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Legal Status of Stateless Children in India and their Right over Access to Justice

JAYANTA BORUAH¹

ABSTRACT

Access to justice is one of the most important rights to live a human life with dignity. But such a right is dependent on the legal status of the individual claiming it. Citizenship becomes inevitable for an individual for getting access to justice in matters of gross human rights violations. However, children born out of illegal immigrants in a country might not be able to pursue national citizenship for which they might remain outside the purview of legal recognition as a human being within that country. In India, statelessness has never been addressed adequately as required, for which a lot of conflicts become visible now and then. As regards the rights of stateless children are concerned, similar situations have become evident in India. Although, International Human Rights Laws provide for the universal rights of Nationality to all human beings, yet Indian laws are more or less silent over the issue of the rights of stateless children. The paper, therefore, attempts to address the issues regarding the rights of stateless children in India by analyzing the Principal laws regulating citizenship, case laws decided on statelessness, and case studies on the conditions of few stateless children.

Keywords: *Access to Justice, Citizenship, Indian Jurisprudence, Migrants, and Stateless Children*

I. INTRODUCTION

Children are the Angels of the land blessed with the Holy spirits as they are innocent and truthful. Most of us are lucky enough to take birth in a country where we passed our childhood under the shelter of a recognized Nationality and we were capable of enjoying all the democratic rights which we are entitled to after our generations fought several wars for democracy though out the greater part of human history. But there is one another story behind the scene which mostly remains hidden due to several socio-political issues. That story is no other than the story of those children who are born out of illegal migrants having no valid Citizenship of a particular nation. It appears from several contemporary facts around, which highlights that such issues are increasing, some of which will be discussed in the following

¹ Author is a Research Scholar, Former Assistant Professor of Law & Advocate in India.

sections, where the fate of such children become vulnerable to insecurity and rests upon the realities of some untold miseries. India has always shown huge concern for her children, the greatest evidence being the celebration of November 14, as children's day every year in the memories of Pandit Jawaharlal Nehru, dedicated to the little minds of the children. But is India showing the same respect to the children of illegal migrants becomes a matter of concern?

India has made some landmark laws relating to the matters of Foreigners in the Country and also laws relating to the provisions of Citizenship in India. These laws also include providing visas and all other such necessary accommodations that are needed by the children of those foreigners, but the provisions of the illegal migrants and their children remain absent in these laws.² In such a situation, the question no doubt arises that although illegal migrants will be treated as illegal, but will it be just enough to treat the children of such illegal migrants with no rights?

II. INTERNATIONAL LEGAL FRAMEWORK ON STATELESS CHILDREN

The Right to Nationality has been recognized as a basic human right internationally under the Universal Declaration on Human Rights, and all such other human rights covenants and conventions including the International Convention on Rights of Child. Stateless Persons are defined as those who do not possess any nationality as per the laws of a state are concerned. The Convention on Status of Stateless Persons provided for an International Recognition to the Stateless Persons including children and made the States responsible to take steps on that behalf. Further, the Convention on Reduction of Statelessness provides few steps to be taken by the Nation States for providing Nationality to children born on their soil who would otherwise become stateless. While the Covenant on Civil and Political Rights makes it binding upon the States to prevent statelessness by registering the birth of children and also by providing affirmation to every such child's right to have a Nationality. The Convention on Rights of Persons with Disabilities also prohibits denial of access to the right of Nationality on grounds of their being disabled. Other such international legal instruments that aim for securing the rights of children to have a Nationality include- Article 6 of the African Charter on the Rights and Welfare of the Child; Article 20 of the American Convention on Human Rights; Article 7 of the Convention on the Rights of the Child in Islam and several such provisions in the European Convention on the Nationality. OCHCR, a member of the Coalition on Every Child's Right to Nationality is determined to put an end to the issues of Statelessness by

² Tariq Ahmed, Laws Concerning Children of Undocumented Migrants, The Library of Congress, (Nov. 03, 2018, 01:12 AM) <https://www.loc.gov/law/help/undocumented-migrants/india.php>.

providing technical supports to the Nation States concerned in making policies and laws while dealing with the said issue.³

It has been found that there are around 6 million stateless children across the world that remain in a very pathetic situation.⁴ They are devoid of education, health care facilities, and all other such basic living accommodations, and also, they are subjected to gross inhuman treatment by way of sexual harassment, exploitations, trafficking, etc., as a whole, they are not only deprived of having a Nationality but are also denied from living a life with dignity.

