁹ Ibid.

²⁰ Pew Research Center, "Religion in India: Tolerance and Segregation," June 29, 2021, accessed January 15, 2025, https://www.pewresearch.org/religion/2021/06/29/religion-in-india-tolerance-and-segregation/pf_06-29-21_india-00-0-png/.

Literature Review

1. Theories of Democratic Backsliding and Ethnic Democracy

Over the decades, scholars have dedicated huge amounts of attention to understanding why democracies break down and in what ways. However, in recent years, the focus on the subject has increased considerably, as many influential voices think that democracy is experiencing a considerable regression.¹

By the early 2000s, significant concerns had set in the academic community regarding democracies around the world.² For example, in 2008, Larry Diamond warned against a new “democratic rollback” and the resurgence of authoritarian figures in many transitioning states.³ At that time, the world had just experienced a significant proliferation of democracies, famously theorized by Huntington as the “third wave” of democratization.⁴ This trend had begun in the middle of the 1970s, picking up speed along the 1980s and 1990s as the Cold War came to an end. The collapse of the Soviet Union meant that the newly independent break-away republics and the former members of the Warsaw pact could transition towards democracy. Similarly, the loosening of the global Cold War alliances, indirectly led to transitions in dictatorships and autocratic regimes which had previously leveraged support by one of the two superpowers.⁵ It was in this climate of optimism, driven by the triumph of the western block and its liberal democracies, that Fukuyama in 1992 published “The End of History and the Last Man”, where liberal democracy was deemed to be on the march and that underdevelopment or other factors would not hinder its diffusion.⁶

This wave of optimism towards democratisation waned shortly after the turn of the century as the empirical landscape shifted. Many of the countries that transitioned to more democratic regimes proved unable to sustain them, and often reversed into authoritarian rule.⁷ In 2016, Freedom House registered the tenth consecutive year of decline in global freedom.⁸ Therefore, while democratic transitions still attract academic interest, considerable attention is now directed towards a growing number of “competitive authoritarian” regimes,⁹ to

¹ Daniel Treisman, "How Great Is the Current Danger to Democracy? Assessing the Risk With Historical Data," *Comparative Political Studies* 56, no. 12 (2023): 1924–1952, <https://doi.org/10.1177/00104140231168363>.

² Stephan Haggard and Robert R. Kaufman, "Democratization During the Third Wave," *Annual Review of Political Science* 19 (2016): 125–144, <https://doi.org/10.1146/annurev-polisci-042114-015137>.

³ Larry Diamond, “The Democratic Rollback: The Resurgence of the Predatory State,” *Foreign Affairs* 87, no. 2 (2008): 36–48, <http://www.jstor.org/stable/20032579>.

⁴ Samuel P. Huntington, "Democracy's Third Wave," *Journal of Democracy* 2, no. 2 (1991): 12–34, <https://dx.doi.org/10.1353/jod.1991.0016>.

⁵ Haggard and Kaufman, "Democratization During the Third Wave," 126.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ David Waldner and Ellen Lust, "Unwelcome Change: Coming to Terms with Democratic Backsliding," *Annual Review of Political Science* 21 (2018): 93–113, <https://doi.org/10.1146/annurev-polisci-050517-114628>.

⁹ Steven Levitsky and Lucan A. Way, “Elections Without Democracy: The Rise of Competitive Authoritarianism,” *Journal of Democracy* 13, no. 2 (2002): 51–65, <https://doi.org/10.1353/jod.2002.0026>.

study their causes and their prospects.¹⁰ In particular, this section of this thesis is dedicated to an overview of the theories of democratic backsliding, namely on how democracies break down. In fact, the concept of democratic backsliding can be defined as “the state-led debilitation or elimination of any of the political institutions that sustain an existing democracy”.¹¹ It is pivotal to note that because the political institutions are several, the definition remains wide and includes several subtypes of processes of democratic backsliding. In fact, the actors responsible of initiating the erosion of democracy can be very diverse and present peculiar context-specific characteristics. However, the discussion that follows will attempt to analyse the main varieties of democratic backsliding in current times, with the help of authoritative and relevant literature. The discussion will highlight a change of trend in the last decades, meaning that democracies often do not die as we used to think, but rather slowly and often imperceptibly.

The last subsection will present a peculiar type of democratic breakdown, the ethnic democracy. This type of regime will prove to be very relevant for the discussion of India’s democratic backsliding and erosion of pluralism.

1.1 Democratic Backsliding in the Past: Coups D’état

When talking about democratic decline and how democracies come to an end, for many, the first scenario that comes to their mind is that of a coup d’état. This usually indicates an abrupt seizure of power by “the hands of men with guns”,¹² followed by the demise of democratic rules. This situation was actually very common in the past, and it represented the most frequent kind of democratic breakdown throughout the years of the Cold War. In fact, during that time, coup d’états accounted for nearly three out of every four democratic downfalls. Some among many examples include the democracies in Argentina, Brazil, Chile, the Dominican Republic, Ghana, Greece, Guatemala, Nigeria, Pakistan, Peru, Thailand, Turkey, and Uruguay.¹³

However, since the end of the Cold War, democratic backsliding has changed significantly. The most dramatic and abrupt kinds of democratic decline have considerably waned in frequency. According to the data analysed by Bermeo in her paper,¹⁴ retrieved from Polity IV, classic coups d’état, executive coups and election-day vote frauds have dropped steadily in the last decades. Throughout the 1950s, 1960s and half of the 1970s, democracies had a 20% probability of being targeted by an attempted coup. In the same period, the probability of a democracy being successfully toppled was above 10%. The 1960s in particular were the most affected, where the probability of an attempted coup stood at 35% and the success rate at 15%. Starting from the 1990s, the attempted coup frequency reached an all-time low at 5%. Similarly, the success rate of classic coups dropped below 5%. A similar downwards trend line can be drawn for executive coups, a term indicating “a

¹⁰ Haggard and Kaufman, "Democratization During the Third Wave," 127.

¹¹ Nancy Bermeo, "On Democratic Backsliding," *Journal of Democracy* 27, no. 1 (2016): 5, <https://doi.org/10.1353/jod.2016.0012>.

¹² Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (Cambridge, MA: Harvard University Press, 2018), 9.

¹³ Ibid.

¹⁴ Nancy Bermeo, "On Democratic Backsliding," *Journal of Democracy* 27, no. 1 (2016): 5–19.

freely elected chief executive suspending the Constitution outright in order to amass power in one swift sweep”,¹⁵ and blatant election-day frauds.

In summary, attempts to install blatant dictatorships have disappeared across most of the world.

1.2 Democratic Backsliding Today: Executive Aggrandizement

Nevertheless, democracies still die. While more dramatic and traditional varieties of democratic backsliding have decreased, other varieties of democratic regression have come to the rise or remain unaltered.

That is the case of promissory coups, where an elected government is overthrown in order to allegedly restore democratic rules as soon as possible. This variety of democratic backsliding has been persistent over time. Unfortunately, while they may often be expectations both at home and abroad, rarely ever are democratic rules and freedom restored to the levels present before the promissory coup.¹⁶ In fact, the very irony of promissory coups is that the defence of democracy is often used as a pretext for its subversion.¹⁷

The second, and much more common form of backsliding is executive aggrandizement. This happens when an elected executive undermines the checks regulating executive power. It does so by promoting a series of institutional changes.¹⁸ These changes are brilliantly examined by Levitsky and Ziblatt in their work on *How Democracies Die*.¹⁹

First of all, elected leaders usually start undermining democracy through rhetoric and words. They do so by fiercely and harshly condemning their critics, which can be embodied by political opponents, the media, the judiciary and others. Some examples include Venezuelan leader Hugo Chavez, who described his opponents as “rancid pigs” and “traitors”, Turkish president Recep Tayyip Erdogan, who accused journalists of spreading “terrorism”, and Italian Prime Minister Silvio Berlusconi, who defined judges who ruled against him as “communist”.²⁰ Although these are only verbal accusations, they do have consequences. If part of the electorate starts to believe that opponents of the executive are enemies of the state, it becomes increasingly easier for the executive to justify their actions against any political adversary. This situation tends to polarize the public, laying the ground for panic, resentment and distrust.

However, rhetoric and narratives are not enough to make a democracy’s institutions fall. As discussed above, nowadays, democracy rarely ends in a sudden and spectacular way like in the past. It is mostly a slow transformation, and the first step, is usually to bias the referees. Modern democracies across the world possess several self-correcting mechanisms and neutral bodies that are entrusted with investigating and punishing wrongdoings. These self-correcting mechanisms are what distinguishes a democracy from a majority

¹⁵ Ibid., 7.

¹⁶ Ibid.

¹⁷ Levitsky and Ziblatt, *How Democracies Die*, 79.

¹⁸ Bermeo, "On Democratic Backsliding," 10.

¹⁹ Levitsky and Ziblatt, *How Democracies Die*, 63-82.

²⁰ Ibid.

dictatorship, as elections are not the only tool necessary to guarantee a democratic government.²¹ This is why a common method among elected strongmen is to attack first democracies' self-correcting mechanisms, starting from the most important: the courts and the media.²² During executive aggrandizement, courts are usually deprived of their powers and filled with government loyalists, shielding the executive from legal prosecution and removal from power²³. Civil servants and judges can be quietly fired, blackmailed, or in some cases new courts are created from scratch. For example, president Orbán's government in Hungary changed the nomination rules for the constitutional court, meaning that the ruling party could alone select new judges, and preferably ones loyal to Orbán.²⁴ In Poland, the Law and Justice party, in a dubious move, decided to appoint five new judges in the fifteen-member Constitutional Tribunal, and then changed the law, requiring that all binding decisions taken by the Tribunal to have a two-thirds majority. This virtually gave the newly appointed judges, loyal to the government, the veto power within the Tribunal, limiting the judiciary's ability to check the executive.²⁵

Once the referees, meaning the judiciary, are brought closer to the executive by undermining their independence, elected leaders have a very powerful instrument in order to attack their political opponents and the media. In fact, if political opponents or media enterprises cannot be bribed or bought off by politicians, they are weakened through a "vener of legality".²⁶ Political opponents are often jailed, exiled or even killed in extreme cases. Similarly, independent media companies often have to face severe legal accusations or financial fines. That is the case of Putin's Russia and Erdoğan's Turkey, just to cite two examples. In 2009, the Turkish AKP government fined Dogan, a secular and liberal media group, almost \$2.5 billion dollars for tax evasion, forcing the company to sell most of its assets to progovernment businesses. Similarly, the independent NTV network in Russia was acquired by the government company Gazprom after the owner Vladimir Gusinsky was arrested for financial misappropriation and was forced to sell.²⁷ These kinds of actions taken by the executive through its loyal judicial bodies pass on the message to other political opponents or media groups, who start to grow wary of the government, and perform self-censorship in order to protect themselves. In the same way, important businessmen or relevant cultural figures, like intellectuals or artists, either decide to stay out of politics or to take on a pro-government attitude. If not, the consequences may again be exile, imprisonment or worse. Again, Putin's Russia provides a great example. When Russian billionaire Mikhail Khodorkovsky, head of the Yukos oil group, refused to step down and began financing pro-western

²¹ Yuval Noah Harari, *Nexus: A Brief History of Information Networks from the Stone Age to AI* (London: Fern Press, 2024), chap. 5.

²² Ibid.

²³ Ibid.

²⁴ Ireneusz Paweł Karolewski and Rafael Sata, "The Dual State of Judiciary in Hungary and Poland," *Zeitschrift für Vergleichende Politikwissenschaft (Z Vgl Polit Wiss)* (2025), <https://doi.org/10.1007/s12286-025-00627-0>.

²⁵ Mirosław Wiącek, "Constitutional Crisis in Poland 2015–2016 in the Light of the Rule of Law Principle," in *Defending Checks and Balances in EU Member States*, ed. Armin von Bogdandy et al., *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, vol. 298 (Berlin: Springer, 2021), https://doi.org/10.1007/978-3-662-62317-6_2.

²⁶ Levitsky and Ziblatt, *How Democracies Die*, 71.

²⁷ Ibid., 73.

opposition parties, he was arrested for tax evasion, embezzlement and fraud in 2003. For that, he was imprisoned for almost ten years, and the message was made clear again: do not interfere in Russian politics.²⁸ Therefore, once an executive has tamed the judiciary, key political opposers, independent media, businessmen, and intellectuals, the opposition consequently loses most of its means to sustain itself. The government always prevaricates without blatantly breaking any laws, and executive aggrandizement is well underway. However, a last important step is missing in order for the executive to definitely secure its power. That is, changing the rules of the game, which means, in other words, to change the law.²⁹ In fact, once the judiciary, political opposition, the media, or any other credible opposing force has been dealt with, under an appearance of legality, want-to-be authoritarians turn to the Constitution, electoral laws, and other legal institutions in order to shape the political arena further in their favour. Constitutional reforms and changes in the electoral system often allow authoritarian executives to solidify their rule for decades.³⁰ In Hungary for example, after Orban won a wide majority in 2010, he decided to amend the Constitution and install new majoritarian electoral rules in order to favour its dominating Fidesz party. Furthermore, he gerrymandered Hungary's electoral constituencies in order to secure further seats in the legislature. Last but not least, campaign advertising in private media platforms was banned, and reserved only for public networks, run by Fidesz loyalists. This meant that in the 2014 elections, although Fidesz saw a considerable decline in absolute votes from 53% in 2010 to 44.5%, Orban's party still secured a two-thirds majority.³¹

Another historical example where rules were re-written in order to maintain an authoritarian advantage, frequently discussed by political scientists and legal experts, is that of the Jim Crow laws in the post-Confederate states, following the Civil War in the USA.³² In fact, from about 1880 to the 1960s, all of the southern states of the USA which fought under the confederate flag during the 1860s witnessed strong democratic backsliding³³. Elected executives and legislative bodies willingly ignored and avoided the norms enshrined in the Fourteenth (1868) and Fifteenth Amendment (1870) of the American Constitution, which guaranteed equality in front of the law,³⁴ and the right to vote for all male citizens, regardless of "race, color or previous condition of servitude".³⁵ In fact, these states made sure through "legal" measures the electorate would be exclusively composed of white males, even though African Americans represented a majority or a close majority of the population in many southern states.³⁶ Although the Jim Crow laws system represents a relatively old example of democratic backsliding and executive aggrandizement by legal means, it is still

²⁸ Ibid.

²⁹ Ibid., 75.

³⁰ Ginsburg, Tom. "Democratic Backsliding and the Rule of Law." *Ohio Northern University Law Review* 44 (2018): 358-363. https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=13786&context=journal_articles.

³¹ Levitsky and Ziblatt, *How Democracies Die*, 76.

³² Ibid.

³³ Ashutosh Varshney and Connor Staggs, "Hindu Nationalism and the New Jim Crow," *Journal of Democracy* 35 (2024): 5-18, <https://doi.org/10.1353/jod.2024.a915345>.

³⁴ U.S. Constitution, amend. XIV, Constitution Annotated, <https://Constitution.congress.gov/Constitution/amendment-14/>.

³⁵ U.S. Constitution, amend. XV, Constitution Annotated, <https://Constitution.congress.gov/Constitution/amendment-15/>.

³⁶ Levitsky and Ziblatt, *How Democracies Die*, 78.

relevant today. As a matter of fact, some scholars, when analysing and criticizing the BJP's discriminatory legal policies towards Muslims in India under the leadership of Modi, have drawn very important parallels with the Jim Crow laws of the southern states of the USA, such as exclusionary laws, segregation and vigilante violence.³⁷ These parallelisms will be discussed in-depth in the dedicated section of this chapter, when examining the peculiar Indian context of discrimination through legal means. Before that, a dedicated section will illustrate the relevance of laws and regulations in the consolidation of aspiring autocrats and the slow demise of democracy.

In summary, when executives set themselves on the quest for aggrandizement, and manage to slowly capture the judiciary and the media, dismiss political opponents, and change the law in their favour, it means that their position in power is well secured, and that democracy has been mostly dismantled. Again, this very often happens in a covert way, while apparently maintaining a sense of legal legitimacy, and avoiding any blatant episodes of autocratic rule. For these reasons, "citizens are often slow to realize that their democracy is being dismantled—even as it happens before their eyes".³⁸

The discussion will follow by briefly introducing India's process of democratic backsliding, which has been classified by scholars as a fitting example of executive aggrandizement.

1.3 Modi's India, a case of Executive Aggrandizement?

When it comes to India's democratic backsliding in recent years, some scholars have already started studying Modi's BJP administration within the framework of executive aggrandizement.

An empirical study conducted by Laebens in 2023, using data from 1989 to 2019, and encompassing 26 case studies, classified Modi's India as an on-going case of executive aggrandizement.³⁹ It was so because Modi could not be yet considered immune to institutional accountability and absolute hegemon of Indian politics.⁴⁰ This outcome is perfectly in line with what described above. Democratic backsliding, in the case of executive aggrandizement, is a process. In fact, it often takes place at a relatively slow pace, it is often imperceptible, and covered by a veil of legality.

However, the analysis conducted in the study above does not include the second term of Modi's BJP, starting from 2019, and their third re-election in 2024. In fact, since 2019, the Modi government has changed gear with respect to the previous term, and has moved into what some have called "consolidation mode".⁴¹ In fact, Khaitan, in his 2020 paper about executive aggrandizement in India, thoroughly analyses all the techniques employed by the BJP in order to systematically undermine all existing self-correcting mechanisms that are in

³⁷ Varshney and Staggs, "Hindu Nationalism and the New Jim Crow,".

³⁸ Levitsky and Ziblatt, *How Democracies Die*, 79.

³⁹ Melis G. Laebens, "Beyond Democratic Backsliding: Executive Aggrandizement and Its Outcomes," V-Dem Institute Working Paper No. 2023:54 (Gothenburg: University of Gothenburg, 2023), <https://politicalscience.yale.edu/news/graduate-melis-laebens-beyond-democratic-backsliding-executive-aggrandizement-and-its-outcomes>.

⁴⁰ *Ibid.*, 20.

⁴¹ Tarunabh Khaitan, "Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India," *Law & Ethics of Human Rights* 14, no. 1 (2020): 50, <https://doi.org/10.1515/lehr-2020-2009>.

place in order to hold the executive power in check. Most of these techniques are performed as a 21st century authoritarian “playbook” would advise,⁴² and precisely in line with what described above when considering Levitsky and Ziblatt’s work on executive aggrandizement.⁴³ In fact, Modi’s central government targeted central non-partisan bodies such as the judiciary and independent commissions, including the Information, Election and Human Rights commissions. The rest then followed, meaning the media, political opponents, universities, and NGOs.⁴⁴

As already stated in the introduction, legal policies and minority rights deserve peculiar attention in the case of India’s executive’s aggrandizement. The BJP is using its power to “nullify the rights of Muslims”,⁴⁵ by adopting new legislation and executive degrees. As mentioned above, because of discriminating legal policies like the Citizenship Amendment Act (CAA), the abrogation of article 370 over the special status of Jammu and Kashmir, and the implementation of the National Register of Citizens (NRC), scholars are comparing India’s democratic regression and its discriminatory laws to the ones of the southern states of the USA during the Jim Crow era⁴⁶. Along very similar terms, contemporary India has been designated by scholars as an ethnic democracy,⁴⁷ or an ethnocracy,⁴⁸ depending on the degree of discrimination against minorities, and the extent of the ruling ethnicity’s dominance attributed to the BJP. These matters will be the focus of the chapters to come.

Meanwhile, this subsection has briefly attempted to show how wide and multi-faceted democratic backsliding and executive aggrandizement has been in India. Many of these aspects will be explored much further in a dedicated section at the end of this chapter. However, as mentioned in the introduction, the focus of this thesis will be dedicated to the erosion of pluralism and secularism in India since 2014, and the legal policies put in place to marginalize religious minorities. Chapter four will deal specifically with this issue. For now, what can be concluded from this brief overview of India’s wide democratic backsliding and executive aggrandizement, is that very few experts of the field would consider India as the world’s largest democracy anymore.⁴⁹

The next subsection will introduce an important type of democratic failure for this discussion, that of ethnic democracy, which will be applied further on with respect to the Indian context.

⁴² Khaitan, "Killing a Constitution with a Thousand Cuts," 92.

⁴³ Levitsky and Ziblatt, *How Democracies Die*, 63-82.

⁴⁴ Khaitan, "Killing a Constitution with a Thousand Cuts," 92-95.

⁴⁵ Ashutosh Varshney, "How India's Ruling Party Erodes Democracy," *Journal of Democracy* 33, no. 4 (2022): 104–118, <https://dx.doi.org/10.1353/jod.2022.0050>.

⁴⁶ Varshney and Staggs, "Hindu Nationalism and the New Jim Crow,"

⁴⁷ Jaffrelot, *Modi's India*.

⁴⁸ Diego Maiorano, "India as an Ethnocracy," *Il Politico* 87, no. 2(257) (2022): 59–75, <https://www.jstor.org/stable/48795006>.

⁴⁹ Maiorano, "India as an Ethnocracy," 59.

1.4 Ethnic Democracies

As anticipated, this subsection is dedicated to the introduction of the concept of ethnic democracy, a very relevant framework for the chapters to come. Furthermore, while ethnic democracies represent a distinctive political system, they can also represent a specific kind of democratic recession and breakdown.

The term “ethnic democracy” was first developed by Sammy Smooha in 1990 when discussing Israel’s political system.⁵⁰ While initially the concept of ethnic democracy indicated solely the Israeli context and its specificity, eventually the term was extended to define other political systems with similar characteristics.⁵¹

The definition goes as follows:

*[t]he ethnic nation, not the citizenry, shapes the symbols, laws and policies of the state for the benefit of the majority ... Non-members of the ethnic nation are not only regarded as less desirable but are also perceived as a serious threat to the survival and integrity of the ethnic nation.*⁵²

As the definition entails, ethnic democracies are “diminished” democracies.⁵³ The dominant ethnic group of the country enjoys a favoured position over the remaining part of the population. More specifically, a polity qualifies as an ethnic democracy when it meets three general criteria. The first parameter, and the most important according to Jaffrelot,⁵⁴ is the existence of a threat, whether real or perceived, to the ethnic nation, that must be tackled in order to preserve the integrity of the ethnic nation. The second criterium is the claim of an exclusive homeland by the ethnic nation, where others are perceived as outsiders. The third criterium regards democratic rule, and it states that an ethnic democracy is characterized by a “diminished” type of democratic regime, where minority citizens enjoy incomplete rights and are discriminated against by the state.⁵⁵

Apart from these general criteria, which are surely useful to grasp the general structure of an ethnic democracy, it is important to stress the fact that ethnic democracies can present a lot of diversity among them. In fact, Smooha himself claims that many countries have been experiencing forms of ethnic democracy, although he still believes Israel represents the original blueprint.⁵⁶ Therefore, it may be much more appropriate to place ethnic democracies on a continuum, as it happens for many types of regimes in political science. This operation was splendidly performed by Adeney in her 2021 article, where she attempted to create an objective and encompassing model in order to evaluate the strength of an ethnic democracy. The model included six measures, three formal and three informal. All of them are assessed on a three-point scale from low, middle,

⁵⁰ Sammy Smooha, "Minority Status in an Ethnic Democracy: The Status of the Arab Minority in Israel," *Ethnic and Racial Studies* 13, no. 3 (1990): 389–413, <https://doi.org/10.1080/01419870.1990.9993679>.

⁵¹ Sammy Smooha, "The Model of Ethnic Democracy: Israel as a Jewish and Democratic State," *Nations and Nationalism* 8, no. 4 (2002): 475–503.

⁵² *Ibid.*, 478.

⁵³ Katharine Adeney, "How Can We Model Ethnic Democracy? An Application to Contemporary India," *Nations and Nationalism* 27 (2021): 393–411, <https://doi.org/10.1111/nana.12654>.

⁵⁴ Jaffrelot, *Modi's India*, 155.

⁵⁵ Adeney, "How Can We Model Ethnic Democracy?" 394-5.

⁵⁶ Jaffrelot, *Modi's India*, 155.

to high level of ethnic democracy. Each score is finalized based on both qualitative and quantitative data, if applicable. The formal ones are all of legal nature, namely, constitutional provisions, citizenship provisions and general legislation. The last three are representation of groups, discourse, and socio-economic indicators.⁵⁷ This model will be very important for the objectives set out at the beginning of this thesis, and it will be used as a reference point. This is especially true for the legal indicators, which will prove to be in line with the focus of this research, namely, India's erosion of pluralism and marginalisation of religious minorities through legal means. Furthermore, Adeney's model can be deemed as even more fitting since it was applied by herself to address the level of ethnic democracy in India in 2019-20, which resulted in the country being classified as a medium-high ethnic democracy.⁵⁸ Accordingly, the extensive work of Jaffrelot in his book "Modi's India, Hindu nationalism and the rise of Ethnic Democracy" will prove to be a fundamental asset for this paper. However, after this short anticipation, the theoretical framework and methodology will be discussed in the dedicated third chapter, and, before that, in section 2.3 of this chapter, the Indian context will be presented, and the contributions mentioned so far will be outlined in detail.

The next subsection will be dedicated to the role played by the law in countries facing democratic regression, a topic already partially addressed when discussing executive aggrandizement and the theories of democratic backsliding. Then, the changing of the law by a want-to-be authoritarian was described as a fundamental step to secure its power and "change the rules of the game". Additionally, the model mentioned above regarding the evaluation of an ethnic democracy also reflects the importance of the legal dimension of democratic regression, where constitutional, citizenship and general legislation are three parameters that need to be analysed in detail in order to properly assess the ethnic nature of a democracy.

2. The Law as a Tool for Democratic Erosion: Autocratic Legalism

As anticipated, this subsection is dedicated to the role played by legal mechanisms and the law in democratic backsliding. In fact, in the previous section, the discussion already partially underlined the importance of the law for elected politicians who undertake the undemocratic path towards executive aggrandizement. However, this specific aspect of democratic backsliding deserves special attention due to the nature of this thesis. As stated in the introduction, this thesis aims at analysing how the legislation put in place by the BJP and its leader Modi is eroding democratic norms. In particular, how the legal mechanism put in place by the Hindu-nationalist government are undermining pluralism and perpetrating the marginalization of religious minorities, with the objective of creating a Hindu-only India. Consequently, the legal dimension of democratic backsliding is at the centre of this work, and will be outlined in this dedicated section.

⁵⁷ Adeney, "How Can We Model Ethnic Democracy?".

⁵⁸ *Ibid.*, 406.

Because of the importance of the law in the process of democratic backsliding, a vast and growing volume of literature is being dedicated to this topic.⁵⁹ In this body of research, the most influential concept and label is autocratic legalism, which will be the focus of this section. The idea of autocratic legalism was developed largely in reaction to the experiences of post-Third democratic Wave regimes. In particular, in reaction to the “patterns of legal executive aggrandizement that surfaced across the globe at the same time in the late twentieth and early twenty-first centuries”.⁶⁰ Furthermore, this strand of research focuses on the experiences of countries in Eastern Europe and Latin America, areas of the world which have already provided insightful examples for this thesis.⁶¹

This brief introduction to the topic already strongly proves that autocratic legalism fits perfectly into the picture provided so far. In fact, it links perfectly to the previous sections dedicated to democratic backsliding in the twenty-first century, executive aggrandizement, and third-wave democracies. Indeed, contemporary debates on autocratic legalism are principally attempting to answer the questions that today’s historical moment is raising.⁶²

The most influential writer on the matter is arguably Kim Scheppele, who popularized the concept of autocratic legalism in her 2018 article.⁶³ First of all, she emphasizes the fact that:

*“Buried within the general phenomenon of democratic decline is a set of cases in which charismatic new leaders are elected by democratic publics and then use their electoral mandates to dismantle by law the constitutional systems they inherited. These leaders aim to consolidate power and to remain in office indefinitely, eventually eliminating the ability of democratic publics to exercise their basic democratic rights, to hold leaders accountable, and to change their leaders peacefully”.*⁶⁴

The few sentences above perfectly define the concept of autocratic legalism. It is a phenomenon embedded in democratic decline, as already stressed in previous sections, and it is used by elected leaders as a tool to strengthen their power. To do so, as also seen previously, leaders attack the self-correcting mechanisms of democracy, the instruments to hold the executive accountable, and the political and civil liberties of citizens, which are enshrined in the Constitution. Additionally, as stressed throughout this chapter, the pace at which these developments take place is slow, making them hardly detectable to the public. In fact, as discussed previously, nowadays, democracies often die gradually, without making much noise, and rarely by falling abruptly into authoritarianism.

⁵⁹ Fiona Shen-Bayh, "Autocratic Legalism," in *The Oxford Handbook of Authoritarian Politics*, ed. Anne Wolf (Oxford: Oxford University Press, 2024), online ed., <https://doi.org/10.1093/oxfordhb/9780198871996.013.57>.

⁶⁰ *Ibid.*, 2.

⁶¹ *Ibid.*

⁶² *Ibid.*, 8.

⁶³ Kim Lane Scheppele, "Autocratic Legalism," *University of Chicago Law Review* 85, no. 2 (2018): 545–583, <https://chicagounbound.uchicago.edu/ucprev/vol85/iss2/2>.

⁶⁴ *Ibid.*, 545.

Overall, autocratic legalism can be summarized as the intentional creation of new laws by elected leaders “in the service of an illiberal agenda”.⁶⁵ In fact, the first wakeup call is the loosening of constitutional constraints on executive power through legal reforms.⁶⁶ This is exactly what happened in Orban’s Hungary, Putin’s Russia, Erdogan’s Turkey, Chavez’s Venezuela, Correa’s Ecuador, and from 2015 in Poland. Most of these examples have already been described in the section dedicated to democratic decline. In all of these cases, legalistic autocrats act by setting in contrast democracy and constitutionalism, at the expense of liberalism.⁶⁷ This is not a novelty, and it is not an uncommon event. In democracies leaders are accountable to the voters, while constitutionalism entails that both political leaders and the voters are accountable to a set of principles. Democratic rule and constitutionalism are in conflict when what the people want, or what their elected leader wants, is overridden by constitutional principles. A general example could be when the electorate fails in its constitutional obligations and produces a majority for unconstitutional change. Elected executives who seek to consolidate their power, exploit these kinds of dynamics, and promote a simplistic idea of democracy, where it is only the electoral result that matters. Strong of electoral support, legalistic autocrats rail against any constitutional constraint that stands in the way of the people’s “will”, which the leader should incarnate. “The end result when such a ploy succeeds is simple majoritarianism, which can lead quickly to illiberalism”.⁶⁸ This scenario is obviously not unavoidable. Democratic constitutionalism solves the friction between democracy and constitutionalism by including into the latter the requirement of a self-sustaining democracy. This indicates a system where the electorate can continue to pick their leaders over time, keeping them accountable, and in rotation if they disappoint. In fact, a constitutional commitment to a self-sustaining democracy requires elected executives to not interfere with the essential institutions required for free and fair elections, which include a diverse and independent media, multiple functioning political parties, an impartial judiciary, acknowledgment of a lawful and loyal opposition, unbiased election authorities, fair representation that does not significantly weaken minority voices, law-abiding security forces, and an active, independent civil society.⁶⁹ A further requirement to consider in a self-sustaining democracy is liberal constitutionalism, which, in brief, demands the state to safeguard individuals' dignity and freedom to help ensure they retain the abilities needed to participate as democratic citizens. This includes the guarantee of protection for minorities. Therefore, democratic and liberal constitutionalism are the instruments in place in order to ease the tension between democratic rule and constitutionalism, and to discourage a purely majoritarian idea of democracy, where anti-liberal views can flourish.⁷⁰

⁶⁵ Ibid., 548.

⁶⁶ Ibid., 549.

⁶⁷ Ibid., 557.

⁶⁸ Ibid.

⁶⁹ Ibid., 558.

⁷⁰ Ibid., 558-570.

Nevertheless, legal autocrats often manage to wear down the guardrails of democratic and liberal constitutionalism, and turn a functioning democracy into a majoritarian regime, controlled by majoritarian legalism, where they can dominate the political arena. In Recep Erdogan's words, "Democracy is like a tram, you ride it until you get to destination, then you step off".⁷¹ And the final destination is their consolidation of power.

The next subsection, drawing on the insights of Scheppele, aims at outlining the main tactics used by legal autocrats to reach such outcome.

2.1 How Autocratic Legalism Succeeds

As anticipated, regardless of the checks and balances present in modern democracies, embodied by democratic and liberal constitutionalism, legal autocrats often manage to transform a vibrant democratic society into a majoritarian one, shaped by majoritarian legalism. This subsection aims at providing a brief overview of how this illiberal turn takes place.

The first aspect to stress when considering contemporary want-to-be autocrats, is that they do not portray themselves as authoritarians. In fact, they always avoid any sort of comparison with twentieth-century authoritarian leaders. This is because the public is often considerably educated on twentieth-century authoritarian regimes, and know how to recognize these kinds of political narratives.⁷² If we consider the infamous examples of the Nazi and Stalinist regimes, they were motivated by all-encompassing, fierce, and revolutionary ideologies which eventually caused unimaginable suffering and millions of deaths. These kinds of authoritarian regimes completely took over the state, destroying previous political institutions, and monopolized power into their hands, leaving no room for dissent or opposition. The past century is rich of these kinds of authoritarian regimes, although very few of them presented the fully totalitarian characteristics of Stalinism and Nazism.⁷³

However, as discussed for contemporary democratic backsliding and executive aggrandizement in this paper, this is not how democracies crumble nowadays. New autocrats are aware of the risks of undertaking such blatant authoritarian methods, as they would raise a swift and overwhelming reaction by the public and the international community. Alternatively, legalistic autocrats endeavour on a softer and gradual path, being cautious of framing their actions within their democratic mandate, and under a "veneer of legality".⁷⁴ Therefore, political institutions are not destroyed or replaced, but rather taken over and repurposed at their political advantage. They slowly take over democratic institutions through the law and its various instruments, which include constitutional revision, institutional reform and electoral reform. These softer measures,

⁷¹ Jenny White, "Democracy is Like a Tram," Turkey Institute, July 14, 2016, <https://www.turkeyinstitute.org.uk/commentary/democracy-like-tram/>.

⁷² Ibid., 571-2.

⁷³ Oliver Schlumberger, "Authoritarian Regimes," in *The Oxford Handbook of Political Regimes*, ed. (Oxford: Oxford University Press, 2017), <https://doi.org/10.1093/oxfordhb/9780199935307.013.18>.

⁷⁴ Levitsky and Ziblatt, *How Democracies Die*, 71.

compared to the ones of past authoritarianisms, reflect a more flexible ideology, and in some cases legalistic autocrats even deny having one, like in the case of Orban in Hungary.⁷⁵ Such flexible ideology, and apparent open-mindedness, serves the purpose of leaving just enough opposition and political debate to make their political system appear as tolerant. In fact, some form of political opposition is often maintained by want-to-be autocrats, including small opposition media, political parties, and government-friendly NGOs. Nonetheless, threatening political opponents are often driven out of the country, fired from their jobs, and sometimes jailed. Similarly, businessmen are proposed unrefusable deals, or harassed through criminal charges of tax evasion or financial misappropriation. The elections are fixed as to keep the autocrat in power, but not through blatant election-day frauds. These tactics allow elected executives to maintain a legitimate public appearance, so to deny authoritarian accusations and to exercise almost unconstrained power. This combination of apparent tolerance and autocratic measures is a very powerful one. Legalistic autocrats steer away from traditional authoritarianism, mass human-rights violations, political killings, and other horrid practices.⁷⁶

On the other hand, this kind of autocratic leaders and practices, based on majoritarian legalism and politics, lack any sort of respect for the basic principles of liberalism, which can be considered the real victim of autocratic legalism.⁷⁷ In fact, legalistic autocrats have no regard for “minorities, pluralism, or toleration”⁷⁸, all of which are very relevant issues for this thesis. Democratic majorities have to be put in check in order to safeguard pluralism, and to ensure that minorities are not unfairly trodden on. Guardrails like freedom of speech and assembly, an independent judiciary, independent media, and a competitive opposition must be maintained in order to keep the executive in check.

Why do liberal constitutional democracies sometimes fail is intensely debated by scholars, and several theories have been put forward, with little agreement. The topic is too vast to be discussed here and would not serve the purpose of this thesis. Surely, what can be said is that the crisis of liberalism and constitutionalism has been accompanied by trends like political polarization, increasingly bad electoral choices, low adaptability of political parties to the preferences of the electorate, economic shocks, and the polarization of the judiciary, among others.⁷⁹

What this subsection aimed for was to present an overview of how liberal and democratic constitutionalism are emptied of their powers, and left only as a façade by legalistic autocrats, opening the way for the unfair treatment of minorities. The next subsection will introduce such problem, on how autocratic legalism and their perpetrators may use the law and its ramifications in the service of minority marginalization. The paragraphs below will hopefully highlight the links and parallels between the relevant literature discussed so far and the topic at hand in this paper.

⁷⁵ Scheppele, "Autocratic Legalism," 574.

⁷⁶ Ibid.

⁷⁷ Ibid., 580.

⁷⁸ Ibid.

⁷⁹ Ibid.

2.2 The Law in the Service of Minority Marginalization?

When autocratic legalism takes place in a democracy, it is responsible for the deterioration of liberalism and democratic constitutionalism. In this political environment, where the executive is strong of its electoral backing and galvanized by majoritarian policies, ethno-religious minorities can pay a considerable toll. The following discussion will introduce how autocratic legalism, characterized by majoritarian legalism and politics can be directed at the expense of minorities. However, before, it will attempt to briefly recollect the main points examined, and put in order the discussion followed in this chapter so far. It will do so by making some considerations and providing some anticipations, which will lay the ground for the last section of this chapter, dedicated to the extremely intricate Indian case, the focus of this thesis.

First of all, the current relevant literature on democratic backsliding seems to agree on the fact that nowadays democracies very rarely die by the hands of coups d'état, but much more often by the covert and gradual actions of elected executives, who seek to consolidate their power, in a phenomenon that has been categorized as executive aggrandizement. While attempting to describe this phenomenon in its methods and general characteristics, the literature highlighted the importance of democracy's self-correcting mechanisms and the law. To this matter, the discussion turned to the issue of autocratic legalism, a concept that has been recently popularized in academia. Autocratic legalism has been defined as a phenomenon that takes place within democratic backsliding and executive aggrandizement, and it serves the quest for power of the elected executive who wants to consolidate its position, and breakdown the safeguards of democracy. In fact, autocratic legalism refers to the practice of want-to-be autocrats of reforming the law of a country to secure their position in the executive. These can be constitutional reforms, general legislation, and electoral reforms. In her work, Scheppele already suggests that autocratic-leaning elected leaders, who make use of the law in order to consolidate their power, and undermine the self-correcting mechanisms of democracy, do so also at the expense of minorities. That can happen due to the effects that autocratic legalism has on democratic and liberal constitutionalism, as seen above. In particular, in Scheppele's words, when autocratic legalism is on the rise, "the casualty [...] is liberalism, even as the external appearance of democracy and constitutionalism remain in place".⁸⁰ The erosion of liberal principles in the laws and politics of a country, such as rights of speech and assembly, the independence of courts, media, and the civil sector, as well as the protection of the Constitution by an independent body like a constitutional court, puts non-members of the majority at risk. In fact, even though democracy requires majorities to work, the majoritarian decision has to be put in check by liberal principles, so that everyone's basic rights are respected, for example, in case the majority comes up with an unconstitutional decision. Consider the extreme scenario offered by historian Yuval Harari: "Suppose that 51 per cent of voters choose a government that then takes away the voting rights of the other 49 per cent

⁸⁰ Scheppele, "Autocratic Legalism," 580.

of voters, or perhaps just one per cent of them. Is that democratic?"⁸¹ The answer should be clear by now, no. This case just wants to highlight the tremendous dangers that leaders with an illiberal agenda and the power to legislate embody. In particular, it wants to emphasize how majoritarian decisions can be extremely harmful to minorities if not kept in check.

