

India Exclusion Report 2019–2020

Three Essays Collective *with* Centre for Equity Studies

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Citizenship and the Mass Production of Statelessness in Assam

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Reviewed by Rafiul Ahmed

1. Citizenship as a Public Good

The India Exclusion Reports (IXRs) define exclusion as processes created by the state that proliferate, tolerate or deepen barriers for individuals and groups for accessing public goods. They define a public good as ‘a good, service, attainment, capability or freedom—individual or collective—that is essential for every human being to be able to live a life of dignity.’ Threats to citizenship engendered by bureaucratic and legal processes have a subtle yet profound implication for exclusion within this meaning.

Citizenship is best understood as a multidimensional concept. From a legal standpoint, citizenship is a guarantee of political status and rights. In modern politics, citizens have secure membership in the constitutional community. This usually means that the State provides them, at least theoretically, the widest legally available bundle of civil, political and socio-economic rights. Scholars have often conceptualized citizenship in terms of this guaranteed bundle of rights. For instance, they have suggested that there could be civil citizenship that guarantees equal protection of the law and basic individual rights, political citizenship that guarantees political rights like voting, and social citizenship that guarantees all members basic standards of living (Marshall, 1963).

Modern democratic states also associate citizenship with guarantees of political participation,

like the right to vote. Citizens are legally entitled to participate in ongoing democratic deliberations and policy-formation. At the same time, a citizen is not only rights-bearing, but also duties-bearing. Modern politics expect their citizens, often through the instrumentalities of law, to contribute to collective political life.

Obviously, an individual having citizenship status does not always mean that she will de facto benefit from everything that is legally guaranteed. But it does mean that she has an institutionally viable claim to demand what is legally guaranteed (Somers, 1994). In this sense, another way to conceptualize citizenship is to think of it as the guarantee to the widest institutional access to make claims from the State and community at large.

Beyond legality, citizenship is also a mark of belonging. States lay down rules of citizenship, demarcating its qualifications and disqualifications. Thus, citizenship rules reflect how a political community understands its normative foundations. For instance, if a country provides citizenship to every person born in it (often described as *jus soli* or birth-right citizenship), we can assume that it has adopted a territorial conception of national belonging.

This multidimensional conceptualization of citizenship allows us to think about the relationship between citizenship and public goods, and the variety of ways in which exclusion can happen in relation to citizenship.

At the first level, barriers to citizenship status and its exercise amount to exclusion in an instrumental sense. Citizenship status facilitates the enjoyment of other public goods through the provision of rights and entitlements. If the State violates, or fails to fulfil or perform its obligations, citizenship allows for institutional access, participation and redress. Thus, citizenship is a *meta* public good since citizenship status allows individuals and groups to exercise most other functionalities within the meaning adopted by the IXRs. Consequently, actual denial or deprivation of citizenship results in exclusion from public goods.

The State's denial or deprivation of citizenship amounts to exclusion in a non-instrumental sense as well. Citizenship status forms an important aspect of what political philosopher John Rawls calls the 'social bases of self-respect'. In his view, a just political system must guarantee self-respect or self-esteem of individuals because this element of dignity is central for a person to lead a good life. For Rawls, this can only be done if the just society guarantees equal citizenship to everyone, as a recognition of everyone's status as an equally dignified person (Rawls, 1999, p. 386).¹ Martha Nussbaum subsequently included 'social bases of self-respect' in her list of core capabilities (Nussbaum, 2011, p. 34). Citizenship encapsulates the mutual recognition among the members of the community that each of them equally belongs to the community, and thus deserves equal respect. Denial or deprivation of citizenship is essentially a declaration that the individual's claim that she deserves respect as an equal member of the community is being rejected. Thus, citizenship is also a public good in a non-instrumental sense because it is a capability, within the meaning adopted by the IXRs, for people to live a life of dignity.

Hannah Arendt has articulated another compelling variation of the relationship between citizenship and human dignity. According to Arendt, human dignity is possible only when a person is a

member of a political community. Human dignity is the result of other members of the polity recognizing the individual's status and ability to be a free agent. Consequently, for Arendt, when any person is bereft of citizenship, she is stripped of humanity itself. This led her to lament that without 'the right to have rights'—the right to be part of some political community as a citizen—human dignity could not be guaranteed for everyone (1973, pp. 296–299). International law recognizes this centrality of citizenship as a human right, as indicated by Article 15 of the Universal Declaration of Human Rights that declares that everyone has a right to nationality, and no one can be arbitrarily deprived of her nationality. In this sense, denial and deprivation of citizenship is a profound exclusion because it may render a person stateless and without any political membership, and thus compromise her dignity altogether.

The appreciation of citizenship as a public good reveals that the State must secure the guarantee of status through legal and institutional means. It must not subject a person's citizenship status to arbitrary targeting. It must also create a transparent legal architecture in case the issue of citizenship verification and authentication arises. It also follows that a person must not be subjected to arbitrary and overly demanding enquiries about their citizenship status. Arbitrary questioning of someone's citizenship—particularly in the absence of transparent, fair and reasonable institutional procedures—would introduce severe uncertainty in her life, especially considering the serious consequences of the loss of citizenship. Legal processes can make citizenship precarious by making it contingent on arbitrary official discretion and whim. Precarious citizens are compelled to invest all their human and material resources to preserving their status, and this diverts them from achieving any other public good. Thus, processes that engender precarious citizenship suspend normal lives altogether. Thus, exclusion from citizenship as a public good is triggered not only when a person is *de jure* (or even *de facto*) denied or deprived of citizenship. It is also triggered when citizenship status is threatened by unfair and arbitrary procedures. They amount to indirect exclusion

¹ See also Cohen, Joshua (2002). For a Democratic Society. In Freeman, S. (ed.). *The Cambridge Companion to Rawls*. Cambridge: Cambridge University Press, p. 86, 109.

by creating a heightened form of vulnerability. Precarious citizenship is exclusion because it undermines the security of status, which is an important basis of self-respect.

It follows that exclusion in relation to citizenship can be of three kinds. First, there can be a de jure exclusion resulting from the withdrawal of citizenship that makes access to public goods contingent on citizenship status. Second, there can be a de facto exclusion as the indignity of citizenship deprivation, resulting from denials of public goods and the withdrawal of membership to political communities. And third, there is what the IXRs describe as adverse inclusion. In the context of the public good of citizenship, adverse inclusion results not from a de facto or de jure withdrawal of citizenship, but from unstable citizenship that undermines meaningful opportunity and access to all public goods.

2. Exclusion from the Public Good of Citizenship and the Mass Production of Statelessness in Assam

On 31 August 2019, the National Register of Citizens (NRC) was published by the Government of India. This listed those residents of the Indian state of Assam who had succeeded in proving to the satisfaction of the Indian state that they were citizens of India.

This momentous list excluded nearly two million people from among the residents of Assam. The state deemed them to have failed to prove that they were Indian citizens. Until the time of writing, a year later, these people have still not fully lost their citizenship. But their legal right to belong to India as Indian citizens stands gravely threatened. Unless the rules are altered, they will be given one more chance to prove their citizenship. After they are given in writing the reasons for their exclusion, they will be authorized to plead the reasons why they should still be recognized as Indian citizens in the Foreigners Tribunals (FTs). These are quasi-judicial bodies set up by the central executive through the Foreigners (Tribunals) Order, 1964 (Tribunals Order) under the Foreigners Act, 1946. Over a year

after the publication of the NRC, none of those whose names were excluded from the register have been given a document with reasons for their exclusion. The ruling political establishment—which had hoped for a significantly larger number of excluded persons—is fervently advocating reverification in minority-concentrated districts. This has introduced further uncertainty regarding the conclusion of the process. For this reason, this final step that will decide their destinies remains in an unexplained and painful limbo. The excluded nearly two million people live, at the time of writing, in a purgatory of uncertainty.

The process was meant to update the National Register of Citizens that the State had prepared in 1951. The updating process was initiated by the Supreme Court in 2015.² The Court subsequently took charge of the whole administrative and judicial process, supervising it directly through orders issued to the NRC authority.

At the core of the systemic injustice of the NRC process is the judicial ruling that shifts the burdens on the individual citizen to establish her citizenship. The exercise thus proceeds with the assumption of foreignness. The resident has to prove her citizenship through official documents prescribed by the State. Her failure to do so is reason enough for her to be denied Indian citizenship.

