

THE ASSAM NRC: ON THE TOUCHSTONE OF THE CONSTITUTION

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Abstract

Recently, there have been multiple political indications of the controversial National Register of Citizens (NRC), being implemented nationwide. The presumed objective of such an exercise would be to prepare a list of bona-fide citizens, identify, detain and deport 'illegal immigrants'. This issue came into public prominence after the passage of the Citizenship Amendment Act, 2019 which sparked off nation-wide protests. The government on the other hand repeatedly affirms the legitimacy of such a policy.

This essay aims to examine the only available precedent – the Assam NRC. It seeks to address the dearth of academic literature on the legality of the exercise, by analysing the substantive and procedural laws in question, relevant judicial opinions and their implications, through a constitutional law perspective.

In this essay, relevant provisions and rules of the Citizenship Act, 1955 and the Foreigners Act, 1946 are summarized, along with the

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historical context of their origins. The NRC process and the Foreigner's Tribunals' proceedings are then critically examined in light of the 'right to equality' under Article 14 and 'right to life and personal liberty' under Article 21 (as expanded across landmark judicial precedents).

The author concludes by emphasizing on the need to reconcile the existing regime with constitutional rights and suggests relying on the erstwhile IMDT Act as a foundation, in the event a similar exercise is implemented in the future.

I. INTRODUCTION

“Citizenship is the right to have rights.”¹

‘Citizenship’ is the legally recognized membership of a political community. It signifies the relationship between a state and an individual. Citizenship acts as a foundational principle of a legal system by conferring by default, rights on individuals and obligations on the state. Individuals owe allegiance to the state, obey its laws and in turn are entitled to its protection and other benefits. Citizenship is accompanied by ‘rights’ such as right to vote and hold political office; and ‘responsibilities’ such as taxation and military service. Such ‘rights and ‘responsibilities’ are either denied or only granted in part, to aliens and other non-citizens residing in a nation. The concept of citizenship thus determines the populace to which the government is

¹*Perez v. Brownell* [1958] 356 US 54.

accountable to and responsible for, and for whose benefit it must shape its policies.²

The importance of citizenship to modern democracies is underscored by its prominence in international human rights jurisprudence. ‘Statelessness’ has been widely observed to be a precursor to human rights violations and persecution.³ Article 15 of the Universal Declaration of Human Rights, 1948, states that “*everyone has the right to a nationality*”, and that “*no one shall be arbitrarily deprived of his nationality*”.⁴ India is a signatory to this convention, which affirms the commitment of the international community to ensure a legal link of nationality of each person to a state.

However, the Indian state has always been doubtful about its capacity to enforce international law obligations concerning the rights of immigrants and refugees, having witnessed some of the greatest human exoduses in history.⁵ The Indian government has thus till date consciously refrained from signing the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, nor does it have an express refugee policy.⁶

Thus, while international law obligations are legitimate constraints on state policy, it would be more appropriate in the Indian context to turn to applicable constitutional rights of ‘non-citizens’, which may more readily be enforced by the courts and the state. These obligations, as interpreted by the courts, extend basic rights protection to all persons

²Richard Bellamy, *Citizenship – A Very Short Introduction* (Oxford University Press, 2008).

³Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press, 2012).

⁴Universal Declaration of Human Rights 1948, art.15.

⁵Niraja Gopal Jayal, *Citizenship and Its Discontents-An Indian History* (Permanent Black, 2013) 146.

⁶Working Environment: India, UNHCR (2011), <<https://www.unhcr.org/4cd96e919.pdf>> accessed Dec 7, 2020.

including non-citizens, and incidentally, closely mirror India's international law obligations in spirit.⁷

It is in this light, that this essay analyses the recently concluded National Register of Citizens (“NRC”) exercise in Assam. In the pending challenge to the Constitutional validity of the Citizenship (Amendment) Act, 2019 - *Indian Union Muslim League v. Union of India*,⁸ the Centre government in its counter-affidavit expressly declared that that NRC is a necessary exercise for any sovereign country and claimed that its implementation was not contrary to fundamental rights. If political indications are interpreted, then the Assam NRC is a pre-cursor to a nation-wide rollout of the scheme. The present Home Minister has gone to the extent of setting a 2024 deadline for conducting this exercise nationwide.⁹ There are also indications that the government intends to rely on the same procedure as the Assam NRC, as created under the Foreigners (Tribunals) Order, 1964.¹⁰

At the outset, it is clarified that this essay does not intend to go into the widely analyzed and contested issue of the Constitutionality of CAA or speculate on the policy aspects of nation-wide NRC. Rather, this essay aims to test the claim whether NRC implementation was or can be consistent with the constitutional rights of stakeholders, by

⁷V. Vijayakumar, ‘Developments. Judicial Responses to Refugee Protection in India’ (2000) 12 International Journal of Refugee Law 235–243.

⁸WP (C) 1470/2019.

⁹Amit shah sets 2024 deadline for NRC, says all infiltrators to be expelled by then’, *Times of India*, <<https://timesofindia.indiatimes.com/india/amit-shah-sets-2024-deadline-for-nrc-says-all-infiltrators-to-be-expelled-by-then/articleshow/72333248.cms>> accessed July 3, 2020.

¹⁰District Magistrates across the country now have been authorized to constitute Foreigner Tribunals, as they exist in Assam. This power was earlier only vested with the Central Government. Vijaita Singh, ‘All States can now constitute Foreigners Tribunals’, *The Hindu* (2019), <<https://www.thehindu.com/news/national/all-states-can-now-constitute-foreigners-tribunals/article27706366.ece>> accessed Dec 7, 2020.

analyzing the only available precedent– the Assam NRC. For sound public policy to be made, it is pertinent that the government and administration take note from past precedents, weight its success and detriments, and mold future laws and policy accordingly. The Constitutional limitations as highlighted by this article must be considered before any move towards a ‘national’ NRC is made.

