

Commentary

Understanding the Income Tax Exemption for Sikkimese

Satyabrat Sinha

In a recent judgement, on 13 January 2023, the Supreme Court (SC) of India extended Income Tax (IT) exemption to the ‘Indian-origin’ old settlers of Sikkim and to Sikkimese women married to non-Sikkimese.¹ The old settlers, most of whom are Marwaris, will now be treated equivalent to the people of Sikkim who are recognized as Sikkimese for the purpose of IT exemption. So far, only Scheduled Tribes residing in Sixth Schedule areas and so recognized as native or local had IT exemption. The inclusion of an immigrant group into the differentiated citizenship regime in North East India is both, an opportunity to address grievances of non-local communities and at the same time a source of fear to communities identified as native and local.

Keywords: Citizenship, Income Tax Exemption, Sikkimese, Scheduled Tribe, Old Settlers.

People identified as Sikkimese were exempted from paying tax on income in 2008 when the Income Tax Act, 1961 was extended to Sikkim. The Association of Old Settlers of Sikkim (AOSS), comprising of ‘Indian-origin’ old settlers of Sikkim, had filed a writ petition in 2013 because they were not recognized as Sikkimese and thus, excluded and denied the exemption. The SC in its judgement held that “the exclusion of Old Indian settlers (settled in Sikkim prior to 1975) from the definition of Sikkimese in Section 10 (26 AAA) is ultra vires to Article 14 of the Constitution of India and is hereby struck down” (AIROnline 2023 SC 49).

Who are the ‘Old Settlers’?

Sikkim was an independent kingdom till its merger with India in 1975. India inherited British colonial empire’s relationship with Sikkim. The prime driver of British interests in Sikkim was trade with Tibet. The British forays into Sikkim led to the migration of Indian traders, largely Marwaris but others too, who were instrumental in the development of not only Tibet trade but also the local economy. The state in Sikkim

Dr. Satyabrat Sinha is Assistant Professor at the Department of Political Science, Presidency University, Kolkata - 700073, India. [Email: satyabratsinha@gmail.com]

while permitting the Indian traders made efforts to regulate them, restricting them to urban locations and prohibited from possessing land. By 1961, the number of Marwaris in Sikkim were 488 (Thatal, 2021: 312-3). The 1950 Treaty between India and Sikkim allowed Indian citizens to engage in trade and commerce and to be employed in Sikkim. The AOSS, who filed the writ petition are descendants of these traders, about 400 in number, who have been living in Sikkim since before Sikkim's merger with India in 1975 (Ravidas 2023a). The specification of the AOSS being 'Indian-origin' is to specify their link to India when Sikkim was an independent country. The reference to them being old settlers is to date their residence prior to 1975 so as to distinguish themselves from the later migrants to Sikkim.

Merger and grant of citizenship

In 1975, when Sikkim merged into India, the Sikkim Citizenship Order 1975 granted Indian citizenship to the people of Sikkim. Indian citizenship was granted only to those recognized as Sikkim Subjects. The Sikkim Subject Regulation (SSR) 1961 was an exercise to define citizenship and aimed at identifying subjects of the kingdom of Sikkim and to distinguish the foreigners. Vandenhelsken (2021: 219) views that the context and the timing of the SSR was aimed at preventing further immigration from Nepal and that it was also driven by the Prince of Sikkim's desire to affirm Sikkim's suzerainty faced with India and the political demand for integration of Sikkim into India by the main opposition party in Sikkim. The SSR specified the conditions under which the people could register themselves as Sikkim Subjects. The people should be domiciled in Sikkim for a period not less than 15 years, possess 'immovable' property in Sikkim. Even foreigners could become Sikkim subjects provided they gave up their citizenship benefits because Sikkim did not allow for dual citizenship.

