

COURTS OF INJUSTICE

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

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Over 1.9 million people have been excluded from the final [National Register of Citizens \(NRC\)](#) in Assam. The herculean executive exercise, mandated and closely monitored by the Supreme Court, has incurred a staggering expenditure of over Rs 1,200 crore and immeasurable cost in terms of human suffering and death. The buck now passes to the Foreigners Tribunals. The fate of close to two million people who have been excluded from the NRC rests with these one-man tribunals. The constitutionality of these quasi-judicial bodies — from the appointment of its members, arbitrary procedure for its functioning and the nature of its orders — have always been in question. Yet, the numbers of these tribunals are being increased, from the existing 100 to more than 200, to adjudicate upon citizenship claims. The Supreme Court recently ruled that the order of the Foreigners Tribunals will prevail over the NRC order on citizenship and declined to create an appellate forum for appeal from the tribunals.

Foreigners Tribunals were set up by an executive order in 1964 in contravention of Article 323B of the Constitution, which requires the legislature, by law, to provide for adjudication of matters by tribunals. The matters that can be decided by the tribunal, listed within the Article, do not include citizenship. “Judicial experience” was an essential appointment criteria for its members, as stated in the 1964 order. However, the eligibility was relaxed in June 2019 by a notification, calling for applications from retired civil servants and advocates with just seven years of practice, to be appointed on a contractual basis, through an interview conducted by a panel of high court judges. Two hundred and twenty one members were recently appointed without any written test and no transparency in the selection process. The members of the tribunal are selected by the [Gauhati](#) High Court, but the appointment is done through the home and political department of the Assam government. The tenure of tribunal members and extension of their terms is based on a review of “performance” conducted by the Gauhati HC.

The minutes of the monitoring committee of the HC reveal that the government is also asked to send its appraisal of tribunal members to the court. The performance report of the government has a special column — “percentage of foreigners declared”. Extension is often given to those who have declared the maximum number of persons as foreigners — the low scorers are “terminated”. Pay and allowances of members is regulated by the government. “Impartiality is the soul of the judiciary, independence is the life blood of the judiciary”, held a Constitution Bench in *UOI v R. Gandhi* (2010). In the absence of security of tenure and dependence on the government, these tribunals cannot function freely and impartially. There is no mechanism for receiving complaints against members of a tribunal, giving a free hand to such members to adjudicate, most often without any judicial experience, on citizenship — the right to all rights.

Apart from those excluded from the NRC, who now have to appeal in the Foreigners Tribunals within a period of 120 days, the Assam Border Police and the Election Commission refer cases to the tribunals. Inquiry reports submitted by Assam Border Police to the tribunal, while making a reference, are often blank. There are allegations that poor and unlettered are randomly picked up and, on non-production of citizenship documents, referred to the tribunals. Further, the

Election Commission, since 1997, under the pretext of a “strict scrutiny” of the voter list, started an exercise that marked D or “doubtful” against any person in the list, arbitrarily, without any investigation. In the absence of investigation, even decorated army officers have been referred as illegal immigrants to the tribunals.

These tribunals have the power to regulate their own procedure for disposal of cases expeditiously. The section 3(1) of the Foreigners Tribunals Order requires that the tribunal shall serve on the person to whom the question relates, a copy of the main grounds on which he is alleged to be a foreigner. However, in practice, these are rarely mentioned in the notices issued by the tribunals. With no grounds to rebut and the burden of proof on the person alleged to be a foreigner, it becomes impossible to present a cogent case before the tribunal. Most of those declared foreigners by the tribunals are poor and do not have access to legal aid to represent them through the procedural spiral. If a person does not appear before the tribunal, either for lack of understanding of the notice issued or in the absence of any notice, such persons are declared as foreigner by an ex parte order. According to a question in the Lok Sabha in July this year, the minister of state in the Ministry of Home Affairs stated that as many as 63,959 persons have been declared foreigners through ex parte proceedings in Assam between 1985 and (February) 2019. The order of the tribunals can be challenged before a division bench of the Gauhati High Court in writ jurisdiction, most often distant and beyond the means of the poor.

Once a person is declared a foreigner, s/he can be detained under Section 4 of the Foreigners Act, 1946. There are close to 1,000 detainees in six detention centres across Assam. Pending deportation, these persons languish in sub-human conditions with little or no access to legal aid or rights such as adequate healthcare and education. According to the government’s own figures, only four such declared foreigners have been deported since February 2013. Since there is no agreement with Bangladesh to deport declared foreigners, their detention seemingly is indefinite. The Supreme Court, in May, ordered all those who had been in detention for over three years to be released on production of two sureties of Rs one lakh each and reporting to the local police station every week. However, four months after the order of the Supreme Court, only nine declared foreigners have been released while 355 remain detained for more than three years, as on June 2019.

Diversity, plurality and inclusivity form the bedrock of the Indian Constitution, which abhors systematic targeting of the minorities and xenophobia. Unfortunately, in Sarbananda Sonowal (2005), the Supreme Court itself laid the ground for xenophobia. Relying on unverified reports about the influx of foreigners, the apex court declared the Illegal Migrants (Determination by Tribunals) Act unconstitutional on the ground that it placed the burden of proving a person to be a foreigner on the state. These tribunals were manned by proper judges and the percentage of those declared foreigners was low. The Supreme Court declared that the Union had failed to protect the State of Assam against “external aggression” caused by the huge influx of illegal migrants from Bangladesh! This astounding judgment has since set the tone for all future proceedings under the Foreigners Act.

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