

# Death by Paperwork:

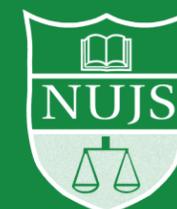
## Determination of Citizenship and Detention of Alleged Foreigners in Assam

A REPORT BY THE NATIONAL UNIVERSITY OF JURIDICAL SCIENCES AND THE INTERNATIONAL HUMAN RIGHTS CLINIC: POLICY ADVOCACY OF CORNELL LAW SCHOOL

JULY 2021



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## EXECUTIVE SUMMARY

In late 2019, worldwide attention turned to India as masses mobilized across the country to protest an amendment to India's citizenship laws that was criticized for discriminating against Muslims.<sup>1</sup> Lesser known, however, is that another process to determine Indian citizenship that had been underway for decades in the northeastern state of Assam had gained steam in recent years. Assam, which shares a 263-kilometer (163-mile) border with Bangladesh, has long been a site of fluid cross-border migration and ethnic tensions. The greatest surge of migration into Assam occurred in 1971 when over 10 million refugees fled modern-day Bangladesh to escape its war for independence from Pakistan.

In the decades after the 1947 Partition, Assamese leaders who rejected the changing ethnic composition of the state stoked a popular movement aimed at detecting, disenfranchising, and deporting "foreigners" from Assam. Following years of violent unrest, the Government of Assam and the All Assam Students Union (AASU) reached an agreement with the Indian government in 1985 to provide amnesty to anyone who had arrived in Assam before March 24, 1971.<sup>2</sup> While anyone born in India prior to 1987 was granted Indian citizenship, those born in India after 1987 could receive citizenship by birth only if at least one parent was an Indian citizen.

On August 31, 2019, upon mandate by the Supreme Court of India, Assam published the National Register of Citizens (NRC), which is a list of people residing in Assam who have been deemed Indian citizens. But the NRC excluded over 1.9 million people, many of whom likely satisfy the requirements of Indian citizenship.<sup>3</sup> To be included in the NRC, all residents of Assam were required to submit documentary evidence of "legacy" showing that they or their ancestors lived in Assam before March 24, 1971.<sup>4</sup> Persons who were excluded from the NRC can appear before quasi-courts known as Foreigners Tribunals (FTs) to contest their adverse citizenship determination. To be successful, however, they must provide significant and often cumbersome paperwork and overcome the arbitrary whims of FT officers. Under the applicable law, the Foreigners Act, 1946, the purported foreigner has the burden of proving that they are an Indian citizen.<sup>5</sup>

This report finds that numerous facets of the citizenship verification process contravene international treaties and Indian constitutional law, including due process, fair trial rights, equality provisions, and norms against arbitrary detention. The functioning of FTs are problematic for the reasons described below and deviate from international and Indian law in the following ways:

## INTERNATIONAL LAW

1. The functioning of FTs violates Article 14 of the International Covenant on Civil and Political Rights ("ICCPR") because they are not functioning competently, independently, or impartially.<sup>6</sup> People with no experience as judicial officers are regularly appointed to serve on the tribunals. In 2015, only 2 out of 63 tribunal appointees were experienced judicial officers.<sup>7</sup> FTs are neither independent nor impartial because FT officers lack security of tenure and therefore are subject to external pressures that affect their decision-making.<sup>8</sup> After FT officers serve for one year,<sup>9</sup> their reappointment by the Government of Assam is contingent on receiving a positive performance review, which Amnesty International (India) revealed depends on whether officers met their silent quota for declaring foreigners.<sup>10</sup>
2. Declared foreigners (even those who cannot be deported) are arbitrarily detained in contravention of prohibitions against inhumane treatment, arbitrary detention, and statelessness. The Government of Assam's current practice of detaining declared foreigners immediately upon the determination of their case by the FTs constitutes arbitrary detention because international law requires that detention of noncitizens be the last resort.<sup>11</sup> Before turning to detention, India therefore must exhaust alternative options, such as requiring declared foreigners to regularly report to their local police stations.

International law also prohibits subjecting detainees to cruel, inhumane, or degrading treatment.<sup>12</sup> Detainees are detained in overcrowded prisons alongside convicted criminals.<sup>13</sup> They are denied work privileges and the opportunity for parole.<sup>14</sup> In addition, detention centers lack adequate sanitation facilities and, as a result, detainees cannot maintain basic hygiene or nutrition practices.<sup>15</sup> Their access to health-care services is also limited, putting detainees at risk of contracting and dying from treatable medical conditions and contagious illnesses, including COVID-19.<sup>16</sup> By stripping Indian citizenship from declared foreigners without deporting them anywhere because no country will take them, India will render some 2 million persons stateless. The prohibition against statelessness is considered customary international law.<sup>17</sup> If rendered stateless, these people will lose access to state benefits, including rights to welfare, social security, and healthcare, which they rely on to survive.

3. International law prohibits India from discriminating against persons, in law or in fact, on the basis of "race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."<sup>18</sup> India's NRC and FT processes

are discriminatory against women, children, transgender persons, religion, national and social origin. The requirement that women possess documents to establish that they are Indian citizens fails to account for the reality that Indian women are, in general, less documented than men. The documentation requirements of the NRC and FTs similarly discriminate against children who, because of their age, lack required documents necessary to prove citizenship. An estimated 24 million Indian children under the age of five still did not have birth certificates in 2019.<sup>19</sup> Transgender persons were disproportionately excluded from the NRC because they lack access to necessary linkage documents due to familial estrangement.

## INDIAN LAW

1. Foreigner's Tribunals in India have been created via an executive order, and not by an Act of Parliament. This constitutes excessive delegation of legislative powers, and renders the Tribunals unconstitutional.
2. In 2015, the Supreme Court ordered the government to update the 1951 NRC as a response to the alleged influx of illegal migrants in Assam.<sup>20</sup> To do so, the Court created a distinct class of persons subject to the NRC (i.e., those domiciled in the state of Assam) to the exclusion of those residing in the rest of India. This has resulted in differential tests of citizenship for Assam and the rest of India, resulting in a potential violation of the right to equality enshrined within Article 14 of the Constitution of India.<sup>21</sup>
3. The procedure for citizenship determination followed by Foreigner's Tribunals is violative of the right to life and personal liberty enshrined to every individual under Article 21 of the Constitution of India.<sup>22</sup> Tribunal procedure does not adhere to the standard of being "fair, just and reasonable" because of the arbitrary manner in which they declare persons to be foreigners and direct them to be detained in immigration detention centres.<sup>23</sup>

Both the NRC and the Foreigner's Tribunals place millions of Indian citizens in precarity with respect to their citizenship status. As a result, they live in constant fear and vulnerability without the protections of Indian citizenship or are indefinitely detained in jails without the possibility of deportation. While currently limited to Assam, national discussions are underway to expand similar citizenship adjudication processes throughout India.

We recommend that the United Nations, United States, and other countries engage with India on the human rights concerns identified in this report. We recommend that India should modify its citizenship adjudication process to comply with international law and Indian constitutional law.

## METHODOLOGY

This report's contributors conducted fact-finding interviews in India and desk research.

### INTERVIEWS IN INDIA

In February 2020, students and faculty from the National University of Juridical Sciences (NUJS) Kolkata and Cornell Law School International Human Rights Policy Advocacy Clinic conducted fieldwork in Assam, India. Law student interviewers were Ketan Jain, Aarushi Mittal, Sumridhi Kaur, Prachee Sawant, and Olivia Rosen. Contributors interviewed more than twenty key stakeholders with insights into the relevant issues, lawyers, social workers, human rights activists, journalists, scholars, and affected persons. Interviewees were selected on the basis of their expertise and geographical location, with special emphasis on some districts in Lower Assam, namely Bongaigaon, Goalpara and Guwahati in Kamrup Metropolitan district. These districts were identified because of the large number of persons declared foreigners in these districts. Some interviews took place in Kolkata or by telephone.

### DESK RESEARCH

Contributors conducted extensive desk research on the content and scope of India's citizenship laws, the historical and political context of Assam, the FTs and NRC process, and applicable international human rights law. Contributors reviewed Indian statutes, domestic newspaper articles, and cases from the Supreme Court of India and Gauhati High Court. For background on governing international law, contributors reviewed the following materials: inter-national treaties and declarations; reports of international human rights monitoring bodies and experts, including the U.N. Secretary-General and Special Rapporteurs; and academic journal articles.

## CHAPTER 1

# Historical Background of India's Citizenship Laws and Foreigners Tribunals in Assam

### CITIZENSHIP LAW IN INDIA

Citizenship law in India is derived from the Constitution of India, 1950, and the Citizenship Act, 1955. Part II of the Constitution of India, which deals with citizenship, was framed in the backdrop of the Partition. It sought to assign membership on the basis of not just birth and domicile, but also to migrants who had moved from territories now included in Pakistan. Responding to what were extraordinarily violent circumstances of the Partition, the Constituent Assembly limited the role of the Constitution to only fixing who was a citizen at the time of its commencement in 1950. The question of who could be a citizen of India, was left to be determined by the Parliament of India, and such legislative power is not constrained by the provisions of Part II of the Constitution.<sup>24</sup>

The Citizenship Act, 1955 sets down how citizenship may be acquired or lost in India. Citizenship acquisition in India may be by birth,<sup>25</sup> descent,<sup>26</sup> registration,<sup>27</sup> naturalisation,<sup>28</sup> and incorporation of territories.<sup>29</sup> The Act, in its original iteration, allowed for anyone born on the territory, irrespective of who they were born to, to become an Indian citizen.<sup>30</sup> However, the Citizenship (Amendment) Act, 1986 restricted birthright citizenship to those born to an Indian parent.<sup>31</sup> The Citizenship (Amendment) Act, 2003 further restricted this right to exclude those children either of whose parents is an illegal migrant.<sup>32</sup>

Thus citizenship law in India has, to borrow Anupama Roy's framing, ranged from "encompassment to closure" - beginning at a liberal jus soli framework but gradually imposing restrictions to transition to a jus sanguinis framework. Equally important is the transition from a unitary form of citizenship applicable across the country to a form of "differentiated citizenship", in the form of Section 6A of the Citizenship Act, applicable only to the State of Assam.

### DIFFERENTIATED CITIZENSHIP IN ASSAM

Assam is the most populated northeastern Indian state. The sovereign nations of Bhutan and Bangladesh border Assam to its northwest and southwest, respectively, while the Indian states of Arunachal Pradesh, Nagaland, Meghalaya, Tripura, Mizoram, West Bengal, and Manipur constitute its other land borders. At India's independence in 1947, the Northeast was comprised of only Assam and the princely states of Tripura and Manipur. Over the

next quarter century, the Indian government created the remaining states from the territory of Assam along ethnic and tribal lines.

The existence and recognition of land borders in the northeastern part of India date to the period of British colonial rule in undivided India. After the British defeated the Nawab of Bengal in 1757, they undertook an initiative to demarcate political territories east of Bengal.<sup>33</sup> Though historians disagree on the exact year that Assam was opened up as a land frontier,<sup>34</sup> there is consensus that the 19th-century saw distinct waves of migration into the region. Tea labourers ("Coolies") from regions in Central and South-Eastern India comprised the first wave of migrants.<sup>35</sup> These laborers worked in very harsh conditions throughout the colonial period and, even today, they are mainly relegated to tea plantations screened off from the broader Assamese population.<sup>36</sup> The second wave of migration began as early as 1891 when the British colonial government began encouraging peasants from East Bengal to settle in the "wastelands" of the Brahmaputra valley to grow jute.<sup>37</sup> It should be noted that at this point in history all movement of population is between provinces within the British empire.

In 1916, as a response to increasing migration from East Bengal, the British colonial government introduced the "Line System" in order to segregate new residents from Assam's "native" inhabitants. The narrative predominant amongst Assam's indigenous population characterized Bengali migrants as "land hungry immigrants" who "threaten[ed] to change the whole nature, language and religion of the Brahmaputra Valley."<sup>38</sup> It is important to note here that historical works on colonial Assam have shown how migrants from East Bengal were actually sold land by Assamese mauzadars (rent collectors) for exorbitant prices. Moreover, these cultivators introduced innovations which increased manifold agricultural production in Assam.<sup>39</sup> The Line policy received provisional sanction in 1920 and was welcomed by the literary class in Assam.<sup>40</sup>

India's independence in 1947, and the partition of East Pakistan from India led to a massive exchange of populations across newly-formed and porous international borders.<sup>41</sup> Even after Partition, migration continued from East Pakistan to Assam,<sup>42</sup> and the Bangladesh Liberation War in 1971 led to an exodus of an estimated 10 million Bengalis, Hindu and Muslim, from erstwhile East Pakistan into Assam and its neighboring states, the vast majority of whom were repatriated in its aftermath.<sup>43</sup> However, by this time, Assam's indigenous population (a demographic comprising numerous ethnic and tribal groups<sup>44</sup>) widely attributed Assam's demographic change to illegal immigration from East Pakistan. Assam's high unemployment and poverty levels, despite its abundance of natural resources, further stoked tensions of Assamese who resented the Govern-

ment of India's exploitative relationship with its periphery state.<sup>45</sup> As anger simmered over the perceived destruction of the "Assamese identity" and the central government's indifference, Assam witnessed popular campaigns throughout the 1960s demanding the imposition of the Assamese language across institutions.<sup>46</sup>

The Assam Movement, spearheaded by the All Assam Students Union (AASU), began in 1979 as a response to this perceived crisis of demography. The Movement's central platform was the detection, disenfranchisement, and deportation of "foreigners" from the state of Assam.<sup>47</sup> On June 8, 1979, a 12-hour general strike snowballed into years of violent civil unrest involving sit-ins and picketing of government offices. The agitation reached their crescendo on February 18, 1983 when mobs armed with guns and machetes massacred over 1,800 people in the Muslim-majority Nellie district of Assam.<sup>48</sup> Amalendu Guha documents how incidents of violence became commonplace during this populist agitation.<sup>49</sup>

After protracted negotiations, the Government of India, the Government of Assam, and the AASU signed the Assam Accord on August 15, 1985 in order to restore normalcy to Assam. The Citizenship (Amendment) Act, 1985 codified the Assam Accord by inserting Article 6A into The Citizenship Act, 1955.<sup>50</sup> Article 6A, which applies exclusively to Assam, added a sixth category of Indian citizenship distinct from those identified in The Citizenship Act of 1955<sup>51</sup>:

- Persons of Indian origin who entered Assam from specified territories (Bangladesh) before January 1, 1966 were deemed Indian citizens.
- Persons of Indian origin who entered Assam from specified territories between January 1, 1966 and March 25, 1971 were to be removed from electoral rolls and eligible for full Indian citizenship after ten years.
- Persons of Indian origin who entered Assam from specified territories on or after March 25, 1971 were to be detected and deported.

