

Doubtful Citizens: Irregularization and Precarious Citizenship in Contemporary India

M. Mohsin Alam Bhat, *Queen Mary University of London*

Forthcoming in *Statelessness in India* (Foster, Neo & Sperfeldt eds., Cambridge University Press, 2024)

Abstract

States have increasingly started framing and instrumentalising insidious legal mechanisms to threaten citizenship status of many persons among vulnerable national minorities. These practices have created widespread precariousness and caused severe attrition of citizenship. A prominent example is India's 'National Register of Citizens' (NRC) that in 2019 left out more than 1.9 million people. The NRC, in the words of the United Nations special rapporteur on minority issues Fernand de Varennes, could result in "the biggest exercise in statelessness since the second world war." Other processes in the country have already declared more than 120,000 persons as foreigners and disenfranchised more than 350,000 persons on the suspicion of being foreigners. This paper focuses on the Indian case with the aim of providing an account of the relationship between state-induced precarious citizenship and the rule of law. The Indian state has not formally revoked citizenship of these persons. Nevertheless, as this paper shows, it has not only created arduous legal processes that weaken citizenship security but also refused to apply normal constitutional due process norms to citizenship status. The paper draws from the critical citizenship studies tradition to argue that the nature of this state-created precarity is best understood as "irregular citizenship". Irregular citizenship is marked by ambivalence, uncertainty, and ambiguity of citizenship status. Irregular citizens do not have transitory or shifting legal identity but are in the condition of suspended animation. Legal practices of irregularization have a paradoxical relationship with law, because even when they are sought to be legally justified, they are constituted by non-application of ordinary legal norms. The paper shows that mass irregularization of citizenship in India has resulted from a historically evolving fusion of racialization of stigmatized minority groups, and exceptionalism led by heightened national security concerns. The Indian state has instrumentalised citizenship procedures to eventually dispossess citizens of the ordinary legal and material goods attached to Indian citizenship. It has also legitimized them in the language of the law, through subtle and insidious tactics that bracket them outside ordinary legal standards. This process has been supported by courts that have adopted delay and indecision to sustain practices of irregularization.

Introduction

In the last two decades, India has introduced several legal mechanisms of documentary citizenship that have alarming implications for the right to nationality. On 31 August 2019, a citizen enumeration exercise in India's eastern state of Assam excluded more than 1.9 million people.¹ The exercise, called the 'National Register of Citizens' (NRC), required the 33 million residents of Assam to submit documents to prove their Indian citizenship. Soon after its release, the United Nations High Commissioner for Refugees (UNHCR) Filippo Grandi called the NRC 'an enormous blow to global efforts to eradicate statelessness',² which was a sentiment soon echoed by numerous international civil society organisations.³ The NRC, according to the United Nations Special Rapporteur on Minority Issues, Fernand de Varennes, could result in 'the biggest exercise in statelessness since the second world war'.⁴ Under other administrative mechanisms, which include procedures for adjudicating citizenship status, more than 500,000 Indian residents have been classified as 'foreigners' or 'doubtful citizens' in Assam since 1985.⁵

These administrative mechanisms provide procedures to legally contest the state's questioning of citizenship status, including appeals in superior courts. Since most of the affected persons lack the material resources to approach the higher authorities, only a miniscule proportion have been able to exhaust all their legal remedies. Indian law is unclear about when, precisely, the affected persons would be formally categorised as foreign nationals. This has meant that the citizenship status of millions of Indian residents remains undecided in any legally clear and final form. Ironically, India has consistently reiterated this to refute the allegation — made frequently by international human rights organisations — that it is rendering people stateless.

While they may not have been formally rendered 'foreigners', the affected citizens are in a heightened condition of insecurity. The legal, material and emotional manifestations of this insecurity are well-documented. The legal system expects poor and unlettered citizens to procure official documents — not adequately maintained by the state as a norm — to prove

¹ 'UN High Commissioner for Refugees Expresses Alarm at Statelessness Risk in India's Assam' *UNHCR* (1 September 2019) <www.unhcr.org/uk/news/press/2019/9/5d6a24ba4/un-high-commissioner-refugees-expresses-alarm-statelessness-risk-indias.html> accessed 1 March 2022.

² *ibid.*

³ 'The *Biggest* Mass-disenfranchisement of the 21st Century' (Joint Statement, 5 September 2019) <<https://files.institutesi.org/cso-joint-statement-on-assam-nrc.pdf>> accessed 1 March 2022.

⁴ Rebecca Ratcliffe, "'A Nightmarish Mess': Millions in Assam Brace for Loss of Citizenship' *The Guardian* (30 August 2019) <www.theguardian.com/global-development/2019/aug/30/nightmarish-mess-millions-assam-brace-for-loss-of-citizenship-india> accessed 1 March 2022.

⁵ As this chapter describes in detail, the two prominent mechanisms besides the NRC are the Indian Election Commission classification of voters as 'doubtful' in late 1990s and the Foreigners Tribunals declaring persons as 'foreigners'. According to the available information, the Election Commission classified approximately 370,000 voters as 'doubtful' in 1997, and until April 2021, the Foreigners Tribunals had declared 143,000 persons as 'foreigners'. See Syeda Ambia Zahan, 'Assam: 22 Years On, RTI Finds Removes Doubts about 33 "D-voters"' *The Times of India* (Mumbai, 22 November 2019) <<https://timesofindia.indiatimes.com/city/guwahati/22-years-on-rti-finds-removes-doubts-about-33-d-voters/articleshow/72174241.cms>> accessed 1 March 2022; Kangan Kalita, 'Over 1.43 lakh People were Declared Foreigners in Assam' *The Times of India* (Mumbai, 9 February 2022) <<https://timesofindia.indiatimes.com/city/guwahati/22-years-on-rti-finds-removes-doubts-about-33-d-voters/articleshow/72174241.cms>> accessed 1 March 2022.

their citizenship.⁶ They are constantly in fear of being detained in prisons,⁷ pushing several persons to commit suicide.⁸ The persons classified as suspected foreigners — despite not formally being declared as non-citizens in a legally final manner — have lost their right to vote and access to welfare benefits.⁹ The fate of these citizens is thus in a state of profound precariousness.

Precarious citizenship in India resonates with developments globally. Scholars have shown how variegated, intersecting and complex legal procedures generate insecurity of status, especially among non-citizen migrants. Legal regimes demand that non-citizens navigate formal categories of migrant status — and non-status — and negotiate rules and procedures, often putting them in states of status liminality and uncertainty. In this state of ‘precarious citizenship’, as Noora Lori notes, persons are ‘unable to gain access to secure citizenship rights and instead inhabit *ad hoc* and temporary legal statuses for protracted periods’.¹⁰ Precarious citizenship forces them to occupy a spectrum of legal or quasi-legal statuses that, as she notes, ‘are neither stateless nor fully unauthorized’.¹¹

Focusing on the case of immigrants in Canada, for instance, Luin Goldring and Patricia Landolt describe the experience of precarious non-citizens as ‘chutes and ladders’, to capture the ‘trajectories and negotiations within and across legal status categories’.¹² ‘Migrant trajectories of precarious legal status’, they note, ‘are non-linear, often lengthy, and can involve moments of irregularization, regularization, and illegalization’.¹³ States often maintain such precarious conditions by adopting *ad hoc* measures because, as Lori notes, ‘they represent a strategic government response to avoid resolving larger dilemmas about citizenship, especially questions about the incorporation of minorities, refugees, or labour’.¹⁴ This could be the fate

⁶ Abdul Kalam Azad, M Mohsin Alam Bhat and Harsh Mander, ‘Citizenship and the Mass Production of Statelessness’ in *India Exclusion Report: 2019–2020* (Center for Equity Studies 2020) 189; *Designed to Exclude: How India’s Courts are Allowing Foreigners Tribunals to Render People Stateless in Assam* (Amnesty International India 2019) <https://www.amnesty.be/IMG/pdf/rapport_inde.pdf> accessed 1 March 2022; Harsh Mander and Navsharan Singh (eds), *This Land is Mine, I Am Not of this Land: CAA–NRC and the Manufacture of Statelessness* (Speaking Tiger 2021).