The production of a range of official documents is an arduously uphill requirement in a country where most of the poor do not possess several legal documents. This is because the State has not established systems to guarantee its citizens error-free documents, and so many live in such dismal conditions that they just cannot summon the social, economic and political capital to muster whatever documentation they are entitled to. The majority of indigent rural people anywhere in the country would be unable to prove their citizenship because birth certificates were rare; many did not attend school and migrated for work or were married as children; land records are poorly maintained, and in

² *Assam Sanmilita Mahasangha v. Union of India*. Writ Petition (Civil) No. 562 of 2012, judgment dated 17 December, 2014.

any case, many are landless or unrecorded tenants or encroachers on government land; and voters lists are replete with omissions. But in Assam, resulting from the orders of the courts and governments, impoverished and often unlettered people were required to garner myriad official documents—such as of birth, land ownership and voters lists—in desperate bids to establish their citizenship credentials.

The assumption of foreignness, unfortunately, is older than the NRC's initiation. In 2005, the Supreme Court ruled that citizenship verification in Assam—or for that matter anywhere in India—must happen under the Foreigners Act by shifting the burden of proof on the individual.³ The State, on the other hand, need not prove their suspicion at all. This most lethal blow to due process is a turning on its head natural law that a person is innocent until proven guilty. The NRC process extends this logic writ large. The institutional practice of the FTs shows that they have interpreted this requirement in ways that sometimes make it practically impossible for individuals to meet this burden. Individuals, most of whom are poor, are expected to present error-free and comprehensive documents, often to be corroborated with oral evidence of their relatives and government officials who need to appear before the FTs.

The problematic nature of the process was further exposed by official orders, again ratified by India's Supreme Court, which exempted 'persons who are originally inhabitants of the State of Assam' from any 'further proof or inquiry' for automatic inclusion in the NRC.⁴ The category of 'original inhabitant' is nowhere defined, but in practice is taken to exclude people who speak Bengali, Nepali or Hindi, even if they have lived in Assam for generations.

The highly fraught business of contesting the citizenship status of anyone whom the State chooses now threatens to transcend Assam and enter civic life in other parts of India. An order published

in the Gazette of 4 June 2019 authorizes any state government, union territory or district magistrate to establish FTs in any part of the country. Until now, this power was restricted to the Union Government and applied exclusively to the state of Assam. It is chilling to observe that the massive mandate for the Modi government in the 2019 elections in itself appears to be interpreted by the Union Government as an authorization to pass such a far-reaching directive which can throw several hundred million people into desperate and prolonged uncertainty about their rights to belong, and indeed to have rights. This carries the potential both to foment untold social strife and to fundamentally alter India's constitutional arrangements. All this without any public debate, let alone a discussion in Parliament, and without even explaining it to the millions whose citizenship today suddenly stands in danger of being interrogated. The only explanation that we have for this order so far is to fall back on Home Minister Amit Shah's incendiary pledge, repeated in his election speeches, to extend the NRC to all parts of the country to identify and deport 'infiltrators' (read undocumented Muslims and those unable to produce documents to the satisfaction of the State) who threatened India's security, unlike undocumented Hindus and Sikhs, who were refugees escaping persecution.

The NRC threatens to produce statelessness on a scale unmatched by any democracy. It caused, in Assam, enormous suffering and dread to millions of mostly poorly lettered and very impoverished people, who have squandered all their meagre belongings to pay lawyers' fees to help them negotiate the hostile and opaque maze of the NRC bureaucracy and the FTs. There have been hundreds of cases in which a small difference in the English spelling of a Bengali name, or a small variation in age, being enough for the NRC authorities and the FTs to sound the death knell of dreaded 'foreignness'. If a person has never been to school, he may have no proof of birth or citizenship. If he owns no land, he has no land records to prove his residence in India before the cut-off date. And even if he does own land, land records are notorious for their errors.

3 *Sarbananda Sonowal v. Union of India*. Writ Petition (Civil) 131 of 2000, judgment dated 12 July, 2005.

4 *Assam Public Works v. Union of India*. Writ Petition (Civil) No. 274 of 2009, order dated 13 August, 2019.

This chapter seeks to assess the implications of these questions, specifically the conceptualization, operationalization and implications of the NRC from the perspective of the analytical framework of exclusion from public goods. It argues that stable citizenship is a public good, and the NRC—as a legal and bureaucratic process—amounts to exclusion from public goods.

The first part of this chapter has argued that stable citizenship is a public good within the meaning of the IXRs since it is, first, instrumentally valuable for persons to access their entitlements and rights, and second, inherently valuable as having a bearing on their dignity as human beings. Moreover, unstable citizenship—marked by arbitrary processes and lack of accountability—engenders the third genre of exclusion. It victimizes individuals and forces them to divert their resources from achieving other public goods towards proving their citizenship.

The second part of this chapter draws from empirical evidence to argue that the NRC engenders these forms of exclusion at the three different levels of design, implementation and consequences. The chapter shows that right from the beginning, there were serious flaws in the design of the process that undercut institutional accountability and transparency. These design flaws were further aggravated by the inefficiencies and oversights at the level of implementation. We draw from empirical and ethnographic evidence to also show that institutions implementing the process reflected bias. These empirical insights—that evince the serious flaws in the NRC process—have weakened and continue to weaken stable citizenship of innumerable Indians. Flawed bureaucratic and legal processes like the NRC produce severe uncertainty for the citizenship status of persons, heightening their vulnerability, disrupting their lives and causing tangible and intangible harm to them. Such processes thus amount to exclusion.

The final part of the chapter ends with recommendations to reform, and, in some cases, substitute the existing State policies.

3. Background

Assam has been witnessing anti-immigrant movements and popular resentment from locals and earlier settlers, starting from the colonial era when British colonizers brought Adivasi labourers for tea plantation and Muslim peasants for agriculture work. In post-colonial Assam, the rhetoric of ‘illegal immigration’ and discontentment continued to grow over time. In 1951, the first National Register of Citizens was prepared to identify illegal immigrants from East Pakistan. Since then, anti-immigrant politics has been feeding the Assamese community with the fear of losing their land, identity and culture. On the other hand, Bengali-origin Muslim and Bengali Hindu communities have been regularly experiencing persecution and mass violence.

In the late 1960s, several thousand Muslims were forcefully deported to East Pakistan under a draconian scheme called the Prevention of Infiltration from Pakistan (PIP), without following any legal mechanism of detection and deportation. The Assam Police has a unique organization to deal with the issues of ‘illegal immigration’ from erstwhile East Bengal and present-day Bangladesh. In 1962, the Assam Police established a Special Branch Organization under the PIP scheme. Initially, the organization was headed by the Deputy Inspector General of Police (DIG), Special Branch. This special police unit was entrusted to detect and deport illegal foreigners from the then East Pakistan. Under the PIP scheme, they forcibly deported nearly 200,000 Muslims to East Pakistan without any legal due process. This was done without garnering much attention, much less any criticism. Hiranya Bhattacharjee, former DIG in 1979, stated in an interview that at the time, ‘the process of deportation was on, in spite of the fact that there was no formal agreement with East Pakistan or Bangladesh on deportation’. ‘Those days,’ he went on to say, ‘we deported thousands, there was no hue and cry. What was happening was considered natural’ (quoted in Pisharoty, 2018).

Many of such families, who were arbitrarily identified as illegal immigrants and served notice to leave the country, are found in present-day Bangladesh. They remember this as ‘Quit India Notices’—a biting irony because ‘Quit India’ was the call made by Mahatma Gandhi in 1942 against India’s colonial rulers. Numerous families were separated because a few members remained in Assam while others were deported to East Pakistan. In present-day Bangladesh, these people still relive the trauma they faced and are socially segregated. Many of their settlements and villages are known as ‘Assam Para’ and ‘Refugee Colony’.⁵

In 1985, the Central and Assam governments signed the ‘Assam Accord’ with the agitating groups. The government agreed to detect and deport any immigrant who entered the state after 25 March 1971. Section 6A was added to the Citizenship Act, 1955. The provision provided a route of naturalization for all migrants who entered Assam before 25 March 1971. The Accord is seen as the genesis of the updated NRC in Assam. After several years of debates, discussions, and also many rounds of violence, almost all the stakeholders—including Bengali-speaking Muslims, who are often branded as illegal Bangladeshis—reached a consensus for updating the NRC. The Muslim community hoped that an updated NRC, despite the immense burdens it was bound to place on them, would ultimately secure them from further persecution, harassment and discrimination that had been their fate for seven decades. However, today, the NRC has been made another tool for persecuting the Bengali speaking Assamese Muslims and Hindus through its range of exclusionary and discriminatory provisions.

The NRC authority is not the only agency empowered to identify non-citizens in Assam. In fact, three parallel processes, mostly dependent on low-level bureaucratic and police discretion, run

side by side in what poet Manash Bhattacharjee aptly describes as the ‘sniffer-dog’ idea of the State, hunting down ‘foreigners’. The special unit under the PIP scheme was transformed into the Assam Police Border Organization (Border Police) (APBO), an independent organization within Assam Police headed by one Additional Director General of Police (ADGP). The APBO has now swelled to more than 4,000 personnel.⁶ The Border Police is authorized to refer suspect foreigners to the FTs.

