

DEFINING STATELESSNESS IN INDIA: JURISPRUDENTIAL ASPECT

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Abstract

The Final Draft of the National Register of Citizens (NRC) is published for the North-eastern state of India, Assam in 2019. Approximately 1.9 million people are excluded from the said list. So, 'statelessness' being a global human rights crisis can be found settling its existence in this matter. However, as a matter of fact, neither the term 'stateless' or 'statelessness' is defined under the Indian Constitution nor India is a signatory to the UNHCR Conventions creating a vague administration procedure. Therefore, the author of this paper will focus on the jurisprudential aspect of 'statelessness' and the background of the phenomenon. Also the relevancy of the subject will be tested by establishing the nexus of the phenomenon. Further, will try to discuss how India can establish the definition of 'statelessness' in the jurisprudential aspect under the obligations of international human rights law.

Key words: citizenship, human rights, jurisprudence, nationality, national register of citizen, statelessness

Introduction

In 1951, the first list of the National Register of Citizens (NRC) was published. In *Assam Sanmilita Mahasangha v. Union of India* (2014) Section 6A of the Citizenship Act, 1955 was challenged which concerns the acquisition of citizenship under the Assam Accord. The bench of Justice Ranjan Gogoi and Justice Rohinton Fali Nariman in concord with the case of *Assam Public Works v. Union of India* (2009) ordered to update the NRC in Assam. Its conduct will be governed under Rule 3 of the Citizenship Rules (2003) to serve as a government archive on people residing in and outside its territory. (Rule 2(k)) Meanwhile, three drafts were released on the inclusion of people. For which just 3,11,21,004 individuals were considered eligible for incorporation in its last form out of 3.29 crore population, leaving behind 19, 06,657 citizens. (Rawat, 2019) Tracing this scenario, we find the surging of the human rights crisis on the way. Nevertheless, one cannot deny the impending breach of human rights in the phenomenon of 'exclusion of people' from the citizenship registry that will carry along. This assumes even more significance in the light of the recently released citizenship amendment act of 2019, the after effects of which are seemingly impossible to even gauge and calculate. The huge number of people who 'can' be called illegal citizens has prompted some to predict the largest human mass migration in India after partition.

Background of statelessness in India

The great divide in 1947 allowed the formation of three sovereigns; India, Pakistan, & East Pakistan (later named as Bangladesh). This can be considered as an illustration of the concept of "Imagined Communities" by Anderson. (Anderson, 2006) He describes a nation as an imagined, political community that is both fundamentally restrained as well as sovereign and furthers, societies not to be differentiated on the basis of falsity or legitimacy, but by the way they are conceived. To which we can deduce that the founding fathers of India constituted 'India' and its Constitution envisioning it on a particular ideology that we celebrate today as the 'Idea of India'. The partition of India generated a colossal surge of movement from Pakistan and Bangladesh into India and vice-versa. The migration process was associated with the traumatic experience of the people belonging to the three nations and their families. People had to flee from their homeland and abandon their properties; and further had to rebuild their lives in the other state due to political tensions and differences. The impact of the large scale migration can be traced even today. Furthermore, the cause of 'migration' includes ethnic, linguistic, and religious proximity; persecution, and better economic opportunities. The influx of illegal immigration in India was an emerging issue during the British colonization period and thereafter. The NRC was then first documented in Bangladesh, bordering to Indian state Assam, during the 1951 Census in order to

realize the illegally residing immigrants. (Raji, 2019) The Illegal Migrants (Determination by Tribunals) Act (1983) (hereinafter referred as IMDT Act) and the Immigrants (Expulsion from Assam) Act (1950) was also established by the Indian parliament as a measure which was later repealed. Led by the then Chairman of Justice B.P. Jeevan Reddy, the Law Committee of India conducted its 175th report proposing Foreigners Bill, 2000. (2000) The Report addressed the menace of illegal migration in India. It also recommended repealing the IMDT Act and the Act of Immigrants, 1950 as *ultra vires* to the Indian Constitution.

Decolonization even influenced the legal identity of Indians migrated to Sri Lanka at colonial times leading to creation of stateless since independence. Nevertheless, individuals and societies struggle to rebound, in particular stateless groups, from the political consequences of decolonization. Besides, refugees' and stateless people escaping oppression such as Rohingyas (Murshid, 2015) and Tibetans (2011) have, over the years asked the Indian government for asylum. The interesting thing to observe here is that although we have given them asylum, we have not legally recognized their existence, thus creating confusion and inconsistencies.