⁷ Salah Punathil, ‘Precarious Citizenship: Detection, Detention and “Deportability” in India’ (2022) 26(1) *Citizenship Studies* 55; Angana P Chatterji and others, *Breaking Worlds: Religion, Law and Citizenship in Majoritarian India — The Story of Assam* (Center for Race and Gender, University of California 2021) 30–40 <<https://escholarship.org/uc/item/6w56781n>> accessed 1 March 2022; Sadiq Naqvi, ‘Fearing Detention, Assam Woman Declared As Foreigner Goes Into Hiding’ *Outlook* (New Delhi, 22 November 2020) <www.outlookindia.com/website/story/india-news-fearing-detention-assam-woman-declared-as-foreigner-goes-into-hiding/347672> accessed 1 March 2022; Ratnadip Choudhury, ‘Left Out of Assam Citizens List, They View Detention Centres With Fear’ *NDTV* (New Delhi, 13 September 2019) <www.ndtv.com/india-news/nrc-left-out-of-assam-citizens-list-they-view-detention-centres-with-fear-2100599> accessed 1 March 2022.

⁸ See ‘NRC Suicides’ (*Citizens for Justice and Peace*, 13 March 2023) <<https://cjp.org.in/tag/nrc-suicides>> accessed 1 March 2022.

⁹ Silvia Masiero, ‘A New Layer of Exclusion? Assam, Aadhaar and the NRC’ (*London School of Economics and Political Science*, 12 September 2019) <<https://blogs.lse.ac.uk/southasia/2019/09/12/a-new-layer-of-exclusion-assam-aadhaar-and-the-nrc>> accessed 1 March 2022.

¹⁰ Noora A Lori, ‘Statelessness, “In-Between” Statuses, and Precarious Citizenship’ in Ayelet Shachar and others (eds), *Oxford Handbook of Citizenship* (OUP 2017) 744.

¹¹ *ibid* 745.

¹² Luin Goldring and Patricia Landolt, ‘The Conditionality of Legal Status and Rights: Conceptualizing Precarious Non-Citizenship in Canada’ in Luin Goldring and Patricia Landolt (eds), *Producing and Negotiating Non-citizenship: Precarious Legal Status in Canada* (University of Toronto Press 2013) 3, 4.

¹³ *ibid* 3.

¹⁴ Lori (n 10) 744.

of citizens, who — as in the case of Nubians in Kenya, Haitians in the Dominican Republic and Rohingyas in Myanmar — may not receive state recognition, and thus be rendered precarious. Arbitrary and overly demanding evidentiary standards and procedures have weakened the security of citizenship status, rendering numerous citizens precarious.¹⁵

This chapter, though, seeks to illuminate a different facet of precarious citizenship in India. This form of precariousness arises not so much from the formal procedures, which, being arbitrary or discriminatory, formally revoke or threaten to revoke citizenship status. Rather, this chapter focusses on precarious citizenship that is produced by the insidious exercise of state power, which makes citizenship status inoperable for vulnerable minority populations rather than formally revoking it.

The chapter draws from the critical citizenship studies tradition to characterize this form of precarity as ‘irregular citizenship’. Precarious citizens in India may formally continue to be citizens. But as citizens whose citizenship is being irregularized, they are unable to access material and legal goods attached to formal citizenship. This includes their inability, due to official practices, to obtain legal redress based on the normal application of legality. Irregular citizenship is thus neither a status of non-citizenship nor in-betweenness: rather, it is a condition. This precariousness is marked by ambivalence, uncertainty and ambiguity of citizenship status. It is not marked by transitory or shifting legal identity, but a state of suspended animation constituted by the non-application of ordinary legal norms.

This chapter argues that the contemporary mass irregularization of Indian citizens has resulted from the historically evolving processes of racialization and exceptionalism. The matter of states irregularizing citizenship, as in the case of India, is not only a story of heightened and overly arduous legal standards that have weakened citizenship security. It is more profoundly about states refusing to apply constitutional due process norms to the citizenship status of stigmatised minorities. State authorities in India — both the government and the courts — have framed citizenship policies in the language of legality. But they have consistently and decisively placed them in the space outside the ordinary process of law.

The first section introduces the history and contours of the Indian citizenship regime. There has been a growing paranoia, particularly since the 1980s, that alleged illegal immigration from Bangladesh, first in Assam and then across the country, was altering religious and ethnic demography. This paranoia in Assam resulted from the fear among socially dominant groups of loss of their political dominance. Outside Assam, right-wing political parties politicised this issue as a religious threat posed by Muslims. I argue that these political developments triggered a process of racialization of Bengali-origin minorities in Assam, and more specifically Bengali-origin Muslims or *Miyas*. By the early 2000s, this racialization came to be fused with the discourse of national security, which legitimized exceptional procedures that increasingly subjected the citizenship of a vast number of Indians to extraordinary legal procedures. The Indian state has instrumentalized these procedures to eventually dispossess citizens of the ordinary legal and material goods attached to Indian citizenship.

The subsequent sections give two examples of India’s institutions, in the context of racialization and exceptionalism, irregularizing citizens. These sections show how the courts

¹⁵ See generally Benjamin N Lawrence and Jacqueline Stevens (eds), *Citizenship in Question: Evidentiary Birthright and Statelessness* (Duke UP 2017).

have legitimized these state actions in the language of the law, through subtle and insidious tactics that bracket them outside ordinary legal standards. The courts, through tactics such as the non-application of legal norms and judicial evasion, have allowed irregularization to persist, undermining the stability and security of citizenship status.

The penultimate section shares two vignettes to illustrate the legal and material costs of irregularization. These vignettes illuminate the central feature of the condition of precariousness: a profound sense of dislocation and confusion that precarious citizens feel because of the complexities of the legal process and Kafkaesque bureaucracies. The last section shows that the harm of these processes is not the formal loss of citizenship status, but loss of fundamental citizenship goods including the stability and security of citizenship status. It is these implications of India's citizenship policies that I identify as citizenship irregularization.

Making 'Stateless Citizens'

Rising Racialization

India's citizenship law was born during an unprecedented refugee crisis. The division of the British colonial territory on the lines of religion in 1947 — India's partition — cost millions of Hindu, Muslim and Sikh lives. India's policymakers had to reckon with the migration of communities displaced by this ferocious sectarian violence. As members of India's Muslim minority were fleeing to Pakistan, millions of Hindus and Sikhs were also entering India to escape sectarian violence.

The Indian Constitution, and later parliamentary legislation on citizenship in 1955, adopted a seemingly inclusive formula by incorporating *jus soli* as the basis of citizenship. Persons born in India irrespective of their parentage were Indian citizens.¹⁶ The policymakers also incorporated citizenship for refugees who were entering into the country from its western (Pakistan) and eastern (erstwhile East Pakistan or present Bangladesh) borders.¹⁷

But the citizenship regime also pulled in a different direction. The partition cast a long shadow on how the citizenship regime was implemented on the ground. Muslims, who wished to return after being forced to flee to Pakistan in the wake of the partition violence, found it next to impossible to establish their legal qualifications to remain Indian citizens.¹⁸ Laws enabled the state to exercise extraordinary powers, in the name of security, to displace populations and take over their properties.¹⁹ The scholars of partition and citizenship in India

¹⁶ See Constitution of India, art 5, which provides that at the commencement of the Indian Constitution in 1950, persons who has their domicile in the territory of India and, among other grounds, were born in the territory of India, shall be citizens of India). See also Citizenship Act, 1955, Act No 57 of 1955, s 3. The Indian Citizenship Act originally providing in 1955 that a person born in India shall be a 'citizen of India by birth', but subsequently amended in 1986 to provide that a person shall be a citizen of India if 'both of his parents are citizens of India' or 'one of whose parents is a citizen of India and the other is not an illegal migrant at the time of his birth'.

¹⁷ See Constitution of India, art 6, providing procedures for deeming persons migrating from Pakistan — which in 1950 included the present Bangladesh — as Indian citizens.

¹⁸ See Vazira Fazila-Yacoobali Zamindar, *The Long Partition and the Making of Modern South Asia: Refugees, Boundaries, Histories* (Columbia UP 2007).

¹⁹ Niraja Gopal Jayal, *Citizenship and its Discontents* (Harvard University Press 2013) 60–75. See also Manav Kapur, 'India's Citizenship (Amendment) Act' (2021) 3(1) *Statelessness & Citizenship Rev* 208, 224–27, reviewing the policy debates on regulating Muslim immigration in Assam after partition, and noting that

have noted that despite being framed in a secular and inclusive manner, the implementation of citizenship law was always marked by religious bias.²⁰ This was reflected in the historically evolving binary between migrants and refugees. In its implementation, India's legal system constructed Hindu migrants as refugees, and hence deserving of citizenship status. In contrast, official practices constructed Muslims as the other — as illegal migrants who were perennially the subject of suspicion under the citizenship regime.

