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A Reckoning For Religious Freedom: India's BJP and the International Implications of Anti-Muslim Leadership

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A RECKONING FOR RELIGIOUS FREEDOM: INDIA’S BJP AND THE INTERNATIONAL IMPLICATIONS OF ANTI-MUSLIM LEADERSHIP

HEATHER HOLMAN*

Currently, the Bharatiya Janata Party (BJP) holds the majority in the Indian Parliament, where it exercises its authority by passing legislation that comports with Hindutva. Hindutva is a political ideology that champions policies intended to make India a Hindu state. Toward this end, BJP leaders use harmful rhetoric and pass legislation that harms Muslim citizens of India. However, India is a party to the International Covenant on Civil and Political Rights (ICCPR), which protects the freedom to manifest one’s religion and prevents the advocacy of religious hatred that constitutes incitement to hostility, discrimination, or violence.

This Comment argues that India and the BJP are currently violating their commitments under Article 18 and Article 20(2) of the ICCPR by passing legislation that discriminates against Muslims and engaging in rhetoric that incites hostility, discrimination, and violence. This Comment recommends that India face international repercussions through Article 41 of the ICCPR and implement domestic measures to remedy the issue including bringing more cases of discrimination to court, allowing Muslims to determine how they want their community to be regulated, and implementing affirmative action programs to change the composition of court.

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I. INTRODUCTION	233
II. BACKGROUND	235
A. THE BHARATIYA JANATA PARTY	235
1. Introduction	235
2. Muslim Discrimination Through Policy	236
3. BJP Culpability in Anti-Muslim Violence	238
B. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS	241
1. Introduction	241
2. Article 18 Jurisprudence: Necessary & Proportionate Standard	242
3. Article 20 Jurisprudence: Intent, Content, Extent Standard	244
III. ANALYSIS	248
A. INTRODUCTION	248
B. THE BJP'S POLICIES AND RHETORIC VIOLATE ARTICLE 18(2) BECAUSE THEY CONSTITUTE COERCION.....	248
C. INDIA'S CITIZENSHIP AMENDMENT ACT VIOLATES ARTICLE 18 OF THE ICCPR BECAUSE IT IS NOT NECESSARY AND PROPORTIONATE TO ACHIEVING A PUBLIC SAFETY GOAL.....	250
1. The CAA Is Not Necessary Nor Proportional To Achieve a Public Safety Goal Because It Favors Hindus Residing in Other Countries Over Muslims Residing in India.....	250
2. The CAA Is Not Necessary To Handle the Influx of Refugees into India Because that Goal Can Be Served Without Infringing on Religious Freedom	251
3. The Harm that the CAA Causes Muslims Is Disproportionate to the Benefit that It May Serve in Immigration Proceedings.....	254
D. THE BJP VIOLATES ARTICLE 20(2) BECAUSE ITS ADVOCACY OF HINDUTVA IS INTENTIONAL, CONSISTS OF HATEFUL CONTENT, AND REACHES A WIDE EXTENT OF THE POPULATION	256
1. India's Reservation to Article 19 Does Not Conflict with the Object and Purpose of the Treaty as a Whole	256

2.	India’s Internal Laws Do Not Sufficiently Protect the Interests Identified in Article 20(2)	257
3.	BJP Leaders Intend for Their Statements To Be Hateful Because They Advocate for Discrimination and Incitement of Violence.....	258
4.	The BJP’s Rhetoric Has Hateful Content Because It Identifies Muslims as the Source of India’s Problems and Calls for Violence Against Them	259
5.	The BJP’s Statements Have a Wide Extent Because They Are Uttered by Politicians to Large Audiences	260
IV.	RECOMMENDATIONS	262
A.	INTRODUCTION	262
B.	SOLUTIONS AVAILABLE UNDER THE ICCPR	262
1.	Adopting the ICCPR’s Optional Protocol	262
2.	Using Article 41 of the ICCPR and International Political Pressure	263
C.	SOLUTIONS OUTSIDE THE ICCPR	265
1.	Hailing Individuals to Court	266
2.	Self-Determination for Religious Communities....	267
3.	Diversify the Composition of the Bench	268
V.	CONCLUSION	269

I. INTRODUCTION

Home to almost 1.5 billion people and eighteen percent of the global population, India plays a significant role on the world stage.¹ As such, it has ratified numerous multilateral human rights treaties.² On April 10, 1979, India ratified the International Covenant on Civil and Political Rights (ICCPR).³ The ICCPR was promulgated by the United Nations (U.N.) General Assembly, and generally protects the

1. See India Population, WORLDOMETER, <https://www.worldometers.info/world-population/india-population> (last visited July 12, 2022).

2. Abdulrahim P. Vijapur, *India’s International Human Rights Obligations: Critical Perspectives*, 2 AIS-JMI J. INT’L & AREA STUD. 76, 77 (2020).

3. *Ratification Status for India*, U.N. HUMAN RIGHTS TREATY BODIES, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx (select “India” from the “Please select a country” drop down box).

enjoyment of civil and political freedoms.⁴ Article 18 broadly covers the freedom to practice any religion, while Article 20, Paragraph 2, prohibits advocacy of religious hatred that constitutes incitement to “discrimination, hostility, or violence.”⁵

Domestically, India’s democracy manages the heterogeneity of its massive population, with both successes and failures in doing so throughout its seventy-five-year history.⁶ India’s constitution establishes a federal parliamentary democracy whereby the executive branch is legitimized by the parliament, and the judiciary is wholly independent from the executive and the legislature.⁷ In 2014, the Bharatiya Janata Party (BJP) won a single-party majority in the Lok Sabha, one of the houses of the Indian legislature.⁸ This was a significant achievement for the BJP, which had previously been considered an extremist fringe party.⁹ The BJP advocates for *Hindutva*, roughly translated to “Hindu-ness,” which seeks to define Indian culture in terms of Hindu values.¹⁰ The BJP’s leadership and

4. International Covenant on Civil and Political Rights arts. 18, 20, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

5. *Id.*

6. See Ian Talbot, *The 1947 Partition of India*, in THE HISTORIOGRAPHY OF GENOCIDE 420, 420 (Dan Stone ed., 2008) (detailing the religious violence and accompanying political strife that led to the partition of India and the creation of Pakistan).

7. Niraj Kumar, *Democratic Developmental State in India*, 62 INDIAN J. PUB. ADMIN. 226, 230 (2017).

8. *Id.* at 235.

9. See CHRISTOPHE JAFFRELOT, *Hindu Nationalism: A Different Idea of India*, in MODI’S INDIA: HINDU NATIONALISM AND THE RISE OF ETHNIC DEMOCRACY, 11, 20–21 (2021) (outlining the rise to power of the BJP through radical means); see also Shantanu Guhu Ray, *Global Report Calls BJP a Fringe Party, Triggers Controversy*, NEWSROOM POST (July 30, 2021), <https://newsroompost.com/india/global-report-calls-bjp-a-fringe-party-triggers-controversy/3453144.html> (detailing a recent characterization of the BJP’s extremist views as “fringe” by the Global Internet Forum to Counter Terrorism, an NGO designed to prevent violent extremists from using digital platforms).

10. See Sudha Ramachandran, *Hindutva Violence in India*, 12 COUNTER TERRORIST TRENDS & ANALYSES 15, 16 (2020) (describing Hindutva’s origins from the 1923 treatise by Vinayak Sarvarkar which described Hindus as the only true Indians because both their “fatherland” and “holy land” are in India, while Muslims and Christians could not be considered Indians since they lack such criteria. Hindutva later developed to include the belief that the “foreign races,” namely Muslims and Christians in India, must adopt the Hindu religion and lose ties to their own religions in order to stay within the country).

political influence has led to the passage of laws that political opponents and global observers have criticized as being discriminatory against Muslims, such as the Citizenship Amendment Act of 2019, which provides a framework for the execution of the National Register of Citizens and Foreigners' Tribunals.¹¹ Furthermore, BJP leaders advocating for *Hindutva* habitually use inflammatory rhetoric and commend anti-Muslim acts of violence.¹²

As a signatory of the ICCPR, India is committed to its protection of freedom of religion. However, the BJP's advocacy of *Hindutva* violates the ICCPR's Article 18, protecting freedom of speech, and Article 20(2), protecting against discriminatory incitement of violence.

Part II of this Comment provides background on the BJP, the specifics of the anti-Muslim legislation passed, and the BJP's culpability in violence against Muslims.¹³ Part II also describes the relevant jurisprudence on Articles 18 and 20 of the ICCPR and the legal standards that courts apply to prove violation.¹⁴ Part III argues that India has violated Articles 18 and 20 of the ICCPR and applies the relevant legal standards to the BJP's actions.¹⁵ Part IV recommends that India accept the jurisdiction of the ICCPR's Optional Protocol and take national-level steps, including haling individuals to court, self-determination for religious communities, and diversification of bench composition, to bring India into compliance with the ICCPR.¹⁶

II. BACKGROUND

A. THE BHARATIYA JANATA PARTY

1. Introduction

In the early twentieth century, Hindu nationalism and the ideology

11. The Citizenship (Amendment) Bill, 2019, Bill No. 370 of 2019 (Dec. 4, 2019) (India).

12. *See infra* Part I.

13. *See infra* Section II.A.

14. *See infra* Section II.B.

15. *See infra* Part III.

16. *See infra* Part IV.

of *Hindutva* emerged, which views Hindus as the only “true” Indians and seeks to equate Hindu and Indian culture.¹⁷ An early follower of *Hindutva* founded the Rashtriya Swayamsevak Sangh (RSS), a quasi-military organization whose goal is to promote the physical strength of Hindus and create a nationalist conscience and solidarity among Hindus to overcome the “threat” Muslims pose.¹⁸ In 1980, RSS members founded the Bharatiya Janata Party for electoral support of their Hindu Nationalist beliefs.¹⁹

2. Muslim Discrimination Through Policy

India’s BJP-led government passed the Citizenship Amendment Act (CAA) in December 2019, which provides a fast-track to citizenship for Hindus, Sikhs, Jains, Buddhists, Parsis and Christians from Pakistan, Bangladesh, and Afghanistan—notably excluding Muslims.²⁰ The CAA made religion a criteria for citizenship in India and privileged Hindus in defining that citizenship.²¹ In support of the CAA, the BJP argues that it is necessary to combat high numbers of refugees from India’s neighbors.²² They contend that Muslims were excluded from the CAA because they have not faced religious

17. Ramachandran, *supra* note 10, at 16.

18. JAFFRELOT, *supra* note 9, at 15; *see also* Ramachandran *supra* note 10, at 16–17 (explaining how the RSS became the arbiter of *Hindutva*, training “uniformed cadres at daily early morning drills” and justifying the use of violence in order to obtain *Hindutva*’s goals. Furthermore, *Hindutva* demonized religious minorities in order to mobilize angry mobs that perpetrated violence against the minorities, primarily Muslims and Christians).

19. *See* Sutapa Lahiry, *Jana Sangh and Bharatiya Janata Party: A Comparative Assessment of Their Philosophy and Strategy and Their Proximity with the Other Members of the Sangh Parivar*, 66 INDIAN J. POL. SCI. 831, 834 (2005) (explaining how the BJP and the RSS were originally unaffiliated, but due to the large overlap between their members, are now strongly aligned to the extent that the RSS campaigns on behalf of BJP candidates without any formal coordination between the two groups).

20. *See* Narender Nagarwal, *The Citizenship Amendment Act 2019: An Insight Through Constitutional and Secularism Perspective*, 37 J. ASIAN & AFRICAN STUD. 1, 8 (2021) (explaining that the CAA is an amendment of the Citizenship Act of 1955, which provided a framework for citizenship for all migrants to India, regardless of religion).

