

MAKING FOREIGNER

**REPORT ON NRC UPDATION IN ASSAM AND
THE RISK OF MASS STATELESSNESS**

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Citizens Against Hate is a collective of individuals and groups committed to a plural, democratic, caring India. It seeks to provide practical help to victims of hate-motivated violence and to counter, through research, litigation, advocacy and dialogue, hate in all its forms.

This report is the result of collective research conducted over July-November 2018, including field investigations in Kamrup, Barpeta, Baksa and Morigaon districts of Assam, and analysis of material collated whilst supporting – through technical advice- counsels for the victims in NRC updation case. Many persons in Assam and Delhi actively and voluntarily contributed to this work. Abdul Kalam Azad, researcher and activists on human rights issues in Assam, and Shahjahan Ali, activist and youth mobiliser, again with significant connections to community networks in the state, provided the bulk of data and insights, and analysis. They were the principal investigators for this research. During our field investigations, people in above districts spoke freely to us of their experiences of the NRC and Foreigners’ Tribunals. We are thankful to them for opening up to us. We were also fortunate to speak to persons with intimate understanding of the working of above state institutions. We are thankful to them for sharing their insights. Mohsin Alam, academic and fellow traveller, kindly read the paper and provided valuable suggestions for improvement. Sajjad Hassan led research and writing.

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Executive Summary

1. The complete draft National Register of Citizens (NRC) in Assam was published on 30th July 2018. Of the total 32,900,000 applicants, 28,983,677 have been included, leaving 4,070,707 out. Of the latter, 3,759,630 have been 'rejected' and 248,077 kept 'on hold'. These are from a mix of communities – both Muslims and Hindus of Bengali descent, besides Nepali-speaking and Hindi, as well as tribal groups - with high percentages being women, children and daily wage workers, among the poorest of the poor. Some 25 persons excluded from draft NRC and associated procedures, have been reported having committed suicide in desperation.

2. NRC methodology

NRC is being updated in accordance with The Citizenship Act, 1955 and The Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003. One is required to identify a legacy person (parents) with whom one claims descent, and then map her relationship to that person through a family tree which must include all other persons that claim descent from the same person. A set of admissible documents are prescribed as proof of citizenship of the legacy person (List A or legacy documents). Another list provides illustrative list of documents to prove relationship of applicant to the legacy person (List B or linkage documents).

3. What explains the large exclusion?

Reasons are many.

- Poor record keeping: Records are poorly created and maintained in India. Errors and inconsistencies are common; records are not integrated too. Thus there is a significant chance of inconsistency in records of the same person – names, age, and other details might not match. This has created havoc for people, with documents with conflicting information or mismatches showing up.

- Digitisation woes: Legacy data not available for many, and also mixed up. Many remote areas did not have their legacy data created. Procedural errors: spelling mistakes and name mismatches, as well as digitisation errors add to the problem. There are errors in family tree digitisation too.
- Poor capacity of NRC authority to plan, manage, and take corrective actions in the course of its administering the NRC updation. Poor systems and processes, and poor staff training and sensitisation, resulted in significant challenges for applicants.

4. Discrimination as the driver

- At the heart of the failure is the politicisation of procedures, with stakeholders reporting discriminatory behaviour by key actors. Discrimination worked at both policy and practice levels: in the rules and procedures that Supreme Court of India authorised and central and state governments accepted, such as separating 'original' and 'non-original' inhabitants arbitrarily, and having differential verification standards for both - very low for the former, rather high for the latter. The NRC bureaucracy of all ranks used this license not just to arbitrarily reject Gram Panchayat (Village Council) certificates for married women, but also school and birth certificates of children, through unfairly harsh verifications (resulting in massive rejections of these documents), in pockets with concentration of Bengali speaking Muslims and Hindus, and Nepali-speakers, all considered non-original inhabitants. In some minority pockets, the rejection of these link documents was as high as 70-80 %.
- Similar targeting of Bengali Muslims and also Hindus has been the trend, by Assam

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Border Police and in Foreigners' Tribunals, increasingly in the past year, with most cases decided against the accused. The feeder to these are 'Doubtful-voters' (244, 144 declared so far) and 'references cases' identified by Border Police (just above 241,496 to date). So far FTs have declared 90, 266 persons as foreigner, with numbers accelerating rapidly. Appeals against these decisions in higher courts do not find much favour.

- 'Declared foreigners' have no voting rights and are denied access to welfare schemes. 6 detention centres in Assam house the declared foreigners. They hold 961 detainees – kept like convicted prisoners, but without any rights, including parole. All suffer indefinite incarceration – no foreign govt. accepts them.
- Discrimination is also writ large in attempts by the Central government seeking to salvage the damage of the NRC and Foreigners' Tribunal process on Bengali speaking Hindus, through attempting to change citizenship laws and offer fast-track naturalisation to those having entered India, even illegally, from neighbouring countries, while cutting off Muslims completely from this scheme.

5. Claims and Objections

A claims process is on, allowing those excluded from the draft NRC another chance. While the modalities for the C&O are an advancement over the original, they are also restrictive – legacy person and family tree cannot be changed, and only those List B documents that are issued before Aug 2015 are admissible, leaving very little latitude in the hands of applicants. And without clear criteria and better preparedness for conducting physical verifications – expected to be 'stringent' - the claims phase risks being a repeat of the original, when minority groups were specifically targeted for rejection.

6. Supreme Court and the NRC

A Supreme Court of India order in 2014 kick-started the current NRC updation, asking for it to be completed in a time-bound manner, due apparently to the magnitude of the Bangladeshi infiltration in Assam. The Court quoted a vital piece of statistic to lend urgency to the task – that according to the Government of India, the estimated number of illegal Bangladeshi immigrants into India (in Dec. 2001) was 12 million, out of which 5 million were in Assam. It is now coming to light – based on information collected recently by activists under the Right to Information Act 2015 - that the 12 million figure quoted by the Court was based on hearsay, and that the Government of India does not have any "accurate estimate of such illegal migrants, including Bangladeshi immigrants living in the country." Questions have also been raised about the unnecessary haste shown by the court in the case; lack of transparency in the entire process; poor independent monitoring of the administration of the updation by the court; and issues of conflict of interest too.