III. JURISPRUDENTIAL INTERPRETATIONS OF INDIAN LAWS ON CITIZENSHIP

As regards the Jurisprudential interpretation of the Indian Laws of Citizenship are concerned, they follow the principle of *jus sanguinis* and not *Jus soli*. *Jus sanguinis* means citizenship of the parents while *jus soli* means Citizenship by place of birth. In India Citizenship is single across the country which means a citizen in India will only be known or recognized as a Citizen of India and not of any other states or place, no matter whatsoever. Citizenship in India is granted under a Person's birth; descent; registration or naturalization.⁵ Although, the provision relating to Citizenship by birth is provided, yet it is not the only criteria for achieving Citizenship in India.

IV. LEGAL DIMENSIONS OF ILLEGAL MIGRANTS AND CITIZENSHIP IN INDIA

Under the Citizenship Act of India,⁶ an Illegal Migrant will be a person who is not an Indian or a Foreigner not having a valid passport or any such other document as is prescribed by any law on that behalf, or with such passports or documents but stays in India beyond the permissible time limit.

An illegal migrant as under the above provisions will not be granted Indian Citizenship, neither their children will be granted, if they were born on or after December 3, 2004. However, the 1955 Act provided Indian Citizenship to children irrespective of their parent's nationality, if born on or after January 26, 1950, but before July 1, 1987. And if children are born after July 1, 1987, but before December 3, 2004, will be given Citizenship by birth only if either of the parents were a citizen of India. But if born after December 3, 2004, then Citizenship will be granted only if both the parents are Indian citizens, or if either of them is and the other is not

³ UNHCR & Plan, Under The Radar And Under Protected, The Urgent Need to Address Stateless Children's Rights, (Nov. 02, 2018, 11:12 PM) <https://www.ohchr.org/Documents/Issues/Children/BirthRegistration/PlanInternational..birthRegistration.pdf>.

⁴ United Nations Human Rights Office of the High Commissioner, Right to Nationality and Statelessness, Your Human Rights, (Nov. 03, 2018, 02:11 AM) <https://www.ohchr.org/EN/Issues/Pages/Nationality.aspx>.

⁵ Citizenship, Know India, (Nov. 02, 2018, 12:11 AM) <http://knowindia.gov.in/profile/citizenship.php>.

⁶ Citizenship Act 1955, No. 57, Acts of Parliament, 1955, (India).

an illegal migrant. Further, Citizenship by way of naturalization will be granted only if a foreigner resides within India for eleven years, provided such foreigner is not an illegal migrant. Moreover, Citizenship by registration will be granted to a foreigner who is not an illegal migrant on making of an application to the Central Government of India, where the Central Government has full authority to decide upon such applications. In addition to the above Citizenship by descent will be granted to a person born outside the territory of India on or after December 3, 2004, to an Indian citizen, on ensuring that such person does not possess a valid passport of any other country or is registered at an Indian Consulate within one year from the time of birth of such person or on the expiry of the said time, on the permission of the Central Government.⁷

The above provisions clearly show that a child born to an illegal migrant in India will not have the right to acquire Citizenship of India, if born after December 3, 2004, no matter what the conditions are.

Assam Accord

The Assam Accord was signed between the Central Government and All Assam Students Union, (AASU) with due consent from the Heads of the other states of India due to the huge inflow of Bangladeshi Immigrants into Assam whereby the Citizenship Act was amended and a new provision under Section 6A was inserted. This new Section categorized Immigrants coming into India into three categories, where the first group includes those Bangladeshi immigrants whose parents were of Indian origin in Undivided India and who entered the territory before 1966, were to be regularized; the second group consisted of Bangladeshi Immigrants who entered India after 1966 but before 21st March 1971, were to be taken off from the electoral rolls and were to be regularized after ten years; and the last group that came after the said period of 1971, were to be expelled as per law.⁸

The Citizenship (Amendment) Act, 2019

This Act came into controversy mainly because it provided for excluding persons belonging to minority communities which include- Hindus, Sikhs, Buddhists, Janis, Parsis, and Christians, from Afghanistan, Bangladesh, and Pakistan, and also relaxing the period required for acquiring citizenship by naturalization to them, to grant Citizenship to those persons.⁹

⁷ Id.