The Assam NRC has stripped 1.9 million people off their citizenship.¹¹ Three thousand people have already been detained across the state. Deportation is not feasible as Bangladesh has refused to accept such persons in categorical terms.¹² The result is that the affected persons are facing prospects of indefinite detention, statelessness and deprivation of rights. These sanctions are being applied retrospectively on these residents for being unable to disprove the allegation of illegally immigrating at some indefinite point in the past.

This essay shall analyse the manner in which the Assam NRC was conceptualized and implemented, and whether it was consistent with the Constitution. First, relevant provisions and rules of The Citizenship Act of 1955 and the Foreigners Act of 1946 are summarized, along with their historical context. Then, the NRC exercise and the Foreigner’s Tribunals’ proceedings are then critically examined in light of ‘right to equality’ under Article 14 and ‘right to life and personal liberty’ under Article 21, as expanded interpreted by the judiciary. Finally, various policy reforms to reconcile the NRC

¹¹Assam NRC: What next for 1.9 million ‘stateless’ Indians?, *BBC News* available at <https://www.bbc.com/news/world-asia-india-49520593> (accessed on June 4, 2020).

¹²Nayanima Basu, ‘Bangladesh wants ‘written’ assurance from India that it won’t send immigrants after CAA’, *The Print*, <<https://theprint.in/diplomacy/bangladesh-wants-written-assurance-from-india-that-it-wont-send-immigrants-after-caa/342579/>> accessed July 3, 2020.; ‘No Relation to Us, Says Bangladesh On Illegal Immigration Amid Assam Row’ *NDTV* (2018) <<https://www.ndtv.com/india-news/no-relation-with-us-bangladesh-on-illegal-immigrants-inassam-1893131>> accessed on May 3, 2020.

regime with constitutional stipulations are posited, followed by the conclusion.

II. LOCATING THE NRC IN CONTEXT

The National Register of Citizens is essentially a government record detailing the names, addresses and photographs of those residents in Assam legally recognized as Indian citizens. As of now, Assam is the only state in India with such a record.¹³

The NRC is best understood in the context of its political beginnings. The state of Assam since colonial times, has had a steady influx of migrants from other regions of the sub-continent, primarily from the modern-day Bangladesh region. The influx continued post-partition and intensified during the 1971 Bangladesh War.¹⁴

As this new populace settled in the border state of Assam, an unfortunate consequence emerged in the form of widespread discontentment among the native populace fearful of their land and culture being subverted by these ‘foreigners’. They began to express fears of becoming ‘a minority in their own land’. The resulting socio-political friction resulted in the ‘Assam Agitation’ in 1979. State-wide protests were organized by the All-Assam Students Union (“AASU”) and the All Assam Gana Sangram Parishad (“AAGSP”). More than 800 people were killed during this agitation which lasted 6 years. The movement ended on August 15, 1985 after a Memorandum of

¹³Office of the State Coordinator of National Registration (NRC), *What is NRC?* available at <<http://www.nrcassam.nic.in/what-nrc.html>> accessed on April 11, 2020.

¹⁴Amit Ranjan, National register of citizen update: history and its impact, (2019) Asian Ethnicity 1–17.

Understanding, known as the ‘Assam Accord’ was signed between the aforementioned groups and the Government of India.¹⁵

The terms of the agreement provided for steps to be taken to detect and deport *illegal immigrants*. Foreigners who entered into India after 25th March 1971 were to be identified, their names deleted from the electoral rolls and be deported. Accordingly, the Citizenship Act of 1955 was amended by Act 65 of 1985 which inserted Section 6-A, titled- “*Special provisions as to citizenship of persons covered by the Assam Accord*”.¹⁶ This introduced a sixth category of citizenship in India, which was to apply exclusively to Assam.

This Provision classified the illegal ‘Indian origin Immigrants’, (i.e., those whose parents or grand-parents were born in undivided India) into three categories:¹⁷

1. Those who entered Assam before 1966 were deemed to be citizens of India.
2. Those who entered into the State between 1966 to 25th March 1971 (the date of commencement of the Bangladesh war) were also deemed to be citizens but their names were deleted from the electoral rolls for 10 years.
3. Those who entered into the State after 25th March 1971 were declared as ‘foreigners’ and were to be deported in accordance with the law.

Such specification derogated from the original Article 6 of the Constitution. That article granted citizenship for any person who has

¹⁵Ahmed Shahiuz, ‘Identity issue, foreigner’s deportation movement and erstwhile east Bengal (Present Bangladesh) origin people of Assam’ (2006) Proceedings of the Indian History Congress 67.

¹⁶Government of Assam, *Assam Accord and Its Clauses / Implementation of Assam Accord*, 2019, <<https://assamaccord.assam.gov.in/portlets/assam-accord-and-its-clauses>> accessed on July 25, 2020.

¹⁷*ibid.*

migrated to India from the territory now included in Pakistan, if he, or either of his parents or any of his grandparents, was born in undivided India and if he had migrated to India before 19th July, 1948.¹⁸ While the original Constitution had made migration as a means of passage to citizenship, the amendment turned it on its head to make it a condition of illegality.¹⁹

In 1997, the Election Commission of India marked thousands of persons as “D voters” or doubtful voters. While these persons remained on electoral rolls, their electoral participation was effectively suspended until their cases were decided by the Foreigner Tribunals.²⁰

The recent history of the Assam NRC can be traced to 2009, when a PIL was filed in the Supreme Court in *Assam Public Works v. Union of India*,²¹ seeking the removal of ‘illegal migrants’ from the electoral rolls of Assam and the implementation of the NRC as per the Citizenship Act, 1955. A division bench consisting of then Justices Ranjan Gogoi and Rohinton Nariman subsequently (from 2014) began to supervise the implementation of NRC in Assam, demanding regular updates from the government on its progress and issuing various orders to this effect. This special bench was later dissolved upon Justice Gogoi’s retirement.²²

¹⁸The Constitution of India 1950, art.6.