So, based on the above discussion we can deduce that India administers stateless people by *ad hoc* measures based on selective politics. However, these approaches will not resolve future incompetency to address statelessness sufficiently unless a uniform statute is enforced. The center has also ratified some mutual regional agreements with its state and neighboring nations to deal with the stateless crisis. Some of the negotiations comprise the Assam Accord, 1985 (Assam); Indo-Ceylon Pact, 1964 (Sri Lanka); Land Boundary Agreement, 1974, and its Protocol, 2011 (Bangladesh); etc.

The erased in Slovenia

A similar case of Slovenia which underwent different social changes after the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY) and consequent independence of former Yugoslav republics. In 1991, Slovenia incorporated new citizenship policies leading to the emergence of the 'erased' category in Slovenia. About 25,671 names had been removed from the 'register of residents' and the 'register of population' in Slovenia. (Kuric and Others v. Slovenia, 2010) These people were then known as "the erased" of Slovenia.

Before 25th June 1991, which is popularly celebrated as the Slovenian Independence Day, its nationals were citizens of either the SFRY or its constituent states republics apart from Slovenia. However, as nationals of the SFRY, they acquired the status of permanent residents in Slovenia, which they retained until 26th February 1992. The individuals were required to apply for the Slovenian Citizenship to enroll in the Slovenian Register of Permanent Residents by 25th December 1991. Out of 2, 00,00 Slovenian inhabitants who were previously SFRY citizens, only 1, 71,132 qualified for the same and were granted citizenship of the new Slovenian state.

People who did not apply for the Slovenian Citizenship or whose requests were not granted became aliens or stateless persons, whose residence in Slovenia was sought to be illegal. These individuals denied receiving any government notification, stating that they learned circumstantially that they have become. They cited instances that it is when they went for renewing their identity papers and such they were denied and given the reason that they can no more own it. They also contended that their "erasure" had serious and enduring consequences. Their documents lost their value and some were evicted from their apartments. They could not work or travel, lost their possession, and lived for years in poor conditions with deteriorating health consequences. Others were expelled from Slovenia. So, the Grand Chamber in the European Court of Human Rights (ECtHR) held that this is a violation of Article 8 (Right to respect for private and family life, home, and correspondence), Article 13 (Right to an effective remedy) and Article 14 (Prohibition of discrimination) of the European Convention of Human Rights (ECHR). (1950)

Hence, the abovementioned case in Slovenia exhibits as precedence to the phenomenon of how it dealt with the humanitarian crisis of statelessness arising out of provincial dissolution and construct of a national register of citizens, similar to that in India.

Jurisprudential aspect

Nationality

Article 15 UDHR guarantees that everyone has the “right to a nationality” and furthers that no one shall be unfairly refused or stripped of his nationality. (1948)The development of UN and adoption of the 1954 Convention, evolved from that of nationality legislation into debates on the importance of statelessness in international law. Australian advocate and survivor of the Nazi persecution, Paul Weis adopts a progressive stance on nationality. He focuses on the aspect of foreign security which States owe to their citizens and their right to admit citizens to their State. The systematic examination of the circumstances under which nationality can, under the scope of international law, be revoked and conferred also is especially important. In his analysis he stresses that, while nationality has traditionally been regarded in large part as a State's advantage, it is gradually perceived as a tool for safeguarding human rights at regional and international levels. At the same time, he concludes that under international law there is no right to a nationality and anticipates that there will be slow progress here. (Weis, 1979)

However, the general principles of international law must comply with the nationality laws and practices, particularly human rights law, there is an obvious protective lacuna. James A. Goldston, Executive Director of Open Society's Foundation in his study expresses how a citizenship denial removes individuals from the enjoyment of rights and gives special consideration to 'indirect discrimination,' which happens when a procedure, a law, duty, or circumstance becomes weak on the face of people. He concluded that in practice the increasing divide between citizens and non-citizens is "mostly the problem of the non-periodical enforcement of existing standards". (Goldston, 2006)

So, implementation results of the NRC, Assam are found to defeat the ideology of holding “nationality” as a human right. Although preparation of NRC is recognized under Rule 4 of the Citizenship Rules, (2003)we see considerable ‘technical errors’ in the outcome. So, this exclusion of individuals whose ‘citizenship’ is at stake can be identified to hold the status of ‘statelessness’.