7. NRC was supposed to be a silver bullet for Assam's long-standing foreigners' problem. Arbitrary and discriminatory rules and practices set up to artificially make foreigners out of citizens – thus the lack of a just and fair intent and process – could potentially derail the project. It could also bring in its wake upheavals that the state could do without.

8. Recommendations:

For state parties

General

- Uphold India's commitment to international norms and conventions, and prevent arbitrariness and discrimination in citizenship laws
- Remove discriminatory provisions of Citizenship (Amendment) Bill 2016
- Make data disaggregated by groups on various parameters available publically

Specific

- a. Support families of those committed suicide in distress
- b. NRC updation:
 - fair and just chance to the excluded to make claims.
 - Proactive efforts at facilitation and making documents easily accessible
 - training and sensitisation of NRC authorities
 - independent oversight of the NRC updation, with all-India observers
- c. Foreigners Tribunals (and Border Police)
 - Change laws and procedures, to provide safeguards against abuse
 - fair and just chance to the excluded to make claims.
 - Proactive efforts at facilitation and making documents easily accessible
 - training and sensitisation of FT and Border Police authorities

- d. Detention Centres
 - clear legal regime for detention; should not be indefinite
 - Do not sperate families
 - Apply juvenile justice law, Special care for patients with mental health issues and the old
 - Legal aid to detainees

For International community

- Monitoring and tracking updation of NRC/FT
- Engaging state parties, acting as watchdog, also providing support they need

For civil society and CBOs

investment in community capacity and providing practical hands-on support to applicants ensuring a fair deal.

Abbreviations

C&O	Claims and Objections
DMIT	District Magistrate's Investigation Team
FT	Foreigners' Tribunal
GP	Gram Panchayat
IEC	Information, Education, Communication
IMDT	Illegal Migrants' (Determination by Tribunal) Act, 1983
LRCR	Local Registrar of Citizen Register
NHRC	National Human Rights Commission
NRC	National Register of Citizens
NRC-SC	National Register of Citizens – State Coordinator
NSK	NRC Sewa Kendra
SC	Supreme Court of India
SOP	Standard Operating Procedure

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1. Introduction

Assam is in the midst of a great reckoning. An exercise in preparing a register of all Indians in the state is being undertaken. This is the National Register of Citizens, or NRC, the first version of which was produced just after Independence in 1951.¹ NRCs are unique to Assam, this updated version, the outcome of the so-called Assam Accord signed in 1985 between Government of India and representatives of the Assam nationalist movement that had at its core the question of illegal migration in Assam. A Supreme Court of India order in 2014 kick-started the current NRC updation, asking for it to be completed in a time-bound manner, due apparently to the magnitude of the Bangladeshi infiltration in Assam. The Court quoted a vital piece of statistic to lend urgency to the task – that according to the Government of India, the estimated number of illegal Bangladeshi immigrants into India (in Dec. 2001) was 12 million, out of which 5 million were in Assam. It is only now coming to light – based on information collected recently by activists under the Right to Information Act 2015 - that the 12 million figure quoted by the Court was based on hearsay, and that the Government of India does not have any “accurate estimate of such illegal migrants, including Bangladeshi immigrants living in the country.”² Preparation of the updated NRC - humungous a task as it is, given it involves processing the papers of close to 33 million applicants – is drawing to a close. The draft NRC was published on 30th July 2018. Those excluded from the list have been given a second chance to prove their nationality.

And therein lies the rub: More than 4 million persons have been deemed ineligible for inclusion in the NRC – with the widespread acknowledgment that many, unjustly so. Bulk of the excluded are the poorest of the poor, ekeing out a precarious existence. Most are women and children. Organising documentary proof of their nationality claim was hard enough. Proving that a second time, on criteria that are now even more harsh, is proving daunting. Of late, reports have been appearing in the media of several persons excluded from the register, or their close relatives, committing suicide in desperation. A figure of 25 – mostly from recent months - is being quoted. This desperation is aided by the awareness of the hopelessness of those ensnared in the what are called Foreigners Tribunals, another unique institution in Assam tasked with determining illegal migrants. Those declared foreigner by the Tribunals end up in ‘detention centres’, forever incarcerated. For those against whom criminal proceedings are underway but have been spared the horror of detention, life is living hell, disenfranchised, marked as doubtful, constantly doing the rounds of police stations and court houses, trying to prove their links to the land, all in the face of societal prejudice and state bias. Often, they are targets of hate violence too. Those excluded from the draft NRC risk joining the ranks of ‘declared foreigners’ - the nowhere people.

This report seeks to shine a light on this making of foreigners in Assam, examining the NRC preparation process closely, also casting an eye on the working of Foreigners’ Tribunals. We seek to understand how rules and procedures,

¹ This was based on Census conducted in 1951, and might have left out many hard to reach areas in the State.

² ‘Assam NRC: Govt Clueless About How Many Illegal Immigrants Actually Live in India, RTI Shows’. Debarshi Das & Prasenjit Bose, Huffpost, 16th November 2018. https://www.huffingtonpost.in/2018/11/16/assam-nrc-govt-clueless-on-how-many-illegal-immigrants-actually-live-in-india-rti-shows_a_23591448/

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organisation and capacity, and bias - at policy as well as practice level - intersect to discriminate against specific communities long stigmatised as illegal migrants in the state. The system then, is already set up to exclude on the basis of religion and ethnicity. This is arbitrary, and given India's secular constitution, an exception. That this is being done under the guise of legality is the more insidious act.