The date of March 25, 1971 was selected as the cut-off for citizenship in Assam in recognition of the special circumstances of mass migration that occurred during the Bangladesh Liberation War.<sup>52</sup>

The process of adjudicating citizenship of suspected foreigners at FTs is rooted in this sociopolitical context of post-Partition Assam. The following section of this chapter will provide an overview of FTs in Assam's history, their legal basis, and the current status of the citizenship verification project ongoing in Assam.

## FOREIGNERS TRIBUNALS

The Foreigners Act, 1946 bestows plenary powers upon the Government of India to regulate the entry, presence, and deportation of foreigners in India.<sup>53</sup> The Act defines a "foreigner" as "a person who is not a citizen of India."<sup>54</sup> This broad definition of foreigners does not differentiate between classes of non-Indian citizens, such as asylum seekers, refugees, and tourists, irregular and economic migrants.<sup>55</sup> Under the Foreigners Act, 1946, the Government has the power to deport a "foreigner" without a valid passport.<sup>56</sup> In 1976, the Ministry of Home Affairs delegated the powers to issue orders under Section 3 the Foreigners Act, 1946 to Assam's Superintendents of Police and Deputy Commissioners.<sup>57</sup>

The Foreigners (Tribunal) Order, 1964 grants the Government of India the power to refer the question of an alleged foreigner's citizenship to designated FTs.<sup>58</sup> Tribunals apply the definition of "foreigner" as defined by the Foreigners Act, 1946.<sup>59</sup> The Ministry of Home Affairs issued the Order as part of the Government of India's "Prevention of Infiltration into India of Pakistani Nationals" (PIP) Scheme that was aimed at deporting "infiltrators" back to Bangladesh (erstwhile East Pakistan).<sup>60</sup> The Assam Border Police Organization, now known as the Border Police, was established for PIP's implementation.<sup>61</sup> The Foreigners (Tribunal) Order, 1964 grants FTs the power to regulate their own procedures,<sup>62</sup> although they have been given the powers of a civil court for summoning and examining witnesses and for producing documents.<sup>63</sup>

As the Assam Movement steadily gained momentum throughout the 1960s and 1970s, FTs were being established and adjudicating cases of alleged foreigners in Assam under the Foreigners Act, 1946.<sup>64</sup> But in 1983, two years before the Assam Accord, the Central Government passed the Illegal Migrants Determination by Tribunals Act (IMDT Act), which wrested the power to resolve citizenship questions from the Government of Assam to the Government of India.<sup>65</sup> The IMDT Act differed from the Foreigners Act, 1946 in crucial ways that resulted in lower rates of identifying foreigners.<sup>66</sup> Specifically, it prescribed burdensome legal procedures for authorities making an "application" (i.e. declaring someone a foreigner) to the FTs, and placed the burden of proof on the State, not alleged foreigners, to prove their citizenship status.<sup>67</sup> By consequence, in 1985, when the Parliament inserted Article 6A into the Citizenship Act, 1955 to effect the Assam Accord, both the Foreigners Act, 1946 and the IMDT Act, 1983 applied simultaneously with two modes of determining citizenship.

Over the next two decades, the Government of India continued to clash with Assamese hardliners who criticized the IMDT Act as evidence of the State's executive

overreach with regard to the foreigners issue. The conflict came to a head in the 2005 Supreme Court of India case *Sarbananda Sonowal v. Union of India*.<sup>68</sup> Sonowal, then-president of the AASU and former Chief Minister of Assam, petitioned the Supreme Court to repeal the IMDT Act for discriminating against the people of Assam by "making it impossible for [them] to secure the detection and deportation of foreigners from Indian soil."<sup>69</sup> The Supreme Court of India granted Sonowal's petition, striking down the IMDT Act as unconstitutional and ordering that provisions of the Foreigners Act, 1946 solely govern citizenship questions of alleged foreigners in Assam.

In its opinion, the Supreme Court cited the factually inconsistent, often-criticized<sup>70</sup> 1998 "Report on Illegal Migration in Assam" by former Governor of Assam Srinivas Kumar Sinha to support its conclusion that the IMDT Act failed to protect Assam from "external aggression and internal disturbance" due to "illegal migrants."<sup>71</sup> Amnesty International (India) concluded that, by conflating illegal migration with national security, the Supreme Court "justified the use of repressive laws and policies," such as shifting the burden of proof from the State back to the alleged foreigner in FT proceedings.<sup>72</sup> The legal implications of the procedures prescribed by the Foreigners Act, 1946 and the Foreigners (Tribunal) Order, 1964 will be explored in the following chapters.

Currently, there are three routes by which alleged foreigners are called in front of FTs. First, the Supreme Court referred the cases of some 230,000 persons marked "Doubtful Voters" (D-Voters) to FTs.<sup>73</sup> The Election Commission had first identified the names of voters that it considered doubtful in its intensive review of Assam's electoral rolls in 1997. Second, the Border Police can refer names of alleged foreigners to the FTs through its own investigations or upon receiving local tips.<sup>74</sup> Third, all persons who were not included on a list of citizens, known as the National Register of Citizens ("NRC"), in August 2019 have the right to appeal their exclusion to the FTs, which then have 120 days to make the final determination.<sup>75</sup>

Although the Government of India has only set up FTs in Assam, a 2019 amendment to the Foreigners (Tribunals) Order empowers State governments and Union Territories to also set up FTs—a move that signals the possibility that they may be set up in other states as well.<sup>76</sup> As of December 2020, FTs have declared over 86,000 persons as foreigners with some 83,000 cases of D-Voters pending.<sup>77</sup> Now, FTs will also be tasked with adjudicating appeals cases of the 1.9 million persons excluded from the NRC.

## THE NATIONAL REGISTER OF CITIZENS

The National Register of Indian Citizens (NRC) is a list of Indian citizens in Assam. It was first prepared in 1951, along with the first census conducted in independent India. The NRC created in 1951 was neither comprehensive nor authoritative,<sup>78</sup> and there was no attempt made in the following decades to update it. It was during the Assam agitation that demands for updation of the NRC grew in strength; however the Assam Accord found no mention of the NRC. A legal framework for registering all Indian citizens was first laid down through the Citizenship (Registration of Citizens and Issuance of National Identity Cards) Rules, 2003,<sup>79</sup> through the creation of a nationwide National Register of Indian Citizens, which was subsequently amended in 2009 to create a framework specific for the state of Assam.

However, it was only in 2013 that the process of NRC updation for Assam began in earnest. The Supreme Court of India, while hearing a petition filed by Assam Public Works, an NGO based in Assam, started passing detailed orders for the updation of the NRC, and commenced the supervision of the exercise.<sup>80</sup> Over the next six years, the process of updation of the NRC went on under the oversight of the Supreme Court of India. The final list of the NRC was released on 31st August, 2019, and 19,06,657 persons were excluded from this list.<sup>81</sup> Persons excluded from the NRC are entitled to file appeals against their exclusion before the Foreigner's Tribunals, after receiving reasons for their rejection.<sup>82</sup> As on date of publication of this report, no person excluded from the NRC has received reasons for their rejection.

In accordance with the 2009 Schedule to the Citizenship Rules of 2003, every resident of Assam had to apply for inclusion in the NRC. The process of inclusion required every applicant to establish that either they or their ancestors had been present in Assam on or before the 24th of March, 1971. Therefore, individuals had to produce documentary evidence to establish, firstly, that their ancestors had been present in Assam on or before the 24th of March 1971, and secondly, that they were indeed related to their ancestors. These two sets of documents, referred to as legacy and linkage documents respectively, became crucial to establishing an individual's citizenship.

# FOREIGNERS TRIBUNALS AND NRC PROCESS VIOLATE INTERNATIONAL LAW

## CHAPTER 2

### The Adjudication of Citizenship by Foreigners Tribunals Violates Fair Trial Rights

India is party to the International Covenant on Civil and Political Rights (ICCPR) and therefore is bound by its provisions.<sup>83</sup> The primary provision of ICCPR Article 14 mandates that “in the determination of criminal charges against [persons]... [they] shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law.”<sup>84</sup> Criminal charges are acts punishable under domestic criminal law, or those acts “that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity.”<sup>85</sup> The requirements of competence, independence, and impartiality are absolute and not subject to any exceptions.<sup>86</sup>

FT proceedings are subject to ICCPR Article 14 because the consequences of finding someone to be a foreigner resembles the consequences of a criminal penalty. As outlined in the previous section, The Foreigners Act, 1946 vests the central government with the power to “prohibit, regulate, or restrict” the presence of foreigners in India, including orders providing for foreigners’ arrest or detention.<sup>87</sup> The Foreigners (Tribunals) Amendment Order, 2019 executes this power by allowing the central or state governments to refer the question of persons’ citizenship to FTs that will make an ultimate determination.<sup>88</sup> Declared foreigners are thereafter subject to arrest and detention under The Foreigners Act, 1946—sanctions that effectively make an adverse determination of “foreigner” the equivalent of a domestic criminal law punishment. Consequently, even though The Foreigners (Tribunals) Order, 1964 mandates that tribunals possess the “powers of civil courts while trying a suit under the Code of Civil Procedure”<sup>89</sup> as opposed to under the Indian Penal Code, the proceedings nonetheless implicate ICCPR Article 14 because sanctions of arrest and detention are punitive in nature and therefore “must be regarded as penal.”<sup>90</sup> Moreover, as

further discussed below, when persons are determined as foreigner, they are not typically deported because they also do not have citizenship in any other country. They remain stateless and lack access to government services, voting rights, and suffer many of the other consequences suffered by criminal defendants. The fact that declared foreigners are frequently detained in prisons alongside convicted criminals is further evidence that the charge is “penal.”<sup>91</sup>

#### FOREIGNERS TRIBUNAL HEARINGS DO NOT MEET THE BASIC REQUIREMENTS OF FAIR TRIALS ENUMERATED IN ARTICLE 14(1).

FT hearings do not provide alleged foreigners the opportunity to adjudicate their citizenship case in fair and public hearings by legal tribunals that are competent, independent, and impartial.

##### Tribunal hearings are not public.

ICCPR Article 14 requires that tribunal hearings be conducted publicly and orally,<sup>92</sup> absent exceptional circumstances necessitated by national security, morality, or public order.<sup>93</sup> The decision to close proceedings from the public and media should be taken on a case-by-case basis and limited to those necessary parts.<sup>94</sup>

Although both India’s Code of Criminal Procedure and Code of Civil Procedure require that courts open their hearings to the public as mandated by Article 14, FTs do not comply in their day-to-day operations. A 2019 exposé by The Caravan found that, because The Foreigners (Tribunal) Order, 1964 grants FTs the power to regulate their own procedures, FTs “operate under a rule that nobody apart from [alleged foreigners] would be allowed inside the building.”<sup>95</sup> The mere act of approaching a tribunal could generate unwanted attention from the Indian government and law enforcement authorities.

The secrecy with which FT hearings are conducted is a flagrant violation of ICCPR Article 14. Moreover, reports that police officers have working orders to bar the media from entering FT hearings demonstrate the intentional quality of the violation and call into question the integrity of the whole FT process. The Government of India also has not provided an explanation of extraordinary circumstances to justify why FT proceedings are closed to the public.

##### Foreigners Tribunals lack competence.

Competency requires that appointees presiding over tribunals must be suitably qualified and experienced to act as judicial officers.<sup>96</sup> But too many FT officers are neither suitably qualified nor experienced as required by ICCPR Article 14. Amnesty International (India) revealed that, in 2015, the Government of Assam appointed 63 members to FTs, only two of whom were former or current judicial

officers.<sup>97</sup> All other appointees were advocates with ten or more years of legal experience and trained for just four days before taking the bench.<sup>98</sup> As recently as June 2019, the Gauhati High Court has solicited applicants to serve as FT officers with even less experience and weaker qualifications.<sup>99</sup> A job advertisement from June 10, 2019 cited “Retired Civil Servants (not below rank of Secretary and Addl. Secretary) having judicial experience” and “Advocates 35 years and above with at least 7 years of practice” as qualified candidates for the position of FT officer.<sup>100</sup> Although it is unclear what type of “judicial experience” a retired civil servant could have without being a judicial officer or advocate, given the high stakes of FT proceedings for the alleged foreigner, this experience is insufficient. Moreover, four days of training for non-judicial officers calls into question their competence, as required under ICCPR Article 14.

Oliullah Laskar, an advocate at the Gauhati High Court and the Director of the Barak Human Rights Protection Committee, relayed an account that illustrates the disastrous consequences of judicial incompetency: a FT officer deemed a man “foreign” because he mistakenly concluded that his certificate registering Indian citizenship was forged.<sup>101</sup> He reasoned that, because the certificate was dated 1956 even though the man migrated to India in 1955, it must have been forged given that there is a 7-year waiting period for citizenship by registration. But the officer failed to realize that when the individual’s father had migrated to India in 1955, the waiting period for citizenship by registration was only one year. Due to the officer’s ignorance of Indian citizenship law—a result of inexperience, lack of judicial qualifications, or both—a man was stripped of his rightful Indian citizenship.

##### Foreigners Tribunals are not independent.

Whether a tribunal is independent depends on the following factors: (1) The method of appointing tribunal officers; (2) The security of tribunal officers’ tenure; and (3) The existence of guarantees protecting tribunal officers from external pressures.<sup>102</sup> The Basic Principles on the Independence of the Judiciary, endorsed by the U.N. General Assembly, echoes these principles and recommends that “judges, whether appointed or elected... have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.”<sup>103</sup>

The FTs currently operating in Assam are not independent because the method of hiring and retaining tribunal officers hinges on appointees’ willingness to detect foreigners. The June 2019 Gauhati High Court advertisement seeking applicants to serve as FT officers states that qualified can-

didates will have “historical background [of Assam] giving rise to foreigners issues.”<sup>104</sup> This requirement indicates that the Gauhati High Court explicitly filters its applicants based on their knowledge of “foreigners issues”—a term that seems to suggest an assumption that litigants before the Foreigners Tribunals will be foreigners. Thus, from the initiation of the application process, prospective tribunal officers lack the independence required to inspire public confidence in the proceedings.

