Source : www.thehindu.com Date : 2019-12-18

LEFT TO THE WHIMS OF THE EXECUTIVE

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

“As a democratic republic, India is committed to having elected legislators deliberate and collectively reason the necessity and soundness of legislative policy.” Protests against the Citizenship (Amendment) Act in Kolkata. | Photo Credit: AFP

The Citizenship (Amendment) Act, 2019 tells us who, in the eyes of the Indian government, has a right to be considered for citizenship. So far, no illegal migrant could be considered for citizenship. Now, the government can grant citizenship to persons with certain religious identities (Hindus, Sikhs, Jains, Parsis, Christians, Buddhists) and from certain countries (Pakistan, Bangladesh and Afghanistan) who entered India after fleeing religious persecution — and are thus presumably “illegal migrants” — on or before December 31, 2014. Much has been written about the classification of the Act’s beneficiaries reinforcing a pre-existing inequality in the Indian context, while also being under-inclusive: it singles out Muslims who face other kinds of persecution in these very countries and ignores religious minorities of other countries such as Sri Lanka and Myanmar. This is the first of many questions that the government must answer in the Supreme Court. There are some other questions that also need answering.

The Act does not itself state that its beneficiaries must be fleeing religious persecution. Instead, it refers to persons from certain groups and from certain countries who were exempted under a prior notification and order issued under the Passport (Entry into India) Act, 1920, and Foreigners Act, 1946, respectively. The relevant notifications, the first issued in 2015 and the second in 2016 by the Ministry of Home Affairs, exempt Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Pakistan, Bangladesh and Afghanistan from provisions of the Passport (Entry into India) Act, 1920, and the Foreigners Act, 1946, if they were “compelled to seek shelter in India due to religious persecution or fear of religious persecution”. All such persons were then allowed to obtain five-year Long Term Visas under a 2011 Standard Operating Procedure (in comparison with other refugees who could seek asylum by applying for a shorter Long Term Visa) on treatment of refugees. Now, the 2019 Act will protect these very persons by offering a right to be considered for citizenship.

The first question that arises is whether the targeted exclusion of certain classes of migrants from the rigours of immigration law, based in part on their religious identity, can be done through notifications and Standard Operating Procedures. Does this mean that a future notification can altogether drop the religious persecution requirement and offer a blanket exemption to everyone except Muslims? As a democratic republic, India is committed to having elected legislators deliberate and collectively reason the necessity and soundness of legislative policy. The executive government, when acting as a delegate of the legislature, can only execute the latter’s legislative policy. Instead, the notifications exempt a class of migrants based on their *identity*, a factor which is not at all germane to the legislative policy of regulating the entry of foreigners into India under the Foreigners Act and Passport Act.

This should not have been done. Such power to execute includes the power to decide whether to “apply the law to an area or to determine the time and manner of carrying it into effect” (in the words of a 1960 Constitution Bench of the Supreme Court in *Hamdard Dawakhana v. Union of India*). In short, the executive may make conditions as to the time, place, or manner of a law’s application, even if the ultimate effect of such conditional legislation is that a class of migrants, defined by their falling within the conditions, end up becoming exempt. What would not be permissible is if the executive applied the legislative policy to a class of migrants defined only by

their identity. Such a class may only be defined by the legislature.

Similarly, the classes of beneficiaries of the 2019 Act who will pursue registration and not naturalisation is also left to the decision of the executive (through Rules yet to be notified). This crucial matter was expressly stipulated so far in the Citizenship Act itself — in Sections 5 and 6 — and thus clearly a matter of core legislative policy. Since the 2019 Act expressly states that the class of migrants earlier described shall no longer be considered “illegal migrants”, theoretically such migrants should be entitled to apply for both registration and for naturalisation, if they fulfil the conditions in Sections 5 and 6 of the Act, respectively. Yet, the discretion to decide which of these beneficiaries can pursue each route has also been left to the executive.

Second, the bedrock of this Act is that persons from certain religious identities who are fleeing religious persecution in certain countries will not to be considered “illegal migrants” under the citizenship law. Yet, neither the Act nor the 2015 notifications tell us how, by whom, and under what guidelines people’s claims to a religious identity, and to fleeing a certain religious persecution, will be determined. How then are we to know “illegal migrants” apart from persons who can rightly claim citizenship under the Act?

In the past, the law itself entrusted this task to an authority. In the Assam context, the Citizenship Act states that the Foreigners’ Tribunals will “detect foreigners” who entered India in a certain period between 1966 and 1971. In the 2019 Act, no such authority is named. The Tribunal is unlikely to be empowered to determine claims under the 2019 Act, so long as the 2015 and 2016 notification and order exclude the Foreigners Act under which the Tribunal operates. Without legislative clarity on this, it appears that the task will fall to an executive body once again through executive fiat — if the Standard Operating Procedure is anything to go by.

As it turns out, the Citizenship Amendment Act is a mere skeleton, whose flesh and blood was left to be dictated by executive action. To decide the membership of a polity through mere executive action is a dangerous path to walk — and one that Indians must be alarmed by.

Malavika Prasad is a lawyer and doctoral fellow at the Nalsar University of Law

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