We attempt in this exploration to use victims' perspectives. We rely largely on victim accounts of their exclusion, as also their perception of the working of institutions and structures of exclusion. We supplement these with record of formal proceedings - Supreme Court of India and NRC State Coordinator's - to highlight both the failures as well as to validate general points we make. But because much of the inner workings of the institutions - the processes and interests that go into decision making - are not visible to the public, we have had to rely on insider accounts of the pathological workings of the structures: the play of arbitrariness and bias, and its determining public outcomes that discriminate. We have been careful to mask the identity of these informants.

The report has many limitations: it is not meant to be an all-encompassing and balanced audit of the NRC process. Its focus on victim perspective means we have not given much space to the working of those with the remit to administer the NRC, also of the Foreigners' Tribunals. This is a project for the future. Linked to this limitation is that of data, which is either sourced through speaking with victims of the exclusion or from public sources - media accounts, court proceedings and those available on Assam State Government and NRC State Coordinator's websites. These are limited, especially those on the focus of our study, viz. showing up discrimination and arbitrary working of state institutions. These accounts draw on anecdotal sources. They also have the inherent limitations of inevitable inaccuracies. These we acknowledge.

The rest of the report is organised as follows: In Section 2 we provide a snapshot of the outcome of the draft NRC, in terms of numbers and coverage. Sec. 3 is about unearthing the reasons behind the large exclusion in draft NRC, focusing on procedural, capacity, and institutional factors. Sec. 4 tries to do something similar with the parallel (and intersecting) working of Foreigners' Tribunals, to shine a light on how they are programmed to exclude. Sec. 5 brings the focus back to NRC, this time on the ongoing claims and objections process, to test whether that provides a chance for redress. In Sec. 6 we look at the specific role of the Supreme Court of India, that has been driving the NRC updation, to see how that has worked especially from justice point of view. Sec. 7 is a bit of crystal ball gazing, examining possible consequences for those that NRC will eventually exclude, outlining scenarios, including detention centres that house 'declared foreigners'. Sec. 8 is a quick peek into attempts by the central government to salvage the situation for those likely to be excluded, butholding back this supposed lifeline from a section already excluded, to emphasize how discrimination against them is sought to be further concretised. We conclude (in Sec. 9) with drawing broad trends from the material presented, to propose a set of recommendations (in Sec. 10).

2. The draft NRC: Outcomes

The complete draft National Register of Citizens(NRC) was published on 30th July 2018. Of the total 32,900,000 applicants, 28,983,677 have been included, leaving 4,070,707 out. Of the latter, 3,759,630 have been 'rejected' and 248,077 kept 'on hold'.³ Without any official information on who the ineligible might be, one must rely on media accounts and anecdotal evidence. According to these sources, these are from a mix of communities - both Muslims and Hindus of Bengali descent, besides Nepali speaking and Hindi, as well as tribal groups - with high percentages being women, children and daily wage workers.⁴ A majority of these are said to have their relatives' names in the draft

NRC. Media accounts have also reported several teachers, government servants and soldiers among the excluded.⁵

3. Unearthing the bias and arbitrariness

The NRC is being updated in accordance with The Citizenship Act, 1955 and The Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003, which define rules for identifying individuals as citizens of India. NRC modalities required one to identify a legacy person (parents or grandparents) with whom one claims descent, and then map her relationship to that person through a family tree which must include all other persons that claim descent from the same legacy person. A set of admissible documents were prescribed to show proof of the citizenship of the legacy person (List A or legacy documents, dated before 24 March 1971, example, 1951 NRC and electoral rolls upto 1971). Another list of documents was prescribed to claim relationship or linkage of the applicant to the legacy person (List B or linkage documents – birth certificates, school leaving certificate, bank documents and such like).

What accounts for the large - almost 12% - exclusion from the draft NRC? Survey of media accounts and field investigations including discussions with applicants and key stakeholders, provide some clues to the exclusion and the risk of those eventually being denied citizenship. This is a saga of an abundance of procedural errors- spelling mistakes and name mismatches, as well as digitisation errors, combined with poor capacity of NRC bureaucracy to plan, manage, and take corrective actions in the course of its administering NRC updation. Poor systems and processes, and poor staff training and sensitisation, resulted in significant harassment

and eventually loss for applicants. Administrative and technological issues also marred the process. But at the heart of the failure is the politicisation of procedures, with key stakeholders reporting discriminatory practices by key actors, at policy and implementation level, resulting in arbitrary action, with negative outcomes for the applicants. The impact of this on the common man is worsened by the lack of coordination between different bodies involved with citizenship determination in Assam – particularly NRC SewaKendra (NSK) administrators, Border police, Foreigners' Tribunals and the judiciary. There is finally, gendered dynamics, including how women and children are particularly vulnerable to having their names excluded from lists.⁶

3.1 Lofty modalities atop weak foundations

NRC updation methodology relies heavily on documentary proof, both of legacy and relationship claims. To be fair to all applicants, this would assume the availability and easy access of documents for all classes of people. It also assumes effective and accurate record keeping by public agencies. Neither is true. Records – particularly land, welfare schemes, births and deaths, school enrolment and graduation, as well as electoral rolls and election IDs – are poorly created and maintained. Errors and inconsistencies, some bonafide, mostly mischievous, are common. Records are also not integrated, and thus there is significant chance of inconsistency across records of the same person – names, age, and other details might not match. Those that are educated and careful make efforts to address these errors, especially now that record keeping with computerised data sets (Aadhar and banking and elections) is

³Supreme Court of India orders dated 30-07-18

⁴<https://indianexpress.com/article/north-east-india/assam/women-left-out-in-assam-nrc-final-draft-teacher-former-pro-researcher-5289376/>

⁵https://www.huffingtonpost.in/2018/08/02/nrc-these-soldiers-guarded-indias-borders-only-to-be-excluded-from-assams-national-register-of-citizens_a_23494581/

⁶NRC final draft analysis (Part-2): Why were 4 million people excluded? Ashraful Husain, Sabrangindia. Sept. 26, 2018. <https://sabrangindia.in/article/nrc-final-draft-analysis-part-2-why-were-4-million-people-excluded>

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improving. The poor and illiterate are less able to mitigate for this risk. Proof of public records – land, births and deaths etc. are also not easy to access and obtain, with bureaucratic red tape coming in the way, and corruption rife. This is particularly so for poorer sections, and for communities marked as suspect. NRC modality's demands of legacy and relationship proofs has made a bad situation, especially for the poor and weak, that much difficult.