¹⁹Anupama Roy, *Mapping Citizenship in India* (OUP 2010) 124.

²⁰This order was subsequently upheld by the Guwahati High Court in 2011. Nazimuddin Siddique, *Discourse of Doubt: Understanding the Crisis of Citizenship in Assam*, 54 Economic and Political Weekly 10 (March 9, 2019). Incidentally the Election Commission is now set to review its 1997 order. See, Bharti Jain, ‘EC set to take fresh look at 1997 order on ‘D’ voters’, *The Times of India* (2019), <<https://timesofindia.indiatimes.com/india/ec-set-to-take-fresh-look-at-1997-order-on-d-voters/articleshow/71366765.cms>> accessed December 7, 2020.

²¹*Assam Public Works v. Union of India* (2018) 9 SCC 229.

²²Murali Krishnan, ‘After Ranjan Gogoi’s retirement, special bench on NRC case dissolved’, *Hindustan Times* (2019), <<https://www.hindustantimes.com/india->

III. THE LAW ‘GOVERNING’ THE NRC

The Law on Citizenship in India can be traced to Articles 5-11 of the Constitution and the Citizenship Act, 1955 and the Foreigners Act, 1946. While, these laws cover the conditions for Indian citizenship and the state’s power to regulate it, they do not expressly deal with the rights of the ‘stateless’. All non-citizens are broadly categorised as ‘foreigners’, with no special provisions made for special classes like refugees, asylum seekers and stateless persons.²³

The Assam NRC exercise is governed by Section 6A of The Citizenship Act, 1955,²⁴ and Rule 4A of The Citizenship (Registration of Citizens and Issue of National Identity cards) Rules, 2003. It was implemented under the supervision of the Supreme Court.²⁵ It was first prepared in 1951 by the Home Ministry after the first census of independent India. The objective of the ongoing exercise is to update the NRC to

*“...include the names of those persons (or their descendants) who appear in the NRC, 1951, or in any of the Electoral Rolls up to the midnight of 24th March, 1971 or in any one of the other admissible documents issued up to midnight of 24th March, 1971, which would prove their presence in Assam or in any part of India on or before 24th March, 1971”.*²⁶

All the names appearing in the NRC, 1951, or in any Electoral Roll (up to the midnight of 24th March 1971) are called *Legacy Data*. In order to prove citizenship, an individual either needs to be included in

news/after-ranjan-gogoi-s-retirement-special-bench-on-nrc-case-dissolved/story-7P5TMKNOB64Wk05dW3shdK.html> accessed December 6, 2020.

²³Neeraj Gopal Jayal, ‘Citizenship’, in *The Oxford Handbook of the Indian Constitution* Chaudhary S, Khosla M and Mehta P ed. (OUP 2016).

²⁴Inserted by the Citizenship (Amendment) Act, 1985.

²⁵*Assam Public Works v Union of India* (2018) 9 SCC 229.

²⁶Office of the State Coordinator of National Registration (NRC), *What is NRC?*, available at <http://www.nrcassam.nic.in/what-nrc.html> accessed on Apr 11, 2020.

this legacy data *or* be able to prove direct lineage to any person on it.²⁷ Residents were required to submit family-wise application forms along with requisite documents. After the particulars are verified, a draft NRC was prepared and the general public was then allowed to submit claims, objections or corrections. After the verification of these claims, the updated NRC was published on 31st August 2019.²⁸

Concurrently, proceedings were initiated in the ‘Foreigner Tribunals’ against those being excluded from the NRC, who are given another opportunity to prove their citizenship. These tribunals are quasi-judicial authorities set up through executive order under the Foreigners Act, 1946 and Foreigners (Tribunals) Order, 1964.²⁹ Cases are referred to the tribunals by the Election Commission or the Border Police. After August 31, 2019, the tribunals also act as the appellate authority for those excluded from the final draft of the NRC. Nearly 200 such tribunals are being set up after the publication of the final list.³⁰

IV. ON THE TOUCHSTONE OF THE CONSTITUTION

The first question that needs to be addressed is whether the people being excluded in the NRC exercise are protected by the rights contained in Part III of the Constitution. The government has repeatedly contended in respect of those excluded from NRC that

²⁷Office of the State Coordinator of National Registration (NRC), *What are the admissible documents*, available at <<http://nrcassam.nic.in/admindocuments.html>> accessed on April 11, 2020.

²⁸Office of the State Coordinator of National Registration (NRC), *NRC in a Nutshell*, available at <http://www.nrcassam.nic.in/what-nrc.html> accessed on April 11, 2020.

²⁹Foreigners (Tribunals) Order, 1964 – issued under S.3 of the Foreigners Act, 1946.

³⁰*ibid* (n 11).

fundamental rights are not available to these ‘foreigners’ or ‘non-citizens’.³¹

However, until tried and declared as a ‘foreigner’, those excluded from NRC remain Indian citizens and are entitled to fair procedure and just treatment, by right. Even assuming that these persons are ‘foreigners’, it is an incorrect presumption that fundamental rights will be rendered inapplicable. The Constitution specifies which rights are applicable only to ‘citizens’. Within Part III, Articles 15 (prohibition of discrimination), Article 16 (equality of opportunity in matters of public employment), Article 19 (six basic freedoms), Articles 29 and 30 (rights of minorities), specifically restrict their applicability to ‘citizens’ as per their text.³²

However, the remaining fundamental rights refer to ‘persons’ in their text and thus remain applicable to citizens and foreigners alike. These include wide-ranging rights such as equality before law and equal protection of laws (Article 14), protection in respect of conviction for offences (Article 20), protection of life and personal liberty (Article 21) and protection against arrest and detention in certain cases (Article 22).³³

This has also been affirmed by judicial precedent. In *Louis De Raedt v. Union of India*,³⁴ the Supreme Court held that foreigners are also entitled to fundamental rights, including right to life and liberty under Article 21. This ratio was also re-iterated in *Chairman, Railway Board v. Chandrima Das*,³⁵ wherein the Supreme Court observed that

³¹Illegal immigrants can't claim fundamental rights: Govt to Apex court, *The Hindu Business Line*, available at <<https://www.thehindubusinessline.com/economy/policy/illegal-immigrants-cant-claim-fundamental-rights-govt-to-apex-court/article9885514.ece>> accessed June 11, 2020.