There is another parallel process called D-voters. In 1997, the Election Commission (EC) identified several hundred thousand people as D-voters, most of them Muslims, but also including Bengali Hindus, Koch Rajbangshis, Nepalis and others. The process of identifying D-voters came into being after a huge political mobilization led by the All Assam Students Union (AASU) and other nationalist organizations, with the government being asked to carry out an intensive revision of the voters list across Assam. EC officials were supposed to conduct door-to-door surveys and revise the list after verifying people’s citizenship documents. However, it is alleged that people were randomly marked as doubtful citizens. There are numerous cases where one or two members of a family were marked as doubtful while others were marked as Indian citizens. The D-voter cases have also been referred to the FTs.

The third and, in scale, the biggest impediment to citizenship has been the NRC project, which has excluded more than 1.9 million people and made them susceptible to lose their citizenship in the FTs.

4. Processes of Exclusion

Our empirical findings highlight three areas in the NRC update that create exclusion. This section focuses on exclusion resulting from design, faulty implementation, and bias and hostility.

We draw our argument from the ethnographic work undertaken in Assam during the five years

⁵ For more details please see Azam, Abdul Kalam (2015). Abdul Kalam Azad: Speaker from the Margin. Retrieved November 13, 2020, from <https://abdulkazad.wordpress.com/2015/01/04/%e0%a6%aa%e0%a7%8d%e0%a7%b0%e0%a6%ac%e0%a7%8d%e0%a7%b0%e0%a6%9c%e0%a6%a8%e0%a7%b0-%e0%a6%85%e0%a6%a8%e0%a7%8d%e0%a6%a8-%e0%a6%8f%e0%a6%95-%e0%a6%a6%e0%a6%bf%e0%a6%b6/> (in Assamese).

⁶ For more details please Assam Police’s official website: <https://police.assam.gov.in/portlet-innerpage/border>

of the NRC update process.⁷ We undertook institutional ethnography of processes at various institutions like the Local Registrar of Citizens Registration (LRCR), the Circle Registrar of Citizens Registration (CRCR), NRC Sewa Kendras (NSKs), and the temporary camps set up for disposal hearings. These are the institutions which were created by the government to undertake the NRC update.⁸ We were a part of these institutional processes as participant observers, and interacted with the concerned officials of these institutions and the persons facing barriers in accessing these institutional spaces. These persons, among other things, were attempting to get access to their documents, legacy data codes, NRC application forms and Family Tree forms; trying to make submissions in the NSKs; and participating in the objections disposal hearings and biometric recording. We accompanied applicants to various offices to support them in the process as social workers. We also conducted in-depth interviews with officials like the LRCRs, the Circle Project Supervisors (CPS), data entry operators, field level officers and disposing officers.

4.1 Exclusion by Design: The Role of the Supreme Court

In the Indian legal system, rulings of the courts carry the force of law. The role of the higher judiciary, particularly the Supreme Court, both in the run-up to NRC and since its initiation, therefore merits searching critical review.

The most momentous Supreme Court judgment in terms of its procedural implications was the 2005 Sarabnanda Sonowal case.⁹ The case involved the constitutionality of the Illegal Migrants (Determi-

nation by Tribunal) (IMDT) Act, 1983 that provided procedures for the identification of foreigners in Assam. The legislation was based on the objective that this identification should have adequate safeguards against misuse and minimize the possibility of targeting genuine Indian citizens. In part, it achieved this by constituting tribunals that were to be filled by persons with judicial experience. The tribunals were to ensure that no vexatious complaints were made against genuine citizens. There were clear procedures for filing of complaints that were also expected to minimize targeting.

There had already been a significant extent of disquiet in Assam about the legislation. Its critics argued that the law, with its many safeguards, would make it considerably difficult for the State to prove that a person was a foreigner. They argued that if instead of the IMDT, the application of the Foreigners Act—particularly its Section 9 that placed the burden of proof on the suspect—would result in more people being declared foreigners. The Supreme Court in the Sarabnanda Sonowal case accepted this contention. It struck down the IMDT Act and held that the Foreigners Act must be applicable to citizenship determination procedures in Assam.

The most disconcerting facet of the judgment was its reasoning. It held that the IMDT Act violated the Union's constitutional duty under Article 355 of the Indian Constitution to protect states from external aggression. Illegal migration, in the Court's view, amounted to external aggression. The Court relied on the factually and legally spurious ground of national security to practically drum up paranoia about an 'Islamic invasion' through 'infiltrators'. The Court relied on this ground to strike down the IMDT Act and place the burden of proof on individuals rather than the State. It directed that all questions of citizenship determination must be referred to the FTs.

The FTs, though, have consistently deviated from basic standards of due process and fair trial. While in some important cases, for instance in *State of Assam v. Moslem Mondal*,¹⁰ the Gauhati

7 This chapter adds to the meagre systematic studies of the social costs of the NRC process in Assam. For a recent study in this genre, see Field, J. (et al) (2019, April). Bureaucratic failings in the National Register of Citizens process have worsened life for the vulnerable in Assam. O. P. Jindal Global University and the Development and Justice Initiative. Retrieved November 13, 2020, from <http://www.daji.org.in/images/NRC-Brief-final.pdf>.

8 See Operating Procedure, Office of the State Coordinator of National Registration (NRC), Assam. Retrieved November 13, 2020, from <http://nrcassam.nic.in/operating.html>.

9 *Sarbananda Sonowal v. Union of India*. Writ Petition (Civil) 131 of 2000, judgment dated 12 July, 2005.

10 *State of Assam v. Moslem Mondal*. 2013 SCC OnLine Gau

High Court did lay down guidelines for referrals to the tribunals, there is growing evidence that these guidelines are rarely followed in practice. The law requires proper police enquiries before notices are issued. But such enquiries are tardy and often non-existent. The FTs ordinarily do not make enquiry reports available to the individuals, making their burden of proof difficult to meet. Under the Tribunals Order that constitutes the FTs, the tribunals are free to determine their own procedures. Evidence suggests that the FTs have operated with arbitrary procedures, often neglecting standard rules of evidence at the cost of due process (Amnesty, 2019). The Gauhati High Court has taken cognizance of bad reasoning in individual FT orders from which writ appeals have been filed. But it is not clear if the Court has taken a desirably strict view of the due process violations that are often seen at the FT level.

The Supreme Court's interventions in dealing with NRC have also been fraught with procedural irregularities. This is most clearly the case with the Court's order that initiated the NRC update. The Court initiated the NRC update in earnest on 17 December 2014, through an order in the case of *Assam Sanmilita Mahasangha v. Union of India*. The Mahasangha had challenged Section 6A of the Citizenship Act, 1955. In its petition, the Mahasangha argued that the provision violated the right to life of the citizens in the State by encouraging the 'massive influx of illegal migrants' from Bangladesh. It also argued that the distinct regime compromised their right to culture as guaranteed by the Constitution. A bench—consisting of Justice Ranjan Gogoi and Justice R. F. Nariman—recommended that the issue be referred to a larger constitutional bench for final determination. In doing so, the bench raised a serious question on the constitutional validity of Section 6A.

But in the same order, the bench also decided to commence supervising the NRC update, on a court-determined calendar, based precisely on the requirements under Section 6A. The Supreme Court initiated one of the most ambitious judiciary-led bureaucratic exercises in the history of the country, on the basis of the rules whose legal validity it is yet

to determine! This was an uncomfortable paradox at the very foundation of the court-led NRC update. The Court relied precisely on the paranoia of illegal immigration that was the basis of the Sarabnanda Sonowal judgment. It also gravely substituted the executive in taking up the role of administering and supervising the NRC update. The institutional consequence of this was that it severely weakened any mechanism of accountability. Since the Court was acting as the executive, it completely removed the possibility of judicial review.

Since the initiation, the Supreme Court left another crucial question unanswered. The original Citizenship Act of 1955 adopted the *jus soli* or birthright citizenship principle by extending to all persons born in India the qualification to be Indian citizens. Subsequent amendments to the legislation diluted this *jus soli* principle, but partly retained it. The current position of law is that anyone born in India before 1 July 1987 would be a citizen by birth. Anyone born between July 1987 and before 3 December 2004 would need at least one Indian parent to be a citizen by birth. And for anyone born after 3 December 2004, to qualify as a citizen by birth, neither of the parents should be an 'illegal migrant'. In 2019, Prateek Hajela, the coordinator of the NRC, asserted before the Supreme Court that these rules were inapplicable in Assam. According to him, even if a person was born in Assam before July 1987, she must be excluded from the NRC if any of her parents was a suspect foreigner or declared to be a foreigner by the FT. This position was completely contrary to the Citizenship Act and was expected to leave out innumerable persons from the NRC. Despite this, the Supreme Court left this question hanging, and instead ruled that it would address it—after the completion of the NRC process—in a separate judgment. In doing this, the Court left innumerable persons in a state of utter uncertainty and flux.