FT officers also lack security of tenure—a cornerstone of an independent judiciary. Officers are hired on a contractual basis for an initial period of one year.<sup>105</sup> Once appointed, officers’ tenure may be “extended from time to time on need basis” following a performance review.<sup>106</sup> In 2017, the Government of Assam extended the tenure of 42 tribunal officers and denied extensions to 19 officers.<sup>107</sup> Amnesty International (India) analyzed the performance appraisal submitted to the Gauhati High Court and concluded that the data reflects “a clear pattern of discrimination against those who did not declare foreigners at a high rate.”<sup>108</sup> Specifically, the appraisal report documented that the Government of Assam had terminated officers who declared less than 10 percent of the persons who appeared before them to be foreigners.<sup>109</sup>

In an interview with Human Rights Watch, a former FT officer acknowledged that “there might be arbitrary actions by [FTs] because there is an internal government policy that more and more people be deemed foreigners. [Officers] are hired on the basis of contracts—those with records of declaring more and more people as foreigners are preferred.”<sup>110</sup> Shahjahan Ali Ahmed, a paralegal in the district of Barpeta, observed a FT officer explicitly tell an alleged foreigner that he would be declared a foreigner despite having sufficient documents due to the government’s quota requirements.<sup>111</sup> By making FT officers’ jobs contingent upon the number of persons they declare foreigners, the Government of Assam is effectively pressuring FT officers to strip Indian citizenship of persons appearing before them—a direct contravention of ICCPR Article 14’s mandate of an independent tribunal.

##### Foreigners Tribunals are not impartial.

ICCPR Article 14 requires that tribunals are impartial. The Human Rights Committee has held that the notion of “impartiality” in ICCPR Article 14(1) “implies that judges must not harbor preconceptions of the matter put before them, and that they must not act in ways that promote the interests of one of the parties.”<sup>112</sup> Impartiality has two components— subjective impartiality and objective impartiality.<sup>113</sup>

## Subjective Impartiality

Subjective impartiality is the ability of judicial officers to exercise their functions without personal bias, prejudice, or preconceptions about the particular cases in front of them.<sup>114</sup> Amnesty International argues that courts in India have been developed with the specific goal of excluding people of Bengali origin.<sup>115</sup> Indeed, four special rapporteurs of the U.N. Office of the High Commissioner of Human Rights (OHCHR) wrote to India's Minister of External Affairs Sushma Swaraj in June 2018, expressing "serious concern that members of the Bengali Muslim minority in Assam have experienced discrimination in access to and enjoyment of citizenship status on the basis of their ethnic and religious minority status" and that "this discrimination is predicted to escalate as a result of the NRC."<sup>116</sup>

But the U.N.'s concerns have gone unresolved. In August 2019, the Times of India reported that out of a sample of 500 judgments issued by FTs, 80 percent of appearing individuals were declared foreigners. Notably, they were all Bengali and overwhelmingly Muslim.<sup>117</sup> To this day, however, there is no conclusive report detailing the patterns of migration from Bangladesh to India to definitively support that claim.<sup>118</sup> More recently, in September 2020, the Government of Assam terminated seven assistant government pleaders (AGPs), the equivalent of assistant prosecutors, before their terms' expiry at FTs in Assam's Dhubri district.<sup>119</sup> All seven terminated AGPs were Muslim and their replacements were all Hindus, further indicating bias against Bengali Muslims.

## Objective impartiality

Objective impartiality depends on whether the reasonable person would view the tribunal as functioning so as to remove legitimate doubts about its impartiality.<sup>120</sup> In the case of FTs, the answer is unequivocally no. Instead of functioning so as to remove doubts about impartiality, FTs are governed by rules and procedures that are, by definition, biased against the undocumented and thus impartial. The rules of evidence governing FTs exemplify this bedrock violation of fair trial rights.

The flexibility afforded to FTs to set their own procedures has given rise to rules of evidence that derail any possibility of objective impartiality. Indeed, Assam's entire citizenship verification process is premised on the requirement that proving one's citizenship can only be achieved through extensive document production. But in a country where most people are too poor and uneducated to be well documented, the near-exclusive reliance on documents to prove citizenship sets a bar that those called before FTs cannot meet.

Take, for example, 10-year old Riya Das from Bongaigaon District's Kachudola village, whose case was documented in an August 2019 profile by journalist Arunabh Saikia of *The Scroll*.<sup>121</sup> Riya was the only one of her siblings excluded from the draft NRC because she lacked the necessary documents to establish linkage with her father. Unlike her siblings, Riya did not possess a birth certificate—when she was born, her father (the only person in her family who understood the birth certificate process) was working as a daily-wage laborer in another part of the country and hence was unable to secure her birth certificate.<sup>122</sup> Now, assuming that Riya was ultimately excluded from the final NRC, her only hope is to appeal her case before the FTs. But at the time of writing this report, the prospect of a happy ending for Riya is bleak—just like the NRC, FTs base their citizenship inquiry on whether the alleged foreigner provides documentary proof of legacy and linkage. Without a birth certificate and no alternative documents proving linkage, her appeal options are virtually nil. Riya's story is not unique and highlights the objective impartiality that results from requiring documentary evidence where the accused's lived reality makes document production impossible.

As the poorest Indians realize the crucial role that obtaining birth certificates have in proving their citizenship, a black-market economy of "middlemen" dealing fraudulent birth certificates has developed to exploit the desperate and undocumented. An anonymous advocate who appears before the FTs explained that middlemen demand large sums of money from undocumented persons in exchange for forged birth certificates and other documents that will be accepted at the FTs.<sup>123</sup> Too often, though, the middlemen defraud families, leaving them with nothing. And even when the families do obtain false documents, FTs are quick to spot the forgeries. Indeed, in an August 2018 judgment, the FT in Morigaon District expressed its alarm that almost all certificates registering Indian citizenship produced before it were forgeries.<sup>124</sup> But instead of recognizing the systemic failures of a process that demands documents from people who, for obvious reasons, just do not have them, the FT encouraged others to be "more diligent" in their scrutiny of documents moving forward.<sup>125</sup>

The challenge of proving one's citizenship does not end even if one possesses the right documents, however. FTs have also set idiosyncratic standards for determining which documents are valid evidence. It is well documented that persons have been declared foreigners for the simple error of having their names spelled differently on two documents.<sup>126</sup> FTs also routinely reject documents that depict the national emblem citing The Emblems and Names (Prevention of Improper Use) Act, 1950, which

requires the Government of India to authorize agencies to reproduce the national emblem.<sup>127</sup> As a result, otherwise valid documentary evidence is rejected for violating a separate statute that has nothing to do with document's veracity. Further, FTs only accept certified copies of documents, forcing daily-wage laborers to travel for miles to certify their documents, only to experience harassment from issuing authorities.<sup>128</sup>

In direct contravention of Section 50 of the Indian Evidence Act, which provides that oral testimony of a familial relationship is relevant evidence,<sup>129</sup> FTs render documentary evidence conclusive and testimonial evidence irrelevant. Oliullah Laskar described one appeal that he worked on where three people testified before a FT in favor of the respondent. Even though the prosecution did not even bother cross-examining the witnesses, leaving their testimonies rebutted, the FT officer declared the respondent to be a foreigner.<sup>130</sup> In a similar case that received media attention, Jabeda Begum, a 50-year old married woman from Baksa District, submitted fifteen separate documents to prove her citizenship, including three voter lists and a gram panchayat certificate.<sup>131</sup> The village headman even testified at the FT on her behalf, verifying her lineage in the absence of a birth certificate. Even with his credible testimony, the FT officer declared Jabeda Begum a foreigner, reasoning that she had not proved linkage to her father. This absurd result illustrates that no amount of evidence is enough to prove citizenship when the State has already decided that the person is a foreigner—the definition of impartiality violating Article 14.

## FOREIGNERS TRIBUNALS DO NOT MEET THE SPECIFIC REQUIREMENTS OF FAIR TRIALS ENUMERATED IN ARTICLE 14.

### Alleged foreigners bear the burden of proof.

ICCPR Article 14(2) provides that all persons charged with a criminal offense have the right to be presumed innocent until proven guilty.<sup>132</sup> The presumption of innocence further requires that the State bear the burden of proving the charge.<sup>133</sup> To reiterate, the determination of persons' citizenship by FTs "must be regarded as penal" and thus implicates Article 14 due to the punitive sanctions of arrest and detention that result from an adverse ruling.<sup>134</sup>

FTs reverse the burden of proof pursuant to Section 9 of the Foreigners Act, 1946, which places the burden on the individual, not the State, to prove that they are not a foreigner.<sup>135</sup> The tragic implications wrought by the reversed burden of proof have been widely reported amongst human rights organizations and the Indian media covering Assam's citizenship verification process.<sup>136</sup> What has

been less discussed are the additional international law violations that stem from this fundamental perversion of fair trial rights. Specifically, ICCPR Article 14 holds that charged persons have the right to examine witnesses against them and to obtain the attendance and examination of defense witnesses under the same conditions as witnesses against them.<sup>137</sup> But an anonymous advocate who represents alleged foreigners revealed that FTs have manipulated the reversed burden of proof to justify withdrawing all procedural support from alleged foreigners.<sup>138</sup>

FTs reason that, because alleged foreigners bear the burden of proving their citizenship, officers need not exercise the powers afforded to them under the Foreigners (Tribunal) Order, 1964 to summon witnesses to the FT or to require discovery and document production that is necessary for respondents to prove their citizenship. Alleged foreigners are therefore stuck with a burden that they cannot conceivably overcome due to the officers' neglect. The situation is best explained with an example. Often, married Muslim women require the testimony of Qazis, or Sharia court judges who sign marriage certificates, to prove linkage to their parents. But if a woman cannot alone convince the Qazi to testify at her hearing, and the FT fails to summon the Qazi based on the twisted logic of reverse burden of proof, then the woman's case is all but lost.<sup>139</sup>

FTs also cite the reversed burden of proof to relieve investigating authorities from providing any legitimate reason for referring alleged foreigners to tribunals. According to the same anonymous lawyer, FT officers reason that the State's evidentiary burden is discharged the moment an investigating authority brings a case to the tribunal.<sup>140</sup> FT officers therefore refuse to provide respondents the inquiry reports detailing the case against them on the basis that the State has already discharged its evidentiary burden.<sup>141</sup> On the same grounds, FTs often prevent attorneys from cross-examining the investigating officer and exempt prosecution witnesses from testifying altogether.<sup>142</sup> Consequently, the Border Police can select random people to serve as prosecution witnesses. All of these practices violate the right of alleged foreigners to a fair trial.

### Foreigners Tribunals issue *ex parte* judgments against alleged foreigners.

ICCPR Article 14(3)(d) provides that charged persons are entitled to be present at their own proceedings and put on a defense.<sup>143</sup> FTs routinely violate this provision by issuing *ex parte* judgments against alleged foreigners. An *ex parte* order occurs where the party against whom the case is brought (i.e., the alleged foreigner) is not present at the proceeding and loses the case (i.e., the alleged foreigner is declared a foreigner). In 2019, the Ministry of Home Affairs stated that between 1985 and 2009, FTs declared 63,959 people to be foreigners through *ex parte* orders.<sup>144</sup> Indeed, journalist Rohini Mohan analyzed 500 judgments issued by FTs and found that 82 percent of respondents were declared foreigners. Of that 82 percent, 78 percent of the orders were issued *ex parte*.<sup>145</sup> In response to the statistic, police explained that alleged foreigners who had absconded justice accounted for all 78 percent of the *ex parte* judgments. But, upon investigation, Mohan personally found many of the people living in their villages, unaware that they had been called to the FTs at all.<sup>146</sup>

Systemic problems within the FT process have caused the surge of *ex parte* judgments. In most cases, *ex parte* judgments occur because the hearing notices have been haphazardly posted somewhere nearby the alleged foreigner's residence, such as on streetlight poles.<sup>147</sup> In some cases, alleged foreigners have been turned away from their own proceedings because they did not produce a physical copy of their notice.<sup>148</sup> And, too often, persons learn about the cases against them only after the FTs have issued the *ex parte* orders declaring them foreigners and the police arrive at their residence to take them to detention centers.<sup>149</sup> The Gauhati High Court has upheld a venue provision prohibiting alleged foreigners from transferring their cases to the FT closest to their home, which creates another barrier to justice.<sup>150</sup> Given the geographic and socioeconomic realities that prohibit residents of Assam from accessing transportation to far away locations, the staggering number of *ex parte* orders ignoring such realities is not a surprise.

### Alleged foreigners lack the right to have access to translators.

ICCPR Article 14 enshrines the right of charged persons to have the free assistance of an interpreter during proceedings that take place in a language that they cannot speak or understand.<sup>151</sup> FTs do not offer this service to alleged foreigners, many of whom exclusively speak and understand Bengali. Even worse, there have been reported instances where FT officers go so far as to prohibit advocates from translating the proceedings into Bengali for their clients, arguing that, if alleged foreigners are really Indians and not Bangladeshi, then they must know Assamese.<sup>152</sup> But this argument is illogical in a country where an estimated 19,500 languages or dialects are spoken as mother tongues, many of which are incomprehensible from one another, and also fails to provide alleged foreigners their fair trial rights.

## CHAPTER 3 The Detention of Declared Foreigners Violates the Prohibition Against Arbitrary Detention, Inhumane Treatment, and Statelessness

India's current policy of detaining declared foreigners without the possibility for deportation to Bangladesh violates international laws that prohibit arbitrary detention, including detention as a first resort for indefinite periods of time and the prohibition against statelessness. The inhumane conditions that detainees are subject to in Assam's detention centers also violate international standards of detention.

### DETENTION RESULTING FROM PROCESSES THAT ARE UNJUST, UNPREDICTABLE, AND LACK DUE PROCESS OF LAW CONSTITUTES ARBITRARY DETENTION.

As of April 2020, Assam had six operating detention centers housing some 800 "irregular foreigners."<sup>153</sup> In September 2019, the Government of India was in the process of building ten new detention centers in Assam and planning to expand construction beyond Assam throughout the rest of the country.<sup>154</sup> Although the Supreme Court of India has ordered that detainees held for over 2 years should be released from detention on conditional bail due to concerns regarding the COVID-19 pandemic,<sup>155</sup> there is otherwise no cognizable framework regulating why certain declared foreigners are detained while others are not, and how long those detained will be subject to detention.