3.2 Procedural maze

NRC relied on legacy data code – based on digitisation of legacy data records, and their generation of unique codes. Large number of applicants could not find their Legacy Data in NRC database, even though they had copies of eligible documents (pre-1971 Electoral Roll and 1951 NRC). Most such cases found their applications rejected. Apart from 1965-66 and 1970-71 Electoral Rolls, none have been made public, and those relying on these lists have been unable to get their status verified. There were also cases where entire districts (KarbiAnglong is named) had no digitized legacy data, also eventually resulting in their rejection. There were various instances of legacy data code being mixed up (persons with similar names) or plain spelling mistakes), due to errors by data entry operators. These too resulted in mismatch with original documents at verification stage, and rejection of the applications. There were also issues with Family Tree Verification, with reports of errors in data entry and updation, resulted in further mismatch and rejections.

3.3 Confirming authenticity – raising the bar for some

Verification of the genuineness of claims and documents provided was by way of checking databases developed by NRC of all public records of the state. Applications where records belonged to another state were shared with respective authorities for their confirmation. Where records were not available or checks (of family tree for instance) could not be performed definitively, physical verifications were also conducted, and oral evidence taken, including of

witnesses. These physical verifications involved NRC teams meeting applicants, examining records, and taking witness statements, among others. Complaints around these are plentiful – ranging from notices for attending verification hearings never received, to receiving them late, and in the case of family tree verification, often entire cluster of families (using same legacy code) being summoned to far-off places at short notices, and absence of one or more members of the extended family resulting in rejections of applications of entire groups. These verifications were also made mandatory for checking the validity of some documents deemed weak, but only for specific communities, thus discriminating against them.

3.4 Setting up to penalise the weak

Behind much of this poor working of the NRC process was the weak capacity of the NRC team. NRC personnel are drawn on deputation from other state govt. departments; mostly with dual responsibility; provided only a little training. They are overburdened and poorly motivated. Data Entry Operators recruited to digitise records and provide legacy data to applicants, were inappropriate, being mostly poorly qualified, and not provided much training, resulting in significant errors on their part in providing Legacy Data Codes (LDCs). These errors on the part of NRC personnel showed up at verification stage and ended up with rejections of client applications. And District Magistrate Investigation Teams(DMIT), the lynchpin of NRC's physical verification process, were made of junior level district functionaries - college lecturers, Food and civil supplies dept. officials and district coordinators of education departments - all with poor capacity and commitment and high on prejudice. Despite being new to evidence and enquiry, they were given only a token training on technicalities, and none on how to conduct themselves with sensitivity and care on a matter of life and death importance for applicants. High rate of rejections of link documents, especially amongst specific groups, was therefore, a foregone conclusion.

a. Together, these accounted for a significant portion of the rejected, involving issues with List A data (absence of legacy data, legacy data mismatch, and family tree mismatch, among others) as well as List B documents, mostly rejected in field verifications (by DMITs). These included birth certificates, many issued by bodies not authorised to issue them; many issued after the one-year grace period; some issued by authorities from outside the state – but in whose case their genuineness could not be confirmed from those states. These were put up for physical verification. But, as we were informed by a staff of an NSK in Baksa district, rather than give the applicants due consideration and take into account circumstantial evidence, DMITs summarily rejected most birth certificates at verification stage.

b. Similar was the fate of school certificates, including of government schools, that were deemed weak evidence, and rejected by DMITs in bulk. Our informant estimated this made up some 30 % of the 7200 applications rejected in a particular NSK in Baksa. Rejections were also made summarily, claim informed sources, at the stage of what are called Quality Checks – a sample of processed cases, examined by supervisory rank NRC officers. Smallest of typographical mistakes was apparently, adequate ground for rejection. In Baksa district, we were informed these were done systematically, targeting heads of families, so the rest of the family was automatically made ineligible. Activists claim all these rejections at stage of physical verification (by DMIT and supervisory officers) were arbitrary and directed especially to target Bengali-speaking Muslims and Hindus as well as Nepali-speakers.

c. But it was the case of the mass rejections of Gram Panchayat – GP (village Council) certificates, provided as proof of identity, that demonstrated how deep-seated bias against specific communities at implementation level

overlapped that in making of rules and procedures, creating a perfect case of institutional discrimination with serious consequences for the applicants.⁷ Taken together with birth and school certificates, these instances of arbitrariness and discrimination show up the gendered dynamics to NRC process including how women and children have been particularly vulnerable to having their names excluded from the NRC.

GP certificates were among the set of 8 admissible List B documents. These were mostly provided by married women having migrated to new places of residence on account of marriage, but with no birth certificates or other proof of identity. As many might have got married before 18 years, their names too did not appear with their parents on electoral rolls. Of the total 32.9 million applications, 4.7 million were made using GP certificates. A special verification – involving two-step process of rigorous checking of the certificates – was put in place for 2.25 million applicants identified by NRC-State Coordinator (NRC-SC)– the body tasked with administering the updation of NRC – as eligible ‘non-original’ inhabitants. This was meant to mean mostly Bengali-speaking Muslims and Hindus, and Nepali-speaking. Married women who were ‘original inhabitants’ and used GP certificates – numbering 1.74 million in all – were not required to go through this physical check. These included Assamese-speaking applicants and Bodo and other tribal groups. Their certificates were accepted automatically.