Some scholars have already started discussing the case of contemporary India under the lens of autocratic legalism. In particular, their focus of study has been the general concern of the BJP administration for majoritarian power, and how the use of the law is proving to be very important for that end.⁸² In fact, the use of majoritarian legalism by the ruling party in India, combined with a powerful Hindu-nationalist ideology, has been connecting the practices of autocratic legalism and minority marginalization.

Not only that. The whole discussion that started at the beginning of this chapter until now, cutting across the frameworks of democratic backsliding, executive aggrandizement, ethnic democracy, ethnocracy, and autocratic legalism, can all be attributed to contemporary India.⁸³ What is taking place in India is extremely complex. The country is experiencing several levels of change. Some aspects can be categorized in wider political and legal phenomena, as attempted in this thesis so far. However, the Republic of India presents some peculiar specificities, which will be the focus of the next chapter. There, the BJP's quest for a Hindu-only nation will be examined, and its consequences on religious minorities, especially Indian Muslims.

When the political and social environment of a democratic country are tainted by democratic regression, executive aggrandizement, autocratic and majoritarian legalism, and united with a Hindu-nationalist or suprematist ideology, like that of the Bharatiya Janata Party, the outcome can be catastrophic for minorities.

⁸¹ Harari, *Nexus*, 122.

⁸² M. Mohsin Alam Bhat, Mayur Suresh, and Deepa Das Acevedo, "Authoritarianism in Indian State, Law, and Society," *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 55, no. 4 (2022): 459–477, <https://www.jstor.org/stable/10.2307/27305891>.

⁸³ *Ibid.*

The Indian Context: Secularism and Minority Rights under BJP Rule

1. India's Unique Trajectory

The case of India is particularly intricate, reflecting its status as the world's most populous and one of its most diverse countries.

For decades, the Indian republic and its Constitution have been regarded as a model of liberal democracy in the global south, capable of handling an extremely plural society.¹ Since independence in 1947, Indian democracy has been associated with free and fair elections, equal citizenship, checks on governmental power, a judiciary with strong powers of review, and a thorough bill of rights, with the exception of the authoritarian Emergency period of the 1970s.²

While the above is broadly accurate, it should be noted that Indian democracy has not always been an ideal expression of liberal democracy throughout its history. As it is true for many other liberal democracies, at times India has been a “democracy with adjectives”.³ In fact, in the early decades of its history, according to some scholars, India could be indicated as a “conservative democracy”. Despite the socialist and progressive rhetoric of leaders such as Jawaharlal Nehru and Indira Gandhi upper-caste dominance remained pervasive, with political clientelism being a widespread practice.⁴ The situation started to change considerably in the late 1980s, when the country experienced a phase of further democratization of politics, to the detriment of former elites and the political hegemony of the Indian National Congress party. This process is defined by Jaffrelot as the “silent revolution”.⁵

Furthermore, apart from the Republic of India's initial flaws in democratic governance, the country's newly installed democratic institutions had to come to terms with the harsh reality of post-independence India, a place “without wealth, widespread literacy, or social homogeneity”,⁶ which made government much more difficult and posed serious challenges for democratic consolidation.

However, regardless of these adverse factors, overall, India's institutional democratic structure had resisted the test of time, maintaining relative stability and democratic rule throughout its history.⁷ Until very recently.

¹ Madhav Khosla and Milan Vaishnav, “The Three Faces of the Indian State,” *Journal of Democracy* 32, no. 1 (January 2021): 111, <https://doi.org/10.1353/jod.2021.0004>.

² Khosla and Vaishnav, “The Three Faces of the Indian State,” 111.

³ Jaffrelot, *Modi's India*, 1.

⁴ *Ibid.*

⁵ *Ibid.*, 5.

⁶ Khosla and Vaishnav, “The Three Faces of the Indian State,” 112.

⁷ *Ibid.*

As discussed so far in the previous sections of this chapter, since the instalment of the BJP government in 2014, under the leadership of Modi, the situation has changed dramatically in India. The country is now being viewed more and more often by scholars, journalists and human rights organizations under a much darker light than in previous decades. A growing number of experts nowadays are not associating India anymore with the world's largest democracy, but rather with democratic backsliding, executive aggrandizement, autocratic legalism, ethnic democracy, ethnocracy, electoral autocracy and so on.⁸

As anticipated, India's current political developments, to different degrees, can be fitted to all the trends and regime types just listed above. This fact reflects the extreme intricacy and composite nature of the Indian case. This is why the thesis has reviewed these broader phenomena before turning to India.

However, the aim and scope of this paper is much more specific. Indeed, it wants to investigate a particular aspect of contemporary India's all-around democratic backsliding, linked to religious tolerance, state secularism, and minority rights. Importantly, as already stated previously, the objective of this work is to fully understand how have legal mechanisms under the BJP government contributed to the erosion of pluralism and the marginalization of religious minorities in India since 2014, particularly Muslims. In fact, this chapter aims to provide a structured overview of the scholarly debate on religion, secularism, and legal marginalization in India, in order to lay the ground for the upcoming chapters dedicated to the study of the discriminating legislation put in place by the BJP. To do so, the discussion has to be focused on the scholarly debate surrounding religion, secularism, and legal marginalization in India.

The first topic to which the review will turn is that of the constitutional tradition of secularism in India. Secondly, it will explain further the ideological foundations of the Bharatiya Janata Party, meaning Hindu-nationalism, and the quest for Hindutva. Thirdly, the discussion will turn to the legal mechanisms and legislation put in place so far by the BJP government that has affected unevenly religious minorities. Fourthly, the judiciary's and the supreme court's role will be analysed with respect to these laws.

2. Constitutional Secularism in India: Origins and Evolution

At the time of India's independence, the dominant constitutional vision was to create a democratic, federal and secular country.⁹ The drafters of the Indian Constitution selected these founding principles due to the concern for unity and prevention of communal violence. Particularly, the broader circumstances of national violence, strife, and deterioration of Hindu-Muslim relations deriving from the partition of India after the end of British rule, played a crucial role in shaping this constitutional framework.¹⁰

However, as confirmed by the actual debates that took place in India's Constituent Assembly, the term "secular" was willingly not included in the 1949 Indian Constitution.¹¹ It was not until the 42nd amendment of

⁸ Bhat, Suresh, and Acevedo, "Authoritarianism in Indian State," 1.

⁹ Jaffrelot, *Modi's India*, 8.

¹⁰ Mate, "Constitutional Erosion", 8.

¹¹ *Ibid.*

1976 that the word was explicitly mentioned in the Constitution's preamble.¹² The reason behind this original omission was motivated by the drafters' intention to differentiate India's secularism from that adopted in the US or in Western Europe.¹³ Famously, some years later, Jawaharlal Nehru, one of the chief architects of modern India, outlined his views on the subject:

*"We talk about a secular state in India. It is perhaps not very easy even to find a good word in Hindi for 'secular'. Some people think it means something opposed to religion. That obviously is not correct [...] It is a state which honours all faiths equally and gives them equal opportunities"*¹⁴

In fact, globally, secularism is commonly framed through two main models: the American and the French.¹⁵ In brief, the American version entails that the "state shall neither be guided by the religion and nor it shall interfere in the religious affairs of any individuals".¹⁶ This means that there is a complete separation between state and religious beliefs, as it is considered a personal matter, and the state should not support any religion. The French variety, known as "laïcité", states that the interference of religious institutions in state affairs is utterly prohibited, defending the "direct division between religion and politics".¹⁷ Additionally, French secularism justifies reasonable interference of the state in religious issues, as long as the state treats all religious beliefs equally.¹⁸

On the other hand, the secularism enshrined in the Indian Constitution represents a unique approach, with "its policies and practices [...] been guided sometimes by elements of one version and at other times by elements of other versions of secularism".¹⁹ In fact, according to Rajeev Bhargava, a leading scholar of Indian secularism, India's Constitution was not only shaped by a social-democratic drive, but most notably by "contextual secularism".²⁰ Bhargava states that secularism in India has a special role, and an additional responsibility. Not only it must check the diffusion of religious fanaticism and manage interreligious conflicts like in most countries around the world, but it must also prevent conflicts that may not originate solely in religious belief, but arise from the use of religion as an identity marker, from crossing a morally unacceptable threshold.²¹ Furthermore, according to Bhargava, the model of contextual secularism enshrined in the Indian Constitution allows for politics to maintain a "principled distance", not equidistance, from religious institutions, meaning that the relation linking religion and politics should neither be fusion nor utter

¹² Valentina Rita Scotti, "The 'Essential Practice of Religion' Doctrine in India and Its Application in Pakistan and Malaysia," *Stato, Chiese e pluralismo confessionale*, no. 5 (February 8, 2016), <https://www.statoechiese.it/>.

¹³ Mate, "Constitutional Erosion", 8.

¹⁴ T.N. Madan, "Secularism in Its Place," in *Secularism and Its Critics*, ed. Rajeev Bhargava (New Delhi: Oxford University Press, 1998), 311.

¹⁵ Anurag Pandey, "Secularism in India Theories, Practices and Controversies" in *Indian Politics and Political Processes*, ed. Mithilesh Kumar Jha and Kamal Nayan Choubey, 1st ed. (New Delhi: Routledge India, 2023).

¹⁶ *Ibid.*, 367.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Rajeev Bhargava, "Secularism in India: The Recent Debate," in *Secularism and Its Critics*, ed. Rajeev Bhargava (New Delhi: Oxford University Press, 1998), 516.

²⁰ *Ibid.*

²¹ *Ibid.*, 517.

detachment.²² More in detail, principled distance is the idea for which the state decides whether to intervene in or stay out of religious affairs based on what best supports religious freedom and equal citizenship. This means the state may not treat all religions in exactly the same way or intervene equally across the board. What matters is that any involvement, or lack thereof, is guided by impartial principles and values that uphold equal dignity for everyone.²³ In summary, Indian secularism is a positive model, advocating rational state intervention in religious affairs when necessary.²⁴

In the 1949 Constitution, which entered into force in 1950, Indian secularism is outlined in several fundamental articles. Article 15 prohibits any discrimination on the basis of religion, descent, caste, sex, or place of birth. Articles 16 and 17 make further considerations. The former, guarantees equality of opportunity in line with the prohibition of discrimination of article 15. On the other hand, article 17 intervenes directly on the Hindu traditional caste system by abolishing it, with special attention to the members of the lower level, called the “untouchables”. Article 25 declares that every Indian is entitled to freedom of conscience, profession, and practice of their religion, while subject to public order, health and morality. The former clause perfectly demonstrates the specificity of Indian contextual secularism just discussed above. Articles 25 to 28 also protect the free acceptance of religion, conduct and propagation. Specifically, article 26 ensures the right of every religious group or community to oversee its own religious affairs, including the freedom to establish and run institutions for religious or charitable purposes, handle internal religious matters, and acquire and manage property in accordance with the law. Article 27 states that the state shall not compel any person to pay taxes which will be used to support a particular religion, while article 28 requires that no religious teaching shall be provided in any educational institution fully funded by the state. Article 29 protects minority religious communities from having any external culture imposed on them by the state. Article 30 grants these communities the right to establish and manage their own educational institutions and ensures they are not discriminated against by the state when it comes to receiving assistance.²⁵

The Indian model of secularism, that these founding provisions embody, worked reasonably well in the first decades of the country’s independence, throughout the 1950s, 1960s and 1970s. This was reflected by the considerable political representation that religious minorities, including Muslims, enjoyed in the country’s legislative assemblies, both at state and federal level. Moreover, communal riots and violence were moderately rare during this period.²⁶ Such circumstances of relative ease started to change in the 1980s, when Indian secularism came under substantial stress. In particular, the Congress party increasingly appealed to various

²² Christophe Jaffrelot, “The Fate of Secularism in India,” in *Hindu Nationalism in South India*, ed. Nissim Mannathukkaren (Abingdon, Oxon: Routledge, 2024).

²³ Bhargava, “Secularism in India,” 515-6.

²⁴ Anurag Pandey, “Secularism in India Theories, Practices and Controversies” in *Indian Politics and Political Processes*, ed. Mithilesh Kumar Jha and Kamal Nayan Choubey, 1st ed. (New Delhi: Routledge India, 2023).

²⁵ Scotti, “Essential Practice of Religion”, 3-5; Pandey, “Secularism in India”; Government of India, *The Constitution of India*, Legislative Department, Ministry of Law and Justice, accessed June 13, 2025, <https://legislative.gov.in/Constitution-of-india/>.

²⁶ Jaffrelot, “The Fate of Secularism,” 20.

religious groups for political gain, to the detriment of secularism. These political practices began under Indira Gandhi, as she wanted to politically exploit religious differences, sometimes cynically. Notably, she acknowledged Aligarh Muslim University as a minority institution; supported militant, separatist Sikhs such as Jarnail Singh Bhindranwale to weaken the Akali Dal, a competing political party in Punjab; and officially opened the Bharat Mata Mandir, a temple built in 1983 with backing from the Vishva Hindu Parishad (VHP), also called the World Hindu Council. Rajiv Gandhi, Indira's son and prime minister of India from 1984 to 1989, further deepened the politicization of religion. During his term he was at the centre of several controversial decisions. For example, throughout the Shah Bano case, he advocated for the use of sharia as the basis for Muslim personal law in India to appease the Muslim community. This approach allowed Hindu nationalists to accuse the Congress Party of practicing "pseudo-secularism", a critical term implying favouritism toward minorities. Notably, the BJP at the time denounced the Congress party for its pro-Muslim attitude.²⁷

Ironically, such practices, aimed at politically exploiting religious differences within the Indian population, opportunistically siding with the majority or the religious minority at stake, "opened the door for Hindu nationalism to gain more widespread political salience".²⁸ In fact, the actions undertaken by the Congress party leaders throughout the 1980s substantially undermined the secularism embedded in the 1949 Constitution, which has the complex task of maintaining fanaticism and interreligious conflict at bay, and to also intervene in support of religious freedom and equal citizenship when required according to the parameter of principled distance, as seen above.

The next section will be dedicated to origins and rise to prominence of Hindu nationalism, which will directly lead the conversation to the concept of Hindutva and its renowned political supporter, the Bharatiya Janata Party. Furthermore, it must be noted that further on a section will be dedicated to the role played by the judiciary and the Supreme Court in upholding the values of Indian secularism, and its possible shortcomings and critiques, a topic only briefly considered in this section, which was solely centred on the scholarly debate surrounding the constitutional foundations of Indian secularism.

3. Hindu Nationalism, The Sangh Family, and the rise of the BJP

Hindu nationalism, nowadays the prominent ideology in India, represented by the BJP and its leader Modi, originated more than a century back during colonial India. Interestingly, Hindu nationalism in many ways developed parallelly to secular anti-colonial nationalism, discussed in the previous subsection. However, its historical trajectory is very different. Its rise in recent years has been made possible through the work of political parties and organizations, who along decades were committed to the belief of an organic Hindu unity. Particularly, the ideology promoted by these Hindu nationalist political and cultural organizations has been

²⁷ Jaffrelot, "The Fate of Secularism," 20-22.

²⁸ *Ibid.*, 22.

centred on the defence of “Hindu interests”, framed in clear contrast to “Muslim interests”. Along the same line, often, “Hindu nationalism’s anti-Muslim stance stands out more than its sense of Hindu distinctness”.²⁹ Hindu nationalism moved its first steps in the nineteenth century, when communities which identified themselves as Hindus organized themselves into “sabhas”, or assemblies, in order to counter the alleged influence of minoritarian religious groups, like the Muslims and the Sikhs, over the British administration.³⁰ In 1915 the All-India Hindu Sabha came to the rise, later renamed Hindu Mahasabha, which congregated all local level assemblies, and was initially based on a distinctly anti-Muslim political program, more than an anti-colonial one. In fact, the Hindu Mahasabha leaders believed that the Indian National Congress was not adequately safeguarding the interests of Hindus.³¹

However, the Hindu nationalist political ideology was formally codified in the 1920s through the work of V.D. Savarkar, most notably the book “Hindutva: Who Is a Hindu?”. In this text the author views India strictly as a Hindu nation-state not only because of the sheer numerical superiority of the Hindus, but because this part of the population can regard itself as the “true sons of the soil”. On the contrary, Muslims and Christians would be products of foreign invasions and influences.³² Savarkar went even further, using the term Hindutva, literally “Hindu-ness”, to refer to Hindus not only as a religious identity, but as an ethnic denomination. In fact, for the author, Hindus were a group possessing a designated territory, the same racial characteristics, and the same culture. In his own words:

*“we Hindus are bound together not only by the tie of the love we bear to a common fatherland and by the common blood that courses through our veins and keeps our hearts throbbing and our affections warm, but also by the tie of the common homage we pay to our great civilization—our Hindu culture, which could not be better rendered than by the word Sanskriti.”*³³

Therefore, according to this theory by Savarkar, both Indian Muslims and Christians were intrinsically not Hindus for the additional fact that they regarded other civilizations as their cultural heritage. The word “Sanskriti” for the author indicates the alleged well-defined culture and civilization belonging to the Hindu race.³⁴ Savarkar went on becoming the leader of the Hindu Mahasabha for seven consecutive years from 1937 to 1944. The Hindu Mahasabha, which had become a party in 1933, never became a formidable political force, playing a neglectable role in the negotiations for independence with the British Crown. To make the situation worse, the party lost even more credibility when Gandhi was assassinated by an individual linked to the Hindu Mahasabha in 1948. Nevertheless, while the Hindu Mahasabha remained politically peripheral in India’s quest

²⁹ Manjari Katju, “The History of Hindu Nationalism in India,” in *The Oxford History of Hinduism: Modern Hinduism*, ed. Torkel Brekke (Oxford: Oxford University Press, 2019), 203, <https://doi.org/10.1093/oso/9780198790839.003.0012>.

³⁰ Giorgio Shani, “Towards a Hindu Rashtra: Hindutva, Religion, and Nationalism in India,” *Religion, State and Society* 49, no. 3 (2021): 268, <https://doi.org/10.1080/09637494.2021.1947731>.

³¹ Katju, “The History of Hindu Nationalism in India,” 204.

³² Jaffrelot, “The Fate of Secularism,” 23.

³³ Savarkar, quoted in Katju, “The History of Hindu Nationalism in India,” 206.

³⁴ Katju, “The History of Hindu Nationalism in India,” 206.

for independence and during the following years, what remained very influential were the ideas put forward by the movement. In fact, Hindutva went on to become “a galvanizing and politically significant idea in the years after Indian independence”.³⁵

This ideology was faithfully adopted by another organization, the Rashtriya Swayamsevak Sangh (RSS), very influential to this day, as it is one of the largest civil society organisations in the world. Indeed, it is considered the most significant organization advocating for Hindu nationhood and revivalism.³⁶ Founded in 1925, in response to a pan-Islamist mobilization of Indian Muslims, namely the Khilafat Movement, the RSS concentrated on the development of a dense network of local branches and the creation of front organizations, such as a student union and a labour union. It is organized through a precise hierarchy, with male “swayam sevacks”, or “volunteers”, being the manpower in local communities, and the “pracharak”, or “full-timers” at the apex. The latter are very disciplined individuals who forego family life and remain unmarried in order to fully commit to the cause of the RSS.³⁷ Namely, the organization was devoted to the “character-building” of Hindu volunteers, so to consolidate a self-conscious Hindu political identity and a Hindu nationhood. Under the leadership of M. S. Golwalkar, starting from 1940, the RSS acquired the form that we know today. Golwalkar insisted that the Hindus were in a state of war, meaning that both their religious and cultural identity were at risk of being defeated. The war was initially triangular, namely the Hindu nation against the Muslims and the British. After Indian independence, which was based on Hindu-Muslim unity and tolerance, Golwalkar defined this settlement as “the greatest treason on our society”, with the Hindus being “defeated at the hands of Muslims in 1947”.³⁸

The RSS, throughout its history, has not avoided violence in the pursue of Hindutva. It has been accused of participating and instigating communal riots, especially directed at igniting Hindu-Muslim violence. The examples are sadly numerous, but one of the most notorious and brutal outbursts of violence is the mass pogrom of Muslims that took place in the state of Gujarat in 2002. In Godhra, more than 2500 Indian Muslims were brutally murdered by Hindu mobs and 200'000 families displaced.³⁹ The event that started off the violence was the death of 59 people on a train carrying Hindu pilgrims, caused by a fire that broke out on one of the coaches. The cause of the fire was never definitely ascertained. In 2008, a commission appointed by the Gujarat government concluded that it was local Muslims that set the train on fire. On the contrary, a commission appointed by the Indian government's railway minister in 2005 concluded that it was an accidental fire. In any case, the death of the Hindu passengers was instantly exploited by Hindu-nationalist groups, including the RSS, to organize a pogrom directed at the Muslim community. According to Genocide Watch, the acts committed in Gujarat meet the definition of genocide, as the actions intended to destroy, at least in

³⁵ Ibid., 207.

³⁶ Katju, “The History of Hindu Nationalism in India,” 207.

³⁷ Shani, “Towards a Hindu Rashtra,” 270.

³⁸ Golwalkar, quoted in Katju, “The History of Hindu Nationalism in India,” 208.

³⁹ Shani, “Towards a Hindu Rashtra,” 270.

part, a religious group, the Muslims. Specifically, it meets four points of the definition of genocide included in the Genocide Convention: “killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; or imposing measures intended to prevent births within the group”.⁴⁰ However, what makes this pogrom even more infamous is the role played by the authorities. In fact, according to Human Rights Watch, “the attacks against Muslims in Gujarat have been actively supported by state government officials and by the police”⁴¹. Coincidentally, the then Chief Minister of Gujarat was Narendra Modi, also a lifelong member of the RSS. Several officials at the time, including police inspector and the late Gujarati home minister Haren Pandya have gone on record saying that Modi told Gujarati police not to stand in the way of the upcoming “Hindu backlash”.⁴² Indeed, the police, apart from isolated cases, intervened only three days after the violence had started, with many witnesses testifying that their calls for help were either unsewered or met with this response: “We don't have any orders to save you”.⁴³ Ultimately, Modi and its BJP government were absolved from any involvement in the Gujarat riots, the worst sectarian violence since the 1947 India and Pakistan partition.⁴⁴ The RSS, as confirmed by the report by Human Rights Watch, played an important part in the acts of genocide that took place in 2002.⁴⁵ For these kinds of actions, during its history, the organization was banned a total amount of three times.⁴⁶

Moreover, the RSS is so important for the topic of this paper due to its direct link with the BJP. The Hindu-nationalist organization, in conjunction with the former Hindu Mahasabha leaders, in 1951 decided to actively play a role in electoral politics, and formed the Bharatiya Jana Sangh (BJS). In 1980, it was revived as the Bharatiya Janata Party (BJP), the “Indian People’s Party” as we know it today. Unsurprisingly, the party was based on the ideology of Hindu-nationalism, and a fierce opposition for inclusive secular nationalism. Indeed, the intention of the BJS was to build a country on a different foundation than that of the Congress Party and the Socialists, which were accused of not doing enough for the interests of the Hindus, and being too interested in appeasing Pakistan and the Indian Muslims.⁴⁷ The BJS, together with the Vishwa Hindu Parishad (VHP), another organization created in 1964 under the RSS umbrella to strengthen Hindu identity in marginalized sections of society and in the Hindu diaspora, formed the backbone of the “Sangh Parivar”, literally “the family

⁴⁰ Genocide Watch, “The 2002 Gujarat Genocidal Massacres,” August 2023, <https://www.genocidewatch.com/single-post/the-2002-gujarat-genocidal-massacres>.

⁴¹ Human Rights Watch, “India: State Participation and Complicity in Communal Violence in Gujarat”, (April 2002), <https://www.hrw.org/reports/2002/india/>.

⁴² Peter Speetjens, "Muslims Under Modi: The Dark Side of India's Prime Minister," Middle East Eye, accessed June 20, 2025, <https://www.middleeasteye.net/opinion/muslims-under-modi-dark-side-indias-prime-minster>.

⁴³ Human Rights Watch, *India: State Participation*, 2002.

⁴⁴ Speetjens, “Muslims Under Modi.”

⁴⁵ Human Rights Watch, *India: State Participation*, 2002.

⁴⁶ Katju, “The History of Hindu Nationalism in India,” 209.

⁴⁷ Ibid.

of the Sangh”, referring to the RSS’s name.⁴⁸ This level of organization and complexity, according to scholar Shani, “effectively constitutes a ‘state within a state’ in postcolonial India”.⁴⁹

The BJS first came to power at the national level in 1977, after the years of the Indira Gandhi emergency, when it merged with other parties within a wider anti-Congress party called Janata. In 1980 the merge broke, mainly due to the ties the BJS members maintained with the RSS. As said previously, the BJS revitalized itself in 1980 under the name of BJP. Under the leadership of L. K. Advani the party took an even firmer nationalist stance, bringing Hindu resentment against Muslims to the forefront by focusing on issues including cow slaughter, the destruction of Hindu temples in Jammu and Kashmir, and depicting secularism as minority appeasement.⁵⁰ In particular, as already mentioned previously, starting from the 1970s, then throughout the 1980s, the BJP accused on several occasions the Congress party of pseudo-secularism, as it increasingly appealed to various religious groups for political gain, to the detriment of secularism.

Eventually, in 1999 the BJP came to power as the head party of a government coalition named the National Democratic Alliance. However, during the full 5-year term, the coalition did not pursue core Hindutva policies or issues directly related to Hindu nationalism. This happened due to the composition of the alliance. In fact, the other members did not share the same conviction in the Hindu nationalist agenda, causing the BJP to “dilute” its ideology. The most pressing priorities for the BJP, namely, the building of a Hindu temple in Ayodhya, the implementation of a uniform civil code that governs all religious communities equally, and the revocation of Jammu and Kashmir’s constitutionally granted autonomy, the only Muslim majority state in the country, all had to wait, but not for long, as it will be outlined further on. In 2004 the elections saw the tide turn once again in favour of a more secular political coalition, the United Progressive Alliance (UPA), led by the Congress party. This happened again in 2009.⁵¹

Despite the two consecutive electoral defeats, the BJP had become a very competitive and formidable organization. Its expanding electoral base virtually allowed it to consolidate as the national alternative to the Congress party, further bringing together right-wing opposition.⁵²

In 2014, for the first time in its history, the BJP won an absolute majority in the Lok Sabha, the lower house of the bicameral Indian parliament. The manifesto for the election was “collective effort, inclusive growth”, highlighting a focus on development. Such manifesto did not entail a softening of the BJP’s Hindutva program, restating the resurrection of the controversial Ram temple in Ayodhya, protection for cows and a Uniform Civil Code, which were previously put on hold due to electoral defeat.⁵³ The Prime Ministerial candidate for the party was Modi, who had been Chief Minister of Gujarat from 2002 up to 2012, winning three consecutive

⁴⁸ Jaffrelot, “The Fate of Secularism,” 23.

⁴⁹ Shani, “Towards a Hindu Rashtra,” 265.

⁵⁰ Katju, “The History of Hindu Nationalism in India,” 211.

⁵¹ Jaffrelot, “The Fate of Secularism,” 2.

⁵² Katju, “The History of Hindu Nationalism in India,” 211-2.

⁵³ Ibid.

elections at state level. He will go on doing the same at national level, the first time since the three consecutive terms of Nehru. In 2019 him and his party obtained an even larger electoral success, registering a staggering 303 seats, well above the 272 absolute majority threshold. In 2024 they registered a regression, losing the absolute majority with 240 seats, which however did not prevent Modi from being nominated Prime Minister under the National Democratic Alliance.⁵⁴

The BJP and its leader Modi, with their rise to power in 2014, uninterrupted to this day, have inaugurated a decade marked by Hindu nationalism, anti-Muslim sentiment, coupled with discriminating and marginalizing policies against non-Hindus, among a wider trend of non-democratic governance, undermining of key democratic institutions, and autocratic legalism as discussed in previous sections of this thesis. The next subsection will be dedicated to the scholarly debate surrounding the legal mechanisms of exclusion under BJP rule, the central topic of this thesis.

4. Legal Mechanisms of Exclusion under BJP Rule

The BJP, as mentioned on several occasions throughout this paper, is in many ways constructing a Hindu state, as dictated by its Hindu-nationalist ideology based on the quest for Hindutva, outlined in the paragraphs above. Specifically, several scholars have emphasized how the construction of a Hindu state by Modi's party is a multi-level and variegated phenomenon, that cuts across all aspects of the political, economic and social sphere. Commentators have defined India's current political circumstances as an ethnic democracy, or worse, an ethnocracy. In the literature, a categorization can be found, with a distinction between informal and formal mechanisms of Hinduisation. Before delving into the most strictly legal policies put in place at the national level, it is worth depicting a brief picture of the informal trends taking place, as they are the ones most discussed in the literature.

In the research conducted by Adeney, where she evaluates the level of consolidation of ethnic democracy in India in 2019, the informal measures adopted by the BJP refer to the dimensions of group representation, discourse and socio-economic indicators. The findings highlighted an increase of underrepresentation of Indian Muslims in political institutions, reflecting therefore a high score of ethnic politics.⁵⁵ In 2019, Muslim's representation in the Lok Sabha reached an historic low. In the 2014, 2019 and 2024 elections the ruling party did not have a single Muslim MP, the first time in the country's history, and out of 1,418 state level representatives only 4 were Muslims.⁵⁶ Secondly, the extent of majoritarian discourse under the Modi administration has increased unequivocally. A notable example refers to the expression "love jihad" where rumours and misinformation have been spread by BJP politicians in order to shape a conspiracy where the

⁵⁴ Inter-Parliamentary Union, "*India – Lower House (Lok Sabha): Election of 19 April 2024*", last updated 20 June 2025, <https://data.ipu.org/parliament/IN/IN-LC01/election/IN-LC01-E20240419/>.

⁵⁵ Adeney, "How Can We Model Ethnic Democracy?", 400-3.

⁵⁶ Maiorano, "India as an Ethnocracy," 63.

Muslim community would “train young men to seduce, marry, and convert Hindu women”.⁵⁷ What is worse is that the majoritarian discourse in favour of a Hindu nationhood has often been implicitly or explicitly accompanied by the endorsement of violence perpetrated by non-state actors, like the RSS. In fact, “the BJP’s rise to power in 2014 was an inflection point for these organizations, they no longer needed to fear police retribution and, in some cases, even became incorporated into the state apparatus”.⁵⁸ Indeed, vigilante groups have increased in scale, scope and ambition, with cases of communal violence and lynchings against Muslims that have either been ignored or defended by the government,⁵⁹ as there are seen as the legitimate embodiment of majoritarian Hindu politics.⁶⁰

These developments, especially in the second term of Modi’s tenure, have been accompanied by more formal measures against minority groups, especially Muslims. In fact, however extremely relevant, informal mechanisms will not be discussed further, as this thesis is dedicated to the formal aspects of the majoritarian transformation of Indian politics, specifically to the legal dimensions of Muslim marginalization and exclusion. This is because there is a very considerable volume of literature focusing on the informal side of Hinduisation, while much less attention is dedicated to the formal and legal aspect of this change. Furthermore, the legal mechanisms for Muslim exclusion are arguably the ones with more lasting, profound consequences in a growingly ethnic state.⁶¹

With the resounding victory of 2019, the Modi government put into practice a much more determined Hindu-nationalist agenda. Khaitan defined this strong turn as a move “into consolidation mode”, where the BJP abandoned the milder approach of its first term in 2014, when it was at the head of a coalition, in order to put forward “a more direct assault on democratic constitutionalism”.⁶² Particularly, the BJP concentrated its efforts to consolidate power and Hindu-majoritarianism by “rule-changing”, the exemplary strategy of autocratic legalism.⁶³ Indeed, one could say Modi and its party “made widespread use of the law to ethnicise the functioning of the state”.⁶⁴ Along the lines of the work of Adeney, it is useful to categorize the legal mechanisms implemented by the BJP for the Hinduisation of India and the marginalization of Muslims into three categories: constitutional provisions, citizenship provisions and general legislation.⁶⁵

The most influential constitutional change was the abolition of Articles 370 and 35a of the Constitution. Article 370 conferred a special status to the Jammu and Kashmir (J&K) region, the only Muslim majority state in the Indian federation. Particularly, in line with India’s asymmetrical federal system, where states enjoy different

⁵⁷ Adeney, “How Can We Model Ethnic Democracy?”, 404, quoting Strohl, 2019.

⁵⁸ Jaffrelot, “The Fate of Secularism,” 25.

⁵⁹ Maiorano, “India as an Ethnocracy,” 64.

⁶⁰ Jaffrelot, “The Fate of Secularism,” 25.

⁶¹ Maiorano, “India as an Ethnocracy,” 62.

⁶² Khaitan, “Killing a Constitution with a Thousand Cuts,” 50.

⁶³ M. Mohsin Alam Bhat, Mayur Suresh, and Deepa Das Acevedo, “Authoritarianism in Indian State, Law, and Society,” *Verfassung und Recht in Übersee* 55, no. 4 (2022): 459–477.

⁶⁴ Maiorano, “India as an Ethnocracy,” 66.

⁶⁵ Adeney, “How Can We Model Ethnic Democracy?”, 399.

levels of self-government, Kashmir and Jammu enjoyed greater autonomy. Delhi only controlled defence, foreign relations, and communication, while the rest was administered by the local government. By abolishing article 370, the BJP stripped the state of its autonomy and divided it into two “union territories”, the designation used for federal entities which are directly ruled by the national government.⁶⁶ Article 35a, inserted on the basis of Article 370 in 1954, allowed J&K to regulate the rights and privileges of its residents. Specifically, the same article also placed limitations on individuals, especially concerning state government employment, the purchase of immovable property, and permanent residency in the region. The purpose of these provisions was to mainly preserve the demographic composition of the state. The decision to abolish articles 370 and 35a proved democratically controversial for two initial reasons. First, critics highlighted how the decision was carried out in way as to circumvent a series of constitutional norms, which some scholars defined as “nothing different from a constitutional coup”.⁶⁷ In particular, Article 370 originally required that any amendments are to be approved by the J&K Constituent Assembly, which however was dissolved in 1956. In 2019, the Presidential Order addressing the abolition of the article, reinterpreted these circumstances by substituting “Legislative Assembly” for “Constituent Assembly”. This move, “was nothing different from a legal sleight of hand, as the President brought back to life, so to speak, an institution long dead and gone, by arbitrarily identifying it with a different institution”.⁶⁸ Furthermore, this decision was in strong contradiction with the Supreme Court’s rulings of 2017 and 2018, which had affirmed that no alterations to Article 370 were possible after the Constituent Assembly’s dissolution.⁶⁹ The second point of controversy surrounding the downgrading of J&K to a union territory points to the fact of how the Modi government completely ignored the will of both Kashmiri political leaders and the broader population. The decision was planned in deep secrecy, and once the presidential order was out, and once tens of thousands of additional troops were pre-emptively sent to the Kashmir Valley, the central government went out of its way to nullify any possible resistance.⁷⁰ The de-facto military occupation of K&J continues to this day, with the BJP administration accused of being responsible for the building of a “kingdom of cruelty and fear”.⁷¹ In a 2024 article, Human Rights Watch denounced the fierce repression carried out by the Indian security forces. Freedom of speech and association have been banned since 2019, while arbitrary detention, extrajudicial killings, and other serious abuses happen regularly.⁷² These practices have been mainly carried out through the application of the Unlawful Activities (Prevention) Act, conveniently amended in August 2019 to include the power to notify individuals as terrorists,

⁶⁶ Varshney and Staggs, "Hindu Nationalism and the New Jim Crow", 11.

⁶⁷ Michelguglielmo Torri, “India 2019: Assaulting the World’s Largest Democracy; Building a Kingdom of Cruelty and Fear,” in *Asia Maior: Asia in 2019 – Escalating International Tensions and Authoritarian Involvement*, vol. XXX (Rome: Viella, 2020), 352.

⁶⁸ *Ibid.*, 354.

⁶⁹ *Ibid.*, 352-5.

⁷⁰ *Ibid.*, 355-6.

⁷¹ *Ibid.*, 358-65.

⁷² Human Rights Watch, “India: Repression Persists in Jammu and Kashmir: Rights Restricted Five Years Since Special Autonomous Status Revoked”, July 31, 2024, <https://www.hrw.org/news/2024/07/31/india-repression-persists-jammu-and-kashmir>.

not only organisations as it required previously.⁷³ Furthermore, the Armed Forces (Special Powers) Act (AFSPA) extended to Kashmir in 1990 provides members of the armed forces effective immunity from prosecution.⁷⁴ Ultimately, these legal and political developments promoted by Modi and his BJP have entailed huge suffering for J&K, a historically autonomous region, inhabited by a Muslim majority, now administered by a Hindu-nationalist government through fear and human rights abuses.

The second most important piece of legislation promoted by BJP, holding an ethnic and religious connotation, is a citizenship provision, namely the December 2019 Citizenship Amendment Act (CAA), which modified the original 1955 law. The previous citizenship law in India had no religious qualifications, but the CAA offers a fast-track for Indian citizenship to persecuted minorities coming from Afghanistan, Bangladesh and Pakistan. The reasons why this legal mechanism entrenches discrimination against the Muslim minority are mainly two-fold. First, it specifies that only the Muslim-majority countries surrounding India are countries with issues of persecution. It excludes Nepal, a Hindu-majority country, Sri Lanka, a mainly Buddhist country, and Burma, a Buddhist country where Muslim minorities have been targets of violence. The second aspect to consider is the definition of persecuted minorities the CAA proposes. It indicates as persecuted minorities the Buddhists, Christians, Hindus, Sikhs, and Zoroastrians, while excluding completely the Muslim minorities under persecution in Afghanistan and Pakistan by the Sunni majority, like the Shia Hazaras and the Ahmadis. Furthermore, it excludes Afghans fleeing from the Taliban regime.⁷⁵ This framing points to the conclusion that “In the BJP’s eyes, no Muslim groups deserved the status of persecuted minorities”.⁷⁶ For these reasons, Amnesty International has defined the CAA as a “blow” to India’s constitutional values and international human rights obligations.⁷⁷

The CAA leads into another citizenship legal mechanism. Indeed, according to the Home Affairs Minister Amit Shah, the implementation of the CAA will set the ground for the creation of a National Registry of Citizens (NRC)⁷⁸. The original NRC, which listed all Indian citizens, was concluded in 1951, after the great migrations caused by the partition of the British territories. This system would mean a nationwide citizenship verification process, where residents have to provide documents ensuring their legal status, in order to not be counted as illegal immigrants. Hindus without papers could avert the risk of not being granted citizenship by mentioning their status of members of a persecuted minority in the eyes of the Indian CAA law. The Muslims, as seen previously, do not have that path. Furthermore, Muslims born in India, if unable to provide

⁷³ Legal Observer, “Can the State Declare an Individual as a Terrorist?,” *Supreme Court Observer*, accessed 21st June 2025, <https://www.scobserver.in/journal/can-the-state-declare-an-individual-as-a-terrorist/>.

⁷⁴ Ibid.

