

Editorial

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Words of caution for the expendable citizens

Viewing the country through the rose (or is it saffron?) tinted glass, the movers and shapers of the nation overestimated their own importance and invincibility to such an extent that what was initially hailed as the beginning of a new and radical changes in the society soon turned into a regime of intolerance and autocracy egged on by a support base unwilling to compromise or accommodate any other opinions or views not in sync with their hardened stand. Despite various path-breaking initiatives implemented to propel the nation towards becoming a leading country in various spheres, the over-the-top promises and inflated figures of achievements started a reverse slide in the trust factor among the public and it would not be much off the mark to state that the rapidly waning popularity of the present government at the centre has become a matter of grave concern.

What could prove to be the proverbial final nail in the coffin is the contentious Citizenship Amendment Bill (CAB) 2016 which has caused so much uproar and protests from all quarters cutting across ethnic, religious and ideological lines. It has presented itself as an opportunity for parties, groups and organizations to come together thereby raising the possibility of working out their differences of religion, region or ideologies and drawing up an understanding or a working modality to enter into an alliance for a common goal. It has also become an opportunistic moment for various organizations and groups to organize protests demanding solutions with even the slightest connection to the present issue much like a festering wound attracting every kind of insects and flies. The perplexing part, of course happens to be that the wound is self-induced.

While the contents and technical aspects of the proposed CAB has become public knowledge, the main objective of this piece is to bring to the fore the genesis of the idea of the Bill and what it projects to fulfill in the future. If one would care to look back a couple of years, the promise made in 2014 to provide shelter to the persecuted minorities in the neighbouring countries of Pakistan, Bangladesh and Afghanistan could not have been without any political connotations. With so much of these illegal immigrants from across the borders already inside India, it goes without saying that the political largesse will certainly translate into votes. What the political think-tank failed to anticipate was the unstoppable stream of illegal immigrants crossing the border fences while security forces manning the border watched helplessly as witnessed from social media sites. What this would mean to the indigenous population might be nothing to be concerned about for the people in mainland India, but for the people in the north east, the already congested and much contested resources including land and employment opportunities become dearer and as such social flare-ups and communal tensions becomes more frequent. The already unstable life of the public is thrown into chaos thanks to the insensitive and ignorant leaders who decided to go with the words of their employees pumping out fake reports to please their bosses rather than try and feel the real pulse of the people before making such sensitive decisions which will undoubtedly have a really lasting effect on the continuity and even the very survival of a political entity.

At this juncture it is pertinent and indeed important to try and look at the big picture which the government at the centre is trying to put together, albeit in pieces and deceptive bits. For a region which doesn't subscribe to the fanatical ideals of any religion one may follow, injecting elements which could replace the political scenario with those that can and will propagate and preserve the idea of Hindutva is not an unpleasant option because electoral politics is about numbers, even if those numbers happen to lack intuition and intelligence.

The Constitutional Case against the Citizenship Amendment Bill

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The Lok Sabha passed the Citizenship (Amendment) Bill on 8 January 2019. In fact, the central government had started taking small and discreet steps towards the enactment and implementation of the law since 2015 itself. The bill violates the Constitution because the classification it adopts is manifestly arbitrary and unjustified. Citizenship law defines a country's political and constitutional identity. Laying down rules that determine membership in our political community only on the basis of one's religious beliefs completely violates this principle.

The author thanks the anonymous reviewers for their comments.

The Bharatiya Janata Party (BJP)-led Lok Sabha passed the Citizenship (Amendment) Bill, 2016 under the shadow of immense opposition and protest.¹ The proposed amendment seeks to make non-Muslim illegal migrants from Afghanistan, Pakistan, and Bangladesh eligible for citizenship. While its fate in the Rajya Sabha may be uncertain, there is a lurking possibility of it coming into effect as an ordinance.

Even before its introduction in Parliament, the central government had started taking small and discreet steps towards its operationalisation. In September 2015, the government, through an executive order, exempted non-Muslim illegal migrants from the three countries from the operation of the Foreigners Act, 1946.² This provided immunity to this class of migrants from any adverse action by the state due to illegal entry and stay. On 23 October 2018, the Ministry of Home Affairs issued a directive that provided a separate and accelerated process for non-Muslim legal migrants from the three countries to get citizenship. The directive extended this policy that was already in place since 2016.³

These administrative steps anticipating the amendment and the possibility of the amendment coming into effect are a clear statement as to why they are legally and constitutionally untenable. The central government has insisted that this law is necessary to protect "persecuted minorities" in India's international neighbourhood. In this article, I shall argue that the proposed amendment and the gamut of executive orders leading up to it are unconstitutional because they fail the constitutional standard of rationality, and for being manifestly arbitrary.