The rigour in verification demanded of ‘non-original inhabitants’ (vs. the absence of it for ‘original inhabitants’), has resulted in NRC authorities exercising their discretion to question GP certificates on the flimsiest of grounds, ending up in large scale rejection of the applications. Our field investigation in Baksa, Barpeta, Morigaon and Kamrup districts confirmed the claim of activists that these were arbitrary. In one particular NSK in Baksa, we

⁷ Supreme Court of India, order dated 30-07-18

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were informed the rejection of GP certificates was as high as 70%, with those affected being overwhelmingly, so-called non-original inhabitants.⁸

A Local Registrar of Citizen Register (LRCR – the head of the NSK) we spoke with in capital Kamrup claimed there was an unwritten rule in NSKs – and enforced by senior officers - to reject link documents, especially of so called non-indigenous inhabitants.⁹ This hostile atmosphere against ‘non-indigenous’ groups also meant NRC staff from these communities – a small minority in the bureaucracy, hardly representative of their population share¹⁰ - worked under tremendous pressure, constantly under watch and undermined by both their supervisors – who doubted their commitment and mostly side-lined them from key decision making roles - and their subordinates who mostly bypassed them. An LRCR we spoke with in Baksa, shared his concerns for his own physical security.

d. Doubting and condemning: D-Voters and NRC

The draft NRC has also kept “on hold” 248,077 applications, on account of their ‘D voter’ or ‘descendants of D voters’ status. Directions by the NRC State Coordinator to Assam Border Police to refer to the Foreigner’s Tribunal (FT) relatives of persons declared as foreigners, without the need for prior inquiry and investigation¹¹, could have had a hand in precipitating the large exclusion. FT is a quasi-judicial body mandated to detect illegal migrants. References are made to the FT by

Assam Border Police, tasked with identifying suspected foreigners as well as by the Election Commission of India, who in an intensive revision of electoral rolls in 1997, identified ‘D’ or doubtful voters on the rolls. These references are required to be made after due inquiry. Draft NRC has recorded the status of relatives of declared foreigners and ‘D’ or doubtful voters as ‘pending’ until their citizenship has been determined by the FT.¹² Whether these ‘on hold’ cases will find closure in the ongoing claims and objections process and, if cleared, be eligible for inclusion in the final NRC is not clear, given cases in FTs can proceed for prolonged durations.¹³ It is also being reported that an increasing number of persons – particularly Bengali-speaking Muslims - are being declared as foreigners by FTs especially over the past year.¹⁴ These have added to the exclusions. A majority of these are women.¹⁵

Instances have also been reported of other arbitrary actions by NRC authorities, targeting D-voters, showing up entrenched bias in the state bureaucracy against specific communities. According to guidelines issued by the NRC office with regards to processing applications of descendent of D-voters, if one of the parents was a D voter, but descendent were born before 2004, the latter’s case for inclusion in NRC would be processed normally, and not kept on hold. If both parents were D-voters, decedents would need to be born before 1987 for their cases to be processed as others. Our sources informed us that in Baksa district, senior districts officials overseeing NRC operations

⁸ Interview with unnamed NSK worker, Baksa district. Interview. 20th November 2018. Baksa.

⁹ Interview with unnamed LRCR, Kamrup district, 13th Sept. 2018.

¹⁰ Of the 65 Local Registrar of Citizens Registers (LRCR) in Baksa, 5 were Bengali-speaking Muslim, 2 Bengalis speaking Hindu and 3 Nepalis, rest all were Assamese and Bodo, in equal measure. All district officers are ethnic Assamese.

¹¹ Memo No. SPMU/NRC/HF-FT/537/2018/15-A, dated 02-05-18 and memo no. SPMU/NRC/HC-FT/537/2018/23, dated 25-05-18. These orders were meant to operationalise Guwahati High Court judgement of 02-05-17 (Guwahati High Court, WP(C) 360/2017, that expected the border police to open up inquiries first.

¹² established under Foreigners (Tribunals) Order of 1964 (under the Foreigners Act, 1946).

¹³ In the more than 30-odd years since FTs have been operational, until Dec. 2017, they had disposed of just over 240,000 cases, leaving some 245,000 still pending. <https://indianexpress.com/article/north-east-india/assam/nrc-migrants-citizenship-rajnath-singh-bangladesh-the-unaccounted-part-4-their-next-stop-5291925/>

directed NSK staff to keep on hold all cases of descendent of D voters, regardless of the parents' legal status and year of birth of their descendent, in complete violation of official guidelines. In a particular NSK in the district, that has close to 400 D-Voters, the cases of all their children – numbering close to a 1000 – were kept on hold as pending.¹⁶ Most, we were informed, were Bengalis-speaking Muslims.

4. Foreigners' Tribunals: The template for exclusion

A process that runs parallel with the NRC updation (and precedes it) to determine whether a person is a citizen or illegal immigrant, is the Foreigners Tribunals (FT). FT is a quasi-judicial body mandated to determine citizenship and detect illegal migrants under the Foreigners' Act of 1946. References are made to FT by Assam Border Police, tasked with identifying suspected foreigners as well as by the Election Commission of India, who in an intensive revision of electoral rolls in 1997, identified 'D' or doubtful voters on the rolls. There are currently 100 tribunals in the Assam, 64 were set up just in 2015, to bolster anti-immigrant efforts of the right-wing BJP ruled central government.

Assam Border Police, Foreigners' Tribunals and National Register of Citizens are the three elements of the elaborate arrangement in Assam for identifying and deporting foreigners. Assam Border Police operates under the Prevention of Infiltration of Foreigners (PIF) Scheme and conducts regular surveys in border areas (23 districts across the state), to identify foreigners, and anyone not on official registers—viz, records of births, deaths and marriages and village population registers.¹⁷ Proceedings are required to begin

with a preliminary enquiry demanding that the accused produce papers to show proof of citizenship and is given reasonable time to do so. Those that are unable to produce these papers have cases registered against them, which are then referred to Foreigners' Tribunal. In practice, Border Police's enquiries have been criticized as being arbitrary, mechanical, and biased, often also used as a tool to harass particularly communities, mostly Bengali Speaking Muslims.