⁷⁵ “India Activates Discriminatory Citizenship Law,” Human Rights Watch, March 15, 2024, <https://www.hrw.org/news/2024/03/15/india-activates-discriminatory-citizenship-law>.

⁷⁶ Varshney and Staggs, “Hindu Nationalism and the New Jim Crow,” 11.

⁷⁷ Amnesty International, “India: Citizenship Amendment Act Is a Blow to Indian Constitutional Values and International Standards”, March 27, 2024, <https://www.amnesty.org/en/latest/news/2024/03/india-citizenship-amendment-act-is-a-blow-to-indian-constitutional-values-and-international-standards/>.

⁷⁸Varshney and Staggs, “Hindu Nationalism and the New Jim Crow,” 12.

documentation, could face expulsion. If they do manage to stay in the country, which seems the most realistic option, since several million people are involved, their lack of papers will mean disenfranchisement and statelessness. Namely, Muslims would be excluded from voting. Several states of the Indian federation not governed by the BJP have criticized the proposal. However, the NRC has already seen some implementation in the region of Assam, in northern-eastern India. When the final NRC was drafted for Assam, roughly 1.9 million residents out of 33 million were excluded. Most of the excluded belonged to marginalized groups, such as low-income groups, ethnic Bengalis (most of which are Muslims), and LGBTQ+ individuals.⁷⁹ To prove one own's citizenship status in one of Assam tribunals for foreigners took on average 3.3 years. The impacts of such policies in Assam have proven to be terrible for tens of thousands of residents. Many have experienced economic hardship in order to cover legal expenses and lawyers. Several others have suffered from severe mental health conditions due to their exclusion by the NRC, some even committing suicide, the majority of which were Muslims.⁸⁰ The NRC, coupled with the CAA, represents a serious threat for the well-being of minorities in India. In fact, it unevenly penalizes the Muslim minority, who may be stripped of their citizenship and will not be able to take it back. The NRC in Assam arguably represents the largest state-manufactured statelessness since the end of World War II.⁸¹

In addition to constitutional and citizenship provisions, the BJP has been promoting at the national and at the local level more general legislation, ranging from religious faith choice, intimacy and food. In fact, Modi's BJP has been responsible for unprecedented attempts to control Indian social life. Among a wide variety of provisions, the two prime examples of autocratic legalism and ethnicization, marked by the enforcement of Hindu majoritarianism at the expense of individual freedom and minority rights, are embodied by the "love jihad" laws, and the criminalization of trade and slaughter of cattle⁸².

The first case refers to a set of provisions which restrict religious conversions within the context of interfaith relationships. The common designation of "love jihad" refers to the conspiracy theory, already mentioned earlier, where Muslim men would be actively engaged in concerted efforts of seducing Hindu women to eventually convert them to Islam. Related rumours have circulated in different parts of India, including abductions, seductions, conversions and marriages carried out by Muslim men with respect to Hindu women, contributing to the consolidating of anxieties around preserving the 'purity' of Hindu women and the fear of demographic replacement by the hand of the Muslims. These theories have been widely promoted by the Hindu-nationalist organizations belonging to the Sangh family, such as the influential RSS.⁸³ Starting from

⁷⁹ Uma Menon, "India's National Register of Citizens Threatens Mass Statelessness," *Journal of Public and International Affairs*, <https://jpia.princeton.edu/news/indias-national-register-citizens-threatens-mass-statelessness>.

⁸⁰ Angana P. Chatterji, Mihir Desai, Harsh Mander, and Abdul Kalam Azad, "Detention, Criminalisation, Statelessness: The Aftermath of Assam's NRC," *The Wire*, September 9, 2021, <https://thewire.in/rights/detention-criminalisation-statelessness-the-aftermath-of-assams-nrc>.

⁸¹ Bhat, Suresh, and Acevedo, "Authoritarianism in Indian State," 471.

⁸² *Ibid.*

⁸³ *Ibid.*, 474.

2014, Modi's first term, a new and distinctive wave of marriage and anti-conversion laws spread all over India, incorporating ideas from the love jihad narrative, and with the alleged claim to "provide for prohibition of conversion from one religion to another by the use of force or allurement or by fraudulent means".⁸⁴ This type of legislation, often designated as "freedom of religion" laws, has been introduced in eight Indian states ruled by the BJP between 2017 and 2022. Exemplary is the case of the 2021 Gujarat Freedom of Religion (Amendment) Act, which expands the set of people who can help enforce the law. A first information report (FIR) can be filed to the police by "any aggrieved person, his parents, brother, sister or any other person related by blood marriage or adoption".⁸⁵ "Any aggrieved person" is clearly a very wide category and an almost explicit call to arms for vigilante groups and Hindu-nationalist organizations. The law encourages fellow citizens to report their relatives or neighbours, creating distrust within civil society by turning anyone into a potential informant, and preventing the practice of religious rights and personal autonomy. Furthermore, the Gujarat law states that "the burden of proof as to whether a religious conversion was not effected through misrepresentation, force, etc., or by marriage shall lie on the person who has caused the conversion".⁸⁶ This provision assumes that women are caused to convert rather than choosing to do so, coherently with the love jihad narrative promoted by Hindu-nationalists. Indeed, in sum, the newest wave of love jihad legislation that came to the rise in BJP-ruled states in India after 2014 are more specifically engineered to prevent interfaith marriages than earlier anti-conversion laws, which have existed in India since the colonial era. Recent love jihad laws are more than anti-conversion laws, as they undermine religious liberty and privacy by obstructing the choice of partners and religious belief. Additionally, these laws are affected by serious procedural imperfections. Vague descriptions of offenses in these provisions, such as the prohibition of conversion based on "allurement", "any temptation", "better lifestyle", "coercion", "psychological pressure", "undue influence", "unconscientious use", "influence", encourages arbitrary and abusive state behaviour, meaning that practically any act of religious conversion could be a criminal offense.⁸⁷ Hindu-nationalist politicians continue to uphold these laws in the name of democracy, as they are allegedly in place to protect the rights of women, Hindu and Muslim. Particularly, they pass these laws in state legislatures, democratic institutions, in what can be defined as "a federal form of autocratic legalism".⁸⁸ At the same time, love jihad laws "explicitly endorse, and enforce majoritarian religious morality, and hence violate Indian Constitution's secular values", reflecting "a creeping legal incorporation of an ethnic state".⁸⁹

The second relevant case, regarding general legislation promoted by the BJP, affecting unequally Muslims and religious minorities, is the one regarding anti-cow slaughter and cow protection laws. Historically, cow-

⁸⁴ Y. Sharma and L. D. Jenkins, "Legislation as Disinformation: The Love Jihad Conspiracy Theory in Law and Lived Experience," *Social & Legal Studies* 33, no. 5 (2024): 767–789, <https://doi.org/10.1177/09646639231225424>.

⁸⁵ *Ibid.*, 775.

⁸⁶ *Ibid.*, 776.

⁸⁷ Bhat, Suresh, and Acevedo, "Authoritarianism in Indian State," 475.

⁸⁸ Sharma and Jenkins, "Legislation as Disinformation," 776.

⁸⁹ Bhat, Suresh, and Acevedo, "Authoritarianism in Indian State," 475.

slaughter has been a very divisive subject, and it often resulted in anti-Muslim and anti-Dalit violence, historically known as “untouchables”. In fact, the matter has remained one of the most major cultural cleavages in Indian society, intersecting with both caste and religious subordination.⁹⁰ Legislation prohibiting the slaughter of cows, a holy animal to many Hindus, has existed since the 1950s. However, after the rise of the BJP as India’s first party, BJP-led states have consistently expanded and politicized these kinds of laws.⁹¹ For example, in 2017 in Gujarat the maximum punishment for cow slaughter had been increased to include life imprisonment.⁹² Other states have legislated imprisonment of up to 10 years, and fines for sale transport or possession of beef.⁹³ As of today, 20 out of the 28 states of India prohibit cow slaughter and recognize it as a legal offense, where police can arrest without a warrant. At the same time, the introduction of stricter laws has coincided with a surge in violence related to cow protection. In several cases the perpetrators are reported to be members of Hindu-nationalist groups such as the RSS and the VHP. The RSS in particular has been involved in over 20 cases since 2016, even though these are extremely under-reported. Furthermore, cow protection related violence unequally affects minority groups, especially Muslims and Dalits. Between 2016 and 2020, out of 133 events of cow protection-related violence targeting civilians, 54 involved cattle traders, an occupation traditionally performed by Muslims and Dalits, 32 directly involved Muslims, 16 involved minority groups including Dalits and tribal groups, and 31 other individuals.⁹⁴ What is worse, according to Human Rights Watch, is that the police consistently fail to investigate and prosecute the attacks carried out by cow vigilantes, due to political pressure, while vigilantes get political protection and assistance.⁹⁵ Again, as said for the previous example regarding the recent wave of anti-conversion laws, the contemporary expansion of cow protection, apart from legal abuse and the violation of secular values, has worryingly encouraged extra-legal violence against minorities, especially Muslims and Dalits. Indeed, according to Sharma and Jenkins, “these laws incorporate ‘vigilante loopholes’ that provide legally viable spaces for vigilante mob groups to target and harass minorities”.⁹⁶

This subsection aimed at providing an overview of the current scholarly debate surrounding the legal mechanisms implemented so far by the BJP that have been criticized for their covert discrimination towards minorities, especially Muslims, the so called “intruders” of the Hindu Rashtra, or nationhood. The most relevant and controversial national legislation have been the abolition of Article 370 regarding the status of J&K, and the chain of abuses that followed, the CAA, which for the first time added a religious connotation

⁹⁰ Ibid., 474.

⁹¹ Ibid.

⁹² N. Ahmad and N. B. H. Zulkiffle, “Discriminatory Policies and Laws Target Indian Muslim Minorities in the Recent Time: A Socio-Legal Study,” *Law and Humanities Quarterly Reviews* 1, no. 2 (2022): 1–17, <https://doi.org/10.31014/aior.1996.01.02.5>.

⁹³ Human Rights Watch, *Violent Cow Protection in India: Vigilante Groups Attack Minorities*, February 19, 2019, <https://www.hrw.org/report/2019/02/19/violent-cow-protection-india/vigilante-groups-attack-minorities>.

⁹⁴ Shreya Maskara, “Cow Protection Legislation and Vigilante Violence in India,” *ACLEDA*, May 3, 2021, <https://acleddata.com/2021/05/03/cow-protection-legislation-and-vigilante-violence-in-india/>.

⁹⁵ Human Rights Watch, *Violent Cow Protection in India*.

⁹⁶ Yash Sharma and Laura Jenkins, as cited in Suresh Bhat and Acevedo, “Authoritarianism in Indian State”, 475.

to Indian citizenship, and the lurking threat of a national implementation of the NRC, which was very politicized in Assam. The last part was dedicated to state-level legislation, which while not implemented nationally, has shown disturbing levels of discrimination, ethnicization and vigilantism with respect to the Muslim minority. Particularly, the unprecedented intensification and diffusion of cow protection and anti-conversion laws serve as the prime examples of the Hindu-nationalist turn of most Indian states, controlled by the BJP. While these cases have been discussed rapidly here, the empirical chapters to come will delve more in detail into the most important pieces of legislation that have been unfairly excluding and marginalizing Muslims since 2014. In particular, constitutional amendments, legislative texts, court rulings, and executive orders will be directly examined, and incorporated with the analysis of the relevant judicial review on religious freedoms, citizenship, and federalism, and the discussion of the landmark cases challenging the CAA, NRC, and the abrogation of Article 370. What can be concluded, in line with the thought of several commentators and experts on Indian politics mentioned throughout this work, is that India is increasingly showing the characteristics of an ethnic democracy.

Accordingly, the next and last section of this literature review chapter will introduce the scholarly debate surrounding the role played by the Judiciary, in particular the Supreme Court of India, in dealing with the crisis of secularism, rise of majoritarian politics, autocratic legalism, and the discrimination towards religious minorities in the country since the appointment of Modi as Prime Minister.

5. The Judiciary's Role in Modi's Majoritarian India

Throughout India's history as an independent country, the judiciary has been a major institution in the defence of secularism and the democratic values enshrined in the 1950 Constitution.⁹⁷ The same document envisages a wide jurisdiction for the Supreme Court, with some commentators having described it as "the most powerful court of the world".⁹⁸ Additionally, it holds considerable influence over other judiciaries across the globe, especially the global south.⁹⁹ However, in recent years Indian courts have become more ambivalent, attracting considerable criticism. In fact, while the Indian SC remains the most important institution for the protection of secularism and religious freedom in India, its decisions, or often its delay in taking a decision, in recent times, have contributed to the erosion of religious neutrality and non-partisanship.¹⁰⁰ Unfortunately, some commentators have pointed the finger towards Modi and the BJP, for interfering with judicial independence and appointments.¹⁰¹

⁹⁷ Jaffrelot, "The Fate of Secularism," 29.

⁹⁸ Arun K. Thiruvengadam, "The Crisis in Context," *FRONTLINE*, February 16, 2018, <https://www.frontline.in/cover-story/the-crisis-in-context/article10055190.ece>, as cited in T. Khaitan, *Killing a Constitution with a Thousand Cuts*.

⁹⁹ Khaitan, "Killing a Constitution with a Thousand Cuts," 74; Scotti, "Essential Practice of Religion".

¹⁰⁰ Jaffrelot, "The Fate of Secularism," 30.

¹⁰¹ Khaitan, "Killing a Constitution with a Thousand Cuts", 73-4.

Chapter four of the Constitution, namely Articles 124-147, regulates the structure and the power of the Supreme Court (SC), the court that sits at the top of the Indian juridical system, followed by the High Courts (HC) in the middle, and the District and Subordinate courts at the bottom.¹⁰² The Constitution attributes almost unbridled powers to the higher judiciary for the sole purpose of protecting liberal rights embedded in Part III of the Constitution, including obviously the articles protecting freedom of religion discussed previously when examining Indian secularism.¹⁰³ Specifically, the SC is a federal court, an appellate court and also the guardian of the Indian Constitution. Additionally, it also counts as a court of record, entailing that its decisions are binding on all subordinate courts, as outlined by Article 141. This means that the SC, because it is a court of record, it inherently has the power to punish anyone who disobeys its orders, shows disrespect, or otherwise obstructs the administration of justice, as stated in Article 129, “the power to punish for contempt of itself”.¹⁰⁴ Its powers include exclusive original jurisdiction over disputes between the Government of India and one or more States, the Government of India or more States on one side and one or more States on the other, and between two or more States if the dispute involves a question of law or fact on which the existence or extent of a legal right depends.¹⁰⁵ The SC also represents the highest appellate court, and appeals against the decisions of the HCs can be made related to constitutional matters, civil matters, and criminal matters. It holds a third advisory jurisdiction, when the President decides to seek the legal advice of the SC. It is a non-binding opinion, but it is rarely contradicted. The last two functions, arguably the most important, are the SC’s role as the “Custodian of Fundamental Rights and Writ Jurisdiction”, and its power of judicial review.¹⁰⁶ The former, refers to the responsibility the Constitution assigns to the SC regarding the protection of fundamental rights, under Article 32(2). This provision differs from the original jurisdiction under Art. 131 as the disputes in these cases are not between units of the union or the State, but between the aggrieved person and agencies of the government. Still under Art. 32, the SC has the right to issue five types of writs, namely habeas corpus, mandamus, prohibition, quo warranto, and certiorari. Regarding the power for judicial review, this is not granted explicitly to the SC apart for Art. 137. However, it has evolved considerably through interpretation. Judicial review was initially limited under the principle of “procedure established by law”, but through landmark cases like *Maneka Gandhi* (1978), the SC moved closer to a “due process” approach, ensuring that laws are just, fair and reasonable. Furthermore, the 1973 *Kesavananda Bharati* case established the “basic structure” doctrine, a very important approach that restricted the power of Parliament from amending the Constitution in ways that would change its fundamental framework. The SC did not define the full content of “basic structure” in this case or subsequent ones, but explicitly indicated certain key aspects such as the

¹⁰² Indrajeet Kumar Jha, “Indian Judiciary: Changing Role and Dynamics of the Supreme Court of India,” in *Indian Politics and Political Processes*, ed. Mithilesh Kumar Jha and Kamal Nayan Choubey, 1st ed. (New Delhi: Routledge India, 2023).

¹⁰³ Amit Prakash, “Autocratic Legalism and Juridical Veto: Reflections on Politics and the Law in India,” *Social & Legal Studies* 33, no. 5 (2024): 808–824, <https://doi.org/10.1177/09646639241266241>.

¹⁰⁴ Jha, “Indian Judiciary,” in *Indian Politics and Political Processes*.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*, 136-141.

supremacy of the Constitution, rule of law, separation of powers, federalism, democracy, judicial review, and secularism. In fact, over time, despite critics and debates on its contradictions, this doctrine has become a pillar of Indian constitutional law. The chapter by Jha provides a very in-depth analysis of the SC's structure and powers, enriched by several further details which cannot be discussed in length here.¹⁰⁷

Relevant to this thesis is the approach adopted by the SC and the judiciary in dealing with secularism, a key recognized component of the “basic structure” of the Constitution, and religious matters. According to Indian scholar Manoj Mate, in the 1990s the SC played a key role in defining Indian constitutional secularism and its scope in a series of landmark decisions involving federalism, electoral regulation, the Hindu right-wing, including the BJP. Additionally, Mate stresses how the SC, although entrenching secularism as a key feature of Indian law, through these decisions created greater political space for the use of religious speech and rhetoric in government and electoral campaign.¹⁰⁸ Particularly, this took place in what have been commonly called the *Hindutva* decisions, a number of judgments which saw involved several prominent BJP members for the violation of the Representation of People Act (RPA) of 1951. The Bombay High Court held that three politicians, Dr. Ramesh Prabhoo, Manohar Joshi, and Ramchandra Kapse had each committed corrupt practices under Section 123(3) of the RPA, which explicitly prohibits candidates from appealing to electors to vote on the grounds of religion, race, caste, community, or language, and on that basis invalidated all three candidates' elections to the state legislature. On appeal, the SC upheld the decision of the HC in the *Prabhoo v. Kunte* case, but overturned the ones in *Joshi* and *Kapse*. In the *Kunte* case however, Justice J.S. Verma specified that not all religious references in elections are in violation of the RPA. In particular he stated that the term “Hindutva” or other references to Hinduism could not be criminalized under the RPA, due to the fact that Hindutva referred to a “way of life or state of mind, and is not to be equated with or understood as religious Hindu fundamentalism”¹⁰⁹. Nevertheless, the SC upheld the HC's conviction due to speeches attacking the Muslim community and advocating for Hindu candidates¹¹⁰. In *Joshi* the SC overturned the conviction on the ground that the mere reference to Hinduism did not constitute a corrupt practice. The HC had originally convicted the BJP politician for stating that if his party won the state elections, Maharashtra would become the “first Hindu state”¹¹¹. Similarly, in *Kapse* the SC's decision to overturn the conviction by the HC extended the political space for the use of religion by political parties. Specifically, in this case the HC had concluded that Kapse had violated the RPA due to the BJP's party manifesto, which included direct and lengthy references to Hindutva and Hinduism. On the other hand, the SC established “that a candidate could not be found to have committed a corrupt practice under Section 123(3) of the RPA if that candidate was not directly

¹⁰⁷ Jha, “Indian Judiciary,” in *Indian Politics and Political Processes*.

¹⁰⁸ Mate, “Constitutional Erosion and the Challenge to Secular Democracy in India”, 15-16.

¹⁰⁹ Sathe, *Judicial Activism in India*, 185, citing *Prabhu v. Kunte* (1996) 1 SCC 130 at 159, quoted in Mate, “Constitutional Erosion,” 18.

¹¹⁰ *Dr Ramesh Yeshwant Prabhoo v Shri Prabhakar Kashinath Kunte* AIR 1996 SC 1113.

¹¹¹ Mate, “Constitutional Erosion,” 19.

involved in the drafting of the election manifesto".¹¹² After these decisions, the BJP began to consolidate its message centred on religious nationalism, which will eventually lead to its definite rise in Indian politics, as discussed earlier in this chapter.

In 2014, the Modi government, with the support of the opposition, passed a constitutional amendment to reform the process of appointments for the higher judiciary. The amendment removed judicial primacy in judicial appointments, and gave the executive an upper hand. In 2015, the Supreme Court struck down the amendment on the grounds of erosion of judicial independence, which is part of the basic structure of the Constitution. Since then, according to Khaitan, the BJP executive undertook a conspicuous retaliation against the judiciary. Particularly, some serious allegations began to circulate where the government was meddling with the judiciary behind the scenes.¹¹³ Eventually, in January 2018, an unprecedented institutional scandal arose when the four senior-most judges of the SC went public with serious charges against the then Chief Justice of India (CJI) Deepak Mishra.¹¹⁴ The suggestion was that the CJI was using his powers in favour of the ruling party and its leaders in politically sensitive cases. In particular, there was a lot of controversy regarding the assignment of a case concerning the alleged murder of a trial court judge who was investigating a murder case that implicated the BJP President Amit Shah. The irregular assignment of this case to a bench headed by the then-CJI, which decided that there was no need for further investigation, was one of the primary motivations for the press conference by the four other members of the collegium. One of the four senior judges who held the press-conference confirmed after his retirement that they did indeed believe that the CJI was acting under "external influence" and that bench allocations were tainted by "political bias".¹¹⁵ The controversies continued, as ironically, Ranjan Gogoi, one of the SC judges that initially denounced the practises of CJI Deepak Mishra, once promoted to CJI himself, presided over several benches which delivered pro-Government judgements. In the Rafale case, where the Indian government signed a deal with France to buy 36 Rafale fighter jets, allegations from the opposition stated that the government had bypassed standard procurement procedures, overpaid, and favoured a private Indian company. To dismiss the petitions, the SC relied on information submitted in a sealed cover, and on a Comptroller and Auditor General (CAG) report examined by the parliamentary Public Accounts Committee, which was completely false as the report did not exist. The dismissal of the case by the SC effectively gave a clean hit to the BJP government. This led to a huge polemic, with the government filing an application seeking correction of the judgment. In the case of Central Bureau of Investigation (CBI) Director Alok Verma, the SC had to answer a straightforward legal question concerning the decision to divest CBI Director Alok Verma of his powers and functions. This took an extraordinary amount of time, and by once again resorting to sealed covers. However, the SC subsequently directed a high-powered committee to consider allegations against Mr. Verma within a week. The committee

¹¹² Ibid.

¹¹³ Khaitan, "Killing a Constitution with a Thousand Cuts," 74-5.

¹¹⁴ Jha, "Indian Judiciary," in *Indian Politics and Political Processes*, 151.

¹¹⁵ Ibid., 151-3.

consisted of the Prime Minister, the opposition leader in the Lok Sabha, and a SC judge nominated by the CJI. The body decided by a 2:1 majority to once again remove Verma from office two days after he was reinstated. These cases marked the beginning of a trend to provide information between the government and the SC in sealed covers, hindering transparency and accountability. To make things even more controversial, immediately after his retirement, former CJI Gogoi accepted the offer by the BJP government to be nominated as a Member of the Rajya Sabha, the upper house, an unprecedented event in Indian politics.¹¹⁶

The examples cited so far, while extremely valuable, do not highlight enough the crisis that the Indian judiciary is running through in most recent times. In fact, it seems as if the SC is trying to avoid any direct confrontation with the government, the BJP party consequentially benefitting directly from this tendency.¹¹⁷ More specifically, in a 2024 study, Prakash identifies three distinct trends currently affecting the Indian juridical system, which he generally depicts as being “in service of an illiberal democracy”,¹¹⁸ the one the BJP is trying to consolidate in order to achieve its majoritarian, Hindu-nationalist, and anti-Muslim Hindutva.

The first thread is named “The credulous judiciary with respect to the executive”,¹¹⁹ where the author argues how India’s higher judiciary has increasingly abandoned its ever so important right-protecting role, by often easily accepting the government’s claims, without adequate scrutiny. Indeed, the higher judiciary seems overly keen in accepting any contention advocated by the law officers of the state. Furthermore, the balance between citizens’ rights and the state’s *raison d’état* is increasingly tilting towards the second, seriously endangering the first. Key cases in line with this trend include: the Supreme Court’s dismissal of petitions for migrant workers’ protection during the COVID-19 lockdown, the almost non-critical endorsement of the Central Vista redevelopment project, and the validation of prolonged internet shutdowns in Jammu & Kashmir. Even in sensitive matters, such as the Zakia Jafri petition concerning the 2002 Gujarat riots, the court prioritized the findings of state-appointed bodies over independent inquiry. Many other court cases in recent years could be mentioned. What the author concludes is that “a credulous judiciary like this forms a formidable pillar of creeping and expanding autocratic legalism”,¹²⁰ in line with what argued in this thesis so far.

The second relevant contemporary tendency, within the broader practice of autocratic legalism affecting India’s judiciary, are the inordinate delays in scheduling and hearing important constitutional cases.¹²¹ For example, the petitions challenging the abrogation of Article 370 regarding J&K, discussed earlier in this chapter, were all delayed for over four years. The petitions addressed pressing constitutional questions, including the validity of using Article 370(1)(d) to alter the state’s status, the legitimacy of Parliament acting in place of the State Assembly, and potential violations of Articles 14 and 21 protecting fundamental rights.

¹¹⁶ Ibid.

¹¹⁷ Ibid., 153.

¹¹⁸ Amit Prakash, “Autocratic Legalism and Juridical Veto: Reflections on Politics and the Law in India,” *Social & Legal Studies* 33, no. 5 (2024): 812, <https://doi.org/10.1177/09646639241266241>

¹¹⁹ Ibid.

¹²⁰ Ibid., 816.

¹²¹ Ibid.

This facilitated a juridical pocket veto which allowed the political and legal dismantling of Article 370, becoming a *fait accompli* before the Supreme Court ultimately upheld the abrogation in December 2023. Likewise, in the case of the 2019 CAA, which has been widely contested for its discriminatory basis on religion as examined previously, the judiciary has exhibited notable lethargy. More than 200 petitions had been filed contesting the CAA for its violation of the right to equality enshrined in Art. 14 in front of the law, its discrimination of citizenship on the basis of religion, its violation of Art. 21 regarding the right to live with dignity, and more. The Court has mainly held procedural hearings without substantial engagement as of 2025. Along the same lines, the petitions regarding the 2019 amendment to the UAPA, mentioned beforehand regarding the BJP government's recent human right abuses in J&K, and which disproportionately expands state powers with limited legal safeguards, remains undecided after over five years. Overall, this delaying attitude by the Indian judiciary holds a two-fold effect. First, a degree of impunity in the executive is created, as the lack of judgments by the judiciary ensures that the executive's action remain unquestioned and unchallenged. In fact, all the mentioned cases, among many more, all regard reforms at the centre of the BJP's Hindu-nationalist agenda. Secondly, a pocket veto is created in the judiciary, meaning that by deliberately not deciding on important cases, the courts effectively allow executive actions to remain unopposed, a power not enshrined in the Constitution.¹²²

Lastly, Prakash outlines a third worrying trend. In recent years, the Indian judiciary has addressed questions regarding individual rights, personal liberties, and freedom of speech in a differential nature.¹²³ For instance, in 2020, FIRs were filed against Arnab Ranjan Goswami, the chief editor of Republic TV, a news channel consistently biased in favour of the Modi government and its policies, as well as the Hindu-nationalist ideology of the BJP¹²⁴. The FIRs accused Goswami of hurting religious sentiments during a show by making reproachful comments about Muslims, among other allegations.¹²⁵ The SC dismissed the petition, and clarified that it was listed urgently "in view of order of competent authority. It pertained to liberty and freedom of media".¹²⁶ Goswami's plea was filed at 8:07 PM and listed the next day. Furthermore, the news presenter was granted protection against any coercive action, and "the police was asked to provide protection against arrest of the person charged by the police under a cognisable offence".¹²⁷ Had this approach been upheld in comparable circumstances, the critics would have not been raised. Instead, there are numerous cases where journalists, ordinary citizens and even comedians have been arrested and jailed on similar grounds. Journalist Siddique Kappan, arrested en route to report on the Hathras case, spent nearly two years in pre-trial detention, with the

¹²² Ibid., 816-9.

¹²³ Prakash, "Autocratic Legalism and Juridical Veto," 819-21.

¹²⁴ Christophe Jaffrelot and Vihang Junle, "Republic's Debates Consistently Promote Modi and Attack Opponents, Study Finds," *The Caravan*, December 15, 2020, <https://caravanmagazine.in/media/republic-debates-study-shows-channel-promotes-modi-ndtv>.

¹²⁵ Anna MM Vetticad, "Indian Media Accused of Islamophobia for Its Coronavirus Coverage," *Al Jazeera*, May 15, 2020, <https://www.aljazeera.com/news/2020/5/15/indian-media-accused-of-islamophobia-for-its-coronavirus-coverage>.

¹²⁶ Supreme Court of India, quoted in Prakash, "Autocratic Legalism and Juridical Veto," 820.

¹²⁷ Prakash, "Autocratic Legalism and Juridical Veto," 820.

SC offering only limited intervention for medical treatment rather than substantive relief. Similarly, in the *Bhima Koregaon* case, sixteen activists and academics have languished in prison since 2018, many without chargesheets, as their pleas for bail have failed, with one detainee dying in custody. Again, in striking asymmetry, in the G. N. Saibaba case, regarding individuals with alleged Maoist links, the SC resorted to an unprecedented Saturday hearing to suspend the Bombay High Court's acquittal, ensuring continued incarceration for the accused.¹²⁸ Overall, the Indian judiciary has been displaying extreme readiness in addressing matters that are important to some, specifically those supported by the BJP regime and the state. Meanwhile, in sharp contrast, the judiciary tends to assume a sluggish approach in considering appeals from the citizenry at large. In fact, the basic principle of the rule of law, where citizens are equal before law is noticeably lacking. Therefore, it seems that currently in India, under the BJP's administration and influence over the judiciary, "some are more equal than others in matters of personal liberty and freedoms".¹²⁹

This last section of the chapter aimed at highlighting the judiciary's importance, particularly the Supreme Court, in India's current political situation, dominated since 2014 by the Hindu-nationalist rhetoric and policies of the BJP. The discussion has analysed how the judiciary is experiencing a crisis of its independence, accountability and transparency, with commentators and experts blaming Modi and its party for applying strong political pressure and meddling with judicial procedures which should be impartial under the Constitution. The recent case law briefly examined above also points in the same direction.

The circumstances surrounding the Indian judiciary nowadays directly recall the tension it exists between democratic rule and constitutionalism, discussed when introducing autocratic legalism, as theorized by Scheppele. Democratic constitutionalism solves the friction between democracy and constitutionalism by including into the latter the requirement of a self-sustaining democracy, along with liberal constitutionalism that safeguards individual rights. If the balance tilts in favour of democratic legitimacy, as it can happen when elected leaders undertake an undemocratic path of executive aggrandizement, the courts could start prioritising the claims of the elected executive and the legislature over the citizens' claims to liberal rights. In fact, as mentioned previously, a common method among elected strongmen is to first attack democracies' self-correcting mechanisms, starting from the most important, namely the courts and the media, the so called "referees". The subversion of liberal values is camouflaged under a veil of constitutional legality, with the courts being deployed to uphold the pitting of electoral democracy and majoritarianism, against constitutionalism. Therefore, the judiciary becomes an active player in the whole subversion of liberalism and fundamental rights, to the detriment of minorities.

The process is underway in India, spear-headed by the majoritarian vision of Hindutva defended by the BJP, in a stark anti-Muslim vein. In the Indian SC, autocratic legalism took the form of a credulous judiciary, the procrastination of urgent matters to benefit the executive, and unequal treatment of similar cases. These trends

¹²⁸ Ibid., 820-1.

¹²⁹ Ibid., 821.

undermine the protection of pluralism envisioned in the Indian Constitution, and foster the consolidation of an all-around Hindu ethnic democracy. The process is still ongoing, and therein “lies the hope as well as the despair in the Indian body politics”.¹³⁰

As mentioned more than once throughout this thesis, scholarly literature on India’s democratic backsliding, majoritarianism, and unfair treatment towards minorities by the BJP administration has often focused on the informal mechanisms of exclusion and discrimination. These include vigilante violence, majoritarian discourse, populist mobilization, underrepresentation of minorities, socio-economic indicators and communal violence. On the opposite, the role of formal legal mechanisms promoted and implemented under the BJP’s political agenda, and the complicity of the judiciary, has frequently received limited and scattered attention, with little in-depth analysis of their actual implications. This study seeks to address this existing gap by systematically examining how key BJP-promoted legislation has contributed to the erosion of pluralism, secularism and ultimately to the marginalization of religious minorities in what was, until very recently, considered the world’s largest democracy.

The next chapter will be dedicated to the methodology of this study, where the approach adopted for this thesis will be outlined in more detail. This will lay the ground for the subsequent empirical chapters

¹³⁰ Ibid., 822.

Methodology

1. Approaching India's Erosion of Pluralism

This thesis, as specified since the Introduction, aims to study in detail how the legal mechanisms implemented by Modi and the Bharatiya Janata Party government have strategically contributed to the erosion of pluralism and the marginalization of religious minorities, especially Muslims, in India. These legal instruments should be understood within a wider attempt by BJP politicians to consolidate a majoritarian, Hindu-dominated country, in line with the ideology of Hindutva. In parallel, these developments are to be taken into consideration within a robust process of democratic backsliding, executive aggrandizement, and autocratic legalism that is affecting the once democratic Republic of India. This multiple-level contextualization is fundamental to adequately grasp the transformations that are taking place in the Asian country.

The focus will be set on the formal mechanisms of Hinduisation, marginalization, and ethnicization, as categorized by Adeney in constitutional provisions, citizenship provisions and general legislation. The logic behind this choice is essentially three-fold. First, it is motivated by the fact that a very considerable volume of literature is already dedicated to the informal side of contemporary Hinduisation, including vigilante violence, majoritarian discourse, populist mobilization, underrepresentation of minorities, socio-economic indicators and communal violence. Meanwhile, much less attention is dedicated to the formal and legal aspect of this change. Secondly, the legal mechanisms for minority exclusion are arguably the ones with more lasting, profound, and broad consequences in a growingly *de jure* ethnic state.¹ This second point is based on the central role that autocratic legalism occupies in the democratic crisis and erosion of pluralism that India is currently experiencing.² Thirdly and lastly, including both formal and informal mechanism into this study would exceed the scope and length of this thesis. The purpose is to provide an in-depth discussion of the topic at hand, and the inclusion of informal Hinduisation practices would require additional sources and methods, with the risk of ultimately diluting the depth and relevance of the analysis.

To answer the demanding research question posed above, which focuses on formal mechanisms of exclusion and marginalization, a legal approach has been chosen, in line with the legal and formal nature of the policies and provisions to be discussed. It will do so by qualitatively analysing the most relevant legislative texts, academic literature and reports from independent NGOs. At the same time, the institutional role of the judiciary, and particularly of the powerful Supreme Court, will integrate the discussion, due to its legal-institutional relevance. The findings of this work will demonstrate that legal mechanisms have indeed played a central role in India's democratic decline, allowing for systematic exclusion of religious minorities, while

¹ Maiorano, "India as an Ethnocracy," 62

² Bhat, Suresh, and Acevedo, "Authoritarianism in Indian State".

maintaining a democratic facade. Furthermore, this thesis will attempt to demonstrate how the judiciary is in many ways adopting legal interpretations with condone the policies of the Hindu-nationalist government, consolidating a transition towards an ethnic democracy.

This chapter will outline the methodology and frameworks used in this thesis by first presenting the theoretical framework, followed by the research design, data sources, the case studies rationale, and finally the possible limitations.

2. Theoretical and Conceptual Framework

As reflected throughout the previous chapter, dedicated to the critical review and discussion of the pertinent literature, the theoretical and conceptual background of this study is based around four core themes, namely democratic backsliding, followed by autocratic legalism, Hindu-nationalism, based on the teachings of Hindutva, and ultimately ethnic democracy, all of which are interconnected within the Indian context. The four concepts are to be organized according to a reasoned order. The theoretical lens begins with broader theories of democratic backsliding, particularly executive aggrandizement, which emphasize the wider global context where recent developments in India can be placed. The order then narrows to the concept of autocratic legalism, a specific practice within executive aggrandizement. Thirdly, the ideology of Hindutva is presented, the founding block of the BJP's majoritarian, Hindu-nationalist political project. This leads to the fourth theme of ethnic democracy, which aims to label the advancing discriminatory institutional and legal characteristics of the Republic of India under the BJP government. This layered progression, starting from global patterns, reaching India-specific outcomes, provides the theoretical lens through which legal mechanisms and their consequences for religious minorities will be examined in the pages to follow.

Democratic backsliding has been at the centre of attention in the field of social sciences since the early 2000s, when the third wave of democratisation was waning away, and the global empirical landscape was showing signs of democratic regression.³ In the years to follow, the situation gradually exacerbated, with Freedom House registering the tenth consecutive year of decline in global freedom in 2016.⁴ Many commentators and scholars still think global levels of democracy are experiencing considerable regression to this day.⁵ What the academic literature has emphasized in these years, is the substantial change in contemporary democratic backsliding compared to the one of the twentieth century. Traditional coup d'états and blatant attempts to install dictatorships have disappeared across most of the globe. In fact, nowadays democracies do not die as we used to think, but rather slowly and often imperceptibly. Democratic backsliding today is therefore a process, more than a swift regime change.⁶ In particular, the most common variety of contemporary

³ Haggard and Kaufman, "Democratization During the Third Wave", 125-6.

⁴ Waldner and Lust, "Unwelcome Change", 93.

⁵ Treisman, "How Great Is the Current Danger to Democracy?", 1924.

⁶ Bermeo, "On Democratic Backsliding".

backsliding is executive aggrandizement, where democratically elected leaders embark on a quest for power and undermine the checks and balances that regulate democratic rule.⁷ As discussed in the previous chapter, the idea of executive aggrandizement has been extensively discussed by scholars in the case of contemporary BJP-ruled India as a fitting definition, that is why this concept is at the basis of the theoretical framework of this thesis.⁸ In this scenario of democratic backsliding, which has unfortunately been the case of many former democracies, elected executives, apart from dismissing political opponents, slowly but relentlessly capture the self-correcting and self-sustaining mechanisms of democracy. Among these, frequently, the first self-correcting mechanisms to be attacked by elected strongmen are the most important: the courts and the media, the so-called “referees”. Biasing the referees in the favour of the executive shields the government from legal prosecution, removal from power, and opens the way for a change of rules. In fact, courts are usually deprived of their powers and filled with government loyalists. Once the judiciary is no more independent, the government always prevaricates without blatantly breaking any laws.⁹ As anticipated earlier, once the judiciary is secured, the last important step in order for the executive to definitely secure its power is to change the rules of the game, meaning the law. Under an appearance of legality, thanks to the covert or overt support of the judiciary, want-to-be authoritarians turn to the Constitution, electoral laws, and other legal institutions in order to shape the political arena further in their favour, potentially solidifying their rule for decades.¹⁰

This final pivotal point introduces and lays the ground for the second level of this study’s theoretical framework, autocratic legalism. In fact, within the more general phenomenon of executive aggrandizement, there are patterns of “legal executive aggrandizement”, which arose in some countries across the globe in the late twentieth and early twenty-first century.¹¹ Specifically, Scheppele popularized and defined the term “autocratic legalism”, which indicates a practice where democratically elected leaders use their electoral mandates to dismantle by law the constitutional systems they inherited, with the purpose of consolidating their power and to remain in office indefinitely, eventually eliminating the ability of democratic publics to exercise their basic democratic rights, to hold leaders accountable, and to change their leaders peacefully.¹² Again, the phenomenon of autocratic legalism is extremely pertinent within the context of India’s democratic backsliding and executive aggrandizement of the BJP government. In fact, scholars have widely discussed how Modi’s party has relied on its electoral mandate to dismantle liberal democratic mechanisms through legal routes, fitting perfectly with the definition of autocratic legalism.¹³ In a context tainted by autocratic legalism, according to Scheppele, the main “casualty” is liberalism.¹⁴ This means that all the liberal safeguards of

⁷ Ibid.