21. ANGANA CHATTERJI ET AL., *BREAKING WORLDS: RELIGION, LAW AND CITIZENSHIP IN MAJORITARIAN INDIA*, 62–63 (2021).

22. Keshab Chandra Ratha, *Interpreting Citizenship Amendment Act: Its Content and Context*, 67 INDIAN J. PUB. ADMIN. 559, 562 (2021).

persecution in the Muslim-majority countries targeted by the Act.²³

Additionally, in November 2019, Parliament announced its plan to implement a National Register of Citizens (NRC), whose goal is to identify illegal immigrants and deport them.²⁴ The northeastern state of Assam has already implemented the NRC, with inequitable results; seventy to eighty percent of the people that the tribunals decided were “foreigners” were Muslims, despite Muslims making up only forty percent of Assam’s population.²⁵ Furthermore, securing proof of citizenship is a complex and expensive process, requiring obtaining decades-old documents, traveling long distances, and hiring a lawyer, which is a nearly insurmountable task for poor and illiterate Indians.²⁶ Additionally, thirty-eight percent of Indian children under the age of five do not have birth certificates, and the number is even higher for older Indians.²⁷

When a resident is excluded from the NRC, they may appeal through specially-established Foreigners’ Tribunals.²⁸ However, these too are riddled with controversy.²⁹ An examination of five of these tribunals found that nine out of ten cases involved Muslims.³⁰

23. *Id.*

24. See Amit Shah: NRC to Apply Nationwide, No Person of Any Religion Should Worry, INDIA TODAY, (Nov. 20, 2019), <https://www.indiatoday.in/india/story/amit-shah-nrc-rajya-sabha-1620810-2019-11-20> (reporting that the NRC’s implementation will require all citizens to provide documentation to prove that they are lawful Indian citizens—raising alarm because its rollout in the state of Assam left out millions of residents).

25. CHATTERJI ET AL., *supra* note 21, at 4; Kaushik Deka, *Can BJP Survive the Demographic Disadvantage in Assam?*, INDIA TODAY (Mar. 29, 2021), <https://www.indiatoday.in/india-today-insight/story/can-bjp-survive-the-demographic-disadvantage-in-assam-1784851-2021-03-29> (stating the size of the Muslim population in Assam).

26. CHATTERJI ET AL., *supra* note 21, at 5.

27. Puja Changolwala, *India’s Muslims Are Terrified of Being Deported*, FOREIGN POL’Y (Feb. 21, 2020), <https://foreignpolicy.com/2020/02/21/india-muslims-deported-terrified-citizenship-amendment-act-cao> (outlining that Indian Muslims do not have the same security from deportation as those of other faiths).

28. *Assam NRC: What Next for 1.9 Million ‘Stateless’ Indians?*, BBC NEWS (Aug. 31, 2019), <https://www.bbc.com/news/world-asia-india-49520593> (explaining the appeals process).

29. *Id.* (“[A] potentially long and exhaustive appeals process will mean that India’s already overburdened courts will be further clogged, and poor people left off [the NRC] will struggle to raise money to fight their cases.”).

30. *Id.*; see Rohini Mohan, *Inside India’s Sham Trials that Could Strip Millions*

Furthermore, the tribunal declared ninety percent of the Muslims heard as “illegal immigrants” and declared only forty percent of Hindus heard as such.³¹ Since 2014, when the BJP took power, the number of these tribunals has nearly tripled.³²

3. *BJP Culpability in Anti-Muslim Violence*

There has been political tension between Hindus and Muslims since before India’s independence, which has often resulted in violence between the two groups.³³ The growth of the BJP’s electoral power and acceptance of their Hindu supremacist ideals have only made matters worse for Indian Muslims.³⁴

A key pillar to the BJP’s Hindu Nationalist platform is its advocacy for violence against Muslims.³⁵ A high profile example is in the early 1990s, when the national-level BJP launched a campaign to construct

of Citizenship, VICE NEWS (July 29, 2019), https://news.vice.com/en_us/article/3k33qy/worse-than-a-death-sentence-inside-indias-sham-trials-that-could-strip-millions-of-citizenship (explaining that although information all 100 of Assam’s Foreigners’ Tribunals was requested, only five provided judgments).

31. See *Assam NRC: What Next for 1.9 Million ‘Stateless’ Indians?*, *supra* note 28 (stating there are now over 200 Foreigners’ Tribunals, and the number is expected to continue to grow exponentially).

32. *Id.*; see also Mohan, *supra* note 30 (providing a case study on one district in Assam, where eighty-two percent of all people on trial had been declared foreigners, and 78 percent of the orders declaring foreigners’ status were delivered without the accused having been heard).

33. See Raheel Dhattiwala & Michael Biggs, *The Political Logic of Ethnic Violence: The Anti-Muslim Pogrom in Gujarat, 2002*, 40 POL’Y & SOC’Y 483, 484 (2012) (citing that during the Partition of India in 1947, 200,000 lives were lost to violence between Hindus and Muslims, and between 1950-2000, 10,000 people died at the hands of religious violence between the two groups).

34. See Apoorvanad, *Majoritarian Violence is Slowly Tearing India Apart*, ALJAZEERA (Jan. 13, 2022), <https://www.aljazeera.com/opinions/2022/1/13/no-respite-in-sight-for-indias-persecuted-religious-minorities> (detailing violence against both Muslim and Christian minorities).

35. See Amulya Ganguly, *BJP Preparing for Babri 2.0 by Targeting Varanasi Mosque and Keep the Communal Cauldron Boiling*, NAT’L HERALD INDIA (Apr. 12, 2021), <https://www.nationalheraldindia.com/opinion/bjp-preparing-for-babri-20-by-targeting-varanasi-mosque-and-keep-the-communal-cauldron-boiling> (explaining how the BJP gained their initial electoral success by advocating for the destruction of the Babri Mosque, and they aim to maintain their success by advocating for the destruction of other high-profile mosques, such as the Varanasi and Mathura mosques).

a temple in Uttar Pradesh in honor of the deity Ram, who some Hindus believe was born on the location of the sixteenth-century Babri Mosque.³⁶ The campaign gave rise to 300 clashes between Hindus and Muslims across India, eventually culminating in rioters destroying the Babri Mosque.³⁷ Riots in these urban areas resulted in 500 deaths between September 1990 and January 1993.³⁸

Another example comes from the BJP's treatment of the beef industry.³⁹ Given the holiness of the cow in Hinduism, BJP-ruled states have passed laws that tighten anti-beef laws and restrict sales of cattle and beef possession, despite the fact that India exported four billion dollars' worth of buffalo meat in the 2015-16 fiscal year.⁴⁰ BJP electoral victories also emboldened "cow protection" vigilantes—mobs who will kill Muslims suspected of slaughtering cows or hiding beef.⁴¹ After one Muslim man had been bludgeoned to death by one of these mobs, the BJP Vice President of the state where it occurred called for the victim's family to be arrested for cow slaughter.⁴² Throughout this "beef terror," BJP Prime Minister Narendra Modi and the national BJP were mostly silent, and in the rare event such attacks were condemned, it was weeks or months after the fact and motivated

36. See Dhattiwala & Biggs, *supra* note 33, at 486 (detailing how participation in the violence spread to upper-caste and middle-caste men and women).

37. *Id.*

38. *Id.*; see also PAUL R. BRASS, *THE PRODUCTION OF HINDU-MUSLIM VIOLENCE IN CONTEMPORARY INDIA*, 130–45 (2003) (explaining the BJP's utilization of the RSS' "institutionalized riot system" where members of both groups produce and/or spread rumors intended for the Hindu public to believe and be mobilized to want revenge against Muslims for their fabricated transgressions).

39. See Supriya Nair, *The Meaning of India's 'Beef Lynchings'*, *THE ATLANTIC* (July 24, 2017), <https://www.theatlantic.com/international/archive/2017/07/india-modi-beef-lynching-muslim-partition/533739> (detailing the BJP's indifference to violence against Muslim's who trade or consume beef).

40. *Id.*; see *India Crackdown on Slaughterhouses Stirs Muslim Unease*, *ALJAZEERA* (Mar. 29, 2017), <https://www.aljazeera.com/news/2017/3/29/india-crackdown-on-slaughterhouses-stirs-muslim-unease> (explaining that India is one of the world's largest exporters of buffalo meat).

41. See Nair, *supra* note 39 (stating that the cow vigilantes have been emboldened by stricter anti-beef policies by the BJP).

42. See Shoaib Daniyal, *How Narendra Modi Helped Spread Anti-Beef Hysteria in India*, *QUARTZ INDIA* (Oct. 7, 2015), <https://qz.com/india/518975/how-narendra-modi-helped-spread-anti-beef-hysteria-in-india> (describing how in the wake of this incident, other BJP legislators threatened violence if "innocents" were framed for the murder and absolved the killer mob claiming their behavior to be an "accident").

by political pressure.⁴³ Between January and July 2017 alone, there were twenty such “beef lynchings” across India.⁴⁴ In a campaign speech, Modi stoked the flames of division over beef eating, claiming that his opposition “will not give out subsidies to farmers . . . keeping cows but will give out subsidies to people who slaughter cows.”⁴⁵ These statements only encouraged cow vigilantes to continue their violence.⁴⁶

BJP Members’ opinions on Muslims are hardly opaque, and they often include anti-Muslim speech in their campaign events.⁴⁷ Although India’s Penal Code Sections 153A, 295A, and 5050 effectively criminalize the incitement of violence, and BJP leaders have on occasion been arrested under these statutes, they are very rarely used to implicate them.⁴⁸ BJP rallies frequently include the

43. Nair, *supra* note 39; see Tommy Wilkes & Malini Menon, *After Lynchings, India’s Modi Condemns Violence in Name of Cow Worship*, REUTERS (June 29, 2017), <https://www.reuters.com/article/us-india-politics-religion/after-lynchings-indias-modi-condemns-violence-in-name-of-cow-worship-idUSKBN19K13S> (stating that Prime Minister Modi advocated for cows to be protected peacefully); *India ‘Beef’ Lynching: PM Modi Breaks Silence*, BBC NEWS (Oct. 8, 2015), <https://www.bbc.com/news/world-asia-34477875> (highlighting the Prime Minister’s longtime silence during beef lynchings).

44. Nair, *supra* note 39 (stating that almost all beef lynchings in India have occurred since the BJP came into power).

45. *Id.*

46. Daniyal, *supra* note 42 (reporting that Prime Minister Modi referred to the slaughter of cows as a “pink revolution” in multiple speeches).

47. See, e.g., Pragya Tiwari, *The BJP Has Incited Hatred It Can No Longer Stop*, ALJAZEERA (Mar. 11, 2020), <https://www.aljazeera.com/opinions/2020/3/11/the-bjp-has-incited-hatred-it-can-no-longer-stop> (reporting on how the BJP used radical anti-Muslim propaganda on pro-government television channels and social media in the local Delhi elections).