Becoming Sikkimese

Thus, when Sikkim became a part of India and people who were recognized as Sikkim Subjects as per the SSR 1961 were granted Indian citizenship. The second group comprised of the old settlers, who were already Indian by citizenship and, living in Sikkim but who were not recognized as Sikkim Subjects. There are many suggestions as to why the old settlers, largely business community living and conducting their trade in Sikkim did not chose to register to be counted as Sikkim Subjects. The 1950 India-Sikkim Treaty allowed Indian citizens to engage in trade and commerce and be employed in Sikkim. The SSR did not allow for dual citizenship, so the Indian businessman would have to give up their citizenship. Thirdly, the Indian traders had certain restrictions. They needed permission to settle in certain parts of Sikkim, to expand or construct new shops, and Marwaris and other plainsmen were prohibited from possession of land in Sikkim. In addition to these reasons and since possession of 'immovable' property was one of the criteria of SSR, the Marwari access to Sikkim subject was limited (Thatal, 2021: 316). Vandenhelsken (2021: 221-222) suggests that the provision preventing¹ dual citizenship was aimed at Indian citizens and that "the Sikkimese rulers and Indian government established that an 'outsider' engaged in trade in Sikkim could not be a Sikkim Subject". Apart from these two categories of people i.e. the Sikkim subjects who became Indian citizens and the businessman

community who were already Indian citizens, there was a third category of people, referred to as stateless people, who lived in Sikkim but since they were not registered as Sikkim subjects, they were not granted Indian citizenship. It is said that this stateless category comprised a majority of people identified as Nepalis. They were recognized as Sikkimese on the basis of land registry records and granted citizenship in 1989/90.

So the first group of Sikkim subjects and the third group of stateless people who become Indian citizens in 1989/90 both are recognized as Sikkimese. These two groups of people are overwhelmingly said to comprise of Bhutia, Lepcha and Nepali. But because the Indian-origin citizens were not Sikkim Subjects, they were excluded from being identified as Sikkimese despite their long residence in Sikkim.

Special Provision and the Income Tax Issue

Sikkim's merger with India is regulated by special provisions laid out in Article 371F. The sub clause (k) of Article 371F protects the 'old laws' which were in force in Sikkim at the time of merger. The protection of old laws under Article 371F implies that these old laws will continue to remain operational and will prevail when in conflict with any new legislation.

The old laws accord special privileges to Sikkimese as opposed to non-Sikkimese. The practice in varying degrees is that one needs the Certificate of Identification, recognition as Sikkim Subject, to register a company, buy land or even register land in Sikkim. The SSR is a means of distinguishing historical residents of the state from new migrants, to limit in-migration and monitor distribution of state entitlements and benefits (Shneiderman & Tillian, 2015: 22-23). The second old law is an order of 1917 known as Revenue Order No. 1 that Bhutia-Lepcha land can only be sold to Bhutia-Lepchas. Lastly, there is the Rule 4(4) of Sikkim Government Establishment Rules, 1974 stating that Sikkimese will be given preferential treatment in all government employment. Non-Sikkimese can be appointed till you find a suitably qualified Sikkimese candidate. These laws are salient in providing special priority for the Sikkimese in the access to state resources.

There were no wealth tax or gift tax levy in Sikkim and income tax rates prior to the merger were low. The continuation of the old laws in Sikkim with respect to taxes led to Sikkim becoming a center for laundering black money in the 1980s brought in from other states (Rattan 1989). In response to the money laundering, in 1989, the Union government extended the Income Tax Act (1961), Wealth Tax Act and Gift Tax Act to Sikkim. The extension of the Income Tax Act to Sikkim would have resulted in the repeal of the Sikkim Income Tax Manual (1948), an old law before the merger, which laid out the details of tax on income in Sikkim.

The Sikkim government opposed the extension of the Income Tax Act taking recourse to provisions in Article 371F. The state of Sikkim insisted on exemption² for persons holding Sikkim Subjects Certificate and their descendants and those who were given Indian citizenship vide the Sikkim Citizenship Amendment Order, 1989. Finally in 2008, the union government accepted the demand of the state of Sikkim and passed an amendment to the Income Tax Act, wherein Clause 26 AAA was introduced in Section 10 of the Income Tax Act granting an exemption to Sikkimese

people and that also legally defined the Sikkimese.