The Court continued to supervise the NRC through means that also compromised the accepted legal standards of transparency. The most profound example of this is the consistent use of 'sealed envelopes' by the judges to appreciate evidence. For example, in late 2014, a bench headed by the then

Chief Justice Gogoi asked the NRC coordinator to submit the steps and measures he was taking for the NRC update in a 'sealed cover'. This soon became a pattern. Keeping such crucial information hidden from the public—and sometimes even from the government and affected parties—makes the legal process dangerously opaque. This has had a severe impact on the transparency and accountability of the NRC administration during the course of the update. Rather than keeping the executive body accountable through the judicial process, the courts have essentially become the administrators, while maintaining silence and secrecy.

4.2 Exclusion by Design: Role of the Executive

The argument in favour of undertaking a huge project like the NRC was marketed as a bitter but necessary medicine for those who would suffer the most from the process. It was proposed as a panacea to the harassment and persecution faced by Bengali-origin Muslims and Bengali Hindus in multiple citizenship contestation processes. Hope was sown among the vulnerable communities that once the NRC would be completed, authentically Indian citizens would not be harassed anymore. However, at the core, the design of the project was exclusionary and biased at different layers and levels.

As already noted, before the NRC process started, there were two more parallel citizenship contestation processes. These were the doubtful or D-voters by the Election Commission and the reference cases by the Border Police. Without proper investigation and due process, allegedly driven by bias and prejudice, both the processes had called to question the citizenship of more than half a million people. But it stood like a dagger, a threat, over millions of other citizens as well. Many of those people with contested citizenship had been waiting for nearly two decades for their cases to come up before the FTs that are authorized to determine citizenship status.

Since the NRC project was meant to end the problem of 'illegal migration' and would be monitored by the appellate judiciary, the people with contested citizenship were expecting that through

the NRC process, they would get rid of the sword of 'doubt' hovering over their heads for decades. However, the NRC design was completely opposite to what the people with contested citizenship expected. The NRC modality—as per the instructions of the Supreme Court—kept all the people with contested citizenship who were before the FTs outside the purview of the NRC process. It also excluded the descendants of people with contested citizenship. Consequently, a large number of people were left at the mercy of the ordinary FT process despite the presence of the NRC that the government proposed was more transparent.

Another important design flaw was the segregation of applicants between the categories of 'original inhabitants' and non-original inhabitants. This segregation was also the result of one of the Supreme Court orders. The term 'original inhabitant' is nowhere defined under the law and has been used in the NRC exercise to give free pass to certain communities and has made the inclusion verification extremely difficult for Bengali-origin Muslims and Bengali Hindu communities. The NRC process also does not recognize the need of special protection for vulnerable social groups like women, children, transpeople, the destitute and orphans, among others.

4.3 Exclusion by Flawed Implementation

It is not just flaws in the design of the process but also in the implementation that has created more barriers. Inefficiency, clubbed with bias and prejudice, has worked as a deadly weapon of exclusion against the vulnerable communities.

4.3.1 Procedural Exclusion

Though the NRC is described as an exercise to enlist citizens, in its implementation it is an exercise to find out the alleged undocumented foreigner living in the state. To be more precise, it is an exercise to find the alleged undocumented foreigner from Bangladesh. In the process, there are certain communities who are facing more exclusion than others. So far, neither the NRC authority nor the government has released the details of the excluded people. The Supreme Court, which was monitoring the whole

exercise since the beginning, instructed the NRC authority not to disclose the data in the public domain, anticipating ethnic strife, and wished to get the details of excluded people from the final draft in a sealed envelope.

The NRC authority used certain exclusion/inclusion criteria like original inhabitants/non-original inhabitants, and migrants from specific countries (i.e. Bangladesh). These criteria are reflected in the stories of excluded people on the ground. The stories reveal that the Muslims of Bengali origin were the prime suspects. Though the current BJP government now wants to provide citizenship rights to non-Muslim undocumented migrants from neighbouring countries through the Citizenship Amendment Act, 2019, on the ground it appears that Bengali Hindus were the second most targeted population in the NRC process. Along with these two communities, there are certain communities who share some commonalities with Bengali Hindus and Muslims of Bengali-origin. These include the indigenous Bengali Muslims, locally known as Cachari Muslims, living in the southern districts of Cachar, Karimganj and Hailakandi; the indigenous Deshi Muslims whose forefathers converted to Islam from the aboriginal Koch Rajbongshi community of western Assam; the Assamese speaking indigenous Gorias and Morias communities of middle and upper Assam; and the indigenous Koch Rajbongshi Hindus of western Assam.

Koch Rajbongshi is an indigenous tribe of Assam with a population of around 7 million. They were a part of the Koch kingdom that included parts of today's West Bengal, Bangladesh and lower Assam. Since they share surnames with Bengali Hindus like Roy, Ray, Rai, Barman and Sutradhar, and speak a native language that is different from the standard Assamese language, they are often seen as outsiders. A large proportion of their population has been excluded from the NRC. Keshab Roy, a student leader of Koch Rajbongshi Students Union from Baksa district, informed us that though his family members are included in the final list, his mother has been excluded. Many people from the community have been put under the D-voters list, and the Border Police has also registered a refer-

ence case under the Foreigners Act. Many of them are already declared as foreigners and put in detention camps.

Similarly, the indigenous Muslims like Deshi and Gorias-Morias are also largely affected because of their religious identity. Ibadul Ali, a functionary of Gorias-Moria Desi Jatiya Parishad, said that the indigenous Muslims are part and parcel of the Assamese society but have still been left out from the final NRC in large numbers and their names sent to the FTs (Sentinel Digital Desk, 2019). Though as per the design the indigenous Muslims are supposed to be included in the NRC as part of the 'original inhabitant' category, the NRC authorities did not treat them as such in many areas during the NRC update and, consequently, they were made to go through the more stringent verification process. An LRCR—the local official authorized to prepare the register at the lowest geographical level like a village or ward—alleged that the LRCR in the Muslim dominated areas did not receive instructions from higher authorities to apply the original inhabitant category. He alleged that this was done to bar the indigenous Muslims from availing attendant benefits.

Apart from these communities, there are indigenous tribal communities like the Bodos, Karbis and Mishings, who were also badly affected during the Kafkaesque implementation of the NRC. A study conducted by Rights and Risks Analysis Group (RRAG) reveals that over 100,000 tribals have been excluded from the final NRC. RRAG told the media that according to their preliminary survey, about 25,000 Bodos, 12,000 Reangs, 8,000 Hajongs and thousands of persons belonging to other indigenous tribes have been excluded from the NRC.¹¹

4.3.2 'Water-tight' Family Tree

Midway into the NRC updating process, the NRC authority suddenly introduced a new verification criterion called the Family Tree. This criterion

11 Assam NRC: Rights body says over one lakh tribals excluded, The New Indian Express, 2nd September 2019, <https://www.newindianexpress.com/nation/2019/sep/02/assam-nrc-rights-body-says-over-one-lakh-tribals-excluded-2027904.html>

was included to the process without any consultation with stakeholders who were part of preparing the modalities. Families were asked to fill up an extremely complicated form and give details like name, age, and the relationship of all the members.

For example, if someone had used the legacy data of her ancestor (say, grandfather or great-grandfather) whose name featured either in the 1951 NRC or subsequent electoral rolls upto 1971, she was expected to mention every detail of the descendants of the person. Sometimes, more than hundred people would come in one family tree, which included several families who lived in areas far from the applicant's location. Needless to mention, the application on numerous occasions would have completely lost communication with distant relatives for years and decades. The need to fill out the details of such relatives in family trees was bound to create many mismatches. And one mismatch was enough for the NRC authorities to demand several rounds of hearings, verifications and reverifications.

'The applicants filled up the handwritten "Manual Family Tree (MFT)". Based on the information provided by the applicant in the MFT, we prepared the "Computerized Family Tree (CFT)" using "Docsmen -3" software. If the data of all family members in MFT and CFT matched, their names [are] publish[ed] in the first draft NRC; those mismatch[ed] attends hearings.' – Circle Project Supervisor

Family trees of a large number of people were found to mismatch with the Manual Family Tree (MFT) and Computerized Family Tree (CFT). They were subsequently asked to appear before the hearing officials, often in far-flung areas. Lower level officers were given discretionary power to decide such cases. There have been allegations that the cases of mismatched family trees were rejected because of minor errors like spelling mistakes or if the extended family members failed to testify to the credentials of their long-separated relatives or young family members whom they have never met.

