

IN THE NAME OF A MAJORITY

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

The Citizenship (Amendment) Bill (CAB), passed in both Houses this week, promises to give the protection of citizenship to non-Muslims who fled to India to escape religious persecution in Pakistan, Bangladesh and Afghanistan. While religious persecution is a reasonable ground for protection, the problem with the CAB is that it does not include all communities that suffered religious persecution, and explicitly excludes Muslims who suffered persecution in the specified countries and other non-Muslim majority countries like Myanmar.

This majoritarian notion of religion-based citizenship, although intrinsic to the Bharatiya Janata Party (BJP)'s idea of India, is not shared by the majority of people in this country. In addition, such a view is alien to the constitutional consensus which emerged in 1950, embodying the idea of a people who committed themselves — and those governing on their behalf — to a constitutional order. Those in support of the CAB have rallied around the argument that it is non-discriminatory and its objectives are justifiable. In doing so, they have often invoked the moral imperative of correcting a perceived past wrong — in this case the Partition. In the process, the CAB changes completely the idea of equal and inclusive citizenship promised in the Constitution.

The CAB cannot, however, be seen in isolation. It must be seen in tandem with the National Register of Citizens (NRC) and other changes in the citizenship law, which have preceded it. The Home Minister and the Law Minister have clarified that the CAB and the NRC are distinct — the NRC protects the country against illegal migrants and the CAB protects refugees. This, however, is incommensurate with the election speeches made by BJP leaders. For instance, speaking in Kolkata earlier this year, Amit Shah had promised an NRC in West Bengal, but only after the passage of the CAB to ensure that no Hindu, Buddhist, Sikh, Jain and Christian refugee is denied citizenship for being an illegal immigrant. In a triumphal note after the passage of the CAB in Lok Sabha, Mr. Shah declared that a nationwide NRC would follow soon.

Despite their seemingly disparate and adversarial political imperatives, the CAB and the NRC have become conjoined in their articulation of citizenship. Indeed, the two represent the tendency towards *jus sanguinis* in the citizenship law in India, which commenced in 1986, became definitive in 2003, and has reached its culmination in the contemporary moment. In 2003, the insertion of the category 'illegal migrants' in the provision of citizenship by birth became the hinge from which the NRC and the CAB later emerged.

The Citizenship (Registration of Citizens and issue of National Identity Cards) Rules of 2003 made the registration of all citizens of India, issue of national identity cards, the maintenance of a national population register, and the establishment of an NRC by the Central government compulsory. Under these rules, the Registrar General of Citizen Registration is to collect particulars of individuals and families, including their citizenship status, through a 'house-to-house enumeration'. In an exception to the general rule, Assam has followed a different procedure of 'inviting applications' with particulars of each family and individual and their citizenship status based on the NRC 1951 and electoral rolls up to the midnight of March 24, 1971. The purpose of the NRC is to sift out 'foreigners' and 'illegal migrants', who were referred to at different points as 'infiltrators' and 'aggressors', and a threat to the territory and people of India.

The second strand emerging from the 2003 amendment has taken the form of the CAB, which

exempts 'minority communities', Hindus, Sikhs, Buddhists, Jains, and Christians, from three countries — Bangladesh, Pakistan and Afghanistan — from the category of 'illegal migrants'. The CAB brings the citizenship law in line with exemptions already made in the Passport Act 1920 and Foreigners Act 1946 through executive orders in September 2015 and July 2016. It sets a cut-off date of December 31, 2014 as the date of eligibility of illegal migrants for exemption.

It must be noted that a PIL filed by the Assam Sanmilita Mahasangha pending before the Supreme Court has contested the deviation in the cut-off date set for Assam by the Citizenship Amendment Act 1986, March 24, 1971, from the date specified in Article 6 of the Constitution, i.e., July 19, 1948, which applies to the rest of the country. The CAB is applicable to entire India, and takes the cut-off date forward by several years.

The claim that the CAB does not violate the Constitution is reflective of the recommendations of the Joint Parliamentary Committee (JPC). The JPC was advised by constitutional experts to use a broader category, 'persecuted minorities', to protect the Bill from the charge of violating the right to equality in Article 14. The CAB uses the category 'minority communities' and goes on to identify them on the ground of religion. The notifications of September 2015 and July 2016, which changed the Passport and Foreigners Acts, had mentioned the term 'religious persecution'. The consideration of religious persecution for making a distinction among persons, the JPC argued, could not be discriminatory, because the distinction was both intelligible and reasonable — satisfying the standards laid down in the Supreme Court judgment in *State of West Bengal vs. Anwar Ali Sarkarhabib* (1952) to affirm adherence to Article 14.

The JPC appears, however, to have overlooked the substantive conditions that the Supreme Court laid down in the same verdict. These require that the criteria of intelligibility of the differentia and the reasonableness of classification, must satisfy both grounds of protection guaranteed by Article 14, i.e., protection against discrimination and protection against the arbitrary exercise of state power. In 2009, the Delhi High Court judgement in *Naz Foundation vs. Government of NCT of Delhi* referred to "a catena of decisions" to lay down a further test of reasonableness, requiring that the objective for such classification in any law must also be subjected to judicial scrutiny. The restraint on state arbitrariness, according to the judgment, was to come from constitutional morality, which as B.R. Ambedkar declared in the Constituent Assembly, was the responsibility of the state to protect.

It remains a puzzle as to why the government wishes to change the citizenship law to address the problem of refugees. The JPC refers to standard operating procedures for addressing the concerns of refugees from neighbouring countries. In the case of refugees from the erstwhile West Pakistan who deposed before the JPC in favour of a CAB, the standard operating procedure was the grant of long-term visas leading to citizenship. One wonders how these refugees will benefit from a law which will put them through an arduous process of proving religious persecution. Immediately after Partition, 'displaced persons' constituted an administrative category, and citizenship files of 1950s tell us how district officials expedited their citizenship in the process of preparation of electoral rolls.

The focus in the recent parliamentary debates, for various reasons, was the eastern borders. States in the region have resisted the CAB, and simultaneously asked for an NRC. West Bengal has been an exception. The reality of imposing a national order of things, through a CAB and an NRC, in non-national spaces will unfold in future but Assam has given us adequate evidence of the risks involved. It can only be hoped that the judiciary and civil society are able to restore constitutional and democratic politics through an exercise of counter-majoritarian power in a context where electoral gains have determined political choices.

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