The AOSS had filed a writ petition to challenge the 2008 extension of Income Tax as discriminatory and violative of Article 15, the right to equality of the Indian Constitution. Almost 94% Sikkimese are exempt from payment of Income Tax. The AOSS claims that they are singled out from the exemption on the ground that they are not recorded in the register under the SSR 1961. The same exclusion from exemption is applied to a Sikkimese women who married a non-Sikkimese. In the writ petition the AOSS had argued that migrants from Nepal, who had settled in Sikkim at the same time or even after the old settlers, were enjoying the benefits of income tax exemption while they were arbitrarily excluded.

Indian Nepalis as foreigners³

It is in this context that the descriptions of “foreigners” and “migrants” for Indian Nepalis were used in the observation part of the SC verdict. Nepali speaking Indians have often been dubbed foreigners. In the view of the community, it is a familiar slur invoked to delegitimize their political demands by referring to them as foreigners. The litany of grievances begins with Sardar Patel’s⁴ letter to Jawaharlal Nehru talking about how the people of the Darjeeling and Kalimpong areas have pro-mongoloid prejudices (Singh 2021) to Moraji Desai as the Prime Minister of India, referring to Nepali as a foreign language (Hutt 1997:126).

It would be important to remember that the Nepali population lives across states in India and referring to them as foreigners has varied effects.⁵ In the state of Assam, the National Register of Citizens (NRC) exercise led to the exclusion of almost one lakh Gorkhas most of whom were arbitrarily tagged. In Sikkim, the state identity of being Sikkimese has provided more security to the Indian Nepalis. The tendency to call Indian Nepalis as foreigners disregards the contiguity of territory, the artificiality of postcolonial borders and their recent origins in comparison to history of the people. The Gorkha invasion of Sikkim in 1789 led to the occupation of the Sikkimese (Darjeeling was a part of the kingdom of Sikkim) territory west of the river Teesta by Nepal till 1817 (Pradhan 2009). It is with the signing of the treaty of Titaliya, the British got the Gorkhas to withdraw from Sikkim to east of the river Mechi, the current boundary between India and Nepal (Sinha 2005: 280). Thus, many Nepalis came with the land as they say.

Article 7 of the Indo-Nepal Treaty of Peace and Friendship, 1950 governs the status of Nepalis in India and Indians in Nepal on a reciprocal basis. It is this provision in the Treaty that Indian Nepalis protest and demand its abrogation as the treaty makes no distinction between Indian Nepalis and Nepal nationals in India (Hutt, 1997:123-124). The insecurity of the Indian Nepalis flowing from them being characterized as foreigner, as people from Nepal, is a prime driver for the demand of a state in Darjeeling district for the Gorkhas. The Gorkhaland movement in the 1980s listed the repeal of the relevant clause in the 1950 Treaty and also adapted the term Gorkhas to differentiate themselves from Nepal. Indian Nepalis are not only accused of being foreigners and discriminated against in ‘mainland’ India. It is said that repeated expulsions owing to the anti-foreigner movement in the different states of North

East⁶ India targeted at the Nepalis has also added to insecurity.

Indian nationalism celebrating unity in diversity and civic in nature plays out in the everyday lives of the citizens North East India in rather limited terms. Indian Nepalis can be distinguished in both racial terms and as a linguistic minority. Thus, not only are they at the receiving end of racism, just like North Eastern people but being a linguistic minority without their own state, they are also accused of being foreigners. Each Indian state's association with a linguistic or an ethnic identity appears to make them belong to the multinational Indian nation and the lack of which appears to make the Nepalis, foreigners.

Identity and Belonging in Sikkim

The commonly accepted definition of the people of Sikkim as Sikkimese identifies the state with the Bhutia, Lepcha and the Nepali. The founding myth of the Namgyal Dynasty holds that a Treaty in 1663 between the Lho (Bhutia)-Mon (Lepcha)-Tsong (Limbu) lead to the kingdom of Sikkim (Vandenhelsken, 2021: 220). The Tsongs or the Limbus are today recognized as Nepalis.