These dynamics were aggravated by the refugee crisis in the wake of the 1971 Bangladesh Liberation War. The violence perpetrated by the Pakistani military pushed both the Bengali Hindu minority and Bengali Muslims into India's eastern borders. The influx of immigrants started raising serious concerns among the existing populations in Indian states. Chief among these were the Assamese-speaking communities in the state of Assam, which saw Bengali immigration as a threat to their demographic and linguistic dominance in the state.

What made this more complicated was the fact that Assam's territory had been home to numerous Bengali-origin and Bengali-speaking Hindus and Muslims.²¹ These communities today constitute up to 30 percent of Assam's population.²² Moreover, no authentic data on Bengali immigration, either during or after the 1971 war is available. Both India and Bangladesh have officially maintained that all refugees who had migrated after the creation of Bangladesh on 23 March 1971 have returned to Bangladesh. Despite this official position, demographic concerns on India's eastern front — with intermittent and often unsubstantiated claims of continuing immigration from Bangladesh — have maintained severe political strain.

These factors heightened the anxiety of immigration, leading to severe public disorder towards the end of the 1970s. In response to the protests, the Indian government entered into a political understanding with the Assamese groups in 1985. Under this understanding — which was later incorporated as section 6A of the Citizenship Act, 1955 (Indian Citizenship Act) — the immigrants who entered India before the creation of Bangladesh (24 March 1971) would be naturalised. The government agreed to identify and deport those who had entered the country after this date.

On the face of it, the provision was meant to facilitate the amelioration of the refugee crisis. The process of naturalisation under section 6A, in fact, was faster than the process outside Assam. But the underbelly of these legal changes, soon to be exposed, was the perceived threat of the immigrant. Through two amendments in 1986 and 2003, Parliament watered down the *jus soli* principle. The 1986 amendment limited citizenship by birth to persons born to at least one parent who is an Indian citizen.²³ The 2003 amendment diminished *jus soli* further.²⁴ As

anxiety about the religious identity of migrants was central to state policies even if not mentioned explicitly in them.

²⁰ See Anupama Roy, 'Between Encompassment and Closure: The "Migrant" and the Citizen in India' (2008) 42(2) *Contributions to Indian Sociology* 219; Jayal (n 19) 63–68, arguing that religious identity of immigrants has historically been central in India's citizenship policy, despite the appearance of religious inclusion.

²¹ See generally Sanjib Barua, *India Against Itself: Assam and the Politics of Nationality* (University of Pennsylvania Press 1999).

²² While there are no official numbers recording this, some scholars have analysed census statistics to offer some approximations. See Navine Murshid, 'Assam and the Foreigner Within: Illegal Bangladeshis or Bengali Muslims?' (2016) 56(3) *Asian Survey* 581–604.

²³ Citizenship (Amendment) Act, 1986, Act No 51 of 1986.

²⁴ Citizenship (Amendment) Act, 2003, Act No 6 of 2004.

the position currently stands, persons born in India after the amendment would be disqualified from citizenship by birth if one of their parents is deemed to be an ‘illegal migrant’. These amendments were applicable not only in Assam, but to the whole country.

Thus, India drastically limited birthright citizenship that was a principle endorsed by India’s constitutional framers and the first generation of its policy makers. These developments introduced two barriers to a secure citizenship status. First, they made citizenship status contingent on the determination of the migration status of the parents. This determination was not to be conducted under citizenship law, but the Foreigners Act, 1946.²⁵ A piece of colonial legislation, the Foreigners Act gave broad and unhindered powers to the government in relation to ‘foreigners’ in its territory irrespective of their immigrant status. This included the power to detain, deport or restrict movement. The legislation placed the burden of proof for establishing citizenship status on the person rather than the state. In 1968, the Indian government issued the Foreigners (Tribunals) Order, 1964,²⁶ which instituted executive-style bodies — the Foreigners Tribunals (or tribunals) — to give their ‘opinions’ on the citizenship status of suspected foreigners. The Order provided complete discretion to tribunal members to determine their own procedures and norms of evidence. The incorporation of the ‘illegal migrant’ limitations in the citizenship regime, thus, exposed the security of citizenship status to this broad and unfettered executive process.

Second, these legislative changes entrenched a profound anxiety towards foreigners as a threat, and consequently, the perennial insecurity of citizenship status in the law. One manifestation of this was the 2003 Citizenship (Registration of Citizens and Issue of Nationality Identity Cards) Rules, 2003,²⁷ through which the Indian government mandated the creation of the ‘National Register of Indian Citizens’ to enumerate all Indian citizens based on a bureaucratic assessment of documentary proof. This mandate — implemented only in Assam and not yet at the national level — was evidently based on the fear that numerous non-citizens were masquerading as Indian citizens. Documentation, despite not being maintained or guaranteed by the state in any meaningful way, was made central to establishing citizenship status. The spectre of illegality now threatens the status of minorities, immigrants, and even the children of immigrants born in India.

The evolving legal politics of Indian citizenship, thus, has increasingly incorporated exclusive tests for citizenship status against the backdrop of religious conflict. My account also shows that Indian law has not merely evolved from *jus soli* to *jus sanguinis*. It has disturbingly incorporated increasingly racialized understandings of the migrant. By racialization, I refer to ‘the process through which groups *come to be understood* as major biological entities and human lineages, formed due to reproductive isolation, in which membership is transmitted through biological descent’.²⁸ In other words, racialization refers to how various social, political, and cultural processes *construct* groups as biologically separate. This process may not always be in relation to the groups that states recognize within the legal

²⁵ Foreigners Act, 1946, Act No 31 of 1946.

²⁶ Foreigners (Tribunals) Order, 1964, GSR No 1405 of 1964.

²⁷ Citizenship (Registration of Citizens and Issue of Nationality Identity Cards) Rules, 2003, GSR No 937(E).

²⁸ Adam Hochman, ‘Racialization: A Defense of the Concept’ (2019) 42(8) *Ethnic and Racial Studies* 1245, 1246 (emphasis added).

category of ‘race’.²⁹ Scholars have noted the deep connection between racialization and immigration, where migrants are ‘perceived as different and undeserving’.³⁰ Racialization processes may affect intersectional groups with certain class, national or religious characteristics, by constructing them as separate.³¹ For instance under the 2003 amendment, Indian-born children who may claim even part of their lineage from those legally deemed as ‘illegal migrants’ are disqualified from citizenship. The amendment excludes them on the ground of sharing any biological connection with the deemed outsider. While the amendment did not explicitly incorporate ethnic distinctions, the policy’s background and implementation have profound racialized connotations.

What was implicit has now increasingly become explicit. After coming to power in 2014, the right-wing Bhartiya Janata Party (BJP) government has introduced a slew of immigration policies that privilege Hindu immigrants from Pakistan and Afghanistan.³² Under the Citizenship (Amendment Act), 2019,³³ Parliament introduced an unprecedented religious test for Indian citizenship. It provided a faster route to Indian citizenship for non-Muslim minorities from Pakistan, Bangladesh and Afghanistan, on the ground that they suffered from ‘religious persecution’.³⁴ Religiously persecuted Muslim minorities — of whom there are many in India’s neighbourhood — do not get the same treatment. The law violates several non-arbitrariness and anti-discrimination norms under India’s Constitution and under international law.³⁵ The Indian Supreme Court is yet to decide the constitutionality of the legislation.

Securitization of Citizenship

These processes of racialization have become fused with the discourse of national security. And, as is the case in relation to racialization, the primary geography for this has been the state of Assam.

In the 1990s, the anti-immigrant politics in Assam underwent two crucial shifts that eventually transformed into sustained policies of irregularization. First, the anti-immigration discourse was slowly reframed not only in terms of language and ethnicity, but also religion. Various political actors, especially those aligned with the national right-wing parties, asserted that it was the religious identity of immigrants and the impact on the state’s religious

²⁹ Herbert J Gans, ‘Racialization and Racialization Research’ (2017) 40(3) *Ethnic and Racial Studies* 341, 351.
³⁰ *ibid* 342.