The requirement of family trees created larger sociological issues and affected the most marginal-

ized sections of the society. Transpeople who had left their families and were living separately were forced to mention their family members' details in their family trees. Their family members often did not mention the trans members of their family in their family trees. This resulted in burdensome hearings and often traumatized transpeople. LGBTQ activists allege that a large proportion of their community either did not participate in the NRC exercise or dropped out midway from the process, resulting in their exclusion.

Similarly, single women who had been abandoned by their husbands faced problems in filling up the family tree for their children. In such cases, the father's family left out the children from their family trees, either intentionally or because of sheer unawareness. The relatives did not mention their names often out of the apprehension that if they accept the abandoned siblings or children as their family members, they would end up losing shares of their inherited property. Such children, as well as the adult persons who had been abandoned by their fathers, consequently faced severe problems during the family tree verification.

'Some people have multiple marriages. One wife doesn't know about another, lives separately. But in the family tree the father has to reveal everything. We have seen many quarrels among those family members' – Circle Project Officer

Family Trees created unthinkable problems for those who are socially stigmatized as 'illegitimate' children. In a sorry instance, an applicant was unable to prepare a family tree because his father was born out of wedlock. The NRC's family tree requirement forced him to visit the relatives of his grandparents who did not legally have any relations with him. The relatives declined to include the applicant's family members in their family tree, allow him to include their names in his family tree, or testify the same during the verification hearings. Finally, he had to bribe the community leaders and officers to find alternatives. He ended up spending more than 400,000 rupees but still failed to be included in the NRC.

‘They didn’t include our names anticipating that if they recognize him as their brother and get included in the NRC they will have to give share of their ancestral property.’ – Daughter-in-law

4.3.3 Inefficiency in Implementation

The NRC administration was embroiled in severe inefficiencies. Several interviews with both government employees engaged in the NRC update and employees of contracted companies revealed that much of the problem that was attributed to large-scale exclusion was actually the result of the inefficiency of the staff. There are allegations that Wipro recruited underqualified or ill-qualified data entry operators. ‘Just matriculated’ candidates, who had not even matriculated from high school and were younger than 18 years, were given the responsibility of providing legacy data to the applicant. These operators were not provided requisite training on how to handle the Linux operating system (Ubuntu), and lacked communication skills to manage huge crowds. The operators were offered only 5,000 rupees per month despite being entrusted with such huge and consequential responsibilities. In rural areas, most illiterate people who approached the NSKs to ask for their legacy data were provided incorrect legacy data slips. Many applications filed the application form with the provided legacy data code with good faith. When Family Tree was introduced at the later stage, the NRC authority discovered that many people had actually used the legacy data of other applicants instead of their own. Many officials, on the condition of anonymity, explained that had the data entry operators been trained and equipped properly, at least 50 per cent of the family tree mismatches could have been averted.

‘A person went to the operator to give him the legacy data of his father named Farhad Ali. The operator asked for the village name, which too matched and gave the legacy data that this person filled up in the NRC form before submitting. In the same village there was another person with the same, and he used the legacy data of that person, not his

father. For this sort of error many forms got rejected.’ – Circle Project Supervisor

When the NRC authority discovered that people had used the legacy data belonging to others, the local officers conducted field verifications. During verification, the NRC administration changed the legacy data documents once again for a large number of the applicants who had applied using wrong legacy data due to official errors. But these corrections were not recorded properly in the software. Consequently, the NRC administration did not rely on the rectified details during the family tree verification hearings. It sent out the Letter of Intimations (LOI) to applicants based on the incorrect data, leading to further hardship for the applicants.

Because of these mistakes, hundreds and thousands of people were called for hearings miles away from their place of residence and work without any logistic support being provided. Sometimes, all members in one family tree were summoned to places 300 or 400 kilometres from the home address. There were cases in which more than a hundred people had to identify each other with the correct name at a single hearing. And failure to do so meant complete exclusion from the draft NRC, potentially for everyone in the extended family.

There were cases where the notice was either served at the last hour or after the date of hearing. Notices were served to wrong people and wrong destinations because of data entry errors, leading to exclusion because of official errors. Moreover, there were serious issues during the hearing process. The investigating officers were provided only a few hours of training and entrusted with the responsibility of deciding an application’s fate. One investigating officer was given the responsibility to hear as many as 6 family tree-related disputes in a day, which meant examining the citizenship status of several hundred people!

4.3.4 Issues with Digitization of Legacy Data

As the first step, the NRC authority digitized the legacy data that included the 1951 NRC and electoral rolls upto the midnight of 24 March 1971. Each page of the legacy data was recorded as an

image with an ID number. The NRC authority also gave each record in these documents a unique code. However, at least two major issues were reported.

First, there are many villages where all the legacy data were not available. When the census was conducted in 1951, the enumerators were unable to visit many far-flung areas. Consequently, the 1951 census—and thus the 1951 NRC that is based on the census—is not comprehensive. Second, there is also a question over the accuracy of the NRC data. The purpose of the data collection in 1951 was to prepare the census and not the NRC, which clearly serve different aims altogether.

When the process of providing legacy data was initiated, the NRC authority could not provide digitized legacy data for the entire population. In many villages, the NRC authority could not provide legacy data code to the individual applicants despite creating legacy data images. As an ad-hoc measure, the NRC authority made provisions to generate a temporary legacy data code called Star DLDD. It was supposed to generate the actual legacy data code and intimate the same to the applicant as well as NSK officials. However, this did not happen. MFT and field verification were conducted using the Star DLDD code. But alterations were not made in the metadata entry software, because of which there was no mechanism of utilizing the Star DLDD code.

‘In our Circle area, some people have copies of 1952 and 1955 electoral roll but those documents are not digitized.’ – Circle Project Supervisor

A large number of applicants were unable to find their legacy data in the NRC database, despite having copies of their pre-1971 eligible legacy documents, including the pre-1971 voters list and 1951 NRC receipt copies. On numerous occasions, the applicants approached the NSK with such documents. The NSK officials were reported to have scanned the documents and sent them to the state office for verification and generation of a legacy data code. In such cases, the NSK officials issued a system generated acknowledgement slip with a unique number against the document. Despite the

applicants being told that they would be sent the legacy data code on their mobile numbers, NRC authorities often failed to do so or even to intimate the applicants about the verification status of the documents. The applicants were also unable to use their unique acknowledgement receipt number because the online system did not have an appropriate option for processing such applications.

4.4 Exclusion by Active State Hostility

The dominant narrative has already marked the vulnerable communities, especially Muslims of Bengali-origin and Bengali Hindus as Others, and thus the primary suspects in the citizenship contestation processes. Many policies of the NRC authority and their implementation were unsympathetic towards the vulnerable communities. This was aggravated by the continuous campaign by media and vigilante groups. These groups—comprising prominent Assamese students associations—were active throughout the NRC process, putting immense pressure on the administration to exclude as many persons as possible. The active hostility against the vulnerable population was evident in different forms and layers.

4.4.1 ‘No Ineligible Person Should Be Included’: Paradigm Shift for Exclusion

In the beginning of the NRC update, the NRC authority undertook several public education and communication programmes to inform the residents of Assam about the process. The focus of the authority appeared to be on making sure all Indians were included in the NRC. The NRC coordinator Prateek Hajela regularly appeared in the media and assured the people of Assam that no genuine citizen would be excluded.

However with time, the focus of the NRC authority shifted. In October 2018, Hajela submitted before the Supreme Court that ‘imposters’ had subverted the NRC process by using wrong legacy data. He suggested that there was a need to shift from the old paradigm of ‘No genuine citizen should be left out’ to ‘No ineligible person should be included’ (Chakravarty, 2018). He proposed to reduce the number of permitted legacy documents.

He also proposed that panchayat or village certificates—that were often the only documents that unlettered and poor women could present to the NRC authority—be removed from the list of acceptable documents.

While the Supreme Court ultimately declined these submissions, Hajela's stance nudged the implementation towards hostility. This was further aggravated by the media and vigilante groups, who had already created an environment of hatred against Bengali-origin Muslims and Bengali Hindus. Lower level officers like lot mandals (revenue officers) were given discretionary power to reject names that were otherwise accepted by investigating officers, who were mostly college teachers. We came to know of one such case where a professor from a local college, acting as an investigating officer, had accepted the few cases that were rejected during the Special Verification Process. The professor lamented that he has a PhD and teaches in a college, but a high school educated junior official has the power to override his decision!

4.4.2 Declared Indians are Excluded

As per the modalities approved by the Supreme Court, D-voters were to be included in the updated NRC provided they had received clearance from FTs.¹² But in implementation, lower level officers were instructed not to include any persons who had been designated D-voters, or for that matter against whom Border Police references had been made, even if the FT had declared the person an Indian citizen. In other words, the NRC authority summarily excluded persons with contested citizenship who had been declared Indian citizens by FTs from 2015 until the end of the NRC process, as well as their siblings and children. The numbers of such persons might run into several thousands.