48. See *Here is What Constitutes to Inciting Violence in Indian Penal Code*, INDIA TODAY (Dec. 22, 2019), <https://www.indiatoday.in/india/story/nrc-protests-caa-protests-india-protests-protesters-arrested-section-153-section-505-1630436-2019-12-22> [hereinafter *Inciting Violence in India*] (detailing the types of acts that are criminalized under India’s Penal Code); *Senior BJP Leader Anil Bonde Among 72 Arrested for Inciting Violence in Amravati*, THE WIRE (Nov. 15, 2021), <https://thewire.in/government/senior-bjp-leader-anil-bonde-among-72-arrested-for-inciting-violence-in-amravati> [hereinafter *Senior BJP Leader Arrested*] (reporting that multiple BJP leaders were arrested); see generally GAUTAM BHATIA, OFFEND, SHOCK OR DISTURB: FREE SPEECH UNDER THE INDIAN CONSTITUTION 154 (2016) (providing an exploration of freedom of speech jurisprudence within India, in particular, hate speech as regulated under § 295A of the Indian Penal Code).

chant “goli maaro saalon ko” which instructs crowds to “shoot traitors to the nation.”⁴⁹ The BJP deems these “traitors” to be those that oppose the anti-Muslim CAA, reflecting the BJP’s Hindu Nationalist platform and reinforcing the idea that India is a Hindu nation where Muslims are not welcome.⁵⁰

B. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

1. Introduction

The ICCPR’s Article 18 states, in relevant part, that “everyone shall have the freedom of thought, conscience and religion” and that “no one shall be subject to coercion which would impair his freedom to have or adopt a religion . . . of his choice.”⁵¹ General Comment 22 notes that such “coercion” may include the threat of physical force or penal sanctions, or policies or practices having the same intention or effect.⁵² Importantly, Paragraph 3 of Article 18 provides that the law may prescribe limitations to the freedom to manifest one’s religion, but only so long as they are “necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.”⁵³

Meanwhile, Article 20, Paragraph 2 states that, “any advocacy of

49. See Liz Mathew & Abhinav Rajput, *Minister Anurag Thakur Chants desh ke gaddaron ko, Poll Rally Crowd Completes goli maaro . . .*, INDIAN EXPRESS (Jan. 28, 2020), <https://indianexpress.com/article/india/anurag-thakur-slogan-rithal-rally-6238566> (reporting an instance of this chant occurring at an election rally).

50. See *id.* (explaining that the term “traitors” refers to those that oppose the CAA, primarily those who took part in the large demonstrations against it that occurred throughout India in the wake of its passage. Although not directly equating “traitors” with Muslims, these BJP leaders do equate such “traitors” with Indians who support Muslims by opposing the CAA); Sunil Prabhu, “*Goli Maaro Minister?*” *BJP’s Anurag Thakur Trolled in Parliament*, NEW DELHI TELEVISION (Mar. 3, 2020), <https://www.ndtv.com/india-news/goli-maaro-minister-bjps-anurag-thakur-trolled-in-parliament-2189251>; *Watch: Union Minister Anurag Thakur Leads ‘goli maaro saalon ko’ Slogans at Rally*, SCROLL (Jan. 27, 2020), <https://scroll.in/video/951289/watch-anurag-thakur-minister-of-state-for-finance-lead-goli-maaro-saalon-ko-slogans-at-rally> [hereinafter *Watch: Union Minister Leads Slogans*] (showcasing the hateful slogan chant about “traitors” at a rally for the Delhi Assembly elections).

51. ICCPR, *supra* note 4, art. 18.

52. U.N. Human Rights Committee, 48th Sess., General Comment 22 ¶ 5, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993) [hereinafter “General Comment 22”].

53. ICCPR, *supra* note 4, art. 18(3).

national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”⁵⁴ Although there is no clear standard articulated by the jurisprudence, the Human Rights Committee (HRC or Committee) takes into account the intent, content, and extent of the speech in determining an Article 20(2) violation.

All parties to the ICCPR are required to submit regular reports to the Committee on the extent of that state’s compliance.⁵⁵ However, of the five reports that the HRC has requested from India, the country has only submitted three, and all three have been years overdue.⁵⁶ India’s failure to submit the reports led the HRC to issue a List of Issues Prior to Reporting in August 2019, urging India to report and address issues such as vigilante cow protection and mob lynching of Muslims, as well as corruption in the judiciary.⁵⁷

2. Article 18 Jurisprudence: Necessary & Proportionate Standard

Secularism has been touted as a primary feature of Indian society since the days of Mahatma Gandhi and the Indian independence movement.⁵⁸ In 1973, the Indian Supreme Court ruling *Kesavananda Bharati v. State of Kerala* deemed secularism as a central feature of the Indian Constitution, which entrenched the freedom of religion as an “unamendable value.”⁵⁹ As such, India has a domestic commitment

54. *Id.* art. 20(2).

55. *Id.* art. 40(1).

56. See Vijapur, *supra* note 2, at 81 (chronicling India’s periodic reports: the first was due July 1980 and was submitted July 1983; the second was due July 1985 and was submitted July 1985; the third was due March 1992 and was submitted November 1995; and the fourth and fifth ones, due March 2001 and 2006, respectively, have still not been submitted).

57. *Id.* at 81–82.

58. See CHRISTOPHE JAFFRELOT, *Part 1: The Hindu Nationalist Power Quest, in MODI’S INDIA: HINDU NATIONALISM AND THE RISE OF ETHNIC DEMOCRACY*, 7, 7–9 (2021) (explaining that secularism in India has been practiced since ancient times: under Ashoka, the first Buddhist Emperor, and under the Mughal Emperor Akbar the Great. Mahatma Gandhi similarly championed the idea of an India that excluded any identification with one particular religion. Gandhi’s perception of the Indian nation based on coexisting religious communities is known as the “universalist” school of thought. This school opposites that of the “communalists” which spawned separatist movement among Muslims, which led to the formation of Pakistan, and among Hindus, which gave rise to Hindu nationalism.).

59. *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225, ¶ 303 (India).

to promote the freedom to exercise any religion within its borders.

The United Nations Human Rights Committee has considered multiple accusations that a State Party to the ICCPR is violating Article 18.⁶⁰ In one such case, *Ranjit Singh v. France*, the French government denied a French citizen named Singh an identification card when he refused to take his turban off for his ID photo.⁶¹ Singh explained that taking off his turban would violate his faith in Sikhism, but the French government still refused to grant him an identification card.⁶² In doing so, they denied Singh the benefits afforded to citizens with ID cards, such as access to the free public health care system.⁶³ In deciding this dispute, the HRC established that limitations to the free exercise of religion—in this case, requiring Singh to act against his faith and take off his turban—must be necessary and proportionate to the end that is sought.⁶⁴ To decide if a measure is necessary and proportionate, the HRC applies a balancing test weighing the burden to the individual against the goal that the measure seeks to achieve.⁶⁵ Here, the burden to Singh was requiring him to take off his turban, and the government's stated goal was for public safety and order.⁶⁶ Ultimately, the court held that prohibiting a turban in an ID photo was not necessary to identify the author (and, in fact, would make it more difficult since he wears the turban at all times⁶⁷) and was not proportionate to achieve the stated goal of public safety and order.⁶⁸

In *Malakhovsky v. Belarus*, the Belarus government denied the application of the Community of Krishna Consciousness (The Community) for registration as a religious association on the ground

60. *Singh v. France*, Communication 1876/2000, U.N. Human Rights Committee [U.N. H.R.C.], ¶ 3.2 (July 29, 2011); *Malakhovsky v. Belarus*, Communication 1207/2003, U.N. Human Rights Committee [U.N. H.R.C.], ¶ 3.1 (July 26, 2005).

61. *Singh v. France*, Communication 1876/2000, U.N. Human Rights Committee [U.N. H.R.C.], ¶¶ 2.1, 2.2 (July 22, 2011).

62. *Id.* ¶ 3.2.

63. *Id.*

64. *Id.* ¶ 8.2

65. *Id.* ¶ 8.4.

66. *Id.*

67. *Singh v. France*, Communication 1876/2000, U.N. Human Rights Committee [U.N. H.R.C.], ¶ 3.5 (July 22, 2011).

68. *Id.* ¶ 8.4.

that they had not provided a proper legal address in the application.⁶⁹ The government cited safety concerns with the provided address, but, prior to the application, the local authorities had conducted a fire safety inspection and approved its use as a legal address subject to seven remedial measures—all of which the Community of Krishna Consciousness fulfilled.⁷⁰ Here, as in *Singh*, the HRC used the necessary and proportional test to determine the validity of Belarus' denial of the Community's application.⁷¹ They note that if a less intrusive alternative to France's rule is available, then the action will be deemed not necessary.⁷² The HRC found that the precondition alone, which requires a valid address to ensure that the religion has use of premises that satisfy relevant public health and safety standards, is a limitation that is necessary for public safety and proportionate to this need.⁷³ However, the HRC noted that Belarus did not advance an argument on why it was necessary for the religious association to have an approved legal address before they are registered, and that the public safety goals could still be achieved if the Community obtained their premises after being registered.⁷⁴ Additionally, the HRC found that the Belarus government's denial of the Community's application rendered them unable to manifest their religious beliefs and that this harm was disproportionate to the public safety benefits that the refusal served.⁷⁵

3. *Article 20 Jurisprudence: Intent, Content, Extent Standard*

Article 20, Paragraph 2 states that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” Additionally, the HRC released General Comment 11 on Article 20, which states that

69. *Malakhovsky v. Belarus*, Communication 1207/2003, U.N. Human Rights Committee [U.N. H.R.C.], ¶ 2.5 (July 26, 2005).

70. *Id.* ¶ 5.1.

71. *Id.* ¶ 7.2.

72. *Id.* ¶ 7.6.

73. *Id.* ¶ 7.5.

74. *Id.* ¶ 7.6.

75. *Malakhovsky v. Belarus*, Communication 1207/2003, U.N. Human Rights Committee [U.N. H.R.C.], ¶ 2.5 (July 26, 2005) (explaining that they are unable to manifest their religious beliefs in the form of establishing a school to teach a religion and inviting foreign dignitaries of the religion to their premises).

for Article 20 to be fully effective, Members should pass domestic laws against the conduct that Article 20 forbids.⁷⁶

Typically, any prohibition of “advocacy” of hatred as required by Article 20 implies an Article 19 inquiry, which protects the right of free expression.⁷⁷ However, when India ratified the ICCPR it took a reservation to Article 19, such that its provisions must conform with Article 19 of the Indian Constitution.⁷⁸

Unfortunately, jurisprudence on Article 20 from the Human Rights Committee is not very robust, but a study from the U.N. Office of the High Commissioner for Human Rights can fill some of the gaps.⁷⁹ This document, along with cases from the HRC, give rise to the “intent, content, extent” test to determine if there has been a violation of Article 20(2).⁸⁰

For a statement to be considered an advocacy of religious hatred, the person making the statement must have intended for the statement to incite discrimination, hostility, or violence.⁸¹ The threshold of intent is relatively low, as the term “advocacy” implies a form of intention.⁸² The HRC considered a dispute, *Faurisson v. France*, which

76. U.N. Human Rights Committee, 19th Sess., General Comment No. 11, ¶ 2, U.N. Doc CCPR/C/GC/34 (1983) [hereinafter General Comment 11]; see BARBORA BUKOVSKA ET AL., TOWARDS AN INTERPRETATION OF ARTICLE 20 OF THE ICCPR: THRESHOLDS FOR THE PROHIBITION OF INCITEMENT TO HATRED, 3 (2010) (noting that while it is recommended in General Comment 11, the wording of Article 20 of the ICCPR is rarely, if ever, found in domestic legislation).

77. See BUKOVSKA ET AL., *supra* note 76, at 12–14.

78. International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, (Apr. 10, 1979) [hereinafter ICESCR]; see also *Glossary*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml#reservation (defining “reservation” as “a declaration made by a state by which it purports to exclude or alter the legal effect of certain provisions of the treaty in their application to that state”).

79. See generally BUKOVSKA ET AL., *supra* note 76.

80. *Id.*; *Faurisson v. France*, Communication 550/1993, U.N. Human Rights Committee [U.N. H.R.C.] (Nov. 8, 1996); *J.R.T. v. Canada*, Communication 104/1981, U.N. Human Rights Committee [U.N. H.R.C.] (Apr. 6, 1983); *Ross v. Canada*, Communication 736/1997, U.N. Human Rights Committee [U.N. H.R.C.] (Oct. 18, 2000).