⁸ Khaitan, "Killing a Constitution with a Thousand Cuts," 92; Laebens, "Beyond Democratic Backsliding".

⁹ Levitsky and Ziblatt, *How Democracies Die*, 71-76.

¹⁰ Ibid.

¹¹ Shen-Bayh, "Autocratic Legalism".

¹² Scheppele, "Autocratic Legalism", 545.

¹³ Bhat, Suresh, and Acevedo, "Authoritarianism in Indian State," 464.

¹⁴ Scheppele, "Autocratic Legalism," 580.

democracy, such as rights of speech and assembly, the independence of courts, media, the civil sector, the protection of the Constitution by an independent body like a constitutional court, are all at risk. Particularly, the erosion of liberal principles puts non-members of the majority at risk. In fact, even though democracy requires majorities to work, it is of uttermost importance that the majoritarian decision is put in check by liberal principles, so that everyone's basic rights are respected, for example, in case the majority produces an unconstitutional decision.¹⁵

This last issue presented sets the stage for the third key theme of this study, the first one to be essentially specific to the Indian context. That is Hindu-nationalism, incarnated by the ideology of Hindutva, and faithfully embraced by the BJP and its Sangh Family. Indeed, Hindu-nationalism has been the ideological driver of autocratic legalism in the country. Such majoritarian ideology, is historically centred on the defence of "Hindu interests" and the Hindu nationhood, is strongly framed in contrast to "Muslim interests" and the Muslim "intruders". Even more strikingly, often, Hindu nationalism's anti-Muslim attitude stands out more than its sense of Hindu distinctness¹⁶. Therefore, during Modi's terms, the majoritarian and anti-liberal essence of autocratic legalism, within a wider context of democratic backsliding and executive aggrandizement, has embraced the majoritarian, exclusivist and racial connotation typical of Hindu-nationalism.¹⁷ Indeed, the BJP has made extensive use of the law in order to ethnicise the functioning of the state.¹⁸ As shown previously, in order to achieve the Hinduisation of India and the marginalization of religious communities, especially Muslims, the BJP has implemented a wide array of constitutional provisions, citizenship provisions and general legislation.

The most relevant and contentious have been the abolition of Article 370 regarding the status of J&K, and the chain of abuses that followed, the CAA, which for the first time added a religious connotation to Indian citizenship, and the pending risk of a national implementation of the NRC, which was very politicized in Assam. Along the same lines of these extensive and impactful provisions, several more specific state-level laws, ranging from religious faith choice, intimacy and food, represent prime examples of the amalgamation of autocratic legalism and Hindu-nationalism into an increasingly ethnicised and marginalizing legal order¹⁹. The discussion smoothly leads into the fourth theoretical lens of this thesis, that of ethnic democracy. Differently from Hindu-nationalism and Hindutva, ethnic democracy is not specific to India, but rather a concept popularized in the social sciences by Smooha, which originally studied the state of Israel.²⁰ Particularly, ethnic democracies, according to Jaffrelot, an expert on India and Hindu-nationalism, present three main characteristics. First, the existence of a threat, real or perceived, to the ethnic nation, that must be

¹⁵ Harari, *Nexus*, 122

¹⁶ Jaffrelot, "The Fate of Secularism," 20-22.

¹⁷ Savarkar, in Katju, "The History of Hindu Nationalism in India," 206.

¹⁸ Maiorano, "India as an Ethnocracy," 66.

¹⁹ Bhat, Suresh, and Acevedo, "Authoritarianism in Indian State," 471.

²⁰ Smooha, "Minority Status in an Ethnic Democracy".

tackled to survive. Second, the claim of an exclusive homeland by the ethnic nation, where others are perceived as outsiders. Third, an ethnic democracy is characterized by a “diminished” type of democratic regime, where minority citizens enjoy incomplete rights and are discriminated against by the state.²¹ These three parameters briefly listed above are strikingly very fitting to the Hindu-nationalist doctrine, Hindutva, and their strong anti-Muslim doctrine mentioned numerous times in this work. And unfortunately, these parameters are growingly applicable to the legal and political developments in BJP-ruled India. In fact, autocratic legalism, a strand of executive aggrandizement, combined with Hindu-nationalism in the context of an electorally BJP-dominated India, has been legally fortifying an ethnic democracy²². This is also confirmed by Adeney in her study, where, by taking into account six qualitative and quantitative measures, three of an informal nature and three of a formal-legal nature, she concluded that India presents a medium-high level of ethnic democracy. That was done by taking into account data up to 2019.²³ The situation has intensified since,²⁴ as lengthily discussed in chapter two.

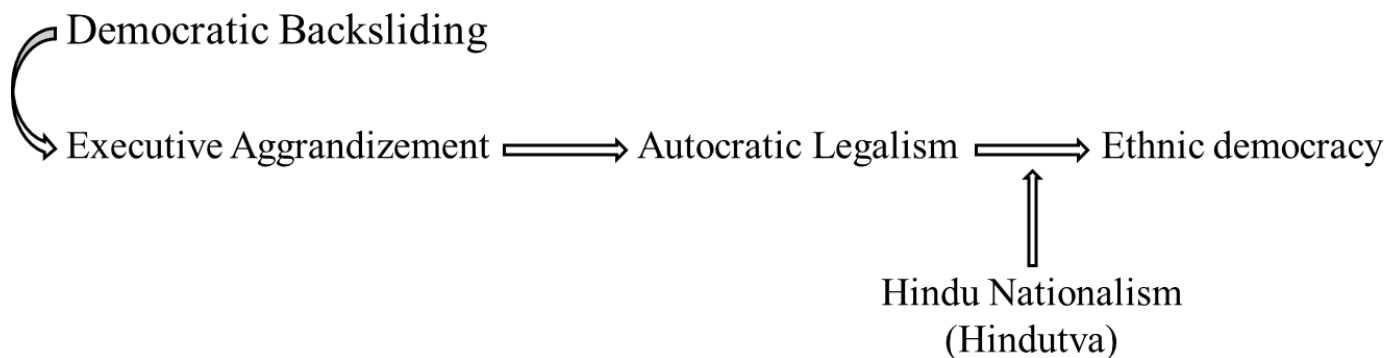


Figure 3. Conceptual diagram showing the layered theoretical framework of this study. It starts with the broader phenomenon of democratic backsliding, narrowing into executive aggrandizement and autocratic legalism, which in the Indian context combines with Hindu nationalism and its ideology of Hindutva, to construct an emerging ethnic democracy.

The theoretical and conceptual framework of this study is now complete of its four constituent elements. These have been logically chosen and organized following a descending and broad-to-specific path. It started with the broad recent trend in the literature regarding democratic backsliding, particularly the diffusion of executive aggrandizement in the last few decades. From there, it moved to a specific strand of executive aggrandizement, of a more purely legal nature, defined as autocratic legalism. These two wider concepts were put into context in the Indian case by taking into account Hindu-nationalism and its quest for Hindutva, embodied by Modi’s formidable Bharatiya Janata Party. By the interaction of the three phenomena, it arises the fourth of ethnic democracy. This layered progression, starting from global patterns, reaching into India-specific developments,

²¹ Jaffrelot, *Modi’s India*, 155.

²² Ibid.

²³ Adeney, "How Can We Model Ethnic Democracy?".

²⁴ Varshney and Staggs, "Hindu Nationalism and the New Jim Crow".

based on four main theoretical and conceptual pillars, provides the interpretive framework through which BJP-sponsored legal mechanisms and their discriminatory consequences for religious minorities will be examined.

3. Research Design

The research that will be conducted in this study will be of a qualitative, interpretative and case-based approach. This research design is widely considered as a suitable way for studying legal mechanisms and legislation. This is demonstrated by the considerable volume of literature used so far for this discussion, which almost exclusively adopts a qualitative, interpretative and case-based methodology. This is motivated by the fact that qualitative legal research (QLR) allows for deep engagement with legal texts, judicial decisions, reports, and scholarly sources. Particularly, as outlined by Bhat in an Oxford Academic book dedicated to quantitative legal research, “the objective of QLR is to understand and explain the reasons, beliefs, and motivations underlying people’s experiences” and “has the capacity to reflect the complexity of legal processes, and the complexity of the relationship between process and outcome”.²⁵ This means that unlike quantitative legal research, where the study attempts to answer questions as “How much? How often? What proportion?”, qualitative legal research wants to answer questions of “Why? How? And What?”.²⁶ The research question guiding this thesis is of the second type, as it wants to answer the question of how have legal mechanisms under the BJP government contributed to the erosion of pluralism and the marginalization of religious minorities in India.

The main tools at QLR’s disposal for data collection include observation, interview, case study, and ethnography.²⁷ This study employs case studies and textual analysis as its primary methods. As specified on several previous occasions, the analytical chapter to follow will focus on a precisely selected amount of legal case studies in order to answer the research question. The rationale used for the selection of these cases will be explained further on in a dedicated section of this chapter. These are the abolition of Article 370 regarding the status of J&K, the 2019 CAA, and the implementation of the NRC. These case studies reflect the intentions of focusing on state-led formal mechanisms, such as laws, constitutional amendments, court rulings, and official legal justifications, all of which are traceable, legitimized, and often institutionalized instruments of exclusion.

In fact, the scope of this thesis, as stated more than once, concentrates its attention on the formal legal dimension of religious marginalization and discrimination, and not on the informal mechanisms of religious exclusion and Hinduisation experienced in India during the latest BJP governments. Additionally, for the sake of clarity, the temporal span of this thesis regards the period from 2014 to the present, coinciding with the three consecutive terms of Prime Minister Narendra Modi and the dominance of the BJP in national and local

²⁵ Bhat, P. Ishwara. “Qualitative Legal Research: A Methodological Discourse.” In *Idea and Methods of Legal Research* (Delhi, 2020; online edn, Oxford Academic, 23 Jan. 2020), 359–60. <https://doi.org/10.1093/oso/9780199493098.003.0012>.

²⁶ Ibid.

²⁷ Ibid.

elections. The investigation of the formal-legal dimension can demonstrate and comprehend how democratic backsliding, autocratic legalism, religious discrimination, and Hindu-nationalism are encoded in the law of a country that was essentially secular and democratic since its foundation in 1947 up to a decade ago.

Summing up, the qualitative and interpretative legal investigation of a carefully selected number of case studies will enable this thesis to answer its core research question: *How have legal mechanisms been used by the BJP government to erode pluralism and institutionalize the marginalization of religious minorities, particularly Muslims, in India since 2014?*

4. Data Sources

This thesis will rely on multiple, complementary data sources in order to provide a comprehensive analysis of the main formal mechanism of exclusion under the current BJP government. These sources will be predominantly of four types.

First, the primary legal texts and legislative documents related to the case studies, such as the Citizenship Amendment Act (CAA), the National Register of Citizens (NRC) guidelines, and the abrogation of Article 370, will be closely examined. In fact, these texts will provide the foundations of the whole discussion centred on the marginalization of religious minorities, particularly Muslims, through legal means. Indeed, these texts provide the official language, provisions and scope of the laws under analysis.

Second, the judicial decisions and ruling by the Indian Supreme Court and higher judiciary will be considered so to understand how the judiciary interprets, validates or challenges politically sensitive cases. This includes the discussion of judicial reasoning, delays, and the broader institutional role of the courts in contemporary India, which, as has been discussed earlier, has been very unusual in recent years, especially regarding secularism, minority protection and fundamental rights.

Thirdly, formal legal documents and judicial developments will be contextualized with the use of pertinent scholarly literature. This includes academic articles and books by experts of the Indian context, such as those used so far in the previous chapter dedicated to the literature review. However limited in volume, academic literature will help this study place the BJP's implementation of marginalizing legal mechanisms within the broader conditions of democratic backsliding, executive aggrandizement, Hindu-nationalism and ultimately ethnic democracy, as outlined in the theoretical framework section of this chapter.

Lastly, legal, judicial and scholarly resources will be complemented by reports from credible non-governmental organizations and human rights organizations. These reports will provide supporting evidence to this study's quest to study the impacts of BJP-sponsored legislation on the erosion of democratic norms and the marginalization of religious minorities in India, particularly Muslims. This kind of reports often also include qualitative reasoning, with the use of statistical data and the recording of documented cases, highlighting the scope of human rights implications. This last aspect will provide an even wider understanding of the impact of the legislation under analysis.

In conclusion, these four main sources of data will enable this study to produce a layered and detailed analysis of the main marginalizing and discriminatory legal mechanisms implemented by Modi's BJP towards religious minorities. Starting from essential legal texts, moving to the judicial evaluation of these cases, followed by their political and social consequences as discussed by scholars and human rights associations, this study will answer the research question on the role of BJP legislation in India's democratic backsliding, erosion of pluralism, marginalization of religious minorities and increasing ethnicization.

5. Case Studies and Rationale

This study will focus specifically on three landmark legal mechanisms proposed and implemented by the BJP government during the leadership of Narendra Modi. As anticipated, these are the abrogation of Article 370 over the status of J&K, the 2019 Citizenship Amendment Act (CAA), and the National Register of Citizens (NRC). This section is dedicated to the clarification of the motivations that justified the selection of these case studies.

First, the cases selected each represent a binding legal policy or constitutional amendment with a high-profile operating at the national level, or with the strong possibility to do so in the near future. This differentiates them from laws of a purely subnational level, such as the ones discussed in the previous chapter regarding anti-conversion legislation and cow protection. These, although relevant as highlighted above, are specific and vary considerably across Indian states.²⁸ Additionally, to preserve analytical depth, more specific provisions were excluded. Certainly, the abrogation of Article 370 and the CAA are national level legislation and have already been implemented. On the other hand, the NRC has seen direct implementation only in the state of Assam. However, its mere numerical significance, and its potential national implementation, make it a very high-profile legal case study for this thesis. In fact, the NRC in Assam alone has directly affected almost two million people, making it arguably the largest exercise in state manufactured statelessness since World War II.²⁹ Furthermore, the BJP leadership has consistently shown a strong inclination to the updating of the NRC in the whole of India.³⁰ The prominence of these legal measures also guarantees more substantial judicial, academic and public discourse, ensuring access to robust primary and secondary sources. Therefore, the first reason for the selection of these legal case studies regards their national scope and significance.

The second reason that determined the selection of these case studies is their relevance to the status and treatment of religious minorities, especially Muslims. As anticipated in the previous chapter, the CAA includes explicit religious criteria for the obtainment of Indian citizenship. Similarly, the NRC's application, particularly in Assam, has manifested severe disproportionate procedural impacts for religious minorities in the state. On the contrary, the abrogation of Article 370 does not contain any explicit religious connotation.

²⁸ Bhat, Suresh, and Acevedo, "Authoritarianism in Indian State," 475

²⁹ *Ibid.*, 471.

³⁰ Varshney and Staggs, "Hindu Nationalism and the New Jim Crow," 11; Torri, "India 2019," 376.

However, it critically affects the status of J&K, the only Muslim-majority state in the Indian Union.³¹ Consequently, these legal case studies are analytically very relevant in order to investigate how formal legal instruments may contribute to patterns of exclusion and marginalization of religious minorities in the context of BJP-ruled India.

The third main reason for selecting these case studies, is to incorporate a range of different legal instruments, thereby offering a more comprehensive view of the transformations taking place in India with regard to pluralism and religious marginalization. This idea aims to align with Adeney's categories of formal measures, namely constitutional provisions, citizenship laws, and general legislation. These categories were formulated by the scholar in order to effectively assess the level of ethnic democracy that India was experiencing during the first term and the beginning of the second of Modi's Hindu-nationalist government.³² The concept of ethnic democracy is one of the founding theoretical lenses of this study, as explained above, and for this reason the model developed by Adeney is very pertinent. In particular, the inclusion of the abrogation of Article 370 of the Indian Constitution among the case studies clearly fits within the category of constitutional provisions. Similarly, the inclusion of the 2019 Citizenship Amendment Act visibly reflects the category of citizenship provisions. Regarding the National Registry of Citizens, this legal mechanism is also fitting to the category of citizenship provisions. However, its broader implications, such as its use for demographic control, political exclusion, and its interaction with administrative and legal practices, mean that it also functions beyond narrow citizenship legislation.³³ The analysis of a purely general piece of legislation has not been selected among the case studies in this thesis due to the absence of a high-profile, nationally significant law that strongly aligns with the research objectives of this thesis at the time of writing. As mentioned, various relevant sub-national laws would fit this model and reflect exclusionary dynamics. However, they lack the national reach, and are specific to state-level politics. Furthermore, including a further case study would have most likely stretched this thesis beyond a manageable length.

In summary, the three case studies selected, namely, the Citizenship Amendment Act, the National Register of Citizens, and the abrogation of Article 370, have been chosen based on their national scope and significance, their strong explicit or implicit implications for India's Muslim minority, and their salience in the modelling of an ethnic democracy. These valuable cases, both conceptually relevant and analytically manageable, will allow this thesis to address its research question and explore how legal instruments have contributed to the erosion of pluralism and the marginalization of religious minorities in India since 2014.

³¹ Maiorano, "India as an Ethnocracy".

³² Adeney, "How Can We Model Ethnic Democracy?".

³³ Torri, "India 2019," 373-6.

6. Limitations

After having outlined the methodology of this study, this section is dedicated to the potential limitations it holds. Their acknowledgement does not intend to diminish the value of the research, but rather aims at situating its findings within identifiable boundaries of what can be claimed, given the sources, instruments, context, and qualitative research method.

The first aspect to be considered is the access and scope of the sources., this study relies entirely on publicly retrievable sources, as described in the dedicated section, such as official legislative texts, court judgments, scholarly literature and NGO reports. Internal government deliberations or confidential judicial communications are inaccessible. This limits insight into political intent and institutional dynamics is limited to the available sources. Additionally, the qualitative legal analysis that will be carried out in the case studies focuses on the interpretation of legislative texts and court rulings while excluding empirical collection of data from field work or interviews. However, this lack of empirical data will be partially solved by the use of literature and reports which make considerable use of field work and data collection.

The second point is also connected to qualitative legal interpretation. This study is based on qualitative and interpretative methods, which entails to some degree a subjective analytical framing. Qualitative legal research, as seen, is a well-grounded practice in scholarly literature, however it leaves some leeway for alternative readings and perspectives. This is especially true for complex legal language and political behaviour.

The third point to note is the selection bias that the choice of the case studies can bear. The analysis that will be carried out in the next chapter will focus on three high-profile legal measures. This choice, as outlined above, was justified also by the relevance and national significance of these legal mechanisms. This criterium entails a risk, that is, the neglect of more subtle or incremental legal developments in more localised contexts. Nevertheless, relevant legislation at the local level has been acknowledged in this study both in the literature review when discussing the Indian context, and in the selection criteria in this methodology chapter. The last strand of inherent limitations affecting this study regards contextual and temporal limitations. This research covers the period from 2014 to the present, and contextually specific to contemporary India, under the Hindu-nationalist BJP government. While to some extent the findings of this research could offer comparative insights in other circumstances, they are not meant to be directly generalizable to other national settings or future political developments. Additionally, as stressed throughout this work, the Indian political and legal system remains extremely complex and dynamic, with legislative changes and judicial decisions that may affect the long-term applicability of this thesis's conclusion.

Overall, these four main limitations define the boundaries within which the findings of this research should be placed. The discussion of this study's possible limitations ensures stronger methodological transparency and hopefully fortifies the relevance of this research within the specific topic of analysis selected. The next chapter

will be dedicated to the examination of the three legal case studies, and how these BJP-sponsored policies have contributed to the erosion of pluralism and the marginalization of religious minorities in India.

Legal Mechanisms in Practice: Case Studies of Religious Marginalization in Contemporary India

1. The Abrogation of Article 370 and the Disenfranchisement of Jammu and Kashmir

The abrogation of Article 370 regarding the status of the federal state of Jammu and Kashmir represents the greatest constitutional change during the Modi-BJP governments.¹

The BJP, since its foundation in 1980, consistently advocated for the deletion of the Article from the Indian Constitution.² In particular, in the rounds of general elections pre-dating the actual annulment of the special status of J&K, meaning 2009, 2014 and 2019, the abrogation of the formerly princely state's autonomy was "batted for" in all of the BJP's campaign manifestos.³ After years of wait, on the 5th of August 2019, in a surprise announcement, Article 370 was made inoperative by making use of a Constitutional Order (C.O.), issued by the president of India Ram Nath Kovind⁴. The following day, another C.O. was issued by the President to abrogate Article 35a, and on the same day, the Jammu and Kashmir Reorganisation Act of 2019 (JKRA) was passed in the Lok Sabha, opening a completely new chapter for the region.⁵ The JKRA effectively abolished the special status conferred to the J&K in the Constitution, the only Muslim-majority state of the Indian federation, splitting J&K into two union territories, under the command of Lieutenant Governors (LGs), appointed by the central government⁶. The "constitutional coup"⁷ was orchestrated by the political leaders of the BJP, namely, Prime Minister Narendra Modi and Minister of Home Affairs Amit Shah.⁸

The legal developments that took place in Kashmir since August 2019 are of uttermost relevance for this thesis. The posture applied by the BJP's government in the legal administration of J&K, marked by an irrevocable takeover of its territory and people, since 2019 has shown unprecedented use of repressive policies. The Indian authorities have practically suspended the Kashmiris' right to free expression, association and peaceful assembly under the excuse of maintaining security⁹. While the government claims that the situation in the

¹ Adeney, "How Can We Model Ethnic Democracy?," 399.

² Ibid. 399; Nikhil Rampal, "Jammu and Kashmir Article 370: Revisiting Election Manifestos – BJP Push and Congress Silence," India Today, August 5, 2019, <https://www.indiatoday.in/diu/story/jammu-and-kashmir-article-370-revisiting-election-manifestos-bjp-push-and-congress-silence-1577579-2019-08-05>.

³ Rampal, "Jammu and Kashmir Article 370," India Today.

⁴ Torri, "India 2019," 353.

⁵ Agnieszka Kuszewska, "Human Rights after Article 370 Abrogation," in *Human Rights Violations in Kashmir*, ed. Piotr Balcerowicz and Agnieszka Kuszewska, 1st ed. (Abingdon: Routledge, 2022), 75.

⁶ Ibid., 76-77.

⁷ Torri, "India 2019," 352.

⁸ Kuszewska, "Human Rights after Article 370 Abrogation", 75.

⁹ Human Rights Watch, "India: Repression Persists in Jammu and Kashmir".

region has improved, dozens of civilians have been killed by armed groups since the JKRA entered into force,¹⁰ along with arbitrary detention, extrajudicial killings, ill-treatment and intentionally prolonged communications blackouts.¹¹ At the same time, the judicial system, led by the Supreme Court, has appallingly provided little, if any, remedy to the human rights violations perpetrated in J&K,¹² a region inhabited by over twelve million people, more than 68 percent of whom are Muslims.¹³ While the law is not explicitly framed against the Muslim community, as it will be discussed for the other case studies, its implementation has led to unprecedented developments in India, occurring exclusively in the Muslim majority region of Jammu and Kashmir.

This section will be dedicated to the analysis and discussion of all of the pressing points presented above. The contemporary circumstances regarding J&K will prove to be an unfortunate prime example of the anti-democratic, majoritarian, marginalizing, Hindu-nationalist, ethnic and legally autocratic political approach adopted consistently since 2014 by the Bharatiya Janata Party. All of these aspects will be addressed in turn. First, a brief but necessary outline of the historical and legal background of Article 370 up to 2019 will be presented. This will be followed by an in-depth commentary of the main legal texts that surrounded the abrogation process of the Article cited above, together with Art. 35a. These provisions will be interpreted in light of the core concepts of the theoretical framework of this study, that is to say executive aggrandizement, autocratic legalism, Hindu-nationalism, and ethnic democracy. Another subsection will discuss the complementary repressive legal instruments that were put into place after the dismantling of the state of J&K, such as the Unlawful Activities Prevention Act (UAPA). Finally, the focus will shift to the judicial response, or disregard, that the current J&K question has produced.

1.1 Historical and Legal Origins of J&K's Constitutional Status

On 26th of October 1947, Maharaja Hari Singh, the last prince of J&K signed the Instrument of Accession to join the Dominion of India.¹⁴ The ruler had contemplated several options, whether to join Pakistan, India, or to remain independent. The decision was accelerated in October when Pakistan attempted to solve the matter by instigating a “tribal” invasion into the princely state. Other historians say it was an earlier protest in the summer against the Maharaja that motivated his final choice. Whatever the case, Singh needed India's support to maintain its rule, and that help would come on the condition of J&K joining the Indian Union.¹⁵ At the time,

¹⁰ Lindsay Maizland, “India's Muslims: An Increasingly Marginalized Population,” *Council on Foreign Relations*, last updated March 18, 2024, <https://www.cfr.org/backgrounder/india-muslims-marginalized-population-bjp-modi#chapter-title-0-11>.

¹¹ Human Rights Watch, *India: Repression Persists in Jammu and Kashmir*.

¹² Human Rights Watch, *India: Government Policies, Actions Target Minorities: Year After Delhi Violence, Bias Against Muslims Taints Investigation*, February 19, 2021, <https://www.hrw.org/news/2021/02/19/india-government-policies-actions-target-minorities>.

¹³ Maizland, “India's Muslims”.

¹⁴ Supreme Court Observer, *Challenge to the Abrogation of Article 370: Case Background*, Supreme Court Observer, <https://www.scobserver.in/cases/challenge-to-the-abrogation-of-article-370-case-background/>.

¹⁵ Mridu Rai, “Kashmir: From Princely State to Insurgency,” *Oxford Research Encyclopedia of Asian History*, April 26, 2018, 1-6 <https://oxfordre.com/asianhistory/view/10.1093/acrefore/9780190277727.001.0001/acrefore-9780190277727-e-184>.

the accession was framed as provisional. In fact, Prime Minister Nehru himself pledged to hold a plebiscite in J&K in order to leave the final choice to Kashmiris on whether to join Pakistan or India. Nevertheless, over the decades, after frequent demands by the Kashmiris, numerous wars, and security council resolutions, the plebiscite remains a paper promise.¹⁶

The Instrument of Accession (IoA) for J&K is a brief three-page document outlining the conditions under which the Maharaja of J&K state joins India, still represented at the time by Governor General Mountbatten. It specifies that India's powers to legislate will be limited to matters of defence, external affairs, and communication.¹⁷ When the Constitution of India came into force in 1950, Article 370 was written based on the principles outlined in the 1947 IoA of J&K.¹⁸

“b) The power of Parliament to make laws for the said State shall be limited to-

- (i) those matters [...] declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State;”¹⁹*

However, Article 370 contained two further core components.²⁰ First, subclauses (c) and (d) specified which constitutional laws exceptionally applied to J&K, apart from the competences assigned to the central government by the 1947 IoA. Particularly, subclause (c) stated that Article 1 of the Constitution and 370 itself shall apply to J&K. While subclause (d) stated that other provisions of the Constitution shall apply to the state only if the President of India explicitly specified so by issuing an order.²¹ The application of Article 1 aimed at enforcing India as a “Union of States”. Interestingly, the term “Union of States” was preferred to others, such as “federation”, to clarify that States did not have the right to secede, according to the Drafting Committee Chairman.²² Regarding subclause (d), the possible constitutional provisions applicable by Presidential Order were regulated on two conditions. If the President wanted to issue an order on the subjects included in the IoA, he could not do so except by consulting the Government of J&K. Differently, if the President wanted to issue an order on a subject-matter not included in the IoA, he could not do so except with the “concurrence”, i.e. formal agreement, of J&K's government.²³ The last pivotal component of Art. 370 was put forward in clause (3), which legislated over the operativity of Art. 370. The President of the Union can declare the article fully

¹⁶ Ibid.

¹⁷ Maharaja Hari Singh, *Instrument of Accession of Jammu and Kashmir State*, October 26, 1947, in *Citizens for Justice and Peace*, https://cjp.org.in/wp-content/uploads/2019/08/instrument_of_accession_of_jammu_and_kashmir_state.pdf.

¹⁸ Supreme Court Observer, *Challenge to the Abrogation of Article 370*.

¹⁹ Government of India, *The Constitution of India: Original 1950*, art. 370, photolithographed at the Survey of India Offices, Dehra Dun, 1950, digital version, Internet Archive, <https://archive.org/details/the-Constitution-of-india-original-1950/page/n343/mode/2up>.

²⁰ Supreme Court Observer, *Challenge to the Abrogation of Article 370*.

²¹ Ibid.

²² Centre for Law and Policy Research, “*Article 1: Name and Territory of the Union*,” [ConstitutionofIndia.net](https://www.constitutionofindia.net/articles/article-1-name-and-territory-of-the-union/), <https://www.constitutionofindia.net/articles/article-1-name-and-territory-of-the-union/>.

²³ Government of India, *The Constitution of India: Original 1950*, art. 370.

or partially inoperative via public notification. However, this could be done only on recommendation by the Constituent Assembly of J&K.²⁴

Overall, the provisions included in this Article set out to create “an expansive, explicit, and sui generis semi-autonomous regime” for J&K.²⁵ The legal status that J&K obtained was unique within the Indian Union, as no other state was empowered to block the application of federal laws by not approving them in the state legislature.²⁶ An event that strengthened further J&K’s special status was the introduction of Art. 35A in 1954, following the 1952 “Delhi Agreement” between the central government and the one of the state.²⁷ The new article assigned an overriding power, over any provisions of the Constitution, to the legislature of J&K for laws regarding the definition of permanent residents and their special privileges in government employment, immovable property, settlement and state aid.²⁸ In the meantime, between 1951 and 1957, the Constituent Assembly of J&K concluded the Constitution for the former princely state. The assembly was dissolved after its final session in 1957, never making any express recommendation to dilute Article 370.²⁹

However, since then, Art. 370 was at the centre of various legal developments that mostly facilitated the “dilution” of the state’s unique legal features, rather than maintaining its autonomy.³⁰ Throughout the decades, the status of J&K and its Art.370 was modified forty-seven times by presidential order, ultimately extending the application of 260 articles of the Indian Constitution to J&K. In particular, India removed Kashmir’s unique legal feature of Prime Ministership, introduced national parliamentary elections, and when it came to state-level elections and appointments, the central government “uninstalled, reinstalled, and hand-picked local leaders”.³¹ Along the same interventionist approach, the use of Governor’s and President’s rule by the Union government in J&K has been the most extensive in any Indian state. The Kashmiris have experienced central rule eight times and faced the longest duration of President’s Rule, coupled with a significant silencing of Kashmiri political voices.³² Central administration by the President is outlined in Art. 356, which legislates “in case of failure of constitutional machinery in State”³³. Similarly, Section 92 of the Kashmiri 1957 Constitution regulates Governor’s rule in the state in case of constitutional failure.

Unfortunately, as will be discussed further on in this section, J&K has been a state afflicted by normalized and legitimised human rights abuses on a wide scale for decades. And since the 1980s, following controversial electoral results, J&K has been “the major flashpoint of anti-India militancy”, often exacerbated by Pakistan-

²⁴ Ibid.

²⁵ 134 Harv. L. Rev. 2530 (2021). “From Domicile to Dominion: India’s Settler Colonial Agenda in Kashmir,” *Harvard Law Review* 134, no. 7 (May 2021): 2534.

²⁶ Ibid.

²⁷ Advay Vora, “Article 370 of the Constitution: A Timeline,” *Supreme Court Observer*, July 31, 2023, <https://www.scobserver.in/journal/article-370-of-the-Constitution-a-timeline/>

²⁸ *Constitution of India*, art. 35A.

²⁹ Vora, “Article 370 of the Constitution.”

³⁰ *Harv. L. Rev.* 134, no. 7 (May 2021): 2535.

³¹ Ibid., 2536.

³² Ibid.

³³ *Constitution of India*, art. 356.

backed extremist groups.³⁴ India's response at the time was fierce, turning the region into one of the most militarized in the world up to this day.³⁵ This stark over-militarization of J&K, where armed forces were estimated to be between 600'000 and 700'000 before the 2019 abrogation of Art. 370, led to the victimisation of the civilian population, composed mostly by Muslims, and casted doubts on the real intentions behind of such extremely oppressive policies.³⁶

Contrarily to what seen so far regarding the legal and political developments that took place in J&K between independence and Modi's BJP governments, the Indian judiciary has intermittently and inconsistently defended the special status enjoyed by the former princely state under Art. 370 and 35a of the Constitution. In 1959, two years after the dissolution of the J&K Constituent Assembly, the SC in *Prem Nath Kaul v. Union of India* reestablished that a declaration by the President is subject to the approval of the Constituent Assembly.³⁷ Specifically, the SC confirmed that:

*"The Constitution makers attached great importance to the final decision of the Constituent Assembly, and the continuance of the exercise of powers conferred on the Parliament and the President by the relevant temporary provisions of Art. 370(1) is made conditional on the final approval by the said Constituent Assembly in the said matters."*³⁸

Differently, in the 1962 case *Puranlal Lakhanpal v. President of India & Ors.* the SC ruled in favour of the central government by arguing that the President, through Presidential Order, could amend Art. 370. In particular, the case revolved around the word "modifications" used in clause (1), with the court stating that the term should be given the widest effect possible, including an amendment. On the opposite, the petition filed for the case argued for a limited interpretation of "modifications", namely "partial alteration". While the SC dismissed the petition, it did specify that the term "modifications", referring to Presidential Orders, shall not include the possibility of making any "radical transformations".³⁹

In 1969, the SC this time ruled in favour of J&K's special autonomous status in *Sampat Prakash v State of Jammu & Kashmir*, however, the court upheld the President's continuing power under Art. 370, even in the absence of the J&K Constituent Assembly. The petitioners claimed that Art. 370 ceased to exist after the dissolution of the J&K Assembly in 1957, thus, the President was no longer empowered to make orders under Article 370 clause (1). On the opposite, the SC held that Art. 370 remained fully operative even after the Assembly's dismissal. Furthermore, it added that the President could continue to issue orders under Art. 370(1) with the concurrence of the State's government.⁴⁰ This verdict implied that the Article in discussion had

³⁴ Agnieszka Kuszewska, "Human Rights in Indian-administered Jammu and Kashmir: Introduction," in *Human Rights Violations in Kashmir*, ed. Piotr Balcerowicz and Agnieszka Kuszewska, 1st ed. (Abingdon: Routledge, 2022), 7-8.

³⁵ *Harv. L. Rev.* 134, no. 7 (May 2021): 2537.

³⁶ Agnieszka Kuszewska, "Human Rights in Indian-administered Jammu and Kashmir: Introduction," in *Human Rights Violations in Kashmir*, ed. Piotr Balcerowicz and Agnieszka Kuszewska, 1st ed. (Abingdon: Routledge, 2022), 10.

³⁷ Vora, "Article 370 of the Constitution".

³⁸ *Prem Nath Kaul v State of Jammu & Kashmir* (1959) 2 SCR 8.

³⁹ *Puranlal Lakhanpal v The President of India and Others* AIR 1961 SC 1519, (1962) 1 SCR 688.

⁴⁰ *Sampat Prakash v State of Jammu & Kashmir and Another* AIR 1970 SC 1118, (1970) 2 SCR 365.

achieved permanent status in the Indian Constitution, despite its initial temporary nature, and the dissolution of J&K Assembly.⁴¹

In 1972, the Court addressed another case relating to a Presidential Order, this time modifying Art. 367 of the Constitution, and applied to J&K's Art. 370. The order in question modified Art. 367, dedicated to the interpretation of the Constitution, to change the meaning of "Sadar-i-Riyasat" to "Governor", which aligned with the state's recent change in nomenclature for the Head of State. Again, the petition argued that such change lacked the recommendation of the J&K Constituent Assembly and therefore the President had no authority to issue such modifications.⁴² The SC upheld the order, and argued that since the position of Sadar-i-Riyasat no longer existed in J&K, references in the Constitution and Art. 370 to such title had become "otiose".⁴³ In fact, according to the SC, the Presidential Order clarified an issue which would have been solved anyways by the court itself through legal interpretation. Finally, the SC stated it was not concerned in answering the question whether Art. 370(3) could now be utilized to amend the provision of Art. 370(1) and (2), and decided not to express its opinion.⁴⁴

The last case that occurred before the 2019 events was in 2016, where the SC had to address a challenge against the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act of 2002, a Union legislation which was allegedly in conflict with the Jammu and Kashmir Transfer of Property Act of 1920. On that occasion, the court concluded that the Constitution of J&K was subordinate to the one of the Union, and it was therefore inappropriate to describe it as sovereign. However, most importantly to this discussion, the SC upheld the constitutional status of J&K, stating that Art. 370 shall continue to operate unless there is a recommendation of the Constituent Assembly that says otherwise, regardless of its original temporary nature.⁴⁵

This subsection aimed at providing a comprehensive analysis of the legal and historical developments regarding Art. 370 of the Indian Constitution. It did so by first placing into context the IoA of 1947, the legal instrument that laid the ground for the drafting of the article under discussion. From there, the attention turned to the strong legal dilution that J&K's special autonomy suffered in the decades following Indian independence, including the use of repressive policies and periods of harsh control by the central government. Lastly, the judicial case history of Art. 370 was discussed, highlighting how the SC has addressed related cases in a variable and inconsistent trend. Particularly, at times the court ruled leaning towards an expansion of powers of the central government in J&K, while at the same time consolidating the status of Art. 370 as a permanent feature of the Constitution, which could cease to exist only under recommendation by the

⁴¹ Vora, "Article 370 of the Constitution".

⁴² *Mohd Maqbool Damnoo v State of Jammu and Kashmir* AIR 1972 SC 963.

⁴³ *Ibid.*

⁴⁴ *Ibid.*; Abhinav Chandrachud, "The Abrogation of Article 370," *Festschrift in Honour of Nani Palkhivala* (January 2020, forthcoming), posted September 16, 2019, SSRN, <https://ssrn.com/abstract=3457514>.

⁴⁵ *State Bank of India v Santosh Gupta and Anr* AIR 2017 SC 25, 2017 (2) SCC 538, para 12.

Constituent Assembly of J&K, regardless of its dismissal in 1957. Interestingly, as it will be discussed in the following paragraphs, Art. 370 was indeed made inoperative without the reference of the Constituent Assembly of J&K, in an intricate and cunning way.

1.2 The Process of Abrogation and its Legal Foundations

As outlined in the introduction to this case study, the BJP government has constantly been opposed to Art. 370 and the special constitutional status of J&K⁴⁶, coherently with its stark Hindu-nationalist political agenda and anti-Muslim sentiment. However, Modi's BJP started taking decisive steps in J&K only at the end of its first term in 2018. These events laid the foundation for the abrogation that took place in 2019.

