Source : www.thehindu.com Date : 2020-03-11

FOR A UNIVERSAL STATUS OF PERSONHOOD

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

A series of judgments delivered by the Gauhati High Court over the course of the last few weeks has brought into sharp focus the utter brutality of the regime governing the **Foreigners' Tribunals in Assam**. These verdicts entrench the establishment of an unreasonable burden on people declared as deemed foreigners by seeking from them a **standard of proof** that is wholly incommensurate with the consequences that befall the ultimate finding — in many cases, consignment to detention camps and a pronouncement of a condition of statelessness. From a reading of the judgments, the standard, as it were, is so disproportionate that it is virtually impossible to glean what a petitioner actually has to do to succeed. Indeed, the chances of success are so negligible that, an analysis of 787 orders and judgments of the High Court between 2010 and 2019, by Leah Verghese and Shruthi Naik of Daksh India, shows us that in 97% of the cases, the petitioner before the court was confirmed as a foreigner.

This statistic is scarcely surprising given the list of documents deemed inadequate for the purposes of establishing a person's citizenship. Consider the following: electoral photo identity cards, voters' lists bearing petitioners' names, land revenue receipts, certificates issued by the local panchayat, bank passbooks, permanent account number (PAN) cards and ration cards. Each of these has been variously rejected as proof of citizenship. What is more, according to the court, not only must a petitioner adduce documentary evidence, whatever that might actually be, establishing that their parents or ancestors were present on Indian soil prior to March 25, 1971 — a cut-off date distinct to Assam — but they must also independently validate those documents by securing the testimony of their issuing authorities. For example, if a petitioner produces a certificate of her marriage in an attempt to establish her lineage, and should that document be accepted by the Tribunal, the petitioner will still have to lead evidence through the authority that was responsible for dispensing the certificate. Is there, we might want to ask ourselves, a more noxiously labyrinthine exercise than this?

The Foreigners' Tribunals (FT), which work as quasi-judicial bodies, were originally created through an executive order made by the Union government in 1964. Their task was to furnish opinions on whether persons referred to them were "foreigners" or not within the meaning ascribed to the term under the Foreigners Act, 1946. This legislation, which was enacted by the colonial government with a view to regulating migration into India, defines a foreigner as any person who is not a citizen of India. It also accords to the government a wide-ranging power to control the entry, exit and movement of foreigners to and within the territory of the country.

In Assam, the FTs have played a role unique to the State's history. Typically, the tribunals there have seen two kinds of cases: those concerning persons against whom a reference has been made by the border police and those whose names in the electoral roll has a "D", or "doubtful", marked against them. The references made to the FTs in the State have arisen out of a mandate contained in the 1985 Assam Accord. The agreement was a product of a student-driven movement against, among other things, immigration into the State following the declaration of Bangladesh's independence on March 26, 1971. It made a number of stipulations, including a direction to government to identify and have declared as foreigners any person who entered Assam between January 1, 1966 and March 24, 1971—the names of the persons so identified, the accord says, ought to be deleted from the electoral rolls. What is more, the pact also demanded that the government identify those who came into Assam on or after March 25 of that year and have them deleted and expelled. It was to this end that in 1997 the electoral rolls were revised in the State and more than three lakh individuals were marked as doubtful voters.

This revision was made without any prior and independent verification. Out of those left out, nearly two lakh people have already been referred to the FTs.

Ordinarily, under the Indian Evidence Act of 1872, the burden of proof in any court of law lies on the person who seeks to make a claim or assert a fact. This would mean that before the FTs, it is the government, which avers that a person is a foreigner, on whom the burden ought to lie. But Section 9 of the Foreigners Act reverses this burden. It places the responsibility on every person referred to an FT by the State to establish before the Tribunal that he or she is, in fact, a citizen of India.

In 1983, the Union government, sensing the oppressive nature of the burden placed, introduced the Illegal Migrants (Determination by Tribunal) Act. This law, which overrode the Foreigners Act, subtly shifted the onus to prove citizenship from the individual to the government. But, in July 2005, the Supreme Court, in *Sarbananda Sonowal vs Union of India*, declared the legislation unconstitutional. The Court found, through an almost cavalier consideration of history and facts, that migration into Assam constituted “external aggression” against the State, and, therefore, that the Central government had violated Article 355 of the Constitution. Given this, the burden to establish citizenship, the Court held, ought to always rest on the individual.

It is this judgment in *Sarbananda Sonowal* that has since served as the fundamental premise on which the Gauhati High Court has ruled on various petitions made against the verdicts of the FTs. But even assuming the burden ought to lie on the individual to establish her citizenship, these rulings could still benefit, as Madhav Khosla recently pointed out, by the outlining of a sensible test on what degree or level of proof ought to be sufficient to discharge the burden. However, by holding, for example, that persons suspected of being foreigners ought to not only provide documentary evidence but also have those documents attested by the authority that issued them, the Court has foisted on the petitioners a standard that is virtually impossible to meet.

Perhaps, the solution lies, as Gautam Bhatia has written, in an approach taken by the African Court on Human and Peoples’ Rights. That is that the burden to establish citizenship might well lie on the individual, as the Foreigners Act stipulates, but once he or she has produced a basic set of documents that, on the face of things, make out a plausible claim, the onus ought to then shift to the State to rebut the evidence provided. Ultimately, as the Gauhati High Court has itself held, individuals are not expected to establish “beyond reasonable doubt” that they are citizens of India. What is expected of them is to show on a balance of probabilities that they are not foreigners. In such circumstances, the rational answer would be to allow the onus to shift to the State once the individual has met a basic threshold of proof.

This approach is, no doubt, far from perfect. In a country like ours, where the weakest and poorest among us are often denied access to basic goods, requiring individuals to produce documents to establish citizenship can by itself represent an onerous demand. We often see rights as universal, but as political philosopher Hannah Arendt pointed out in The Origins of Totalitarianism, to truly possess rights, individuals often need to belong to a political community. In other words, “the right to have rights” is seen as contingent on citizenship. In instilling a regime where a presumption against citizenship operates, the Foreigners Act denies to the weakest among us this right to have rights. It treats them as less equal beings. To reverse this damage, we must do as Seyla Benhabib has suggested. We must recognise a universal status of personhood of every human being independent of their nationality.

Suhrith Parthasarathy is an advocate practising at the Madras High Court

You have reached your limit for free articles this month.

Register to The Hindu for free and get unlimited access for 30 days.

Already have an account ? Sign in

Sign up for a 30-day free trial. Sign Up

Find mobile-friendly version of articles from the day's newspaper in one easy-to-read list.

Enjoy reading as many articles as you wish without any limitations.

A select list of articles that match your interests and tastes.

Move smoothly between articles as our pages load instantly.

A one-stop-shop for seeing the latest updates, and managing your preferences.

We brief you on the latest and most important developments, three times a day.

*Our Digital Subscription plans do not currently include the e-paper ,crossword, iPhone, iPad mobile applications and print. Our plans enhance your reading experience.

Why you should pay for quality journalism - Click to know more

Please enter a valid email address.

Subscribe to The Hindu now and get unlimited access.

Already have an account? Sign In

Sign up for a 30-day free trial. Sign Up

To continue enjoying The Hindu, You can turn off your ad blocker or Subscribe to The Hindu.

Sign up for a 30 day free trial.

END

Downloaded from **crackIAS.com**

© **Zuccess App** by crackIAS.com