The Nepalis of Sikkim have been accused of being 'immigrants' in the past. It is believed the British colonial aims of construction of roads, clearing of forests, labour in tea plantations, recruitment of Gorkha soldiers and the development of Darjeeling as an urban center, created opportunities for immigration. In Sikkim too, the British Political agent, encouraged immigration from Nepal and forest land was made available for agricultural development in order to increase land revenue. It is also suggested that the British encouraged migration from Nepal to reduce the influence of Tibet in the kingdom of Sikkim (Vandenhelsken, 2021: 216). The kings of Sikkim expressed their misgiving to the British with regard to it.

However, the term Nepalis needs to be unpacked as it includes diverse groups with varying degrees of belonging to Sikkim. Nepalis are a linguistic-community, a quasi-ethnic group (Hutt, 1997:102) that includes migrants from Nepal as well as the Kirantis, consisting of Limbus, Mangars and Rais who are said to be indigenous to Sikkim. In fact, the name Sikkim derives from the Limbu word "Sukhim" which means New House.

The politics of belonging in Sikkim is an everyday matter with terms like 'outsider' and 'influx' commonly used. Individuals through their collective identity belong or do not belong to Sikkim. There are varying degrees of belonging in everyday terms, both, the Lepchas, described as the indigenous, and the Bhutias, the ruling class, are presumed to have the highest sense of belonging to Sikkim. Vandenhelsken (2021: 216) argues that specific policies like higher land revenue payable by Nepali subjects of Sikkim in comparison to Bhutia and Lepcha, Revenue Order No. 1 of 1897 that forbade Bhutias and Lepchas from selling or mortgaging their lands to non-tribals and finally outsiders or non-indigenous being prohibited from settling in North Sikkim without a permit to protect the indigenous and the backward, created a divide, the Bhutia Lepchas (BLs) as 'old inhabitants...indigenous, backward and in need of state's protection' as opposed to the Nepalis who were depicted as non-indigenous and outsiders. The Nepalis were denied full citizenship rights in Sikkim during the

monarchy. The BL and Nepali binary was further institutionalized after the withdrawal of the British as political demands for reforms arose in Sikkim (Sinha 1973: 76). The first pole was the Sikkim State Congress (SSC) that saw itself as a counterpart of the Indian National Congress and their demands were the abolition of landlordism, formation of an interim government and accession to India (Sinha 2009: 124). In response to the SSC, the pro-feudal elements and the palace sponsored the Sikkim National Party (SNP) in 1948. The SNP spoke in the voice of concern for the Bhutia-Lepchas and protection of feudal relations and disagreed with the SSC agenda of accession to India.

The SSC led democratic movement led to the creation of the Sikkim State Council in 1951 where the distribution of seats was equally divided between the Bhutia-Lepchas and the Nepalis (Sengupta 1985:10). This arrangement came to be known as the communal parity formula and it was a concession to the demands of the democratic movement but also a way to check the domination of the majority Nepalis. The recognition of Nepalis of Sikkim as Sikkimese Nepalis, who are a majority has occurred incrementally over a century and involved a long struggle. Hutt (1997: 131-132) suggests that Sikkim's loss of sovereignty and its merger with India was a direct consequence of the emergence of a Nepali majority but the Nepali majority was not of recent origin.

The parity system was abolished four years after merger in 1979, the seats reserved for the Nepalis were declared general seats while Bhutia Lepcha reservation continued. The reclassification of Nepali seats in the new Sikkim Legislative Assembly as general seats in and therefore, also open to 'plainsmen' alarmed the Nepali majority of Sikkim. These concerns were significant as the majority Sikkimese Nepalis who were instrumental in voting for merger with India found that instead of being in an advantageous position in a situation they helped create, they lost the reserved Nepali seats.

The SSR 1961 is the legal way of identifying the people of Sikkim. The Sikkimese believe that the political community of Sikkim comprises of Bhutia, Lepchas and Nepalis. It emphatically excludes the plainsmen. Thatal (2021: 320) suggests that the Marwaris are excluded because they were not recognized as a local ethnic group.