³¹ As in the case of Muslim immigrants to the United States in the aftermath of September 11, the religious framing of immigrants in the refugee–migrant dichotomy is, in the words of Muneer Ahmad, ‘neither religion- nor conduct-based’. Rather, it has ‘racial content and is preoccupied with phenotype rather than faith or action. As with previous regimes of profiling, this one results in gross over-breadth because of its reliance upon appearance; the regime’s ascription of identity characteristics to its subjects dictates the application of the profile’. Muneer I Ahmad, ‘A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion’ (2004) 92(5) *CLR* 1259, 1278.

³² See M Mohsin Alam Bhat and Aashish Yadav, ‘On the Verge: Revocation and Denial of Citizenship in India’ in Émilien Fargues and Iseult Honohan (eds), *Revocation of Citizenship: The New Policies of Conditional Membership* (GLOBALCIT 2021) 25, 31–32.

³³ Citizenship (Amendment) Act, 2019, Act No 47 of 2019.

³⁴ Citizenship (Amendment) Bill, 2019, Bill No 370 of 2019, Statement of Objects and Reasons, 4 [2].

³⁵ M Mohsin Alam Bhat, ‘The Constitutional Case against the Citizenship Amendment Bill’ (2019) 45(3) *Economic and Political Weekly* 7; Michelle Foster and Adil Hasan Khan, ‘Citizenship (Amendment) Act 2019 and International Law’ (Legal Brief, 1 April 2021) <https://law.unimelb.edu.au/_data/assets/pdf_file/0005/3769484/Citizenship-Amendment-Act-and-International-Law.pdf> accessed 1 March 2022.

composition that was the central problem of immigration. This form of racialization — fusing ethnicity and religion — accompanied an explicit reference to national security.

Second, there was a discrete shift in terms of the site of anti-immigration politics. From political discourse that demanded heightened control of border immigration, the site increasingly shifted to citizenship law.

One of the early indications of both these dynamics was the report of SK Sinha, the Governor of Assam.³⁶ Governors are centrally appointed nominal heads of states and are expected to serve as the bridge between the central and state governments. In 1998, Sinha wrote to the central government sharing his ‘views’ in a report, based on undisclosed conversations with civil society actors, security institutions and communities in the state. Most of Governor Sinha’s claims were anecdotal and were based on erroneous claims of data.³⁷ Perhaps this report was a marginal event at the time, but in hindsight, the report’s framing and recommendations were both significant and consequential.

The first important move in the report was the reframing of the immigration controversy from a regional concern to a concern of national defence. Sinha advocated that immigration was not merely threatening Assam’s local communities. It was threatening India’s geopolitical wellbeing. This was because, he insisted, immigration was part of the ‘long cherished design’ of creating a ‘greater Bangladesh’ by undermining India’s territorial integrity.³⁸ From this view, immigration was a ‘continuing silent demographic invasion’ of the country.³⁹ Thus, Sinha argued, ‘illegal migration’ from Bangladesh was ‘altering the demographic complexion’, and posed ‘a grave threat both to the identity of the Assamese people and to our national security’.⁴⁰ This was a distinctively securitized interpretation of the immigration controversy.

Second, Governor Sinha advocated interpreting this ‘demographic invasion’ not in terms of linguistic and ethnic implications of immigration, but in terms of religious identity. Relying on undisclosed sources, he asserted that immigration was turning the border districts of Assam ‘into a Muslim majority region’.⁴¹ ‘The rapid growth of international Islamic fundamentalism’, he argued, would ‘provide the driving force’ for merging these regions into Bangladesh.⁴²

Governor Sinha recommended a series of exceptional legal measures. He suggested the repeal of the Illegal Migrants (Determination by Tribunals) Act, 1983 (IMDT).⁴³ Parliament had enacted the IMDT to substitute the Foreigners Tribunals in Assam. The tribunals under the IMDT Act were based on a more credible mechanism of the judicial assessment of citizenship status of individuals. It provided safeguards against targeting and harassment of genuine citizens and laid down judicial qualifications for tribunal members. Sinha claimed that these

³⁶ SK Sinha, *Report on Illegal Migration into Assam* (Submission to the President of India, 8 November 1998).

³⁷ See eg Debarshi Das and Prasenjit Bose, ‘Assam NRC: Govt Clueless About How Many Illegal Immigrants Actually Live in India, RTI Shows’ *Huffpost* (New York, 31 January 2019) <www.huffpost.com/archive/in/entry/assam-nrc-govt-clueless-on-how-many-illegal-immigrants-actually-live-in-india-rti-shows_a_23591448> accessed 1 March 2022. Das and Bose argue that the Indian government does not have accurate data estimating the scale of foreigners influx in Assam.

³⁸ *Report on Illegal Migration into Assam* (n 36) 3.

³⁹ *ibid* 1.

⁴⁰ *ibid* .

⁴¹ *ibid* 10.

⁴² *ibid*.

⁴³ Illegal Migrants (Determination by Tribunals) Act, 1983, Act No 39 of 1983.

safeguards obstructed local officials and the police from surveilling, identifying and detaining foreigners.

In his report, Governor Sinha noted that it may not be possible to deport all irregular immigrants. But he expressed that short of that, after identifying immigrants, the government must deny them voting rights, the right to acquire property, and the right of their children to be eligible for Indian citizenship. In a remarkable sentence, Sinha recommended that foreigners ‘will not be deported but will be made Stateless citizens’.⁴⁴

In 1998, Sinha’s configuration of the immigration question in Assam along racialized and exceptionalist lines remained an outlier. Ironically, it was the Supreme Court in its 2005 judgment of *Sarbananda Sonowal v Union of India (Sonowal)* that endorsed his views and legitimized it in the language of the rule of law, and finally shaped the country’s citizenship policies in racialized and exceptional terms.⁴⁵

In answering a constitutional challenge against the IMDT Act, the Supreme Court in the *Sonowal* case endorsed the contents and conclusions of Governor Sinha’s report. The Court noted that Bangladeshi immigration posed ‘a threat to the integrity and security of north-eastern region’, by reducing ‘the local people of Assam ... to a status of minority in certain districts’.⁴⁶ The judgment was writ large with anxieties not only of the ‘unabated influx’ of Bangladeshi nationals, but also of Islamic fundamentalism and Muslim terrorists.⁴⁷

The threat of immigration, according to the Court, was a form of international ‘aggression’ and required exceptional countervailing measures.⁴⁸ But the IMDT Act, by providing far too many safeguards, did not meet these needs. Parliament had enacted the legislation to replace the Foreigners Act that was far more permissive towards the Executive. In doing so, the Court held that Parliament had failed in its duty to prevent aggression and perform its constitutional obligation to protect states. The Indian state had, the Court ruled, violated its constitutional obligation to ‘prevent any trespass and make the life of the citizens safe and secure’.⁴⁹

The *Sonowal* judgment fused the increasing racialization of citizenship on the axes of ethnicity and religion, with the discourse of national security. This fusion produced the logic of exceptionalism based on a paradoxical relationship with the rule of law. The best reflection of this was how the Court dealt with the application of due process norms to the adjudication of citizenship status. In a remarkable moment in the judgment, the Court held that the ordinary constitutional standard of just, fair and reasonable procedure had ‘no application here’ since ‘in the matter of identification of a foreigner and his deportation, he is not being deprived of his life or personal liberty’.⁵⁰ The determination of citizenship status was to operate in the twilight zone of legality.

The Supreme Court offered the legitimising language of the law to the state’s creation of a vast legal apparatus of citizenship deprivation that has since operated at the brink of due process. Through complex and insidious legal processes, this apparatus — the tribunals and border police at the helm — has targeted thousands of Assam’s residents.

⁴⁴ *ibid* 19.

⁴⁵ *Sarbananda Sonowal v Union of India* [2005] 5 SCC 665 (*Sonowal*).

⁴⁶ *ibid* [70].

⁴⁷ *ibid* [62].

⁴⁸ *ibid* [51]–[63].

⁴⁹ *ibid* [51].

⁵⁰ *ibid* [73].