³²The Constitution of India 1950.

³³*ibid.*

³⁴*Louis De Raedt v. Union of India* (1991) 3 SCC 554.

³⁵*Chairman, Railway Board v. Chandrima Das* (2000) AIR SC 988.

the rights contained in International Human Rights Law, like the Universal Declaration of Human Rights, 1948, overlapped with the scheme of fundamental rights outlined in the Indian Constitution.³⁶ Applicability of Article 21 in the context of refugees was again reaffirmed in *National Human Rights Commission v. State of Arunachal Pradesh*,³⁷ wherein the Supreme Court held that eligible stateless individuals (the Chakmas in this case), have a right to be considered for Indian citizenship.

The following critique of the NRC exercise is thus based on violation of fundamental rights guaranteed under Part III of the Constitution. It is based on 2 prongs - first is the *substantive illegality* of the exercise, argued based on violation of ‘right to equality’ under Article 14. The second prong of criticism is directed at the *arbitrariness and unfairness of the procedure* employed, which contravenes ‘right to life and personal liberty’ under Article 21, as expanded by the Supreme Court across various landmark judgements.

A. Right to Equality

The most apparent paradox of the Assam NRC is that there is a pending challenge to constitutionality to the very law on which it is based, before the Supreme Court- in *Assam Sanmilita Mahasangha v. Union of India*,³⁸ to decide the Constitutional validity of Section 6A of Citizenship Act, 1955. Yet the Supreme Court, rather than deciding the plea first and settling the legality of the law, gave directions to implement the NRC nonetheless, at great cost to the state and the people. Hypothetically, it is very well possible, that the section is declared unconstitutional by a future court, rendering the entire

³⁶V. Vijayakumar, ‘Developments. Judicial Responses to Refugee Protection in India’ (2012) *International Journal of Refugee Law* 235–243.

³⁷*National Human Rights Commission v. State of Arunachal Pradesh* (1996) SCC 1 742.

³⁸*Assam Sanmilita Mahasangha v. Union of India* (2015) SCC 31.

exercise redundant and illegal. Though at this point, gauging the current stance of the court, the possibility is minimal at best.

The issues before the court are whether Section 6A violates Article 14 by singling out Assam, whether the separate cutoff date is justified, and whether unchecked immigration constitutes external aggression under Article 355.

A pertinent question is why Assam has been singled out from all the border states, by Section 6-A of the Citizenship Act. Prima facie, this arrangement does not treat Assamese residents on par with the residents of other states, by imposing a higher standard for them to claim citizenship and thus is violative of Article 14. It is also questionable whether it was valid for Parliament to carve out an exception for the state of Assam through an amendment to the Citizenship Act, with respect to the cut-off date for grant of default citizenship, without passing a formal constitutional amendment amending Article 6 of the Constitution, which expressly prescribes an earlier date.³⁹

Ever since the NRC began, reports indicate that it has disproportionately affected the Muslim community, with the majority of the cases before the tribunals being of Muslims. Persons living below the poverty line are also disproportionately affected.⁴⁰

In terms of government policy, a bias is apparent in light of the Citizenship (Amendment) Act, 2019. The bill expedited the process of acquiring citizenship for individuals from Hindu Christian, Sikh and Buddhist communities who migrated from neighboring

³⁹The Constitution of India 1950.

⁴⁰USCIRF, *Issue Brief: India – The Religious Freedom Implications of the National Register of Citizens*, November, 2019; Praveen Donthi, 'How Assam's Supreme Court-mandated NRC Project Is Targeting and Detaining Bengali Muslims, Breaking Families', *Caravan* (July 2, 2018) <<https://caravanmagazine.in/politics/assam-supreme-court-nrc-muslim-families-breaking-detention>> accessed December 7, 2020.

countries.⁴¹ By thus disadvantaging Muslims, this act has been challenged for violating the fundamental right to equality as per Article 14 of the Constitution.⁴² Specifically, in the context of Assam, as affirmed by the state government, the act would enable five lakh Bengali Hindus who entered the state between 1971 and 2014 to claim citizenship, while seven lakh Bengali Muslims will have to face the foreigner's tribunals.⁴³ This amounts to a violation of the right to be treated equally before law. This bias already seems to be taking effect, with the Central government instructing the Assam government to release 'non-muslims' from the detention centers.⁴⁴

The 2019 amendment has incidentally, also been opposed by the native populace on the charge that it undermines the entire point of the NRC exercise, which was to identify and deport all immigrants irrespective of religion. The Assam accord was meant to protect the ethnolinguistic identity of the native Assamese, religion was not a factor.⁴⁵

B. Right to a Fair Trial

Article 21 of the Constitution of India states that "*no person shall be deprived of his life or personal liberty except according to procedure*

⁴¹Citizenship (Amendment) Act 2019, s 3 and 5.

⁴²*Indian Union Muslim League v. Union of India* (2019) WP (C) 1470.

⁴³'NRC Bill: Five lakh Bengali Hindu NRC rejects will get citizenship', *The Times of India*, available at <<https://timesofindia.indiatimes.com/india/five-lakh-bengali-hindu-nrc-rejects-will-get-citizenship/articleshow/72465093.cms>> accessed June 11, 2020.

⁴⁴Prabin Kalita, 'Assam told to free non-Muslims from detention camps: MoS in Lok Sabha', *The Times of India* (2020), <<https://timesofindia.indiatimes.com/city/guwahati/assam-told-to-free-non-muslims-from-detention-camps-mos-in-lok-sabha/articleshow/73958268.cms>> accessed December 7, 2020.

