

AN UNCONSCIONABLE JUDGEMENT

By Prashant Bhushan

The problem of illegal migrants into India, particularly from Bangladesh has been a longstanding and vexed political and legal problem, particularly since 1971 when there was a large scale influx of Bangladeshi refugees into India. However, a large number of Bangladeshis continued to enter India even after 1971 in search of jobs, through a long a porous border. While some of them went to Bengal, some to other parts of the country, a large number of them settled in Assam, leading to a series of agitations by the All Assam Students Union.

Prior to 1983, the detection and eviction of these foreigners was done under the Foreigners Act 1940. This Act gave virtually unbridled powers to the authorities under the Act, mainly the police, to designate any person as a foreigner and detain and deport him. Anyone disputing his designation as a foreigner had no recourse under the Act to a judicial body. Though the Foreigner's Tribunal's order 1964 framed under the Act did give the discretion to the government to refer any dispute to tribunals constituted for this purpose, the government did not constitute any such tribunals in any part of the country outside Assam. Moreover, in this colonial legislation (the Foreigners Act), if you were alleged to be a foreigner by the authorities, the burden of proving that you were not a foreigner was on you. This was an impossible burden to discharge for most people in the country, who had no birth certificates and no land holdings. The result was that most people were completely at the mercy of the police, who in many places were abusing their powers under the Act to extort money from poor and defenceless people.

Taking note of these problems, in 1983, Parliament enacted the Illegal Migrants (determination by Tribunals) Act, (IMDT Act) which as the title suggests provided for judicial tribunals to determine disputes about Citizenship which might arise under the Foreigners Act. The rules under the Act also provide for an administrative screening committee which would examine the complaints under the Act and reject complaints found to be frivolous. The Act also for the first time, gave a limited right to any person to lodge a private complaint with the Tribunals under this Act against persons regarding whom they had information of their being foreigners. Such a right did not exist under the Foreigners Act. The right was however limited by providing that such a complaint could only be made against a persons residing within the same local area and that persons could make a maximum of ten such complaints.

Though the Act itself was for the entire country, it was initially made applicable only to Assam and was to be made applicable to other parts of the country whenever the government notified it for those parts. The government's statistics showed that in the 20 years of the operation of the IMDT Act, about 80% of the complaints were rejected by the screening committee itself . Out of the remaining 76,228 cases referred to the Tribunals during these years, only 21,169 were disposed off by the Tribunal till 2003. Out of these, 11,636 persons were declared as illegal migrants, but only 1517 could be physically expelled.

When the AGP government (supported by the BJP) was in power in Assam it felt that the IMDT Act was coming in the way of expelling the foreigners that they wanted to expel. They began demanding that the Centre repeal the Act and thus give a free hand to the government and the police to expel anyone that they wanted under the Foreigners Act, without any judicial determination of the rights of those that were sought to be expelled.

Soon after the BJP government came of power at the Centre in 1998, it began to resonate the demand of the AGP and the AASU. As part of this campaign, the BJP appointed Governor of

Assam, Gen S.K. Sinha, sent a shrill report to the government in November 1998, which ended thus, “The silent and invidious demographic invasion of Assam may result in the loss of the geostrategically vital districts of lower Assam. The influx of these illegal migrants is turning these districts into a Muslim majority region. It will then only be a matter of time when a demand for their merger with Bangladesh may be made. The rapid growth of international Islamic terrorism may provide the driving force for this demand.”

However, it seems that it was not possible for the BJP to convince its coalition partners about the need to repeal the IMDT Act. In 2000, a former president of the AASU, Sarbananda Sonowal filed a writ petition in the Supreme Court seeking a declaration that the IMDT Act was unconstitutional. He argued that the Act impeded the expulsion of foreigners from Assam, as was evident from the figures of foreigners expelled using the IMDT Act. It thus violated the right of the Assamese people to preserve their culture. The impediments against expulsion, he argued, were placed primarily by the reversal of the burden of proof from the Foreigners Act. Also, he pleaded that the restrictions placed on the complainant (about filing a maximum of 10 complaints and that too against persons residing only in his local area) contributed to the problem. It was finally contended that the application of the IMDT Act to Assam alone was discriminatory since in other States, the authorities could resort to the Foreigners Act and throw out anyone that they wanted, without allowing recourse to a judicial Tribunal.