⁸ Gautam Bhatia, *The Constitutional Challenge to S 6A of the Citizenship Act (Assam Accord): A Primer*, Indian Constitutional Law and Philosophy, (Nov. 03, 2018, 02:12 AM) <https://indconlawphil.wordpress.com/201705/the-constitutional-challenge-to-s-6a-of-the-citizenship-act-assam-accord-a-primer/comment-page-1>.

⁹ Citizenship (Amendment) Bill, No. 172, 2016, (India).

V. INDIAN JUDICIARY ON STATELESSNESS

It becomes very unfortunate for the Stateless persons when he/she requires addressing his/her grievances in the courts of law due to lack of recognition, he/she is reduced to nil. In such cases, the Indian Judiciary has also felt the trouble in deciding these cases, some of which can be briefly analyzed as below.

The High Court of Punjab and Haryana considered citizenship based on Domicile in the case of *Mangal Sain v. Shammo Devi*¹⁰. In this case, an appeal was made against the decision of the Election Tribunal which held the candidature of the appellant as invalid under the Representation of People's Act 1955 and therefore held him ineligible for contesting election to the Punjab Legislative Assembly. The appellant argued that his papers were accepted as an Indian citizen and he was regarded as an Indian citizen under Article 6 of the Constitution of India after he migrated to India from Pakistan. The Court after giving a liberal interpretation to the facts of the case went on defining the meaning of Domicile and with an attempt to reduce statelessness held him to be an Indian National.

In another case where a PIL was filed by NHRC in favor of the *Chakma* people who were displaced by the Kaptai Hydro Power Project in 1964 and were residing in the state of Arunachal Pradesh.¹¹ They were even receiving notices for leaving the state from the State Government and were not allowed access to justice and were also subjected to the fear of presentation. The Supreme Court, in this case, upheld Article 21 and also held that these people have the Right to Equality before Law in India. The Court went on further directing that the Human Rights of such people cannot be taken for granted and allowed the Legislature to take steps for allowing these people the right to apply for citizenship of India.

In the case of *Namgyal Dolkar*¹² who was held to be born of Tibetan, Refugees were given a Passport identity but subsequently, her application for an Indian Passport was refused for which she filed a petition before the Delhi High Court. The Court held, that although a person would be rendered stateless by law if born after July 1987 and whose both parents are illegal migrants, yet it would not be just enough to treat such children as stateless if born on Indian soil before July 1987 no matter what the nationality of their parents was. The Court further held it unnecessary to apply for citizenship if born on Indian soil before 1987 irrespective of their

¹⁰ *Mangal Sain v. Shanno Devi*, AIR 1959, P H 175.

¹¹ Ishani Duttgupta, Why Children of H-B Workers May Now Have to Leave America, ET Bureau, (Nov. 03, 2018, 02:45 AM) <https://m.economictimes.com/nri/returning-to-india/why-children-of-h-1b-workers-may-now-have-to-leave-america/articleshow/61166125.cms>.

¹² *Namgyal Dolkar v. Government of India*, 2011, IAD (Delhi) 201.

parent's nationality in 2011. This was a positive step taken by the Indian Judiciary for reducing Stateless Children in the country. Thus, she became the first Tibetan to have an Indian Passport.

In the case of *Jan Balaz v. Anand Municipality and Ors*¹³ where the petitioner being a German residing in the United Kingdom, along with his wife decided for having children by surrogacy from an Indian woman in India and they had two surrogate boys from the Indian mother and later when the surrogate parents applied for Indian Passports, it was refused. This led to a unique situation before the Gujarat High Court, since there were no precedents to follow and even the laws of the land were silent on this issue. However, the Court gave a liberal interpretation to the case and upheld the Citizenship of the children, and also issued guidelines in this regard for regulating the Foreigners who opted for surrogacy and for the rights of the children born from such surrogacy to be protected.

