

1. Assam NRC: The Danger in Leaving the Issue of Citizenship to Foreigners Tribunals

Context:

- ▶ On 31st August, the updated National Registry of Citizens (NRC) was released in Assam after a Supreme Court deadline. Of the 3.3 crore applicants, 3.11 crore figured in the final citizens' list, while about 19 lakh residents were excluded. The excluded people have about 120 days to appeal against their exclusion to the foreigner tribunals.

Background:

- ▶ Defining Indian citizenship in Assam has always been problematic. The Assam province of 1947 had diversity, hardly matched by any other geo-political entity of a similar size.
- ▶ **Migration within British India was a source of social and political conflict.** Specific provisions to deal with this issue were demanded even in the Constituent Assembly.
- ▶ A special law for the State of Assam, i.e. the **Immigrants (Expulsion from Assam) Act of 1950** was enacted soon after the commencement of the Constitution. This was even before a citizenship law had been drafted for the rest of the country (1955).

Influx of Refugees and the Assam Accord:

- ▶ A 'massive influx of refugees into India' from (what was then) East Pakistan was cited as one of the reasons for India's involvement in the Bangladesh War of 1971.
- ▶ Ultimately, this led to a state-wide student movement called the **Assam Agitation**, which **lasted six years, from 1979 to 1985.**
- ▶ The movement was sometimes punctuated by violence, including the Nellie massacre of 1983. It was finally brought to a close in 1985.
- ▶ **A Memorandum of Settlement (MoS) popularly known as the Assam Accord** was signed amongst the representatives of **Government of Assam, Government of India and the leaders of the Assam Agitation.**
- ▶ A number of stipulations of the Accord have been given effect to. One of these was the **introduction of Section 6A into the Citizenship Act. It provides for special provisions for citizenship for people covered by the Accord.**

The demand for an Updation of the NRC:

- ▶▶ Universal revulsion after the Nellie massacre and the signing of the Assam Accord ushered in a new phase. Masses were still passionately committed to the "foreigners' issue."
- ▶▶ However, they were no longer willing to participate directly in violent activities. **The solution was now sought through political means.** Numerous elections have been fought on the plank. A constant demand has been one for the updation of the National Register of Citizens (NRC). **The NRC is the register containing the names of Indian citizens, which was prepared in 1951.**

The Supreme Court Steps In:

- ▶▶ In 2009, certain petitions were filed before the Supreme Court challenging the validity of Section 6A of the Citizenship Act. Certain other petitions, sought a time schedule for the updation of the NRC.
- ▶▶ Questions of nativism, identity politics and xenophobia were brought up, after 30 years of the enactment of amendments to the Citizenship Act. The Supreme Court has usually declined to get into the political thicket. In this instance, it did. The effect of its intervention has been devastating.
- ▶▶ Starting December, 2014, the Supreme Court took upon itself the task of updating the NRC. It is not common knowledge that the process has been plagued by inconsistencies.
- ▶▶ The first draft of the registry came out in December 2017, and enlisted 1.9 crore people—less than 60 percent of the applicants—as Indian citizens. The final draft came out last week and excludes over 19 lakh people.
- ▶▶ Mainstream and social media are awash with stories of names of genuine citizens being absent from the list. Several people whose names were not in the draft have claimed that they had submitted the same set of documents as their family members to establish their claim to citizenship. However, while names of some family members have been included in the nrc, names of others have been left out.

Fundamental problems with foreigners tribunals:

- ▶▶ 19 lakh people whose names are missing from the final list of NRC can file appeals before the Foreigners Tribunals. Herein lays a fundamental problem.
- ▶▶ **A tribunal is a quasi-judicial body created by legislature - through a statute.** This is crucial.
- ▶▶ **Article 323B** of the Constitution states that **the 'appropriate legislature', may, 'by law', provide for adjudication of matters by tribunals.** This is limited to a specified category of matters, listed in the Article itself. **Citizenship is not one of them.**
- ▶▶ Even assuming that citizenship can indeed be decided by a tribunal, that tribunal still has to be created by legislature.