It has been reported that Assam Border Police are being given targets of suspected foreigners to commence cases against. An NHRC report on detention centres in Assam recorded, "Senior police officer Louis Aind, DCP Crime, Guwahati, who was earlier in charge of border police unit admitted that a monthly target of 6 reference cases from each border police unit was given to the police." (NHRC, 2018). This was confirmed for us in Barpeta, in discussions with lawyers pleading for the accused in FTs.¹⁸ Apart from migrant labour – a common profile – women are often targeted, those that moved to their place of marriage, but without much papers to show by way of claim to citizenship.¹⁹ The enquiries too are conducted mechanically, with the police often not visiting homes or providing the accused a chance to defend their case. In many cases wrong charges are made out, and with the accused mostly being poor, illiterate and weak, often all, there is no way to know what the charges are and the record of the case. Targeting of suspected foreigners has accelerated parallel to the draft NRC being published, hinting at the possibility of Assam State government trying to get more persons involved in FT cases to defeat their chance of being included on the final NRC.²⁰

¹⁴ They are coming under increasing political pressure under the ruling Bharatiya Janata Party (BJP) government in the state, and there are reports of FTs not toeing political lines, being dismissed.

¹⁵ It is estimated that there are currently some 125,000 'D' voters. 60 % of these might be women. NHRC (2018:9)

¹⁶ Interview, unnamed NSK worker, Baksa district. 20th November 2018.

¹⁷ 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>

¹⁸ Interview with unnamed Foreigners' Tribunal lawyer, Barpeta, 20th November 2018.

¹⁹ Low literacy also means many do not have school certificates. No birth certificates too, and land papers are not normally in their names.

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This tragedy of errors continues when the case reaches the FT. Established under the Foreigners Act, 1946 and the Foreigners Tribunal Order of 1964, also read with the Citizenship Act, 1955, FTs are required to follow a set procedure – serve notices with grounds on which the person is alleged to be a foreigner, and give her a reasonable opportunity of making a representation and producing evidence in support of her case, after which, hearing is meant to be conducted before a directive can be proposed. (Sec. 3, FT Orders, 1964). For verification, unlike NRC, FTs have no prescribed list of documents, but as the burden of proof is on the accused, it is up to the person to adduce as much proof as possible. FTs normally look at all ‘legacy’ and ‘linkage’ documents, but unlike NRC, they look also for continuity in these documents. Also, unlike NRC, the accused in an FT must produce certified copies of the documents. These are not easy to organise from government offices.

Our discussions with lawyers in Barpeta revealed that over the past year and particularly the past 6 months, there has been a change in FT practices, making things more difficult for the those charged. FTs are not accepting certified copies, rather they demand original certificates, and are increasingly insisting on verification of these by the issuing authorities in person. This would require public officials attending FT hearings, to secure which summons would need to be issued and enforced. Only occasionally are summons issued for attendance, and seldom are they enforced. This creates a strange catch-22 situation: FT members demand that government documents – electoral rolls, land records, panchayat certificates – must be verified by their issuing authorities in person; but themselves do not take action to make that happen. Rather it is left to the accused to organise depositions. With lower ranking

officials, such as Gram Panchayat secretaries, that is possible, but with more senior ones – Election Officers for instance – a tall order. As a result, verifications are left incomplete. FT members claim the burden of proof is on the applicant, and it is their job to prove authenticity of what they provide as proof, yet by linking this to appearance of issuing authorities, and refusing to call the latter’s attendance, FTs are effectively killing the verification, and the case itself deliberately. The Foreigners Act 1946 reverses the burden of proof – the accused is guilty unless proved otherwise – and yet it has few checks and balances against abuse. This is remarkable. The overwhelming majority of people likely to be affected by this law are poor, and those acutely vulnerable to harassment by police accusing them of being illegal immigrants.²¹

Underlying the increasing hostility of FTs to the accused in Foreigners Act cases, is the shift in composition of the FTs in the past year, since the Bharatiya Janata Party (BJP) came to power in the Centre in 2014, and later in the state, in 2016. In 2015, 64 FTs were added to the existing 36, taking the total number of FTs in the state to 100. But in this scaling up, FTs lost some of their character. In the past, tribunal members used to be retired district court judges or additional district judges. That condition no longer applies – any practising lawyer over 45 years of age on 1st April, 2015, and with 10 years of experience, was eligible. FTs also do not have Public Prosecutors (PP) or Additional PPs, only government pleaders, thus compromising the proceedings. Demonstrating the muscular stance of the BJP government in the state towards foreigners cases, was the move in June 2017, where 19 FT members were dismissed for their “under performance”, whilst more than 15 others were warned to improve results. Today, all FT members are new, on 2 year contracts,

²⁰ Assam State Finance Minister, Himanta Biswa Sarma who is reported to have claimed recently that the purpose of the NRC was becoming futile and that a way should be devised to exclude more people living in districts near the Bangladesh border, with the intent to vitiate it <https://scroll.in/latest/898088/assam-nrc-we-must-find-a-way-to-exclude-more-names-in-border-districts-says-minister>

²¹ Harsh Mander vs UoI and Others. Writ Petition in Supreme Court of India, 2018

with an unwritten rule that extension would be dependent on their upholding most charges of being foreigner.²²

This they seem to be doing with much alacrity – declaring foreigners on minor technicalities like spelling errors, small age differences, appearance of titles in the citizenship documents and such like. We were informed that in the past 6 months alone, 500 cases brought before FTs in Barpeta (there are 11 of them) have been rejected and applicants declared Foreigner. Most FTs in Barpeta have, over the past 6 months, upheld practically all cases before them.²³ Media accounts confirm this suggestion. From 1985 to July 2018, the 11 tribunals in Barpeta have declared 2,284 persons foreigner – later, 287 of them, after long retrials in the higher courts, were rejudged Indian.²⁴ In a recent report Fourteen lawyers interviewed across the 11 Foreigners Tribunals in Barpeta confirmed the observations. Three others who work in Tezpur, and three lawyers in Guwahati also agreed. They described the process variously as “heart breaking”, “arbitrary”, “too strict”, “politicised” and “intentionally unjust”.²⁵