While the Constitution contains some criteria of citizenship, it grants Parliament the power to determine them through legislation. These criteria, which are contained in the Citizenship Act, have evolved over the years. The courts have stayed away from interfering with these laws till now. Perhaps, the first time they will categorically do so is when the Supreme Court's constitutional bench will hear a challenge to the separate citizenship regime for Assam under Section 6A of the Citizenship Act.⁴

The criteria and procedures for citizenship under the Citizenship Act are varied and complex. Without going into the entire scheme, it may serve our discussion well to focus on citizenship by birth, registration, and naturalisation. These will change in a significant manner through the passage of the amendment act.

Under the existing law, any person who was born in India till 1987 is an Indian citizen. Hence, till 1987, India followed the criterion of citizenship by birth. This criterion is narrowed down for persons born in India between 1987 and 2003. Such persons must have at least one parent who is an Indian citizen. A person can also be registered as an Indian citizen. A person qualifies for registration if, among other grounds, they are of Indian origin and have been residing in India or outside undivided India, are married to an Indian citizen or are a minor child of Indian citizens. A person can also apply for citizenship through naturalisation following the procedures laid down

in the act and rules.⁵

In 2004, this scheme was amended by the introduction of the term "illegal migrant," which was defined as someone who enters or stays in India without legal authorisation.⁶ The amendment was an obvious response to the anxiety, well founded or otherwise, that Bangladeshi migrants would get Indian citizenship and participate in elections. After the amendment, any child born 2004 onwards to even one parent who is an illegal migrant would be disqualified from citizenship by birth. Illegal migrants were also disqualified from the other routes to citizenship. Any person who was an "illegal migrant" or a descendant of an "illegal migrant" would be disqualified from getting Indian citizenship through any means whatsoever.

The amendment bill seeks to change this scheme. It removes the disqualification based on illegal migration for "minority communities," specifically "Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan." These groups would not be considered "illegal migrants," thus allowing them and their descendants to be Indian citizens or apply for Indian citizenship. The proposed amendment also shortens the minimum period of residence in India for them. Instead of the 11 years applicable to everyone, they need six years to qualify for citizenship through naturalisation. In other words, the proposed amendment seeks to make two changes, specifically for non-Muslim migrants from these three neighbouring countries: it removes the possibility of their and their descendants' disqualification from citizenship, and accelerates obtaining citizenship by naturalisation.

Assessing Constitutionality

The most dramatic impact of the proposed amendment is to place certain Indian residents at a profound disadvantage because of their religious identity and the country of origin.

If the proposed amendment were passed, the non-Muslim residents who illegally migrated from Afghanistan, Pakistan, and Bangladesh will be able to apply for citizenship through registration and naturalisation. Similarly placed Muslim residents will continue to be barred. If the proposed amendment were passed, a child born in India after 2003 to Hindu "illegal migrants" would qualify as a citizen by birth. If the child is born to even one Muslim "illegal migrant," they would not.

The proposed amendment also places residents who may have illegally migrated from other countries like Sri Lanka, Nepal, China, and Myanmar at a disadvantage. It would be immaterial if their religious identity and the reasons for migration were the same. For example, while a Buddhist who illegally migrated from Pakistan owing to religious persecution would qualify for citizenship, a Buddhist who fled China for the same reason would not.

This differential treatment of Indian residents must meet the requirement of equality before law and equal protection of laws under Article 14 of the Constitution. The Constitution extends this right to all persons within the territory of India irrespective of citizenship.

Equal protection does not demand exact treatment. But, it does demand that any differential treatment be reasonable and justified. The classification made by a law should be rational and the differentiation must correspond with its proclaimed purpose.

The central government has argued that the purpose behind the amendment is to accommodate minorities facing religious persecution. The 2015 executive order providing exemption to illegal migrants does so for Hindu, Sikh, Buddhist, Jain, Parsi, and Christian "minority communities" from the three countries, which "were compelled to seek shelter in India due to religious persecution or fear of religious persecution." The Citizenship (Amendment) Bill excludes these "minority communities" from the category of "illegal migrants," presumably for the same reason of religious persecution.