Increasing evidence has shown that the police rarely if ever conduct meaningful investigations before issuing notices to ‘suspected foreigners’, which require their presence in the tribunals.⁵¹ Until October 2019, Assam’s tribunals had declared 129,009 persons as foreigners.⁵² At least 63,959 of these cases were decided *ex parte* (in the absence of the litigants),⁵³ presumably because many litigants may not have received notices. The tribunals following the *Sonowal* case place the burden of proving citizenship on individuals, who are required to produce documentary evidence. Being composed of government-appointed members with no security of tenure, these tribunals enjoy no institutional independence and are often staffed with inexperienced lawyers.⁵⁴ They have relied on minor errors, such as inconsistencies in dates and spellings, to declare persons foreigners.⁵⁵ Defendants, most of whom are extremely poor and unlettered, are often under-resourced to engage lawyers, have to travel vast distances to appear regularly for the proceedings, and pay for the travel of witnesses to corroborate their claims. This has had a disproportionate and discriminatory impact on vulnerable groups.⁵⁶ The complete absence of institutional standards for the police to issue notices and the erratic nature of tribunal adjudication have cast the shadow of irregularization on practically all Bengali-origin and *miya* citizens of Assam.

Doubtful Citizen

The discourses of exceptionalism and racialization continue to shape how the language of the law is instrumentalised to obscure the attrition of citizenship status. This is illustrated by the way the courts have dealt with the disenfranchisement of suspected foreigners.

At the centre of the immigration anxiety was the loss of demographic majority and hence political power. Consequently, elections were always at the epicentre of the immigration anxiety. One of the most violent incidents at the height of the Assam movement was in 1983, when insurgents massacred thousands of Bengali-origin Muslims in a village in Nellie in response to their participation in elections.⁵⁷ Electoral anxieties continue to this day, where various political parties, especially the right-wing BJP, continuously assert the loss of political power to Muslims.

⁵¹ See Ipsita Chakravarty, ‘Declaring Foreigners: How Assam’s Border Police and Tribunals Form a Secretive System of Justice’ *Scroll* (19 August 2018) <<https://scroll.in/article/890134/declaring-foreigners-how-assams-border-police-and-tribunals-form-a-secretive-system-of-justice>> accessed 1 March 2022.

⁵² Parliament of India, Lok Sabha No 17, Session II, ‘Unstarred Question No 3558: Declaration by Foreigners Tribunals’ (Answered on 10 December 2019 by Nityanand Rai, Minister of State, Ministry of Home Affairs) <<http://164.100.47.194/Loksabha/Questions/QResult15.aspx?qref=10079&lsno=17>> accessed 1 March 2022.

⁵³ Parliament of India, Lok Sabha No 17, Session I, ‘Unstarred Question No 1724: Detention Centres’ (Answered on 2 July 2019 by G Kishan Reddy, Minister of State, Ministry of Home Affairs) <<http://loksabhaph.nic.in/Questions/QResult15.aspx?qref=1909&lsno=17>> accessed 1 March 2022.

⁵⁴ Talha Abdul Rahman, ‘Identifying the ‘Outsider’: An Assessment of Foreigner Tribunals in the Indian State of Assam’ (2020) 2(1) *Statelessness & Citizenship Rev* 112.

⁵⁵ See *Designed to Exclude* (n 4).

⁵⁶ See Chetna Sharma, ‘Hijras of Assam: Undocumented “Citizens” in the National Register of Citizens’ (2022) 30(2) *Contemporary South Asia* 181; Trisha Sabhapandit and Padmini Baruah ‘Untrustworthy and Unbelievable: Women and the Quest for Citizenship in Assam’ (2021) 3(1) *Statelessness & Citizenship Rev* 236.

⁵⁷ Makiko Kimura, *The Nellie Massacre of 1983: Agency of Rioters* (SAGE Publications India 2013).

The most insidious expression of this anxiety was when India's Election Commission marked more than 370,000 voters as 'D' (or 'doubtful') in 1997 and 1998.⁵⁸ The Election Commission has a constitutionally prescribed responsibility of preparing voter lists of Indian citizens. While this responsibility may involve the verification of citizenship status, the Commission in practice does not adjudicate but relies only on easily accessible information, like the residential status and basic documents, for incorporating the voters. Supreme Court precedent lays down that before removing any voter, the Election Commission must conduct a fair and individualized inquiry that includes a reasonable opportunity to be heard.⁵⁹ Despite these norms and conventions, the Commission disenfranchised thousands of voters without any legal process or publicly accessible evidence.⁶⁰ The 'D-voters' have now lost their right to participate in elections. They are expected to prove their Indian citizenship in the tribunals, without which they are exposed to being imprisoned for being unauthorized aliens.

The Commission's disenfranchisement of Indian citizens is the institutional manifestation of irregular citizenship. Its justification has always been both racialized and on the grounds of exceptionalism. The courts have consistently refused to subject the Election Commission's decision to any established legal standard.⁶¹ In the 2002 case of *HRA Choudhury v Election Commission of India (Choudhury)*,⁶² the petitioners challenged the power of the Commission to mark voters as 'D'. The Assam High Court followed the Supreme Court precedent to hold that the Election Commission was bound to give a reasonable hearing to all affected persons. But the High Court upheld the Commission's unprecedented power to *en masse* classify voters as suspected foreigners based on the exceptionalist logic most visible in the *Sonowal* case. The High Court held that the Election Commission had this evidently extraordinary power of enormous political consequence because of 'the peculiar situation relating to influx and presence of a large number of foreigners in Assam'.⁶³

The legal discourse of doubt is marked by a profound paradox. Formally, the High Court in the *Choudhury* case subjected citizenship status to ordinary administrative mechanisms, constituted by the established legal standards of bureaucratic discretion. This normalcy worked as a legitimizing tool for a dramatic exercise of state power that disenfranchised thousands of Indian citizens. It framed state action to be, as the High Court put it, 'in consonance with the rule of law'.⁶⁴ But simultaneously, normal legality has unravelled under the pressure of exceptionalism.

Since the Election Commission's decision, thousands continue to be marked as 'doubtful' and hence unable to participate in elections. In most cases, neither the Commission nor other state institutions have conducted further investigations. Increasing evidence suggests that the Commission's officials maintained no record whatsoever of any inquiry before

⁵⁸ Syeda Ambia Zahan, 'Assam: 22 Years On, RTI Finds Removes Doubts about 33 "D-voters"' *The Times of India* (Mumbai, 22 November 2019) <<https://timesofindia.indiatimes.com/city/guwahati/22-years-on-rti-finds-removes-doubts-about-33-d-voters/articleshow/72174241.cms>> accessed 1 March 2022.

⁵⁹ *Lal Babu Hussein v Electoral Registration Officer* [1995] 8 SCC 100.

⁶⁰ See Nazimuddin Siddique, 'Discourse of Doubt' (2019) 54(10) *Economic and Political Weekly* 25.

⁶¹ This section is drawn from the author's critique of the Assam High Court's jurisprudence on 'D-voters'. See M Mohsin Alam Bhat, 'Citizenships Rule of Exception' *The Leaflet* (Mumbai, 26 January 2021) <<https://theleaflet.in/citizenships-rule-of-exception>> accessed 15 March 2022.

⁶² *HRA Choudhury v Election Commission of India* (2002) 1 GLT 1 (*Choudhury*).

⁶³ *ibid.*

⁶⁴ *ibid.*

disenfranchising voters.⁶⁵ In the aftermath of the *Choudhury* case, several petitioners have approached the High Court and argued that none of the procedures mandated by the judgment were actually carried out. Most recently, a set of petitioners have approached the Supreme Court, armed with the responses to their right to information applications, indicating that the Commission had not conducted any hearings or inquiries, nor collected or maintained any information or reasons regarding marking voters ‘D’.⁶⁶

The response of the courts has not been to enforce standards of legality, but to perform exceptionalism through the refusal to apply legal norms. For instance, in February 2019, the High Court while deciding one such petition skirted the issue altogether.⁶⁷ The petitioners argued that the Commission must produce the grounds and investigations that led it to mark them as ‘D’. But rather than asking the election officials to justify their actions — something that should have been expected under India’s administrative law — the High Court ordered the petitioners’ cases to be heard by the Foreigners Tribunal.