Plainsmen in Sikkim

The role of the state in the use of ethnicity as a resource to create political support and society's response to seek the material benefits offered by the state in ethnic terms is well documented (Chettri, 2015). In contemporary context, with the recognition of the Nepalis as Sikkimese/local/insider/indigenous group, the outsider is identified as the plainsmen. Plainsmen is an euphemistic category that refers to the people who are from the plains as opposed to the hills. The reference possibly also means that people from the hills are local. Plainsmen is a racial category employed to differentiate people from the plains. In Nepali, the term for plainsman is madhisey. The plainsmen can be a Marwari or a Bihari or a Punjabi and their occupations could be business or service. In the current context in Sikkim, the outsider is the madhisey, the plainsmen.

Plainsmen have been living in Sikkim since 20th century. The group can be cate-

egorized in terms of the length of their residence in Sikkim. The first would be the group of old settlers who have been living in Sikkim before the merger in 1975 and the second category would include those who came to Sikkim after 1975, recent migrants. Both these groups are considered 'outsiders' in Sikkim and have lesser rights in terms of the distributive functions of the state. We can point to the experience of Baruah's two-tiered citizenship for the 'settler' due to state politics that promotes and recognizes the link between territory and ethnicity (Baruah 2005:10). In this context, we also see the old settlers of Sikkim, those plainsmen living in Sikkim from before 1975 distinguishing themselves from the recent migrants, newer plainsmen (Thatal 2021: 315). These old settlers call attention to their years of long residence, evoking their old connection to Sikkim and compare themselves with the Sikkimese Nepalis and feel discriminated at their exclusion from Sikkim society and the resultant inequality.

Fear of Influx and Sikkim's response

The threat that Sikkim and Sikkimese would be overwhelmed economically and politically due to migration is shared by all the three 'indigenous' groups - Bhutia, Lepcha and Nepali. Being the smallest state in India in terms of population and the continuing migration of people from the majority community in India further strengthens the fear of the plainsmen.

The loss of the reserved Nepali seats in 1979, fueled a new regional politics of Sikkim as a part of India. The regional sentiment and dissatisfaction with the government led to the 1979 elections which were fought around the restoration of Nepalis seats in the Assembly and democracy was interpreted as rule of the 'plainsmen' (Sengupta 1985: 113). Nar Bahadur Bhandari, three times Chief Minister of Sikkim, set the tone of politics and concerns about Nepali protection, preservation of local identity and implementation of a 'son of soil' policy in government jobs and trade licenses. One of the key effects of this politics was that despite the general seats in the Sikkim Legislative Assembly being open to all, no political party has ever given ticket to a plainsman. The only plainsman to win an election was an independent candidate in 1985.

It is in this context that the Old settlers want to be recognized as a part of old Sikkim society. The efforts to seek equality with the Sikkimese are also necessitated by practical reasons as state organizes distribution of benefits and goods on the basis of ethnic categories.

Conclusion

The writ petition by the AOSS was seeking equality specifically for the matter of Income Tax exemption. The Supreme Court has struck down the definition of Sikkimese in Section 10 (26 AAA) of the Income Tax Act as unconstitutional and granted Income Tax exemption to old settlers. The Court also struck down the exclusion of Sikkimese women married to non-Sikkimese after 1 April 2008 as unconstitutional, arbitrary and discriminatory.

The judgement was welcomed by most people in Sikkim, including the state gov-

ernment. The furor over the judgment came two weeks later when there were protests in Sikkim over the description of Sikkimese Nepalis as “foreigners” and “migrants” (Ravidas 2023b). The crux of the protests was to get the offensive remarks expunged and review petitions were filed. The Supreme Court on 8 February removed the remark that had described the Sikkimese Nepalis as ‘persons of foreign origin’ from the judgement.

But there are other issues of concern in the Supreme Court judgement that led to fear. The disquiet over the inclusion of Indian origin old settlers and the striking down of the definition of Sikkimese has given rise to a fear that this could be a precedent and the same principle could be extended into other areas of state benefits. The use of the right to equality clause of the Indian constitution can dilute the protection offered by Article 371F. The inclusion of old settlers, mostly Marwaris, an immigrant group into the differentiated citizenship regime, usually restricted to specific ethnicity in a given territory, in North East India must be a first. But it can also be a source of fear to communities identified as native and local, as we notice in Sikkim. Sikkimese civil society in response to the judgment has demanded protection of all old laws and immediate implementation of the Inner Line Permit to safeguard the identity and security of the people of Sikkim (Ravidas, 2023d). The Sikkim government in response constituted a committee to look into the demands of the Inner Line Permit in Sikkim (Ravidas, 2023e) and a civil society meeting with the Home Minister spoke about the “rising influx of outsiders in the state threatening its delicate demography that could lead to potential ethnic crisis and conflict” (Ravidas, 2023f).