⁴⁵Chandan Kumar Sarma and Obja Borah Hazarika, *Anti-CAA Protests and State Response in Assam: Identity Issues Challenge Hindutva-based Politics*, Economic and Political Weekly (2020), available at <https://www.epw.in/engage/article/anti-caa-protests-and-state-response-assam> (accessed on December 10, 2020).

established by law."⁴⁶ In the landmark judgement of *Maneka Gandhi v. Union of India*,⁴⁷ a procedural due process requirement was read into this article by the Supreme Court. A person's life and personal liberty can thus be deprived only as long as the procedure by which such deprivation takes place is 'just, fair and reasonable'. This single right has been progressively expanded to include other substantive rights, which by the language of the original wording itself, apply to *all persons*, regardless of status of citizenship.⁴⁸

However, as empirical studies of the NRC process and the tribunal proceedings have indicated, there are ample instances of disregard of procedural due process in the case of the Assam NRC.

The sheer scale of the exercise, the predisposed bias in the administration and the vulnerability of the affected population resulted in the application of the law varying widely from what is posited. The border police are required to conduct due investigation before referring cases to the tribunals, which they overwhelmingly fail to do. Verification forms are submitted empty and no grounds are furnished in most cases. Notices to appear before tribunals are to be served in person, however in several cases, delivery is forged or large omnibus notices are put up instead. As a result, a large number of the tribunal proceedings are conducted *ex-parte*.⁴⁹

⁴⁶The Constitution of India 1950, art. 21.

⁴⁷*Maneka Gandhi v. Union of India* (1978) 1 SCC 248; *Ranjan Dwivedi v. Union of India* (1983) SCC 3 307

⁴⁸Abhinav Chandrachud, 'Due Process' in *The Oxford Handbook of the Indian Constitution*, (OUP 2016).

⁴⁹Harsh Mander, Draft Report of the NHRC Mission to Assam Detention Centers (2018)

<https://drive.google.com/file/d/1skGrqF6L8XnW8nsYbw2oruAi5yKsuxUx/view> (accessed June 26, 2020). Mr. Mander is the former Special Monitor for the National Human Rights Commission on Minorities in India. He was appointed to report on the conditions in the detention centers of Assam. He later resigned after his report was not accepted and published it on his own.

The law governing procedure before these tribunals is not clear and consistent, neither the Civil Procedure Code nor the Criminal Procedure Code is applicable. The law authorizes each tribunal to set its procedure.⁵⁰ Even in such circumstances, tribunals and the state authorities are obligated to adhere to the *principles of natural justice*.⁵¹ However, this discretion is exercised arbitrarily by each of the 100 or so tribunals to the disadvantage of the appellants. The tribunals thus have different standards regarding time accorded to file replies, admissibility of documents, methods to establish family trees etc. There is extensive use of closed-door hearings and ‘sealed covers’ by the tribunals which allows for non-uniform application of law and leaves scope for bias and contradiction.⁵²

For instance- while considering citizenship of different family members, the law extends deprivation of citizenship from a declared foreigner to his family i.e. – the tribunals can initiate proceedings against persons based on any member of their immediate family being declared a ‘foreigner’. This does not apply in reverse, i.e., a person cannot claim the benefit of his immediate family having been declared as citizens.⁵³ This results in contradictory outcomes, in which members of the same family are being differently classified as ‘foreigners’ and ‘citizens’.⁵⁴ The procedural law, therefore, is

⁵⁰ibid (n 17).

⁵¹*Maneka Gandhi v. Union of India* (1978) 1 SCC 248.

⁵²Citizens for Justice and Peace, *Contested Citizenship in Assam: People’s Tribunal on Constitutional Processes and Human Cost*, 2019, available at <<https://cjp.org.in/nrc-has-spawned-a-humanitarian-crisis-interim-jury-report/>> accessed March 26, 2020.

⁵³Amnesty International India, *Designed to Exclude: How India’s courts are allowing foreigners tribunals to render people stateless in Assam*, (2019) available at <<https://amnesty.org.in/wp-content/uploads/2019/11/Assam-Foreigners-Tribunals-Report-1.pdf>> accessed on March 25, 2020.

⁵⁴Human rights Law Network, *The Citizenship Amendment Bill and the National Register of Citizens: Report of the Public Hearing of February 2019 at Guwahati Assam*, (May 2019) available at <<https://hrln.org/wp-content/uploads/2019/06/Report-of-Public-Hearing-on-NRC-and-CAB.pdf>>

completely removed from reality, unclear and variable, hindering compliance. Several high-profile cases have also emerged in which prominent citizens, veterans of the armed forces, freedom fighters, their descendants and in one case, even an NRC field inspector have been declared as ‘foreigners’, which casts doubt on the credibility of these proceedings itself and are testaments to the inherent arbitrariness.⁵⁵

The tribunals have also been accused of pre-disposed bias against marginalized communities, in terms of subjecting them to stricter scrutiny and dismissing appeals on flimsy technical grounds.⁵⁶ Tribunals function in routine contravention of the directions issued by the High Court. They regularly refuse to provide the parties with a copy of the inquiry report based on which their citizenship is being questioned.⁵⁷

This arbitrariness can be partly attributed to the fact that despite being declared as quasi-judicial bodies by the Supreme Court,⁵⁸ the state government exercises substantial influence on these tribunals in terms of procedure and, appointments and terms of service of the members. In such a political charged exercise, as apparent from the historical context, this is a serious flaw the process. There are limited prescribed qualifications for judges. The sole criteria for appointment is ‘judicial experience’ as the Government deems fit.⁵⁹ The number of individuals declared as ‘foreigners’, has been regarded as a performance indicator for the members on these tribunals. Members have even been terminated on account of low ‘performance’. This is a

accessed on May 2, 2020. The Panel included Justice Gopala Gowda (Chairperson), Prof. Monirul Hussain (Co-Chairperson), Harsh Mander, Sanjoy Hazarika and Colin Gonsalves.