This has now become a norm. Take a recent matter in January 2021,⁶⁸ where the petitioner in a case alleged that the Election Commission had not conducted any semblance of inquiry before taking away his right to vote. ‘Whether a person is a ‘D’ voter or not’, the High Court noted, ‘is a matter of factual determination, and the appropriate forum to do the same is the concerned Foreigners’ Tribunal’.⁶⁹ The High Court held that it did not have the ‘competence’ to decide factual questions under its writ powers and directed the police to refer the matter to the tribunals. However, contrary to the High Court’s framing of the matter, the petitioner’s argument did not directly involve the factual determination of his citizenship status. It involved the administrative legal question of whether a government agency — India’s Election Commission — had acted under its legal authority by following due process. In framing the case as merely ‘factual’, the Court failed to meet its constitutional obligation to enforce the legal boundaries of legitimate state action.

Persons marked ‘D’ are now stuck in a peculiar conundrum. The moment they approach the courts to enforce judicial standards, their cases are referred to the tribunals — the institutions that have increasingly become notorious for arbitrarily declaring people foreigners. The *Choudhury* case proclaimed the rule of law. The tactics of non-application have maintained the field of exception.

Citizens in Suspension

Thus far I have shown how the legal apparatus of citizenship in India has fused racialization and exceptionalism. This occurred most decisively in the Indian Supreme Court’s *Sonowal* judgment. The *Sonowal* case reflected a paradoxical relationship of India’s jurisprudence on

⁶⁵ Zahan (n 58).

⁶⁶ Abraham Thomas, ‘SC Seeks Centre, EC Response on Listing 26 Assam Women in Doubtful Voters List’ *Hindustan Times* (New Delhi, 4 March 2021) <www.hindustantimes.com/india-news/sc-seeks-centre-ec-response-on-listing-26-assam-women-in-doubtful-voters-list-101614837635342.html> accessed 1 March 2022.

⁶⁷ See *Sayam Uddin v Union of India* (2019) 5 GLR 479; *Sayam Uddin v Union of India*, WA No 170 of 2019 (29 July 2019) (Gauhati High Court).

⁶⁸ *Samsul Haque v Union of India*, WP(C) No 5265 of 2020 (11 January 2021) (Gauhati High Court) <<https://indiankanoon.org/doc/104841051>> accessed 1 March 2022.

⁶⁹ *ibid*.

citizenship with the rule of law. Through the logic of exceptionalism, the Supreme Court bracketed citizenship processes out of the ordinary legal norms.

Subsequent judicial developments have further engrained these features through various tactics. One such tactic that the previous section highlighted has been that of non-application of norms: the courts, following racialized and exceptional logic, have left the exercise of bureaucratic discretion ungoverned by the rule of law. This section highlights the second tactic, namely, that of judicial evasion.

The tactic of evasion is most visible in how the Supreme Court initiated and supervised the update of Assam's NRC. The NRC was a subterranean demand in Assam for decades. In 1951, the government of Assam prepared the original NRC drawn from the census data. The 1951 NRC was widely seen to be incomplete and inaccurate. The proposal to update the NRC — as a strategy of resolving Assam's immigration controversy — started to gain ground particularly during the 1990s. Governor Sinha's report recommended updating the NRC, and the 2003 Citizenship Rules endorsed the proposal not just for the state but also for the whole country.

Despite its legal incorporation, the central government remained reluctant to implement the policy. The NRC update was expected to be administratively burdensome. When the policy was eventually implemented from 2013 to 2019, it cost more than 150 million US dollars.⁷⁰ Another reason for the reluctance may have been how demanding the update was bound to be for ordinary citizens. It would have required the 33 million residents of Assam to provide evidence of citizenship, mostly in documentary form. When it was finally updated, Assam's NRC ended up excluding 1.9 million residents of the state.

Between 2009 and 2013, after a series of violent anti-immigrant incidents in Assam, several petitioners approached the Supreme Court challenging section 6A of the Citizenship Act. The petitioners argued that the provision was unfair and discriminatory towards Assam's citizens by providing a wider route to naturalization for alien immigrants in the state. They also demanded that the Court order the government to take more proactive steps to address the immigration question in the state. One of the petitioners asked the Court to direct the government to update the NRC in the state.

In an unprecedented order in December 2014,⁷¹ a two-judge bench of the Court headed by Chief Justice Gogoi and Justice Nariman, initiated the update. While the Indian Supreme Court has been known to take activist decisions,⁷² its NRC order was unusual even on these terms. Rather than merely directing the government, the Court assumed the supervision of the NRC update, including directly instructing the NRC administration, approving the methodology and technologies, and mandating the update schedule.

The Supreme Court's supervision led to procedurally pathological consequences. On several occasions, Justice Gogoi asked the NRC administrator to share crucial details of the project

⁷⁰ Amit Shrivastava, 'An All-India National Register of Citizens will be an Economic Disaster' *The Wire* (New Delhi, 9 December 2019) <<https://thewire.in/economy/all-india-nrc-costs>> accessed 11 September 2023.

⁷¹ *Assam Sanmilita Mahasangha v Union of India* [2015] 3 SCC 1 (NRC Order).

⁷² See generally Satyaranjan P Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (OUP 2002). See also Manoj Mate, *The Rise of Judicial Governance in the Supreme Court of India* (2015) 33(1) BU Int'l LJ 169. Mate gives an account of how the Indian Supreme Court became arguably the most powerful court among democratic polities.

under seal.⁷³ The Court presumably sought to insulate the update from political influence, but in the process introduced opacity and unaccountability. The bureaucratic process of the NRC update also suffered from many well-documented design and implementation flaws.⁷⁴ The update's unreasonably compressed schedule placed a heavy burden on the state's residents, especially the most marginalized among them. Many requirements were altered mid-way, resulting in confusion and potentially several unjustified exclusions. One of the most discriminatory norms was the incorporation of the category of 'original inhabitants' or OIs who were meant to be automatically included in the NRC. The authorities never formally defined who qualified as OIs, and increasing evidence has shown that Bengali-origin citizens, especially *Miyas* were excluded in practice from this category *en masse*.⁷⁵ The NRC authorities also decided to exclude 'D-voters' and persons declared foreigners by tribunals.

The most profound flaw was treating documentary proof as necessary for citizenship status. Several applicants, especially those who were socially marginalized, found it next to impossible to procure documents.⁷⁶ Women were less likely than men to be literate or with access to property rights, and hence more likely to be without property deeds or school certificates. Sexual minorities argued that they were often estranged from their families, and hence had lost access to their documents. Transgender persons were especially vulnerable because of having changed their gender or sex recorded at birth.

The Supreme Court in its NRC order reproduced and endorsed the racialized and exceptionalist logic, reminiscent of the *Sonowal* judgment, as the basis of its extraordinary executive action. The two-judge bench accepted that the petitioners had a prima facie case against the naturalization of immigrants under section 6A of the Indian Citizenship Act. The bench noted that naturalization under the provision could amount to a violation of the 'sovereignty and integrity of India' and the right to life and culture of 'the Assamese people as a whole'.⁷⁷ Consequently, the judges held that their petition deserved a hearing on merits by a larger bench of five judges. Such larger benches are usually reserved for deciding important constitutional cases.

Yet even before the larger bench could be constituted (and it is yet to be constituted), the judges proceeded to initiate several executive actions. 'Not only is there an assault on the life of the citizenry of the State of Assam', the bench noted, 'but there is an assault on their way of life as well'.⁷⁸ It further noted that, '[t]he culture of an entire people is being eroded in such a way that they will ultimately be swamped by persons who have no right to continue to live in this country'.⁷⁹ By not intervening immediately, the judges asserted that the Court 'would be guilty of shirking [its] Constitutional duty to protect the lives of our own citizens and their

⁷³ Gautam Bhatia, 'Justice Must Be Open, Not Opaque' *Hindustan Times* (New Delhi, 19 October 2018) <www.hindustantimes.com/analysis/justice-must-be-open-not-opaque/story-uOIfNMAKfX0sijzmKAETnM.html> accessed 1 March 2022.

⁷⁴ See Azad, Bhat and Mander (n 4); Deepankar Basu, 'Assam and the NRC' (2020) 55(39) *Economic and Political Weekly* 55; Abhishek Saha, *No Land's People: The Untold Story of Assam's NRC Crisis* (HarperCollins 2021).

⁷⁵ See D Bhattacharjee, 'NRC for Assam: A Flawed Design' (*Citizens for Justice and Peace*, 7 January 2021) <<https://cjp.org.in/nrc-for-assam-a-flawed-design>> accessed 1 March 2022.

⁷⁶ Azad, Bhat and Mander (n 6).