- ▶▶ Without the checks and balances of legislature, the executive is free to create a 'committed', adjudicating authority.
- ▶▶ **Foreigners Tribunals are not created by legislature. They were created by an executive order issued by the MHA in 1964.** The selection process of its members, their terms of service etc are decided completely by the executive.

SC Observation on Tribunals:

- ▶▶ The Supreme Court in Secretary, A.P.D. Jain Pathshala and others vs Shivaji Bhagwat More and others, (2011) case held:
- ▶▶ “If the power to constitute and create judicial Tribunals by executive orders is recognized, there is every likelihood of Tribunals being created without appropriate provisions in regard to their constitution, functions, powers, appeals, revisions, and enforceability of their orders, leading to chaos and confusion. There is also very real danger of citizen's rights being adversely affected by ad hoc authorities exercising judicial functions, who are not independent or competent to adjudicate disputes and render binding decisions.”
- ▶▶ Therefore, the executive power of the State cannot be extended to creating judicial Tribunals or authorities exercising judicial powers and rendering judicial decisions.

Compositional Issue of Foreigners Tribunal:

- ▶▶ The latest recruitment notification issued by the Gauhati High Court states that retired judicial officers, civil servants and Advocates having 7 years of practice (and a minimum age of 35) can apply to be members of the Tribunal.
- ▶▶ The appointment is contractual, and for a year. The chances of these members being fair is very little. There are reports of services being terminated, because the members were not 'taking enough wickets'. They had not declared enough people to be foreigners.
- ▶▶ Many current members of these tribunals have no experience of being judges in regular courts. However, the consequences of a wrong determination can be fatal. This is specially so because there is no provision for an Appeal from an order of a Foreigners Tribunal. Only a Writ Petition can be filed to the High Court. Its scope is extremely limited. The court sitting in Writ Jurisdiction over an order of a Tribunal acts in exercise of a supervisory, and not an appellate jurisdiction. This means that the High Court will not review findings of facts reached by the Foreigners Tribunal, even if they are erroneous. Crores of people have gone through an unfair process. Almost two million now find themselves before an extra-constitutional authority.
- ▶▶ The responsibility for this lies solely and completely at the doors of the Supreme Court.

The Danger Ahead:

- ▶▶ Under Section 9 of the Foreigners Act, the "burden of proof" of establishing citizenship status lies on the person apprehended. Thus, a failure to discharge the burden of proof entails that a person is a 'foreigner'.
- ▶▶ This does not lead to an automatic presumption that the person is a citizen of Bangladesh or any other country. For its part, Bangladesh has denied that these people are its citizens.
- ▶▶ The result is that people declared foreigners by Assam's tribunals are interned in 'detention centres' till such time as they are deported. However, since there is no country to deport them to, these people end up in a state of permanent detention. The detention centres themselves are carved out of prisons. The Government is in the process of setting up more centres. However, it is safe to say that they don't have a capacity to detain two million people.
- ▶▶ The Assam movement had more or less one-point programme – the expulsion illegal migrants from East Pakistan. Locally, the movement came to be known as the 'videshi kheda andolan'- the movement to drive out the foreigners. Massive pogroms against the religious and linguistic minorities were masked with the facade of peaceful mass movement. The facade could be successfully maintained because the overwhelming majority of native, Assamese-speaking Hindus lent support to it.
- ▶▶ Though the issue has remained quiet for almost three decades, tensions have continued to simmer under the surface.

Conclusion:

- ▶▶ The Supreme Court monitored NRC updation process is a story of great human suffering. Its outcome is likely to lead to an even bigger crisis. The process started with the Court's judgment in Assam Sanmilita Mahasangha, where the Court made certain observations which legitimized the scare mongering that politicians had resorted to for years. The Court noted that:
 - ▶▶ "..... the spectre looms large of the indigenous people of Assam being reduced to a minority in their home state. Their cultural survival will be in jeopardy, their political control will be weakened and their employment opportunities will be undermined."
 - ▶▶ The pogroms of the early 1980s were started exactly in the same manner – by calling people foreigners – and going after their lives and property. The Supreme Court has now given a judicial stamp to a dubious process. One only hopes that the events of 1983 do not repeat themselves in 2019.