⁵⁵ibid.

⁵⁶ibid (n 53).

⁵⁷Mander, (n 49).

⁵⁸*Abdul Kuddus vs. Union of India* (2019) AIR SC 2834.

⁵⁹Foreigners (Tribunals) Order 1964, Rule 2(2).

de-facto conflict of interest as the adjudicating members have a vested interest in the conviction of the accused.⁶⁰

These issues are further compounded by lack of an appellate mechanism.⁶¹ Even approaching the High Court under writ jurisdictions has proven ineffective, as the court refuses to go into questions of ‘fact’. This problem was further exacerbated when the Supreme Court refused to establish a competent appellate forum to hear such cases.⁶² There have also been allegations of bias at the highest level of the Supreme Court itself, with the then presiding judge – Justice Gogoi who directed the implementation of the exercise being an indigenous Assam resident himself, which raised questions regarding his motives. His conduct and the ultimate stances he took only served to cement these concerns.⁶³

By not providing for a fair hearing and transparent procedure in these crucial proceedings which have the potential to result in disenfranchisement, detention and eventual deportation of those tried under it, this process violates the right to a fair trial under Article 21.

C. *Right to Legal Representation*

‘Right to life’ under Article 21, includes the ‘right to legal aid’. The same expressly posited by the Supreme Court in the landmark case of *Hussainara Khatoon v. State of Bihar*.⁶⁴ This right originates as a Directive Principle of State Policy as per Article 39-A of the

⁶⁰<<http://ghconline.gov.in/Recruitment/Notification-10-06-2019.pdf>> accessed on June 27, 2020.

⁶¹Foreigners (Tribunal) Order, 1964, Clause 3A (8).

⁶²*Abdul Kuddus v. Union of India* AIR 2019 SC 2834.

⁶³Alok P Kumar, National Register of Citizens and the Supreme Court, 53 Economic and Political Weekly July 21, 2018; *Harsh Mander v. UOI* WP (C) No.1045/2018.

⁶⁴*Hussainara Khatoon v. State of Bihar* (1980) 1 SCC 98.

Constitution. In *Suk Das v. Union Territory of Arunachal Pradesh*,⁶⁵ the Court further clarified that the onus is not on the accused to ask for free legal representation, but the judge instead must inform the accused of such a right. The right to legal aid is further affirmed by Section 304 of the Criminal Procedure Code,⁶⁶ Order 33 of the Civil Procedure Code⁶⁷ and The Legal Services Authority Act, 1987.⁶⁸

Several empirical reports by human rights activists indicate that several persons deemed to be ‘foreigners’ and detained, had lacked proper legal representation and had not been heard fairly by the tribunals.⁶⁹ Several were detained on ‘*ex-parte* orders’, because they allegedly failed to appear before the tribunals, despite being served legal notices.⁷⁰

The procedure of serving notices itself is to blame for this. Many of those summoned are migrant workers working away from their native places. Many people are not personally served notices, or their names are just included in long omnibus notices addressed to the public.⁷¹ In reality, people are unlikely to evade notices, as that just increases doubt and reduces the chances they have for proving citizenship.

The evidentiary burden is exclusively on the accused,⁷² the tribunals are not even legally required to first establish sufficient grounds to initiate proceedings, which make arguing a case even more difficult

⁶⁵*Suk Das v. Union Territory of Arunachal Pradesh* (1986) 2 SCC 401.

⁶⁶The Code of Criminal Procedure 1973.

⁶⁷The Code of Civil Procedure 1908.

⁶⁸The Legal Services Authority Act, 1987; Sushant Chandra & Nityash Solanki, *Legal Aid in India: Retuning Philosophical Chords*, 2 BRICS L.J. 68 (2015). Pooja Vardhan, *Right to Legal Aid; A Constitutional Commitment*, PIB, available at <https://pib.gov.in/newsite/mbErel.aspx?relid=118011> accessed June 11, 2020.

⁶⁹Amnesty International India, *supra*, note 53.

⁷⁰*ibid.*

⁷¹Mander, (n 49).

⁷²The Foreigners Act 1946, s.9.

for the accused.⁷³ The major shortcoming of the entire exercise, is the assumption that those excluded from the NRC, have the resources to discharge the heavy burden imposed on them by the state, i.e.-proving their citizenship. The discharge of this burden is not an easy task itself. There is excess reliance on documentary evidence and oral testimony is disregarded by these tribunals. The process involves gathering relevant and valid government identification and other documents, to prove residence and direct lineage going back three generations of one's family. It is important to consider the impoverished and illiterate state of the populace and also the state's flood-prone terrain, which only add on to the difficulties.⁷⁴

The persons who fail to prove their citizenship, are more often among the poor and the marginalised, who lack the resources to gather such documentary evidence, let alone be able to successfully defend themselves before a belligerent tribunal. Thus, the foreigner's tribunals working in conjunction with NRC violate this fundamental right on a routine basis, by failing to provide requisite legal aid to those who are summoned before them.⁷⁵

It is only after much public outcry, that the state government in Assam began to take active steps to secure this fundamental right. In late August 2019, it offered to sponsor legal expenses of those excluded from the NRC and appealing to Foreigner Tribunals, who

⁷³*Sarbananda Sonowal (II) v Union of India* (2007) AIR SC SUPP 1372.

⁷⁴Akhil Ranjan Dutta, *Political Destiny of Immigrants in Assam: National Register of Citizens*, 53 Economic and Political Weekly (February 24, 2018).

⁷⁵Rebecca Ratcliffe, 'A nightmarish mess: millions in Assam brace for loss of citizenship', *The Guardian* (2019), available at <<https://www.theguardian.com/global-development/2019/aug/30/nightmarish-mess-millions-assam-brace-for-loss-of-citizenship-india>> accessed June 11 2020.

have an annual income of below 3 lakh rupees.⁷⁶ Yet, how it would be implemented, remains to be seen.