The prohibition against arbitrary deprivation of liberty is a *jus cogens* norm, or a fundamental principle of international law that all states must follow.<sup>156</sup> ICCPR Article 9(1) sets out the prohibition, which applies to all persons, including migrant workers, stateless persons, and aliens.<sup>157</sup> The same provision also prohibits arbitrary detention.<sup>158</sup> Detention becomes arbitrary where the non-observance of fair trial rights is so severe that the deprivation of liberty takes on an arbitrary character.<sup>159</sup> Common characteristics of arbitrariness include inappropriate conduct, injustice, and lack of predictability and due process of law.<sup>160</sup> The International Court of Justice (ICJ) has interpreted ICCPR Article 9(1) to apply to all detention "whatever its legal basis and the objective being pursued."<sup>161</sup>

As established in the prior section, FTs violate the criteria for a fair trial. By consequence, detentions proceeding from FT judgments are arbitrary and in violation of India's

international law obligations. The unfairness of the FT hearing is not the only aspect of the citizenship verification process that renders the resulting detentions arbitrary.

### The Border Police Acts Arbitrarily

The Border Police, established in 1962 as a branch within the Assam Police, is mandated to detect and deport illegal migrants.<sup>162</sup> As described in Chapter 1, the Border Police refers names of suspected foreigners to FTs through three channels.<sup>163</sup> First, the Border Police was mandated to refer all D-Voters to Foreigners Tribunals. Second, the Border Police surveys villages and refers persons whose names were not included on official registers, such as birth, death, and marriages certificates and village population registers. Third, the Border Police collects names from tips identifying the presence of "strangers" in an area.

In *State of Assam v. Moslem Mondal*,<sup>164</sup> the Gauhati High Court set forth guidelines to govern the Border Police's conduct in order to preserve the fundamental rights of a person under Article 21 of the Indian Constitution. The Court stated that, before referring cases of alleged foreigners to the FTs, the Border Police must first attempt to find alleged foreigners and give them the opportunity to demonstrate that they are Indian citizens.<sup>165</sup> Then, only after the Border Police undertakes a satisfactory review of the materials collected by the investigating officer can it refer cases to FTs.<sup>166</sup>

Despite these court-issued guidelines, an investigative report by *The Scroll* revealed that the Border Police does not perform its due diligence as required by law.<sup>167</sup> For example, the Border Police is required to conduct an enquiry, and contact the person in whose name a reference has been initiated. According to an anonymous advocate who represents alleged foreigners, however, the Border Police never actually visits alleged foreigners' homes to complete Annexure A and also fails to complete local verification reports.<sup>168</sup> Because the Border Police fails to perform proper investigations of alleged foreigners in contravention of its own judiciary, their referrals to the FTs are arbitrary. Consequently, all detentions that arise from those arbitrary references are also arbitrary.

### Detention of declared foreigners as a first resort constitutes arbitrary detention.

The U.N. High Commissioner for Refugees (UNHCR) holds that "detention for immigration related purposes should only take place as an exceptional measure, where necessary and reasonable in each individual case."<sup>169</sup> Detention must be the last resort, proportionate to a legitimate state purpose and occurring only after less coercive means are unavailable or inappropriate.<sup>170</sup> Notably, the U.N. Working Group on Arbitrary Detention does not

consider the criminalization of irregular migration, which refers to migrants crossing the border of a country without proper documentation, to constitute a state's legitimate purpose in protecting its territories and regulating migrant flows.<sup>171</sup> Moreover, in cases where states justify detention as necessary to expel persons served with removal orders, detainees must be released when it becomes apparent that removal will not occur within a reasonable time.<sup>172</sup> This often occurs where removal does not "lie within [that state's] sphere of responsibility."<sup>173</sup> Finally, states must consider the effect of detention on migrants' physical or mental health.<sup>174</sup>

The detention of declared foreigners in Assam constitutes arbitrary detention under international law because it currently functions as the default option for declared foreigners, not the last resort. The high number of detainees currently held in Assam (some 800 "irregular" foreigners), as well as the government's aggressive expansion of detention, indicates that detention is the government's default solution. This practice would be sanctioned under international law if it was the true last resort, but it is not. The Foreigners Act, 1946 provides for alternatives to detention, such as requiring declared foreigners to regularly report to their local police stations.<sup>175</sup> Indeed, the Supreme Court of India's 2019 order to release detainees held for more than three years included the condition that the government monitor released detainees through the police check-in system.<sup>176</sup> It is clear, then, that feasible and other alternatives to detention exist in Assam. The current practice of detention as a default therefore violates international human rights law.

Despite the April 2020 order passed by the Supreme Court of India directing the release of persons who have been in detention centres for two years or more, detainees continue to languish in these centres.<sup>177</sup> One reason for this reality is that detainees, most of whom are poor, cannot afford to pay the high bail amount that the Supreme Court has set as a pre-condition for release.<sup>178</sup> Because Bangladesh has maintained its position that India's citizenship verification process is an "internal matter" and therefore refuses to accept declared foreigners into Bangladesh, India has no realistic option to deport detainees, if one is to assume that those detained are actually foreigners and are also from Bangladesh.<sup>179</sup> As a result, detainees suffer indefinite detention that violates the prohibition of arbitrary detention.

### The conditions of detention violate international human rights law

ICCPR Article 10 provides that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."<sup>180</sup> Moreover, detainees shall not be subjected to torture or cruel, inhumane, or degrading treatment.<sup>181</sup> No state can excuse its compliance with the above rules by citing lack of material resources.<sup>182</sup>



Bengali migrant laborers build the new detention center in Goalpara, Assam

International law also provides for guidelines specifying the conditions of detention. First, migrant detention centers should not bear similarities to prisons.<sup>183</sup> When practical reasons inhibit states from housing declared foreigners in facilities specifically established for that purpose, detainees must nonetheless be separated from persons imprisoned under criminal law.<sup>184</sup> Second, promptly after arrest or transfer among facilities, detainees are entitled to notify whomever they choose regarding their circumstances and place of custody.<sup>185</sup> Third, the state must provide a medical examination to detainees promptly after their admission to detention and, thereafter, free medical care and treatment as required.<sup>186</sup> Every detention center must have at least one medical officer with knowledge of psychiatry.<sup>187</sup>

Detention centers in Assam do not comply with any of the above-listed requirements, thus constituting a crisis of international human rights law. The story of Shaw (name changed), a declared foreigner who was detained for four years, exemplifies these violations:

### Shaw's Story

Shaw was born and raised in Assam.<sup>188</sup> He was first called to prove his citizenship after being marked as a doubtful voter. Shaw used personal documents and those of his parents to show linkage and legacy, respectively. Though Shaw's entire family was included in the NRC, he was excluded. Shortly thereafter, police officers arrived at Shaw's home and dragged him away to a detention center without alerting his family. For days, Shaw's family searched in anguish for their patriarch. Finally, they were informed that he was detained at the prison in Goalpara.

The detention center was actually a functioning prison. There, Shaw lived among criminals convicted of murder and rape with just two square feet of space to him. An elderly man, Shaw's health deteriorated; yet he received no medical care. His family was allowed to visit him for ten minutes at a time. Shaw remembered: "I couldn't sleep properly, I couldn't live properly, many of the people like me, who were declared foreigners, died in prison due to poor detention conditions." Shaw's family spent their savings on his medical care and legal costs. But even after Shaw's name was included on the updated NRC list, he remained in detention for four months. Indeed, Shaw was only released after the 2019 Supreme Court order directed the Government to release detainees who had been held for over three years.

While Shaw was in detention, the entire burden of the household fell on his sons and daughter-in-law. Six months into his detention, Shaw's wife fainted due to stress and was left paralyzed down the right side of her body. Now, with Shaw back at home, both he and his wife have limited mobility and rely on their children to take care of them.

Shaw's case is not an outlier. Declared foreigners live in fear, oblivious to when and if the Border Police will arrest them and lock them in detention. Too often, when the dreaded day comes, their families return home to an empty house with no knowledge of their loved ones' arrest. Because many detention centers are located far from detainees' homes, detainees are cut off from their families.<sup>189</sup> Detainees from the same family have even been housed in separate detention facilities.<sup>190</sup>



Shaw suffers from permanent medical conditions developed during his four years in detention

Contrary to international law, migrant detainees are frequently housed in prisons alongside convicted criminals,<sup>191</sup> yet "deprived even of the rights of [criminals]."<sup>192</sup> Prison staff are supposed to apply the Assam Jail Manual to migrant detainees in the absence of any government directive creating guidelines distinguishing migrants from criminal prisoners. But prominent human rights activist Harsh Mander revealed that prison staff apply the Manual selectively, denying migrant detainees benefits, including waged work and parole.<sup>193</sup> For example, prison staff reason that declared foreigners can never be eligible for parole, because the parole right applies only to Indian citizens.<sup>194</sup> And while convicted criminals are allowed to roam the prison courtyards, declared foreigners are locked in cells to prevent them from mixing with "citizen prisoners."<sup>195</sup>

As in Shaw's experience, these prisons cum detention centers are overcrowded and offer detainees limited to no medical attention.<sup>196</sup> Because accommodations and resources like beds, toilets, and food are scarce, detainees cannot maintain basic hygiene or nutrition.<sup>197</sup> Consequently, detainees experience an array of physical and psychological problems associated with their living conditions and uncertain future.<sup>198</sup> One doctor working in detention centers stated that the majority of detainees suffer from

depression.<sup>199</sup> In November 2019, the Government of India disclosed to the Rajya Sabha (Upper House) that 28 detainees had died in Assam's detention camps due to illnesses despite having been treated with appropriate medical care.<sup>200</sup> But the Citizens for Justice and Peace, a human rights organization, disputed the government's claim, asserting that at least 100 detainees have died from varied causes, including suicide.<sup>201</sup> While the exact number of deaths of declared foreigners in detention may never be known, there is no question that detention conditions are not living up to international human rights laws governing detention and thus must be resolved immediately.

Due to the conditions of their detention, migrant detainees are in a uniquely vulnerable position to contract and spread the COVID-19 virus. In April 2020, the Supreme Court of India announced that it would lower the bail amount to 5,000 rupees and discharge detainees held for over two years on parole.<sup>202</sup> By May 2020, a reported 308 detainees had been released pursuant to the Supreme Court's order.<sup>203</sup> Still, the order is subject to problematic reasoning and poor foresight. First, it based detainees' conditional release on their time spent in detention as opposed to whether they present risk factors for COVID-19.<sup>204</sup> Given that it is impossible to socially distance in overcrowded prison cells, a COVID-19 outbreak could prove lethal to detainees with preexisting conditions, including pregnant women.<sup>205</sup> Second, the Court failed to anticipate that, since COVID-19 has caused bureaucracy to slowdown and, in some cases, halt operating completely, family members of detainees are unable to navigate the bail process. Third, the bail amount is still a large sum of money for detainees, most of who come from the most impoverished backgrounds. To date, international organizations, including the World Health Organization and UNHCR, have raised serious concerns about detention of migrant detainees in the context of COVID-19.<sup>206</sup> As India continues its fight against COVID-19, families of detained migrants live in fear for the safety of their loved ones.

#### THE ACT OF CREATING NON-CITIZENS WHO CANNOT BE DEPORTED VIOLATES THE PROHIBITION AGAINST STATELESSNESS AND INDIA'S OBLIGATION TO PROTECT STATELESS PERSONS' RIGHTS.

Although India is not a party to the major international treaties on statelessness, it is a rule of customary international law that states are obligated to avoid cases of statelessness.<sup>207</sup> The prohibition against statelessness is linked to the affirmative right of every person to a nationality, which is established in the UDHR.<sup>208</sup> Moreover, the Convention on the Rights of the Child (CRC), to which

India is a party, holds that in cases where the nationality of a child is disputed and they will otherwise be stateless, states are obligated to provide the child with a nationality under their national laws.<sup>209</sup>

Bangladesh is refusing to accept India's declared foreigners and there is no other country that will accept them.<sup>210</sup> As a result, when people in Assam are denied Indian citizenship, they are rendered stateless. These stateless people will become a new subclass of citizens within India, possessing limited to no rights. There are over 12 million stateless persons worldwide.<sup>211</sup> With the NRC and FT processes in Assam, India will add some two million persons to that figure. India must modify its current citizenship verification scheme to grant Indian citizenship to those that otherwise would be rendered stateless. Children, especially, must not be forced to undergo the citizenship verification exercise and should be granted Indian citizenship by virtue of their birth on Indian soil.

The prospect of creating two million stateless persons in Assam has implications far beyond the symbolic power of stripping the title of Indian citizen from persons. Recall that those most vulnerable to being declared foreigners in Assam are poor, illiterate, migrant laborers. If rendered stateless, these people will lose access to state benefits, including rights to welfare, social security, and healthcare, which they rely on to survive. On our fact-finding mission in Assam, we witnessed firsthand a preview to that harsh new reality. Bengali Muslims who had been excluded from the NRC were toiling in the hot sun, laying the bricks that would form Goalpara's new detention center—the very detention center that would potentially house them or their friends and families in the future. Without the protection of Indian citizenship, declared foreigners may be subject to indentured servitude or even forced labor reminiscent of the plight of India's Dalits. The fact that India plans to expand the citizenship verification system beyond Assam threatens to upend the strides that India has made against casteism by introducing a system of sub-citizenship in violation of international human rights law.

Moreover, international law is clear that nationals should never be arbitrarily expelled from their own country.<sup>212</sup> But even if one assumes that declared foreigners were actually born in Bangladesh, international law has interpreted one's "own country" as the country with which a person has developed strong links, which may include the country where they were born or have lived a large part of their lives.<sup>213</sup> A strong argument can therefore be made that Bengali migrants, who have spent much—if not the entirety—of their lives in Assam, cannot be expelled or indefinitely detained as "foreigners" because India is in fact their "own country."

## CHAPTER 4 The NRC and FT processes violate the rights of women, children, and transgender persons to equality before the law and non-discrimination

"Non-discrimination and equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights."<sup>214</sup> India is a party to a number of international treaties and conventions that affirm these rights,<sup>215</sup> most notably the ICCPR.<sup>216</sup> Under the ICCPR, discrimination is "any distinction, exclusion, restriction or preference" based on "race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" and that has the "purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms."<sup>217</sup>

India's commitment to non-discrimination is non-derogable and extends to all people irrespective of their nationality or statelessness.<sup>218</sup> Although ICCPR Article 4(1) allows states to take measures during "public emergencies" that infringe on protected rights,<sup>219</sup> those measures must not "solely involve discrimination" of race, color, sex, language, religion or social origin.<sup>220</sup> ICCPR Article 26 also prohibits discrimination both in law (*de jure*) and in fact (*de facto*), which means that a law that is equal on its face may still violate Article 26 in application.<sup>221</sup> Notably, ICCPR Article 26 is an "autonomous" provision that applies to rights beyond those identified in the ICCPR.<sup>222</sup>

### Challenges Women Face in Proving Citizenship: Meena's Case

Meena was born to a Hindu mother and given the name Pooja.<sup>223</sup> She was orphaned as a child and grew up in an ashram, or a religious hermitage. There, Pooja was essentially a slave and faced great abuse from her guardians. As a teenager, Pooja married a Muslim man who helped her run away from the ashram. They were married, and she converted to Islam and changed her name to Meena.

