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Critical Analysis on The Citizenship (Amendment) Act, 2019

Awanthika Raikelkar

The main purpose of this article is to look beyond the usual questions on The Citizenship (Amendment) Act, 2019. The paper also looks forward to analyze the answers given by the ruling party for defending CAA. This article is written purely on my understanding of the Act and as a neutral law-abiding citizen of India.

“India shall remain a natural home for persecuted Hindus and they shall be welcome to seek refuge here.” This is what is stated by the BJP Party in their manifesto during the 2014 elections. This line, I believe clearly proves that party as a whole is in the favor of Hindus and any prudent man wouldn’t deny that. I certainly don’t understand the logic of putting this statement in a manifesto, if it wasn’t to show their benevolence to that community. In fact, when I was going through their 2019 Manifesto, I found something peculiar. When 2019 elections were being held, there were two controversial cases before the Supreme Court. One was the Sabarimala review issue and the other was Ram Mandir. Let’s now look at what the party had to state regarding both the issues in their manifesto (in the Cultural Heritage section).

Ram Mandir:

“We reiterate our stand on Ram Mandir. We will explore all possibilities within the framework of the Constitution and all necessary efforts to facilitate the expeditious construction of the Ram Temple in Ayodhya.”

Sabarimala:

“We will undertake every effort to ensure that the subject of faith, tradition and worship rituals related to Sabarimala are presented in a comprehensive manner before the Hon’ble Supreme Court. We will endeavour to secure constitutional protection on issues related to faith and belief.”

Couldn’t they have written in the same way for Ram Mandir, like they wrote for Sabarimala? For Sabarimala issue, they leave the Supreme court to take the decision. But for Ram Mandir, they distinctly take a stand. Both the two issues were related to two Hindu temples which were for the Supreme Court to decide the judgement. I only mean that as a party in a secular country, how can you take a stand supporting only the majority? Such controversial issues are for the Supreme Court to be dealt with and the political parties need to be uniform in the way they look at such cases. When parties start supporting the majority or any community specifically, what will happen to the secular notion of this country? Parties will support the majority, majority vote for them, majority get the benefits and this cycle will repeat which is not good for a country like India which also shelters many religions on its land.

After I mentioned all this you wouldn't be surprised as to why the government brought out CAA.

This Act says that any person belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community, who has entered India before or on 31st December, 2014, coming from Pakistan, Afghanistan and Bangladesh will be provided citizenship. This Act also mentions that for the purposes of this Act, that person will not be treated as an "illegal migrant". When we look at the definition of "illegal migrant" in The Citizenship Act, 1955, Section 2, Clause (b), it says that any foreigner who has entered India without a valid passport or lawful documents will be treated as an "illegal migrant".

Non-Muslims of Pakistan constitute 3.72 per cent of the total population: Religious minorities include Christians (1.59 per cent, 1998 Census), Ahmadis (0.22 per cent, 1998 Census), Hindus (1.6 per cent, 1998 Census), Shi'as, Isma'ilis, Bohras and Parsis¹. For example, consider a group of persecuted people (including Hindus and Ahmadis) who have entered India fleeing the persecution in 2013. When the government was asked that here Hindus will be given citizenship easily, but what about Ahmadis? Their answer² was that they can obtain citizenship through the usual process of naturalization³. The problem I have with the answer is that when they are saying that Ahmadis can obtain through the normal citizenship process, then why can't Hindus do the same or for that matter any community. The answer is also deeply flawed in itself because as mentioned earlier any person who enters the country without documents will be declared as illegal migrant and is ineligible to apply for Indian Citizenship under section 5 or section 6 of The Citizenship Act, 1955. Due to the CAA, Hindus and other communities will be benefitted because they can get away without documents but then the Ahmadis who entered in the same way will suffer. It simply means that the government is expecting that Ahmadis will definitely carry the legal documents and other communities will not. The major question which arises is that why is the government in a hurry to provide citizenship to only those communities?

CAA isn't any new thing which BJP has brought out suddenly. It was passed in the Lok Sabha in the 2016 also, but wasn't passed in the Rajya Sabha and was lapsed. Apparently, there are many changes in the bill which the party has made. Let's look at changes made in Section 2:

¹ MINORITY RIGHTS GROUP (Feb. 13, 2020, 07:54 PM), <https://minorityrights.org/country/pakistan/>.

² Citizenship Amendment Act, 2019, (Feb. 13, 2020, 07:59 PM), https://hcikl.gov.in/pdf/press/CAA_2019_dec.pdf.

³ The Citizenship Act, 1955, No. 57, Acts of Parliament, 1955 (India).