Citizenship

‘Citizenship’ is a ‘unitary political identity’ (Cohen, 2014) that a person is designated to. Part II of the Constitution of India deals with the criterion in which an individual can attain Indian citizenship. (1950) ‘Citizenship’ of any nation signifies membership in a political community, in which citizens support their government in various ways while enjoying the protections and services associated with their privileged legal status. (Kingston, 2014) This obligates the State to confer various rights and protection to its members or 'citizens'. T.H. Marshall, a sociologist, states that ‘there is basic human equality associated with full political membership or of citizenship’. He asserts that citizenship cannot be fully attained until every citizen enjoys a full array of rights, including essential civil, political, and social rights. (Marshall, 1964) This can be traced in Article 19 ensuring its citizens the ‘right to freedom’ and other rights enshrined in the Indian Constitution thereto. This implies if one is disentitled to ‘citizenship’ they can be determined to be in a state of ‘incapacity’ as they are not immune to human rights violations. Citizens can be categorized as, *de facto* and *de jure* citizens. One can attain *de jure* citizenship under Section 5 of the Citizenship Act, 1955. So, the exclusion of 1.9 million people from NRC infers, that these individuals will be denied access to state protections.

Statelessness

Hannah Arendt, a political philosopher explained ‘statelessness’ to be an outcome of a ‘hegemonic international state system’. (Arendt, 1958) It means that the socially predominant class or society culturally influences the social structure of the state in the best interest of them upon the other classes. In Arendt's literature, she points the state's engagement into the hegemonic framework results in the consequence of exclusion, and its dependency theory upon the nation's disenfranchisement may be addressed comprehensively. To which Professor Nell Gabiam asserts, statelessness to be an outcome of a political order founded on the falsified presumption that the world's population is divisible into “sovereign nation-states” composed of citizens and emphasize on collective dimensions of statelessness. (Gabiam, 2015)

The national-level implementation procedure for determining statelessness must be regionally harmonized, this will also strengthen national efforts to identify and protect stateless persons. Better identification is the most

important key and wherever around the world when a similar exercise was envisioned, identification was stressed as the most important step. This ensures that the existing arrangements offering safeguards can reach the lowest denominator and also ensure that would require states to give citizenship to children who would otherwise be stateless. This implies that the formation of the regional legal instrument, by the aid of strong international organizations, should be supported by the government. This legal instrument will provide a catalyst for States to develop procedures for assessing statelessness and to implement national harmonized minimum standards.

Nexus between Nationality, Citizenship and Statelessness

The 'nationality' of a person determines that the state is the guardian of its citizens. A person claims its nationality by attaining the 'citizenship' of the nation through various modes of legal documentation set by the parliament of that state. A person who doesn't have the entitlement of a 'citizenship' is a 'stateless' person. 'Statelessness' is a process of disenfranchisement of nationality. In other words, it refers to a person who doesn't belong to any nation and has no citizenship. Indeed, stateless people are illegitimate. (Arendt, 1958) The presence of inalienable and universal human rights that appear, contradicts the claim in the absence of a legislative system that provides for a guarantee of human rights for all individuals. Rights are to be enjoyed to the extent that they are protected by an institution that is capable of advocating. The widespread abuses of human rights globally are evidence that the UN has grave deficiencies as an organization with the mission of defending individual rights in particular when States intentionally deny nationality and thus "the right of some groups and persons to have their rights." It is the failure of international institutions to establish a capacitated body like the state to protect rights through the use or threat of force that challenges the primary authority in human rights. States can agree, by implementing legislation, to formalize international commitments, implement national structures that resolve particular human rights demands, or otherwise ensure that State actors are mandatory to comply with those norms. However, it does not include any clarification as to successful compliance but insists that it requires litigation to determine protected beneficiaries and other protection steps against general relevant laws impacting refugees such as the provision of legal residency to apply. Hence, compliance may take a variety of forms, based on the essence of the duty and the national approach to international law integration in the domestic legal system. (Goodwin-Gill & McAdam, 2007)