The first key decision was taken within the state in June 2018, when the BJP party in J&K pulled out of a coalition government formed in 2015 with the People's Democratic Party (PDP), a Muslim-backed organisation. The decision was motivated by BJP General Secretary Ram Madhav as functional in bringing control over the situation in the state. In the previous days, influential Kashmiri journalist Shujaat Bukhari was killed by unidentified gunmen,⁴⁷ later attributed to the Pakistan-based terrorist organization Lashkar-e-Taiba.⁴⁸ Furthermore, the BJP politician added it was time that J&K be handed over to the central government by Governor rule,⁴⁹ a situation already often seen in Kashmir in the past, under Section 92 of the state's Constitution, as mentioned earlier.⁵⁰ Consequently, opposition leaders and experts accused the BJP of political opportunism, as the withdrawal of the party from the government coalition in J&K could destabilize the region, and thus allow the Hindu-nationalist party "to rule Jammu and Kashmir through the Governor who has to go by the diktat of the Union Ministry in New Delhi".⁵¹

Indeed, as a result of the political breakdown in the mountainous Indian state orchestrated by the BJP, and the resignation of state Chief Minister Mehbooba Mufti, Indian President Ram Nath Kovind, a long-time BJP member and RSS loyalist,⁵² imposed the Governor's Rule in J&K on 20th June 2018.⁵³ As prescribed by the Kashmiri Constitution, the Governor's rule, used in cases of "failure of constitutional machinery in the State",

⁴⁶ Rampal, "Jammu and Kashmir Article 370."

⁴⁷ "India Kashmir: BJP pulls out of controversial alliance," *BBC News*, June 19, 2018, <https://www.bbc.com/news/world-asia-india-44530254>.

⁴⁸ "Shujaat Bukhari's Murder A Pak-Based Conspiracy, Say Police," *NDTV*, June 28, 2018, <https://www.ndtv.com/india-news/shujaat-bukharis-murder-a-pak-based-conspiracy-say-j-k-police-1874771>.

⁴⁹ Manveena Suri, "India's Ruling BJP Quits Kashmir Coalition, Leaving Region on Edge," *CNN*, June 20, 2018, quoting BJP General Secretary Ram Madhav, <https://edition.cnn.com/2018/06/20/asia/india-kashmir-bjp-intl>.

⁵⁰ *Harv. L. Rev.* 134, no. 7 (May 2021): 2536.

⁵¹ Manveena Suri, "India's Ruling BJP Quits Kashmir Coalition, Leaving Region on Edge," *CNN*, June 20, 2018, quoting Happymon Jacob, associate professor at Jawaharlal Nehru University, <https://edition.cnn.com/2018/06/20/asia/india-kashmir-bjp-intl>.

⁵² IANS, "When RSS Loyalist Ram Nath Kovind Said Islam, Christianity Are Alien to India," *The News Minute*, June 20, 2017, <https://www.thenewsminute.com/news/when-rss-loyalist-ram-nath-kovind-said-islam-christianity-are-alien-india-63957>.

⁵³ Santosh Chaubey, "Jammu and Kashmir under Governor's Rule for Eighth Time," *India Today*, June 20, 2018, <https://www.indiatoday.in/india/story/jammu-kashmir-under-governor-s-rule-for-eighth-time-1265259-2018-06-20>.

can last a maximum of six months.⁵⁴ The State Legislature was initially kept under “suspended animation” by the governor, and later dissolved in November.⁵⁵

Approaching the expiry of the Governor’s rule, on 19th December 2018, the Indian President, on recommendation of the Governor, issued a proclamation imposing President’s Rule over the state for six months, as allowed under Art. 356 of the Indian Constitution.⁵⁶ This provision just mentioned attributes to the President any powers previously vested in the governor of the state apart from the state legislature, which will be replaced by the Union’s Parliament.⁵⁷ Before the expiration of the proclamation, in June 2019, the Union cabinet chaired by Modi approved the extension of President’s Rule in J&K for six extra months, allegedly on the grounds of “the prevailing situation in the state as stated in the report of Governor of Jammu and Kashmir”.⁵⁸ However, the second term of President’s rule would be cut short by an unprecedented and unanticipated political move by the BJP leadership.

On the night between the 4th and the 5th of August 2019 the Kashmir Valley experienced a complete blackout, an indefinite curfew, and the prohibition of free movement or assembly. The government had been gathering further armed forces in the state since July. These extreme measures were put into place to prevent any possible resistance and an inevitable future crisis.⁵⁹ In fact, on 5th and 6th of August, the President of India, on recommendation of the Indian Parliament, dominated by the BJP, issued two presidential orders C.O. 272 and 273, making J&K’s Art. 370 inoperative. On 9th of August the Jammu and Kashmir Reorganisation Act (JKRA) wiped out J&K’s statehood definitely and bifurcated the state into two different Union Territories.⁶⁰ C.O. 272, issued first on the 5th, included two sections. The first one stated that the current order “superseded” the 1954 one of J&K, which as discussed earlier included special provisions like Art. 35A. The second section concerned a list of minor amendments to Art. 367, dedicated to the interpretation of the Indian Constitution. However, an apparently unimportant subclause was included in this section of C.O. 272, which proved to be a key juncture for the dismissal of J&K’s special autonomy. In particular, subclause (d) addressed clause (3) of Art. 370, the provision specifying that the recommendation of the state’s Constituent Assembly is necessary for the abrogation of Art. 370. The subclause of the C.O. stated that the original expression “Constituent Assembly of the State” will have to read as “Legislative Assembly of the State”.⁶¹ This provision created a congruity between two originally different institutions tasked with clearly distinct functions, allowing the

⁵⁴ Section 92(3), *Constitution of Jammu and Kashmir*.

⁵⁵ “Cabinet Approves Extension of President’s Rule in J&K for Six Months with Effect from 3rd July, 2019,” *Prime Minister of India*, June 12, 2019, https://www.pmindia.gov.in/en/news_updates/cabinet-approves-extension-of-presidents-rule-in-jk-for-six-months-with-effect-from-3rd-july-2019/.

⁵⁶ *Ibid.*

⁵⁷ *Constitution of India*, art. 356.

⁵⁸ *Prime Minister of India*, “Cabinet Approves Extension of President’s Rule in J&K.”

⁵⁹ Kuszewska, “Human Rights after Article 370 Abrogation,” 76–78.

⁶⁰ Chandrachud, “The Abrogation of Article 370”, 21-22.

⁶¹ The Gazette of India, Ministry of Law and Justice (Legislative Department), *The Constitution (Application to Jammu and Kashmir) Order, 2019*, C.O. 272, G.S.R. 551(E), August 5, 2019, https://www.scobserver.in/wp-content/uploads/2021/09/370_PO_CO2721.pdf.

Legislative Assembly of J&K to act on behalf of the Constituent Assembly. Not only that. Subclause (d) also entailed that a defunct institution since 1956, the Constituent Assembly, was going to be brought back into the Indian legal system by identifying it with a different one, the Legislative Assembly. This legal choice, defined by some as a “legal sleight of hand”⁶² for its oddness, also went against the SC’s jurisprudence over Art. 370. As analysed in the previous subsection, in *Sampat Prakash v State of Jammu & Kashmir* and more recently in *State Bank of India v Santosh Gupta and Anr* the SC ruled that Art. 370 will cease to exist only upon recommendation of the Constituent Assembly of the State, regardless of its prolonged period of inactivity. In fact, the court argued that Art. 370 does not specify in any way that it shall cease to exist once the Constituent Assembly has resolved its tasks or been dissolved. The SC further specified that while Art. 370 is included in the Constitution originally under the definition of temporary provision, it is in current usage and will continue to be so until the Constituent Assembly of J&K allows otherwise.⁶³ Despite the jurisprudence formulated over decades by the SC, the highest judicial body in India, the process went further, and subclause (d) of C.O. 272 proved to be a pivotal and controversial legal component.

Indeed, since J&K was under presidential rule at the time, recently renewed in July 2019, the Union Parliament was acting on behalf of the suspended and later dissolved J&K Legislative Assembly, as enshrined in Art. 356 of the Constitution.⁶⁴ With the introduction of the apparently marginal interpretative subclause (d) of C.O. 272, which replaced the Constituent Assembly for the Legislature of the State in the phrasing of Art. 370 (3), the Union Parliament was essentially empowered to recommend to the President to amend or terminate Art. 370, a task previously reversed exclusively to the former Constituent Assembly of J&K, and now replaced by the wording proposed by subclause (d) of C.O. 272. This legal stratagem opened the way for the abrogation of Art. 370 by the hands of the Union Parliament, dominated by the recently elected 2019 super BJP majority.⁶⁵ This is what effectively took place. Immediately after the issuing of C.O. 272, on the 5th of August the Rajya Sabha, the upper house of the Indian Union, sent a recommendation to the President asking for an amendment of Art. 370, empowered by the newly modified interpretation of Art. 370 (3) and the situation of President’s Rule in J&K. The recommendation, formally laid out in a Statutory Resolution of the upper house, asked for the issuing of a public notification by the President proposing the inoperativeness of Art. 370, in the exercise of the power listed in Art. 370 (3), with the exception of Art. 370 (1), which was to be modified as to confirm the complete loss of J&K’s special constitutional status. The second part of the Statutory Resolution expressed the Rajya Sabha’s views on the Jammu and Kashmir Reorganisation Bill, 2019, anticipating the organization

⁶² Torri, “India 2019,” 354.

⁶³ *State Bank of India v Santosh Gupta and Anr* AIR 2017 SC 25, 2017 (2) SCC 538, para 12.

⁶⁴ *Constitution of India*, art. 356.

⁶⁵ Becky Dale and Christine Jeavans, “India General Election 2019: What Happened?,” *BBC News*, May 24, 2019, <https://www.bbc.com/news/world-asia-india-48366944>.

of J&K after the abrogation of Art. 370.⁶⁶ As spelled out in the recommendation, on the 6th of August the Indian President issued C.O. 273:

“In exercise of the powers conferred by clause (3) of article 370 read with clause (1) of article 370 of the Constitution of India, the President, on the recommendation of Parliament, is pleased to declare that, as from the 6th August, 2019, all clauses of the said article 370 shall cease to be operative except the following which shall read as under, namely :—

‘370. All provisions of this Constitution, as amended from time to time, without any modifications or exceptions, shall apply to the State of Jammu and Kashmir notwithstanding anything contrary contained in article 152 or article 308 or any other article of this Constitution or any other provision of the Constitution of Jammu and Kashmir or any law, document, judgement, ordinance, order, by-law, rule, regulation, notification, custom or usage having the force of law in the territory of India, or any other instrument, treaty or agreement as envisaged under article 363 or otherwise.’”⁶⁷

This proclamation effectively made Art. 370 inoperative, along with Art. 35A, erasing the special autonomy and constitutional status enjoyed by J&K since its accession to the Indian Union many decades earlier. The only clause left in the Article was modified to the point of making it redundant, simply stating that from that moment, all of the provisions contained in the Indian Constitution shall apply to the state, contrarily to what originally intended through the 1947 IoA and the drafting of Art. 370.

The last legislative step, which further consolidated the end of J&K’s history as a federal state, was the enactment on the 9th of August of Jammu and Kashmir Reorganization Act, already mentioned in the previous Statutory Resolution and passed by the Lok Sabha on the 6th of August.⁶⁸ The Act is a lengthy 55-page document outlying several key changes for the former princely state. First of all, the state was divided into two separate Union Territories, the territory of Ladakh, comprising the Kargil and Leh districts, and the territory of J&K, holding all the other districts. Consequentially, seat allocations for both chambers of the national parliament were adjusted. The territory of J&K was awarded a Legislative Assembly, while Ladakh was not. The legislative powers of the state were strongly limited compared to the ones originally enshrined in Art. 370 and the IoA, outlined above. In fact, the Assembly for the Union Territory of J&K can legislate only on the subjects included in the State List and Concurrent List of the Seventh Schedule, a key appended document of the Indian Constitution where the legislative powers and responsibilities of the Union and State governments are outlined in a Union List, State List and Concurrent List.⁶⁹ The Seventh Schedule relates

⁶⁶ Rajya Sabha, *Supplementary List of Business: Statutory Resolutions*, August 5, 2019, <https://www.scobserver.in/wp-content/uploads/2021/09/S050819.pdf>.

⁶⁷ The Gazette of India, Ministry of Law and Justice (Legislative Department), *Declaration under Article 370(3) of the Constitution*, C.O. 273, G.S.R. 562(E), August 6, 2019, https://www.scobserver.in/wp-content/uploads/2021/09/370_PO_CO273_proclamation.pdf.

⁶⁸ Kuszewska, “Human Rights after Article 370 Abrogation,” 76.

⁶⁹ The Gazette of India, Ministry of Law and Justice (Legislative Department), *The Jammu and Kashmir Reorganisation Act, 2019*, No. 34 of 2019, Part II-III, August 9, 2019,

directly to Art. 246 of the Constitution, dedicated to the definition of subject-matters for Parliament and state legislatures, a provision which did not apply to J&K before 2019 due to its special status. Now, because J&K was transformed into a Union Territory under the JKRA, while the Legislative Assembly can legislate on subjects included in the State List, the national Parliament under Art. 246 (4) still has the power to make laws with respect to any matter, notwithstanding if such matter is enumerated in the State List.⁷⁰ This is a key characteristic of Union Territories, where it is the central Parliament that holds ultimate legislative control. Additionally, two further powerful restraints to legislative power are incorporated into the JKRA. The State Assembly's power to legislate on matters in the State List explicitly excludes entries 1 and 2, "Public Order" and "Police", transferring to the central government two of the most important subject-matters of the entire List.⁷¹ These exceptions in public order and police will prove to be key legal enablers for the repressive policies and practices that exacerbated in J&K starting from the enactment of the JKRA. Other important legal implications of the JKRA include the wide powers held by the Lieutenant Governor (LG), the administrator of the Union Territory directly appointed by the President. In fact, the LG holds veto power over Assembly bills.⁷²

Overall, in a matter of a few days, from the 5th of August to the 9th, J&K had been stripped of its decade-long status as an especially autonomous state within the Indian Union. As argued above, the BJP had been preparing the ground for such move substantially since 2018, at the end of its first term. In that occasion, the BJP purportedly and rather unexpectedly left the coalition of the J&K government, which had been in power since 2015, causing a political crisis in the state. On the same occasion, local BJP leaders called for the central government's intervention, instead of calling for new elections, on the grounds of a worsening security situation in the region. As a result of this orchestrated move J&K had been under Governor's Rule and later under President's Rule since 2018, which turned out to be a fundamental condition for the issuing of C.O. 272 and 273. In fact, the legislative powers of the State Legislature were taken over by the central Parliament, which was now also acting as the long defunct Constituent Assembly of J&K as outlined in C.O. 272., and could therefore put an end to Art. 370. The closing act was JKRA, which integrated and divided the former autonomous state into two Union Territories, drastically downsizing the political autonomy of Kashmiris. The whole legal foundations of this intricate abrogation process ignited a very fierce debate.⁷³ Indeed, the legal path used to achieve the long-sought abrogation of Art.370 by the BJP was at the very least unconventional. As a consequence, the abrogation immediately caused a considerable judicial reaction by the public, with

<https://cdnbbsr.s3waas.gov.in/s395192c98732387165bf8e396c0f2dad2/uploads/2019/10/2019102914.pdf>; Seventh Schedule (Article 246), Government of India, Ministry of External Affairs, <https://www.mea.gov.in/images/pdf1/S7.pdf>.

⁷⁰ Article 246, Constitution of India, clause (4).

⁷¹ The Gazette of India, Ministry of Law and Justice (Legislative Department), *The Jammu and Kashmir Reorganisation Act, 2019*, No. 34 of 2019, Part III, August 9, 2019, art. 32.

⁷² *Ibid.*, Part III.

⁷³ Torri, "India 2019," 354; *Supreme Court Observer*, "Challenge to the Abrogation of Article 370," *Supreme Court Observer*, citing *In Re: Article 370 of the Constitution*, 2023 INSC 1058, <https://www.scobserver.in/cases/challenge-to-the-abrogation-of-article-370-case-background/>.

many petitions being filed to the SC. While this topic will be discussed further on in a dedicated section, it is worth noting that the main legal controversies surrounding the legal stratagems put into place by Modi's BJP are: The equation between Constituent Assembly and State Legislature in C.O. 272, the utter absence of concurrence by the people of J&K through their elected representatives, as intended in Art.370, and lastly the conversion of J&K into a Union Territory, which is also supposed to take place after a consultation with the legislature of the state.⁷⁴

1.3 The Intensification of Repressive Legal Policies and Abuses

The Abrogation of Art. 370 and the transformation of the former state of J&K into two Union Territories dramatically changed the fate of J&K, India's only Muslim-majority state, and especially the life of Kashmiris for the worse.

As previously mentioned, during the weeks immediately before the abrogation of Art. 370, the mountainous state, already one of the most militarized areas in the world, saw the arrival of 175'000 additional military personnel,⁷⁵ and on the night between the 4th and the 5th of August a complete military lockdown was enforced, coupled with a government-imposed total communications blackout.⁷⁶ On the 5th of August Several thousand Kashmiris were immediately imprisoned under preventive detention without being charged with a recognizable offense.⁷⁷ Many of the affected were Kashmiri politicians and opposition activists, including three ex-chief ministers of J&K Farooq Abdhullah, Omar Abdhullah, and Mehmooba Mufti.⁷⁸ Since August 2019 the situation in the state has not improved, despite the declarations of the BJP leadership saying otherwise.⁷⁹ In fact, there are unfortunately numerous reports by activists and independent organizations documenting widespread, systemic and intentional abuses by the armed forces and institutions controlled by New Dheli, which are so lengthy that it is impossible to fully address them here. Notably, the "Imprisoned Resistance: 5th of August and its aftermath" report, published at the end of 2019, analyses state-sponsored oppression through first hand experiences. Its findings are overwhelming, reporting extensive use of night raids as a mode of collective punishment, the destruction of property as a mode of terrorizing, arbitrary arrests and unjustified detentions, community bonds as a form of collective punishment, in-lieu arrests, where relatives are arrested in place of the people the armed forces are looking for, mysterious deaths, pellet gun injuries, torture, and forced labour.⁸⁰ Most of these appalling practices have been documented regularly since

⁷⁴ Chandrachud, "The Abrogation of Article 370", 22-24.

⁷⁵ Jaffrelot, *Modi's India*, 364.

⁷⁶ Kuszewska, "Human Rights after Article 370 Abrogation," 76.

⁷⁷ Human Rights Watch, "India: Free Kashmiris Arbitrarily Detained—Thousands Held More Than a Month Without Charge," *Human Rights Watch*, September 16, 2019, <https://www.hrw.org/news/2019/09/16/india-free-kashmiris-arbitrarily-detained>.

⁷⁸ Jaffrelot, *Modi's India*, 367.

⁷⁹ NDTV, "Exclusive: Amit Shah Explains Why PM Modi's Kashmir Policy Has Been a Success," *NDTV*, May 29, 2024, <https://www.ndtv.com/india-news/exclusive-amit-shah-explains-why-pm-modis-kashmir-policy-has-been-a-success-5770009>

⁸⁰ PUCL (People's Union for Civil Liberties), *Imprisoned Resistance: 5th August and Its Aftermath* (fact-finding report, November 23, 2019), 6–7, <https://www.kljp.org/articles/imprisoned-resistance-5th-august-and-its-aftermath>.

2019 up to today by organizations such as the United Nations and Human Rights Watch.⁸¹ Meanwhile, according to Modi, as stated during a public speech in 2024, by abrogating Art. 370, the BJP removed the largest impediment for the development of J&K, ending at the same time the mounting corruption, nepotism and appeasement, enabling “equitable opportunities for all”.⁸²

The focus of this thesis and of this section is on the role played by the law in these circumstances of widespread human rights abuses and state oppression against religious minorities, particularly Muslims. In fact, as documented by human rights organizations so far, systemic abuses and violations of basic human rights are carried out under a veneer of legality, in accordance with specially designed legislation.⁸³ These practices are very in line with the characteristics of autocratic legalism and the unfair treatment of minorities seen in ethnic democracies, given the distinctive demographic composition of J&K. The legal mechanisms that will be analysed under this light include the Armed Forces (Special Powers) Act (AFSPA), The J&K Public Safety Act (PSA), and the Unlawful Activities (Prevention) Act (UAPA). All three were recently addressed in a 2024 written statement in the United Nations General Assembly’s Human Rights Council by the World Muslim Congress as “Draconian Laws” used to systematically suppress dissent.⁸⁴ In particular, the UAPA was interestingly amended at the same time as when the abrogation process of Art. 370 was taking place,⁸⁵ and it is a legal mechanism which is rather neglected in the literature regarding the events in J&K. The other acts mentioned refer to older legislation, nevertheless, they have seen an unprecedented increase in their execution in J&K since the 5th of August of 2019.⁸⁶

The UAPA, originally issued in 1967, provides legal procedures to deal with terrorist activities, among other matters. Up to 2019, the UAPA dealt with terrorism by notifying and identifying terrorist organizations. This meant that individuals could be legally prosecuted as terrorists only by proving their membership, support, or funding to a terrorist organization.⁸⁷ In July 2019, the BJP Minister of Home Affairs, Mr. Amit Shah, presented a new amendment bill for the UAPA, and on the 8th of August, a few days after the abrogation of Art. 370, and following the approval of both houses and the president, it entered into force.⁸⁸ The amendment focuses on Chapter VI, dedicated to the designation and treatment of terrorist organizations. The modifications

⁸¹ Human Rights Watch, *India: Repression Persists in Jammu and Kashmir*; United Nations Office of the High Commissioner for Human Rights (OHCHR), “India: UN Expert Demands Immediate End to Crackdown on Kashmiri Human Rights Defenders,” OHCHR, March 24, 2023, <https://www.ohchr.org/en/press-releases/2023/03/india-un-expert-demands-immediate-end-crackdown-kashmiri-human-rights>

⁸² Narendra Modi, “By Abrogating Article 370, We Removed the Biggest Impediment in Development of J&K,” YouTube video, 15:46, February 20, 2024, <https://www.youtube.com/watch?v=RZK57ha2O9I>

⁸³ PUCL, *Imprisoned Resistance*, Chapter 6.

⁸⁴ World Muslim Congress, written statement to the Human Rights Council, Fifty-seventh session, September 9–October 9, 2024, Agenda item 4: *Human rights situations that require the Council’s attention*, UN doc. A/HRC/57/NGO/8 (submitted August 5, 2024), accessed August 24, 2025, United Nations Digital Library, <https://docs.un.org/en/A/HRC/57/NGO/8>

⁸⁵ *The Unlawful Activities (Prevention) Amendment Bill, 2019*.

⁸⁶ *Ibid.*; Human Rights Watch, *India: Repression Persists*.

⁸⁷ Ministry of Home Affairs, Government of India, *The Unlawful Activities (Prevention) Act, 1967*, Chapter VI, <https://www.mha.gov.in/sites/default/files/A1967-37.pdf>

⁸⁸ *The Unlawful Activities (Prevention) Amendment Bill, 2019*.

introduced a fundamental shift in the legal prosecution of terrorism, in fact the central government was now able to declare an individual as a terrorist without the needing to prove its membership, support or funding to a terrorist organization.⁸⁹ In fact, following the 2019 amendment, clauses (1) to (3) of section 35 of the UAPA read like this:

“(1) The Central Government may, by²[notification], in the Official Gazette, --
(a) add an organisation to the³[First Schedule]⁴[or the name of an individual in the Fourth Schedule] [...]
(2) The Central Government shall exercise its power under clause (a) of sub-section (1) in respect of⁵[an organisation or an individual only if it believes that such organisation or individual is] involved in terrorism.
(3) [...] [an organisation or an individual shall be deemed to be involved in terrorism if such organisation or individual]—
(a) commits or participates in acts of terrorism, or
(b) prepares for terrorism, or
(c) promotes or encourages terrorism, or
(d) is otherwise involved in terrorism.”⁹⁰

The change in the legal framework for terrorism enshrined above empowers the government to label an individual as a terrorist without requiring a past conviction, trial or any links to a terrorist organization. The second clause states that the government can list an individual in the Fourth Schedule as a terrorist just if it “believes” the person is involved in such activity. The grounds for this belief are stated in clause (3), using a broad terminology, empowering the executive to issue such designations without any sort of considerable accountability. Accordingly, a 2020 joint report by several UN Special Rapporteurs specialized in the promotion of human rights, minority issues and freedom of religion, outlines various concerns related to the compatibility of the 2019 UAPA amendment with international human rights law, of which India is a signatory.⁹¹ In particular, they stress the problematic nature of the designations that the amendment provides for “terrorist”, due to its imprecise, vague criteria, and the lack of a definition of “terrorist threat”. Therefore, these provisions allow broad discretion to the Indian executive authorities. In fact, another aspect highlighted in the report is the transfer of wide powers that the amendment assigns to the executive. Consequentially, the authors highlight how these circumstances have been undermining fair trial rights, due process and the right to privacy. In particular, the Act effectively reverses the burden of proof on the accused, countering the right of presumption of innocence. Lastly, the report points out how the new UAPA threatens human rights

⁸⁹ *The Unlawful Activities (Prevention) Amendment Act, 2019* (No. 28 of 2019), Ministry of Law and Justice, Government of India, enacted August 8, 2019.

⁹⁰ *Unlawful Activities (Prevention) Act, 1967*, Section 35, as amended by the *Unlawful Activities (Prevention) Amendment Bill, 2019*.

⁹¹ United Nations Human Rights Council, Special Procedures, *Communication OL IND 7/2020 to the Government of India by Special Rapporteurs and the Working Group on Arbitrary Detention*, May 2020, accessed August 24, 2025, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25219>

defenders, freedom of expression, and religious minorities. Indeed, already at the time, in 2020, the authors warned that:

*“The proposed expansion of the legal scope of the Act to individuals as outlined in the Bill will broaden potential discrimination against religious and other minorities as well as human rights defenders and is being used to target certain civil society actors on political, religious or other unjustified grounds.”*⁹²

This is exactly what happened in J&K from August 2019 onwards. Between 2020 and 2022, out of 2,615 total UAPA cases in India, 947 were from the Muslim-majority region of J&K, or 37 per cent of the total.⁹³ These numbers are even more expressive if we consider that J&K represent only 1% of the Indian population.⁹⁴ Additionally, out of all these cases in J&K, only 3 per cent ended in a conviction.⁹⁵ According to Amnesty International, this considerably low conviction rate illustrates how the UAPA is being exploited to suppress and dishearten human rights defenders through stringent bail provisions, prolonged detention, and lengthy investigations.⁹⁶ Indeed, among this impressive volume of UAPA cases, numerous detentions regard journalists and human rights advocates.⁹⁷ For example, Khurram Parvez, a Kashmiri Muslim human rights activist, was charged in November 2021 under the UAPA on allegations of “terrorism funding, being a member of a terrorist organization, criminal conspiracy, and waging war against the state”, and to this day he is still under detention.⁹⁸ This story is a single manifestation of an organized, intentional, and documented method of coercion,⁹⁹ which has established a dreadful “new normal” for Kashmiris since August 2019.¹⁰⁰ In fact, the 2019 amendment of the UAPA is just one of the many legal manifestations of the systemic repressive approach that the central government has been applying in J&K since its controversial integration as a Union Territory. The JKRA of 2019 repealed more than 150 state laws when it entered into force, however, it kept in place roughly the same amount, including the powerful Jammu and Kashmir Public Safety Act of 1978 (PSA).¹⁰¹ The law has a long history of misuse. It was introduced by the State Government led by Sheikh Abdullah allegedly to curb timber smuggling, but already at the time it was exploited in order to discourage political

⁹² UNHRC, Special Procedures, *Communication OL IND 7/2020*, 8.

⁹³ Amnesty International, “India: Authorities Must End Repression of Dissent in Jammu and Kashmir,” press release, September 18, 2024, accessed August 24, 2025, <https://www.amnesty.org/en/latest/news/2024/09/india-authorities-must-end-repression-of-dissent-in-jammu-and-kashmir/>

⁹⁴ StatisticsTimes.com, “List of Indian States by Population,” India, accessed February 5, 2025, <https://statisticstimes.com/demographics/india/indian-states-population.php>

⁹⁵ Amnesty International, “India: Authorities Must End Repression of Dissent in Jammu and Kashmir.”

⁹⁶ Ibid.

⁹⁷ Human Rights Watch, *India: Repression Persists*.

⁹⁸ U.S. Commission on International Religious Freedom, *Khurram Parvez*, Freedom of Religion or Belief Victims Database, accessed August 24, 2025, <https://www.uscirf.gov/religious-prisoners-conscience/forb-victims-database/khurram-parvez>

⁹⁹ United Nations Office of the High Commissioner for Human Rights (OHCHR), “India: UN Expert Demands Immediate End to Crackdown on Kashmiri Human Rights Defenders,” press release, March 24, 2023, accessed August 24, 2025, <https://www.ohchr.org/en/press-releases/2023/03/india-un-expert-demands-immediate-end-crackdown-kashmiri-human-rights-defenders>

¹⁰⁰ PUCL, *Imprisoned Resistance*, Chapter 3.

¹⁰¹ *The Gazette of India, Jammu and Kashmir Reorganisation Act, 2019*, Tables 1-4.

opposers.¹⁰² Throughout the years it has raised considerable concerns for its incompatibility with international human rights law, as its provisions are in violation of due process in detention, and it has been arbitrarily use against human rights militants.¹⁰³ In fact, section 8 of the PSA empowers the government to detain people:

“a) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to:

- (i) the security of the [Union territory of Jammu and Kashmir] or the maintenance of the public order [...]”¹⁰⁴

The phrasing is again vague, similarly to what seen in the UAPA 2019 amendment, as the Act does not define broad concepts such as “security of the state” or “public order”, leaving open the possibility for misuse and arbitrary detention by the executive. Section 13 clause (1), which regulates the “Grounds of order of detention to be disclosed to persons affected by the order”, states that the detaining authority may take up to ten days in order to communicate the grounds on which the person is being detained. However, clause (2) of Section 13 affirms that nothing in clause (1) “shall require the authority to disclose facts which it considers to be against the public interest to disclose”.¹⁰⁵ This can possibly allow authorities to detain people for prolonged periods of time without having to provide any reason. According to section 18 of the Act, once the Advisory Board has confirmed the detention order, a person “acting in any manner prejudicial to the security of the Union Territory of Jammu and Kashmir” may be detained for six months in first instance, and possibly extended to up to two years.¹⁰⁶ Section 19 allows the competent authorities to re-issue detention orders as there is “no bar to making of a fresh order of detention against a person on the same facts as an earlier order of detention made against such person in any case”. Finally, section 22 effectively provides impunity from any prosecution or legal proceeding to “any person for anything done or intended to be done in good faith in pursuance of the provisions of this Act”.¹⁰⁷ The vague phrasing and lack of strong accountability measures have allowed the PSA’s stark emergence as a key repressive legal mechanism since the abrogation of J&K’s special autonomous status. Between 2014 and 2019 the Habeas Corpus Petitions (HCPs) filed to challenge detentions under the PSA before the Jammu & Kashmir and Ladakh High Court amounted to 41 in Jammu, Hindu-majority area, and 231 in Srinagar, Muslim-majority area. Meanwhile, in the period 2019-2024, once J&K was turned into a Union Territory under the central government, the HCPs filed against PSA detentions amounted to a staggering

¹⁰² Mudasir Ahmad, “How the Public Safety Act Continues to Haunt Kashmir,” *The Wire*, January 28, 2020, accessed August 25, 2025, <https://thewire.in/rights/psa-detentions-kashmir>

¹⁰³ United Nations Human Rights Council, *Opinions Adopted by the Working Group on Arbitrary Detention: Opinion No. 45/2008 (India)*, Addendum to the Report of the Working Group on Arbitrary Detention, A/HRC/13/30/Add.1, Thirteenth session, Agenda item 3, March 4, 2010, 120–29, accessed August 25, 2025, <https://docs.un.org/en/A/HRC/13/30/Add.1>; United Nations Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights Defenders, Margaret Sekaggya: Mission to India (10–21 January 2011)*, Addendum, A/HRC/19/55/Add.1, Nineteenth session, Agenda item 3, February 6, 2012, 5–6, accessed August 25, 2025, <https://digitallibrary.un.org/record/721007?ln=ar&v=pdf>

¹⁰⁴ *The Jammu and Kashmir Public Safety Act, 1978* (Act No. VI of 1978), Section 8, enacted April 8, 1978.

¹⁰⁵ *Ibid.*, Section 13.

¹⁰⁶ *Ibid.*, Section 18.

¹⁰⁷ *Ibid.*, Section 19 and 22.

289 in Jammu and 1791 in Srinagar.¹⁰⁸ Again, similarly for what seen for the UAPA, the abuses and arbitrary use of the PSA since 2019 are well documented. Amnesty International published a thorough report on the misuse of the PSA in J&K, defining it a “lawless law” due to its application of lengthy detentions without providing substantive, timely reasons, nor due process. Particularly, the PSA has seen widespread application of detention orders on vague and general grounds, with frequent procedural failures, continued detention despite bail or acquittal, and repeat orders or revolving-door detentions.¹⁰⁹ A prime example could be the one of Nazir Ronga, the J&K High Court Bar association ad-hoc chairman, who was put under preventive detention through the PSA on the 10th of July of 2024 on grounds of being “a threat to public order”. His detention was eventually quashed eight months later in March 2025 after the J&K High Court defined the allegations as “vague”, with Justice Sanjay Dhar stating that there had been “a total non-application of mind on the part of the detaining authority”.¹¹⁰ Again, this is one of the numerous examples of legal abuses put in place through the PSA in J&K, where the central government’s administration of the region, dominated by the BJP’s Hindu-nationalist and anti-Muslim majority, has been systematically using the PSA to suppress any sort of dissent or disagreement with the Hindu-nationalist majoritarian rhetoric sponsored by the centre.

The last legal mechanism that deserves particular attention in J&K is the Armed Forces (Special Powers) Act (AFSPA). Originally, the AFSPA was enacted in 1958 as a short-term measure to counter insurgencies in north-eastern India. J&K was declared as a “disturbed area” in 1990, a decision not subject to judicial review, and has since seen the application of a state version of the AFSPA. Ever since, Militants and Indian security forces have been responsible for numerous human rights violations, including extrajudicial killings and torture.¹¹¹ The Act is generally not compatible with basic internationally recognized human rights standards. Section 4 of the AFSPA allows the armed forces to fire upon or use force, without excluding the possibility of shooting to kill:

“Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area, —

(a) if he is of opinion that it is necessary so to do for the maintenance of public order, after giving such due warning as he may consider necessary, fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of fire-arms, ammunition or explosive

¹⁰⁸ Amnesty International, “India: Authorities Must End Repression of Dissent in Jammu and Kashmir.”

¹⁰⁹ Indians for Amnesty International Trust, *Tyranny of a “Lawless Law”* (Bengaluru: Indians for Amnesty International Trust, 2019), https://www.amnesty.be/IMG/pdf/tyranny_of_a_lawless_law_-_briefing-2.pdf

¹¹⁰ Naseer Ganai (TNN), “J&K HC Quashes 8-Month Detention of 76-Yr-Old Ex-Kashmir Bar Union Chief, Slams Charges as ‘Vague,’” *The Times of India*, March 18, 2025, 3:30 AM IST, accessed August 25, 2025, <https://timesofindia.indiatimes.com/india/jk-hc-quashes-8-month-detention-of-76-yr-old>

¹¹¹ Human Rights Watch, *Getting Away With Murder: 50 Years of the Armed Forces (Special Powers) Act*, Backgrounder No. 1, August 2008, accessed August 25, 2025, <https://www.hrw.org/legacy/backgrounder/2008/india0808/>

substances [...]”

Under the same circumstances, later subsections allow to arrest anyone on suspicion of a “cognizable offence”, searching any premises without need for a warrant, and the seizure of any property.¹¹² Additionally, as seen also for the PSA, section 6 of the AFSPA protects from any prosecution any person in respect of any action perpetrated in exercise of their powers under this Act¹¹³. Since the abrogation of Art. 370 in 2019, the use of unsanctioned violence through the AFSPA has not changed. Several extrajudicial killings have been reported, without the possibility of being prosecuted.¹¹⁴ The gravity of the situation imposed by the application of the AFSPA in certain areas of J&K was reiterated by the Community Human Rights and Advocacy Centre (CHRAC) in a written statement to the UN’s Human Rights Council in February 2025. It states that the situation in J&K remains one of the world’s most pressing human crises, with the AFSPA being responsible for the unchecked use of excessive force, and further unsanctioned extrajudicial killings.¹¹⁵

In this subsection, by taking into consideration the unfolding of the increased use of oppressive legal mechanisms by the BJP-led central government in the Muslim-dominated region of J&K, the objective was to demonstrate how the central government led by Modi’s Hindu nationalist agenda has taken advantage of the piloted abrogation of Art. 370 to tighten its grip on the dissent of Muslim Kashmiris. The legal measures put into place reflects the illiberal logic of autocratic legalism, where the law serves as a cover for repression and the erosion of liberalism. Given J&K’s peculiar historical and demographic background rooted in Islam, these legal measures inevitably assume an ethnic nature as well, as they contribute to the consolidation of a regime oppressing the Muslim-dominated Kashmiris, privileging Hindu-majoritarian rule, and the consolidation of an ethnic democracy. The central government has left almost no room for democratic discourse, free expression, freedom of religion, freedom of assembly, and other basic rights such as movement or due process. After the events of August 2019, Muslim Kashmiris, which already bore a history of terrorism and violence, have seen their lives worsen profoundly under purportedly designed state-imposed legal mechanisms of oppression and marginalization.

At this point, the attention turns to the judiciary, in order to understand what it has done with regard to the appalling situation of J&K’s population, and the human rights abuses that are being perpetrated.

¹¹² *The Armed Forces (Jammu and Kashmir) Special Powers Act, 1990* (Act No. 21 of 1990), enacted March 9, 1990, accessed August 25, 2025, Ministry of Home Affairs, Government of India, Sections 4-5, https://www.mha.gov.in/sites/default/files/The%20Armed%20Forces%20%28Jammu%20and%20Kashmir%29%20Special%20Powers%20Act%2C%201990_0.pdf

¹¹³ *Ibid.*, Section 7.

¹¹⁴ Human Rights Watch, *India: New Reports of Extrajudicial Killings in Kashmir – Authorities Should Investigate, Repeal Law That Perpetuates Abuse*, news release, August 14, 2020, accessed August 25, 2025, <https://www.hrw.org/news/2020/08/14/india-new-reports-extrajudicial-killings-kashmir>

¹¹⁵ *Human Rights Council, Fifty-eighth Session, 24 February–4 April 2025, Agenda Item 4: Human Rights Situations that Require the Council’s Attention. Written Statement Submitted by Community Human Rights and Advocacy Centre (CHRAC), a Non-Governmental Organization in Special Consultative Status, United Nations A/HRC/58/NGO/75*, <https://docs.un.org/en/A/HRC/58/NGO/75>

1.4 The Role of the Higher Judiciary

Having considered in detail the legal developments that have been taking place in J&K starting from Modi's decision to abrogate Art. 370 and convert the former autonomous state into a Union Territory, where human rights violation towards the Muslim-majority population have been rampant, the attention turns to the role played by the judiciary in the Kashmiri question since its escalation in 2019, and whether the justice system has provided substantial relief to the afflicted and marginalized by challenging the oppressive use of legal mechanisms. The higher judiciary is meant to be the guardian of the constitution, and the rights it enshrines, against the possible overstretch of the executive. However, the Indian judiciary, as already partially discussed in previous chapters, has shown signs of passivity and condescension with regards to the executive's aggrandizement under Modi's BJP. The following paragraphs will take into consideration the judiciary's role in addressing the controversial abrogation process of J&K's special constitutional status, followed by the judicial developments surrounding the use of repressive laws in the former state since 2019.