81. BUKOVSKA ET AL., *supra* note 76, at 13.

82. TOBY MENDEL, STUDY ON INTERNATIONAL STANDARDS RELATING TO INCITEMENT TO GENOCIDE OR RACIAL HATRED, 47 (Apr. 2006) (a study for the U.N. Special Advisor on the prevention of Genocide).

demonstrated the low threshold needed for intent.⁸³ In this case, a magazine reporter interviewed Professor Robert Faurisson, during which the professor expressed his belief, based on his academic research, that the Nazis did not use gas chambers during the Holocaust.⁸⁴ These statements led to his conviction under France's "Gayssot Act," which effectively criminalizes the challenging of conclusions reached during the International Military Tribunal at Nuremberg—one of which was the Nazis' use of gas chambers during the Holocaust.⁸⁵ Faurisson brought this complaint, arguing that the Gayssot Act curtailed his freedom of expression.⁸⁶ Ultimately, the Committee found that the restrictions on Professor Faurisson's freedom of speech were justified because his speech was "of a nature as to raise or strengthen antisemitic feelings," and restricting that speech through the Gayssot Act served "the respect of the Jewish community to live free from fear of an atmosphere of antisemitism."⁸⁷ The concurring opinion further noted that in the interview, Faurisson demanded that "particularly Jewish historians" who agree with the findings of the Nuremberg Tribunal be prosecuted, and he referenced the "magic gas chamber" and that "the myth of the gas chambers" was a "dirty trick" endorsed by the victors at Nuremberg.⁸⁸ Because these statements singled out Jewish historians and implied that the Jews concocted the story of the gas chambers for their own purposes, it demonstrated the requisite intent by Faurisson to advocate for hatred under Article 20(2).⁸⁹

Like intent, the content inquiry is relatively straightforward in that the "advocacy" in question must be promoting "hate."⁹⁰ In *J.R.T. and the W.G. Party v. Canada*, J.R.T. founded the W.G. Party and attracted

83. *Faurisson v. France*, Communication 550/1993, U.N. Human Rights Commission [U.N. H.R.C.] (Nov. 8, 1996).

84. *Id.* ¶ 2.5 (providing that Faurisson was a professor of literature at the Sorbonne University in Paris until 1973 and at the University of Lyon until 1991, when he was removed from his chair).

85. *Id.* ¶ 2.3.

86. *Id.* ¶ 3.1.

87. *Id.* ¶ 9.6.

88. *Id.* ¶ 10 (Elizabeth Evatt & David Kretzmer, concurring) (Eckart Klein, co-signing).

89. *Id.*

90. ICCPR, *supra* note 4, art. 20.

membership by a phone number the public could call to hear tape-recorded messages.⁹¹ The messages were ostensibly to promote the party platform, but they all contained antisemitic statements whose purpose were to warn callers of “the dangers of . . . international Jewry leading [to] the collapse of world values and principles.”⁹² After the Canadian Human Rights Commission subjected him to discipline and ordered him to change the messages, J.R.T. changed one to “some corrupt Jewish international conspiracy is depriving the callers of their birthright and that the white race should stand up and fight back.”⁹³ These statements are discriminatory because they name a specific group, Jewish people, and identify them as the source of impending doom while othering them by drawing contrast to “the white race.”⁹⁴ The HRC decided that the opinions that the message system was disseminating “clearly constitute the advocacy of racial or religious hatred, which Canada has an obligation under Article 20(2) of the Covenant to prohibit.”⁹⁵ In this way, the HRC clarified that the kinds of content that constitute advocacy of religious hatred include those that single out a particular group as being responsible for the end of the cultural status quo.⁹⁶

The extent of the speech is also relevant to the Article 20(2) inquiry. The study prepared for the OHCHR emphasizes that, “to qualify as incitement under Article 20, the communication has to be directed at a non-specific audience (general public) or to a number of individuals in a public space.”⁹⁷ In *Ross v. Canada*, a Jewish parent alleged that the School Board condoned the antisemitic views of its teacher by failing to take action against him.⁹⁸ Canada’s Supreme Court found that the author’s statements were discriminatory by “call[ing] upon true Christians to not merely question the validity of Jewish beliefs and teachings but to hold those of Jewish faith and ancestry in

91. J.R.T. v. Canada, Communication 104/1981, U.N. Human Rights Committee [U.N. H.R.C.] (Apr. 6, 1983).

92. *Id.* ¶ 2.1.

93. *Id.* ¶ 2.8.

94. *Id.*

95. *Id.* ¶ 8.

96. *Id.*

97. BUKOVSKA ET AL., *supra* note 76, at 14.

98. *Ross v. Canada*, Communication 736/1997, U.N. Human Rights Committee [U.N. H.R.C.] (Oct. 18, 2000).

contempt as undermining freedom, democracy, and Christian values”;⁹⁹ the teacher was subsequently laid off.¹⁰⁰ The Committee found that the influence of the teachers justifies a restraint of the speech, therefore his firing was not a violation of Article 19 and was a valid sanction under Article 20(2).¹⁰¹

III. ANALYSIS

A. INTRODUCTION

The ICCPR protects an individual’s freedom to practice their chosen religion and freedom from religious hatred in Article 18 and Article 20, respectively.¹⁰² The BJP’s policies and rhetoric violate both Article 18 and Article 20(2) of the ICCPR. The Citizenship Amendment Act, the National Register of Citizens, and Foreigners’ Tribunals are not necessary and proportional to the stated goals, and therefore violate Article 18. Furthermore, the intent, content, and extent of BJP leaders’ rhetoric violates Article 20(2) and cannot be saved by an argument that free speech is protected under Article 19. Additionally, under Article 18(2) and the Office of the High Commissioner for Human Rights’ General Comment 22 on Article 18, the BJP’s policies and rhetoric constitute coercion.¹⁰³

B. THE BJP’S POLICIES AND RHETORIC VIOLATE ARTICLE 18(2) BECAUSE THEY CONSTITUTE COERCION

Article 18 of the ICCPR states that “no one shall be subject to coercion which would impair his freedom to have or adopt a religion . . . of his choice.”¹⁰⁴ Analyzing against the language of the CAA alone, using religion as the determining factor for citizenship denies

99. *Id.* ¶ 11.5.

100. *Id.* ¶ 8.3.

101. *Id.* ¶ 11.6.

102. ICCPR, *supra* note 4, arts. 18, 20.

103. *Id.* art. 18; General Comment 22, *supra* note 52 (“Article 18.2 bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief, or to convert. Policies or practices having the same intention or effect . . . are similarly inconsistent with 18.2”).

104. ICCPR, *supra* note 4, art. 18.

Muslims the freedom to practice Islam in India because it predicates their citizenship on their practicing of one of the named religions, rather than Islam.¹⁰⁵

Additionally, General Comment 22 stipulates that the threat of penal sanctions constitutes coercion.¹⁰⁶ As such, requiring citizens to prove their status through the NRC and a Foreigners' Tribunal ruling on deportation may constitute "coercion" under Article 18 in an environment where there are few records kept and high barriers for poor and uneducated residents to obtain such documents.¹⁰⁷

Finally, General Comment 22 maintains that the threat of physical force to compel believers to recant their beliefs constitutes coercion.¹⁰⁸ The BJP's culpability in violence against Muslims through their advocacy of mosque destruction, violence against beef eaters, and the use of the chant "goli maaro saalon ko" constitutes a threat of physical force because these actions often lead to violence against Muslims.¹⁰⁹ Because this violence specifically targets Muslims on the ground that they do not belong in India, it may rise to the level of coercion.¹¹⁰

105. *Id.*

106. *Id.*; General Comment 22, *supra* note 52.

107. See CHATTERJI ET AL., *supra* note 21 at 5, 62–63 (explaining that even in Muslim communities where it is common to keep records (which is rare), proof of belonging is discredited, dismissed, or deemed inadmissible by institutions. Furthermore, women, particularly low caste Muslims, are at greater risk for losing citizenship rights).

108. General Comment 22, *supra* note 52.

109. Dhattiwala & Biggs, *supra* note 33, at 486; see Ganguly, *supra* note 35 (arguing that the BJP benefits from a political agenda that involves religion); see Nair, *supra* note 39 (quoting speeches by Prime Minister Modi inciting anti-beef rhetoric); Tiwari, *supra* note 47; see Mathew & Rajput, *supra* note 49 (reporting on the chant being used at a BJP election rally).

110. See generally BRASS, *supra* note 38, at 12 (explaining that the production of riots in India is, to an extent, "anticipated" in that Indians expect them to occur because such Hindu-Muslim violence has been endemic in India since its founding. The expectation of such violence allows Hindu leaders to use rhetoric that encourages members to retaliate against "Muslims' aggression," despite such "aggression" being the result of a centuries-long tradition of violence between the groups. Furthermore, the forms of aggressive action taken are chosen because of its likelihood of provoking the other community into aggressive action, such as processions through the neighborhood of the other community).

C. INDIA'S CITIZENSHIP AMENDMENT ACT VIOLATES ARTICLE 18
OF THE ICCPR BECAUSE IT IS NOT NECESSARY AND
PROPORTIONATE TO ACHIEVING A PUBLIC SAFETY GOAL

Article 18 of the ICCPR broadly protects the freedom of religion.¹¹¹ However, the ICCPR allows certain limitations to the freedom to manifest one's religion so long as the limitations are necessary "to protect public safety, order, health or morals or the fundamental rights and freedoms of others," and are proportionate to achieve these goals.¹¹²

*1. The CAA Is Not Necessary Nor Proportional To Achieve a Public
Safety Goal Because It Favors Hindus Residing in Other Countries
Over Muslims Residing in India*

The CAA provides a simplified route to Indian citizenship for refugees from India's neighbors, as long as those refugees do not practice Islam.¹¹³ The BJP argues that the CAA is necessary to combat high numbers of refugees from India's neighbors, which would fall under a permissible limitation under Article 18, paragraph 3.¹¹⁴ They further contend that Muslims are excluded from the CAA because they do not face the same religious persecution as do other religious groups in the stipulated nations.¹¹⁵ However, this justification is insufficient because the CAA causes harm to Indian Muslims that is disproportionate to the benefits served to potential non-Muslim immigrants in other countries.¹¹⁶ The harm to Indian Muslims by the CAA is the threat of their deportation and separation from their

111. ICCPR, *supra* note 4, art. 18.

112. *Id.*

113. The Citizenship (Amendment) Bill, 2019, Bill No. 370 of 2019 (Dec. 4, 2019) (India) (providing a method for citizenship only for those of Hindu, Sikh, Buddhist, Jain, Parsi and Christian faiths from Pakistan, Bangladesh and Afghanistan).

114. Ratha, *supra* note 22, at 562 (explaining that in justifying the CAA, the BJP Government drew a distinction between Muslims (who it says have immigrated illegally) and refugees (of the named religions) trying to escape persecution in their country by stating, "there is a basic difference between a refugee and an infiltrator, [t]his bill is for refugees").

115. *Id.* at 561 ("[The CAA] seeks to provide a right of return for Hindus to their natural home as these people look at India as 'Mother India.'").