2016⁴:

“Provided that persons belonging to minority communities, namely, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan, who have been exempted by the Central Government by or under clause (c) of sub-section (2) of section 3 of the Passport (Entry into India) Act, 1920 or from the application of the provisions of the Foreigners Act, 1946 or any order made thereunder, shall not be treated as illegal migrants for the purposes of this Act.”.

2019⁵:

"Provided that any person belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community from Afghanistan, Bangladesh or Pakistan, who entered into India on or before the 31st day of December, 2014 and who has been exempted by the Central Government by or under clause (c) of sub-section (2) of section 3 of the Passport (Entry into India) Act, 1920 or from the application of the provisions of the Foreigners Act, 1946 or any rule or order made thereunder, shall not be treated as illegal migrant for the purposes of this Act;".

There are two questions which arise:

1. Why did they not explicitly not state minority communities in 2019?
2. Why did the government come up with that date, 31st December 2014?

The government doesn't precisely answer the above questions. As far as the first question is concerned, they might have realised that they aren't the only minority communities and being specific might help. I have a major concern regarding the second question. There is one more question which arises here. How will you decide who entered before or on 31st December 2014 if they don't have documents in the first place?

Government made this statement saying, “Muslims are not minority in those countries and that is the reason we are not giving them citizenship” I have already stated that religious minorities in Pakistan don't just include these six communities, they include Ahmadis, Shi'as, Isma'ilis and Bohras. Bangladesh's minorities include: Hindus (8.5 per cent), Buddhist (0.6 per cent),

⁴The Citizenship (Amendment) Bill, 2016, (Feb. 13, 2020, 07:53 PM), https://www.prsindia.org/sites/default/files/bill_files/Citizenship_%28A%29_bill%2C_2016_0.pdf.

⁵The Citizenship (Amendment) Act, 2019, No. 47, Acts of Parliament, 2019 (India).

Christian (0.3 per cent)⁶. Concerning Afghanistan, there are no clear statistics available on the minority groups. Probably, all these minorities, as stated above, might have been from Indian Origin. Then why does the government not provide citizenship to all of them? Or rather why is it specifically sorting out certain communities? The object of Article 14 is to secure to all persons, citizens or non-citizens, the equality of status and opportunity referred to in the Preamble to our Constitution. When our Constitution is saying that equal opportunity will be provided to everyone, then I believe that the above treatment is unconstitutional. This is what was held in *R.K.Garg and Others v. Union of India and Others*⁷:

“The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely,

(1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and

(2) that differentia must have a rational relation to the object sought to be achieved by the Act.”

The problem with the Act is that they are not specifying as to why they have chosen only those communities excluding the other minority communities, not fulfilling the first condition. While the object sought to be achieved by the Act is biased on the face of it.

Do you think we have responsibility towards minorities of other countries?

For this, the government upholds by quoting the Nehru-Liaquat pact of 1950. It was an agreement between the governments of India and Pakistan regarding security and rights of minorities. At a prayer meeting in New Delhi on 12-9-1947 Mahatma Gandhi said⁸:

“Just because the country has been divided into India and Pakistan, it does not befit us to slaughter the Muslims who have stayed behind. The Government of Pakistan has forgotten its duty. I shall appeal to Quaid-e-Azam Jinnah who is the Governor General of Pakistan to desist from such politics. I would tell him that the Hindus and Sikhs have remained in Pakistan to serve him. Why are the Hindus and Sikhs scared now? Because they are afraid that they and their wives would be abducted. They are in danger and so they are fleeing. . . Should I say that Hindus and

⁶ MINORITY RIGHTS GROUP (Feb. 13, 2020, 07:42 PM), <https://minorityrights.org/country/bangladesh/>.

⁷ Bharati Mazmudar, *Gandhiji on partition*, MANI BHAVAN GANDHI SANGRAHALAYA MUMBAI (Feb. 13, 2020, 07:40 PM), <http://www.gandhi-manibhavan.org/gandhicomelive/ebks/GandhiOnPartition.pdf>.

Sikhs of Delhi and those who come from outside should become barbarians because Muslims are becoming barbarians?”

“The Muslims wanted Pakistan and they have got it. Why are they fighting now and with whom are they fighting? Because they have taken Pakistan do they want the whole of India too? That will never happen. Why are they killing the weak Hindus and Sikhs? Let both the governments come to a mutual agreement that they have to protect the minorities in their respective countries”

So now, the situation under which the pact came into existence is clear. The government says that since this pact failed, we have brought in CAA. The government has already set the cut-off date for giving citizenship, so how does this help those communities who are still being persecuted there and who want to enter India?

Since Bangladesh got independence in 1971 from Pakistan, this pact doesn't hold true for the present Bangladesh. Which means that the pact doesn't answer why we need to protect the minorities of Afghanistan and Bangladesh in any way.