We also followed applicants—in various offices and interactions with officers—to understand how they were excluded and what explanation the officials provided them.

In one instance, the applicant was a woman who was married to a successful businessman and politician. She had already contested her citizenship in the FT and succeeded in getting a favourable order. Her husband was running pillar to post—from the election office to the office of the Superintendent of Police—showing the tribunal order, as officials kept referring him to others. The husband understood the consequences of being excluded from the final NRC. We followed him to two NRC offices and observed his conversation with three officers of different ranks. He first approached the NRC Seva Kendra, where a junior officer told him that there was an order from a higher authority not to accept the names of any D-voters irrespective of the status of the case. Then the husband approached the LRCR who was in charge of the NSK. The LRCR repeated the same instructions. The LRCR added that there were at least 50 such cases in his NSK and suggested that the person should meet the CRCR, who was the Executive Magistrate and his immediate supervisor. We followed the husband to the CRCR's office. The CRCR asked his junior officers to check the details of the official record. The junior officer confirmed that the woman's name was in the list of people who the state office had instructed to be kept on hold. The CRCR said that his hands were tied. At that stage, we intervened and reminded him about the announced modalities as well as Prateek Hajela's press statements clarifying that any names cleared by the FTs would be included in the NRC. On hearing this, the officer lost his temper and thundered, 'Bring Hajela to my office!'

4.4.3 Exclusion through Dubious Objection Mechanisms

The NRC update process permitted anyone to file an objection against the inclusion of any person in the draft NRC. The initially approved modalities had a penal provision for frivolous objections. But owing to the pressure of vigilante organizations like AASU and the Assamese media, the NRC authority removed this provision.

After the removal of the provision, AASU and partner organizations coordinated the filing of frivolous objections against 'suspected foreigners'.

¹² See NRC website for more details. National Register of Citizens (NRC). *Office of the State Coordinator of National Registration(NRC), Assam*. Retrieved November 13, 2020, from <http://www.nrcassam.nic.in/faq01.html>.

The NRC authority allowed objections even in cases where the objector had no possibility of knowing the person against whom the objection was being made. It also permitted a person to file en masse objections.

Despite the campaign, only a few thousand objections were filed until the end of the objections period. Government officers stated on record that the objections were mostly filed based on personal grudges. On the last day of the objections, AASU and other associated organizations submitted lakhs of objections in districts dominated by Bengali-origin Muslims and Bengali Hindu across the Brahmaputra valley. Evidently, their target was to implicate as many as 1.5 million people by filing 300,000 objections. On prime time television discussions, the office bearers of the most powerful students organizations openly discussed the objections as a success story. They accepted that submitting frivolous objections would help them increase the number of the excluded from 4 million (as in the draft NRC) to 5.5 million.

The NRC authority never questioned this transparent plan to persecute people from two of the most marginalized communities. Rather, there is credible allegation that the NRC authority supplied the required Application Register Numbers (ARN) to AASU and other organizations to facilitate filing objections. The NRC authority even accepted objections that lacked basic information like the address and contact details of the objector. For the disposal of the objection under law, the NRC authority was supposed to summon both the parties for hearing. However, not a single objector came for the hearing. The NRC authority did not dismiss such objections, but rather used it as another opportunity to exclude people whom they had included in the complete draft NRC after several years of scrutiny and verification. The authority asked the people against whom the objections were made to appear before a disposal officer. An interview with a disposal officer at one of the crowded hearing venues revealed that the officers were not given authority to decide the case. They were asked to reverify the documents and record their observations. The dis-

posal officer told us that the fate of the case was to be decided by higher authorities.

The NRC authority also made provisions to take biometric data of all persons who were excluded or against whom the objections had been made. One elderly person was asked to attend the hearing and provide biometrics in another district. During the process, the officer in-charge humiliated him by asking him from which part of Bangladesh he was! When the officers took the biometric data, they threatened the man. They told him that they were taking this data to make it easier for them to track him down and send him to a detention centre. Two days later, the elderly person committed suicide by consuming poison.

Though government data is not available in the public domain, it is estimated that the Unique Identification Authority of India (UIDAI) took the biometrics of up to fifty lakhs (5 million) individuals during the verification processes. This includes the 40 lakh (4 million) excluded from the complete draft NRC, and conservatively an estimated 10 lakhs (1 million) against whom objections were filed. UIDAI is the government agency that operates the Aadhaar ID that is the basis of access to numerous welfare schemes. There are serious concerns that all these persons could now be dropped from Aadhaar and be deprived from government sponsored schemes like housing, direct benefit transfer and other schemes that require the Aadhaar number.

4.4.4 Exclusion by Selectively Not Appreciating Documents

The NRC authority refused to accept documents that were issued after 31 August 2015. Thus, even if, for instance, a person had inherited land property decades ago and was part of the government record, he was not permitted to use the official extract if retrieved from the government office after this date.

While the Supreme Court later ruled that the NRC authority must accept these supporting documents, the lower level officials were given discretionary power and they often refused to accept such documents ('Apex court rejected most of 51 peti-

tions', 2019). The local authorities were particularly hostile towards Muslims and people of Bengali descent.

Similarly, the NRC authority identified many valid documents such as birth, refugee or village certificates as weak documents. The NRC coordinator instructed the officials to take 'extra caution' while considering these documents (Hajela, 2018). This was despite the fact that documents like birth certificates were authenticated by the executive at the time of issuance.

4.4.5 Short Notice Long Distance Hearings

With less than a month from the scheduled date for publication of the final NRC, thousands of people from the lower Assam districts of Kamrup and Barpeta were given notice to appear before for their hearing before officers the next day in faraway places in upper Assam, sometimes more than 500 kilometres away. According to the modalities, the NRC authority was expected to give the applicants at least 15 days to appear for the hearings. Moreover, the Supreme Court order dated 10 April 2019 required the NRC authority to call the applicants to centres that were convenient for them. On 23 July 2019, Prateek Hajela submitted before the Supreme Court that the NRC authority had already reverified 27 per cent of the NRC applications included in the draft NRC. Consequent to this submission, the Court ordered that no further reverification was required. But despite this, there were numerous occasions when applicants were required to attend hearings in far-off places within a short notice period. This created panic among the people who received the notices. The sudden rush to hire vehicles to reach the hearings dramatically increased the fares. There were many cases when the vehicles were overloaded, with the drivers travelling multiple trips without taking any rest. There were numerous incidents of accidents caused by this panic, leading to several deaths and injuries (Das, 2019).

5. Consequences of Exclusion

The historical and empirical account reveals that in its design and implementation, the NRC process has destabilized the citizenship of millions of Indi-

ans, threatening to produce statelessness on a scale unknown in any democracy. In its design and implementation, the NRC is an arbitrary and opaque system, which consequently weakens stable citizenship. It has introduced a lingering frightening uncertainty in people, about whether they would remain Indian citizens, be locked up for years in detention centres, forced to live as doubtful or non-citizens without elementary rights to access a range of public goods including owning property or accessing social protection such as subsidized foodgrains, or indeed be deported. This debilitating and humiliating instability and uncertainty marks the lives not only of those who were ultimately excluded from the NRC, but also those who had to go through the maze of burdensome bureaucratic procedures to prove their citizenship.

This unstable citizenship—that has rendered innumerable residents of the state precarious—amounts to adverse exclusion, especially of those belonging to vulnerable communities. The precarious citizens of the state were subjected to overly burdensome and often discriminatory procedures. These persons were compelled to divert all their meagre resources, time and energy—away from pursuing their lives and livelihoods—towards establishing their citizenship. This process heightened their vulnerability and engendered fear, harming their dignity and freedom.

Now the political establishment threatens to drag these precarious citizens through this same process all over again. It has been demanding re-verification in minority-concentrated districts, with the aim of increasing the total number of excluded persons. The NRC authority is yet to notify the final list that would entitle the excluded to file appeals in the FTs. Instead, at the time of writing the chapter, it had issued circulars instructing its officials to revisit the inclusion of several persons (Saha, 2020).

The path for those who were—or will be—ultimately excluded from the NRC is now riddled with steep challenges. They now have the right to appeal to the FTs, which are notorious for arbitrariness and disregard for ordinary laws of evidence. If

the excluded persons fail at the FT stage, they can arguably approach the Gauhati High Court and the Supreme Court. The expense of this would be an insurmountable barrier for scores of the excluded.