116. CHATTERJI ET AL., *supra* note 21, at 5.

families and homes, while the benefits of the CAA are to non-Indian Hindus (among other religions) seeking a path to citizenship.¹¹⁷ In this way, the CAA favors Hindus residing in other countries over Muslims residing in India.¹¹⁸

Additionally, the BJP's characterization of the CAA as "a noble effort to welcome Hindus who are oppressed in neighboring Muslim-majority countries" reflects *Hindutva* by favoring the wellbeing of Hindus in other countries over Muslims in India.¹¹⁹ Also, the CAA's goal to protect religious minorities in neighboring countries ignores the distinction between dominant and less dominant sects of Islam in the CAA's targeted countries, where members of less dominant sects are not free from discrimination solely because they practice Islam, as the CAA posits.¹²⁰

2. *The CAA Is Not Necessary To Handle the Influx of Refugees into India Because that Goal Can Be Served Without Infringing on Religious Freedom*

The basis of necessity justifying the CAA is mischaracterized and disregards India's commitment to secularism. The CAA rests entirely on a distinction between religious groups to determine who is permitted in India, which contrasts the country's protection of

117. Changolwala, *supra* note 27; *see also* CHATTERJI ET AL., *supra* note 21, at 7 (giving an example from Assam, where the NRC and Foreigners' Tribunals have already been implemented, in which non-Muslims without documentary evidence of their birth may claim to have come from Pakistan or Bangladesh and had their documents seized, and this seizure can be used as evidence that they are entitled to citizenship in India. Muslims, meanwhile, do not succeed on such a defense).

118. CHATTERJI ET AL., *supra* note 21, at 7; *see generally* Arunav Kaul, *Afghan Refugees in India Highlight the Need for Indian Domestic Refugee Law*, JUST SECURITY (Oct. 18, 2021), <https://www.justsecurity.org/78586/afghan-refugees-in-india-highlight-the-need-for-indian-domestic-refugee-law> (arguing that because India has not adopted international agreements on refugees such as the United Nations Refugee Convention, the rights associated with refugee status are subject to the political will of the Indian government).

119. *See* Ratha, *supra* note 22, at 561.

120. *See* Alok Prasanna Kumar, *Citizenship (Amendment) Act: An Unconstitutional Act*, DECCAN HERALD (Dec. 15, 2019), <https://www.deccanherald.com/specials/sunday-spotlight/citizenship-amendment-act-an-unconstitutional-act-785638.html> (proving that Ahmadiyya and Shia Muslims face the most majoritarian violence in Pakistan, thus, the CAA's stated goal to protect against religious persecution of minorities conspicuously fails by leaving them out).

secularism as stated in *Kesavananda Bharati v. State of Kerala*.¹²¹ Although proponents of the law try to argue that it is a rational response to protect incoming migrants who are victims of religious persecution, critics of the law point out that the “religious persecution” criteria is not mentioned within the text of the law itself.¹²² As such, using religion as the discriminating factor to determine citizenship is arbitrary and therefore unconstitutional.¹²³

The CAA and its resulting Foreigners’ Tribunals and National Register of Citizens are not necessary to handle the influx of refugees into India.¹²⁴ As in *Ranjit Singh v. France*, where Singh was denied an ID card when he refused to take off his turban for an ID photo, Muslims are being denied the benefits of citizenship when they are forced to register under the NRC.¹²⁵ When the French government

121. *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225 (India); *see also CAA Distinguishes Between People Based on Religion, Is Unconstitutional: Former SC Judge*, THE WIRE (Mar. 22, 2021), <https://thewire.in/rights/caa-religion-unconstitutional-former-sc-judge> (“[Justice Gowda] expressed his apprehensions about the [NRC] exercise in Assam, saying that many people who are citizens are unable to prove their citizenship because they lack the certificates to do so.”). *But see* Harish Salve, *CAA is Necessary: Why the Many Arguments About Its Being Constitutional Don’t Hold Water*, TIMES OF INDIA (Mar. 5, 2020), <https://timesofindia.indiatimes.com/blogs/toi-edit-page/caa-is-necessary-why-the-many-arguments-about-its-being-unconstitutional-dont-hold-water> (arguing that classification on the basis of religion is not per se unconstitutional given that the Indian constitution distinguishes between religious groups by conferring special rights to minority religious communities. Additionally, the procedures in place under the CAA do not pose different requirements for Muslims in India than it does to other communities, so it therefore does not unconstitutionally target them).

122. Salve, *supra* note 121; *see* Jai Dehadrai, *Why Harish Salve’s Defence of the CAA is Wrong in Law*, THE WIRE (Mar. 17, 2020), <https://thewire.in/law/harish-salve-citizenship-amendment-act>. (emphasizing that support of the CAA comes from the belief that India has “the sovereign right” to protect migrants that are victims of persecution in neighboring Islamic-majority countries, yet the law itself does not specify such a rationale or even what kind of persecution it would be protecting neighboring minorities from).

123. *See* Dehadrai, *supra* note 122.

124. *See generally* Om Prakash Mishra, *Who is the Hollow CAA Really Meant to Protect?* THE INDIAN EXPRESS (Sept. 21, 2021), <https://indianexpress.com/article/opinion/columns/caa-act-minorities-refugees-bjp-govt-7520070> (arguing that the CAA has not benefitted the influx of Afghan refugees into India following formal Taliban takeover of Afghanistan in 2021, and rather serves as a legal mechanism to deny asylum and protection to its claimed beneficiaries).

125. *Singh v. France*, Communication 1876/2000, U.N. Human Rights

denied Singh his ID card, they also denied him benefits that are only granted to holders of a valid ID, just as the Foreigners' Tribunals in India deem Muslims not to have the appropriate credentials for citizenship and deny them the benefit of living in India, since they are subject to deportation.¹²⁶ In *Singh*, the Committee decided that prohibiting a turban in an ID photo was not necessary to serve the public safety and order objective of identification of citizens, because that goal could be adequately served if he were to leave his turban on during the ID photo.¹²⁷ Similarly, the public safety and order goal that can be achieved by limiting refugees can still be adequately served without discriminating according to the religious identities of the refugees.¹²⁸

Denying Muslims the same immigration rights as those practicing other religions denies them protection under Article 18, just as denial of registration of the Krishna Community in *Malakhovsky v. Belarus* denied the members of the Community the protections of Article 18.¹²⁹ In *Malakhovsky*, the Committee noted that there was a legitimate purpose identified by Belarus in denying the registration of a religious group without an address, because making sure there was no safety hazard at the location where the religion would be registered serves a necessary public safety goal.¹³⁰ Similarly, a mechanism to limit a high volume of refugees into India would serve a valid public safety purpose—to ensure less strain on infrastructure and prevent overcrowding.¹³¹ However, the Committee in *Malakhovsky* ultimately

Committee [U.N. H.R.C.], ¶ 3.2 (July 29, 2011).

126. See Changolwala, *supra* note 27 (showing that the CAA's imposition of an NRC singles out Indian-born Muslims for deportation).

127. *Singh v. France*, Communication 1876/2000, U.N. Human Rights Committee [U.N. H.R.C.], ¶ 8.2 (July 29, 2011).

128. See Kaul, *supra* note 118 (explaining that India has the option to sign onto international refugee agreements that can provide international guidance to refugees seeking asylum in India, and assure that the admittance of refugees is done in a way that does not violate human rights. Also, that India can solve the refugee problem through better domestic legislation to bring uniformity and certainty for refugees and asylum seekers).

129. *Malakhovsky v. Belarus*, Communication 1207/2003, U.N. Human Rights Committee [U.N. H.R.C.], ¶ 7.5 (July 26, 2005).

130. *Id.* ¶ 7.6.

131. MARYBETH MORAND ET AL., THE IMPLEMENTATION OF UNHCR'S POLICY ON REFUGEE PROTECTION AND SOLUTIONS IN URBAN AREAS, United Nations High

determined that the restriction was not necessary because the requirement that a valid location be chosen prior to registration was arbitrary, since acquiring a valid location was inconsequential to the determination of whether the Community could gain full status as a religious organization.¹³² Similarly, although limiting refugees in general may serve a valid purpose, discriminating by religious identity to determine which refugees are permitted is arbitrary because it is unnecessary to address an influx of refugees.¹³³ Therefore, the CAA in its present form is not necessary to achieve its valid goal of promoting public safety and order.¹³⁴

3. *The Harm that the CAA Causes Muslims Is Disproportionate to the Benefit that It May Serve in Immigration Proceedings*

The CAA's religious classifications harm Indian Muslims more than they benefit the Indian immigration system. The Committee in *Singh* determined that the personal harm suffered by Singh in having to take off his turban was not proportionate to the public order and safety benefits that would be served by requiring head coverings to be

Commissioner for Refugees 7 (explaining that ninety percent of the world's asylum seekers are estimated to be in urban or peri-urban centers where they compete with the indigenous urban poor for limited livelihood possibilities, further stressing already inadequate urban infrastructure and services).

132. *Malakhovsky v. Belarus*, Communication 1207/2003, U.N. Human Rights Committee [U.N. H.R.C.], ¶ 7.6 (July 26, 2005) ("The Committee notes, however, that the State party has not advanced any argument on why it is necessary for the purposes of article 18, paragraph 3, for a religious association, in order to be registered, to have an approved legal address which not only meets the standards required for the administrative seat of the association but also those necessary for premises used for purposes of religious ceremonies, rituals, and other group undertakings. Appropriate premises for such use could be obtained subsequent to registration.").

133. See Dehadrai, *supra* note 122 ("[T]he CAA creates a distinction between individuals of the same group—'illegal immigrants'—on the basis of a criterion as arbitrary and illogical as religion.").

134. *Contra Afghanistan Crisis Shows Why CAA Is Needed: Hardeep Singh Puri*, TIMES OF INDIA (Aug. 23, 2021), <https://timesofindia.indiatimes.com/india/afghanistan-crisis-shows-why-caa-is-needed-hardeep-singh-puri/articleshow/85549052.cms> (quoting the BJP Minister of State who tweeted, "recent developments in our volatile neighbourhood and the way Sikhs and Hindus are going through a harrowing time are precisely why it was necessary to enact the Citizenship Amendment Act").

removed for identification purposes.¹³⁵ The harm in that case was that doing so would violate Singh's faith in Sikhism.¹³⁶ The harm suffered by Indian Muslims, meanwhile, is the possibility of deportation from their ancestral homes.¹³⁷ Therefore, as in *Singh*, the harm suffered by Indian Muslims is disproportionate to the benefit that may be served by classifying citizens by religion to address high numbers of refugees.¹³⁸ As such, the CAA violates Article 18 of the ICCPR because the measure is not necessary and proportional to serve a stated public safety and order goal.

The CAA harms Indian Muslims by subjecting them to uncertainty in their citizenship status and to deportation. In *Malakhovsky*, the HRC found that denying the registration to the Krishna Community resulted in a harm that was disproportionate to the stated purpose.¹³⁹ By denying registration, Belarus harmed the Community because it rendered them unable to establish religious educational institutions and receive foreign dignitaries of the religion.¹⁴⁰ Similarly, the CAA-NRC harms Indian Muslims by subjecting them to uncertainty in their citizenship status and to deportation.¹⁴¹ The HRC in *Malakhovsky* determined that the harm inflicted on the Krishna Community in not being able to exercise their religion was not proportional to the goal of public safety that their registration may serve.¹⁴² Therefore, the harms to Indian Muslims subjected to the provisions of the CAA are not proportionate means to achieve the public safety goals associated with

135. *Singh v. France*, Communication 1876/2000, U.N. Human Rights Committee [U.N. H.R.C.], ¶ 8.4 (July 29, 2011).

136. *Id.*

137. *Changolwala*, *supra* note 27 (explaining that while many Muslims do have documents that can prove a semblance of citizenship, such as passports, the NRC requires decades-old documents which are much more difficult to find, and Muslims may not waive this requirement as can migrants that do not practice Islam).