When the time came to apply to the NRC, because she was an orphan, Meena had no documents to

establish linkage and legacy to her parents. Too traumatized to return to the ashram, which had her documents, she listed her husband's uncle as her father on the NRC's legacy documents. But when called upon to verify Meena's identity, her husband's uncle denied the claim because he did not want Meena to gain any land entitlements.

Meena was then left with no choice but to return to the ashram. In 2015, she made three separate, daylong trips to the ashram. But because she had changed her name to Meena at marriage, the ashram officials refused to provide her "Pooja's" documents on the basis that they could not verify that she was indeed Pooja. Although one ashram official did indeed remember Meena, he refused to give her the documents after realizing that she had married a Muslim man and converted to Islam. Meena then submitted an application to the FT in Bongaigaon District to compel the ashram to release her documents, but the FT officials never executed the order. Ultimately, Meena and her three children were left off of the NRC and must now appeal their citizenship at a FT.

When we met Meena in February 2020, she was terrified that she would be taken away to detention, although we assured her that nothing would happen until she exhausted her appeals. Still, she lived in constant fear, clutching her newborn baby to her chest, waiting for the inevitable day when police would come to lock her up.



Meena and her husband fear for the day she will be separated from the family and sent to detention

## WOMEN

In addition to its obligation to gender equality and non-discrimination under ICCPR Article 26, India is party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which affirmatively requires India to “pursue all appropriate means” to eliminate discrimination against women.<sup>224</sup> India must therefore adopt legislation that prohibits discrimination against women and abolish existing laws or regulations that are discriminatory.<sup>225</sup> Moreover, India must ensure that “competent national tribunals” serve as effective protection from gender discrimination.<sup>226</sup>

As currently applied, the NRC and FT processes call into question India’s obligations to gender equality and nondiscrimination because the requirement that documentation must establish one’s “legacy” and “linkage” in order to be deemed an Indian citizen fails to account for the societal realities that prevent women from possessing acceptable documents. In Assam, especially among poor and rural communities, it is still uncommon for families to register their children’s births in the form of birth certificates.<sup>227</sup> Many women in Assam do not complete school (in 2011, female literacy was estimated at 66.27 percent)<sup>228</sup> and therefore lack matriculation certificates that are accepted as (albeit weaker) forms of documentation. Prevalence of child marriage is also high in Assam—40 percent of girls are married before they reach 18 years of age,<sup>229</sup> as compared to the national average of 27 percent.<sup>230</sup> At marriage, women change their surnames to their husbands’. However, this change is rarely formally registered. Moreover, many marriages are also not legally registered, which, while not affecting their validity, leave women with little proof of being married.<sup>231</sup> And any documents that women do possess are often lost when married women move from their home village to their husbands’.<sup>232</sup> Consequently, women encounter the double burden of establishing legacy to their fathers (whose names no longer match their own) while lacking documentation to establish their former and current identities. Indeed, one organization has reported that not a single woman who migrated to Assam from a different Indian state after marriage was included in the NRC.<sup>233</sup>

Additionally, women are often excluded from property inheritance. Land titles may serve as a key record for establishing one’s lineage for purposes of citizenship verification. of a woman’s linkage to her ancestors, but systemic exclusion from property rights means that women are denied this crucial means of proving their citizenship.<sup>234</sup> The problem, however, is that land entitlements are a key form of establishing one’s lineage for purposes of citizenship verification. Rahima, who was left off of her family’s land title document, was declared a “foreigner” and excluded from the NRC while all five of her brothers were included.<sup>235</sup> Endemic patriarchal biases may lead families to

refuse to add their daughters’ names to the land title even with the knowledge that doing so could further their claims to citizenship. When Rashida was marked as a D-voter, her husband begged her father to add Rashida’s name to the family’s land entitlement.<sup>236</sup> But her father refused and thereafter Rashida was declared a foreigner.<sup>237</sup> The fact that some applicants to the NRC were denied the option of using documents confirming their maternal legacy in the absence of paternal-legacy documents further indicates the inherent discrimination of citizenship verification.<sup>238</sup>

For many women, residency certificates from the gram panchayat are their greatest hope for establishing linkage. Out of 3.9 million total applicants to the NRC, 4.7 million relied on gram panchayat certificates.<sup>239</sup> Initially, despite that gram panchayat certificates are an acceptable “List B” document for married women, the Gauhati High Court held that they were ineligible to establish linkage.<sup>240</sup> In December 2017, however, the Supreme Court of India ordered that gram panchayat certificates should be accepted so long as they are verified for authenticity.<sup>241</sup> To this end, the Supreme Court implemented a two-step verification procedure: (1) verification of the certificate itself and (2) verification of the certificate’s contents.<sup>242</sup> Step two is “an exhaustive process” intended to ascertain the facts and all other details set forth in the certification.<sup>243</sup> In December 2018, the U.N. Working Group on Arbitrary Detention in collaboration with three Special Rapporteurs asserted that 2.25 million “non-original” inhabitants of Assam were subject to this heightened verification whereas 1.74 million “original” inhabitants were not.<sup>244</sup> Recall the case of Jabeda Begum, who submitted 15 documents to the court and had the village headman testify on her behalf but was nonetheless declared as a foreigner.<sup>245</sup>

Upon reference to FTs, women are vulnerable not only due to lack of documents but also due to broader patriarchal forces that inhibit their ability to defend themselves. A report found that FT officers did not speak to accused women, instead directing their questions to men that had accompanied them.<sup>246</sup> Because men are the sole breadwinners in many families, women are reliant on their husbands or fathers to hire a lawyer.<sup>247</sup> But many husbands refuse to spend money to defend their wives’ cases at all.<sup>248</sup> One journalist recalled meeting a woman whose husband threatened to divorce her if she was not listed on the NRC.<sup>249</sup> Women’s lack of education also puts them at a disadvantage when appearing before FTs. They are often intimidated and answer questions improperly upon cross-examination, which may result in their testimony being discarded.<sup>250</sup>

Women’s subservient roles in society also makes it more likely that they will not attend their FT hearing and therefore have an *ex parte* order issued against them. When the FT is located faraway from a woman’s village, as is com-

mon, she may skip her hearing because it would involve travel and women are often dependent on male relatives to be able to travel long distances. We were informed of one case where an estranged husband hid his wife’s notice of appearance to the FT. When she missed the hearing and an *ex parte* decision was taken against her, she was unable to prove that the reason for her non-appearance was due to a domestic dispute.<sup>251</sup>

The emotional trauma that the burden of the citizenship verification process has taken on women is clear. Rahima, a declared foreigner terrified of being sent to detention, admitted that every time she sees strangers approaching her family’s compound, she runs into the forest and hides until it is safe to emerge.<sup>252</sup> Women forced to recount their experiences express anxiety and hopelessness at the prospect of detention. Meena acknowledged, “If they take me, I have to go” before she broke down in tears.<sup>253</sup> Although contributors are unaware of a study documenting the physical and psychological effects of citizenship verification on affected women, the potential conclusions are sobering. Obira Nessa, who was excluded from the NRC, reflected that the ordeal has taken a toll on her memory—she is now forgetful and absentminded despite having never suffered from memory problems before.<sup>254</sup>

The emotional trauma is not limited to women who themselves are D-Voters or excluded from the NRC. If the family patriarch is detained or threatened with detention, women must undertake the tremendous burden of financially supporting the family while maintaining their normal domestic duties. In the weeks after her husband was declared a foreigner and sent to detention, Shaw’s

wife’s health deteriorated to the point that she became paralyzed down half of her body.<sup>255</sup> As a result, the household responsibilities fell upon her daughter-in-law Aisha, who was forced to abandon her dreams of continuing her studies after marriage. Aisha recalled that during the four years of her father-in-law’s detention, the tension in the household was high as she juggled keeping food on the table, raising her children, caring for her ailing mother-in-law, and coordinating her father-in-law’s appeal efforts.<sup>256</sup>

The conditions of women’s detention as compared to men’s also constitute discrimination. On our fact-finding mission in Assam, we visited a detention center that is being constructed in Goalpara, Assam. Within the detention ground, there is an inner detention facility for women detainees that is separate from, and a fraction of the size of, the larger facility for men.<sup>257</sup> This setup is typical to other working detention centers in Assam. Women detainees are almost always confined to dark and cramped spaces, with no opportunity to move outside the limited space reserved for them.<sup>258</sup> Conditions of detention have also resulted in a mental health crisis amongst women detainees. Cases of schizophrenia, acute depression, and bipolar disorder are rampant.<sup>259</sup> In addition, pregnant women and lactating mothers are subject to detention with no exemption from the government.<sup>260</sup> The Government’s mandate to detain declared foreigners, which does not provide for exemptions to detention based on particular circumstances,<sup>261</sup> therefore constitutes de facto discrimination against women by failing to consider gendered realities that should factor into the decision of women’s detention.



The women’s detention center in Goalpara, Assam is located within the men’s detention center, behind this impenetrable wall

## CHILDREN

India is a party to the CRC, which protects children from discrimination on the basis of the child's or his or her parents' race, color, religion, political or other opinion, ethnic or social origin, property, disability, birth or other status.<sup>262</sup> Under the CRC, India is required to take measures to protect children against discrimination resulting from the "status, activities, expressed opinions, or beliefs" of the child's parents.<sup>263</sup>

India is failing in its international law commitments concerning children because, instead of protecting children, the NRC and FT processes leave children acutely vulnerable to adverse findings of citizenship. Children are at a disadvantage when it comes to proving their citizenship via documentation by sheer virtue of their age. Although India has mandated birth registrations since 1969,<sup>264</sup> an estimated 24 million Indian children under the age of five still did not have birth certificates in 2019.<sup>265</sup> But between a child's birth and entry into Class 10, birth certificates are many children's only document establishing linkage to their parents.<sup>266</sup> Even for children that do possess birth certificates, FTs have rejected birth certificates from children born from underage mothers.<sup>267</sup>



A migrant boy in Assam's Char region boats across the Brahmaputra River to get to his village

In addition, the documentary requirements are discriminatory in application because they fail to account for the socioeconomic realities of life in Assam that prevent children from possessing acceptable forms of documentation. School certificates are accepted documents, but many affected children, especially girls, do not attend school on a routine basis. Although immunization records are accepted, children of migrant workers—a sizeable demographic in Assam—rarely receive immunizations.<sup>268</sup> In the Char region of Lower Assam, for example, brick kiln workers migrate after winter's end when the kilns

sink underwater. Due to their seasonal migration, children of migrant workers miss visits from social workers that perform immunizations.<sup>269</sup> Children are also barred from using gram panchayat certificates. Children's lack of accepted documentation necessitates their reliance on oral evidence to prove citizenship, which FTs consider as holding weaker persuasive value than documents.<sup>270</sup>

The NRC and FT processes also punish children whose families deviate from the traditional patriarchal family structure. Orphans and children born to unmarried women, in particular, struggle to establish their lineage in the absence of a present father.<sup>271</sup> Recall the story of Meena, who was forced to solicit birth documents from the ashram that she had fled as an orphan. The ashram administrators refused to hand over her documents after learning that she had married a Muslim man.<sup>272</sup> Ultimately, Meena was rejected from the NRC, her fate having been tied to the ashram that was the source of her childhood abuse.<sup>273</sup> Advocate Ouillulah Laskar pointed to another case where a child was excluded from the NRC because his estranged father had denied paternity.<sup>274</sup>

The citizenship verification process has had negative effects on children mirroring the symptoms of trauma. Most children who undergo trauma, experience distress or behavioral changes in the early stages of recovery from the event.<sup>275</sup> Common reactions to trauma include the development of new fears, separation anxiety (especially in young children), sleep disturbance and nightmares, sadness, loss of interest in normal activities, reduced concentration, decline in schoolwork, anger, somatic complaints, and irritability.<sup>276</sup> For children whose names have been left off of the NRC, the trauma is not an isolated event; rather, it is a continuous trauma inflicted over time.

Tora Agarwala, an Assam-based journalist at *Indian Express*, visited families whose children were excluded from the final NRC and published her findings in February 2020.<sup>277</sup> She reported that children as young as ten understand the risks of being left off of the NRC. On the night of August 31, 2019, the final list's publication date, ten-year old Nazarina woke her mother and, sobbing, asked if she would be taken away.<sup>278</sup> Similarly, Rahima, who is excluded from the NRC along with her six children, said that her children beg her to leave the family and "fix this problem" so that they will not be taken to detention.<sup>279</sup> When Rahima's youngest son learned that he was excluded from the NRC, he cried that "the police will come and take me now." He did not eat for three days; when he finally did eat, he vomited. Rahima was terrified that her son would die from fear.<sup>280</sup> Social out-casting on account of children's citizenship status also occurs in schools and social spaces, like madrasas.<sup>281</sup> Older children fear that their exclusion from the NRC will thwart their dreams of attaining an education and career prospects.<sup>282</sup>

## TRANSGENDER PERSONS

The U.N. Human Rights Committee and the Committee on Economic, Social, and Cultural Rights interpret the non-discrimination provisions of the ICCPR and ICESCR as protecting transgender persons.<sup>283</sup> To this end, India has a legal obligation to ensure that its own laws and policies, and those of private actors, do not discriminate against transgender persons.<sup>284</sup>

In addition, India must address "conditions and attitudes" that result in de facto discrimination,<sup>285</sup> including that which is isolated to the family sphere.<sup>286</sup> The UNHRC further recognizes that discrimination often occurs when transgender persons seek to attain legal recognition of their gender preference.<sup>287</sup> The NRC exercise has resulted in de facto discrimination against transgender persons in violation of India's obligations under international human rights law.

A petition filed in the Supreme Court of India in September 2019 challenged the exclusion of an alleged 2,000 transgender persons from the final NRC,<sup>288</sup> or roughly 18 percent of Assam's transgender population.<sup>289</sup> On the other hand, the proportion of applicants in the general population excluded from the NRC is 6%.<sup>290</sup> Thus, the proportion of transgender people excluded from the NRC is far greater than people in the general population. Assam's first transgender judge, Swati Bidhan Baruah, attributes the disproportionate impact of the NRC on transgender persons as the result of the systemic marginalization of the transgender community in India.<sup>291</sup> Specifically, there are three discrete ways in which the NRC *de facto* discriminates against transgender persons: (1) The NRC's emphasis on documentation fails to take into account that transgender persons lack access to necessary legacy and linkage documents; (2) Even in cases where transgender persons do possess documents, these documents are often rejected on the basis that transgender persons' gender and name changes have not attained legal recognition; and (3) Threats and overt acts of violence prevented transgender persons from applying to the NRC altogether.