The right to nationality as human rights is affected because the jurisdiction remains covered by nationality issues. The regulation of statelessness through the international instruments reflects the interests of States. Even the non-binding obligation of international laws on non-member states leaves the measures vague and allows States to retain nationality regulation in their national regulation. In practice, therefore, the right guaranteed internationally is often left unimportant. Hence, we observe the internal conflicts and inconsistencies between the various ethnic groups alongside the dynamic ties between Central and Region, based on the context of international relations and geopolitics affects multiethnic societies. Professor Dr. Dilip Gogoi introduces a new framework of the "Common Ethnic House" to address the ongoing inter-ethnic conflicts between various groups and a deadlock between the middle and the northeast. He argues that political conflicts are the grounds for the abuse of rights in the NRC process. (Gogoi, 2016) A similar example, of the Galjeel Somali community of Kenya who faced huge discrimination due to new reforms can be cited. They traditionally held Kenyan identity cards in 1930s, voted on elections, were owner of enterprises, and had access to government services but eventually lost their rights after 1989. Initiatives were taken to screen the illegal migrants which led to the loss of children and statelessness in many people, including girls, resulting in grave discrimination, with fewer income options and child education. (UNHCR, 2014)

According to the 2018 UNHCR statistics, there are 2,820,348 stateless people around the globe. (2018) Further on August 31st, 2019, the Final Draft of NRC of Assam was published. Over 3 crore Assami Citizens found their place in the NRC as legitimate Indian citizens, however the more worrying signs were when almost 19 lakh citizens found themselves out of this list. This constituted over 6 percent of Assamese population (approximately 6% population), thus rendering them stateless, homeless and without any apparent social security arrangements protecting them. (NRC Assam) *Nirode Baran Das*, 69year old advocate, a resident of Darrang district, Assam, died by suicide three months after his name was excluded from the NRC list. (Das,

2018) *Rahim Uddin*, 47year old peasant, resident of Hojai district, Assam died by suicide by intake of agricultural poisonous substance in the terror of being sent to the detention center. (Naqvi, 2019) *Angad Sutradhar*, a 57year old daily-laborer, hanged himself from a tree getting anxious about the verification process of the NRC as he was illiterate. (Sharma, 2018) These are a few of the distressful stories as an aftermath of an exclusionary list. Concerns were raised by the United Nations officials to the Indian government seeking clarifications on the discriminatory allegations and assurance of human rights protection. (Saha, 2018) The NRC, therefore, awaits a humanitarian crisis in Assam.

Role of UNHCR

India is not a signatory to the UNHCR stateless conventions. Also India does not have any legal status for the 'stateless'. So, the jurisprudential aspect of statelessness in India would be to find the traces of how the international obligations can be assembled to administer measures for the stateless. The absence of nationality manifests the fundamental challenge to an individual's human rights. Carol Batchelor, a special advisor on statelessness at UNHCR asserts nationality as the "starting point" for other rights. (Batchelor, 1998) She expresses the distress of the people in her literature and points to the range of rights that are inaccessible by an individual who neither has nationality nor identity documents. Carol's statement about lack of nationality is further described by Alice Edwards to be a 'powerfully distressing state of being'. (Waas, 2014) A 2015 report by the UNHCR estimates the figure of statelessness to be 10 million people worldwide. (UNHCR, 2015)

As nations are based on the theory of 'sovereignty-affirming' the existence of statelessness continues. So, one can infer that the quandary of 'ethno-nationalist' (Sköld, 2019) concept gave rise to the Hague Convention. (1930) Hereinafter, the Convention promotes eradication of statelessness and dual citizenship with the ideology of 'humanity'. (1961) The significance of nationality as a human right is also underlined by other international treaties and conventions. The UNHCR is the main governing body of the 'stateless' people created in 1950. However, India has neither signed nor ratified to either of the Conventions of Status of Stateless Persons (1954) or the Convention of Reduction of Statelessness (1961).

India became UN member-state on 30th October 1945. (Member States) Eventually, it became a signatory and also ratified many international treaties and conventions. This implies that India is legally bounded by its ratified international treaty or convention. As India is not a signatory to any of the Conventions related to 'statelessness' yet, India is obligations towards it directly or indirectly. Although India has not advocated itself for its non-membership, yet some of the articulations of the 'right to a nationality' can be cited from its ratified international treaties such as Article 5(d)(iii) of CERD, (1965) Article 24(3) of ICCPR, (1966) Article 9 of CEDAW, (1979) Article 7, and 8 of CRC, (1989) and Article 18 of CRPD (2007).