In light of this, the proposed amendment and the executive orders make three distinctions: (i) between Muslim and non-Muslim migrants from Afghanistan, Bangladesh, and Pakistan; (ii) between migrants from these three countries and those from other countries; and (iii) between residents who migrated due to reasons of religious persecution and those who migrated due to other forms of persecution like racial or ethnic persecution.

The question for the purpose of constitutional validity is whether this classification meet the test of equal protection; whether the classification is rational and corresponds with the proclaimed purpose. If the proposed amendment and executive orders fail to meet both these requirements, they will be deemed unconstitutional on account of discrimination.

Discriminatory Amendment

Let us assume for the time being that the government is right to isolate religious persecution as the privileged reason for accommodating unauthorised migrants as Indian citizens. Despite treating this as grounds for accommodation, the amendment bill and the executive orders exclude from their ambit persons and communities that have suffered from religious persecution. Specifically, numerous Muslim communities from Afghanistan, Pakistan, and Bangladesh have suffered and continue to suffer from religious persecution. Persecution against the Ahmadiyas is both socially pervasive and state-backed in Pakistan. Shia Muslim communities, particularly the Hazaras, have been subjected to severe persecution in Afghanistan because of their religious beliefs. Despite suffering from religious persecution, these minority communities have been explicitly excluded only on the grounds of their Muslim religious faith. Religious persecution of minorities is equally pervasive outside these three neighbours. Muslim Rohingyas in Myanmar have been subjected to one of the most heinous religious and ethnic persecutions in recent times. Muslim Uighurs from the Xinjiang region and Tibetan Buddhists have been subjected to religious persecution at the hands of the Chinese.

If the proclaimed purpose of the amendment bill and executive orders is to accommodate minority communities suffering from

religious persecution, the distinction between Muslim and non-Muslim migrants is irrational and unjustified. So is the distinction between migrants from Afghanistan, Bangladesh, and Pakistan, versus those from other countries. None of these distinctions correspond with the ostensible purpose of the law. From the perspective of India's equality jurisprudence, these distinctions are under-inclusive. They do not include groups that must be included to meet the law's aim of accommodating minority communities facing religious persecution.

It is also not hard to imagine instances where the amendment's categorisation would break down completely. What if a Muslim illegal migrant from Afghanistan converts to Hinduism during her stay in India? What about a child born in India to an inter-religious couple from Bangladesh that had to illegally migrate because of religious persecution?

The fundamental constitutional flaw in the proposed amendment is that it is not based on an assessment of actual persecution. Rather than defining the nature of persecution and leaving the rest to a case-to-case evaluation for the purposes of granting citizenship, the amendment seeks to respond by generalisations that do not correspond with the proclaimed purpose. This makes the proposed amendment unjustified and discriminatory.

Arbitrary and Unconstitutional

To what extent is the choice of religious persecution, to the exclusion of other grounds of persecution, legally justified as the ground for accommodation? In ordinary course, the courts do not interfere in Parliament's determination of what purpose and aim it should pursue through enacting a legislation. Parliament is the politically accountable branch is presumed to decide this question of policy in a legitimate manner. Nevertheless, this does not mean that there are no constitutional standards for the purpose of a policy. One such standard is that no legislation can be "manifestly arbitrary."

The Supreme Court has consistently been reading this requirement under equal protection to mean that no statute can be "capricious, irrational or without an adequate determining principle." Indian equality jurisprudence demands that every law, including its purpose, must not be whimsical or capricious, but based on a factually tenable principle and rationale.

One will have to struggle to identify any semblance of a principle behind the government's assertion that religious persecution—that too only for non-Muslim minority communities from Afghanistan, Bangladesh, and Pakistan—must receive special attention under Indian citizenship law. Various minority communities in India's neighbourhood have suffered severe persecution, not only based on their religious beliefs, but also their race, ethnicity, and language. The case of Tamils in Sri Lanka and Tibetans in China are the most prominent examples. India has also received Hindu Nepalese migrants fleeing persecution in Bhutan. The persecution of the Rohingyas is religious and ethnic in equal measure. India's neighbourhood

(Contd. on Page 3.)

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