As soon as Art. 370 was abrogated in August 2019, a considerable number of petitions were filed to the Supreme Court challenging its constitutionality.¹¹⁶ Because the abrogation process comprehended a substantial number of acts and provisions, as seen above with C.O. 272-273 and the JKRA, the petitions addressed a number of legal conundrums. According to the Supreme Court Observer, the petitions generally raised two challenges. The first one regarded the constitutionality of the two orders issued by the President. Particularly, petitioners argued for the unconstitutionality of the orders by applying the "doctrine of colourable legislation".¹¹⁷ This doctrine, a relatively established juridical method in India, "denies legislatures of limited jurisdiction the power to enact legislation which 'purports' or 'pretends' to fall within its powers, though it does not 'in substance and in reality'".¹¹⁸ Additionally, according to the jurisprudence developed along this doctrine, courts will apply the principle of colourable legislation when legislative bodies "transgress [their] powers, the transgression being veiled by what appears, on proper examination, to be a mere pretense or disguise".¹¹⁹ According to the petitioners, by indirectly amending Art. 370 through C.O. 272 and 273 without the concurrence of the Constituent Assembly of J&K, the President engaged in colourable legislation. Particularly, in reference to the problematic substitution of "constituent assembly" with "legislative assembly" of C.O. 272.¹²⁰ The second kind of legal challenge put forward by petitioners regarded the JKRA, stating that it was unconstitutional under Art. 3 of the Constitution, which regulates "The formation of new States and

¹¹⁶ Krishnadas Rajagopal, "Petitions in SC on J&K Move: NC Challenges Constitutionality of Article 370's Abrogation," *The Hindu*, August 11, 2019, 2:00 a.m. IST, accessed August 25, 2025, <https://www.thehindu.com/news/national/petitions-in-sc-on-jk-move/article28977660.ece>

¹¹⁷ Supreme Court Observer, *Challenge to the Abrogation of Article 370*.

¹¹⁸ Farrah Ahmed, "Arbitrariness, Subordination and Unequal Citizenship" (University of Melbourne Legal Studies Research Paper No. 906, *Indian Law Review*, forthcoming, January 7, 2020, revised October 27, 2020), 10-11, SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3515056

¹¹⁹ *K.C. Gajapati Narayan Deo v. State of Orissa*, AIR 1953 SC 375, quoted in Ahmed, "Arbitrariness, Subordination and Unequal Citizenship."

¹²⁰ Supreme Court Observer, *Challenge to the Abrogation of Article 370*.

alteration of areas, boundaries or names of existing States”¹²¹. In particular, their claim was that Art. 3 does not give Parliament the powers to downgrade federal democratic states like J&K into a more integrated and less representative entity such as a Union Territory.¹²² Once the petitions were filed in August 2019, a very long and contorted judicial process started, characterized by an extraordinary delay. At the end of August 2019, a three-Judge bench of the SC referred the case to a five-Judge Constitution Bench. This bench started hearing the case in October of the same year. In 2020, the five-Judge bench rejected the request by petitioners to refer the case to a larger Constitution Bench. Since then, up to 2023, little progress had taken place with regard to the case, with some legal commentators stating that the SC bench had fallen into “a deep slumber”.¹²³ Meanwhile, petitions kept being filed by J&K political organizations and private citizens requesting early hearing.¹²⁴ In July 2023 the SC assigned the challenge to the abrogation of Art.370 to a new Constitution Bench where some replacements took place. Finally, after four years, in August 2023 the newly appointed Bench started hearing the case, which was renamed as “In re: Article 370 of the Constitution”, and included twenty-two petitions. After the conclusion of all hearings, on the 5th of September the Judges reserved judgement. Months later, on the 11th of December of 2023 the Constitution Bench lastly announced its decision over the August 2019 abrogation of Art. 370.¹²⁵ The SC upheld the Union’s abrogation of Art. 370, including all the specific legal questions that came with it. In the final conclusions of the 300-page ruling, the SC ascertained at least eight legal questions raised by the petitions.¹²⁶ Firstly, the court answered the question whether J&K retained any element of its sovereignty after the IoA. While there was some slight disagreement, with Judge S.K. Kaul saying that the former state did indeed retain some internal sovereignty, the majority either stated that Art.370 was a feature of asymmetric federalism and not sovereignty, or that the IoA showed full surrender of J&K’s sovereignty. The second issue regarded whether Art. 370 was a permanent provision of the Constitution. The whole Bench unequivocally ruled against it, mainly stressing the historical context of Art. 370 and its inclusion in Part XXI of the Constitution as a temporary provision. Thirdly, the SC ruled that the President was empowered to abrogate Art. 370 without the recommendation of the Constituent Assembly of J&K, based on its temporary nature and the argument that the dissolution of the Assembly did not affect the power of the President under Art. 370 (3). This verdict specifically was in contrast with the legal discourse of

¹²¹ *Constitution of India*, Art. 3, “Formation of New States and Alteration of Areas, Boundaries or Names of Existing States,” accessed August 25, 2025, ConstitutionofIndia.net, <https://www.constitutionofindia.net/articles/article-3-formation-of-new-states-and-alteration-of-areas-boundaries-or-names-of-existing-states/>

¹²² Supreme Court Observer, *Challenge to the Abrogation of Article 370*.

¹²³ Prakash, “Autocratic Legalism and Juridical Veto,” 817.

¹²⁴ “Sajad Lone’s Party Files Application in SC for Early Hearing of Petitions on Article 370,” *The New Indian Express*, November 9, 2020, updated 10:41 pm, accessed August 25, 2025, <https://www.newindianexpress.com/nation/2020/Nov/09/sajad-lones-party-files-application-in-sc-for-early-hearing-of-petitions-on-article-370-2221586.html>

¹²⁵ Vora, “Article 370 of the Constitution: A Timeline.”

¹²⁶ *In Re: Article 370 of the Constitution*, Writ Petition (Civil) No. 1099 of 2019 (Supreme Court of India, December 11, 2023), 2023 INSC 1058, 348-351, accessed August 25, 2025, Supreme Court Observer, <https://www.scobserver.in/wp-content/uploads/2023/07/Judgement-Abrogation-of-Article-370.pdf>; Supreme Court Observer, “Challenge to the Abrogation of Article 370 | Judgement Matrix,” *Supreme Court Observer*, December 12, 2023, accessed August 25, 2025, <https://www.scobserver.in/reports/challenge-to-the-abrogation-of-article-370-judgement-matrix/>.

the previously considered rulings of *Sampat Prakash v State of Jammu & Kashmir* and *State Bank of India v Santosh Gupta and Anr*, where it was stated that Art. 370 will cease to exist only upon recommendation of the Constituent Assembly of J&K, regardless of its prolonged period of inactivity. Balcerowicz contends the unconstitutionality of the Abrogation of Art. 370 exactly on the grounds that it expressly contravenes the judgments pronounced by the SC over a span of six decades.¹²⁷ Fourthly, regarding the controversial C.O. 272, the Bench ruled that the order was partially unconstitutional. Paragraph two, which amended the wording of Art. 370 through Art. 367, as seen above, was declared “ultra vires”, as it modifies Art. 370 (1) (d) without following the established procedure for its amendment. In brief, “an interpretation clause cannot be used to bypass the procedure laid down for amendment”.¹²⁸ However, the SC defended that the President’s actions in abrogating Art. 370 were valid, and not in “mala fide”. The SC’s premise is that the President already possessed the unilateral power to declare Art. 370 inoperative under Art. 370 (3). Therefore, the more tortuous process of applying all of India’s Constitution to J&K under Art. 370 (1) (d) was also possible, even without the concurrence of the State Government, as the result was going to be the same as direct abrogation.¹²⁹ The argument by the Bench suggests that a lesser power, the application of constitutional provisions with concurrence, can be used to achieve a greater outcome, such as abrogation, if that greater power already exists unilaterally. Surely, as Chandrachud argues, “the underlying motive force of Article 370 was that no fundamental constitutional change would be brought about in J&K without the ‘concurrence’ of its people through their elected representatives”¹³⁰. Therefore, while the abrogation process may not literally violate the constitution, it does disregard its intent. In fact, this is probably one of the points that attracted the most criticism and doubts. The fifth point confirmed the legality of C.O. 273 by again focusing on the historical trajectory of J&K, saying that “The declaration issued by the President under Article 370(3) is a culmination of the process of integration and as such is a valid exercise of power”.¹³¹ The sixth question was whether the Head of State could take irreversible decisions during President’s Rule under Art. 356. The SC again ruled in favour of the government’s decision. This happened also for the seventh matter, when the SC was asked whether the reorganization of J&K into Union Territories was a constitutionally valid measure under Art. 3. The validity rested on the assurance by the central government to restore J&K’s statehood and conduct elections for the Union Territory’s Assembly by the 30th of September 2024.¹³² The controversy surrounding this issue arises when considering that Art. 3 requires Parliament to the opinion of the Legislature of the State before taking any kind of action like the one above.¹³³ Because J&K was under President’s Rule at the time, and the State

¹²⁷ Piotr Balcerowicz, “The 2019 Debacle,” in *Law and Conflict Resolution in Kashmir*, 131 (London: Routledge, 2022), <https://doi.org/10.4324/9781003196549-14>

¹²⁸ *In Re: Article 370 of the Constitution*, 349.

¹²⁹ *Ibid.*, 350.

¹³⁰ Chandrachud, “The Abrogation of Article 370”, 23.

¹³¹ *In Re: Article 370 of the Constitution*, 350.

¹³² *Ibid.*, 351.

¹³³ *Constitution of India*, Art. 3.

Assembly had been dissolved by the central government through the Governor, Parliament did not take into account the opinion of the representatives of J&K. As seen already in this case, while the JKRA and the conversion of the State into a Union Territory may not be unconstitutional according to the Constitution Bench, it does go against the spirit of Art. 370 and Art. 3, due to the utter neglect of the will of the Kashmiri population that these provisions attempted to safeguard.¹³⁴ The last point the court addressed was the fate of the Constitution of J&K. Since the application of the constitution of India in the state following the abrogation of Art. 370, the Constitution of the State was declared inoperative and redundant by the SC.¹³⁵

Overall, the SC Bench ruled in favour of the Central Government's actions in every doubtful or controversial legal point arising from the process of revocation of J&K's special constitutional status. As already discussed in another chapter, the Indian higher judiciary has been showing worrying symptoms during the years of the Modi administrations. In fact, higher courts seem to be exceedingly accepting with respect to the government's demands, with the equilibrium between the rights of citizens and the state's interests leaning closer to the latter. A judiciary that acts this way can turn into a death sentence for democracy, unable to provide a constitutional check on executive power and incapable of protecting people's rights. Indeed, "a credulous judiciary [...] forms a formidable pillar of creeping and expanding autocratic legalism".¹³⁶ While it is difficult to say with absolute certainty whether this is the case for *In Re: Article 370 of the Constitution*, as the legal arguments proposed by both petitioners and the SC can be subject to legal interpretation and generate disagreements, there is at least one undisputable issue in the delivery of justice. The SC was able to finalize a verdict only at the end of 2023, more than four years after the facts occurred. Abrogation of Art. 370 was a matter of uttermost constitutional importance and urgency, as it regarded a state afflicted by profound, and lasting grievances, with a special standing in India's political and legal history. Once the SC finally pronounced itself, the dismemberment of the State of J&K and its autonomy was a well-established, accomplished fact. The situation for J&K had virtually evolved in an irreversible way, regardless of the SC's opinion. The exceptional delay and capriciousness in addressing the petitions, unfortunately a growing tendency in contemporary India as will be illustrated numerous times further on, grants a degree of impunity to the executive, as its decisions remain unchallenged for years, and creates a "pocket veto" for the judiciary, a practice never intended in the Indian legal system.¹³⁷

Interestingly, this is what is also happening with the case regarding the constitutionality of the UAPA amendment of 2019, discussed earlier for its stark violations of international standards for the right to a fair trial, due process and the right to privacy. At the time of writing, 2025, the case is still pending at the SC. The petitions were sent as early as August 2019. The key questions put forward regard whether the new UAPA violates the right to dissent, along with freedom of speech, and freedom of expression. Furthermore, whether

¹³⁴ Chandrachud, "The Abrogation of Article 370", 24.

¹³⁵ *In Re: Article 370 of the Constitution*, 351.

¹³⁶ Prakash, "Autocratic Legalism and Juridical Veto," 816.

¹³⁷ *Ibid.*

the power of the executive categorize someone as a terrorist without judicial adjudication goes against criminal jurisprudence, principles of rule of law, natural justice and the right to reputation. Lastly, whether the amended Act is arbitrary and in violation of Art. 14 and 21, respectively covering the principle of equality before the law, and the protection of life and personal liberty.¹³⁸ The same reasoning presented for the SC's handling of the abrogation of Art. 370 holds for the UAPA, possibly even worse since six years have gone by. The UAPA may also be considered a case of extreme importance and urgency, especially given the unprecedented and fierce application it has seen in J&K since 2019, where thousands of people were affected and taken advantage of, as described previously. The court's delay is allowing the government to continue misusing the amended UAPA to curb dissent and frighten the Kashmiri population.

Regarding the older legislation, the PSA and the AFSPA, as of today there are no cases pending or recently concluded in the Supreme Court regarding their constitutionality. They have been challenged in the past, but not since Modi's instalment nor J&K's transformation in 2019. For example, the AFSPA's constitutionality was upheld in a 1997 case.¹³⁹ However, preventive detentions under the PSA have been quashed on several occasions by the J&K High Court due to the lack of reasonable grounds for detention and the systematic misuse of the Act.¹⁴⁰ The detention orders are usually rebuked through a Habeas Corpus Petition to the High Court, which have registered an exponential increase since 2019 in J&K as discussed above.

Overall, India's higher judiciary, particularly the Supreme Court, have not played a substantial role in alleviating and safeguarding the rights of Muslim-dominated J&K. Regarding the very sensible case of the abrogation of Art. 370 and the reorganization of J&K into a Union Territory, the SC took more than four years to pronounce a verdict. Its judgement upheld the BJP government's decisions in every key legal question. Some questions were answered in a controversial and debatable way, contrasting with past jurisprudence on Art. 370 and the original intent of the provisions. While these considerations can still be up for legal debate, the exceptional delay and capriciousness that the SC has carried out is a certainty. A key constitutional matter such as Art. 370 was delayed for years while the government made the dissolution and centralisation of J&K a *fait accompli*. The same is happening with the case regarding the 2019 amendment of the UAPA, which to this day is yet to be concluded, and has been open since 2019. These juridical delays reinforce the executive while putting at risk the rights of citizens, in these cases especially Kashmiris, a traditionally Muslim community. Furthermore, these exceptional postponements empower the courts with a juridical pocket veto which is not proper to the Indian Constitution.

¹³⁸ Supreme Court Observer, "*Sajal Awasthi v. Union of India: Constitutionality of UAPA Amendment*," accessed August 25, 2025, [https://www.scobserver.in/cases/sajal-awasthi-union-of-india-constitutionality-of-uapa-amendment-case-background/#:~:text=Case%20Description,notice%20to%20the%20Union%20Government](https://www.scobserver.in/cases/sajal-awasthi-union-of-india-constitutionality-of-uapa-amendment-case-background/#:~:text=Case%20Description,notice%20to%20the%20Union%20Government;);

¹³⁹ *Naga People's Movement of Human Rights v. Union of India*, A.I.R. 1998 S.C. 431; (1998) 2 S.C.C. 109.

¹⁴⁰ Ajoy Sinha Karpuram, "Why 'Application of Mind' (by the DM) Is Crucial for Preventive Detention under the J&K Public Safety Act," *Indian Express*, April 18, 2024, <https://indianexpress.com/article/explained/explained-law/application-of-mind-dm-preventive-detention-psa-jammu-and-kashmir-9275971/>; Human Rights Watch, *India: Repression Persists*

1.5 Results

The trajectory of Jammu and Kashmir, starting from 2018, and later consolidated since 2019, provides a very dense example of the dynamics that India has been enduring with the governments of the Hindu-nationalist BJP, led by Modi since 2014. These are executive aggrandizement, autocratic legalism, Hindu-nationalism and ethnic democracy.

The BJP effectively started interfering into the Kashmiri question by destabilizing the state's political system. The sudden and most probably planned withdrawal of the party from a three-year long coalition in the state government, the subsequent imposition of Governor's and President's Rule for over a year, were calculated and necessary measures to prepare the abrogation of Art. 370 in August 2019. The abrogation of J&K's special constitutional status was made possible through a sequence of legal stratagems and the exploitation of President's Rule, where the political will of Kashmiris, the only Muslim-majority community in India, was utterly disregarded. The analysis of the legal foundations of the abrogation of Art. 370 highlights how constitutional procedures and legislation can be reinterpreted, distorted and exploited to realize political goals, exactly as indicated by the theory of autocratic legalism. The reorganization of J&K into a Union Territory under the direct control of the Central Government aligns with the executive aggrandizement agenda promoted by Modi and its party, and the majoritarian ideology of Hindu-nationalism, especially adverse to Muslims, framed as enemies or outsiders, in this case Kashmiris.

The consequences of August 2019 for the Muslim population of J&K were awful. The abrogation worsened an already historically difficult situation, and was accompanied by sweeping curfews, communications blackouts, extrajudicial killings, arbitrary detentions, further militarization. The circumstances culminated into a systematic use of repressive legislation such as the conveniently newly amended UAPA, along with the older PSA and AFSPA. These laws enforced a haunting infrastructure of repression for any form of dissent, cracking down the right to free expression, speech, fair trial, due process and worse. Extrajudicial violence and deaths became part of what observers have described as the "new normal" for Kashmiris. These recurrent events reflect the core logic of autocratic legalism, where the use of legal mechanism is functional to the legitimation of autocratic practices. Additionally, because these are perpetrated specifically by a Hindu-nationalist and anti-Muslim government against a Muslim-majority population in a mostly Muslim region, they align with the concept of ethnic democracy. Indeed, the not targeted by the government's repressive legal mechanisms are Kashmiri Muslims.

The higher judiciary, represented especially by the Supreme Court, has reinforced rather than alleviated the situation for J&K. The SC's negligence in addressing pressing constitutional matters allowed the government to do as it pleased for years, virtually allowing J&K's conditions to become irreversible. When judgment was delivered more than four years later, the SC upheld every controversial element in favour of the government. This meant going against previous jurisprudence and the intended spirit of the provisions abrogated. To make

matters worse, the challenges against the UAPA amendment remain pending since 2019. The judiciary's passivity and compliance have not provided any support to the marginalized and afflicted population of J&K. In the absence of a solid and adequate judicial review, autocratic legalism remains unchecked, reinforcing the government's majoritarian and marginalizing policies on Muslim Kashmiris.

In conclusion, the case of J&K demonstrates how legal mechanisms have been central for the marginalization and oppression of Kashmiris, which represent a unique Muslim-dominated community in India. Constitutional provisions, emergency powers, and ordinary legislation combined have entrenched a majoritarian control, eroding federalism, rights, and democratic accountability. The abrogation of Art. 370 and its aftermath embody a textbook example of autocratic legalism, where legislation serves an illiberal agenda. The specific circumstances of J&K, inhabited by a Muslim population, and the evident Hindu-nationalist ideological framework of government situates these developments also within the framework of ethnic democracy, where some citizens enjoy less privileges than others based on ethnoreligious characteristics.

Indeed, the next section will analyse a case where religion becomes a parameter for citizenship.

2. The 2019 Citizenship Amendment Act: A Non-Secular Citizenship

The 2019 Citizenship Amendment Act (CAA) made India move a large step closer to a "de jure" ethnic democracy.¹⁴¹ In fact, the CAA provides Hindu, Sikh, Buddhist, Jain, Parsi and Christian migrants from Afghanistan, Bangladesh and Pakistan a fast-tracked process to Indian citizenship, while at the same time not considering them as illegal migrants. While the official intent of the law is to protect persecuted minorities, Muslim persecuted minorities are completely excluded from the amended provisions.¹⁴² As discussed in previous chapters, India's legal framework is based on secularism and the principle of equality in front of the law. Similarly, the conception of citizenship adopted by independent India was universalistic and based on the place of birth, "ius soli".¹⁴³ For these reasons, as will be discussed in depth below, the CAA is in stark contrast with the constitutionally enshrined guarantees of equality and secularism.

The legal establishment of citizenship in India has been a long and intricately process since the moment of Partition with Pakistan in 1947, an event which has left a "long shadow" on the matter. In particular, fourteen million people crossed the newly created borders, about half in the western divided region of Punjab, and the other half in the partitioned region of Bengal.¹⁴⁴ Inherited by the British during the colonial era, independent India started with an inclusive *jus soli* regime, as *jus sanguinis* could have most probably been an impractical

¹⁴¹ Christophe Jaffrelot, "From Hindu Rashtra to Hindu Raj? A de facto or a de jure ethnic democracy?," in *Routledge Handbook of Autocratization in South Asia*, ed. Sten Widmalm (London: Routledge, 2021), 130-2, <https://doi.org/10.4324/9781003042211-13>

¹⁴² The Gazette of India, Ministry of Law and Justice (Legislative Department), *The Citizenship (Amendment) Act, 2019*, No. 47 of 2019, December 12, 2019, <https://www.scobserver.in/wp-content/uploads/2021/10/CAA2019.pdf>

¹⁴³ Jaffrelot, *Modi's India*, 371-2.

¹⁴⁴ Niraja Gopal Jayal, *Citizenship and Its Discontents: An Indian History* (Cambridge, MA: Harvard University Press, 2013), chap. 2.

principle to apply in a profoundly multiethnic society.¹⁴⁵ The principle is reflected in Part II of the 1950 Constitution regulating citizenship provisions at the commencement of the Constitution and for the people affected by the partition.¹⁴⁶ However, these provision left considerable leeway to Parliament to govern the matter. The 1955 Citizenship Act (CA) expanded the possible sources of citizenship, including birth, descent, registration, naturalization, and incorporation of territory.¹⁴⁷ Since then, the Act has been amended several times, particularly in response to migratory issues in sensible areas such as Assam in the eastern border with Bangladesh.¹⁴⁸ In fact, as will be discussed in the third and last case study of this thesis, dedicated to the National register of Citizens (NRC) in Assam, the CAA and the NRC are deeply connected, if not complementary, to the political agenda of the BJP and its anti-Muslim attitude.¹⁴⁹

The BJP has long sought an amendment to the CA, particularly in relation to the issue of illegal migration in the eastern border with Muslim Bangladesh. Already in 2004, during a BJP-led government, an amendment was passed introducing the first reference to religious identities and illegal migrants.¹⁵⁰ It is in fact considered the precursor to the 2019 CAA.¹⁵¹ The Modi government had already proposed a CAA in 2016 during its first term, however it was not passed on time in the Lok Sabha. During the 2019 electoral campaigns the CAA was again reinstated as a key measure.¹⁵²

This 2019 CAA is pivotal to the research objective of this thesis. Its discriminating nature based on ethno-religious distinction of Muslim migrants makes it a key legal mechanism for the marginalization of religious minorities during the rule of Modi's Hindu-nationalist BJP governments. Similarly with what seen for the J&K case, the 2019 CAA case study will be dealt with by first introducing its legal and historical background, partially initiated here, followed by the legal analysis of the actual discriminatory contents of the Amendment. Then, the unsatisfactory role of the higher judiciary will be discussed. Some important consideration will be put forward regarding the widespread anti-CAA movement and the government's violent response. Lastly, apart from providing a synthesis determining how the CAA's is a legal embodiment of autocratic legalism, Hindu-nationalism, and ethnic democracy, the discussion will highlight how the CAA is meant to work in combination with the NRC, the last case study.

¹⁴⁵ Ibid., 57.

¹⁴⁶ *Constitution of India*, Part II: *Citizenship*, accessed August 25, 2025, ConstitutionofIndia.net, <https://www.constitutionofindia.net/parts/part-ii/>

¹⁴⁷ *The Citizenship Act, 1955* (Act No. 57 of 1955), Sections 3–7, enacted December 30, 1955, accessed August 25, 2025, https://www.scobserver.in/wp-content/uploads/2021/10/Citizenship_Act_1955.pdf

¹⁴⁸ Farrah Ahmed, "Arbitrariness, Subordination and Unequal Citizenship," *Indian Law Review* (forthcoming), University of Melbourne Legal Studies Research Paper No. 906, January 7, 2020, SSRN, 3, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3515056

¹⁴⁹ Khosla and Vaishnav, "The Three Faces of the Indian State," 113.

¹⁵⁰ Jayal, *Citizenship and Its Discontents*, 66.

¹⁵¹ Ahmed, "Arbitrariness, Subordination and Unequal Citizenship," 4.

¹⁵² Torri, "India 2019," 374.

2.1 Historical and Legal Origins of the 2019 CAA

The debates surrounding Indian citizenship provisions in the Indian Constituent Assembly had caused a great “headache” to its members, according to direct testimonies, without knowing exactly “how many drafts were prepared and how many were destroyed”,¹⁵³ referring to the Articles of Part II. According to some scholars, Part II of the Constitution already treats different categories of people unevenly, and holds some implicit premises to Indian citizenship. In fact, while there was no formal discrimination between Hindu and Muslim migrants relating to the period of the Partition, the provisions contained some moderate disadvantages for Muslims that wished to return to India, most notably through the requirement of a resettlement permit.¹⁵⁴ Nevertheless, Part II of the Constitution was only tasked with solving the immediate chaotic and dreadful situation created by the partition. Art. 11 leaves the initiative to regulate citizenship to Parliament,¹⁵⁵ and for this reason the possible disadvantages initially present could be reformulated. This point is also confirmed by the transcripts of the debates that took place in the Constituent Assembly.¹⁵⁶

After five years since the creation of the Republic of India, in 1955 the CA was enacted, expanding the constitutional framework for citizenship to birth, descent, registration, naturalization, and incorporation of territory as stated above. The CA does not contain any implicit or explicit discriminatory provisions. Indeed, it introduces several new paths to citizenship.¹⁵⁷

The first major amendment came in 1985 in response to the immigration flow from Bangladesh in eastern India. Since the partition in 1947, more intensively in 1971 during the Bangladesh Liberation War, and constantly since then, a large number of refugees and migrants crossed the border into India. A large number of these people got enfranchised. This growing situation became heavily politicized in the 1980s in Assam, where an influential nativist student movement led numerous protests against the “swamping of Assam with ‘foreigners’”.¹⁵⁸ This process culminated in the Assam Accord, where the government of India and the leaders of the “Assam Agitation” agreed in some fundamental questions of citizenship for illegal migrants.¹⁵⁹ The 1985 CA Amendment was passed in accordance with the Accord. Section 2 of the Amendment states that people who had migrated to Assam before 1966 and lived there since then shall be deemed an Indian citizen. For those arrived between 1966 and 1971, when the Bangladesh War started, and have resided there since, shall have Indian citizenship except for voting rights, which will be obtained after ten years. Lastly, anyone

¹⁵³ Constituent Assembly of India, *Constituent Assembly Debates*, vol. IX, 10 August 1949, Part II (speech by Dr. B. R. Ambedkar).

¹⁵⁴ Abhinav Chandrachud, “*Secularism and the Citizenship Amendment Act*” (January 4, 2020), SSRN Scholarly Paper, 8-13, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3513828.

¹⁵⁵ *Constitution of India*, Art. 11, “Parliament to Regulate the Right of Citizenship by Law,” accessed August 25, 2025, ConstitutionofIndia.net, <https://www.constitutionofindia.net/articles/article-11-parliament-to-regulate-the-right-of-citizenship-by-law/>.

¹⁵⁶ *Constituent Assembly Debates*, vol. IX, 10 August 1949 (Ambedkar).

¹⁵⁷ *The Citizenship Act, 1955*, sections 3–7.

¹⁵⁸ Jayal, *Citizenship and Its Discontents*, 63.

¹⁵⁹ Robert G. Gosselink, “Minority Rights and Ethnic Conflict in Assam, India,” *Boston College Third World Law Journal* 14 (1994): 83–116, https://www.iilsindia.com/study-material/348508_1622965176.pdf.

migrated after 1971 shall be deported as illegal immigrants.¹⁶⁰ The Act created an Assam-specific exception which will be discussed further in the last case study dedicated to the NRC.

The second major amendment to the CAA came in 2004, and this time the scope was national, and not Assam-specific. The bill was passed during the BJP government of Atal Bihari Vajpayee,¹⁶¹ and it represented a significant shift for legal citizenship in the country. Before the Amendment, under the 1955 Act, any person born in India after the 26th of January 1950 was considered a citizen, regardless of whether one or both parents were illegal immigrants.¹⁶² The 2004 CAA states that any person born in India after the 26th of January 1950 and before the 1st of July 1987 is an Indian citizen, regardless of whether one or both the parents was an illegal immigrant, restricting the time span compared to the original Act. Additionally, a person born in India after 1st of July 1987 and before the 3rd of December 2004 is a citizen if one of the parents was a citizen at the time, regardless of whether one parent was an illegal immigrant. Lastly, if someone is born in India after the 3rd of December 2004, he or she is a citizen only if both parents are Indian citizens, or if one parent is a citizen and the other is not an illegal immigrant.¹⁶³ These provisions embodied a considerable change in India's citizenship law towards a *jus sanguinis* conception, moving away from the original *jus soli* approach. The 2004 Amendment also explicitly impedes illegal migrants to seek citizenship by registration or naturalization.¹⁶⁴ As defended by Jayal, since most migrants from Bangladesh were Muslims, the Amendment implicitly introduced a religion-based exception to the principle of *jus sanguinis*, undermining the idea of citizenship by land.¹⁶⁵ This Amendment is the reason why, according to Adeney's study on India, the country already scored as medium on the level of ethnic democracy for the citizenship dimension, even before the arrival of Modi as leader of the BJP.¹⁶⁶

Also in 2004, the BJP government passed an Amendment to the Citizenship Rules of 1956, which regulated the implementation of the 1955 CA. Unprecedentedly, the amendment makes an open distinction based on the religious affiliation of immigrants:

*"In respect of minority Hindus with Pakistan citizenship who have migrated to India more than five years back with the intention of permanently settling down in India and have applied for Indian citizenship, the authority to register a person as a citizen of India [...] shall be the concerned Collector of the district where the applicant is normally resident."*¹⁶⁷

¹⁶⁰ *Citizenship (Amendment) Act, 1985*, section 2.

¹⁶¹ Prime Minister of India, "Shri Atal Bihari Vajpayee," accessed August 26, 2025, https://www.pmindia.gov.in/en/former_pm/shri-atal-bihari-vajpayee-2/

¹⁶² *The Citizenship Act, 1955*, Section 2.

¹⁶³ *The Citizenship (Amendment) Act, 2003* (Act No. 6 of 2004), enacted January 7, 2004, accessed August 26, 2025, Section 2, <https://www.indiacode.nic.in/repealedfileopen?filename=A2004-6.pdf>

¹⁶⁴ *Ibi.*, Section 5-6.

¹⁶⁵ Niraja Gopal Jayal, "Reconfiguring Citizenship in Contemporary India," *South Asia: Journal of South Asian Studies* 42, no. 1 (2019): 35, <https://www.tandfonline.com/doi/pdf/10.1080/00856401.2019.1555874>

¹⁶⁶ Adeney, "How Can We Model Ethnic Democracy?," 399.

¹⁶⁷ Jayal, *Citizenship and Its Discontents*, 66, quoting Section 3(2)(ii) of the 2004 Amendment to the Citizenship Rules, 1956.

This modification, similarly to the one seen for Assam, was context-specific and directed at the District Collectors in Rajasthan and Gujarat on the Western border. This amendment of the Citizenship rules breaks the ground completely compared to any past citizenship regulation, as it explicitly refers to religious identity. Secondly, the provision entails that Hindu migrants do not require any permit for resettlement, with their intention to permanently settle down in India being a satisfactory condition, while returning Muslims were never awarded this benefit.¹⁶⁸ This provision, however secondary, is in line with the shift from a *jus soli* citizenship to a *jus sanguinis* one, apart from being clearly unconstitutional, despite its current enforcement. In fact, some experts consider it the precursor of the 2019 CAA, as stated above.¹⁶⁹

Another secondary piece of legislation which presents ethno-religious differentiation is the one contained in the 2015 Amendment to the Passport (Entry into India) Rules, 1950, and the Foreigners Order, 1948, promoted by the first Modi BJP government. In this case, the modifications grant special exemptions to:

“Persons belonging to minority communities in Bangladesh and Pakistan, namely, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians who were compelled to seek shelter in India due to religious persecution or fear of religious persecution and entered into India on or before the 31st December, 2014”¹⁷⁰

Again, like the 2004 Amendment to the Citizenship Rules of 1956, these modifications above already anticipate considerably the 2019 CAA. In the provision, persecuted Muslim minorities present in the two countries that are mentioned are completely neglected. At the same time, the rest of the countries neighbouring with India are not even considered in the picture of minority persecution. It is an unconstitutional provision which is still effective today.

The last main event before the enactment of the 2019 CAA regards the previous attempt in 2016 by Modi and its party to table a Citizenship Amendment Bill (CAB). The Bill was meant to fulfil an electoral promise that the party had made during the 2014 electoral campaign, and accommodate Hindu migrants from Bangladesh that came to India.¹⁷¹ As the 2019 CAA, the Bill proposed to create a new scheme under the 1955 CA where Hindus, Sikhs, Buddhists, Jains, Parsis, and Christians from Afghanistan, Bangladesh, and Pakistan were not to be considered illegal migrants in the country, among other privileges which will be discussed in detail below.¹⁷² As stated earlier, the 2016 Bill was ultimately not approved on time by the Lok Sabha.

Overall, the analysis of the legal and historical background of the 2019 CAA has highlighted the presence of a trajectory in the conception of legal citizenship in India. After the dealing with the intricate issue of partition, without exemption from criticisms, the Constitution allowed for the establishment of the 1955 CA, a non-

¹⁶⁸ Jayal, *Citizenship and Its Discontents*, 67.

¹⁶⁹ Ahmed, “Arbitrariness, Subordination and Unequal Citizenship,” 4.

¹⁷⁰ Ministry of Home Affairs, *Notification G.S.R. 685(E) and Order G.S.R. 686(E)*, September 7, 2015, Government of India, accessed August 25, 2025, https://indianfirro.gov.in/firro/Notifications_dated_7.9.2015.pdf

¹⁷¹ Varghese and Harish Narasappa, “Contestations over Indian Citizenship: An Analysis of the Citizenship (Amendment) Bill, 2016,” *National Law School of India Review* 31, no. 2 (2019): 158, <https://repository.nls.ac.in/cgi/viewcontent.cgi?article=1350&context=nlsir>

¹⁷² *The Citizenship (Amendment) Bill, 2016*, Bill No. 172 of 2016.

discriminatory and secular legal mechanism based on *jus soli*, while allowing other paths, including for illegal migrants. The special migratory context in eastern India, especially in the Assam region bordering with Bangladesh, culminated into a special agreement between the local population and the central government. The Assam Accord was upheld by amending the CA in 1985, where special provisions recognized cut-off dates for dealing with illegal migrants. The Amendment was not discriminatory towards minorities, even though its application naturally affected to a higher degree Muslim migrants. Meanwhile, since the early 2000s and throughout the 2010s, BJP governments have slowly but steadily introduced two new correlated trends in India's citizenship framework. The first trend is embodied by BJP's willingness to shift from a mainly *jus soli* conception to one more focused on birth, or *jus sanguinis*. Secondly, although in secondary legal contexts, the Hindu-nationalist BJP had been amending legal mechanism in a way that explicitly discriminates people based on their religious identity, the first to do so in independent India. The enforcement of the 2019 CAA took things to another level.

2.2 The 2019 Citizenship Amendment Act and Religious Citizenship

In December 2019, at the beginning of Modi's second term super-majority, and a few months since the abrogation of Art. 370, the 2019 CAA was passed by both the Lok Sabha and the Rajya Sabha.¹⁷³ The BJP Home Minister Amit Shah justified the necessity of the CAA on two grounds. Firstly:

*"It is needed because the Congress partitioned this country on the ground of religion.... Who did it? The Congress divided the country on the basis of religion. That was done by the Congress... This is the history,"*¹⁷⁴

The second reason provided by Shah was allegedly driven by the intention to protect persecuted groups:

*"If minorities are getting persecuted in neighbouring countries, we cannot be mute spectators. We have to ensure their safety and dignity,"*¹⁷⁵

This second argument can also be found in the Statement of Objects and Reasons attached to the actual 2019 CAA.¹⁷⁶ While the first motive is far from being historically accurate, the second one will be demonstrated to be deceiving and mendacious. Some historians do rise justified criticism with regard to Congress over the issue of partition,¹⁷⁷ however it is undisputable that Nehru's party never accepted the idea of separating Hindus and Muslims into separate nations, or to depict India as the motherland of a specific ethno-religious group.¹⁷⁸

¹⁷³ Torri, "India 2019," 374.

¹⁷⁴ Zia Haq, "In Amit Shah's Push to Citizenship Bill, Sharp Attack on Congress over Partition," *Hindustan Times*, updated December 9, 2019, 2:58 p.m. IST, accessed August 26, 2025, <https://www.hindustantimes.com/india-news/in-amit-shah-s-push-to-citizenship-bill-sharp-attack-on-congress-over-partition/story-DZ3sKW626TdSmhqEXze6tL.html>

¹⁷⁵ HT Correspondent, "'Motivated': Govt Responds to US Commission Statement on Citizenship Bill," *Hindustan Times*, updated December 10, 2019, 4:44 p.m. IST, accessed August 26, 2025, <https://www.hindustantimes.com/india-news/no-locus-standi-govt-on-us-commission-statement-on-citizenship-bill/story-Bwre7TJMYajT6GD70OA6aM.html>

¹⁷⁶ Ministry of Law and Justice (Legislative Department), *Statement of Objects and Reasons for the Citizenship Amendment Bill, 2019*, enclosed with the Bill in Parliament (Bill No. 370 of 2019), December 4, 2019.

¹⁷⁷ Asim Roy, "The High Politics of India's Partition: The Revisionist Perspective," *Modern Asian Studies* 24, no. 2 (1990): 385–408, <http://www.jstor.org/stable/312661>

¹⁷⁸ Torri, "India 2019," 375.

As already discussed in previous chapters, Independent India was built as a secular system, with no space for religious identity in legal citizenship.

The 2019 CAA is blatantly unconstitutional for several reasons.¹⁷⁹ The most important paragraph in this sense is the following, which can be found in the section dedicated to the definition of illegal migrant, and builds upon the previously discussed 2015 Amendment of to the Passport (Entry into India) Rules and the Foreigners Order:

*“Provided that any person belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community from Afghanistan, Bangladesh or Pakistan, who entered into India on or before the 31st day of December, 2014 and who has been exempted by the Central Government by or under clause (c) of sub-section (2) of section 3 of the Passport (Entry into India) Act, 1920 or from the application of the provisions of the Foreigners Act, 1946 or any rule or order made thereunder, shall not be treated as illegal migrant for the purposes of this Act;”*¹⁸⁰

First of all, by only applying in favour of Hindu, Sikh, Buddhist, Jain, Parsi, and Christian immigrants, the CAA excludes immigrants from other religious communities. The excluded minorities include Jews, Muslim minorities such as Shias or Ahmadiyas, atheists, and agnostics all of which have been persecuted on grounds of religion in Afghanistan, Pakistan or Bangladesh.¹⁸¹ This discrimination, based on the neglect of other relevant religious minorities migrating from the states in question due to persecution, violates the fundamental principles of secularism and equality enshrined in the Constitution, and claimed as part of India’s “constitutional morality” by the Supreme Court on various occasions in its jurisprudence.¹⁸²

The second issue with the phrasing above relates to the exclusion of religious asylum seeker from other countries, apart from Afghanistan, Pakistan and Bangladesh, the only three mentioned. The Muslim Rohingyas originally from Myanmar represent a stark example. Countries like Nepal, Bhutan and Sri Lanka are not mentioned, even though the last two have been documented to hold persecuted religious minorities.¹⁸³ Generally, the exclusion applies to all other states, and as Bombay High Court Advocate Chandrachud pointed out as an example, “why should a Parsi fleeing religious persecution from Afghanistan have an easier route to naturalization as against a Parsi fleeing religious persecution in, say, Iran?”¹⁸⁴ The unconstitutionality of the CAA is evident.