Article 1 of the Stateless Convention, 1954 defines a "stateless person" as "a person who is not considered as a national by any State under the operation of its law". (1966) India suffers a huge influx of illegal migration in the country since its colonization period. Despite India being a non-state member of the mentioned Convention, it is obliged to adhere to the customary international laws. The Government of India obeys the "doctrine of *non-refoulement*" (Supaat, 2013) to deal with refugee groups. In accordance to international customary law, the "principle of non-refoulement" stipulates that none shall be expelled where they are susceptible to violence or dehumanized treatment along with other irreparable harm. Further the definition extends at all times to all refugees irrespective of their migration status. To summarize the key component of rights under customary international law, Lauterpacht derive the "principle of natural justice". The "principle of non-refoulement" is found to balance as an internationally recognized theory that exhibits the simultaneous existence of a similar rule in the form of customary law and treaty law. (1969) (1984) Hence, it is observed that India does not exercise the act of 'forceful repatriation' towards the individuals seeking asylum in its territory.

Conclusion

So, to *conclude* by borrowing an idea from Kelly Staples's work, the concept of 'statelessness' is associated with an individual being in a state of 'rightlessness'. (Larking, 2015) We can conceive from the discussions in this literature that the dichotomy of citizen and non-citizen is an overpowering significance to the problem of

statelessness. Laura Van Waas, the co-founder of the European Network on Statelessness makes a statement that 'nationality matters'. (Chetail & Waas, 2009) To support the statement, we can infer that as citizenship indicates the inclusivity in any sovereign territory and follows up with entitlement to a range of fundamental rights and protection. Every human has 'equal dignity and rights', so the individuals who are not sheltered under the roof of 'nationality' should not be deprived of their entitlements is mentioned in Article 1 of the UDHR. The idea of 'statelessness' brings along the notion of oppression and denials which presupposes to couple with gross human rights violations. So, the shortfalls of statelessness can be addressed solely through the process of citizenship acquisition. The predicament 'to belong' or 'not to belong' in these 'government-sponsored identities' should be neutralized. As India faces the human rights emergency, the marginalization of the oppressed shall be minimized. The objective to prevent the crisis can be achieved by legitimizing and reinforcing inclusivity in society. As the world unites to foster cooperation between nations to promote human rights, India being a member-state to the United Nations shall take up initiatives to end statelessness. Keeping in mind the immense population growth of the country, the government of India shall provide advice and operational support in citizenship campaigning. Citizenship campaigning is one of the effective ways of spreading awareness among the statelessness people the conduct of citizenship acquisition. This can be also achieved by following the example of NGO *Praxis* in Serbia (Praxis) where the Non-Government Assistance provides legal aid to the stateless. The government of India can facilitate collaboration with the UNHCR in the Inter-Parliamentary Union system. Mobile registration clinics should be implemented to assist the people such as the 'Access to justice' project in Sri Lanka.

So, there must be a centralized and specialized decision-maker for a proper administrative system to determine statelessness. A personal hearing which is the most appropriate means of gathering oral evidence should be assured, an efficient judicial review; fair timeframes to make decisions; control of the ties among asylum process and decisions about statelessness, as many first try asylum protection; and minimum proof burden among applicants who wants to prove their citizenship. This would enable the society to be made more 'legible' to enhance the effectiveness of government policies in the nation-building process. The relationship between education and identity shall also be stressed in a way to unify a country to establish a common national view of culture, ideas, and theories. The stateless people not only lose the benefits of being trained but also their identity when they do not have access to services like education which helps to shape ideas and create a mass identity. To note that, a few countries have taken initiatives to minimize statelessness on their borders, one of which is Kenya. It provides that Kenya has achieved some progress in its administrative laws and processes concerning the record of birth and identity of children. It made reforms to avoid statelessness and takes the viewer to recognize all national laws discriminatory in the effort to give suggestions to add to those already introduced reforms. However, Kenya still has discriminatory legislation on nationality, despite changes.

Finally, on an optimistic note we can add that, even though India is not a signatory to the UNHCR Conventions of 1954 and 1961, it has tried to deal with the cases of statelessness with a credible response. Being a member-state to the UDHR, India respects the "principle of right to nationality" as enshrined under its Article 15. Unlike the universal statelessness definition, India has not defined it under its constitution. However, we observe how the government of India pays homage to asylum seekers in its territory. This can be summed up that, despite suffering from the immense influx of migration since its colonization it has tried to upload and respect the ideology of 'humanity' in-ground.

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