D. Rights of Detainees

In conformity with Article 21, the state is obliged to respect the right to a life of dignity of its citizens, even in detention, as held in *Sunil Batra v. Delhi Administration*.⁷⁷ As of March 2020, more than 3,331 ‘declared’ foreigners were detained in 6 detention centers across Assam.⁷⁸

In theory, those declared as ‘foreigners’ are to be detained in these centers till arrangements are made for their deportation to their supposed ‘original’ country. However, the Government of Bangladesh has repeatedly stated that it will not accept these expelled people numbering in millions, and views it as India’s internal problem.⁷⁹ It is reiterated at this point that such persons have merely been unable to prove their Indian nationality, which is not the same as having being proved to possess another nation’s citizenship. Such persons are thus rendered ‘stateless’. Thus, the detention of these ‘declared foreigners’ is *de-facto* indefinite. Such detention is inherently arbitrary and disproportionate, and violative of right to life and personal liberty under Article 21. The number of ‘declared

⁷⁶Prabin Kalita & Tnn, *Poor to get free govt legal aid on NRC*, *The Times of India*, <<https://timesofindia.indiatimes.com/india/poor-to-get-free-govt-legal-aid-on-nrc/articleshow/70867275.cms>> accessed June 11, 2020.

⁷⁷*Sunil Batra v. Delhi Administration* AIR 1978 SC 1675.

⁷⁸Lok Sabha, *Unstarred question no. 3880*, (2020), available at <<https://mha.gov.in/MHA1/Par2017/pdfs/par2020-pdfs/ls-17032020/3880.pdf>> accessed on Dec 7, 2020.

⁷⁹Basu, (n 12). As per the Assam government, only 6 foreigners identified under the NRC have been successfully deported. *Supreme Court Legal Services Committee v Union of India* (2018) W.P. (C) 1045/2018.

foreigners' has increased to 1,29,009 persons, who are now facing the risk of such detention.⁸⁰

However, when the matter of indefinite detention and its conditions were brought before the Supreme Court,⁸¹ it took an opposite stand by deprecating the government for being slow in the deportation process, ignoring the government's prudent contention that deportation is impractical unless the host country is willing to receive the detainees, which is certainly not the case with Bangladesh.

Apart from the arbitrary manner in which these persons were detained in the first place, the conditions of their detention are another violation of their fundamental rights.

These detention centers have been carved out of existing jails, but have even worse conditions than those afforded to convicted criminals, with cramped, confined living quarters and little prospects of bail or recreation.⁸² This can be attributed to the non-existence of any concrete legal regime governing the rights and entitlements of detainees.⁸³

There are no official guidelines from the Central or the state government about the rights of the detainees. The detention centers are *de facto* administered under the Assam Jail Manual. Thus, for all practical purposes, the state makes no distinction between jails and these detention centers, and by extension, between convicted felons and the detainees. In the absence of a clear regime, authorities selectively apply the Assam Jail Manual to these detention centers, applying all the restrictions but denying benefits like waged work,

⁸⁰Lok Sabha, *Unstarred question no. 3558*, (2019), available at <<http://164.100.24.220/loksabhaquestions/annex/172/AU3558.pdf>> accessed on Dec 7, 2020.

⁸¹*Harsh Mander vs Union of India* WP (C) No.1045/2018.

⁸²*Supreme Court Legal Services Committee v. Union of India* WP No. 1045/2018.

⁸³Mander, (n 49).

communication facilities and parole, that prisoners are entitled to under jail rules.⁸⁴ Such a manner of detention is violative of right to life under Article 21.

V. THE WAY AHEAD: A POLICY PERSPECTIVE

The entire NRC exercise was based on the retrospective application of a 1985 law, penalizing conduct 14 years before, which was then implemented 34 years later, that too as per the procedure of a pre-constitutional law – the Foreigners Act. It is also pertinent to note that when the migration did take place in the impugned period, particularly in the leadup to the 1971 Indo-Pak war and the refugee crisis that preceded it, it happened in full knowledge and even with the facilitation of the state along the porous border.⁸⁵ There was a failure of the state to provide uniform documentation and official channels for migration in the past.⁸⁶ That has been apparent in the NRC exercise, in which many applicants who submitted Refugee Registration Certificates to back their residency claims, faced rejections as the government was more often than not (in nearly 60% of such cases) unable to locate corresponding records.⁸⁷

⁸⁴ibid.

⁸⁵Madhumita Sarma, *A Study of Migration from Bangladesh to Assam, India*, University of Adelaide, available at <<https://digital.library.adelaide.edu.au/dspace/bitstream/2440/97379/3/02whole.pdf>> accessed on July 2, 2020.

⁸⁶India till date lacks an official refugee policy. *Working Environment: India*, UNHCR (2011) <<https://www.unhcr.org/4cd96e919.pdf>> accessed Dec 7, 2020.

⁸⁷Naresh Mitra, 'NRC Applicants hit by lack of government records', *Times of India* (August 26, 2019) <<https://timesofindia.indiatimes.com/india/nrc-applicants-hit-by-lack-of-government-records/articleshow/70834076.cms>> accessed Dec 7, 2020.

Application of such a 1971 cut-off date now is unfeasible, it may have been possible to implement it in the 1980s,⁸⁸ but not in 2015 when the court began to enforce it.⁸⁹ By this time, the supposed “illegal immigrants burdening the state” that the law targets, have been residing in this country as bona-fide citizens for decades, established themselves and have extended families. It would be inhuman to deport not just these immigrants but also their descendants who lack any genuine link to their country of origin. Adhering to the old cut-off date, only renders the entire process irrational and impractical from a policy perspective

The most pertinent argument against the NRC law is that it is simply impossible for most to comply with, i.e., to establish genealogy and proving the residence of oneself or one’s ancestors (up to three generations) in the country, prior to 1971, through documentary evidence. This burden is impossible for many to discharge in a state whose one-third population is below the poverty line, one-fourth is illiterate and two-thirds of whose area is prone to chronic floods.⁹⁰ The evidentiary requirements are strict, tribunals insist on certification of even original documents by issuing authorities, impose strict deadlines unmindful of practical constraints and hold non-appearance and delays against appellants.⁹¹ In spite of these problematic aspects, the government is expanding this legal regime to the rest of the country.⁹² The lack of a statutory, rights-oriented regime also invests significant authority in the executive to dictate the procedure of such an exercise, allows for manifestation of bias, at the

⁸⁸When the Assam Accord was signed (1985).