¹⁷⁹ Amnesty International, "India: Citizenship Amendment Act is a blow to Indian constitutional values and international standards," March 14, 2024, <https://www.amnesty.org/en/latest/news/2024/03/india-citizenship-amendment-act-is-a-blow-to-indian-constitutional-values-and-international-standards/>.

¹⁸⁰ Ministry of Law and Justice (Legislative Department), *The Citizenship (Amendment) Act, 2019*, No. 47 of 2019, Section 2, New Delhi, December 12, 2019, accessed August 31, 2025, <https://www.scobserver.in/wp-content/uploads/2021/10/CAA2019.pdf>.

¹⁸¹ Chandrachud, “Secularism and the Citizenship Amendment Act,” 18.

¹⁸² *State (NCT of Delhi) v. Union of India*, (2018) 8 SCC 501, ¶ 308; *Indian Young Lawyers Association v. State of Kerala*, (2018) SCC Online SC 1690, ¶ 189.

¹⁸³ Meghan G. Fischer, "Anti-Conversion Laws and the International Response," *Penn State Journal of Law & International Affairs* 6, no. 1 (2018): 1, 38–44, <https://insight.dickinsonlaw.psu.edu/cgi/viewcontent.cgi?article=1175&context=jlia>

¹⁸⁴ Chandrachud, “Secularism and the Citizenship Amendment Act,” 24.

A third problem arises if the cut-off date of the CAA is considered. According to the amendment, only those entered before or on the last day of 2014 will have the right to seek Indian citizenship. This condition inherently excludes illegal migrants arrived later from that right, even though they might be equally subject to religious persecution. While it is not usual for legislation to draw bright-line rules, such as the age to vote,¹⁸⁵ the temporal limit imposed here contradicts the original intent proclaimed by the BJP leadership and included into the Statement of Objects and Reasons of the actual Amendment.¹⁸⁶ As stated earlier, allegedly, the aim of the CAA was to provide protection and shelter to non-Muslim persecuted religious minorities in certain nearby countries. To this humanitarian end, it seems irrelevant whether an illegal migrant has arrived before or after 2014. This inherent contradiction between the provision and the official humanitarian intent of the CAA shows how in fact the BJP's proclamations both in Parliament and in paper are misleading.

The fourth issue arising from the CAA is the fact it excludes migrants facing non-religious persecution, possibly based upon race, sexual orientation or political reasons. Indeed, such phenomena are present in the Indian neighbourhood. The most representative example could be the one of the Sri Lankan Tamils, an ethnic group persecuted mainly on ethnic grounds by the majoritarian Sinhalese ethnic group.¹⁸⁷ From this same issue, it is relevant to stress how the Act fails to define a person belonging to one of the minority communities mentioned, assuming that such clear distinction of identification can be done. Terms such as "Christian" or "Hindu" are remarkably broad, with the Act conferring discretion to individual government or state officials with no criteria or guidelines.¹⁸⁸

The fifth incongruity to note is related to Section 6 of the CAA, amending clause (d) of the Third Schedule of the main Act. The amendment introduces a lowering of the residence requirement in India for the mentioned religious minorities which want to apply for citizenship by naturalization.¹⁸⁹ A person has to be resident in India for the twelve months preceding its application in order to be eligible. Additionally, the applicant has to have resided in India a total of eleven years out of the fourteen preceding the twelve-month period of application. The 2019 CAA adds a clause where the earlier mentioned religious minorities coming from Afghanistan, Pakistan and Bangladesh, who are applying for naturalization, have a reduced requirement of residence in India of "not less than five years" over the last fourteen. This means, for example, that while any Buddhist or Hindu escaping persecution from a country not included in the list might have to reside in India for at least eleven years in a fourteen-year period in order to be eligible for Indian citizenship, an individual

¹⁸⁵ Chandrachud, "Secularism and the Citizenship Amendment Act," 19.

¹⁸⁶ Ministry of Law and Justice, *Statement of Objects and Reasons*, Citizenship Amendment Bill, 2019.

¹⁸⁷ Timothy Robinson and John Curtis, *Sri Lankan Tamils and Human Rights*, Commons Library Debate Pack CDP-0217, Research Briefing, House of Commons Library (London: December 1, 2023), accessed August 31, 2025, <https://commonslibrary.parliament.uk/research-briefings/cdp-2023-0217/>.

¹⁸⁸ Douglas McDonald-Norman, "The Citizenship Amendment Act and 'Persons Belonging to Minority Communities'," *Law and Other Things*, December 28, 2019, <https://lawandotherthings.com/2019/12/the-citizenship-amendment-act-and-persons-belonging-to-minority-communities/>.

¹⁸⁹ Ministry of Law and Justice (Legislative Department), *The Citizenship (Amendment) Act, 2019*, No. 47 of 2019, Section 6, New Delhi, December 12, 2019, accessed August 31, 2025, <https://www.scobserver.in/wp-content/uploads/2021/10/CAA2019.pdf>.

of the same religion in the three countries mentioned will be eligible for naturalization after just five years of residence in India out of the previous fourteen.

Lastly, it is relevant to this discussion to briefly take into consideration a part of the Statement of Objects and Reasons found in the 2019 CAA, as the arguments proposed in that text prove once again to be misleading and incorrect:

*“The constitutions of Pakistan, Afghanistan and Bangladesh provide for a specific religion. As a result, many persons belonging to Hindu, Sikh, Buddhist, Jain, Parsi and Christian communities have faced persecution on grounds of religion in those countries. Some of them also have fears about such persecution in their day-to-day life where right to practice, profess and propagate their religion has been obstructed and restricted. Many such persons have fled to India to seek shelter and continued to stay in India even if their travel documents have expired or they have incomplete or no documents.”*¹⁹⁰

Apart from the aspects already considered above when dealing with the actual amended provisions, this paragraph contains a fallacious assumption. The logical cause and effect relationship asserted in the first two sentences between countries with an established state religion and the persecution of minorities is misleading. Numerous countries worldwide, such as the UK or Scandinavian countries, have an officially established state religion, while not engaging in religious persecution, and actually granting substantial religious liberty. On the opposite, states who do not declare a state religion, such as China, do in fact persecute and discriminate religious minorities.¹⁹¹ The whole humanitarian argument is simply political rhetoric, and lacks any grounding in the actual contents and effects of the Amendment.

Art. 14 of the Constitution assures that “The State shall not deny any person equality before the law or the equal protection of the laws within the territory of India”.¹⁹² From the breaking down of the 2019 CAA, its unconstitutionality has become even more evident, and repeated in different aspects. The exclusion of Muslims is the first noticeable discriminatory feature of the Amendment. Muslim minorities are not considered as possible persecuted religious groups, while all the other major religions of the three states considered are. In fact, another assumption put forward by the CAA is that the Muslim-majority countries neighbouring India are the only having persecution issues. At this point, it is clear that “In the BJP’s eyes, no Muslim groups deserved the status of persecuted minorities.”¹⁹³ Furthermore, it is also clear, that the alleged humanitarian purpose of the CAA is nothing other than a political excuse, as the provisions of the Amendment have demonstrated to be completely inadequate to that end.

¹⁹⁰ Ministry of Law and Justice (Legislative Department), *Statement of Objects and Reasons for the Citizenship Amendment Bill, 2019*.

¹⁹¹ Ahmed, “Arbitrariness, Subordination and Unequal Citizenship,” 11-13.

¹⁹² *Constitution of India*, Art. 14, “Equality Before the Law,” accessed August 31, 2025, <https://www.constitutionofindia.net/articles/article-14-equality-before-law/>.

¹⁹³ Varshney and Staggs, “Hindu Nationalism and the New Jim Crow”, 11.

The attention will turn to the Indian higher judiciary, and how it has reacted, or not, to the unprecedented “faith-based citizenship” put forward by the Hindu-nationalist BJP. However, some necessary considerations will be made first regarding the extraordinary reaction of the Indian citizenry to this law.

2.3 An Uncompromising Citizenry and Brutal State Repression

Unlike for the central government’s intervention in J&K, the CAA provoked a widespread popular reaction in every major city across India. Large sections of the Indian citizenry did not take long in realizing the unconstitutionality that the amendment entailed, and what it meant for the discrimination of religious minorities. The anti-CAA movement was cross-communal. It included indigenous people of the Northeast, students, social activists, human rights movements, NGOs, Dalits, Sikhs, Christians, and obviously Muslims, with a strong participation of women all around. The Northeast population saw the CAA as a threat to their homeland, as it would allow the presence of non-Muslim foreigners in their area, an issue that will be pivotal in the next case study. All the rest of the dissenters were generally aligned, demanding the removal of the CAA in the name of the Constitution, while protesting through non-violent civil disobedience and passive resistance. Sit-ins were the preferred method. Mass demonstration started happening even before the final approval of the law on the 11th of December 2019, with violent protests taking place only in West Bengal and the Northern-eastern territories. The demonstrations went on during the whole month of December and into the first months of 2020, before the Pandemic diverted the attention with the lockdown in March.¹⁹⁴

On the 15th of December, Modi made an unprecedented assertion in a speech, stating that the “people who are setting fire (to property) can be seen on TV [...] they can be identified by the clothes they are wearing”, and accused Congress of organizing “what Pakistanis has been doing for long”,¹⁹⁵ in an attempt to depict Muslims as the sole responsible for the anti-CAA movement.

The BJP government’s reaction against anti-CAA protestors was fierce, brutal and in many cases deadly. After the passing of the CAA, the central government started its attempt to repress the demonstrations, which turned especially brutal in BJP-administered territories or states.¹⁹⁶ In the Delhi Union Territory, under the control of the central government, the police force stormed into the grounds of the Jamia Millia Islamia (JMI) university, a highly esteemed Muslim institution in India, with dreadful consequences. This happened on the 15th of December, when the students had organized a march against the new Amendment in the university area. Evidence shows how, after some students threw stones at the police, officers entered the campus without administrative permission, and made disproportionate use of force, not with the intention of dispersing the

¹⁹⁴ Jaffrelot, *Modi’s India*, 377-8; Torri, “India 2019,” 380-2.

¹⁹⁵ PTI, “PM Modi on Anti-CAA Protest: ‘Those Indulging in Arson Can Be Identified by Their Clothes,’” *The Times of India*, updated December 15, 2019, 10:49 PM IST, accessed August 31, 2025, <https://timesofindia.indiatimes.com/india/congress-raising-storm-over-citizenship-law-pm-modi-in-jharkhand/articleshow/72674900.cms>

¹⁹⁶ Torri, “India 2019,” 384.

crowd, but with “sheer vindictiveness”, as indicated by senior advocate Indira Jaising.¹⁹⁷ Tear gas was used, students were chased within the campus after hiding in libraries and toilets, and ultimately physically beaten up and verbally mocked for their religion, both women and men. At least eighty students ended up in hospital with serious injuries such as fractures and rubber bullet wounds.¹⁹⁸

In Uttar Pradesh, infamous was the attack by police forces and the special Rapid Action Force in the campus of the Aligarh Muslim University (AMU), which also happened on the 15th of December, after Modi’s speech and the attack at the JMI. Two days earlier AMU students had organized an anti-CAA protest near the campus. A detailed fact-finding report states that more than a thousand officers were involved in the attack on the university grounds, with the reasons remaining unclear, as students and faculty say that the attack was completely unprovoked. In any case, tear gas shells were launched over the university gates before the police entered the premises. The use of stun grenades was reported, devices only used in war situations or in militarised police actions against very hostile individuals such as terrorists. Private vehicles of students such as motorbikes and scooters within the university were purposely destroyed by police. Ambulances attempting to attend the wounded were withheld by police officers and sometimes attacked. Around one hundred students were injured, sixty of which were hospitalized. Evidence proves the use of gas shells, sound bombs, stun grenades, and lathis, long heavy bats, on students, along with a sustained use of anti-Muslim verbal slurs. The violence did not stop after the campus was stormed, as the twenty-six students detained faced repeated beatings, fustigations with belts, and the destruction of their mobile phones while in custody.¹⁹⁹ In the state of Uttar Pradesh, the most heavily affected, by late December, more than a thousand people had been arrested and more than five thousand preventively detained. In the region, the total deaths due to the repressive police measures of the BJP-administered state amounted to twenty-three. Across all states, the death toll caused by police repression amounted to thirty-one deaths.²⁰⁰

Demonstrations and sit-ins went on for months and saw their climax in the February 2020 Delhi riots. Between the 23rd and the 26th of February, after losing local elections, and in the context of anti-CAA protests, BJP supporters, incited by local BJP leadership and acting with the complicity of the police, unleashed their violence against the considerable Muslim population living in Northeast Delhi. The fact-finding report by the Delhi Minorities Commission of the National Capital Territory (NCT) government of Delhi documented a well-organized and pre-mediated systematic violence directed with surprising precision at Muslim individuals,

¹⁹⁷ Scroll Staff, “Jamia Violence: Delhi Police Acted with ‘Sheer Vindictiveness’ Against Students, Says Indira Jaising,” Scroll.in, August 5, 2020, 10:47 a.m. IST (updated 1:38 p.m.), accessed today, <https://scroll.in/latest/969477/jamia-violence-delhi-police-acted-with-sheer-vindictiveness-against-students-says-indira-jaising>

¹⁹⁸ Mausami Singh, “80 Students Undergo Treatment at Delhi Hospital after Violence at Jamia,” India Today, updated December 17, 2019, 7:54 p.m. IST, accessed September 1, 2025, <https://www.indiatoday.in/india/story/jamia-protests-anti-citizenship-amendment-act-caa-injured-hospital-1629100-2019-12-17>

¹⁹⁹ “The Siege of Aligarh Muslim University: A Fact Finding Report—How the UP Police Reduced a University to a Battleground on December 15, 2019,” NewsClick, December 24, 2019, accessed September 1, 2025, <https://www.newsclick.in/Siege-Aligarh-Muslim-University-Fact-Finding-Report>.

²⁰⁰ Jaffrelot, *Modi’s India*, 383-4.

houses or shops, mosques, and private property, leaving Hindu properties untouched. The mobs were armed with lathis, iron rods, tear gas bombs, and firearms. The police completely failed to protect the life and property of the affected, namely the Muslims. In fact, police officers often just acted as onlookers while the mobs were fighting, while sometimes offering support to the Hindu mob, and even worse, engaging with physical violence against Muslims along with the BJP militants. The reports filed by the victims were either ignored by the police force or forcibly registered by omitting the names of the accused.²⁰¹ Ultimately, more than 40 people died, most of which Muslims, with millions of dollars' worth of property destroyed.²⁰²

Overall, the BJP administration and government never admitted any of the actions taking place in Delhi riots nor during the repression of the anti-CAA movement. In turn, the party created and promoted a sophisticated conspiracy theory, with the complicity of the police, blaming the actual victims, the Muslims along with secular and liberal opposers of the CAA, of the violent riots that took place, instead of the actual perpetrators. Home Minister Amit Shah congratulated the police for “not allowing the riots to spiral” and argued that the “riots were ‘pre-planned’ conspiracy”.²⁰³ The anti-CAA movement ultimately lost momentum due to the coronavirus pandemic lockdown imposed in March across the country.²⁰⁴ Despite widespread public demonstrations and outbursts of violence, the BJP administration did not back down from the CAA. The final say over the unconstitutionality and discriminatory nature of the Amendment depended on the judiciary.

2.4 A Dormant Judiciary

As of today, after all the events that have taken place, due to the unconstitutional and discriminatory nature of the 2019 CAA, the Supreme Court has yet to pronounce itself on the matter. Similarly to what seen with the case of the abrogation of Art. 370 and the 2019 UAPA amendment, the SC is showing extreme delay in addressing an important constitutional matter such as the CAA. The same considerations drawn above for previous cases apply to this one, meaning that a growing delay over a key constitutional issue, affecting millions of people in an openly discriminatory manner, strengthens the executive, which remains unchallenged for years, establishing a virtual *fait accompli*. Additionally, as defended by Parkash, the systematic prolonged delay in the delivery of justice over sensible constitutional matters “introduces a degree of informality and negotiability to citizens’ rights”.²⁰⁵ Since 2019, several petitions have been filed to the Supreme Court

²⁰¹ Delhi Minorities Commission (Govt. of NCT of Delhi), *Delhi Riots Fact-Finding 2020* (New Delhi: Delhi Minorities Commission, July 2020), 98–106, accessed September 1, 2025, <https://archive.org/details/DMC-delhi-riots-fact-finding-2020/page/106/mode/2up>.

²⁰² Soutik Biswas, “Delhi Riots: How Muslims' Homes Were Targeted and Burnt,” BBC News, March 4, 2020, accessed September 1, 2025, <https://www.bbc.com/news/world-asia-india-51719204>.

²⁰³ Jaffrelot, *Modi's India*, 392-9.

²⁰⁴ “Shaheen Bagh Anti-CAA Sit-In Removed amid Coronavirus Lockdown,” Al Jazeera, March 24, 2020, accessed September 1, 2025, <https://www.aljazeera.com/news/2020/3/24/shaheen-bagh-anti-cao-sit-in-removed-amid-coronavirus-lockdown>

²⁰⁵ Prakash, “Autocratic Legalism and Juridical Veto,” 819.

challenging the constitutionality of the CAA, and as of today they amount to more than two hundred. Overall, there are four key legal questions that have been put forward the SC.²⁰⁶

First, whether the CAA violates Art. 14, the principle of equality before the law regardless of citizenship, by failing the reasonable classification test. The reasonable classification test, established by the SC in cases like *State of West Bengal v Anwar Ali Sarkar* (1952) and *Ram Krishna Dalmia v Justice SR Tendolkar* (1959), is a two-step verification process which aims to ascertain whether a classification created by the state has intelligible differentia, and if the differentia are reasonably linked to the subject of the law.²⁰⁷ The SC has actually previously addressed a challenge under Art. 14 using the reasonable classification test in *R.K. Garg And Ors. vs Union of India* (1981). On that occasion, it stated that:

*“It is clear that Article 14 does not forbid reasonable classification of persons, objects and transactions by the legislature for the purpose of attaining specific ends. What is necessary in order to pass the test of permissible classification under Article 14 is that the classification must not be ‘arbitrary, artificial or evasive’ but must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the legislature”.*²⁰⁸

According to the petitioners, and the legal analysis conducted in the previous section, the CAA is profoundly arbitrary, failing the reasonable classification test, and therefore in contrast with the principle enshrined in Art.14.

The second key question petitioners asked the SC is whether the CAA discriminates on the basis of religion. As analysed above, since the official and praised objective of the legislation is to safeguard migrants fleeing from religious persecution, this humanitarian end is in stark contrast with the limitation of religions included, the selected number of countries, and the cut-off date that the CAA proposes. The openhearted logic of the legal mechanism does not hold. Truly, the differentiations and limitations outlined in the CAA discriminates and marginalizes various religious persecuted communities, most notoriously Muslims.

Some petitions raise the question of whether the CAA violates Art. 21, which protects the right to life and personal liberty. According to the petitioners the Amendment infringes the dignity and personal liberty of the excluded migrants. Along these same lines, the Indian Union Muslim League in their petition stressed the importance of international law for the treatment of refugees, the right to nationality, and the constraints that a State has in its discretion to grant citizenship.²⁰⁹ Even the United Nations High Commissioner for Human Rights sent an Application for Intervention to the Supreme Court along with the other petitions, stressing the

²⁰⁶ Supreme Court Observer. “Citizenship Amendment Act.” Indian Union Muslim League v Union of India, WP (C) 1470/2019. Last modified September 9, 2024. <https://www.scobserver.in/cases/constitutionality-of-the-citizenship-amendment-act-2019-caa/>.

²⁰⁷ Jahnavi Sindhu and Vikram Aditya Narayan, “Reasonable Classification versus Equality under the Indian Constitution,” *National Law School Journal* 17, no. 2 (2023): Article 4, <https://repository.nls.ac.in/cgi/viewcontent.cgi?article=1473&context=nlsj>

²⁰⁸ *R.K. Garg v. Union of India*, (1981) 4 SCC 675, para. 8.

²⁰⁹ *Indian Union Muslim League v. Union of India*, Writ Petition (Civil) No. 1470 of 2019, Supreme Court of India, filed 2019, https://www.scobserver.in/wp-content/uploads/2021/10/IUML_WPC_1470_2019.pdf

importance of international human rights law, and how the CAA presents several shortcomings to that regard.²¹⁰

Lastly, petitions question the validity of the amendments to the Passport (Entry into India) Rules, 1950 and Foreigners Order, 1948, made by the first Modi government in 2015, on the same grounds as the CAA. This legislation was mentioned at the beginning of this section, and while it is secondary, it is considered the one of the precursors of the CAA for its very similar wording. In fact, the amendments provide special exemptions to the six religious groups coming from the three countries spelled out in the CAA.²¹¹ Because of this, they are also challenged by petitioners on the same arbitrary and discriminatory grounds.²¹²

An additional interesting point, not included in the petitions, is developed by Ahmed in his paper dedicated to analysis of the 2019 CAA. Drawing from both US jurisprudence on Jim Crow laws and Indian equality jurisprudence, he argues that while the Act does not formally affect the citizenship status of Indian Muslims, it functions as a “speech act” that symbolically lowers their civic and social status. The Constitution’s commitment to equality and equal treatment comprehends more than just evident discrimination. It also includes prohibiting legislation that consolidates social hierarchies or second-class citizens. In this sense, the 2019 CAA is not only unconstitutional for its evident arbitrariness and discrimination, but also because it is a subordinating legal mechanism, where Indian Muslims “may have all or many of the legal benefits of citizenship, but are only citizens in an attenuated and marginal sense”. This marginalizing and subordinating effect regarding not only migrants, but also Indian Muslim citizens, means that the CAA not only violates Art. 14, but also Art. 15, which prohibits to discriminate citizens on any grounds, including religion.²¹³ This argument fits perfectly into the intent of this thesis. Not only a legal mechanism like the CAA shows blatant arbitrariness and discrimination with regard to Muslim migrants, but it also entails a covert subordination principle which marginalizes Indian Muslims, lowering their social and civic status. A textbook characteristic of an ethnic democracy.²¹⁴

Despite all of these arguments, and the widespread protests that broke out after the CAA, at the time of writing the court has still not finalized a verdict, after almost six years. The CAA was operationalized by the issuing of new rules as notified by the Home Minister on the 11th of March 2024, after nearly five years. In response to that, the day afterwards the Indian Union Muslim League, along many others, filed a plea in the Supreme Court in order to stay the implementation of the Citizenship Amendment Rules. In other words, the League asked to put a hold on the implementation of the CAA, as the granting of citizenship to the interested categories would result in an irreversible situation, and again consolidate a *fait accompli* situation, as seen for other legal

²¹⁰ *Deb Mukharji v. Union of India*, W.P. (C) No. 1474 of 2019, Application for Intervention by Michelle Bachelet Jeria, UN High Commissioner for Human Rights, Supreme Court of India, filed 2019, https://www.scobserver.in/wp-content/uploads/2021/10/Intervention_Application_by_UNHCR.pdf

²¹¹ Ministry of Home Affairs, Notification G.S.R. 685(E) and Order G.S.R. 686(E).

²¹² *Indian Union Muslim League v. Union of India*, W.P. (C) No. 1470 of 2019.

²¹³ Ahmed, “Arbitrariness, Subordination and Unequal Citizenship,” 13-17.

²¹⁴ Smootha, “The Model of Ethnic Democracy,” 478.

mechanisms discussed so far. Additionally, the League asked the SC to direct the government to temporarily allow Muslims to also apply for citizenship and submit a report on their entitlement.²¹⁵ The SC refused, as apparently it “did not find any merit in the batch of pleas to stay the CAA and rules”, and were not therefore expressing *prima facie* unconstitutionality.²¹⁶ Apart from the extensive delay already underway, as already discussed in previous chapters, the Indian judiciary is growing excessively keen in accepting the decisions and attitudes of the executive. Ultimately, a “credulous judiciary”, which favours the government over the rights petitions of its citizens, leaves ample space to manoeuvre for autocratic legalist practices, tainted by majoritarianism, and in India’s case, an ethnic democracy based on the ideology of Hindu-nationalism.

2.5 Results

The 2019 CAA most probably represents the most significant and nation-wide marginalizing and discriminatory legal mechanism implemented by the Hindu-nationalist BJP against religious minorities, especially Muslims, ideologically considered as intruders and foes of India by Hindu-nationalists. Unlike the case of J&K, where the special constitutional status of the state was dishonestly abrogated to exert more control and oppress the local Muslim-majority through specifically designed draconian laws, the CAA affects the whole definition of citizenship across all the country and for every Indian citizen, future and present. In fact, the CAA attempts to establish a faith-based citizenship, consolidating a *de jure* ethnic democracy.

The CAA is profoundly unconstitutional. The official purposes of the amendment asserted by the government, namely of helping persecuted minorities as a benevolent humanitarian gesture, or to solve the religious issues left behind by Congress after partition, are misleading, deceitful, and ultimately false. The official humanitarian objective aims at justifying and covering under a veneer of legality the true exclusionary and marginalizing objective of the citizenship legal mechanism.

The original 1955 CA and the Indian Constitution did not include in anyway any religious connotation to Indian citizenship, which was to be obtained mainly by *jus soli*. Meanwhile, the BJP has long pursued an amendment to the CAA on religious grounds. Apart from the unique migrant situation in Assam during the 1980s, when the government had to modify the CAA in order to appease the population, the 1955 Act and its fundamental aspects of citizenship remained unaltered. Things started to change in the early 2000s, when the BJP government amended the CAA, gradually shifting legal citizenship from a *jus soli* to a *jus sanguinis* conception. Furthermore, in related secondary legislation, the early 2000s BJP government started introducing explicit religious connotations for administrative tasks. The same happened a decade later when the BJP was back in the executive under Modi’s first term, and a CA Bill was almost passed in 2016. Therefore, for the

²¹⁵ Ashish Tripathi, “IUML Moves Supreme Court to Stay Citizenship (Amendment) Rules 2024,” *Deccan Herald*, March 12, 2024, <https://www.deccanherald.com/india/iuml-moves-supreme-court-to-stay-citizenship-amendment-rules-2024-2932603>

²¹⁶ Suchitra Kalyan Mohanty, “SC issues notice to Centre on pleas to stay CAA; posts matter on April 9,” *The New Indian Express*, March 19, 2024, <https://www.newindianexpress.com/nation/2024/Mar/19/sc-asks-centre-to-respond-within-three-weeks-to-pleas-seeking-stay-of-caa-rules>.

BJP, the 2019 CAA is the coronation of a long quest for a religion-based and discriminatory citizenship. After that, the BJP administration showed again its true colours by violently and disproportionately repressing any form of dissent such as the anti-CAA movement. This cost the lives of dozens of people, injuring countless, most of which Muslims, who also saw their livelihoods destroyed by BJP-instigated brutal mobs.

The implementation of the CAA lies perfectly within the political and legal transformations that India has been experiencing under the last three Hindu-nationalist governments. The CAA presumption of legality is characteristic of autocratic legalism, where legal mechanisms offer an effective cover for illiberal and majoritarian objectives. Hindu-nationalism provides a very powerful ideological basis for the promotion of these kinds of legislation. The ultimate purpose of the BJP's ideology is to consolidate a Hindu state, rather than a secular one, as envisaged by the founding fathers of India when drafting the Constitution, during one of India's most religiously charged historical moments.

The interlock and combination between autocratic legalist measures and Hindu-nationalism empowers an aggrandizing executive like Modi's BJP to consolidate an ethnic democracy. Legal mechanisms like the CAA not only exclude Muslims, but also assign Indian Muslims a secondary social and legal status, based on citizenship, effectively enacting marginalization on religious grounds. Notwithstanding the fact that Indian Muslims already are be the most economically disadvantaged religious group in India, as documented governmental and non-governmental reports throughout the years.²¹⁷

In this picture, the judiciary provides little relief to the offended and marginalized. As seen for the cases of the UAPA and Art. 370, the Supreme Court delays hearing key constitutional cases that affect the lives of millions, virtually condoning the unconstitutional actions of the executive through judicial pocket veto. The CAA case has still to be finalized after six years and countless petitions, containing numerous solid legal arguments. Pleas to stay the implementation of the Amendment have been refused, passively allowing the government to enforce the CAA with irreversible effects. The Indian higher judiciary is showing clear symptoms of crisis, due to the growing influence exerted by the government, in a clear attempt of executive aggrandizement, which is giving its results. As already argued in this thesis more than once, when the executive manages to seize the "referees", meaning the judiciary, their actions and legislation remain unchecked, allowing the establishment of an illiberal agenda, where the rights of citizens are trumped on. At that point, liberal rights leave the way for majoritarianism, and the marginalization and discrimination of minorities. In India's context, when autocratic legalism is coupled with a politically dominant Hindu-nationalist ideology, it originates a *de jure* ethnic democracy, where Muslims are the greatest victims.

²¹⁷ Abhishek Jha and Roshan Kishore, "Muslims are the poorest religious group in India," *Hindustan Times*, June 30, 2023, <https://www.hindustanathai.com/india-news/muslims-in-india-the-poorest-religious-group-with-high-inequality-and-limited-opportunities-data-analysis-reveals-101688097160955.html>; Prime Minister's High Level Committee, Cabinet Secretariat, Government of India, *Social, Economic and Educational Status of the Muslim Community of India: A Report* (New Delhi: Government of India, 2006), https://www.education.gov.in/sites/upload_files/mhrd/files/sachar_comm.pdf.

The CAA alone is a great demonstration of the erosion of pluralism taking place in India under the BJP. However, the next case study, dedicated to controversial National Register of Citizens in Assam, will illustrate the full discriminatory potential of the CAA. The two legal mechanisms will prove to work in a cumulative and interlocking way, reinforcing the intentions of the BJP of creating a “Hindu Rashtra”, or Hindu Nation, as taught by Savarkar, the coiner of Hindutva.²¹⁸

3. The National Registry of Citizens: Exclusion through Bureaucracy in Assam

The last case study of this thesis is dedicated to the National Registry of Citizens (NRC), one of the most significant and controversial legal mechanisms in post-independence India, along with the CAA. The NRC is a citizenship verification process which has proven to be flawed and discriminatory since the early decades of the Republic of India. However, during the tenure of the BJP, it has gained unprecedented political importance. Originally finalized in 1951 to list all Indian citizens after the partition of undivided British India, throughout the decades the NRC became a paramount question for the Assamese and the eastern region of Assam. Since the colonial period the native population of Assam had expressed preoccupation regarding the inflow of Bengali migrants. The situation escalated significantly in the 1970s after the bloody war of Liberation of East Pakistan, now Bangladesh, where many migrants moved to eastern India. As seen in the previous case study, the considerable migration flow from Bangladesh ignited a prolonged and violent movement in the late 1970s and 1980s which led to the Assam Accord and the consequential Amendment of the CCA in 1985. The Accord saw little implementation by the Assam government in the following years, fearing communal violence.²¹⁹

The circumstances changed completely once the BJP came to power again in 2014, with the updating of the NRC becoming a key political objective. In fact, as stated more than once by Home Minister Amit Shah, “Understand the chronology [...] First the Citizenship (Amendment) Bill will come, all the refugees will be given citizenship, and after that the NRC will be prepared”.²²⁰ While the NRC has seen widespread application only in Assam in recent years under strong indication of the BJP, leaving two million people on the brink of statelessness, the objective is in reality much more ambitious. In November 2019 the BJP posted on X, former twitter, that they “will ensure implementation of NRC in the entire country. We will remove every single infiltrator from the country, except Buddha (sic), Hindus and Sikhs”.²²¹ Again, Shah said “After that [the CAA] NRC will be made and we will detect and deport every infiltrator from our motherland.”²²² The BJP

²¹⁸ V. D. Savarkar, *Hindu Rashtra Darshan: A Collection of the Presidential Speeches Delivered from the Hindu Mahasabha Platform* (Poona: Maharashtra Prantik Hindusabha, 1949), <https://savarkar.org/en/pdfs/hindu-rashtra-darshan-en-v002.pdf>.

²¹⁹ Torri, “India 2019,” 368-9; Suraj Gogoi and Rohini Sen, “National Register of Citizens (NRC) in Assam: Within, without and beyond the Law,” *Journal of Ethnic and Migration Studies* 50, no. 19 (2024): 4831-2, <https://doi.org/10.1080/1369183X.2024.2376408>.

²²⁰ Christophe Jaffrelot, “From Hindu Rashtra to Hindu Raj? A de facto or a de jure ethnic democracy?”, in *Routledge Handbook of Autocratization in South Asia*, 1st ed., ed. Paul D. Williams (New York: Routledge, 2021), 131-2.

²²¹ Rohan Venkataramakrishnan, “Who is linking Citizenship Act to NRC? Here are five times Amit Shah did so,” *Scroll.in*, December 20, 2019, <https://scroll.in/article/947436/who-is-linking-citizenship-act-to-nrc-here-are-five-times-amit-shah-did-so>.

²²² Ibid.

later deleted that tweet for its clear exclusion of Muslims and the protests that came in December 2019 when the CAA was approved.²²³ However the message was clear, Muslims were not welcome in India and will be treated as illegal migrants unless they could prove otherwise.

The CAA and the NRC are deeply interconnected and are virtually designed to work “in tandem”,²²⁴ as also clarified by BJP leaders. The NRC allows for statelessness and mass detention, mainly affecting the weak and vulnerable who are unable to prove their citizenship status, and are rejected on the basis of faith. Meanwhile, the CAA provides an easier route to citizenship for those migrants excluded by the NRC, but that are considered acceptable based on the religious categories listed in the CAA. In all of this, Muslims are completely left out and destined to marginalization or expulsion.²²⁵ A national implementation of the NRC would change India’s political and social characteristics from the foundations.

The considerations above attempt to highlight why the implementation of the NRC in Assam during Modi’s tenure is so important for this thesis’s research question. It will be demonstrated how this case study embodies the marginalizing potential of legal mechanisms implemented in India’s contemporary Hindu-nationalist and majoritarian shift. As seen above for the other case studies, the discussion will start with an historical and legal overview of the NRC in Assam, followed by the contemporary marginalizing and exclusionary developments taking place under Modi. Lastly, the central role of the judiciary will be taken into consideration.

3.1 Historical and Legal Origins of the NRC

The first NRC in India’s history was conducted in 1951, based on the data collected by India’s first census as an independent nation the same year, under the Census Act of 1948. Therefore, the national census and NRC enabled the government at the time to compile the NRC for Assam, listing all the officially registered Indian citizens of the state.²²⁶ The national Census was greatly needed at the time due to the chaotic events of partition and the vast migratory flows that it caused. Millions of migrants from today’s Bangladesh moved to West Bengal, Tripura and Assam. The NRC was not intended to be regularly repeated, and the matter was left untouched for at least a few decades.²²⁷

It must be noted that the region of Assam has been experiencing ethnic and religious tensions since the 19th century, when Assamese nationalism first emerged. During British rule, the growing presence of Bengali and Bangla-speaking populations in Assam triggered the formation of hostile Assamese nationalism, based on the

²²³ The Quint, "BJP Deletes Its Tweet on NRC as Nationwide Protests Gain Ground," *The Quint*, last updated December 20, 2019, <https://www.thequint.com/news/india/bjp-twitter-official-nrc-citizenship-amendment-act-election-rally-tweet-deleted>.

²²⁴ Jaffrelot, "From Hindu Rashtra to Hindu Raj?", 131.

²²⁵ Niraja Gopal Jayal, "Faith-Based Citizenship: The Dangerous Path India Is Choosing," *India Forum*, November 13, 2019, <https://www.theindiaforum.in/article/faith-criterion-citizenship>.

²²⁶ Subir Bhaumik, Samir Purkayastha, and Samrat Chaudhury, *NRC Factsheet: Media Factsheet on Issues of Citizenship in the Northeast (Educational Material)* (Calcutta: Calcutta Research Group, 2020), 7–12, http://www.mcrg.ac.in/RLS_Migration_2020/NRC_Factsheet_2020.pdf.

²²⁷ Amrita Hari and Sugandha Nagpal, "The National Register of Citizens (NRC) in India and the Potential for Statelessness in Situ: A Cautionary Tale from Assam," *Contemporary South Asia* 30, no. 2 (2022): 194–201, <https://doi.org/10.1080/09584935.2022.2057439>.

preservation of the Assamese language and culture, while framing the Bangla language and people as the paramount enemy for its survival. The conflict between these two broad groups was also partially based on faith, as Assamese are mainly Hindus, while Bengalis are mostly Muslims. During the later years of colonial rule, the Assamese intellectuals and middle-classes became more and more terrified about the thought of becoming a minority in their own region, by the hands of Bengali migrants. Already at the time, the Assamese institutions and press were profiling migrants “as land hungry, criminal, scavengers and dangerous”.²²⁸ The situation that had arisen in colonial era, also due to the British’ opportunistic administration, escalated after partition, and especially after the Bangladesh Liberation War of 1971.²²⁹

The conflict in East Pakistan, now known as Bangladesh, in 1971 led to an enormous refugee movement across the border, with ten million estimated Hindu and Muslim refugees crossing and fleeing to Assam. This unprecedented wave of migration caused a popular upheaval of the local population, which was already wary of Bengalis.²³⁰ Throughout the late 1970s and 1980s mass protests took place, known as the Assam Movement, and spearheaded by the All-Assam Students’ Union, already mentioned above. These upheavals turned extremely violent, such as the massacre of Nellie in 1983, when more than two-thousand East Bengali Muslims were slaughtered in one of India’s most brutal ethnic clashes.²³¹ Academics have defined the Assam Movement as “national in form, chauvinist and undemocratic in content and proto-fascist in its method”.²³² At that point, the ethno-religious conflict in Assam represented a huge threat to the national integration of India.²³³

In 1985 the central government opted for an agreement with the Assamese, known as the Assam Accords,²³⁴ mentioned in the previous case study. The understanding was upheld by the government through the 1985 CAA, which made some special citizenship arrangements for the state of Assam. People of Indian origin, meaning undivided India, who had migrated to Assam before 1966 and resided there since shall be deemed an Indian citizen. For those arrived between 1966 and 1971, when the Bangladesh War started, and have resided there since, shall have Indian citizenship except for voting rights, which will be obtained after ten years. Lastly, the government agreed to deport as a illegal immigrant anyone arrived after 1971.²³⁵ These Assam-specific conditions were aimed at easing the extremely tense situation in the state and appeasing the local population which saw Muslim Bengalis as a growing threat to their homeland. In fact, the ethnic rhetoric promoted in

²²⁸ Gogoi, Suraj, and Rohini Sen. 2024. “National Register of Citizens (NRC) in Assam: Within, without and beyond the Law.” *Journal of Ethnic and Migration Studies* 50 (19): 4831. doi:10.1080/1369183X.2024.2376408.