⁷⁷ *NRC Order* [30].

⁷⁸ *ibid.*

⁷⁹ *ibid.*

culture’.⁸⁰ Evidently the judges drew a line between what they saw were the deserving citizens of India — the Assamese populations — and those who were the ‘migrants’ and hence suspect foreigners.

Without much by way of reasoning as to the basis of its powers or the nature of the bureaucratic effort, the Supreme Court ordered the updating of the NRC and issued the schedule. Over the next many months, a special bench of the Court continued to supervise the update. The final list of the NRC was released on 31 August 2019. The list left out more than 1.9 million residents, who now were marked as suspected foreigners, technically with the right to appeal to the tribunals against their exclusion.

It is not merely the uncertainty of legal outcome of this process that makes the condition of persons subject to it precarious. What makes the NRC a citizenship irregularization exercise is the way in which the Indian state has politically instrumentalized citizenship, and the tactics of courts in legitimizing the suspension of citizenship. The most significant tactic was that of judicial evasion and delay.

Evasion is visible in the way the Supreme Court dealt with two legal questions. Since the Court referred the constitutional validity of section 6A of the Indian Citizenship Act to a larger bench, it had not determined the validity of the substantive norms of citizenship that were bound to be the basis of the NRC update. Similarly, another consequential legal question regarding whether birthright citizenship would be applicable in Assam was referred to a larger bench. This question was crucial for the status of persons who were born to non-citizen parents in Assam before 1987. Despite this question not having been authoritatively decided, the Court directed the NRC authorities to limit inclusion only to persons with at least one parent who is an Indian citizen. It is safe to assume that these confounding decisions may have led to the exclusion of numerous individuals from the NRC, even if under the law they qualify as Indian citizens.

The Supreme Court has adopted a similar tactic even after the finalization of the enumeration. Despite millions having been excluded from the NRC, politically dominant groups including the ruling political party have consistently expressed dissatisfaction with the numbers of potential foreigners. Since the final draft of the NRC in August 2019, these political elements have insisted that numerous foreigners have managed to enrol in the NRC by taking advantage of what they believe to be lax procedures and administration’s corruption.⁸¹ These assertions — vociferously made in a volatile racialized and securitized rhetoric — have now gained substantial political support despite a complete absence of evidence.⁸² After having piloted the NRC, the Supreme Court under the leadership of the new chief justice stepped back from the exercise. Rather than directing the government to proceed with the appeals against exclusion, the Court has consistently not intervened, even as this continues to undermine its authority.

⁸⁰ *ibid* [31].

⁸¹ ‘Assam: 80 Lakh Names of Illegal “Immigrants” Entered in Final NRC’ *United News of India* (New Delhi, 30 March 2022) <www.uniindia.com/story/Assam-80-lakh-names-of-illegal-immigrants-entered-in-final-NRC> accessed 31 March 2022.

⁸² Suraj Gogoi, ‘Assam & Citizenship: Sarma’s Comment Shows There Will Never Be a “Final” NRC’ *The Quint* (New Delhi, 31 March 2022) <www.thequint.com/voices/opinion/assam-citizenship-sarmas-comment-shows-why-therell-never-be-a-final-nrc#read-more> accessed 31 March 2022.

Irregular Citizenship

What do these racialised and exceptionalist official practices mean for the lives of precarious citizens? What is the condition entailed by the production of irregularization? I answer these two questions by invoking two vignettes from my field visits in Assam that I collected during 2021 and 2022 as part of my participation in legal aid interventions in the state.⁸³

I start with the case of 40-year-old Rahima Begum, an unlettered woman who belongs to a poor family of daily-wage workers in a small village in Assam's Barpeta district.⁸⁴ When Rahima went to cast her vote in 2001, the election officials informed her that she could not exercise her democratic right. The officials told her that they had marked 'D' next to her name. Not fully comprehending the implications of this, Rahima did not pursue the matter, thinking of it as a bureaucratic error. She did not know that in 1997, the Election Commission had taken the unprecedented decision of disenfranchising 370,000 'D-voters', which included her.

Rahima, over the following years, slowly started to understand what being a 'D-voter' could mean for her. She heard numerous stories of the police 'picking up' D-voters and lodging them in detention centres. Rahima's life was completely disrupted. The thoughts of being detained away from her family started hounding her. Rahima found herself in a confounding situation. She never received any official communication from the Election Commission, the police, or the Foreigners Tribunals. But just a whisper of the police entering her village was enough to make Rahima run and hide in the nearby forest for several nights.

Her mental health started deteriorating. She started to attempt suicide. Her family members could not leave her by herself. Befuddled and paranoid, her husband approached a lawyer for advice. The lawyer assured them that he would ensure that the 'D' is removed from Rahima's name, provided they paid him a hefty sum. Rahima's family paid the lawyer but did not hear back from him or any official.

Years later, in 2021, when I met Rahima and her family, it became clear to everyone what had really transpired. The lawyer had used part of the money to bribe the police to issue a 'suspected foreigner' notice to Rahima, so that she would be asked to prove her citizenship in the tribunal. Ironically, Rahima had unwittingly paid money to be taken to the tribunal just so that she could escape her uncertain condition. The last time I met her, Rahima had not received any notice. She had lost her right to vote and continued to live under the immense threat of captivity.

Take the second case of Dulali Barman, a 77-year-old Hindu Bengali woman from an extremely impoverished family in Guwahati, Assam.⁸⁵ The Foreigners Tribunal registered a case against Dulali in 2011 on the ground that election officials had classified her as a D-voter. Dulali succeeded in proving her Indian citizenship and received a favourable order from the

⁸³ The legal aid interventions were associated with the legal clinical project Parichay. Parichay was formed in response to the release of Assam's NRC and was based on a collaboration among Indian law schools and students to provide legal representation and support to persons facing citizenship deprivation. It has worked with communities, lawyers, and activists, and participated in status determination proceedings, strategic litigation at the appellate level, research and documentation. See 'Our Vision' (*Parichay*, 1 October 2019) <www.parichay.org.in/our-vision> accessed 1 March 2022.

⁸⁴ Her name has been changed in the interests of her privacy. A team of legal aid lawyers at Parichay and I interviewed Rahima and her family through community workers in the Barpeta district on 13 January 2021.

⁸⁵ The details of Dulali's struggles are drawn from her writ petition in *Dulai Barman v State of Assam*, Writ Petition (Civil) No 990 of 2022 (on file with author).

tribunal in 2014. Despite this, the election officials did not remove her ‘doubtful’ classification, due to which she was unable to vote. Her representations continued to not be heard.

The situation deteriorated when the government in 2019, suddenly and without any notice, stopped providing food benefits that Dulali’s family was legally entitled to receive under India’s food security law. The government had made ration provisions contingent on the beneficiaries linking their names to their national identity cards. When Dulai applied for her card, the authorities rejected her application since she was still classified as a doubtful voter. Desperate without food for her family, Dulali approached numerous government officials, all in vain. In January 2022, she approached Assam’s High Court for redressal through public interest lawyers. ‘Till date’, her petition stated, the ‘authorities are sleeping over the representation’.

These vignettes reveal the character of precariousness that India’s citizenship policies — such as the ones creating ‘doubtful’ voters — have produced. The Indian state has not formally revoked the citizenship status of either Rahima or Dulali. Like other D-voters, Rahima is formally a citizen, but there is a question mark on her status. She is threatened by the possibility of citizenship revocation, but she has not even been subjected to a formal status determination process. While it may appear that Dulali succeeded in the formal proceedings against her, the state continues to not affirm her Indian nationality.

These precarious citizens may not have formally lost their citizenship status, but they have lost fundamental goods attached to citizenship. They have lost their political and social rights as Indian citizens. And profoundly, they have lost any semblance of security and stability of citizenship status. Short of formally revoking citizenship, the Indian state has introduced complex legal procedures that independently and conjointly have serious consequences for citizenship rights.

Working together, these processes have the conjoint effect of both disorienting those who are subjected to them, and lethally affecting their citizenship rights. For example, during the NRC update, government authorities decided to exclude D-voters from the enumeration altogether until they establish their citizenship status in the tribunals. The state, simultaneously, recorded the biometric details of these persons and blocked the possibility of using them for authenticating state services. This included the ability to apply for national identity cards, which are mandatory for receiving several welfare benefits. Since the appeals process against NRC exclusion has not commenced, millions of persons have been left in a materially precarious condition.⁸⁶ This also explains the strange situation Dulali finds herself in. Being excluded from the NRC as a D-voter, Dulali cannot receive her state welfare benefits despite succeeding in the tribunals.

