

# A PATENTLY UNCONSTITUTIONAL PIECE OF LEGISLATION

Relevant for: Indian Polity | Topic: Indian Constitution - Features & Significant Provisions related to The Preamble, Union & its Territories and The Citizenship

How a country defines who can become its citizens defines what that country is, because citizenship is really the right to have rights. For India, the choice was inexplicably made in 1950 when the Constitution was adopted, and Part II (concerning citizenship) provided citizenship based on domicile in the territory of India. In fact, under Article 6 of the Constitution, migrants from Pakistani territory to Indian territory were also given citizenship rights. Religion was conspicuous in this constitutional scheme, in its absence. The Constitution also recognises the power of Parliament to make provisions with respect to “acquisition and termination of citizenship”. Pursuant to this, Parliament had enacted the Citizenship Act, 1955; again, religion is not a relevant criteria under the 1955 Act.

This position is now sought to be changed through the proposed Citizenship Amendment Bill, 2019 (CAB) that seeks to amend certain provisions of the 1955 Act.

The obvious question on which much of the debate has so far focused on is whether in a country such as India, with a secular Constitution, certain religious groups can be preferred in acquisition of citizenship. Especially when secularism has been declared to be a basic feature of the Constitution in a multitude of judgments. But in addition to this basic question, a look at the proposed CAB shows that it is peppered with unconstitutionality. The classification of countries and communities in the CAB is constitutionally suspect.

First to the countries. The basis of clubbing Afghanistan, Pakistan and Bangladesh together and thereby excluding other (neighbouring) countries is unclear. A common history is not a ground as Afghanistan was never a part of British India and always a separate country. Being a neighbour, geographically, is no ground too as Afghanistan does not share an actual land border with India. More importantly, why have countries such as Nepal, Bhutan and Myanmar, which share a land border with India, been excluded?

The reason stated in the ‘Statement of Objects and Reasons’ of the Bill is that these three countries constitutionally provide for a “state religion”; thus, the Bill is to protect “religious minorities” in these theocratic states. This reason does not hold water. Why then is Bhutan, which is a neighbour and constitutionally a religious state — the official religion being Vajrayana Buddhism — excluded from the list? In fact, Christians in Bhutan can only pray privately inside their homes. Many Bhutanese Christians in the border areas travel to India to pray in a church. Yet, they are not beneficiaries under CAB. Further, if religious persecution of “religious minorities” in the neighbourhood is the concern, then why has Sri Lanka, which is Buddhist majority and has a history where Tamil Hindus have been persecuted, been excluded? Why is also Myanmar, which has conducted a genocide against Muslim Rohingyas, many of who have been forced to take refuge in India, not been included? The CAB selection of only these three countries is manifestly arbitrary.

On the classification of individuals, the Bill provides benefits to sufferers of only one kind of persecution, i.e. religious persecution. This itself is a suspect category. Undoubtedly, the world abounds in religious persecution but it abounds equally, if not more, in political persecution. If the intent is to protect victims of persecution, there is no logic to restrict it only to religious persecution. Further, the assumption that religious persecution does not operate against co-

religionists is also false. Taslima Nasreen of Bangladesh is a case in point. She or similarly placed persons will not get the benefit of the proposed amendment, even though she may have personally faced more religious persecution than many Bangladeshi Hindus. Similarly, Shias in Pakistan, a different sect of the same religion, also face severe persecution in Pakistan. The fact that atheists are missing from the list of beneficiaries is shocking.

Restricting the benefits of “religious minority” to six religious groups (Hindus, Sikhs, Buddhists, Jains, Parsis and Christians) is equally questionable. Ahmadiyas in Pakistan are not recognised as Muslims there and are treated as belonging to a separate religion. In fact, because they are seen as a religion that has tried to change the meaning of Islam, they are more persecuted than even Christians or Hindus. If the avowed objective of CAB is to grant citizenship to migrants on the basis of religious persecution in their country of origin, the absence of Ahmadiyas from the list makes things clear.

Article 14 of the Constitution of India, prevents the State from denying any “person” (as opposed to citizen) “equality before the law” or “equal protection of the laws” within the territory of India. From the serious incongruities of CAB, as explained above, it is not difficult to imagine, how it will not just deny equal protection of laws to similarly placed persons who come to India as “illegal migrants” but in fact grant citizenship to the less deserving at the cost of the more deserving.

How else does one explain how a Rohingya who has saved himself from harm in Myanmar by crossing into India will not be entitled to be considered for citizenship, while a Hindu from Bangladesh, who is primarily an economic migrant and who may not have not faced any direct persecution in his life, will be entitled to be considered apparently on the ground of religious persecution? Similarly, why a Tamil from Jaffna who took a boat to escape the atrocities in Sri Lanka will continue be an “illegal migrant” and never be entitled to apply for citizenship by naturalisation? It is not difficult to imagine many other examples of this kind that reveal the manifestly arbitrary nature of CAB. There is also the reduction in the residential requirement for naturalisation — from 11 years to five. It is almost as if CAB in its provisions and impact is trying to give definitional illustrations of the word “arbitrary”.

CAB is devoid of any constitutional logic, as explained above. But it does have a sinister political logic. By prioritising Hindus in matters of citizenship as per law, it seeks to make India a Hindu homeland, and is the first *de jure* attempt to make India a Hindu Rashtra. If India is to stay a country for Indians and not for Hindu Afghans, Hindu Pakistanis and Hindu Bangladeshis and eventually for Hindu Russians, Hindu Americans, CAB should not be passed in Parliament. If it is, the judiciary must call it out for what it is — a patently unconstitutional piece of legislation. Else, make no mistake, it is only the beginning and not the end of similar legal moves, which, with time, will bring an end to the Constitution as we know it.

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