²²⁹ Hari and Nagpal, "The National Register of Citizens (NRC)," 196-7.

²³⁰ Ibid.

²³¹ Harsh Mander, “Nellie: India’s forgotten massacre,” *The Hindu*, December 14, 2008, <https://web.archive.org/web/20081216010719/http://www.hindu.com/mag/2008/12/14/stories/2008121450100300.htm>.

²³² A. Guha, “Little Nationalism Turned Chauvinist: Assam’s Anti-Foreigner Upsurge, 1979-80,” *Economic and Political Weekly* 15, no. 41/43 (1980): 1699, <http://www.jstor.org/stable/4369155>.

²³³ M. Kimura, “Memories of the Massacre: Violence and Collective Identity in the Narratives on the Nellie Incident 1,” *Asian Ethnicity* 4, no. 2 (2003): 228, https://www.researchgate.net/publication/249014913_Memories_of_the_Massacre_Violence_and_Collective_Identity_in_the_Narratives_on_the_Nellie_Incident_1.

²³⁴ Gosselink, "Minority Rights and Ethnic Conflict," 83–116.

²³⁵ *Citizenship (Amendment) Act, 1985*, section 2.

Assam eventually came to depict any Bengali as a Bangladeshi, meaning “an archetypical foreigner/outsider/other”.²³⁶

As described for the CAA case, from the 1980s onwards Indian citizenship was subject to gradual shift from a *jus soli* conception, as enshrined in the 1955 CA, to a *ius sanguinis* one. The key legal mechanisms in this sense, as amply discussed, are the 2004 CAA and the 2004 Amendment to the Citizenship Rules of 1956, both promoted by the BJP before Modi’s tenure.²³⁷ Importantly, during the 1990s, two political shifts took place in Assam. First, the anti-migration sentiment of the Assamese went from being mainly based on language and ethnicity, to religion. The issue gradually turned from being a Bengali and Bangla speaker to that of being a Muslim. This change of paradigm was promoted especially by right-wing parties, like the BJP, based on Hindu-nationalism. The second change that took place in Assamese politics was the approach to apply to contrast illegal immigration. Traditionally, it was based on border control, but eventually more and more attention was dedicated to citizenship law, identified as the definitive solution.²³⁸

However, the NRC question and its updating remained marginal until the rise of the BJP under Modi in the early 2010s. The next section will be dedicated to the return of the NRC in Assam as a key political objective of the Hindu-nationalist BJP, which also clearly saw the legal mechanism as a potentially national measure. The analysis will prove how BJP politicians intend to make use of the NRC not simply as a way to fight illegal migration, but as an anti-Muslim legal mechanism with discriminating and marginalizing effects. While not mentioned so far, the judiciary and the SC have a pivotal proactive role in these developments, as it will be analysed further on.

3.2 The NRC under the BJP: Disenfranchisement and the CAA Nexus

In 2013, before the BJP won the 2014 elections, SC Justice Gogoi, an Assam native, heard a petition by an Assam NGO requesting the updating of the NRC in the state, so to adequately identify illegal migrants. Indeed, Gogoi supported the petition and kickstarted the updating of the NRC, on the grounds that the governments both at the centre and state level were acting too slowly in addressing the flow of illegal migrants from Bangladesh. Gogoi was already mentioned in previous chapters due to his untransparent and complicit behaviour with regards to the executive.²³⁹ The matter will be analysed in more detail in the dedicated section. At this point it is important to note how Justice Gogoi, due to its background and political beliefs, has shown a strong sense of ethnonationalism towards the Assam question, consistently working hand in hand with the BJP government and their Hindu-nationalist agenda.²⁴⁰ In 2014, after hearing the petition mentioned, and unsatisfied with the situation, he instructed Assam’s NRC coordinator Prateek Hajela to investigate whether

²³⁶ Gogoi and Sen, "National Register of Citizens (NRC)," 4832.

²³⁷ Mohsin Alam Bhat, “Doubtful Citizens: Irregularization and Precarious Citizenship in Contemporary India,” in *Statelessness in Asia*, ed. Michelle Foster, Jaclyn Neo, and Christoph Sperfeldt (Cambridge: Cambridge University Press, 2025), 209-11.

²³⁸ *Ibid.*, 213.

²³⁹ Jha, “Indian Judiciary,” in *Indian Politics and Political Processes*, 151.

²⁴⁰ Jaffrelot, *Modi’s India*, 293-4.

the NRC could be completed by December 2016. For the next five years, until Gogoi's retirement, when he controversially accepted the BJP's offer as a member of the Rajya Sabha, the SC carefully managed and supervised the implementation of the legal mechanism in detail, with the government providing the human and economic resources to make it happen.²⁴¹

While the official deadline imposed by the SC was not respected, in 2017 and 2018 the government published the first NRC drafts for Assam. These registries excluded four million applicants from eligibility to Indian citizenship.²⁴² In order to be included into the NRC, Assam residents have to produce legal proof in the form of an official document such as a birth certificate or passport. Importantly, as entailed by the 1985 CAA, these documents have to refer to a period previous to the cut-off date of the 24th of March 1971.²⁴³ The burden of proof therefore sits with the applicant. Due to the general circumstances of the Indian population, where poverty and illiteracy are widespread, it is very demanding if not impossible for regular citizens to efficiently provide the necessary documents, even more so if these are decades old.²⁴⁴ These problems were reflected again in the final version of the NRC published on the 31st of August 2019, after postponing the final deadline imposed by the SC on several occasions. Almost two million people out of the thirty living in Assam were excluded from the NRC. Among these, 700,000 were Muslims, 36.7 per cent of the total. Among these, 486,000 were Bangla Muslims, 25.5 per cent of the total. Additionally, between 500,000 and 600,000 Bangla Hindus were excluded, along with 60'000 Hindu Assamese. From 2013 up to 2019, the total cost for the implementation of the NRC amounted to more than 150 million US dollars.²⁴⁵ This represents arguably the vastest state-imposed statelessness since WWII.²⁴⁶

Apart from the fact that the most affected were the Muslims residing in Assam, much more worrying for the government was the exclusion of Hindus, an inconvenience that had arisen already in the previous drafts due to the difficulties that residents experienced in legally proving their status.²⁴⁷ The BJP's Assam unit expressed profound preoccupation for the potential inclusion of illegal foreigners in the final NRC, but most of all for the exclusion of Hindus. A BJP Member of the State Legislature (MLA) stated that "Hindus can never be

²⁴¹ Arshu John, "Ranjan Gogoi's Gift to the Government," *The Caravan*, February 1, 2020, <https://caravanmagazine.in/reportage/ranjan-gogoi-gifts-government>; Jaffrelot, *Modi's India*, 293.

²⁴² Hari and Nagpal, "The National Register of Citizens (NRC)," 197.

²⁴³ Government of Assam, "What are the Admissible Documents?," National Register of Citizens (NRC), accessed September 6, 2025, <https://www.nrcassam.nic.in/admin-documents.html>.

²⁴⁴ Chandrachud, "Secularism and the Citizenship Amendment Act," 26-28.

²⁴⁵ Bhat, "Doubtful Citizens," 220, citing Amit Shrivastava, "An All-India National Register of Citizens will be an Economic Disaster," *The Wire*, December 9, 2019.

²⁴⁶ Bhat et al., "Authoritarianism in Indian State," 471, citing Michelle Foster and Jade Roberts, "Manufacturing Foreigners: The Law and Politics of Transforming Citizens into Migrants," in *Research Handbook on the Law and Politics of Migration*, ed. Catherine Dauvergne (Cheltenham: Edward Elgar Publishing, 2021).

²⁴⁷ Chatterji et al., "Detention, Criminalisation, Statelessness."

foreigners in India”.²⁴⁸ Accordingly, the chief of the RSS, the patron organization of the BJP and its leaders, clarified that “not a single Hindu will have to leave this country because of the NRC”.²⁴⁹

Generally, many requirements of the NRC were changed during the process, causing a widespread sense of confusion and causing numerous unjustified exclusions. For example, the category of “original inhabitants” (OIs) was meant to be automatically included in the NRC. Evidence has demonstrated how Bengalis were excluded and discriminated systematically from this category, while the NRC rules are extremely vague on the matter, and offer no parameters for the identification of OIs.²⁵⁰ In fact, the whole NRC system to recognize the citizenship status of the residents of Assam was deeply flawed in favour of Assamese and Hindus, while Bengalis and Muslims had a much more difficult time in getting accepted. Accordingly, categorized OIs were exempted from proving their residency in Assam before the 1971 cut-off date. Contrarily, the inhabitants excluded from the OIs, mostly Muslim Bengalis as said before, had to retrieve documents predating the 25th of March 1971 in order to prove their legal status, documents which are virtually unretrievable in most cases.²⁵¹ The whole situation was worsened further with the complicity of the Border Police and Election Commission, which since the 1990s have been arbitrarily accusing Assam residents of being foreigners or “doubtful voters”. Usually, no substantial investigation is carried out nor is the person affected notified by authorities. The consequences include the automatic exclusion from the NRC and the suspension of voting rights. It is estimated that between 1997 and 2021 370,000 voters were labelled as doubtful and 143,000 residents as foreigners.²⁵² The next section will prove the fundamental involvement of the judiciary in this discriminatory process, which was fully supervised by the SC.

The consequences for the people excluded from the NRC are devastating, especially because the affected are generally the poorest sections of the Assam population, mostly of whom are Muslims. As indicated by the NRC Rules, any person not satisfied with the outcome has the right and obligation to present an appeal the Foreigners’ Tribunals in Assam, specifically designed semi-judicial bodies. These institutions, installed under the Foreigners (Tribunals) Order of 1964, are extremely problematic, and according to Amnesty International they are “designed to exclude”.²⁵³ First, members of these tribunals lack “security of tenure”, as they serve brief and renewable terms which makes them vulnerable to government influence an incompatible with judicial independence. Secondly, the tribunals’ members can be selected even without the adequate judicial

²⁴⁸ Manogya Loiwal, "NRC Final List: BJP Worried Over Exclusion of Hindus, Inclusion of Illegal Bangladeshi Muslims," India Today, August 31, 2019, <https://www.indiatoday.in/india/story/nrc-final-list-bjp-worried-over-exclusion-of-hindus-inclusion-of-illegal-bangladeshi-muslims-1593966-2019-08-31>.

²⁴⁹ "No Hindu Will Have to Leave over NRC," The Telegraph, September 22, 2019, <https://www.telegraphindia.com/west-bengal/no-hindu-will-have-to-leave-over-nrc/cid/1706854>.

²⁵⁰ *The Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003*, Schedule, sec. 3, accessed September 6, 2025, <https://nrcassam.nic.in/images/pdf/citizenship-rules.pdf>; Bhat, “Doubtful Citizens,” 222.

²⁵¹ Citizens for Justice and Peace, “NRC for Assam: A Flawed Design,” January 7, 2021, <https://cjp.org.in/nrc-for-assam-a-flawed-design>.

²⁵² Bhat, “Doubtful Citizens,” 204.

²⁵³ Indians For Amnesty International Trust, *Designed to Exclude: How India’s Courts are Allowing Foreigners Tribunals to Render People Stateless in Assam* (Indians For Amnesty International Trust, 2019), https://www.amnesty.be/IMG/pdf/rapport_inde.pdf.

experience. For example, retired civil servants are eligible. Lastly, there is no statutory right to appeal the tribunals' decision. In fact, these decisions have to be challenged directly to a High Court, making the process very inaccessible to the vast majority of the affected.²⁵⁴ On average, it takes more than three years for an individual to prove its status in front of these tribunals, and that comes at a great cost. People are forced to use their most valuable possessions and savings in order to put up a strong case and hire a defence lawyer. Cases have been reported of people committing suicide due to the hardship that these proceedings brought onto families.²⁵⁵ The capricious and hostile nature of the Tribunal is well documented. The state's legal representative is rarely present during the proceedings. Documents are often rejected due to the absence of the testimony of the official who signed them. Other times documents are ignored due to alleged wrong positioning of the state emblem, and similar superficial discrepancies. It is in fact common practice to manipulate officials and tribunal members through bribes in order to target unwanted community members. Another unclear, arbitrary and widespread practice was the filing of objections against the inclusion of Muslim families in the NRC. Apparently at least 250,000 objections were filed, mostly anonymously, to purposely exclude entire families despite their undisputable proof of residence before the cut-off date. The result of these profoundly flawed proceedings is astonishingly discriminatory and marginalizing. In October 2019, 468,905 cases were pending before the Tribunals. Of the 136,149 people that were eventually declared foreigners, between 70 and 80 per cent were Muslims, most of which are local inhabitants with valid documentary evidence.²⁵⁶ As of January 2025, Foreigners' Tribunals have declared 165,992 people as foreigners.²⁵⁷

Once one is declared a foreigner, the person is detained in one of the several detention centres present in Assam. The living conditions are awful, where overcrowding is a constant condition and there are testimonies of detainees who had to share cells with regular criminals in standard jails due to the lack of space. Human Rights Watch has reported that some people are deported to Bangladesh while still having pending appeals for their status. While there is a standard procedure for deportation, in these detention centres it is carried out in secret and illegally. Additionally, some end up spending years in these conditions of detention.²⁵⁸ As of April 2020, at least thirty people were confirmed to have died in these centres since 2009.²⁵⁹ To make things worse, in 2025 the Chief Minister of Assam declared that "foreigners" will be deported even though they are listed in the NRC, as the former cannot be the only instrument to ascertain one's nationality.²⁶⁰

²⁵⁴ Chandrachud, "Secularism and the Citizenship Amendment Act," 30-33.

²⁵⁵ Chatterji et al., "Detention, Criminalisation, Statelessness.," Bhat, "Doubtful Citizens," 225.

²⁵⁶ Chatterji et al., "Detention, Criminalisation, Statelessness."

²⁵⁷ Human Rights Watch, "India: Hundreds of Muslims Unlawfully Expelled to Bangladesh," July 23, 2025, <https://www.hrw.org/news/2025/07/23/india-hundreds-of-muslims-unlawfully-expelled-to-bangladesh>.

²⁵⁸ Ibid.

²⁵⁹ Deepanshu Mohan, Samragnee Chakraborty, Yashovardhan Chaturvedi, Hima Trisha M., Nitya Arora, Rishav Chakraborty, and Aman Chain, "Detainees Sharing Cells With Criminals': Human Rights Violations in Assam's Detention Centres," The Wire, accessed September 6, 2025, <https://thewire.in/rights/detainees-sharing-cells-with-criminals-human-rights-violations-in-assams-detention-centres>

²⁶⁰ T.R. Vivek, "Assam will deport 'foreigners' even if their names feature in NRC: Himanta," The Hindu, June 12, 2025, <https://www.thehindu.com/news/national/assam/assam-will-deport-foreigners-even-if-their-names-feature-in-nrc-himanta/article69685571.ece>.

While what discussed so far is mainly directed towards Bengali Muslims, framed by the BJP state and government leaders as illegal “infiltrators”, the CAA offers an alternative path to Indian citizenship to any non-Muslim individual that migrated from Bangladesh before 2015 and were excluded by the NRC. As already mentioned, and asserted on several occasions by the BJP leadership, the NRC and CAA are meant to be applied in combination. It was clear well before the final draft of the NRC that such legal mechanism would have entailed also a substantial exclusion of Hindus.²⁶¹ The CAA allows Hindus, Sikhs, Buddhists, Jains, Parsis, and Christians from bordering Bangladesh to obtain Indian citizenship after just five years of residence in a fifteen-year period. While the CAA might apparently seem related only to migrants, its relation to the NRC points to the fact that it is not just that. The potential threat of a national NRC, like the one in Assam, is strengthening the idea of a polity based on the outing of Muslims, no more considered as natural citizens of India.²⁶² This juncture between the NRC and the CAA labels India as the homeland of the Hindus, the Hindu Rashtra, where Muslims are not welcome and not considered as indigenous. Former Chief Justice of the Delhi High Court and former Chairperson of the Law Commission of India Ajit Shah summarized the CAA and NRC nexus as follows:

*“This law [the 2019 CAA] automatically makes Muslim immigrants second class priorities when they are on Indian soil, even though they may have made the long trek to India for the same reasons (poverty, political persecution, etc.) that drove their Hindu or Christian neighbours out. If you expand the understanding of this law, as the government has overtly done (by linking the NRC to the CAA), it has implications of making all Muslims in India second class citizens.”*²⁶³

Accordingly, in 2025, the Assam Government asked district authorities and Foreigners’ Tribunals to drop cases against the six communities covered by the 2019 CAA that entered in India before 2015. The notification also included instructions to “encourage” and “support” foreigners applying for citizenship under the CAA. Accordingly, in 2024 the state government had instructed border police not to forward cases of non-Muslims who entered before 2015 to the Tribunals.²⁶⁴ As mentioned when discussing the anti-CAA movement, the Assamese opposed the CAA due to its potential migratory repercussions on the state, which has long been opposed to any kind of immigration, regardless of religion or nationality. However, the real interest of the BJP is simply to cast out the Muslims, and that is the function allocated to the NRC and CAA.

²⁶¹ Torri, “India 2019,” 373.

²⁶² Jayal, “Faith-Based Citizenship.”

²⁶³ Ajit Prakash Shah, “In CAA Narrative, Finding the Judiciary’s Lost Voice,” *The Hindu*, December 28, 2019, <https://www.thehindu.com/opinion/lead/in-caa-narrative-finding-the-judiciarys-lost-voice/article30415118.ece>.

²⁶⁴ Rokibuz Zaman, “Assam to drop foreigners tribunal cases against non-Muslims who entered state before 2015, cites CAA,” *Scroll.in*, August 5, 2025, <https://scroll.in/latest/1085270/assam-to-drop-foreigners-tribunal-cases-against-non-muslims-who-entered-state-before-2015-cites-caa>.

3.3 The Judiciary and the NRC

As anticipated, the high judiciary and particularly the Supreme Court played a central role in the events that have unfolded in Assam regarding the migration crisis and the NRC. While the focus of this thesis covers in particular the events unfolded since 2014 under the leadership of Modi's BJP, the SC actively and decisively laid the ground for the unfolding of the NRC crisis already in the early 2000s.

The already mentioned and controversial Foreigners' Tribunals were originally installed in 1964 through the homonymous order, still active today. However, in 1983 the Indira Ghandi government enacted the Illegal Migrants (Determination by Tribunals) (IMDT) Act, a special provision applicable only in Assam.²⁶⁵ This took place in the midst of the Assam Movement against the Bengali Muslim Community residing in the state. The IMDT outlined the procedures for the detection and expulsion of illegal migrants in Assam. However, the tribunals put in place under the IMDT were much more reliable and credible legal mechanism to ascertain the citizenship status of individuals with respect to the Tribunals put in place under the 1964 order.²⁶⁶ In fact, their purpose was to protect and safeguard minorities which were being severely targeted by the Assamese insurgency. Early that same year the Nellie massacre had taken place, killing thousands of Bengalis. Particularly, the IMDT placed the burden of proving citizenship or illegal status on the authorities or individuals that filed the complaint, and not on the accused.²⁶⁷ The opposite of the regular Foreigners' Tribunals.

During the late 1990s and early 2000s Governor of Assam S.K. Sinha mounted a fierce opposition with regards to the IMDT. In particular, in 1998 he published a report advocating that immigration in the state was not only a threat to the local communities, but a matter national security.²⁶⁸ In this document he warned about threats such as the "long cherished design of Greater East Pakistan/Bangladesh", and the "continuing silent invasion".²⁶⁹ Additionally, the influx of Muslims was included as another threat, as once the border districts of the state will turn into Muslim-majority regions, "It will then only be a matter of time when a demand for their merger with Bangladesh may be made", and consequentially the "rapid growth of international Islamic fundamentalism may provide the driving force for this demand".²⁷⁰ In the report he severely criticized the IMDT stating that it only served the interests of the illegal migrants. He recommended to repeal the Act all together, and to replaced it with a more "just, fair, transparent and expeditious" mechanism.²⁷¹ He further advised, rather surprisingly, that illegal migrants arrived after 1971 "will not be deported but will be made

²⁶⁵ *The Illegal Migrants (Determination by Tribunals) Act, 1983* (Act No. 39 of 1983), 1983.

²⁶⁶ Bhat, "Doubtful Citizens," 214.

²⁶⁷ Gogoi and Sen, "National Register of Citizens (NRC)," 4833-4.

²⁶⁸ Bhat, "Doubtful Citizens," 213.

²⁶⁹ S.K. Sinha, *Report on Illegal Migration into Assam Submitted to the President of India*, 1998, Letter and Chapter 1 para. 3, https://www.satp.org/satporgtp/countries/india/states/assam/documents/papers/illegal_migration_in_assam.htm.

²⁷⁰ *Ibid.*, Chapter 3 para. 24.

²⁷¹ *Ibid.*, Chapter 4

Stateless citizens”.²⁷² It has been demonstrated how this report’s claims were unreliable and based on faulty sources of data,²⁷³ along with its exceptionally racializing, and anti-Muslim rhetoric.

In 2005 the SC repealed the IMDT by adopting most of the very same arguments proposed by Sinha in 1998.²⁷⁴ The petition was sent by Sarbananda Sonowal in 2000, Assamese native and future long-standing BJP politician, currently part of Modi’s Cabinet as Minister of Ports, Shipping and Waterways.²⁷⁵ The SC concluded that the IMDT Act of 1983 was *ultra vires* and therefore struck down, meaning that the Foreigners’ Tribunal order of 1964 shall apply again to Assam, as in the rest of India.²⁷⁶ The ruling underlines how Bangladeshi immigration is a threat to the “integrity and security of [the] north-eastern region”.²⁷⁷ The SC goes over most of the warnings put forward by Sinha in its report, including how allegedly “Muslim militant organizations have mushroomed in Assam”, and how these can cause the severing of the north-east from the rest of India.²⁷⁸ Additionally, the SC came to the conclusion that the State of Assam is facing “external aggression and internal disturbance on account of large scale illegal migration of Bangladeshi nationals”, and for this reason, the IMDT conflicts with the Art. 355 of the Constitution which entrusts the Union to protect the state from external aggression and internal disturbance.²⁷⁹ The examples are numerous. Generally, as argued by Bhat, the judgment merged a growing racialization of citizenship, based on ethnicity and religion, with issues of national security. In fact, such kind of discourse offered the state the appropriate legitimizing language for the creation of a vast legal mechanism of citizenship deprivation which has since operated beyond the guardrails of due process and human rights,²⁸⁰ namely, the NRC and its Tribunals. Chandrachud further highlights how the reasoning of the SC in this case was inherently faulty.²⁸¹ First, when the SC discusses that the burden of proof for citizenship in democracies like the US and the UK lies on the individual, as a way to demonstrate how India should do the same, it fails to realize that the socio-economic conditions of these countries may well allow such a system, while India’s widespread illiteracy and poverty does not. The second flaw regards the issue of aggression. The SC treated illegal immigration as an external aggression or internal disturbance, failing to acknowledge that migrants that travelled to India do so mainly to improve their economic condition, not to conduct criminal or dangerous activities. Lastly, it is incorrect to assert, as the SC did, that a person who is deported is not deprived of his life and personal liberty.²⁸²

²⁷² Ibid.

²⁷³ Bhat, “Doubtful Citizens,” 213.

²⁷⁴ *Sarbananda Sonowal v. Union of India*, AIR 2005 SC 2920, para. 11-12.

²⁷⁵ Ministry of Ports, Shipping and Waterways, “Shri Sarbananda Sonowal,” accessed September 7, 2025, <https://shipmin.gov.in/content/shri-sarbananda-sonowal>.

²⁷⁶ *Sarbananda Sonowal*, AIR 2005 SC 2920, para. 57.

²⁷⁷ Ibid., para. 45.

²⁷⁸ Ibid., para. 37.

²⁷⁹ Ibid. para. 38-9.

²⁸⁰ Bhat, “Doubtful Citizens,” 215-16.

²⁸¹ Chandrachud, “Secularism and the Citizenship Amendment Act,” 27-28.

²⁸² Ibid.

Following the SC's judgment on the IDMT, the central government ruled by Congress attempted to circumvent the SC's verdict by issuing the 2006 Foreigners (Tribunals for Assam) Order.²⁸³ The petition was forwarded again by Sarbananda Sonowal, and once again the SC ruled in favour of the petitioner and quashed the 2006 Order on the same grounds as the previous case. In fact, the SC argued that the 2006 Order by the government, which installed Assam-specific Tribunals instead of the ones enshrined in the 1964 Order, "has been issued just as a cover up for non-implementation of the directions of this Court".²⁸⁴ Particularly, like for the previous case, according to the SC the 2006 order placed the entire burden of proof on authorities, and for this reason it did not serve the purpose sought to achieve by the Central Government.²⁸⁵ The unreliable and non-transparent Foreigners' Tribunals under the 1964 Order were again enforced in Assam.

After the IDMT was struck down, the government agreed to update the Assam NRC, however the process never really ignited. After a series of violent anti-immigrant clashes between 2009 and 2013 in the state, a series of petitions over the deportation of illegal migrants and the constitutionality of Section 6A of the 1985 CAA, the Supreme Court, and Justice Gogoi in particular, took matters in their own hands.²⁸⁶ In 2014, the SC bench chaired by Gogoi and Nariman, issued an order to initiate the updating of the NRC. What was unusual about this order was not the pro-active decisions of the SC, as directives were not uncommon, but rather that the Court assumed full supervision over the implementation of the NRC, almost in very detail, from methodology, technologies and scheduling.²⁸⁷ Additionally, during the lengthy process of implementation, that took several years to finalize, the SC made wide use of sealed cover communications with the executive. While this method is sometimes necessary for security reasons, its practise has grown considerably, with Justice Gogoi being one of its most consistent users.²⁸⁸ As highlighted by Jaffrelot, throughout the updating of the NRC, the SC, headed by Gogoi as Chief Justice between 2018 and 2019, expressed a strong sense of ethnonationalism aligned with the one of the BJP.²⁸⁹ In particular, Assamese nationalism. It is relevant to point out that Gogoi is an Assamese with royal lineage to the antique Ahom kingdom in Assam.²⁹⁰ The last major action regarding the NRC was taken in May 2019, when the SC, headed at this point by Gogoi ordered two-hundred extra Foreigners' Tribunals to be set up.²⁹¹ Eventually, just four months after its retirement from the SC, Gogoi was nominated by Modi to the Rajya Sabha. Before that, in 2019, the Modi government sided with Gogoi when he was accused by a former SC employee of sexual harassment.²⁹² Senior advocate and president

²⁸³ *Union of India, Foreigners (Tribunals for Assam) Order, 2006.*

²⁸⁴ *Sarbananda Sonowal v. Union of India*, 2007 AIR SCW 326, para. 45.

²⁸⁵ *Ibid.*, para. 41-42 and 44.

²⁸⁶ Gogoi and Sen, "National Register of Citizens (NRC)," 4835; Bhat, "Doubtful Citizens," 221.

²⁸⁷ *Assam Sanmilita Mahasangha v. Union of India*, AIR 2015 SC 783.

²⁸⁸ Gautam Bhatia, "Justice Must Be Open, Not Opaque," *Hindustan Times* (New Delhi), October 19, 2018, <https://www.hindustantimes.com/analysis/justice-must-be-open-not-opaque/story-uOifNMAKfX0sijzmkAETnM.html>.

²⁸⁹ Jaffrelot, *Modi's India*, 293-4.

²⁹⁰ *India TodayNE*, "Judge Who Presided over Historic Ayodhya Verdict Has Mythical Lineage to Lord Krishna. Read to Know Why," January 23, 2024, <https://www.indiatodayne.in/assam/story/judge-who-presided-over-historic-ayodhya-verdict-has-mythical-lineage-to-lord-krishna-read-to-know-why-791884-2024-01-23>.

²⁹¹ John, "Ranjan Gogoi's Gift to the Government."

²⁹² Jaffrelot, *Modi's India*, 295-6.

of the Supreme Court Bar Association Dushyant Dave summarized the unprecedented nomination of Gogoi as “totally disgusting, a clear reward in *quid pro quo*. The semblance of independence of the judiciary is totally destroyed.”²⁹³

In conclusion, unlike the cases of the 2019 CAA and J&K, the Supreme Court played a fundamental active role in the implementation of the NRC. Indeed, it worked in coordination with the political agenda of the BJP executive, along the lines of anti-Muslim sentiment and Hindu-nationalism. The SC moved the first decisive steps towards an updating of the NRC in the early 2000s, with rulings that safeguarded more the preservation of the Assamese, while considering migrants as inherent threats and aggressions to India’s security. This meant that the untransparent and dysfunctional Foreigners’ Tribunals were favoured over the much more safeguarding Tribunals under the IMDT. From there, particularly under the meticulous direction of Justice and then CJI Gogoi, the SC kickstarted and oversaw the entire updating of the NRC. The circumstances surrounding Gogoi’s approach and political affiliations, questioned even further after his post-retirement job, highlight the profound political significance that the NRC had to the BJP. Its majoritarian and Hindu-nationalist agenda, focused on the outing of the Muslim population, perceived as infiltrators, saw in the NRC a key legal mechanism for marginalization and discrimination. The trembling impartiality of the judiciary highlights the influential impact of the BJP’s executive aggrandizement and autocratic legalist agenda.

3.4 Results

The NRC in Assam has demonstrated to be not just a demanding administrative task in order to record every Indian citizen, but a massive executive and judiciary-sponsored legal mechanism of Bengali-Muslim marginalization, under the form of disenfranchisement and statelessness.

It has disproportionately affected the Muslim population of the state, while at the same time also affecting the most vulnerable classes of Hindus, due to the difficult and fallacious bureaucratic process. Nevertheless, after the passing and implementation of the 2019 CAA, Hindus, among other non-Muslim groups, are granted a smoother way to achieve Indian citizenship, while not being considered illegal migrants, but rather persecuted minorities. Virtually, the CAA attempts to correct the NRC’s fallacies. Muslims on the other side, do not have this possibility, as they are not considered at all as possible persecuted minorities. In fact, they are framed as infiltrators by BJP authorities, regardless of their provenance.

As asserted by BJP leaders, together, the NRC and CAA attempt to consolidate a Hindu Rashtra, where there is no natural room for Muslims, who have to be marginalized or deported. The social and legal standing of Muslims has actively been undermined and put to the side. The system implemented in the NRC, such as the Foreigners’ Tribunals has shown evident flaws to the detriment of Muslims, coupled with illegal deportation practices and inhuman detention conditions.

²⁹³ The Wire Staff, “In Unprecedented Move, Modi Government Sends Former CJI Ranjan Gogoi to Rajya Sabha,” *The Wire*, March 16, 2020, <https://thewire.in/law/cji-ranjan-gogoi-rajya-sabha-nomination>.

The judiciary, particularly the Supreme Court, has had a central role in this marginalizing system. It has worked hand in hand with the BJP executive and supervised every aspect of the NRC. Unlike for the CAA and the J&K, where the judiciary assumed a more passive and delaying attitude, while still condoning the actions of Modi's government, in Assam, the SC actively took part in the unfair treatment reserved to Muslim Bengalis. Before that, already in earlier years, it had favoured an anti-Muslim and racializing rhetoric in dealing with the Assam question. Later, this approach was re-applied by Justice Gogoi, a key figure for the NRC updating, whom was at the centre of critics for its government-aligned Hindu-nationalist stance, which was most probably rewarded through its post-retirement job offer by the BJP. This crisis of the Indian judiciary and its impartiality is a decisive sign of autocratic legalism, where the checks and balances on executive power are thinned, leaving the way to majoritarianism.

This case study, as for the 2019 CAA and the J&K, represents a key legal mechanism of marginalization on religious grounds enacted under the BJP government. It presents the features of democratic backsliding, autocratic legalism, Hindu-nationalism, and ethnic democracy. As of today, the NRC has not seen a national implementation yet. However, the Modi government is expected to remain in power at least up to 2029, raising the likelihood of a wider NRC.

Conclusions

This thesis started by emphasizing the deep transformations which have been undergoing in India in the last decade under the Hindu-nationalist leadership of Modi and the Bharatiya Janata Party. Democratic backsliding has reached unprecedented levels in what could once be considered the largest democracy on earth. As of today, no expert would define India's regime as democratic.¹

India's democratic regression cuts across multiple dimensions. All the major democratic self-correcting mechanisms and accountability measures to keep in check the executive have been eroded, from the judiciary to political opposition, including the media, academia, civil society organizations, and fourth branch institutions.²

In this intricated environment of executive aggrandizement, where democratic institutions have been formally kept in place while democratic norms and practices have been substantially undermined,³ this thesis focused on a contemporary Indian-specific phenomenon: the marginalization of religious minorities at the hands of Hindu-nationalism. In recent years, the secular doctrine of the Indian Constitution, along with religious freedom and religious organizations, have been victims of systemic repression, especially the Muslim community. In particular, this work attempted to answer the research question of how have legal mechanisms under the BJP government contributed to the erosion of pluralism and the marginalization of religious minorities. The research question was answered through in-depth legal analysis of three pivotal case studies, the revocation of J&K's special status, the 2019 CAA, and the NRC in Assam, all of which are central items on the BJP's illiberal political agenda. These were addressed through the close examination of the relevant legal provisions, and jurisprudence, incorporated with the academic literature published so far, and reports by reliable human rights organizations.

The theoretical and conceptual framework of this thesis has been constructed by engaging with fitting pre-existing concepts in the literature, most of which have been recently defined. In fact, this work has attempted to contribute to this developing literature by adopting an original, layered, descending, and broad-to-specific theoretical lens. Its foundations are to be found in the theories of democratic backsliding, and in particular executive aggrandizement,⁴ a phenomenon which can smoothly be identified in contemporary India. From there, a specific strand of executive aggrandizement has been considered, autocratic legalism.⁵ This sub-trend, of a substantial legal nature, highlights the importance of legislation in legitimizing and covertly consolidating the illiberal agendas of expanding executives. This legal phenomenon, just like for the wider executive

¹ Maiorano, "India as an Ethnocracy," 59.

² Khaitan, "Killing a Constitution with a Thousand Cuts," 51-2.

³ Maya Tudor, *Why India's Democracy Is Dying*.

⁴ Bermeo, "On Democratic Backsliding,"

⁵ Scheppele, "Autocratic Legalism".

aggrandizement, has been attributed to Modi's India. These two wider concepts set the ground for the unique India-specific phenomenon of Hindu-nationalism, embraced fiercely by the BJP. This strong majoritarian ideology, based on Hindutva, or "Hindu-ness", and on a fierce anti-Muslim stance, has worked in combination with the pre-existing context of executive aggrandizement and autocratic legalism. From there, India's democratic system has growingly been showing the characteristics of an ethnic democracy, where minority citizens are marginalized and enjoy incomplete rights compared to the ethno-religious majority, in this case Hindus.⁶ This progressive interpretive framework provided the adequate theoretical tools to analyse the selected case studies and demonstrate how legal mechanisms have been central to the erosion of pluralism and the marginalization of Muslims in BJP India.

The analysis of the three case studies, which have been selected based on their national scope and significance, have successfully provided an answer to the research question of this thesis. Furthermore, while the case studies present their own specific contexts within Indian politics and jurisprudence, they have demonstrated a robust affinity with the theoretical lens and framework structured in this work. Consequentially, they have also outlined a satisfying response to the question that motivated this inquiry.

The J&K case has highlighted the Hindu-nationalist and majoritarian intentions of the BJP, which have been realized mainly through the distortion and overstretch of the Indian constitutional framework, so to overcome the democratic safeguards in place to protect the only Muslim-majority state in the Indian Union. The BJP's legal policies in the region have entrenched majoritarian oppressive control, eroding federalism, human rights, and democratic accountability. Indeed, the analysis of the various legal mechanisms enforced in J&K has proved how the abrogation of J&K's special status embodies an authentic example of autocratic legalism, where the law is at the service of illiberal and oppressive ends. The dreadful conditions imposed by the BJP government to the Muslim-majority population of the state situates the case study into the framework of ethnic democracy, and the marginalization of religious minorities. The higher judiciary, responsible for the protection of constitutional values, has shown its flaws, and is in crisis. Namely, it has revealed a passive and complacent attitude towards the abuses enacted by the government, leaving constitutional questions unanswered to this day. These circumstances constitute stark signs of executive aggrandizement and autocratic legalism.

While featuring their own specific characteristics, the other two case studies stress the same patterns of executive aggrandizement, Hindu-nationalism, and ethnic democracy, decisively contributing to answering how legal mechanism have purportedly marginalized religious minorities in India under the BJP. The CAA represents the most significant and nation-wide legal mechanism of marginalization and discrimination against Muslims currently in India. The CAA, presented as a *bona fide* provision to protect persecuted minorities, in reality operates as a starkly discriminatory and marginalizing legal mechanism. The law provides a fast-track to Indian citizenship to six religious communities, including Hindus, from three Muslim-majority

⁶ Jaffrelot, *Modi's India*.

neighbouring countries, while completely ignoring Muslims, among other groups. Markedly unconstitutional, the Amendment affects the whole secular definition of legal citizenship, as it establishes a faith-based requirement, consolidating a *de jure* ethnic democracy. The CAA not only excludes Muslims, but it also implicitly assigns them a secondary social and legal status in the country, framing them as outsiders and non-natural inhabitants of India. The judiciary's deficiencies in upholding basic principles of equality and equal protection have also been evident in this case, as for the rest. The Supreme Court has shown great delay in addressing key constitutional matters, leaving the CAA's constitutionality unanswered to this day, after six years. By reserving its judgment, the SC has left the executive unchecked, allowing the realization of its illiberal agenda and marginalizing legal mechanisms, establishing a *fait accompli*.

The case of the NRC is interconnected to the CAA. The NRC embodies an extremely demanding legal mechanism in order to cast out Bengali Muslims from the state of Assam, a proposal promoted by the executive and the SC. The official purpose of the NRC, that of recording the citizenship status of the residents of Assam, was in fact exploited to cast out the Muslims living in the state. Millions were left out of the registry, disenfranchised and with the concrete risk of being stateless. While some Hindus were also affected, due to the fallacious and demanding system, these are offered a smooth solution through the 2019 CAA, which grants a rapid access to Indian citizenship. This is not allowed to Muslims, who in turn face unfair treatment in the legal ascertaining of their status, illegal deportation, and prolonged inhuman detention conditions. The SC in this case, unlike for the J&K question and the CAA, adopted a pro-active role assisting and directing the government in the implementation of this discriminatory and marginalizing legal mechanism. The SC's complicity was a clear demonstration of the executive's influence over the judiciary, and its loss of impartiality.

The findings of this thesis aim at considerably contributing to the broader literature of democratic backsliding, autocratic legalism, Hindu-nationalism and ethnic democracy. The contemporary Indian context has proven to be extremely enriching for all of these theories. In particular, the legal analysis of the three case studies proposed above, and their legal mechanisms, have emphasized the relevance of theoretical concepts in the real legal and political domain of India's current transformations. Indeed, while some considerable attention had already been dedicated to the erosion of pluralism in the country, this thesis emphasized a specific yet extremely relevant aspect of it: the marginalization of religious minorities through legal mechanisms.

As a matter of fact, this thesis has argued that India's constitutional promise and political tradition of secularism and pluralism have been substantially set aside and replaced through law itself, with religious minorities, especially Muslims, paying the highest price.

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