138. *Id.*

139. *Malakhovsky v. Belarus*, Communication 1207/2003, U.N. Human Rights Committee [U.N. H.R.C.], ¶ 7.6 (July 26, 2005).

140. *Id.*

141. CHATTERJI ET AL., *supra* note 21, at 5; *see also* *Changolwala*, *supra* note 27 (showing that the passage of the CAA has led to heightened anxiety among Muslims across the country worried about deportation. A member of a legislative assembly said that at least 500 people visit his office every day expressing concern with the legitimacy of their citizenship documents, some of whom are in their seventies).

142. *Malakhovsky v. Belarus*, Communication 1207/2003, U.N. Human Rights Committee [U.N. H.R.C.], ¶ 8 (July 26, 2005).

a large volume of refugees.

Applying the HRC's necessary and proportional standard to justify state action infringing on the freedom of religion, the Citizenship Amendment Act and its resulting National Register of Citizens and Foreigners' Tribunals violate Article 18 of the ICCPR because they are not necessary to achieve the stated goal, and the means to achieve the goal cause disproportionate harm to Indian Muslims.¹⁴³

D. THE BJP VIOLATES ARTICLE 20(2) BECAUSE ITS ADVOCACY OF HINDUTVA IS INTENTIONAL, CONSISTS OF HATEFUL CONTENT, AND REACHES A WIDE EXTENT OF THE POPULATION

Article 20(2) is violated when advocacy of religious hatred is intended to convey animosity to a certain group, the content of the statements is hateful, and the statements are extensively disseminated.¹⁴⁴ BJP leaders' advocacy of *Hindutva* violates Article 20(2) because it is intended to garner support, it consists of derogatory, prejudicial statements against Muslims, and those statements are consumed by large audiences all over India.

1. *India's Reservation to Article 19 Does Not Conflict with the Object and Purpose of the Treaty as a Whole*

Some may argue that India's reservation to Article 19 conflicts with the object and purpose of the treaty as a whole, because it forbids enforcement of Article 19 of the ICCPR if it conflicts with Article 19 of the Indian Constitution.¹⁴⁵ However, because Article 19 of the Indian Constitution is substantially similar to Article 19 of the ICCPR, it does not conflict with the ICCPR's object and purpose.¹⁴⁶ Article

143. *Id.*; Singh v. France, Communication 1876/2000, U.N. Human Rights Committee [U.N. H.R.C.], ¶ 8.4 (July 29, 2011).

144. *See supra* Section II.A.3.

145. *See* Tom Ginsburg, *Objections to Treaty Reservations: A Comparative Approach to Decentralized Interpretation*, in COMPAR. INT'L L. 231, 234 (Anthea Roberts et al. eds., 2018) (noting that the interpreters of whether a reservation comports with the object and purpose of the treaty are other states, who object to reservations for a variety of reasons. If a state determines that another state's reservation conflicts with the object and purpose of the treaty, the reservation is deemed invalid as it applies between the reserving state and the objecting state).

146. India Const. art. 19, cl. 2. ("Nothing in [Article 19] shall . . . prevent the State from making any law, in so far as such law imposes reasonable restrictions on the

19(2) of the Indian Constitution provides that restrictions to freedom of speech may be imposed so long as they reasonably serve a public order goal.¹⁴⁷ Meanwhile, Article 19(3)(b) of the ICCPR holds that restrictions of freedom of speech may be imposed if they are necessary to protect the public order.¹⁴⁸ While there may be some discrepancy between being “reasonable” and being “necessary” to achieve a public order goal, this small distinction does not contradict the object and purpose of the treaty as a whole.¹⁴⁹ Furthermore, India’s reservation to Article 19 does not substantially impact the Article 20 analysis.¹⁵⁰

2. *India’s Internal Laws Do Not Sufficiently Protect the Interests Identified in Article 20(2)*

The U.N.’s General Comment 11 on Article 20 states that for the article to be fully effective members should pass laws against the sort of conduct that it forbids.¹⁵¹ Sections 153A and 505 of the Indian Penal code effectively criminalize the conduct stipulated by Article 20 to the extent that the General Comment recommends.¹⁵² In fact, BJP leaders have been arrested under these statutes for incitement of violence on religious grounds.¹⁵³ However, these arrests are few and far

exercise of the right [of freedom of expression] conferred by [Article 19] in the interests of . . . public order.”).

147. *Id.*

148. ICCPR, *supra* note 4, art. 19(3)(b).

149. See generally David Jonas & Thomas Saunders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 VAND. J. TRANSNAT’L L. 565 (May 2010) (emphasizing that object and purpose analysis should focus on the reservation’s effect on the application of the treaty as a whole).

150. Rep. of Human Rights Committee, Concluding Observations of the Human Rights Committee: India, U.N. Doc. A/46/40 No. 40, ¶¶ 309–10. (Oct. 10, 1991); Rep. of Human Rights Committee, Concluding Observations of the Human Rights Committee: India, U.N. Doc. CCPR/C/79/Add.81 (Aug. 4, 1997) (expressing dismay at India’s implementation of the ICCPR in general, but not finding India’s reservations to be against the object and purpose of the treaty in either report).

151. General Comment 11, *supra* note 76 (“In view of the nature of article 20, States parties are obliged to adopt the necessary legislative measures prohibiting the actions referred to therein.”).

152. See *Inciting Violence in Indian*, *supra* note 48 (explaining that Section 153A criminalizes and punishes making statements, speeches or acts that disturb public tranquility or law and order by promoting enmity between classes of people on the basis of difference in religion. Section 505 criminalizes making statements that encourages and/or incites persons to disturb public tranquility).

153. See *Senior BJP Leader Arrested*, *supra* note 48 (citing to arrests that took

between.¹⁵⁴ Although the existence of these laws in India satisfies the recommendation from General Comment 11, it is nonetheless in violation of Article 20(2) because they are not sufficiently utilized to punish BJP actions.¹⁵⁵

3. *BJP Leaders Intend for Their Statements To Be Hateful Because They Advocate for Discrimination and Incitement of Violence*

The BJP advocates hatred against Muslims in their rhetoric, and because advocacy implies a form of intention, they therefore intend to promote hatred.¹⁵⁶ In *Faurisson v. France*, the HRC found that Professor Faurisson intended to promote hatred against the Jewish Community because his statements singled out Jewish historians and implied that they had something to gain from perpetuating (what Faurisson believed to be) a lie about the Holocaust.¹⁵⁷ Similarly, BJP leadership intends to promote hatred against Muslims because they single out Muslims by provoking resentment towards the beef industry and lauding the perpetrators of “beef lynchings.”¹⁵⁸ Furthermore, the BJP directly calls for violence against opponents to the anti-Muslim CAA through their “goli maaro saalon ko” chants.¹⁵⁹ As such, the BJP

place on November 5, 2019 in connection with violence outbreak out in Amravati).

154. See generally Tiwari, *supra* note 47 (arguing that the BJP’s propaganda campaign against Muslims has been successful in granting them electoral victories by Hindu voters, “turn[ing] India’s unemployed and undereducated youth into its foot soldiers and the country’s middle-class into armchair supporters of its politics of hatred” such that the BJP is destined to continue such an electoral strategy lest lose the electorate gained through anti-Muslim messaging).

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156. MENDEL, *supra* note 82, at 47 (positing that advocacy implies a form of intention).

157. *Faurisson v. France*, Communication 550/1993, U.N. Human Rights Committee [U.N. H.R.C.], ¶ 9.6 (Nov. 8, 1996).

158. See Nair, *supra* note 39 (analyzing the meaning of India’s ‘Beef Lynchings’ in connection to the rise in anti-Muslim violence under Modi); see Daniyal, *supra* note 42 (explaining that because the cow is holy in Hinduism, the Indian beef industry is predominately occupied by Muslims and BJP campaigns frequently invoke prejudice against beef eaters and producers).

159. See Prabhu, *supra* note 50 (discussing the BJP Union Minister Anurag

intends for their speech to incite discrimination, hostility, and violence against Muslims in India and should be subject to discipline under Article 20(2), as was Professor Faurisson.

4. The BJP's Rhetoric Has Hateful Content Because It Identifies Muslims as the Source of India's Problems and Calls for Violence Against Them

Additionally, the content of the BJP's rhetoric promotes hatred against Muslims. The situation in *J.R.T. & W.G. Party v. Canada* parallels that in India because both situations concern a potential limitation on the speech of a member of a political party as a representation of that party.¹⁶⁰ Furthermore, both the W.G. Party and the BJP use their rhetoric to pin the ills of their country onto a minority religious group.¹⁶¹ In *J.R.T. & W.G.*, the group was made up of those with Jewish faith and ancestry, and the radio audience was instructed to “stand up and fight back,” just as BJP political leaders frequently invoke their Hindu audiences to “shoot the traitors to the nation,” referring to those who support Muslims by opposing the CAA.¹⁶² In

Thakur, who made headlines with his “goli maaro” slogan); see Mathew & Rajput, *supra* note 49 (reporting that when Minister Anurag Thakur chanted “desh ke gaddaron ko,” poll rally crowd responded with “goli maaro”); see *Watch: Union Minister Leads Slogans*, *supra* note 50 (showing that these chants, translated to “shoot the traitors to the nation” consider Muslims and their supporters (those who oppose the CAA) to be “traitors” to India).

160. *J.R.T. v. Canada*, Communication 104/1981, U.N. Human Rights Committee [U.N. H.R.C.], ¶ 2.1 (Apr. 6, 1983); see Daniyal, *supra* note 42 (showing that anti-Muslim sentiment is repeated at political rallies intended to gain support for the BJP, such as at a campaign event for now Prime Minister Narendra Modi).

161. *J.R.T. v. Canada*, Communication 104/1981, U.N. Human Rights Committee [U.N. H.R.C.], ¶¶ 2.1, 2.5 (Apr. 6, 1983) (showing that the W.G. Party's messages against those of Jewish faith are that they are involved in the current “corruption of our Christian way of life”); see Prabhu, *supra* note 50 (stating that the slogans used have set the tone for a particularly aggressive campaign, given a vicious edge by frequent hate speeches from a section of BJP leaders); see Mathew & Rajput, *supra* note 49 (showing that the “goli maaro saalon ko” chant is intended to blame such “traitors to the nation” (opponents to the CAA) for the widespread violence between Hindus and Muslims in the wake of the CAA's passage).

162. *J.R.T. v. Canada*, Communication 104/1981, U.N. Human Rights Committee [U.N. H.R.C.], ¶ 2.1 (Apr. 6, 1983); see *Watch: Union Minister Leads Slogans*, *supra* note 50 (reporting that the Minister of State for Finance, the BJP's Anurag Thakur, was seen leading a crowd with the inciting listeners to shoot “traitors to the country”).

both instances, the speech contains an “us vs. them” sentiment between those of the majority and minority religious groups in the country (Christians and Jews in Canada and Hindus and Muslims in India), and calls upon the majority to take action against a minority that is portrayed as a threat.¹⁶³ In *J.R.T. & W.G.*, the Committee decided that the speech contained on the audio recordings was a “clear” advocacy of racial or religious hatred and that Canada had an obligation under Article 20(2) to prohibit such hatred.¹⁶⁴ Therefore, because the content of the BJP’s statements similarly single out a religious minority to whom the country’s problems are attributable, and call for violence against that group, India has violated its obligation under Article 20(2) to prohibit the BJP’s hateful statements.¹⁶⁵

5. *The BJP’s Statements Have a Wide Extent Because They Are Uttered by Politicians to Large Audiences*

The wide extent of the BJP’s hateful statements renders them actionable under Article 20(2).¹⁶⁶ Just as the HRC in *Ross v. Canada* held that a teacher espousing antisemitic views warrants restriction of that speech, so too does the BJP’s promotion of Islamophobic views warrant restrictions.¹⁶⁷ In *Ross*, the purpose of the speech was to demonstrate that those of Jewish faith and ancestry were undermining freedom and democracy just as BJP leaders advocating for *Hindutva*

163. *J.R.T. v. Canada*, Communication 104/1981, U.N. Human Rights Committee [U.N. H.R.C.], ¶ 2.1 (Apr. 6, 1983); see also *Watch: Union Minister Leads Slogans*, *supra* note 50 (reporting that slogan about traitors has been heard at numerous pro-Citizenship Act and Bharatiya Jarata Party rallies in the country, with even young children being made to say it).