VI. ACCESS TO JUSTICE FOR STATELESS CHILDREN WITH FEW CASE STUDIES

Access to Justice becomes possible for a person only if he/she is legally recognized by the laws of the land. As such it can be assumed that until and unless a person secures a legal entity, it will be most difficult for him/her to secure all forms of justice including social, economic, and legal justice. It is basically because laws are the principal source at present in the entire world of humanity, which defines the rights of their subjects as well as provides for the consequences for violation of such rights. Therefore, a child who is not subject to any laws of a particular nation, or is not recognized in those laws will have no existence at all. Then the child may have to suffer from several inhuman evils few of which can be listed as below-

Stateless Children may be deprived of getting an education, especially higher secondary education due to their inability to appear for State Board Exams which may again bang them into child labor and other forms of exploitation. The greatest example can be laid down from the case of H4 dependent kids who are mostly left unrecognized by both Indian and US governments and the IT firms in both countries. Jahnvi Parikh, who began school in the US in 1999, but she was admitted to an Indian school from 2004-2007, after that she was again admitted to US school, the issue of her discrimination came to light when she was admitted to College and she was denied access to any scholarship, unlike her other American classmates, besides her being topper in the batch and also she was denied from having a Green Card permit and her father Piyush, an IT Professional admitted that his daughter is now an international student who will have to acquire a non-immigrant worker permit for getting a job there for no

¹³ Jan Baalaz v. Anand Municipality and others, AIR 2010, Guj 21.

fault of hers, she was even denied admission in medical courses.¹⁴

During emergencies either by way of natural disasters or armed conflicts, the stateless children may have to suffer a huge loss without being counted in numbers, since they are not adequately registered in any documents. In such situations, instances of their being missing out or lost are themselves nowhere to be found. In most situations, it is likely for them not to be counted as normal human beings.

The Stateless children often face violations of their right of nationality as provided as a human right under UNDHR. It gets highlighted from the case of Gursewak Singh in Japan who was born in Japan and is fluent in the Japanese language was not permitted visas for him and for his family to work legally in Japan, besides his strong desire to stay there and live the rest of his life there. Even though he wrote to the Justice Ministers and Immigration Officials more than 50 times, where he wrote his first letter to the Justice Minister when he was about 10 years of age, yet he did not receive any reply.¹⁵ This seems to be the scenario of grave injustice with the Stateless children where even though the international law provides for a valid human right yet these children are not appropriately provided with Justice.

Stateless children are also kept away from social welfare policies and legal protection since they remain not reachable in most cases. This exposes them to crimes like sexual exploitations, trafficking, mostly in cases of the girl child, and several other health-related issues in common for both boys and girls. It is reported that around 10,000 to 20,000 children of Filipino and Indonesian descent in Malaysia's Saheb state are not having access to social services and they are even forced to work at a very early age due to their being stateless, as a result of which they are exposed to huge poverty and are at risk of suffering from gross human rights violation.¹⁶

The rate of child laborers is also increasing across the world since they are unable to attain education as discussed earlier. It becomes more pathetic when their right to employment comes under consideration. Several countries in the world denied employment facilities to stateless children in the past and are not willing to grant such rights even at present. They are forced by a compulsion to satisfy their hunger to work at an early age which ultimately increases the

¹⁴ Ishani Duttgupta, Why Children of H-B Workers May Now Have to Leave America, ET Bureau, (Nov. 04, 2018, 01:12 AM) <https://m.economictimes.com/nri/returning-to-india/why-children-of-h-1b-workers-may-now-have-to-leave-america/articleshow/61166125.cms>.

¹⁵ Minami Funakoshi, "Ami Miyazaki & Thomas Wilson, Japan forces a harsh choice on children of migrant families", REUTERS Born in Limbo, (Nov. 04, 2018, 03:10 AM) <https://www.reuters.com/investigates/special-report/japan-detention-children/>.