⁸⁹*Assam Public Works v. Union of India* WP (C) 274/2009.

⁹⁰Government of Assam, *State Profile of Assam | Directorate of Economics and Statistics*, 2019 available at <<https://des.assam.gov.in/information-services/state-profile-of-assam>> accessed June 26, 2020.

⁹¹Amnesty *supra* note 53.

⁹²Vijaita Singh, (n 10).

expense of citizens. Such a discretionary, bureaucratic process is bound to result in bias and exclusion.

The worst affected strata of the population are illiterate, impoverished daily wage workers. They lack documentary evidence such as land deeds, birth certificates and school records needed for inclusion in NRC. They have often moved away from their original homes for work and thus fail to reply to notices on time. In the proceedings, they lack the resources to engage good counsel and if detained, to meet the stringent bail requirements. The burden is more so on women, who usually married underage, hardly have any property documents or educational record, and usually have documents to prove relationship to their husbands, but not their parents and natal family tree.

Apart from these human costs, any government considering extending NRC to the rest of the country, should also consider the disproportionate costs in relation to the uncertain outcome of deportation. From an administrative perspective, the NRC updating exercise was a massive undertaking, costing around ₹1,600 crores over 10 years and involving around 52,000 staff. It also had a severe impact on the development and economic activities of the state.⁹³

In the interim, the NRC legal regime in Assam should be reconciled with the fundamental rights under Articles 14 and 21 of the Constitution, by the means of an appropriate legislation. An exception cannot be created. A uniform procedure should be laid down to bind all tribunal proceedings. Hearings should be open; documentary criteria should be relaxed. It should be the duty of the state to ensure adequate legal representation of all accused. Sufficient notice should be provided, orders should not be *ex-parte* and should be reasoned. The state must also establish a separate legal regime governing the rights and conditions of these detainees.

⁹³Does Amit Shah even understand what NRC will cost?', *National Herald*, <<https://www.nationalheraldindia.com/opinion/does-amit-shah-even-understand-what-nrc-will-cost>> accessed on June 1, 2020.

As a first step to reconciling the legal regime with the Constitution, the author suggests relying on the provisions of the erstwhile Illegal Migrants (Determination by Tribunal) Act (IMDT), 1983,⁹⁴ as a basis for amending the current law governing the NRC and making it compatible with fundamental rights.

The IMDT Act required a ‘prescribed authority’ to prove non-citizenship of an individual.⁹⁵ Thus, by shifting the burden of proof onto the state, rather than the accused person, the IMDT Act was more protective of immigrant interests. The procedure for referring a case to the Tribunal involved verification at multiple levels.⁹⁶ Only a serving or retired District Judge or Additional District Judge was eligible for being a tribunal member,⁹⁷ and an appellate tribunal also existed to ensure oversight.⁹⁸

Regarding the substantial provisions, appropriate legislation should be introduced re-examining the feasibility of the cut-off date and the sanctions being imposed. Communal identity should not be used as a criterion for citizenship. Such legislation should be consistent with fundamental rights and international law obligations of the state.

VI. CONCLUSION

In conclusion, the NRC legal regime as it exists, is violative of fundamental rights. Rights under Articles 14 and 21 of millions of persons have been violated by this exercise with the complicity of both the state and the judiciary. It is a matter of great concern that

⁹⁴*Sarbananda Sonowal v. Union of India* (2005) 5 SCC 665; *Assam Sanmilita Mahasangha v. Union of India* (2015) SCC 31.

⁹⁵IMDT Act 1983, s 12.

⁹⁶IMDT Rules 1984, Rule 4.

⁹⁷IMDT Act 1983, s.5(2).

⁹⁸IMDT Act 1983, s.15.

millions of people resident in this country for decades are facing disenfranchisement, detention and eventual deportation, in such an arbitrary and unjust manner, in clear violation of constitutional provisions and judicial precedents.

By a perusal of the relevant judicial opinions, it is apparent that the Supreme Court played a paradoxical role. On multiple occasions, it was the state pleading before the court for granting bail to detainees, extending deadlines, while it is the court which questioned the state for being lax, questioning the low number of detentions, ordered deportations. There can be no greater irony than innocents being deprived of their fundamental rights through a Supreme Court directed process itself. Yet, number of the issues identified by this paper still remain pending before the court in various petitions, with a new bench in place, the court still has the time to shed its earlier role as a 'Executive Court' and perform its duty to protect the vulnerable.

Finally, it is essential to keep in mind the impact of the National Register of Citizens in Assam has had on fundamental rights as highlighted in this paper, in light of the recent indications by the present government, that the exercise will be extended to the whole of India in the future. The ramifications such a step will have on the social fabric of the country and our civil rights will be significant. The manner of the Assam NRC is thus certainly not a model to follow, the underlying legal regime requires a significant overhaul, to conform to constitutional rights.

Keeping in mind the social and administrative costs of the Assam NRC, in a post-COVID economy, a wiser policy choice would be to invest these resources in healthcare and infrastructure, rather than in such an unproductive political gimmick, with an uncertain outcome. The state should instead adopt a more human attitude towards vulnerable immigrants and address the social friction created by their presence, rather than uproot these persons themselves. The state

should focus its efforts on integrating these migrants with the local community, while protecting the interests of the native populace.