

BAD IN LAW, POOR IN HISTORY

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

The veritable chaos into which the Citizenship Amendment Act (CAA) has plunged the nation is just the beginning of the far-reaching and dangerous consequences it threatens to have on India's constitutional character.

The rationale for the CAA has its roots in two sources — Partition and the alleged religious persecution of non-Muslims in Islamic countries. The emotional argument is that such non-Muslims have no other place that they may claim as home as a matter of right and India would be remiss in not remedying this injustice. While a legislative crusade against religious persecution may seem attractive, the rhetoric of the present central government in support of the law is both legally misconceived and historically flawed.

Even a cursory look at the Act exposes the lacunae in the government's argument that the legislation seeks to remedy the errors of Partition. Those errors were quite adequately taken care of when the Constitution brought about Article 6, recognising and restoring the rights of persons who migrated to India from Pakistan in those unhappy times.

The government (through Parliament) has been deliberately selective about the choice of countries to which the Act will apply — Pakistan, Bangladesh and Afghanistan — while ignoring others such as Sri Lanka, Myanmar, China and Bhutan. This makes the intent to deny protection to Muslims patently clear, even though it is a universally acknowledged fact that Muslims are no more safe from religious persecution than other communities. Instances of such persecution abound, as in the case of the Ahmadi and Shia sects in Pakistan, Taslima Nasrin in Bangladesh, and indeed Salman Rushdie in practically every Islamic country. The CAA fails to recognise the powerful truth that religious persecution is not necessarily premised on the religion of the victim.

One must also worry about the eventual legal effects of the amendment. Under the earlier citizenship regime, "an illegal migrant" was denied access to citizenship even through the process of naturalisation under Section 6 read with Third Schedule of the Citizenship, 1954. An illegal migrant was defined under Section 2(b) as one who was without the necessary passport or travel documents as specified therein. Hence, whether or not a person was an illegal migrant was simply an outcome of the existence of requisite travel documents or the lack thereof. The CAA has shredded this definition by introducing the parameter of religion. Parliament has effectively decreed that a Muslim will remain an illegal migrant, whereas any non-Muslim will not, irrespective of lack of travel documents.

The list of non-Muslim communities excluded from the definition of illegal migrants does not even require that they be of Indian origin. This again makes a mockery of the "persons of Indian origin protection" set out in the objects of the Act. All they have to be is "from Afghanistan, Bangladesh or Pakistan". What does "from" mean? A citizen? A resident? A passenger in transit? Given no requirement of being of Indian origin or having to prove any such origins means that an alien could simply apply on the terms of the CAA, prove entry on/before December 2014, and be eligible for citizenship. On the other hand, a Muslim of possibly Indian origin would be denied such a benefit. This may lead to many an undesirable element slipping through the cracks, causing even national security to be sacrificed at the altar of religious jingoism.

If the government does not seek to execute a political programme, and wants merely to protect

the rights of those who are victims of religious persecution, then why doesn't India have an effective policy/legislation for victims of religious persecution seeking asylum? Such a policy/legislation would suffice to serve the purpose, as is the case in most countries. The routine law of citizenship through naturalisation could then take over in due course.

What then is the legal imperative, much less the rationale, to elevate a refugee to a citizen merely because he is a non-Muslim while denying the same right to a Muslim?

The idea of citizenship is contained in Part II of the Constitution under Articles 5 to 11. The fact that these Articles were drafted, debated, redrafted and re-debated over a period of two years, culminating in their final form only on August 12, 1949, shows what a vexed question it was then too.

Unfortunately, the incumbent Union government has, through its brute majority in Parliament, managed to sneak into the constitutional charter what the founding fathers rejected more than 70 years ago. The introduction of religion-specific parameters for granting of citizenship was attempted by some members of the Constituent Assembly and completely rejected by the majority. Panjabrao Deshmukh had proposed a definition of citizenship to include one "who is naturalised under the law of naturalisation and every person who is a Hindu or a Sikh by religion and is not a citizen of any State wherever he resides". The law of naturalisation is nothing but Section 6 read with the Third Schedule, which has now been amended. The argument even then was that while Muslims have Pakistan, neither the Hindu nor the Sikh has any other place and hence he should get Indian citizenship. This sordid logic was raised not just for the primary issue of citizenship but even the troubling subject of citizenship for persons (read Muslims) who had initially migrated to Pakistan but then returned to India.

Fortunately for young India, this divisive refrain was drowned out by saner voices. It was birth, circumstance and domicile and not religion which would define citizenship. Pandit Thakur Das Bhargava was perhaps the strongest proponent of the disconnection of religion from citizenship when he said "...If a Muslim comes to India and bears allegiance to India and loves India as we love her, I have nothing but love for that man. If any nationalist Musalman who is afraid of the Muslims of East Pakistan or West Pakistan comes to India he certainly should be welcomed. It is our duty to see that he is protected. We will treat him as our brother and a bona fide national of India."

That, in essence, is the ethos on which we have built a secular and progressive India . The danger of the CAA is that it says if you are a Muslim, you do not conform to the idea of being an Indian. And that, my friends, would no longer conform to what we know as India.

The writer is advocate general of Punjab

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