

Interview with Faizan Mustafa

Vice Chancellor of NALSAR University of Law and jurist on Constitutional law

Nikhila Henry in the Huffington Post¹



Source: Hindustan Times via Getty Images

HYDERABAD, Telangana — The Citizenship Amendment Bill violates India’s “constitutional vision” Faizan Mustafa, Vice Chancellor of NALSAR University of Law and jurist on Constitutional law, said in an interview.

On Dec 11, 2019, the Rajya Sabha passed the controversial bill, which offers a path to Indian citizenship to persecuted refugees from Pakistan, Bangladesh and Afghanistan from practically all religious groups except Muslims. The law was passed in the backdrop of the Bharatiya Janata Party (BJP)-led government’s proposal to implement a National Register of Citizens, potentially putting in motion a two-step process where millions of Indians would be forced to prove their citizenship — and Muslims left out the process would have little legal redress.

¹ https://www.huffingtonpost.in/entry/citizenship-amendment-bill-why-hindus-must-also-fear-it_in_5df1b3b5e4b06a50a2e9e06f
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The bill was passed amidst the bitter objections of India's opposition parties.

Yet even Hindus left out of the NRC will be affected, Mustafa explains, as they will first have to admit they aren't Indian citizens, and then somehow prove they were original inhabitants of one of the three countries covered by the bill.

Edited excerpts from the interview.

The opposition has referred to the Citizenship (Amendment) Bill-2019 as “unconstitutional” and “anti-constitutional”. As a constitutional law expert do you think the opposition is right?

Our constitutional vision is not like that of Israel which goes by the theory of “law of returns” that stipulates that the country is the natural home for all Jews. Our constitution has not assigned the country to any religious group. India is a natural home for people of all religions and for citizenship we have not prescribed any religious criteria. Hence, adding a religious test to citizenship when there is no such test in the Constitutional provisions goes against the constitutional vision of the Indian constitution.

Most importantly, the bill is incompatible with the ideals of secularism. Even though the word secular was inserted in the year 1976, the Supreme Court in Kesavananda Bharati Vs State of Kerala judgment, 1973 had observed that secularism is part of the basic structure of the constitution (The judgment reads, “every provision of the Constitution can be amended provided in the result the basic foundation and structure of the Constitution remains the same.

The basic structure may be said to consist of the following features: (1) Supremacy of the Constitution; (2) Republican and Democratic form of Government; (3) Secular character of the Constitution; (4) Separation of powers between the legislature, the executive and the judiciary; (5) Federal character of the Constitution). The constitution does not uphold any religious text, everybody has the freedom of religion, and to hold official positions one does not have to follow any particular religion. So, to say that the Constitution was not originally secular and that it was made secular only in 1976 is wrong.

Also, by assigning automatic disqualification on the basis of religion to a particular religious group, it denies socio-economic and political justice which is inscribed in the preamble of the Constitution. It also goes against the freedom of belief, faith and worship which is incorporated in the preamble.

So CAB strikes at the very root of our republic and violates our Constitutional vision. It is the very betrayal of our republic because our republic is founded on the principles of justice, equality and on principles of liberty.

As per Home Minister Amit Shah, Article 14 of the Constitution, which deals with equality, allows classification. Can the CAB stand the scrutiny of “reasonable classification”?

Article 14 is the fundamental core of the Constitutional law and it not just confines to citizens but also non-citizens because the words used in the Article are, “any person”. But, I agree with the honourable Home Minister that Article 14 permits classification. However, the

classification has to satisfy three tests—reasonability, rational object and non-arbitrariness. The CAB fails all the tests, miserably.

The classification is not reasonable because it is not based on intelligible differentia. Meaning, there should be an intelligible difference between whom/what you exclude from the law and whom/what you include. According to the CAB (and the Home Minister) “persecution” in Pakistan, Bangladesh and Afghanistan is the precondition for citizenship. But followers of any religion including Islam can be persecuted in “regressive”, “undemocratic” countries. It is not completely true that only religious minorities are persecuted in these countries because people can be persecuted for political reasons or for being liberal or atheists too.

Author Taslima Nasreen of Bangladesh is an example. And if, (as the Home Minister said) CAB is about protecting persecuted religious minorities in the three countries, then as per intelligible differentia, it cannot exclude persecuted Muslim minorities including Ahmediyas Muslims or Shia Muslims of these countries. Going by the same reason, CAB cannot restrict itself to just three countries of the neighbourhood because persecuted religious minorities exist in countries including Bhutan (Christians), Srilanka (Hindus) and Myanmar (Rohingya Muslims) as well. So the classification is not reasonable.

The classification also does not have a rational object because the Supreme Court says that rational object should be a just object and should not be arbitrary. This brings into question the cutoff date for availing citizenship as per the bill—December 31, 2014. How and why did the government decide that “religious persecution” ended on this date? Did the three countries which are listed become secular and progressive after this date? Did they amend their Constitution after this date? So that cutoff date itself proves that the government’s action is neither rational nor just. Meaning, there is no rational object.

CAB is arbitrary also because it does not include all religious minorities and all countries in the neighbourhood. It is arbitrary because one of the countries, Afghanistan which is included in the list of countries was not formed by partitioning India. It is also not clear why other countries I mentioned earlier were excluded and Afghanistan included. Besides, as per the Indian Constitution rules religion, sex of a person and place of birth, cannot be grounds for reasonable classification. These are prohibited grounds.