To make matters worse, the State has failed to announce its policy for those who are ultimately excluded after exhausting all the legal remedies. The gravest violation of constitutional justice of the entire NRC process in Assam, which now threatens to imperil minorities across India, is that to date the Union Government has not clarified what will be the fate of people who are finally declared to be foreigners. Neither the Supreme Court nor Parliament have compelled the government to clarify what the destiny of possibly one to two million people in Assam will be, if they are finally declared to be 'foreigners'. Home Minister Amit Shah has made amply clear his determination to give citizenship to people of every religious identity except Muslim. If he succeeds in doing this, what will happen to those Muslim residents of Assam who are unable to prove their Indian citizenship?

There is no question of Bangladesh accepting those who the Indian government declares to be foreigners, but who deny that they are Bangladeshi. Thousands have been detained over time in detention centres located within prisons.¹³ The Assam government has reported that it is building ten detention centres in the state; one of them, which is nearing the construction in Goalpara, will house 3,000 'declared foreigners' (Naqvi, 2019). But what will happen to possibly half a million or more people declared by India's judicial system, such as they are, to be non-citizens in Assam? And possibly several million more if the NRC is actually extended to the rest of India? Will the Indian government detain them in massive concentration-camps? If so,

for how long? Will they—men, women and children—be confined there all their lives? Or will they continue to live outside detention centres in India but stripped of all citizen rights? Stripped of the rights to vote, to own property, to enter government service? What kind of lives will they live in the absence of citizenship? The spectre of intense existential uncertainty, thus, pervades the lives of millions.

6. Conclusion: Recommendations

6.1 The Ongoing NRC Process

At the time of writing, it has been more than a year since the final NRC was published. The government has not published the gazette notification. Rather, the Assam government is trying to discredit the NRC and is advocating a fresh NRC along with the national NRC. This would be nothing short of calamitous for the linguistic and religious minorities of Assam. It would mean that even those among these intensely vulnerable people who had been through a trial of fire to prove their citizenship to a hostile bureaucracy against immense odds would have to start all over again, and would need to go through similar painful and traumatic processes once more. The first recommendation is that the authorities should immediately issue identity cards to all the people who included.

Those who were excluded from the NRC list are living through an immense degree of anxiety and uncertainty. The authorities should immediately release to them the 'reason of rejection' and kick-start the process of determination of their citizenship in a fair and judicious manner.

The environment of hatred and discrimination against the vulnerable communities has been mounting in the fraught and highly polarized political environment of the state. The amended Citizenship Act that provides citizenship to excluded Bengali Hindus has actually made the community more vulnerable in Assam. On the other hand, the BJP government in Assam has been propagating hatred against Bengali-origin Muslims. In such an environment, the active hostility both of the state and the majority community against these vulner-

13 In May 2020, the Supreme Court passed orders for decongesting jails in the context of COVID-19. Among the ordinary prisoners who were released, the government also released 308 of the total 802 persons in foreigners detention centres. See Karmakar, Rahul (2020, May 20). 308 'foreigners' released from Assam detention centres. *The Hindu*. Retrieved November 13, 2020, from <https://www.thehindu.com/news/national/other-states/308-foreigners-released-from-assam-detention-centres/article31632918.ece>.

able communities are only increasing. Authorities should make all the officials involved in the processes of citizenship contestation and determination accountable. They should also be provided training on principles of non-discrimination, human rights and rights of vulnerable social groups like women, children and transpeople.

6.2 Transparent Judicial Process

The rights to fair trial and due process are fundamental human rights. They are equally constitutive of the right to equal protection (Article 14) and the right to life, personal liberty and due process (Article 21) under the Indian Constitution. Article 9(4) of the International Covenant on Civil and Political Rights (ICCPR)—that India is a party to and hence bound by—lays down that no person can be deprived of her liberty without recourse to a court of law. Article 14 of the Covenant also lays down that everyone has a right to a fair and public hearing by a tribunal. Such a tribunal must be competent, independent and impartial. These rights of fair trial and due process apply to the legal determination of citizenship status.

Since citizenship is undoubtedly one of the most significant rights under international law and has the most valued status under India's constitutional scheme, there is an even greater need to secure fair trial and due process while dealing with the question of citizenship determination and verification.

From this perspective, it is an anomaly that citizenship determination in Assam is being conducted not before India's courts but through the FTs. While the FTs appear to have trappings of courts, they are executive-created bodies constituted—not under a law of Parliament—through the government's rule-making powers under the Tribunals Order. They are meant to give their 'opinions' to the government regarding whether a person is a foreigner. There is no parliamentary legislation regarding the qualifications of its members. In fact, the government has consistently diluted the need for judicial experience for someone to be appointed as an FT member. At present, in addition to retired judges, the government recruits former civil servants and

practicing advocates without any requirement of compelling judicial experience or training. Moreover, there are no formal provisions that secure the independence of the FT members. There are many anecdotal accounts of lawyers who are ideologically aligned to the ruling establishment being selected for this office. Currently, the FT members are appointed on a contractual basis, and any extension of the tenure is left to the government's assessment of their performance. There are serious fears—borne out by numerous journalistic reports—that only those FT members have been given extensions who have indiscriminately declared people foreigners.¹⁴ There is also compelling evidence to show that the FTs have adopted arbitrary procedures, often disregarding basic rules of evidence, to declare people foreigners (Amnesty, 2019). This problem is further aggravated by the fact that under the executive rules, the FTs are free to lay down their own procedures (Rahman, 2020). These factors clearly reflect that the FTs are not competent, independent or impartial, and thus do not fulfil the criteria of courts and tribunals as required under the law.

It is also relevant to note that when the question of citizenship determination comes up in other countries, they leave it to the final determination by ordinary courts. The question of citizenship determination should be left *not* to administrative bodies but to courts, which are more adept at evaluating evidence. For example, under the Immigration Act, 1971 of the United Kingdom, while the State does exercise the right to deport non-citizens, the question of determining whether a person is a UK citizen or not involves ordinary courts. Similarly, revocation of naturalization in the United States under the Immigration and Nationality Act, 1952 also involves judicial determination by courts. French law requires courts to determine if a person is a citizen owing to the 'inherent difficulties in providing proof of French nationality'.¹⁵

14 For a recent example, see Agarwal, Poonam (2020, October 6). Assam NRC | Lost Job as I Declared Fewer Foreigners: Ex-Officer. *The Quint*. Retrieved November 13, 2020, from <https://www.thequint.com/news/india/nrc-former-judicial-officer-of-assams-foreigners-tribunals-interview>.

15 See Commentaire Décision n° 2013-354 QPC du 22

Ironically, the Indian Supreme Court relied on the practice in the USA and the UK to shift the burden of proof onto individuals in citizenship determination cases in the Sarabnanda Sonowal case. But both these countries leave citizenship determination not to bodies like the FTs that are created by the executive, but to the courts of law bound by respectable rules of procedure and evidence, and with laws and conventions securing their independence and competence.

In light of this, this chapter recommends that all citizenship determination processes come within the purview of ordinary courts. The Indian Parliament may enact suitable provisions, as part of the Citizenship Act, 1955 if need be, to constitute independent, impartial and competent special courts to adjudicate such cases. These special courts must meet the criteria of due process and fair trial that are mandated by the Indian Constitution and international human rights laws. The members should be recruited through the Assam Judicial Services and employment be made permanent so that they do not have to feel insecure of losing their employment while involved in the administration of justice. Individuals must have a right to appeal to the High Court and the Supreme Court the decisions of these special courts.

6.3 Reform of the FTs

In the interim, the government must seriously reform the current operation of the FTs. Reforms are needed at the three levels of structure, membership and operation. Structurally, the FTs must be given complete independence from the executive. There should be a politically insulated system for the appointment of members, who must be given security of tenure to ensure independence. The current system of contractual employment and extension based on State evaluation must be completely removed.

In terms of membership, the government must reinstate the requirement of judicial experience for the members of the FTs. Appointing lawyers or retired civil servants as members undermines the

need for transparent and rigorous legal reasoning and appreciation of evidence.

The government must also reform the operation of the FTs. At present, the FTs are not bound by any procedural and evidentiary laws, because of paragraph 3 of the Tribunals Order. The paragraph must be amended to make the ordinary laws of the land applicable in citizenship determination proceedings.

One of the biggest concerns has been the vexatious—and often non-existent—police enquiries that continue to target genuine Indian citizens. The FTs must be reminded and empowered to take punitive steps against police officers filing false cases. They must also ensure that they assess the substance of the grounds and allegations of suspicion before issuing notices to individuals. The government must appoint government pleaders in all the FTs, which is not currently the case.

6.4 Fair Legal Rules of Evidence

Some of the biggest concerns about the FT process—and by extension, about the appeals after NRC exclusion—have been about the faulty appreciation of evidence. Since the FTs are not legally bound by the Indian evidence law, extensive documentation has shown that they rely on hyper technicalities, minor contradictions and overly burdensome evidentiary requirements to declare persons foreigners.