164. *J.R.T. v. Canada*, Communication 104/1981, U.N. Human Rights Committee [U.N. H.R.C.], ¶ 8b (Apr. 6, 1983).

165. Mathew & Rajput, *supra* note 49 (reporting on Thakur’s speeches during rallies); see Prabhu, *supra* note 50 (reporting on opposition leaders’ reactions to Thakur’s slogans); see Tiwari, *supra* note 47 (opining that the BJP has incited hatred it can no longer stop); see Daniyal, *supra* note 42 (analyzing how Narendra Modi helped spread anti-beef hysteria in India).

166. *Ross v. Canada*, Communication 736/1997, U.N. Human Rights Committee [U.N. H.R.C.], ¶ 6.12 (Oct. 18, 2000) (establishing that because a teacher can transmit their beliefs across large audiences of their students, the statements are entitled to more stringent review).

167. *Id.*

habitually target Muslims as undermining Indian tradition.¹⁶⁸ In *Ross*, the HRC emphasized the influence teachers hold by virtue of their position, and found that this influence justifies restraints on their speech.¹⁶⁹ Leaders in politics exert a similarly strong influence, if not a stronger one, on the beliefs of their audiences.¹⁷⁰ Teachers and politicians are both influential in changing the beliefs of others, because they frame which issues are discussed and project authority on the matters they discuss.¹⁷¹ The BJP specifically exerts a strong influence on the beliefs of Indians because it is the country's majority party and gains further support all the time.¹⁷² In *Ross*, the teacher's statements deemed hateful occurred outside of his occupation as a teacher, yet were still deemed to warrant restriction because of the influence of his position.¹⁷³ As such, because the BJP's anti-Muslim

168. *Id.* ¶ 11.5; see also Ganguly, *supra* note 35 (“The BJP has made so much headway by its pursuit of a Hindu agenda that it apparently sees the programme of advancing the cause of the majority community as a goose that lays the golden electoral eggs. It will be unrealistic, therefore, to expect the party to step back from a path which pays so much political dividends.”).

169. *Ross v. Canada*, Communication 1876/2000, U.N. Human Rights Committee [U.N. H.R.C.], ¶ 11.6 (July 29, 2011) (noting that the right to freedom of expression carries with it certain duties and responsibilities that are particularly relevant in the school system. The influence exerted by school teachers on the young students they teach may justify restraints so that the school system does not legitimize the expression of discriminatory views).

170. See generally Jere E. Brophy, *How Teachers Influence what is Taught and Learned in Classrooms*, 83 *ELEMENTARY SCH. J.* 1, 1 (1982) (emphasizing the agenda-setting role of teachers influencing the topics their students learn as well as the ways that they learn them).

171. See generally Shanto Iyengar, *Framing Research: The Next Steps*, in *WINNING WITH WORDS: THE ORIGINS AND IMPACT OF POLITICAL FRAMING*, 185, 185 (Brian F. Schaffner & Patrick J. Sellers eds., 2009) (arguing that politicians' authority on the matter being discussed gives the audience little reason to challenge the narratives they are being provided).

172. Saurabh Sharma, *Modi's BJP Set to Retain India's Most Populous State After Vote – Opinion Polls*, *REUTERS* (Mar. 7, 2022), <https://www.reuters.com/world/india/modis-bjp-set-retain-indias-most-populous-state-after-vote-opinion-polls-2022-03-07> (explaining that the BJP continues to win seats, despite facing criticism for their handling of the COVID-19 pandemic, high unemployment, and waves of protests against controversial laws—such as the CAA).

173. *Ross v. Canada*, Communication 1876/2000, U.N. Human Rights Committee [U.N. H.R.C.], ¶ 2.1 (July 29, 2011) (showing that the objectionable speech was in books, pamphlets, and television interviews in contexts outside of the teacher's position as an educator).

speech occurs within their official capacity as a political party, it reaches far wider audiences and is more damaging given the legitimacy of its position.¹⁷⁴ Therefore, the wide extent to which the BJP's statements influence Indians across the country is sufficient to warrant action under Article 20(2).

IV. RECOMMENDATIONS

A. INTRODUCTION

India has violated the right to freedom of religion and freedom from incitement of discrimination, hostility, and violence under Articles 18 and 20(2) of the ICCPR, respectively.¹⁷⁵ However, there are ways that India can come into compliance with the ICCPR and provide a remedy to its violations. One set of recommendations includes ratifying the articles of the ICCPR necessary for more just and efficient redress of the violations. Another set of recommendations stipulates performing actions through the mechanisms in place within the Indian legal and political system to cure the BJP's wrongs.

B. SOLUTIONS AVAILABLE UNDER THE ICCPR

1. *Adopting the ICCPR's Optional Protocol*

The most efficient way to resolve India's violation of the articles of the ICCPR is for India to accept and enforce the First Optional Protocol to the ICCPR.¹⁷⁶ This agreement allows individuals whose home countries are party to the ICCPR to claim that their rights under the ICCPR have been violated and allows them to submit written communications to the HRC to request a remedy.¹⁷⁷ Under the

174. CITIZENS AGAINST HATE, SUBMISSION TO THE SPECIAL RAPPORTEUR ON FREEDOM OF RELIGION OR BELIEF (2020) ("Since 2014, Muslims have suffered a heightened campaign of hate, vilification and physical attacks, with senior BJP leaders at the forefront, and social media generously used as amplifier. In areas of Muslim concentrations . . . the targeting has been more widespread and systematic. Perpetrators have suffered no accountability for their actions").

175. *See supra* Part III.

176. *Status of Ratification*, U.N. OFFICE OF THE HIGH COMMISSIONER OF HUMAN RIGHTS, <https://indicators.ohchr.org> (select "India" from the left-side menu) (proving India's lack of adoption of the Optional Protocol).

177. *Why an Optional Protocol?*, U.N. WOMEN, <https://www.un.org>

Optional Protocol, Muslims in India who have experienced discrimination under the CAA and the NRC can appeal directly to the HRC if they have already exhausted domestic remedies.¹⁷⁸ The Foreigners' Tribunals are how Indians can appeal their treatment under the CAA and NRC, and, as discussed above, the Tribunals frequently produce unjust results.¹⁷⁹ Therefore, Muslims in India aggrieved by its laws will likely be able to exhaust domestic remedies and be heard by the HRC.

2. *Using Article 41 of the ICCPR and International Political Pressure*

The ICCPR itself also provides remedies for the violation of its articles through Article 41.¹⁸⁰ However, the ICCPR requires an affirmative declaration recognizing the competence of the HRC under Article 41 in order for it to exercise such competence.¹⁸¹ India has not made such a declaration accepting the competence of the HRC under Article 41; therefore, the HRC has no jurisdiction to resolve an inter-state complaint under that Article.¹⁸² Thus, India should make the declaration accepting competence of the HRC under Article 41 so that

/womenwatch/daw/cedaw/protocol/why.htm (explaining that the Optional Protocol allows citizens of a state options to rectify a wrong committed at the hands of the state when the state itself will not recognize nor address the wrong).

178. *Id.*; Optional Protocol to the International Covenant on Civil and Political Rights, art. 2, 999 U.N.T.S. 171 (Dec. 19, 1966) (“[I]ndividuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.”).

179. Mohan, *supra* note 30 (providing statistics from Assam, a state in India that had already adopted the National Register of Citizens, showing that the Foreigners' Tribunals used to adjudicate appeals to classifications under the NRC consistently disfavor Muslim residents).

180. ICCPR, *supra* note 4, art. 41.

181. *The Practical Guide to Humanitarian Law*, DOCTORS WITHOUT BORDERS, <https://guide-humanitarian-law.org/content/article/3/human-rights-committee> (explaining how Article 41 is “optional,” meaning that it only applies to State Parties that have expressly recognized the HRC’s competence to receive and consider communications from states under the Article).

182. International Covenant on Civil and Political Rights, *Declarations Recognizing the Competence of the Human Rights Committee Under Article 41*, Dec. 16, 1966, 999 U.N.T.S. 171 (listing the Member States who have accepted the competence of Article 41; India is absent from this list).

the HRC and its Members may intervene and attempt to resolve the BJP's discrimination against Muslims in India.

If India declares their acceptance under Article 41, that would allow a State Party to notify the Committee when it considers another State Party to the Covenant to be breaking their commitment.¹⁸³ Under 41(1)(a), the State Party must, by written communication, bring the matter to the attention of the State Party they believe to be in violation, and the alleged violating State Party must provide an explanation within three months.¹⁸⁴ If the matter is not adjusted, either state can refer the matter to the HRC, who will then ascertain if domestic remedies have been exhausted and hold closed meetings before submitting a report on the matter.¹⁸⁵ Article 41(2) requires that the above provisions can only take effect when ten State Parties to the ICCPR have made declarations that they believe another State Party to be in violation of the Covenant.¹⁸⁶ Although finding ten State Parties to denounce the BJP and its policies could be challenging, support could be garnered by the fact that the United Nations itself has denounced the CAA as discriminatory.¹⁸⁷ If the matter is not resolved by Article 41, Article 42 provides that the Committee may appoint an ad hoc Conciliation Commission designed to "amicably" solve the issue.¹⁸⁸

Using the method outlined in Article 41 would be a significant undertaking, as no Inter-State complaint has ever been submitted to

183. ICCPR, *supra* note 4, art. 41.

184. *Id.*

185. *Id.*

186. *Id.* art. 41(2).

187. Press Release, U.N. Office of the High Commissioner for Human Rights, Press Briefing on India (Dec. 13, 2019) (stating that the CAA appears to undermine India's commitment to equality before the law as enshrined in its Constitution, and that the CAA will have a discriminatory effect on people's access to nationality. UNHCHR further noted that while India's proposed purpose of the law is valid, protecting persecuted groups, such protection should happen through a "robust" asylum system based on equality, and apply regardless of religion).

188. ICCPR, *supra* note 4, art. 42(1)(a) ("If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an ad hoc Conciliation Commission . . . the good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant.").

the Committee.¹⁸⁹ However, even if the formal process does not reach fruition, the international pressure resulting from ten State Parties publicly decrying the actions of the BJP would likely have a strong influence on India.¹⁹⁰ Furthermore, HRC's General Comment 31 on Article 41 urges State Parties "to draw attention to possible breaches of the Covenant obligations by other State Parties and to call on them to comply with their Covenant obligations" regardless of their acceptance of the HRC's competence under Article 41.¹⁹¹ Therefore, the ICCPR itself condones State Parties exercising international political pressure to resolve ICCPR violations outside of the formal mechanisms it provides.¹⁹² Further, India's democratic processes will account for the international repugnance over the BJP's action, as it is more likely that people will support efforts to change government policies if there is more criticism of that government from outside actors.¹⁹³

C. SOLUTIONS OUTSIDE THE ICCPR

In addition to formal complaints lodged under the ICCPR, solutions at the level of the judiciary are also available. These include protesting certain laws on a case-by-case basis, calling on government officials

189. *Human Rights Committee by ICCPR*, CTR. CIV. & POL. RTS., <https://ccprcentre.org/ccpr-hr-committee>.