So in essence, CAB is a class legislation and not a reasonable classification because it mandates that an entire class is out of its purview. CAB is essentially saying that people who are Muslims are out of its ambit and hence it is a class legislation.

Does this also mean that there are inherent contradictions in the bill?

There are inherent contradictions in the whole argument around the bill. Apart from the fact that the bill does not include all persecuted minorities, all persecuted people or all neighbouring countries, it also has blatant contradictions like two kinds of treatment for “persecuted religious minorities” from the three selected countries depending on which part of India they take refuge in.

For instance, a persecuted person can take refuge in any part of the country because people under persecution go to the nearest place of escape when they are driven out of their homes.

But if such a person reaches some states or some areas in Northeast India, they will not be considered for citizenship because CAB is not applicable there (Exemptions include places in Assam, Meghalaya, Mizoram or Tripura which are included in the Sixth Schedule of the Constitution that ensures tribal autonomy and protected areas in Arunachal Pradesh, Nagaland and Mizoram which fall under 'The inter line' as notified in the Bengal Eastern Frontier Regulation of 1873 where outsiders can enter, travel or stay only with an Inner Line Permit). How can that central reason or the fact of persecution (based on which citizenship is given) change when someone is in Kohima instead of New Delhi?

The other part is that the ruling Bharatiya Janata Party has contradicted itself and its promises. In 2016, BJP said that they will honour the Assam accord which had set March 24, 1971, as the cutoff (for migrants from other countries to avail citizenship). Besides, Sarbananda Sonowal and Hemanta Biswa Sarma have also argued in the Supreme Court that July 19, 1948, should be considered as the cutoff date for according citizenship in Assam. These two dates were violated in the CAB and the cutoff date was brought to December 31, 2014. And now we have Assam up in flames because they do not want the new cut-off date, among other reasons.

How are the Indian Muslims going to be affected by the CAB?

India as a country had rejected two-nation theory (one country for Hindus and the other for Muslims). As the country rejected this theory, Muslims in India had also rejected it, even though they could have opted to move to Pakistan. They stayed because they thought the country will not take into account religion for any political reason or while passing laws. It is this trust which Indian Muslims had in the Indian Constitution that was betrayed by the CAB which includes religious test as a criterion for classification of citizenship.

The CAB if linked to the National Register of Citizens will bring in more chaos. When it implemented NRC in Assam, the government presumed that 'illegal' Muslim migrants from Bangladesh and Pakistan will be excluded in large numbers. But in reality, this number turned out to be less and it was found that migration from Pakistan was near nil and that from Bangladesh was less than expected. It seems like the only way to exclude Muslims was to bring in religious classification which is arbitrary in nature.

Does the CAB at least benefit immigrants from other religions?

What is worse is that this bill is going to hurt even the Hindus or other communities. If the idea was to help people who were excluded from NRC Assam because there were discrepancies in the records, then even that cause stands defeated now. That is because the initial claim of such people was that they should be included in NRC because they are essentially Indian. Going by this claim, they had attended foreigners tribunals and had made representations. Now, with the CAB stressing on "persecuted religious minorities" from three countries, they will have to prove that they are from those countries. How can this same group of people (who once claimed to be Indian) now claim that they are from a foreign country? How will they be able to prove that they are citizens of those countries now? How can a person born in Guwahati, be the person be of any religion, be able to prove that they are originally a "persecuted minority citizen" of another country?

According to you, CAB is against the Constitutional vision and betrays the Indian Muslims, even as it fails to benefit any group of people of any religion. Can you say, how a government with honest intentions to support persecuted people or even minorities of neighbouring countries could have done it, without violating the structure of the Constitution or excluding any particular religious group?

I am happy that our government cares for the persecuted people but it cannot be selective in its care. Each persecuted person, who is persecuted either by religion, political opinion or any other reason could have been given shelter in India if all were given Indian citizenship without any exemptions. And this could have been unanimously passed in the parliament.

To achieve this all that the government had to do was to remove the “ineligible” criteria in the Citizenship Act-1955, which prevents “illegal” migrants from taking citizenship. All “illegal” migrants could have been given citizenship provided they spend a stipulated period of time of residence in the country. All that the government had to do was either delete the word “illegal” or include “all persecuted people” in the list.

In its given form, can the CAB if it becomes a law be challenged in the Supreme Court?

It can be challenged, but the government will be in an advantageous position because the court presumes the Constitutionality of the Law. So the burden of proof will not be on the government but on the petitioner who challenges it. Also, since such matters eventually get referred to the constitution bench, it will not be quickly decided upon.

But it is true that the Constitutional structure cannot be changed by even by an amendment of the constitution and CAB is only an ordinary law. The government cannot change the basic structure using an ordinary law.

Can the Supreme Court strike the amendment down?

I cannot predict the outcome of the judgment. But the Supreme Court, to save the Constitution, can take a bold stand and stay straight away that this is unconstitutional. If the Court does not stay this right away, it will become fait accompli (fact or done deal) by the time they pronounce on it. If the Court does not state it right away, the nationwide NRC can be implemented right away.