Decisions of Foreigners Tribunals can be challenged as writ petitions in Guwahati High Court, which has a special bench for FT cases. So far some 7000 writs have been brought before the High Court. According to anecdotal but informed evidence, in the last one month, 90% of WPs in the High Court, challenging FT decisions have been dismissed. A new bench has been constituted that seems to be determined to dismiss all writs on the matter. This is a departure from the past. HC decisions can be challenged in the Supreme Court through Special Leave Petitions (SLP). Indications are

that the Supreme Court too – in a break from the past – is now reluctant to entertain FT related SLPs.²⁶ It is to this broken system of Foreigners Tribunals that those left out of the final NRC are likely to be turned. It is not too difficult to imagine what the outcome of the cases will be.

5. NRC Claims and objections: Effective remedy?

The procedure put in place for what is called the Claims and Objections (C&O) process is similar to that for the main application, with those excluded allowed another opportunity to provide documents rejected in the draft round.²⁷ The C&O process uses modalities that the Supreme Court of India authorised in its judgement of 1st November 2018. An advancement over the original procedures, the new Standard Operating Procedure (SOP) is similar to the original – no change in legacy person is allowed or in the family tree – whilst providing more clarity especially on List B documents, including detailing what will be considered strong evidence and weak, the latter calling for “stringent verification”.²⁸ Special measures are prescribed for vulnerable applicants, such as children left out despite parents’ inclusion and destitute and homeless applicants, for whom rules have been relaxed. There also seems an effort to make the process more accessible, through better public awareness; capacity building and sensitising the NRC bureaucracy to better engage with applicants; and introducing measures for oversight of the process, through a system of ‘observers’ – made up of senior officers of the state government.

What the SOP gives with one hand through, it takes away with another, by creating

²³ Interview, unnamed Foreigners’ Tribunal lawyer, Barpeta, 20th November 2018.

²⁴ Ipshita Chakraborty,

²⁵ ‘What’s Going On Is Really Unfair’: Inside The Foreigners Tribunals In Assam’. Huffington Post. 05/08/2018. https://www.huffingtonpost.in/2018/08/05/what-s-going-on-is-really-unfair-inside-the-foreigners-tribunals-in-assam_a_23496313/

²⁶ In the past few months, SC has taken up 4 SLPs, in all, cases overruled FT decisions, and declared applicants Indian. Eg. Sophia Khatun and Moinum Mullah

²⁷ People can also object to the inclusion of names, in fact the new SOP having made this convenient ...

²⁸ “...birth certificates with delayed registration beyond one year, immunisation records, and ration cards will be subject to rigorous scrutiny...” (NRC-SC, 2018)

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an artificial cut off for List B documents. Only those issued before 31st August 2015 (the deadline for original NRC applications) are admissible. Experience of the NRC verification process hints at how – without clear criteria, among others – “stringent verification” of so-called ‘weak documents’ can be shorthand for summary rejections, thus denial of rights. And only time will tell whether the process is indeed accessible and objective, allowing for genuine applicants to be granted what is their right. How is the new SOP playing out on the ground?

Our field investigation of the working of C&O in Guwahati, Morigaon, Baksa and Barpeta districts, between 7-21 November, revealed some serious lacunae with how the stated SOP is being implemented. The overriding sense we got was of poor awareness and heightened confusion among people about the process being followed.

- i. Exclusions from the draft NRC was not notified individually, rather applicants were required to check the status of their applications on a centralised website (of the NRC State Coordinator). For those excluded, reasons were not provided, rather one had to make an application (using a prescribed form) to own NSK to find the grounds for rejection. A visit to one of the NSKs in Baksa district as late as 21st November 2018 revealed a large number of persons visiting were doing so only to know the reasons for exclusion. Its only once the reason is known can one organise herself to address any shortcomings in paperwork. Even in providing reasons, NSK staff were not helpful – only providing vague answers, rather than specific grounds. Only on intervention by civil society mobilisers present at the centre, did the concerned Local Registrar of Citizen Registers (LRCR) provide specific grounds for rejection.
- ii. We did not get a sense that much proactive effort had been made to educate those left out of the NRC on the next steps, and provide helpful information soon enough, knowing organising additional documents from government offices takes time. Notices have been circulated through newspaper, and we found stacks of NRC flyers piled at NSKs, but did not get a sense that there had been much active outreach.
- iii. Persons that were aware of the reasons for their rejection, were also not clear about documentary requirements. The claims window opened on 25th Sept. 2018 (with a deadline of 23rd November 2018). But the Supreme Court, after authorising commencement of the C&O, was still deliberating on the choice of List A and List B documents, and a final order on that the crucial count was only provided on 1st November 2018.²⁹ This hastiness resulted in many persons making applications in a hurry, but without following the new SOP fully. The delay in finalising the SOP also resulted in people holding back. According to media reports, only a small percentage of potential claims have been filed so far.³⁰
- iv. The biggest barrier however, in making claims applications is the requirement that only those linkage documents will be admissible that were issued before the 31st of August 2015. This was the last date for making applications for entry in NRC, and most persons – especially those with poor documentary evidence of relationship to legacy person – have already used the strongest of those to make the original application. Most of the

29 Supreme Court of India Writ Petition (c) No. 274/2009, dated 23rd Oct. 2018.

30 ‘NRC: Only 8.75 percent of those left out have filed claims’, Newsclick. 19th November 2018. <https://www.newsclick.in/nrc-only-875-percent-those-left-out-have-filed-claims>

rejections too have been on account of these list B documents – GP certificate, birth certificates, school certificates. Any new List B document, issued before the cut-off date, will mostly be weaker than the ones already used (and rejected). Most of the persons we met were not sure yet what documents they might be able to provide that meet the new cut off criterion – potentially marriage certificates, ration cards, land documents, PAN cards – that would be considered strong evidence.