190. Jamie Gruffydd-Jones, *Citizens and Condemnation: Strategic Uses of International Human Rights Pressure in Authoritarian States*, 52 COMPAR. POL. STUD. 579, 582 (2018) ("Making a target country's citizens more aware and concerned that their government is abusing their human rights is one important means by which international activism helps domestic movements pressurize governments to change their policies."). *But see* Sebastian Hellmeier, *How Foreign Pressure Affects Mass Mobilization in Favor of Authoritarian Regimes*, 27 EUR. J. INT'L REL. 450, 455 (2021) (arguing that foreign interventions facilitate mobilization of support in favor of the existing authoritarian government, as autocrats can spur nationalist sentiments and frame foreign interventions as an attack on the nation).

191. U.N. Human Rights Committee, 80th Sess., General Comment 31(80): Nature of the General Legal Obligation Imposed on State Parties to the Covenant, ¶ 2, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

192. *Id.*

193. Gruffydd-Jones, *supra* note 190, at 582 ("As foreign pressure tells people that their country does not respect human rights, and denounces it for doing so, their grievances about human rights conditions in their country increase after hearing it. As grievances grow, this will empower and legitimate the claims of domestic opposition groups against norm-violating governments.").

to allow religious communities to determine how they want to be legislated and diversifying the composition of judicial bodies.¹⁹⁴

1. *Hailing Individuals to Court*

The Civil Rights Movement in the United States during the 1960s used the strategy of bringing individual cases to court to highlight discriminatory laws and discriminatory impacts of laws, and this same strategy can be used in India.¹⁹⁵ The Indian judicial system is a single integrated system, where the superior judiciary consists of the Supreme Court and the High Courts, and the subordinate judiciary consists of lower courts under the control of the High Courts.¹⁹⁶ The decisions of the superior judiciary are binding on all of the courts of the subordinate judiciary.¹⁹⁷ Usually, the defendants hailed into the Foreigners' Tribunals are poor and unsophisticated in legal matters, thus the decisions from those tribunals are rarely appealed up to the High Court level.¹⁹⁸ Ensuring competent counsel for these defendants and increasing the quantity of the appeals can raise the likelihood that an especially egregious decision will be appealed to a court in the superior judiciary and overturned.¹⁹⁹ Additionally, the CAA can be

194. See *infra* Parts IV(C)(i), IV(C)(i), and IV(C)(iii).

195. See generally Klar Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*, 443–68 (2006) (arguing that “Court decisions can disrupt the order in which social change might otherwise have occurred by dictating reform in areas where public opinion is not yet ready to accept it.” For instance, in the case *Brown v. Board of Education*, the U.S. Supreme Court declared that racial segregation of public schools was unconstitutional. In response, the areas of the country opposed to the measure attempted to evade enforcement of the ruling, forcing federal resources to be expended (like, in extreme circumstances, dispatching the National Guard) in order to desegregate the schools pursuant to the ruling in *Brown*).

196. Ashish Bhan & Mohit Rohatgi, *Legal Systems in India: Overview*, THOMSON REUTERS (Mar. 1, 2021), [https://uk.practicallaw.thomsonreuters.com/w-017-5278?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-017-5278?transitionType=Default&contextData=(sc.Default)&firstPage=true) (discussing the general court structure and hierarchy).

197. *Id.* (noting that if there is a contrary decision from another High Court, the decision from the Court with the larger bench usually prevails).

198. CHATTERJI ET AL., *supra* note 21, at 22 (holding that the populations subjected to the Foreigners' Tribunals are economically marginalized, not formally educated, and either illiterate or semi-literate, which minimizes their ability to effectively and meaningfully exercise their right to an appeal).

199. Amruta Byantnal, *In India's Assam, Lawyers Needed to Fight Statelessness*, DEVEX (Sept. 6, 2019), [devex.com/news/in-india-s-assam-lawyers-needed-to-fight-](https://www.devex.com/news/in-india-s-assam-lawyers-needed-to-fight-)

challenged in a court with judges that are more favorable to preserving secularism in Indian society.²⁰⁰

A case-by-case approach targeting higher courts is likely to have success, as the Supreme Court has recently issued relatively progressive decisions condemning faith-based customs that resulted in hardships for non-Hindu religious minorities.²⁰¹ For example, the court struck down a May 2017 federal government ban on the slaughter of cows, emphasizing the ban's potential to impact the livelihood of those in the beef and leather industries, who are predominantly Muslim.²⁰²

2. *Self-Determination for Religious Communities*

Another possible solution is for courts to more aggressively call on government officials to determine if and how religious communities want their laws modified.²⁰³ For instance, in response to the Supreme Court's decision in *Mohd. Ahmen Khan v. Shah Bano Begum*, which recognized the right of an elderly woman to alimony from her divorcing husband, the then-Prime Minister enacted the Muslim

statelessness-95546 (explaining that it will be difficult for Foreigners' Tribunals in Assam to ensure justice without adequate legal counsel given that there were 1.9 million people who were left off of the National Register of Citizens who have grounds to appeal, but the legal system is not ready for such a massive undertaking. Furthermore, most of the people excluded in the list are poor, which would make it impossible for them to spend for lawyers' fees and court costs).

200. See M.S. Ananth, *Ideology and Judiciary*, THE INDIAN EXPRESS (Jan. 7, 2021), <https://indianexpress.com/article/opinion/columns/ideology-judiciary-constitutional-interpretation-7137357> (arguing that the political leanings of the judges on India's "constitutional courts" have a wide influence on federalism, secularism, and the fundamental rights of citizens, and that where there are drastically varying legal thoughts among the courts, the impact is most acutely felt by minorities).

201. Sunny Dharod, *Responding to "Stealth Theocracy": Propositions for India's Civil Courts*, 32 GEO. J. LEGAL ETHICS 504, 515 (2019) (citing examples of other progressive Supreme Court decisions, such as when the court decriminalized consensual homosexual sex and when they struck down the ban that a Hindu temple had against women of menstruating age from entering).

202. See generally K. ALAN KRONSTADT, INDIA: RELIGIOUS FREEDOM ISSUES, CONG. RSCH. SERV., R45303 (Aug. 30, 2018).

203. Dharod, *supra* note 201, at 518 (discussing "stealth theocracy" as a phenomenon that involves the fundamental alteration of a constitutional system's religious or secular character through less visible means of constitutional change).

Women's Protection After Divorce Act, which deprived Muslim women of the right of maintenance guaranteed to them under the Criminal Procedure Code.²⁰⁴ In response, the Women's Action Research and Legal Action for Women (WARLAW) brought a petition to the Supreme Court to order the government to state "how it intends to determine whether communities want [their] personal laws changed," as well as how the government "intends to include the voices of women from these communities when making its assessment."²⁰⁵ Although in this context the petition did not produce any concrete results, a similar petition to the Supreme Court can be submitted regarding the government's treatment of Muslims.²⁰⁶ This would provide a degree of self-determination for the Muslim community, and could create a bulwark against a BJP-majority that may pass further discriminatory legislation.²⁰⁷

3. *Diversify the Composition of the Bench*

A key feature of the Indian legal system that leads to discrimination against Muslims is the occupation of judgeships by BJP-supporting and Islamophobic judges.²⁰⁸ By diversifying the composition of judges on the courts, the judges could neutralize each other's biases and more accurately assess matters of religious discrimination.²⁰⁹

204. Madhavi Sunder, *Piercing the Veil*, 112 YALE L. J. 1399, 1428 (Apr. 2003) (arguing that because law does not recognize religious communities as contested and subject to change, legal norms such as the freedom of religion and the right to culture defer to the claims of patriarchal elites).

205. Dharod, *supra* note 201, at 519 (arguing that by revisiting WARLAW's request, Indian civil courts could challenge the monolithic and static manner with which the Indian government has characterized and treated religious groups).

206. *Id.* (exploring alternative possibilities to obtain results).

207. *Id.* (explaining how elected officials could be held to a higher standard for taking all constituents into account, regardless of religious community).

208. *E.g.*, *India Court Upholds Karnataka State's Ban on Hijab in Class*, ALJAZEERA (Mar. 15, 2022), <https://www.aljazeera.com/news/2022/3/15/india-court-upholds-karnataka-states-ban-on-hijab-in-class> (explaining that in the southern state of Karnataka, which is governed by a BJP majority, the court upheld a law that banned Muslim women wearing a hijab during school).

209. Dharod, *supra* note 201, at 520 ("[M]ore diversity would also allow civil courts to acquire a more reflective understanding of the varying rationales that litigants are presenting to defend their actions. That way, if judges in the civil courts feel that it is inevitable for them to interpret religious text when deciding the validity of a citizen's religious actions and beliefs, the chances that those texts would be

There is support for an affirmative action measure like this in the Indian Constitution's Article 15, which holds that "nothing in this article . . . shall prevent the state from making any special provision for the advancement of any socially and educationally backward classes of citizens or Scheduled Castes and the Scheduled Tribes."²¹⁰ Therefore, India's constitutional tradition favors such quotas and affirmative action measures for deprived groups to ensure an equal playing field.²¹¹ Applying such measures to the courtroom could protect against the arbitrary denial of justice in matters regarding Muslim discrimination.

V. CONCLUSION

The leadership of the BJP in India is predicated on the ideal of *Hindutva*, which is inherently discriminatory against Muslim Indians.²¹² The BJP continues to pass legislation that hurts Muslims and engage in anti-Muslim rhetoric despite being a party to the ICCPR, which not only preserves the right of individuals to be free from religious persecution, but also bans any statements of religious hatred that incites hostility, discrimination, or violence.²¹³

The BJP violates its commitments under ICCPR Article 18 and Article 20(2) because its discriminatory laws, such as the Citizenship Amendment Act, are not necessary and proportional to a valid goal, and the harmful rhetoric of the BJP has the requisite intent, content, and extent so as to constitute religious hatred that incites hostility, discrimination, and violence.²¹⁴ India can sign onto the Optional

reviewed by someone who actually subscribes to them in their day-to-day life would increase.").

210. India Const., art. 15.

211. *Id.*

212. See Ramachandran, *supra* note 10, at 15 (arguing that underlying the recent anti-Muslim violence in India is the *Hindutva* ideology, which aims at making secular India a Hindu state).

213. ICCPR, *supra* note 4, arts. 18, 20.

214. Singh v. France, Communication 1876/2000, U.N. Human Rights Committee [U.N. H.R.C.] (July 29, 2011); Malakhovsky v. Belarus, Communication 1207/2003, U.N. Human Rights Committee [U.N. H.R.C.] (July 26, 2005); Faurisson v. France, Communication 550/1993, U.N. Human Rights Committee [U.N. H.R.C.] (Nov. 8 1996); J.R.T. v. Canada, Communication 104/1981, U.N. Human Rights Committee [U.N. H.R.C.] (Apr. 6, 1983); Ross v. Canada, Communication 736/1997, U.N. Human Rights Committee [U.N. H.R.C.] (Oct. 18,

Protocol of the ICCPR and accept the authority of Article 41 to allow international rectification of the issues and can also take steps domestically to remedy this issue such as bringing more cases of discrimination to court, allowing Muslims to determine how they want their community to be regulated, and implementing affirmative action programs to change the composition of judges. These methods can help to offset the impact of the BJP and its policies and ensure that Muslim Indians may have the freedom of religion guaranteed by both the ICCPR and the Indian Constitution.²¹⁵

2000).

215. ICCPR, *supra* note 4, arts. 18, 20; Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225 (India).