¹⁶ UNHCR, Nowhere People: UK show highlights plight of stateless in UK, UNHCR The UN Refugee Agency, (Nov. 04, 2018, 03:15 AM) <http://www.unhcr.org/news/stories/2017/11/5a1c04ac4/nowhere-people-uk-show-highlights-plight-of-stateless-in-uk.html>.

burden over the world fraternity on the issue of child labor. It was reported by NGOs in Thailand that over 2 million children are stateless and they are likely to face violations of their voting right and to get employment in certain jobs of their own choice.¹⁷ The situation becomes more complicated when the employers, employing such child laborers are to be brought before the court of law since the court faces the difficulties of enforcing the rights of those children whose rights are not even defined by the country's laws, and therefore the employers escape the liabilities.

Children without Nationality face huge discriminations even in the courts of law, which are regarded as the custodian of justice when these children are unable to produce their identity as a nation being besides being a human being which itself is a great identity for being recognized as a human and to have the right to live a life with dignity. It was well remarked that stateless children are second-class people having no right at all in comparison to that of a citizen, which forces them to remain in poverty. It becomes very difficult to defend their rights and status as human beings when they come in conflict with the laws of a country¹⁸.

VII. CONCLUSION AND SUGGESTIONS

The above few cases depict the plight of stateless children across the globe which shows how difficult it is for them to have an access to justice. Besides, the UNDHR providing for the Right to Nationality as a basic human right, it seems that upon whom such rights are to be conferred and how it is to be conferred is not provided. Further, there arises a serious conflict when the question for recognizing such stateless children comes into light between the policymakers and the natives of the state, where the policymakers cannot ignore the sentiments of their native population as such it becomes very difficult for them to work on behalf of them in practice.

In India, it has been seen that in several aspects the laws relating to the plight of stateless children are silent, for instance on the issue of children born from surrogacy by foreigners in India. However, although the Court gave a liberal interpretation in most cases and allowed Indian Citizenship as discussed earlier, it remains very difficult for most of such children to opt for justice. The Indian government, in a case where two Indian children were decided to be kept in foster cares after the end of their visas in Norway, showed strong concern for stateless children and held that children are neither orphans nor stateless, they enjoyed the protection of

¹⁷ The International Observatory on Statelessness, Thailand, (Nov. 04, 2018, 03:18 AM) <http://www.nationalityforall.org/thailand>.

¹⁸ Laura Bingham, Nubian Community in Kenya v. Kenya, OSF, (Nov. 03, 2018, 03:55 AM) <https://m.timesofindia.com/city/guwahati/NRC-not-to-include-illegal-migrants-kids-born-in-state/articleshow/48074337.cms>.

Indian State.¹⁹ However, in another instance, the reverse altitude has been witnessed where the Registrar General of India has turned down the plea for including the kids born from illegal migrants in Assam in the list of NRC for the time being.²⁰ And this might lead to millions of children of illegal migrants becoming stateless. In such situations legal aid becomes very vital to address these issues of injustice done upon the stateless children, or else the legal civilization of India will be questioned by the intellectual world fraternity. A significant issue that arises is the conflict of such children with the interests of the native citizens. The very basic purpose behind the creation of the state as agreed by most scholars was to ensure their citizen's right to access to the state's resources, which comes at risk of getting scarce as the population increases. In such situations it is obvious to face conflict while granting citizenship to children who are not from the countries concerned, such conflicts even increase when natives of such countries are themselves suffering from hunger. But children cannot be treated with inhumanity as they are the pure souls of humankind. They cannot be denied access to human rights after being born as human beings without any of their faults. Therefore, treating children as stateless will be a grave injustice upon them, so there is a need to address such issues by the National Legislations, to work actively by the Civil Societies, to provide them with legal aid for the sake of securing access to justice for them and to increase awareness amongst the native citizens of the land about the rights of such children.

¹⁹ Special Correspondent, The children are not stateless persons: India, THE HINDU, (Nov. 04, 2018, 03:19 AM) <https://www.thehindu.com/news/national/the-children-are-not-stateless-persons-india/article2920233.ece>.

²⁰ Prabin Kalita, NRC not to include illegal migrants' kids born in state, TOI, (Nov. 03, 2018, 01:16 AM) <https://m.timesofindia.com/city/guwahati/NRC-not-to-include-illegal-migrants-kids-born-in-state/articleshow/48074337.cms>.