One of the reasons given by the government for coming up with CAA is that many Indian origin people, especially from these communities want to apply for citizenship through the Section 5 of The Citizenship Act, 1955, but are unable to prove their Indian origin due to lack of documents and that is why the government wants to amend the Third Schedule, clause (d), of The Citizenship Act, 1955 so that the aforesaid communities can easily obtain the citizenship without the condition of staying in the country for 12 years but instead 6 years. Do they mean that people from those specific communities should enjoy the benefits of citizenship comfortably and other communities can't? Does constitution mean this when it says Right to Equality? Here the government is also contradicting itself when it is saying that it doesn't want those communities to suffer for a long time in order to get citizenship. Where does the question or the condition of satisfying the requirement of staying for a certain period arise if those people don't have documents in the first place. They are illegal migrants according to The Citizenship Act, 1955. What government is doing is basically bifurcating those group of illegal migrants based on religion and is granting them citizenship only if they are fulfilling the religion condition. As I already mentioned above, the CAA explicitly states that now persons from these communities cannot be treated as illegal migrants, which logically means that those Ahmadis or people from any other community, who entered India are illegal migrants and there is no way out there for them to obtain citizenship.

In simpler words when the government is making flawed arguments that other communities will get the citizenship through naturalization or when it is saying the suffering period of people of the specific community needs to be reduced since they are already persecuted, it clearly shows bias towards the other communities because now they lose the right to get citizenship just because they belong to a particular religion. Another argument given by the government is that Pakistan, Afghanistan and Bangladesh provide for a specific state religion and that these specific communities were persecuted based on the grounds of the religion. If the government was very sure that Muslims aren't being persecuted then it should have stated any person from any religion can obtain citizenship if they have entered on or before 31st December, 2014. If the government replies to this argument by saying that since Muslims are already in Muslim Majority country, we don't need to take charge of them, I want to say that we can't treat people differently based on religion because we need to remember that we are not a Hindu country trying to save only Hindus or any particular community. We are secular and it is our responsibility to help those who are in need be it from any religion or sect.

During the CAA debate in the Lok Sabha, when asked why religion is being taken as a consideration for giving citizenship, the answer given by the ruling party is that "Don't forget the India-Pakistan partition took place on the basis of religion and anyone can't deny it". Saying partition took place on the basis of religion doesn't entirely justify as to why religion is being used as a basis. In *S.R.Bommai v. Union of India*⁹, the following was held:

"Constitutional provisions prohibit the establishment of a theocratic State and prevent the State from identifying itself with or otherwise favouring any particular religion. When the State allows citizens to practice and profess their religion, it does not either explicitly or implicitly allow them to introduce religion into non-religious and secular activities of the State. The freedom and tolerance of religion is only to the extent of permitting pursuit of spiritual life which is different from the secular life. The latter falls in the exclusive domain of the affairs of the State."

Politics and religion cannot be mixed, principally in a country like India. The above judgement tells us that policies of the government should not take the basis of religion. Political parties usually do that in the light of obtaining votes of a community. I propose that such ideology should be kept aside and parties should stop including religion in their policies because ultimately it doesn't serve the purpose of secular India. "Secular idea of India" will only remain in the constitution if these practices continue.

⁹ *S.R.Bommai v. Union of India*, A.I.R. 1994 S.C. 1918 (India).

The biggest question which I personally have concerning CAA is that, how will the government seek the “proof of religion” of those people? For now, let’s consider they find a way to seek the proof of religion. Will it not be against the constitution? People informing the state regarding the status of their religion to obtain some benefit from the government. In a country like India, where secular values are enshrined in the basic structure of the Constitution, this is something which directly goes against it.

UN in “Nationality and Statelessness: A Handbook for Parliamentarians”¹⁰ emphasizes that:

“There are some fundamental human rights that apply to all persons regardless of their status or the type of stay in a particular jurisdiction. These include, for example, the prohibition against torture and the principle of non-discrimination.”

I hope that this principle is respected by the parliamentarians at the time of making any government policy.

According to me, policies of the government should not be based on religion, no matter what. Any action taken by them should treat every single person equally without linking their religion, especially in a country like India. I understand that the government is trying really hard to help persecuted people those of Indian Origin. But at the same time, they also need to understand that it is going directly against the Constitution. Even though their intention maybe good but the way they are approaching it is definitely opposed to the very idea of Secular India which the constitution makers tried to build, which would further nullify the concept of democracy. The concept of secularism doesn’t only include passive attitude of religious tolerance, it also includes equal treatment of all religions.

¹⁰ Nationality and Statelessness: A Handbook for Parliamentarians, UNHCR (Feb. 13, 2020, 07:32 PM), <https://www.un.org/ruleoflaw/files/Nationality%20and%20Statelessness.pdf>.