Meanwhile, during the pendency of this case, the police in Delhi were abusing their powers under the Foreigners Act and were engaged in a regular racket of extorting money from poor Bengali Muslims living in slums. The modus operandi has been detailed in an investigative report produced by a very eminent group of citizens calling themselves the “Citizen’s campaign for preserving democracy”. Its members included such experienced and eminent persons like former Chief Justice of Delhi High Court, Justice Sachar, former President of the PUCL perhaps the country’s most eminent social scientist, Professor Rajni Kothari and many other eminent persons. The report indicated how the local police arbitrarily picked up poor Bengali Muslims living in slums under the Foreigners Act who were then detained in inhuman conditions at a Municipal Corporation detention centre where they are kept till there is a train bogie load of them. They are then taken to the Bangladesh border, dispossessed of whatever possessions they have, and asked to run across. In the words of the report, “When the people are forced across the border, all their possessions are taken away, along with any signs that may point to their Indian origin. ----- They are warned that if they turn back, they will be shot as infiltrators. As parting advice, they are also cautioned to tell the Bangladeshi Rifles, if they are caught across the border, that they are returning from some work or wedding from a particular village. Thus poor people, deliberately bereft of identity and citizenship, have no option but to again take the path of illegality merely in order to survive.”

In 2001, Abu Hanif, a poor Bengali Muslim who was detained by the police, by branding him a Bangladeshi who had come from Bangladesh six months previously, filed a petition in the Supreme Court, seeking the application of the IMDT Act to Delhi. He pointed out that he had an Indian passport for the last 15 years and had been registered as a voter in Delhi for the last 15 years. He had all the other documents to prove his citizenship, including ration cards, jhuggi cards etc. Yet, the police claimed that he had come from Bashirhat in Bangladesh only 6 months ago. And to top it all Bashirhat was in West Bengal, not in Bangladesh! He therefore asked for the constitution of a Tribunal under the IMDT Act to determine his claim and not be left at the mercy of police officers who had even earlier tried to extort money from him.

Though Abu Hanif’s petition, as also a petition by Jamaith Ulema E Hind (which was also seeking extension of the IMDT Act to Delhi) was ordered to be heard along with Sonawal’s

petition, when the time came for them to be heard, the court decided to first hear arguments only on Sonaval's petition, saying that the other petitions would be heard only after Sonaval's petition was decided. However, on a persistent plea by Abu Hanif's lawyer, Mr. Shanti Bhushan that the decision in Sonaval's case would affect his case, the court gave a brief hearing to him.

On 12th July, a 3 judge bench of the court allowed Sonaval's petition and declared the IMDT Act and the Rules framed under it unconstitutional and void. It had been pointed out to the court that an Act of Parliament cannot be declared void merely because it had not succeeded in its objective. It could only be struck down if Parliament lacked legislative competence to enact it, or if it violated a specific provision of the Constitution. Being conscious of this limitation, the judgement written by Justice G.P. Mathur, comes up with a brilliant idea. It opines that the Act violates Art 355 of the Constitution, which mandates the Central government to protect the States against external aggression and internal disturbance! It goes on to say that the onerous provisions of the Act and Rules makes it virtually impossible to expel foreigners and therefore the Act encourages infiltration of illegal migrants from Bangladesh, which amounts to external aggression against India! Certainly an inspired, original and breathtakingly audacious interpretation of Article 355 of the Constitution. But then, it has been bluntly stated by a legendary American judge, that the view that judges do not make the law, is a fairy tale. And nowadays we do not believe in fairy tales.

While giving this interpretation to Article 355 of the Constitution, I wonder whether the Honourable judges were aware of the implications of what they were saying. For example, India has a treaty with Nepal which permits Nepali citizens to come and freely stay in India, without visa and vice versa. Will this treaty not be similarly unconstitutional on the principle that it encourages Nepali migration to India and thus promotes external aggression by Nepal. Or suppose that Parliament were to amend the Citizenship Act to provide that persons from any territory which was part of undivided India would be given Indian citizenship if they applied. Would such an amendment also be unconstitutional on the same ground? If so, what of the existing provision which gives automatic citizenship to those who were born in undivided India. Mr. Advani and many others who were from Pakistan are citizens of India only by virtue of that. That would also be unconstitutional on that logic. Clearly, the fantastic interpretation to Article 355 given in this judgement can have extremely far reaching implications on the citizenship and external policy of the country which is supposed to be made by Parliament and the government.