The most worrying area of concern is the question of burden of proof. The Sarabnanda Sonowal judgment placed the burden of proving citizenship on the individual rather than the State. If one is to adopt a generous reading of the judgment, the Court's ruling on the issue was based on the understanding that ordinary—and hence, reasonable, fair and just—principles of evidence law would continue to apply. Consequently, the State will also need to share the onus to showing why certain evidence presented by the individual is not admissible or persuasive. But since the judgment, this burden of proof has degenerated into unfair demands from the individual.

novembre 2013 (Mme Charly K), Conseil constitutionnel, quoted in p. 9.

First, the FTs proceedings are overly dependent on documentary proof. This is unfair simply because most Indians do not have access to viable documents like birth certificates, school certificates and property ownership documents. Individuals are forced to spend resources on getting certified copies of public documents, most of which are already in the possession of the State. To make matters more burdensome, the FTs require many of these documents to be corroborated by officials and witnesses. This forces the individuals—mostly poor and unlettered—to incur heavy expenditure. Moreover, many FTs refuse to summon officials, who are most unlikely to come to the FTs merely on the request of the individual struggling to prove her citizenship.

Second, most of the documents are often error-ridden, which is also often the fault of the State rather than the individual. For example, individuals often present voter lists as evidence of their citizenship. These voter lists invariably have errors because of the Election Commission's machinery. The FTs regularly reject such documents during the proceedings.

Third, the FTs never make any evidentiary demands from the State. Government pleaders are often missing during the proceedings. In their place, the FT members cross-question the defence witnesses. The members also practically never require the State to argue why documentary and non-documentary evidence presented by the individual should not be accepted. Finally, the FTs almost never make the enquiry reports and grounds of suspicion available to the individuals, to allow them to satisfy their burden.

These problems demand a serious review of the FT process in relation to the appreciation of evidence. The FTs must apply ordinary principles of evidence law as a rule. They must accept both documentary and oral evidence. Grounds of suspicion and enquiry reports must be made available to the individuals the moment notices are issued. Individuals should also not be required to certify government documents in their possession. The State is better placed to authenticate and present these documents to the FT. The State must ap-

point government pleaders during all proceedings, and the FT members must ask the State—as is the case in any normal legal proceeding—to assert its own evidence and rebut the individual's evidence. The burden of proof should be shared, rather than placed only on the individual. A good practice in this regard is the African Court of Human and Peoples Rights, which in its jurisprudence has held that in citizenship determination proceedings, the burden of proof must be shared.¹⁶ The Court has held that since citizenship has implications on the dignity of individuals, it is not proper for the burden to be only on the individuals. The State must share the burden if it seeks to prove that the documents that the individual is relying upon are inadequate or wrong. Finally, minor errors, especially in government documents, must never be used to declare someone a foreigner.

6.5 Appellate Court Supervision

At present, the higher judiciary has limited the scope of its review of FT decisions. This review does not occur in the form of appeals from FT orders since the Tribunals Order does not provide for it. Rather, individuals who are declared foreigners by the FTs can file writs in the Gauhati High Court under Article 226 of the Constitution, beyond which they can approach the Supreme Court. Through this mechanism, the High Court has consistently refused to interfere with the factual findings of the FTs. This is despite the FTs not following standard rules of evidence and procedure, and numerous instances of badly reasoned orders. From available evidence, it also appears that the High Court never assesses the procedural lapses—absent or poor enquiries, non-delivery of ground of suspicion, inadequate opportunity to cross-question government witnesses or prove the case, and absence of government pleaders—that may have undermined due process at the FT level. In light of the serious problems with the FTs, the High Court must adopt a more searching and demanding model of review of FT orders.

16 *Anudo Ochieng Anudo v. United Republic Of Tanzania*. Application No. 012/2015 Judgment V 22 March, 2018; *Robert John Penessis v. United Republic Of Tanzania*. Application No. 013t2015 Judgment 28 November 2019.

6.6 Detention

Under Indian and international law, any detention that is without legitimate purpose and disproportional is illegal.¹⁷ It is the duty of the State to identify less intrusive means in case there may be any justified reason to secure a person. Indefinite detention would always be illegal.¹⁸ The Indian government has not made its long-term policy regarding the ends of detention clear. Nor has it raised this matter diplomatically with Bangladesh, despite the rhetoric of deportation. In these circumstances, detention—of any person excluded from the NRC or through any other route of citizenship contestation—would be illegal. The State must affirm that no person will be detained and create alternatives to detention.

6.7 Naturalization of Excluded Persons

One of the most worrying features of the NRC process is the uncertain fate of the persons who ultimately are unable to establish their citizenship during the appeals from their exclusion. International organizations have already raised concerns about a crisis of statelessness, and potentially a refugee crisis resulting from the NRC. In this light, there is a need to consider the best policy and legal measures to address this impending crisis.

This chapter recommends that the Indian state must immediately clarify its position on the final consequences of the NRC. It must also make necessary changes in Indian law to ensure that no person is rendered stateless. Under international law, all states are bound by the obligation of not deliberately or inadvertently rendering its nationals stateless.¹⁹ The persons left out of the NRC after appeals will have no other viable nationality. India

has not raised this issue diplomatically with Bangladesh, which in any case will be reluctant—to say the least—to accept any Indians who may lose their Indian citizenship. Consequently, India would be violating its obligations under international law if it does not secure the citizenship of Indian nationals.

India must amend the Citizenship Act, 1955 in light of this obligation. It must provide a transparent mechanism of the naturalization of any person who may be finally rendered without Indian nationality.

6.8 Protecting Child Rights

India is a party to numerous international conventions that bind it to the obligation of securing the citizenship of children born in its territory.²⁰ These include the obligation to provide citizenship to children who would otherwise be rendered stateless. This is reflected in best practices across the world. For instance, countries like France and Finland confer citizenship to any child born in the country to unknown or stateless persons, or to those who cannot transmit citizenship to the child (UNHCR, 2017, p. 8, 10). Estonia grants citizenship to any child born in the country whose parents were residents in the country for five or more years, and who did not have access to citizenship of any other country (UNHCR, 2017, p. 15). Article 21 of the Indian Constitution, which guarantees right to life with dignity, must be interpreted in this light.

The best for India to meet these legal obligations is to strengthen birthright citizenship based on the *jus soli* principle.²¹ The dilution of this principle through the 1986 and 2003 amendments to the Citizenship Act, 1955 must be reversed.

Moreover, any detention of children would violate India's commitments under international law²² and also be contrary to the Juvenile Justice Act,

17 See Securing Citizenship: India's Legal Obligations Towards Precarious Citizens and Stateless Persons (2020). Centre for Public Interest Law, O.P. Jindal Global University..

18 UN Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2233/2013, (2016) UN Doc CCPR/C/116/D/2233/2013.

19 See UN Human Rights Council, Human rights and arbitrary deprivation of nationality: Report of the Secretary-General (2013,19 December) A/HRC/25/28; and Securing Citizenship: India's Legal Obligations Towards Precarious Citizens and Stateless Persons.

20 See Article 7(1), Child Rights Convention; Article 24, ICCPR, Article 18(2), CRPD.

21 See UN High Commissioner for Refugees (UNHCR). (2012, December 21). Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness, HCR/GS/12/04; *Good Practices Paper - Action 2: Ensuring that No Child is Born Stateless* See Securing Citizenship.

22 Article 3, Convention on the Rights of the Child.

2015 that places the best interests of children at the centre of State policy.

6.9 Enacting a Refugee Policy in Conformity with the International Refugee Conventions

In his historic address to the Parliament of the World's Religions in Chicago in 1893, Swami Vivekananda declared, 'I am proud to belong to a nation which has sheltered the persecuted and the refugees of all religions and all nations of the earth.' It is ironic that the Indian government that claims allegiance to Swami Vivekananda has enacted the Citizenship Amendment Act, 2019, restricting citizenship to people on the grounds of both religion and nation.

There is a moral imperative for India to adopt an expansive and humane refugee law. This must conform to what is finest in India's civilizational ethos, and to the morality of India's Constitution. In this light, India must sign and ratify the international conventions on refugees, including the 1951 Convention for the Protection of Refugees.

The Convention defines refugees as persons fleeing persecution on grounds of race, religion, nationality, social group or political opinion. Refugees get legal rights, most important of which are 'non-refoulement', which prevents states from sending back refugees to persecution in their home countries. They also get secondary rights, such as education, work and property. It also prohibits discrimination in accepting refugees.

Accepting these legal obligations would mean recognizing undocumented immigrants as refugees, based on evidence determined by due process of their persecution in their home countries. This would also assure them a set of binding rights. The most important of these is the guarantee that they would not be forced to return to the conditions of persecution, threatening their lives and liberty, which they escaped. The second is that they would be assured lives of dignity within India, with education, healthcare and livelihoods.

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