These citizenship procedures are also strikingly unspecific about their consequences for citizenship status. The Indian state has reiterated the existence of routes of legal redress. The normal course of the law, the state has insisted, continues to remain open to people. The state has also consistently refused to specify precisely when — at what stage of this legal redress — citizenship would be formally revoked.

⁸⁶ ‘Assam: Many Not Getting Aadhaar as Biometric Details Locked Due to NRC’ *Mint* (Bangalore, 15 March 2022) <www.livemint.com/news/india/assam-many-not-getting-aadhaar-as-biometric-details-locked-due-to-nrc-11647344426066.html> accessed 20 March 2022.

According to the state, being marked as a suspected foreigner by the Election Commission or the NRC does not indicate formal revocation. But what about being declared a foreigner by the tribunals, or failure in further appeals? Instead of formal revocation, the Indian state has relied on the very existence of the legal process to introduce insecurity of status. The existence of legal instrumentalities has not attenuated the severity of precarious citizenship. It has further intensified it.

The legal processes aggravate precarity because they are complex, intersecting and insidious. They are treacherous for the precarious citizens to navigate, and overwhelming for others to study and critique. Precariousness is not the by-product of poor implementation of the law. Rather, this Kafkaesque bureaucratic nightmare is the very essence and culmination of its application.

Recognizing this feature of India's citizenship policies — the introduction of severe citizenship insecurity without formal revocation — is significant for two reasons. First, for the state, it postpones the potentially inconvenient decision of citizenship revocation, while at the same time allowing it to politically instrumentalize citizenship. The unfolding story of the NRC attests to this political instrumentalization. Just as the country was making sense of the Assam NRC's exclusion of 1.9 million people and the possibility of mass statelessness, the Indian government proposed to extend the NRC across the country. The ruling BJP framed this as an election issue in various states. The government has also remained non-committal on 'finalising' the NRC, which would entail the issuance of receipts with grounds for rejection and initiate the appeals process. At the time of writing, the BJP government in Assam — arguably to satiate the demands of politically influential sections of the state — has insisted that the extent of exclusion underestimates the number of foreigners in the state. The government has demanded 'reverifications' in Bengali-origin and Muslim dominated districts. Thus, the Indian state has sought to both aggravate and satiate immigration anxieties through disenfranchisement and citizenship enumeration. It has simultaneously maintained a convenient distance from what its actions have meant in terms of citizenship deprivation.

Second, claiming to use the instrumentalities of the law has also allowed the Indian state to claim legal legitimacy. India has consistently dismissed the national and transnational civil society's concerns by emphasizing the legal character of its policies.⁸⁷

In this process, the Indian state has irregularized its citizens. Describing irregular citizenship, Peter Nyers notes that states not only unmake the rights of citizenship through formal mechanisms of citizenship revocation or denationalization. They also unmake citizenship through 'irregular' processes, which are 'arguably more complex cases where citizenship has not been revoked per se, but where it has been rendered inoperable, or irregularized'.⁸⁸

Irregular citizenship, as Nyers notes, is not a status but a condition. It is marked by state power unmaking citizenship not through formal revocations, but 'performatively'.⁸⁹ This

⁸⁷ See eg 'Statement by MEA on National Register of Citizens in Assam' (Ministry of External Affairs, Government of India, 2 September 2019) <www.mea.gov.in/Speeches-Statements.htm?dtl/31782/Statement+by+MEA+on+National+Register+of+Citizens+in+Assam> accessed 1 March 2022.

⁸⁸ Peter Nyers, 'Forms of Irregular Citizenship' in Vicki Squire (ed), *The Contested Politics of Mobility: Borderzones and Irregularity* (Routledge 2011) 184, 185.

⁸⁹ *ibid* 189.

performative aspect is writ large in the cases of Rahima and Dulali. Without formal revocations, and through complex workings of administrative rules and procedures, fundamental rights attached to citizenship have been rescinded.

Interpreting precarious citizenship in places like India as irregular citizenship has distinct theoretical advantages. Irregularization allows us to appreciate how state practices weaken citizenship transnationally. Much attention has been paid to how states, especially in Europe and North America, subject immigrants to legal standards that produce insecurity of status. It has often been implicitly assumed that states adopt such practices in case of non-citizens. Scholars also sometimes assume that the weakening of status of citizens is frequent only in the Global South. Irregular citizenship bridges this geographical divide, revealing that states, in Western or non-Western contexts, weaken the status of citizens through very similar tactics. As Nyers notes in the context of Canada and the United States, governments irregularized the citizenship of numerous individuals on grounds of national security and terrorism, in the background of increasing racialization and exceptionalism.⁹⁰ India's case resonates with these instances, perhaps differing only in scale and quantum.

Irregularization also allows us to appreciate the harm of citizenship policies and their relationship with legality. States may claim to be addressing background problems of migration and status verification. But rather than merely enforcing existing rules of citizenship, they constantly re-create the boundaries between citizens and foreigners through insidious legal processes. Scholars have recently shown that states strategically 'manufacture' statelessness as 'statecraft' by implementing neutrally framed and subtle citizenship laws that have discriminatory impact on groups.⁹¹ Irregular citizenship adds another dimension to these accounts, by further appreciating the precise role that the legal process plays in weakening citizenship.

Irregularization shows how the problem of precarity is not only about formal loss of status. Precarious citizenship is rather a condition of insecurity despite the formal persistence of legal status. While the state defends policies in the language of the law, it shares a paradoxical relation with the rule of law. Hidden behind the stories of Rahima, Dulali and innumerable other precarious citizens is the systematic way in which India's institutions, especially judicial institutions, have refused to extend standard norms to judge what the legal apparatus is doing to their citizenship. Despite assertions of the application of traditional legal principles and safeguards, precarious citizenship is marked by their suspension. This logic leads to confounding results, for instance, in the case of Rahima, who rather than legally questioning her disenfranchisement has to bribe officials to be taken to tribunals, even at the risk of being declared a foreigner.

Conclusion

This chapter has argued that the Indian state has weakened citizenship of its nationals in profound ways without formally revoking citizenship status. It has irregularized citizenship of

⁹⁰ *ibid.*

⁹¹ Neha Jain, 'Manufacturing Statelessness' (2022) 116(2) *AJIL* 237. See also Michelle Foster and Jade Roberts, 'Manufacturing Foreigners: The Law and Politics of Transforming Citizens into Migrants' in Catherine Dauvergne (ed), *Research Handbook on the Law and Politics of Migration* (Edward Elgar 2021) 218.

a large population through insidious legal processes. Precarious citizens facing irregularization may not formally lose their nationality, but they lose fundamental social and political goods attached to their status. Most of all, they lose any semblance of stability and security of citizenship status, which in turn severely harms their well-being. This irregularization has occurred in the background of increasing racialization of Indian citizenship. While the Indian government and courts have sought to justify irregularization in the language of the rule of law, racialization and exceptionalism have permitted them to not apply ordinary legal standards to these citizenship policies. Irregularization — as opposed to formal revocation of citizenship — allows the Indian state to politically instrumentalize citizenship policies at the cost of citizenship security, without facing the obvious domestic and international repercussions that denationalization often invites.

This account raises some key questions for the global understanding of citizenship insecurity, including statelessness. The first question is how, and to what extent, can the evolving interpretation of the right to nationality accommodate such policies of citizenship attrition? The attrition of citizenship I describe in this chapter is not in the form of formal deprivation. But, as I have argued, it is in the form of the suspension of citizenship status through insidious legal means, often through various discriminatory yet hidden modalities of procedural implementation, non-enforcement of ordinary legal norms, and legal evasion. Second, how can religious discrimination in nationality policies be addressed legally? This has remained an underdeveloped area for international legal norms.⁹² This chapter articulated the concept of racialization in the context of irregular citizenship in India. Racialization captures the intersectional and dynamic nature of discrimination towards ethnic, religious, and racial groups. This notion of racialization — with its appreciation of the historical and political processes of discrimination against religious groups — may offer some resources in this direction.

⁹² See E Tendayi Achiume, ‘Governing Xenophobia’ (2018) 51 *Vand L Rev* 333, 355.