The federal arrangements in India and India’s diversity, privileges the claims of the provincial majority who may turn intolerant, under certain conditions, to their minorities (Singh 2008: 73). Singh suggests that while India has been successful in protecting the identity and interests of major national minorities that happen to be a state or provincial majorities (Muslims in Jammu & Kashmir, Sikhs in Punjab, Nagas in Nagaland), the record when it comes to the issue of ‘internal’ minorities⁷ and ‘discrepant’ majorities⁸ is problematic.

In specific terms, in Sikkim, we are dealing with what Singh categorizes are the ‘discrepant’ majorities, the national majority, Hindi speakers/plainsmen who are in a minority. We can make a case for a double denial for the plainsmen, not only as a provincial minority but also due to the differentiated citizenship rights prevalent in North East India. But to deal fairly to the denial that the national majority experience in Sikkim, it needs to be borne that they can and do respond to their provincial asymmetry using different strategies. If we take the old settlers of Sikkim who are all Marwari, as an example of a discrepant majority, we can point to their access of caste/community networks to approach Delhi or the national parties to exert influence on their behalf. The Marwari control and dominance of big business also makes them influential in regional politics. It should be borne in mind that the national majority, especially Hindi speakers and their dominance in Indian state structures can and disproportionately do influence the politics even in states where they are a minority. Sikkim, both in terms of land and people, in contrast is a rather small state; the 2011 census population figures are about 6,11,577. And if we are to understand India as a

multinational state and not the classic European nation-state, then differentiated citizenship might be necessary to accommodate the claims of national minorities in order to successfully integrate in the spirit of consociationalism.

Notes

¹ By the time the discussion of the SSR was begun, Sikkim was a protectorate of India and all steps were taken with the explicit clearance of the Government of India. The legal opinion of the Government of India held that since the SSR would have important bearing on relations of Sikkim and India with those of China and Nepal, therefore, India should be involved in the framing of laws. A suggestion to give preferential access to Sikkim citizenship for persons of Indian origin was objected to by the Government of India's Law ministry as the government of India would have to reciprocate such a provision by allowing Bhutia, Lepchas and Tibetans to 'infiltrate' into India (Vandenhelsken 2021: 219-20).

² Only Scheduled tribes residing in Sixth schedule areas are exempt from paying tax earned on Income as per Section 10 (26) of the Income Tax Act.

³ The Nepali community in India in efforts to distance itself from being associated with Nepal has made efforts to call themselves Gorkha and the language they speak Gorkhali. This was one of the key aspects of the Gorkhaland movement of 1986-1988. The Notification on Citizenship issued by the Ministry of Home in 1988 uses the term Gorkha. However, the Eighth Schedule of the Indian Constitution, the Sahitya Akademi and the West Bengal official languages Act, recognizes the Nepali language. So both terms Gorkhali and Indian Nepali are used to refer to the community.

⁴ Sardar Patel to Nehru, 7 November 1950.

⁵ They were recruited in the British army, and also as watchman and peon to assist the colonial administration. After retirement from the British services many of them preferred to stay back and settle there permanently (Haokip 2014: 305).

⁶ Hutt (1997:124) suggests that while legal status was ostensibly put forward to justify the expulsions 'but in practice they have often occurred on a purely ethnic basis' and lists Mizoram 1967: 8000 expelled; Assam 1979: Thousands fled; Manipur 1980: 2000 expelled; Meghalaya 1980-86: 13,000-17,000 expelled.

⁷ Minorities in a state or minorities to major minorities.

⁸ The national majority, defined in plural terms, Hindus or Hindi speakers, which is in a minority in a state

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