First, transgender persons do not possess the necessary legacy and linkage documents required for inclusion on the NRC. Due to societal ostracization, many of India's transgender persons were abandoned by, or estranged from, their families at a young age and live in isolated "hijra" communities with other transgender persons. As a result, transgender persons lack access to birth certificates and other accepted documents, such as land entitlements and immunization and school matriculation records, which prevented their successful application to the NRC.

Second, even in cases where transgender persons possessed documents, those were frequently rejected on the basis that transgender persons' gender and name changes have not attained legal recognition. As discussed, the NRC requires applicants to establish "legacy" with pre-1971 Indian residents and "linkage" to those residents. But transgender persons, whose birth certificates do not reflect the gender and name of their true identity, encountered the additional hurdle of proving that they indeed are the person on their birth certificate.<sup>292</sup> While the NRC therefore discriminated against transgender persons for failing to anticipate the added hurdle required for their application, the state's process for attaining legal recognition is itself discriminatory.

According to Baruah, legal recognition is a three-step process.<sup>293</sup> Transgender persons must first get a name and gender change affidavit, followed by a notice in a newspaper declaring that they have changed their name. This process is concluded by publishing a notice in a government gazette. Even after completing the three-step process, transgender persons must visit every institution where their former identity was documented and manually make the necessary change. For the NRC application, if transgender persons needed to use a school matriculation certificate or other document as evidence, it would be rejected unless the identity change was noted on that certificate. Ultimately, the legal recognition process can take seven or eight years to complete and total fifty thousand rupees or more.<sup>294</sup> For transgender persons, many of whom depend on begging to make a living, the time and cost required to attain legal recognition made successfully applying to the NRC impossible. Transgender persons who now seek to appeal their exclusion from the NRC at FTs will face the same struggles in attaining documentary evidence establishing their identity.

In December 2019, four months after the publication of the final NRC, the Indian Parliament passed the "Transgender Persons (Protection of Rights Bill)" under the auspices of expanding and safeguarding transgender rights.<sup>295</sup> The Bill prohibits discrimination against transgender persons in the areas of education, recreation, and employment.<sup>296</sup> It also purports to execute the Supreme Court's landmark decision in *National Legal Services Authority (NLSA) v. Union of India* (2018), which recognized transgender persons as a third gender and upholds their right to self-identify.<sup>297</sup> Transgender activists, however, criticize the Bill for actually subverting the *NLSA* judgment—the Bill sets forth a two-step procedure for transgender persons to attain legal gender recognition.<sup>298</sup> Thus, instead of upholding transgenders persons' right to self-identify, the Bill gives near total discretion to a single government office (the District Magistrate) to determine whether transgender persons "qualify" as transgender and thus are

eligible to receive benefits ordered in *NLSA*.<sup>299</sup> The statutory change will be crucial when the NRC appeals process commences, as transgender persons will be subject to novel bureaucratic hurdles that will again impact their ability to procure acceptable documentation.

Third, threats and overt acts of violence prevented transgender persons from applying to the NRC at all. An anonymous source revealed that transgender persons were pulled out of lines at NRC administrative facilities and thus were prevented from applying to the NRC altogether.<sup>300</sup> We were informed by an anonymous source that in 2016, a transgender person was assaulted at an NRC office and suffered a broken arm. The assault was captured on video but did not gain media attention.<sup>301</sup> This revelation is not surprising—a 2018 survey conducted by Swasti Health Resource Center found that at least 40 percent of transgender persons in India are sexually abused before the age of 18.<sup>302</sup> Yet the punishment for abusing a transgender person ranges from just six months to two years in jail, whereas the same crime committed against women or children may result in a life sentence or the death penalty.<sup>303</sup> Despite groundbreaking advances in transgender persons' rights over the last decade,<sup>304</sup> the execution of the NRC and the Transgender Persons (Protection of Rights) Act, 2019 represents a step backwards for India's transgender community. India thus must live up to its obligations under international law to take affirmative measures to protect transgender persons from discrimination and ensure their ability to exercise their civil rights (which necessarily includes the right to apply for recognition of citizenship).

## FOREIGNERS TRIBUNALS AND NRC PROCESS VIOLATE INDIAN DOMESTIC LAW

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### CHAPTER 5 The Problem of Rule of Law - Excessive Delegation by Parliament to the Executive

The doctrine of excessive delegation is closely associated with the common law concept of "rule of law." The doctrine posits that the legislature may only delegate certain aspects of its authority to the executive and cannot do so in a manner that vitiates its responsibility as lawmaker in favor of the executive. The concept has evolved to protect the rights of people from arbitrary exercises of power by an unaccountable executive.<sup>305</sup> In the *In Re: Delhi Laws Act* case, then Chief Justice Kania stated that it is the legislature's responsibility to outline the "policy and principles" governing an executive's conduct, while the executive is limited to administering the principles.<sup>306</sup> Further cases clarify that the legislature's responsibility includes laying down a clear "standard" for executive governance.<sup>307</sup>

The preparation of the NRC in Assam derives its authority from Rule 4A of the Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003 issued by the central executive. Meanwhile, the rules themselves derive their validity from Section 18 of the Citizenship Act, 1955. The provisions give the central government power to make rules pursuant to the objectives listed in the 1955 Act, including creating a citizens' register within Assam as under Section 6A. The 1955 Act does not identify the requisite burden of proof or standards of law for foreigners' proceedings. Consequently, this responsibility has been left to the executive authorities, including the Office of the State Coordinator of NRC in Assam, which details its own standards and procedures through SOPs, subject to the approval of the Supreme Court of India. The delegation to executive authorities constitutes a clear violation of the principles stated above because the "standard" making authority has been given to the executive. The same has allowed the authorities to set discriminatory procedures, which make it difficult for persons to represent themselves before NRC authorities. Further, as has been widely reported, there is no consistency in application of these standards due to their vagueness.<sup>308</sup> As a result, the possi-

bility of success is dependent on the whims and fancies of the local registrar, who sometimes may proceed on a "document only" basis while at other times choose to consider oral testimony.<sup>309</sup> The NRC process is a clear failure of the legislature to discharge its responsibility as the elected lawmaker. The failure of rule of law violates the doctrine of excessive delegation. In so far as the NRC operates on such excess use of authority, it is illegal.

## CHAPTER 6

# The Constitutional Perspective

In her seminal work *The Origins of Totalitarianism*, Hannah Arendt terms the right to citizenship as one that begets all other rights.<sup>310</sup> In this respect, the notion that Part II of the Indian Constitution is a self-contained regime becomes difficult to reconcile with the other constitutional rights that flow from citizenship. The proposition that the Parliament has unrestricted powers to determine questions of citizenship under Article 11, therefore, must be read in this context.

In *Maneka Gandhi v. Union of India*, the Supreme Court of India rejected the contention that fundamental rights should be considered in complete isolation of each other.<sup>311</sup> Even though they are separate, they need not be seen as “watertight compartments.”<sup>312</sup> Instead, fundamental rights are meant to be read together in order to decipher their meaning.<sup>313</sup> For instance, the Supreme Court has read Articles 14 and 15 (which guarantee equality for all and prohibit discrimination) with Article 21 (which guarantees the right to life and liberty) to prohibit sexual harassment of women at the workplace.<sup>314</sup> In *Kesavananda Bharati v. State of Kerala*, the Supreme Court opined that the Indian Constitution has a basic structure from which Acts of the Parliament cannot derogate.<sup>315</sup> Time and again, the Supreme Court has affirmed that Articles 14 (equality before law), 19 (right to freedom) and 21 (right to life and personal liberty), among others, form part of this basic structure.<sup>316</sup> The limitations placed on the operation of these doctrines, which are entrenched in Indian Constitutional jurisprudence, therefore limits the proposition that Article 11 gives the legislature plenary powers to regulate matters relating to citizenship.

### ARBITRARINESS OF THE EXERCISE

Article 14 of the Indian Constitution guarantees equality and equal protection of laws to all, while Article 15 prohibits discrimination on the basis of certain criteria.<sup>317</sup> The doctrine of equality is enshrined within these Articles, along with Article 16, forming part of the Indian Constitution’s basic structure. The rights provided under Article 14 apply to all persons; it is immaterial whether a person is a citizen or not. The Supreme Court has set forth two tests that prescribe standards against which to judge laws. Justice Das laid down the primary test for examining a law’s validity under Article 14 in the *Anwar Ali Sarkar* case.<sup>318</sup> The “two-pronged” test, as it is known, requires the following: (1) an “intelligible differentia” for making a classification and (2) a rational nexus between differentia and the purpose sought to be achieved by the Act.<sup>319</sup> The second test, formulated by Justices Bhagwati and Krishna

Iyer in the case of *EP Royappa*, is the test of arbitrariness (known as the “new doctrine”). There, the Justices rejected the “two-pronged” approach to Article 14 in favor of one that considers arbitrariness as antithetic to equality.<sup>320</sup> Under the test of arbitrariness, a law is unconstitutional if it functions arbitrarily. Today, the Supreme Court applies both tests.

In the *Assam Sanmilita Mahasangha* case, the Supreme Court ordered the government to update the 1951 NRC as a response to the alleged influx of illegal migrants in Assam.<sup>321</sup> This order may be tested against Article 14 because the Court has clarified that the right to enforce fundamental rights applies to all sorts of “state action.”<sup>322</sup> The order created a distinct class of people subject to the NRC (i.e., persons domiciled in the state of Assam) to the exclusion of those residing in rest of India. Further, Section 6A of the Citizenship Act of 1955, which the Court referred to in making its order, applies only to the state of Assam. Consequently, when the Supreme Court ordered the government to update the NRC in Assam, it created a clear “intelligible differentia” under the two-pronged test.

For the differentia to be valid under Article 14, there must be a rational nexus between the differentia and the purpose sought. According to the Office of the State Coordinator of NRC in Assam, the 1951 NRC was conducted in conjunction with details collected by the 1951 census.<sup>323</sup> On this basis, the NRC struck persons considered “doubtful” voters from the electoral rolls.<sup>324</sup> The NRC’s purpose was never to determine person’s citizenship status and render them stateless. If, as the Supreme Court stated, the reason for initiating the updated NRC is to embattle the alleged influx of migrants, then that cannot be achieved through the NRC, because its original purpose was never to challenge persons’ right to citizenship. The fact that the NRC is now being used to refer persons to FTs and decide their citizenship status therefore constitutes executive overreach, if it is truly intended to merely update the 1951 NRC, as the court purports. Thus, there exists a flagrant incompatibility between the purported reasons for creating the differentia, (i.e., to combat illegal immigration) and the NRC’s actual purpose (i.e., to create a registry of citizens).

Alternatively, even if the intended purpose of the NRC is to decide citizenship, there is still no rational nexus between the object sought (i.e., expulsion of illegal migrants) and the distinction created (i.e., between Assam and the rest of India). The NRC exercise rests on two questionable assumptions: (1) illegal immigration is endemic to Assam, and (2) illegal immigration is more severe in Assam than the rest of India. In making its assessment, the Supreme Court relied on figures that were unverified or grossly exaggerated by politicians. The results of the final NRC have proven the inaccuracy of these figures.<sup>325</sup> “Rational nexus” includes the requirement of “rationality,” which cannot be superseded with unverifiable political hyperbole or subterfuge. Consequently, there is no rational nexus between the NRC and its exclusive application citizens of Assam. The Supreme Court order in the *Assam Sanmilita Mahasangha* case therefore violates Article 14 of the Constitution.

Further, the arbitrary functioning of the NRC violates Article 14. The Supreme Court has stated that “Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment.”<sup>326</sup> “Equality of treatment” means that persons appearing before the NRC authorities must be treated as equals and not subject to discrimination based on race, caste, sex, or place of birth.<sup>327</sup> As the case studies in this report point out, however, the NRC Seva Kendras (the local NRC units and functionaries) operate under a variety of biases. Bengali Muslims are singled out from the ethnic, racial, and religious connotations of their names and are subject to greater scrutiny. Institutional problems that disproportionately affect these communities make it difficult for them to obtain the documents required to prove their citizenship, further adding to these inequalities. Data indicates that the rounds of verification a person must go through is highly dependent on their given community.<sup>328</sup> Insofar as the actions of NRC officials lead to discriminatory treatment, those actions are accordingly arbitrary in violation of Article 14. Therefore, the NRC exercise in Assam violates Article 14 of the Indian Constitution because it lacks a rational nexus and is arbitrary.

### DUE PROCESS DEFICIT

Article 21 of the Indian Constitution guarantees the right to life of all persons, which may only be denied through “procedure established by law.”<sup>329</sup> The Supreme Court has interpreted the right to life expansively, not to signify mere survival, but as the right to live with human dignity and with access to basic necessities of life.<sup>330</sup> The detention or imprisonment of a person constitutes “deprivation of life and liberty” under Article 21 unless it is provided for by “procedure established by law.”<sup>331</sup> This protection extends to any action of the legislature,<sup>332</sup> executive<sup>333</sup> and, to a limited extent, the judiciary.<sup>334</sup>

Persons declared “foreigners” are offered neither dignity nor liberty. An adverse judgment guarantees persons a life spent in the inhumane condition of detention, or as a sub-citizen without the civil and political rights allowing them to participate in the republic as citizens of India. Accordingly, The Foreigners Act, 1946 and The Foreigners (Tribunals) Order, 1964 and the decisions of the FTs, insofar as they allow for detention or the suspension of rights of adjudged foreigners, are subject to the due process enquiry under Article 21.