The Court also ruled that the applicability of the IMDT Act only to Assam made it discriminatory and violative of Article 14, since other states did not have to adhere to the more stringent provisions of the IMDT Act before pushing out persons designated as foreigners. In saying so, the court completely overlooked the fact that the IMDT Act as such was applicable throughout India. However the government had not notified it for other parts of the country other than Assam. But that was an executive lapse and the other pending petitions sought precisely that direction from the court- that the government be directed to notify the IMDT Act for other parts of the country. The currently limited application of the Act to Assam alone was therefore not a defect in the Act, but a case of executive inaction for which the court could always issue direction to the government. Similarly, if there was any problem with the screening procedure in the Rules made under the IMDT Act or the restrictions placed on the complainants, the court could always strike down those part of the rules or direct the government to correct the procedure. If the Tribunals under the Act were not acting expeditiously (which no court in India ever does), they could have directed the government to take whatever steps were required to remedy those.

In fact, the Act itself merely provides a judicial remedy to a person who is being thrown out of the country by the police on a mere allegation that he is a foreigner. This is not merely

unexceptionable, but something the court would itself be expected to require the State to do even otherwise. In fact one would have expected the Supreme Court which is constitutionally mandated to protect the fundamental rights of citizens, to have declared the Foreigners Act unconstitutional, insofar as it allows the authorities to throw out citizens alleged to be foreigners, without a judicial determination. Instead the court says that, "A deep analysis of the IMDT Act and the Rules made thereunder would reveal that they have been purposely so enacted or made so as to give shelter or protection to illegal migrants who came to Assam from Bangladesh on or after 25th March 1971 rather than to identify and deport them." Mr. Shanti Bhushan had submitted that a citizen cannot be thrown out of the country without a judicial determination of his rights and therefore the provisions under the Foreigners Act which allow the authorities to do this would be unreasonable and thus violate his fundamental rights to liberty. To this, the Court replies that no rights of an illegal migrant are violated when he is expelled from the country. But that is begging the question. How can you presume that he is an illegal migrant without a judicial determination of this question. Clearly, this judgement reflects a somewhat authoritarian and fascist mindset which feels that the police must have the authority to throw out anyone that they want without the impediment of independent judicial scrutiny. And this, coming from the Court which had been fully informed about the high handed and inhuman manner in which the authorities had been treating citizens under the Foreigners Act, is atrocious. It completely justifies the observation contained in the report of the Citizen's campaign for preserving democracy, when it said, "Right from roundup and arrest, to the supposed 'hearing' and deportation, no lawful procedure is being followed by the authorities. The entire process contributes to and manifests the criminalization and communalization of the State and the corruption of its legal and judicial institutions".

A serious flaw found by the Court in the IMDT Act was that it did not place the burden of proving his Indian citizenship on the person accused of being a foreigner, unlike in the Foreigner's Act. This, the court said was completely unreasonable, since the person accused has the best means of knowing and proving whether he is an Indian or Foreigner. But that can be said for an accused in a criminal offence as well. After all, he has the best means of knowing whether he has committed the crime or not. So he should be required to prove his innocence. Yet, it is well established in our jurisprudence that an accused is presumed to be innocent unless proved guilty. The question of burden of proof is relevant only in a situation where there is no evidence either way. So for a person accused of a criminal offence, he would be declared innocent. But the court says that if there is no evidence either way about a person alleged to be a foreigner, he will be presumed to be a foreigner. Consider how this will translate in practice in India. Most people in India do not have any document which could 'prove' their Indian Citizenship. Abu Hanif had a passport, a voter identification card, ration card etc. Yet, he was declared by the police to be a Bangladeshi. But most people in the country do not have any of these documents or any 'official document' which would establish their Indian Citizenship. Should they be thrown out of India in these circumstances? This would indeed be the import of this judgement.

In all of 30 years that I have observed the Supreme Court, I have yet to come across a judgement that is so illiberal, authoritarian, indeed fascist and communal in its mindset, uses such a fantastic interpretation of the Constitution, betrays such ignorance of basic legal principles and shows such a lack of sensitivity to human rights and basic human values. The ball is now in the Court of the government and people of this country. Will they tolerate such a slur on the Constitution.