For a law to qualify as an exception of “procedure established by law,” it must be “fair, just and reasonable.”<sup>335</sup> This requirement is the Indian constitutional counterpart to “procedural due process” in the United States, but much wider.<sup>336</sup> One must examine both the “content” of the law and the procedure adopted to bring about the law, as is done in the United States. The Constitution of India explicitly spells out protections that may be afforded to persons under Article 22 in cases involving preventive or punitive detention. Article 22 functions in conjunction with Article 21, which provides the overarching safeguard for the right to life.<sup>337</sup> In matters involving trials or judicial pronouncements, the “fair, just, and reasonable” threshold is expanded to require a fair trial in compliance with principles of natural justice.<sup>338</sup> The Supreme Court interpreted a fair trial to include impartiality of judges, fairness of procedure, and an atmosphere of judicial calm.<sup>339</sup> These principles form part of both Articles 21 and 22. The Court has also stated that truth is given primacy over procedural technicalities and that the judicial quest for truth must not be hindered by such technicalities.<sup>340</sup> The requirement of fairness in judicial decision-making percolates to all stages, including investigation, and to the conduct of all State functionaries, including public prosecutors.<sup>341</sup>

Under the lenses of Article 21 and 22, the day-to-day functioning of the FTs and the concurrent NRC processes are not “fair.” Much of how these authorities function involves tacit or apparent reinforcement of prevalent biases and procedures designed to make it near impossible for the already underprivileged populace to prove their citizenship. This deep-rooted bias manifests itself in the operation of the Border Police, which selects people for reference based on racial and communal criteria, the response of State functionaries required to help people obtain documents, or how crudely the State demarcates D-Voters based on the racial connotations of persons’ names.<sup>342</sup> Similar biases have surfaced in the form of differential treatment by FT officers who adjudge against persons based on their ethnicity.

Systematic measures in the form of prescribed “conviction quotas” that members of the FTs are obligated to meet worsen the plight of these people.<sup>343</sup> The rule against bias is an integral element of natural justice in common law.<sup>344</sup> The Supreme Court has affirmed the essential requirements of impartial judges and the absence of prejudice in the context of Article 21, including those arising out of preconceived notions of adjudicators, in the cases of *Maneka Gandhi* and *Jayalalitha*.<sup>345</sup> Decisions based on bias have been held to be illegal and in violation of this principle.<sup>346</sup>

In this respect, the marked ethnic biases and the systematic approval thereof violate Article 21’s principles of fair trial, impartiality, and judicial calm.

### FAILURE OF NATURAL JUSTICE

The Supreme Court has also recognized the right to present and rebut adverse evidence as a principle of natural justice.<sup>347</sup> When persons are first called to the FTs, the assumption is that they are foreigners; the onus to prove their case is skewed against them. The FT procedures, which prohibit the defense from cross-examining their referring authorities is a case in point.<sup>348</sup> At the same time, FTs are reluctant to issue summons to third parties and state officials to provide evidence in the alleged foreigner’s favor. The onerous requirements of discharging the burden on proof are also excessive. By disallowing certain documents like passports, voter ID cards, and gram panchayat certificates to prove linkages, the tribunals deny alleged foreigners their right to present and rebut evidence.

As held in the case of *Ashok v. Union of India*,<sup>349</sup> the rights guaranteed under Articles 21 and 14 should be interpreted expansively with a liberal meaning. As Meena’s story illustrates, the FTs in Assam are emblematic of an excessive and arbitrary government that has targeted society’s most vulnerable. Meena revealed that she was mentally and physically abused at the ashram, where she spent the tender years of her life. It is well documented that ashrams are sites of child abuse, including sexual abuse, particularly committed against young girls.<sup>350</sup> Other shortfalls, structural and social, have culminated in the woes of a populace that is impoverished and uneducated. Despite their state of abject poverty, many people have spent lakhs, selling off their land, and languishing for decades in court, just to make their case before the tribunal. It is from this reality of Assam and the greater India that we must endeavor to appreciate the legal deficit of the FT and NRC processes. Accordingly, it is incomprehensible to believe that alleged foreigners have been provided an adequate opportunity to present their case and rebut adverse evidence.

Insofar as the processes adopted by the FTs violate the principles of natural justice and hinder effective legal representation, they are unconstitutional.

### ROLE OF OTHER CONSTITUTIONAL AIDS

Scholars like Dr. Mohsin Alam Bhat<sup>351</sup> have argued for an expansive approach focused on constitutional aids to tackle the question concerning the legality of determining Indian citizenship. Within the Indian constitutional context, there exist “indeterminate silences” on certain rights, which form what is known as “constitutional dark matter.”<sup>352</sup> It is not as if these rights do not exist, however. In actuality, rights that constitute “constitutional dark matter” have the same importance as express provisions.<sup>353</sup> In the present understanding of the Indian Constitution, though it is difficult to understand what these rights may look like, it is nonetheless clear that citizenship exercise in Assam goes against the conscience and founding principles that are sacrosanct to the idea of the Indian republic. We thus may defer to other materials forming the constitutional ethos of the country, including Constituent Assembly debates, to chart a map of this dark matter.<sup>354</sup>

Upon considering the early history of Indian citizenship and the Constituent Assembly debates that led to the drafting of Part II of the Constitution, it is clear that the principle of *jus soli* was central to India’s philosophy regarding citizenship. Only after Parliament enacted the Citizenship (Amendment) Act of 1986 and the amendments that followed was the principle of *jus soli* diluted. As Sardar Patel proclaimed to the Constituent Assembly of India, instead of a racial or ethnic notion of citizenship, India would have the *jus soli* model—in his opinion, the “enlightened modern civilized view” of citizenship.<sup>355</sup> The principle of *jus soli* did not carry over as a permanent measure in the final Constitution, only as an “ad hoc” measure, because the impending mass migrations due to Partition created uncertainties. According to B.R. Ambedkar, the Constituent Assembly wanted to allow some latitude to Parliament so that it could appropriately deal with such uncertainties.<sup>356</sup>

From this perspective, *jus soli* forms an important part of the Indian constitutional ethos and, consequently, it is a right afforded by the Indian Constitution available to all those born in India. The NRC exercise and the decisions of FTs, insofar as they impinge upon this right of Indian citizens, are unconstitutional.

## RECOMMENDATIONS

The process of identification, adjudication of citizenship status, and detention of people deemed to be foreigners contravenes both international law and Indian constitutional law, including due process norms, fair trial rights, and prohibitions against arbitrary detention, statelessness and cruel and inhumane treatment.

- We encourage the United Nations, particularly the Office of the United Nations Office of the High Commissioner for Human Rights and special rapporteurs, to engage in a dialogue with the Government of India to ensure that it complies with international law mandates in the process of identifying foreigners, adjudicating persons’ citizenship status, and detaining declared foreigners in Assam and elsewhere in India.
- We recommend that the United States open discussions with India in regard to its process of citizenship adjudication as an issue of concern to the Quadrilateral Security Dialogue.
- We encourage the Parliament of India and Indian policymakers to revisit the process they have created for citizenship adjudication and ensure that it is amended to comply with international law and Indian law mandates. Rather than the ad hoc approach it takes to refugees, we recommend that India accede to the 1951 U.N. Refugee Convention, which provides universally accepted standards on refugee determinations.

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## ENDNOTES

- 1 The Citizenship (Amendment) Act, 2019, No. 47, Acts of Parliament, 2019 (India) [hereinafter The Citizenship (Amendment) Act, 2019]. It provides a pathway to Indian citizenship for persecuted Sikhs, Hindus, Buddhists, Jains, Parsis and Christians from Bangladesh, Pakistan, and Afghanistan who arrived in India before the end of December 2014. Muslims are not eligible for the statutory scheme.
- 2 The Citizenship (Amendment) Act, 1985, No. 65, Acts of Parliament, 1985 (India) [hereinafter The Citizenship (Amendment) Act, 1985].
- 3 Assam NRC: What Next for 1.9 Million 'Stateless' Indians?, BBC (Aug. 31, 2019), <https://www.bbc.com/news/world-asia-india-49520593>.
- 4 GOVT. OF ASSAM, WHAT ARE THE ADMISSIBLE DOCUMENTS? (2014), <http://nrcassam.nic.in/admin-documents.html>. Specifically, persons could show that they or their descendants appeared on the 1951 NRC or on any electoral rolls up to midnight on March 24, 1971. "List A" identified the following additional admissible documents, also subject to the midnight on March 24, 1971 cutoff date: (1) Land and Tenancy Records; (2) Citizenship Certificate; (3) Permanent Residential Certificate; (4) Refugee Registration Certificate; (5) Passport; (6); LIC; (7) Any Government of India issued License or Certificate; (8) Government of India Service or Employment Certificate; (9) Bank or Post Office Accounts; (10) Birth Certificate; (11) Board or University Educational Certificate; (12) or Court Records or Processes.
- 5 The Foreigners Act, 1946, § 9, No. 31, Acts of Parliament, 1946 (India) [hereinafter The Foreigners Act, 1946].
- 6 International Covenant on Civil and Political Rights, art. 14, *opened for signature* Dec. 16, 1966, 99 U.N.T.S. 171 [hereinafter ICCPR] (entered into force Apr. 10, 1979).
- 7 *Designed to Exclude: How India's Courts are Allowing Foreigners Tribunals to Render People Stateless in Assam*, AMNESTY INT'L: INDIA 26 (2019), [HTTPS://AMNESTY.ORG.IN/WP-CONTENT/UPLOADS/2019/11/ASSAM-FOREIGNERS-TRIBUNALS-REPORT-1.PDF](https://amnesty.org.in/wp-content/uploads/2019/11/ASSAM-FOREIGNERS-TRIBUNALS-REPORT-1.PDF).
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- 9 Recruitment Notification, THE GAUHATI HIGH COURT AT GUWAHATI.
- 10 See AMNESTY INT'L: INDIA, *supra* note 7, at 26.
- 11 UNHCR, *Stateless Persons in Detention: A Tool for Their Identification and Enhanced Protection*, 6 (Jun. 2017) [hereinafter *Stateless Persons in Detention*].
- 12 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, U.N.G.A. Res. 43/173 ¶ 6 (Dec. 9, 1988) [hereinafter Detention Principles].
- 13 Abantee Dutta, *Indefinitely Incarcerated: Assam and its Non-Citizens*, 3 NILIMA: A J. OF L. AND POL'Y 91, 96 (2020).
- 14 Harsh Mander, *The Dark Side of Humanity and Illegality: A Glimpse Inside Assam's Detention Centers for Foreigners*, SCROLL.IN (Jun. 26, 2018), <https://scroll.in/article/883936/assam-citizens-register-detention-centres-for-foreigners-of-fer-a-glimpse-of-the-looming-tragedy>.
- 15 Raqib Hameed Naik & Mahibul Hoque, *India: Fears of Coronavirus Outbreak in Assam's Detention Centres*, AL JAZEERA (Apr. 8, 2020), <https://www.aljazeera.com/news/2020/04/india-fears-coronavirus-outbreak-assam-detention-centres-200408075603980.html>.
- 16 *Id.*
- 17 See Explanatory Report to the Council of Europe Convention on the Avoidance of Statelessness In Relation To State Succession, Strasbourg, 19 COUNCIL OF EUROPE TREATY SERIES 200, 1 (2006), <https://rm.coe.int/CoERMPublic-CommonSearchServices/DisplayDCTMContent?documentId=09000016800d3815>.
- 18 ICCPR arts. 2(1) and 26.
- 19 See Swagata Yadavar & Disha Shetty, *Almost 38% of Indian Children Under the Age of Five Don't Have a Birth Certificate*, SCROLL.IN (Jan. 4, 2020), <https://scroll.in/article/948667/almost-38-of-indian-children-under-the-age-of-five-dont-have-a-birth-certificate>.
- 20 Assam Sanmilita Mahasangha & Ors. v. Union of India & Ors., AIR 2015 SC 783, ¶ 48.
- 21 INDIA CONST. art. 14.
- 22 INDIA CONST. art. 21.
- 23 See Maneka Gandhi v. Union of India & Anr., 1978 AIR 597 (India).
- 24 Article 11.
- 25 Section 3, Citizenship Act, 1955.
- 26 Section 4, Citizenship Act, 1955.
- 27 Section 5, Citizenship Act, 1955.
- 28 Section 6, Citizenship Act, 1955.
- 29 Section 7, Citizenship Act, 1955.
- 30 Section 3, Citizenship Act, 1955.
- 31 Section 3(1)(b), Citizenship Act 1955.
- 32 Section 3(1)(c), Citizenship Act 1955.
- 33 Nandita Saikia, et al., *Trends in Immigration from Bangladesh to Assam, 1951-2001: Evidence from Direct and Indirect Demographic Estimation* (Int'l Migration & Diaspora Studies Project, Working Paper No. 91, 2016). See generally SANGHAMITRA MISRA BECOMING A BORDERLAND: THE POLITICS OF SPACE AND IDENTITY IN COLONIAL NORTHEASTERN INDIA (2011).
- 34 See *id.* at 5–6.
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- 36 Parag Jyoti Saikia and Suraj Gogoi, *A Register Most Flawed* (Fountain Inkj, Oct 8, 2018).
- 37 *Id.* at 5–6. See also Debarshi Das, *The Spectre of Citizenship: History & Politics of NRC in Assam* (Jan. 22, 2018), <http://www.raiot.in/the-spectre-of-citizenship-history-politics-of-nrc-in-assam/>.
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- 40 See Subir Dey, *Settlement of East Bengal Farmers and Consequent Histories in Assam 1900-1951* (2015) (unpublished Ph.D dissertation, Jawaharlal Nehru University) (on file with authors).
- 41 Home & Political Department, Govt. of Assam, *White Paper on Foreigners Issue*, § 1.2(1) (Oct. 20, 2012) [hereinafter *White Paper on Foreigners Issue*]. The White Paper stated that the "number [was] initially reported by the State Govt. to be between 1,50,000 and 2,00,000 but later estimated to be around 5,00,000."
- 42 ANUPAMA ROY, MAPPING CITIZENSHIP IN INDIA at 93, n. 1(2010) (describing differences between The Illegal Migrants (Determination By Tribunals) Act, 1983 and The Foreigners Act, 1946). The porousness of the eastern border is in contrast to India's western border separating Punjab from mainland Pakistan, which was sealed following the constitutional deadline for migrants from Pakistan to claim Indian citizenship.
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- 46 GARETH PRICE 1998, THE ASSAM MOVEMENT AND THE CONSTRUCTION OF ASSAMESE IDENTITY (*Unpublished dissertation from University of Bristol*).
- 47 *White Paper on Foreigners Issue, supra* note 30, at §1(VII) (1).
- 48 See Suraj Gogoi, *Nellie Massacre: 36 years on, a reflection on why victims of tragedy have been erased from public memory*, FIRSTPOST (Feb. 21, 2019), <https://www.firstpost.com/india/nellie-massacre-36-years-on-a-reflection-on-why-victims-of-tragedy-have-been-erased-from-public-memory-6130741.html>.
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- 50 The Citizenship (Amendment) Act, 1985; The Citizenship Act, 1955, § 6A, No. 57, Acts of Parliament, 1955 (India) [hereinafter The Citizenship Act, 1955].
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- 52 ROY, *supra* note 31, at 97. Notably, the Assam Accord did not clearly define the term "foreigner."
- 53 The Foreigners Act, 1946, § 3.
- 54 *Id.* at § 2(1)(a).
- 55 See AMNESTY INT'L: INDIA, *supra* note 7, at 22.
- 56 The Passport (Entry into India) Act, 1920, § 5, No. 34, Acts of Parliament, 1920 (India).
- 57 Ministry of Home Affairs Notification, Gazette of India, pt. II § 3 (Feb. 17, 1976).
- 58 The Foreigners (Tribunals) Order, 1964, § 2(1), Notification No. G.S.R. 1401, 1964 (India) [hereinafter The Foreigners (Tribunals) Order, 1964].
- 59 *Id.* at § 2(1).
- 60 *Case Closed: How Assam's Foreigners Tribunals, Aided by the High Court, Function Like Kangaroo Courts and Persecute Its Minorities*, THE CARAVAN (Nov. 5, 2019), <https://caravanmagazine.in/law/assam-foreigners-tribunals-function-like-kangaroo-courts-persecute-minorities>.
- 61 Govt. of Assam (Assam Police), *History & Objectives*, <https://police.assam.gov.in/portlet-sub-innerpage/history-and-objectives-0>.

62 The Foreigners (Tribunals) Order, 1964, § 3(2).

63 *Id.* at § 4.

64 See *White Paper on Foreigners Issue*, *supra* note 30, at § 2(3)(1). The Government of Assam's 2015 *Whitepaper on the Foreigners Issue* stated that Foreigners Tribunals were established in 1964 and then phased out from 1969 to 1973 "as most of the infiltrators had been deported." In 1979, 10 Foreigners Tribunals were revived.

65 The Illegal Migrants (Determination By Tribunals) Act, 1983 Act No. 39 of 1983 (India) [hereinafter The IMDT Act, 1983].

66 See *White Paper on Foreigners Issue*, *supra* note 30, at § 2(3)(1). The Government of Assam's 2015 *Whitepaper on the Foreigners Issue* stated that Foreigners Tribunals were established in 1964 and then phased out from 1969 to 1973 "as most of the infiltrators had been deported." In 1979, 10 Foreigners Tribunals were revived.

67 Roy, *supra* note 31, at 104.

68 Sarbananda Sonowal v. Union of India, AIR 2005 SC 2920 (India).

69 *Id.*

70 See AMNESTY INT'L: INDIA, *supra* note 7, at 5 ("...it is clear that [Sinha] gave very little evidence to prove that migration into Assam represented a threat to the national security. Even the evidence furnished was not based on any comprehensive or credible data.").

71 Sarbananda Sonowal v. Union of India, AIR 2005 SC 2920 (India).

72 See AMNESTY INT'L: INDIA, *supra* note 7, at 5.

73 See *White Paper on Foreigners Issue*, *supra* note 30, at § 2(6) (2).

74 Ipsita Chakravarty, *Declaring Foreigners: How Assam's Border Police and Tribunals Form a Secretive System of Justice*, SCROLL.IN (Aug. 19, 2018), <https://scroll.in/article/890134/declaring-foreigners-how-assams-border-police-and-tribunals-form-a-secretive-system-of-justice>.

75 The Foreigners (Tribunals) Amendment Order, 2019, § 3(A)(16), Notification No. G.S.R. 409(E), 2019 (India) [hereinafter The Foreigners (Tribunals) Amendment Order, 2019].

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77 Rokibuz Zaman, *In 5 Years, 86,000 Declared Foreigners in Assam: Centre to Lok Sabha*, TIMES OF INDIA (Sept. 21, 2020), <https://timesofindia.indiatimes.com/city/guwahati/in-5-years-86000-declared-foreigners-in-assam-centre-to-lok-sabha/articleshow/78227183.cms>.

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82 Para 8 of the Schedule, Citizenship Rules, 2003.

83 India ratified the ICCPR on April 10, 1979 and has not issued reservations to any ICCPR provisions discussed in this report.

84 ICCPR, art. 14.

85 U.N. Human Rights Committee, General Comment 32 ¶ 15, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007) [hereinafter General Comment 32].

86 *Id.* at ¶ 19.

87 The Foreigners Act, 1946 §§ 1, 2(g).

88 The Foreigners (Tribunals) Amendment Order, 2019, § 2(1).

89 The Foreigners (Tribunals) Order 1964 § 4.

90 General Comment 32, *supra* note 71, at ¶ 15. Alternatively, one can argue that foreigners tribunal proceedings constitute "suits at law" under ICCPR Article 14. The U.N. defines "suit[s] at law" as "various civil... or administrative proceedings before a judicial body." Cases where domestic law grants an entitlement to a person constitute suits at law. In determining whether referred persons are Indian citizens or foreigners, Foreigners Tribunals necessarily decide whether persons are entitled to rights bestowed to Indian citizens. But the Gauhati High Court has justified the reversed burden of proof on the basis that Foreigners Tribunal cases are different from "a suit in the civil court" and so are not subject to Section 101 of the Evidence Act. See *State of Assam & ANR v. Moslem Mondal*, 2013 (1) GLT (FB) 809, ¶ 78 (India).

91 Dutta, *supra* note 13. Dutta reported that, as of 2019, six jails operated as detention centers. Consequently, detainees are housed alongside undertrials and convicts and "for all effective purposes are imprisoned."

92 ICCPR, art. 14, *supra* note 6, at ¶ 1.

93 General Comment 32, *supra* note 71, at ¶ 29.

94 *Id.*

95 See THE CARAVAN, *supra* note 51.

96 U.N. Counter-Terrorism Implementation Task Force, *Basic Human Rights Reference Guide: Right to a Fair Trial and Due Process in the Context of Countering Terrorism*, 14 (Oct. 2014), <http://www.ohchr.org/EN/newyork/Documents/FairTrial.pdf> [hereinafter U.N. Counter-Terrorism Task Force].

97 See AMNESTY INT'L: INDIA, *supra* note 7, at 26.

98 *Id.* at 26–27.

99 See Recruitment Notification, THE GAUHATI HIGH COURT AT GUWAHATI, *supra* note 8.

100 *Id.*

101 Interview with Oliullah Laskar in Assam, India (Feb. 2020).

102 U.N. Counter-Terrorism Task Force, *supra* note 82, at 15.

103 7<sup>th</sup> U.N. Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Independence of the Judiciary*, (Aug.–Sept. 1985), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>.

104 See Recruitment Notification, THE GAUHATI HIGH COURT AT GUWAHATI, *supra* note 8.

105 AMNESTY INT'L: INDIA, *supra* note 7, at 26.

106 Recruitment Notification, THE GAUHATI HIGH COURT AT GUWAHATI, *supra* note 8.

107 AMNESTY INT'L: INDIA, *supra* note 7, at 27.

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112 *Karttunen v. Finland*, Comm. No. 387/1989, ¶ 7.2, U.N. Doc. CCPR/C/46/D/387/1989 (1992). In October 1992, the HRC adopted the views expressed in Comm. No. 387/1989 under art. 5, para. 4 of the Optional Protocol.

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114 General Comment 32, *supra* note 71, at ¶ 21.

115 See AMNESTY INT'L: INDIA, *supra* note 7, at 30. ("The Courts in India...have adopted and implemented a set of legislative measures with a clear goal in mind: to exclude people of Bengali origin."); Saif Khalid, 'Harassed, Discriminated': *Story of Assam's Bengali Origin People*, AL JAZEERA (Jun. 23, 2018), <https://www.aljazeera.com/features/2018/6/23/harassed-discriminated-story-of-assams-bengali-origin-people>; Praveen Donthi, *How Assam's Supreme Court-Mandated*

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- 133 General Comment 32, *supra* note 71, at ¶ 30.
- 134 *Id.* at ¶ 15.
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- 156 Working Grp. on Arbitrary Detention, Compilation of Deliberations, ¶ 51, <https://www.ohchr.org/Documents/Issues/Detention/CompilationWGADDeliberation.pdf> [hereinafter Working Grp. on Arb. Detention]. The prohibition of arbitrary deprivation of liberty is recognized in all major regional and international human rights instruments, including UDHR Article 3, ICCPR Article 9, and national constitutions.
- 157 U.N. Human Rights Committee, General Comment 35, ¶ 3, U.N. Doc. CCPR/C/GC/35 (Oct. 23, 2014) [hereinafter General Comment 35].
- 158 *Id.* at ¶ 9(5). The Working Group on Arbitrary Detention has concluded that all forms of arbitrary deprivation of liberty, including detention, are also prohibited under customary international law. The UNHCR defines detention as the deprivation of liberty or confinement in a closed place which a person is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centers or public facilities. See *Stateless Persons in Detention*, *supra* note 11, at 11.
- 159 See OHCHR, Fact Sheet No. 26: The Working Group on Arbitrary Detention, IV(B)(c). <http://www.unhcr.ch/html/menu6/2/fs26.htm> [hereinafter Fact Sheet No. 26].
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- 177 See Leah Verghese, *Weaponising Citizenship in India*, BORDER CRIMINOLOGIES (Feb. 19, 2020), <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/02/weaponising> (“There is no statutory limit on the period of or periodic review of detention.”).
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- 183 Jorge Bustamante (Special Rapporteur on the Human Rights of Migrants), Report of the Special Rapporteur on the Human Rights of Migrants, ¶ 87 (Aug. 4, 2010).
- 184 Working Grp. on Arb. Detention, *supra* note 142, at II(9) at p.27.
- 185 Detention Principles, *supra* note 12.
- 186 U.N. Economic and Social Council Res. 663 C (XXIV), at 24–25 (July 31, 1957).
- 187 *Id.* at 22.
- 188 Interview with Shaw (named changed) in Bongaigaon District, Assam (Feb. 2020).
- 189 Dutta, *supra* note 13 at 96.
- 190 *Id.* at 96. See also Mander, *supra* note 14 (revealing that “men, women and boys above six years [were] separated from their families, adding to their distress. Many had not met their spouses for years.”).
- 191 *Id.* Dutta reported that, as of 2019, six jails operated as detention centers. Consequently, detainees are housed alongside undertrials and convicts and “for all effective purposes are imprisoned.”
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- 193 Mander, *supra* note 14.
- 194 *Id.*
- 195 *Id.*
- 196 Interview with Shaw (named changed) in Bongaigaon, Assam (Feb. 2020). See also Raqib Hameed Naik & Mahibul Hoque, *India: Fears of Coronavirus Outbreak in Assam’s Detention Centres*, AL JAZEERA (Apr. 8, 2020), <https://www.aljazeera.com/news/2020/04/india-fears-coronavirus-outbreak-assam-detention-centres-200408075603980.html>.
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- 212 UDHR, *supra* note 194, at art. 13 (“everyone has the right to leave any country, including his own, and the right to return to his country”); ICCPR, *supra* note 6, at art. 12(2), (4).
- 213 See *Without Papers I am No One: Stateless People in the Dominican Republic*, AMNESTY INT’L, 48 (2015), [https://www.amnesty.be/IMG/pdf/dr\\_statelessness\\_report\\_-\\_report\\_eng.pdf](https://www.amnesty.be/IMG/pdf/dr_statelessness_report_-_report_eng.pdf), citing OHCHR, General Comment 27, ¶ 2 U.N. Doc. CCPR/C/21/Rev.1/add.9 (Nov. 2, 1999).
- 214 U.N. Human Rights Committee, General Comment 18, ¶ 2 (Nov. 10, 1989), <https://www.refworld.org/docid/453883fa8.html> [hereinafter General Comment 18].
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- 216 ICCPR, *supra* note 6, at art. 26. Article 26 states that “all persons shall be equal before the courts and tribunals and are entitled without any discrimination to the equal protection of the law.”
- 217 General Comment 18, *supra* note 200, at ¶ 7.
- 218 U.N. Human Rights Committee, General Comment 15, ¶ 1 (Apr. 11, 1986), <https://www.refworld.org/pdfid/45139acfc.pdf> [hereinafter General Comment 15]. The only two exceptions are found in ICCPR Article 25, which applies only to citizens, and ICCPR Article 13, which applies only to “aliens.”
- 219 U.N. Human Rights Committee, General Comment 29, ¶ 2, U.N. Doc. CCPR/C/21/Rev.1.11 (Aug. 31, 2001) [hereinafter General Comment 29]. The OHCHR has strictly defined “public emergency,” making it a high threshold for states to meet. Specifically, “not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation.”
- 220 ICCPR, *supra* note 6, at art. 4, ¶ 1. There is disagreement whether the adverb “solely” limits the forms of prohibited discrimination to those explicitly listed in the provision (i.e. race, color, sex, language, religion or social origin). The U.N. Training Guide states that “solely” modifies the provision to exclude discrimination based on political or other opinion, national origin, property, birth or other status. See OHCHR, HUMAN RIGHTS AND THE ADMINISTRATION OF JUSTICE: A MANUAL ON HUMAN RIGHTS FOR JUDGES, PROSECUTORS, AND LAWYERS 649 (2003).
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- 235 Interview with Rahima in Assam, India (Feb. 2020).
- 236 Interview with Rashida in Assam, India (Feb. 2020).
- 237 *Id.*
- 238 Interview with Suraj Gogoi in Assam, India (Feb. 2020). See also WSS Fact Finding, *supra* note 218.
- 239 OHCHR, Letter dated Dec. 13, 2018 from Special Rapporteurs de Varennes, Shaheed, Achiume and Vice-Chair of the Working Grp. on Arb. Detention Steinerte, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24247> [hereinafter Dec. 2018 OHCHR Letter].
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- 258 Interview with Abantee Dutta in Kolkata, West Bengal (Feb. 23, 2020).
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- 260 The Foreigners Act, 1946.
- 261 *Id.*
- 262 CRC, *supra* note 195, at art. 2(1).
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- 352 *K.S. Puttaswamy & Anr. v. Union of India & Ors.*, (2017) 10 SCC 1, ¶ 344–46 (India).
- 353 *Id.* at ¶ 345.
- 354 *Id.* at ¶ 350, n. 19. J. Chelameswar calls the contrary proposition to be primitive.
- 355 *Sardar Vallabhbhai Patel, Interim Report on Fundamental Rights at the Constituent Assembly of India Debates* (Apr. 29, 1947), <http://loksabhaph.nic.in/Debates/cadebatefiles/C29041947.html>.
- 356 *B.R. Ambedkar, Speech on Article 260 at the Constituent Assembly of India Debates* (Aug. 10, 1949), <http://loksabhaph.nic.in/Debates/cadebatefiles/C10081949.html>.