- v. The SOP warns that weak List B documents will be put through a process of “rigorous scrutiny” and “will be verified with originals for admissibility”, but also provides assurance that “adequate opportunity” will be given to applicants for “adducing evidence” through oral submissions. Truth about how objective the verification will be, will become clear only when the verification process starts much later in the new year, but if the present is any indication – this time on NRC SC’s claims of IEC and outreach - it all seems like a case of promising much and delivering little. And going by past experience of NRC verifications, claims of rigorous scrutiny and special verifications are a shorthand (and often a dog whistle to NRC bureaucracy) for wholesale rejection of cases of those peremptorily marked doubtful.

Overall the C&O process is not looking very inspiring. People we spoke with were unsure and confused, especially about the Link documents they will be able to provide and will hope for the best at the time of providing oral evidence in hearings.

6. Supreme Court and the NRC: Upholding justice?

That all this is happening on the Supreme Court’s watch is striking. NRC updation is being monitored by the Supreme Court, through a 2012 Writ Petition demanding traction on a promise made by the central government as part of the Assam Accord (1985) that brought to close a protracted identity based insurgency movement in Assam. Since late 2014 at least, the SC has played a more than monitoring role, driving the updation, deciding on procedure and criteria and determining timelines. Observers have noted how despite the court’s evident special interest in the case and its effectively directing the proceedings, the process comes across as being flawed and insensitive.³¹ Let’s examine one instance of this failure.

Gram Panchayat certificates

NRC revision commenced in December 2014, based on a set of modalities agreed by the Centre and Assam state government and authorised by the Supreme Court.³² New modalities were devised when the matter of GP certificates for married women came up, with differential and potentially discriminatory verification criteria for ‘original inhabitants’ vs. the rest. On 30th November 2017 the Supreme Court struck down a Guwahati High Court order³³, and restored the validity of Gram Panchayat (Village Council) – GP certificate as a link document (List B) for NRC verification.³⁴ But in doing so, the court created separate pathways for the verification of certificates of ‘original inhabitants’ and those not deemed so, asking the NRC-SC to segregate original inhabitants from the list. It then created for non-original inhabitants, a two-step process of “exhaustive” verification of the GP certificates.³⁵

³¹In the Court of Last Resort’. Bhatia, Gautam, The Hindu, 3rd October 2018.

<https://www.thehindu.com/opinion/lead/in-the-court-of-last-resort/article25105456.ece>

³²Supreme Court of India, Writ Petition (c) No. Judgement dated:

³³MonowaraBewa case: challenging the order of the Foreigners’ Tribunal (dated 28-02-2017)

³⁴Supreme Court of India, Special Leave Petition (SLP) 13256/2017, final hearing dated 30-11-2017

³⁵Supreme Court of India SLP 13256/2017, hearing dated 24-08-201:

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On 5th December, 2017, a single judge bench of the Supreme Court hearing motions seeking directions from the court on the definition of “original inhabitants” of the state of Assam and procedure for identifying such persons,³⁶ refused to do so, noting “the sole test for inclusion in the NRC is citizenship under the constitution of India and under the Citizenship Act including Section 6A thereof. Citizens who are originally inhabitants /residents of the state of Assam and those who are not, are at par for inclusion in the NRC”. Yet, the court noted in the same judgement, “clause 3(3) contemplates a less strict and vigorous process for deciding claims for inclusion in the NRC in so far as persons who are originally inhabitants of the state of Assam are concerned”.³⁷ Of the total 32.9 million applications for inclusion in NRC, 4.7 million claims were made using GP certificates. In the court hearings of 12th October, 2017, NRC-SC identified 1.74 million applicants as ‘original inhabitants’. No explanation was either provided by the NRC-State Coordinator (NRC-SC) nor any demanded by the 2-judge bench, on what the basis for the identification had been. Immediately, the court authorised the claims of all these 1.74 million persons already deemed ‘Original Inhabitant’ for inclusion in NRC to be processed. By presuming authenticity in the case of those deemed original inhabitants, and doubt for the rest, hence using a differential test, Supreme Court might have authorised discrimination on a mass scale. The victims of this are women who come from the poorest backgrounds, as the Attorney General of India was at pains to argue before the judges.³⁸

There are other criticisms too:

- i. It has also been observed that the SC has shown unnecessary haste, seeking to rush through a process that given its likely serious consequences at scale, should have been dealt with more consideration. Against strong objections of the Government of India, the Supreme Court ordered in December 2017, publication of what was only partial draft of the NRC.³⁹ Besides the confusion it created in the minds of those left out, it also came to light later on, in admissions by the NRC-SC, that serious errors had been made in as many as 150,000 claims, making them ineligible. These were papered over by the Supreme Court.⁴⁰ Haste has also been shown in how even before it has decided the matter of the legacy documents (List A) to be included for the current claims and objections process, the court authorised receiving claims,⁴¹ resulting in, according to news from the ground, further confusion and uncertainty among applicants.
- ii. Much of this has been happening despite pleas to the contrary by parties to the case, particularly the central government and private parties representing those excluded from the list. In a strongly worded rejoinder to the court’s going ahead with ordering publication of just a partial draft NRC in November 2017, the Attorney General of India (the top lawyer of the centre) challenged the “encroachment on the executive domain and violation of the doctrine of separation of power” by the court, warning that largescale exclusions from the list might result in law and order problem.⁴² There is also little transparency in the process, including for parties to the case, central and state government too, with the court

36 in clause 3(3) of the Schedule (Special provision as to preparation of National Register of Indian Citizens in state of Assam) to the Citizenship (Registration of Citizens and Issue of national Identity cards) Rules 2003. No definition is also provided in the said rules.

³⁷Supreme Court of India Writ Petition(c)NO 1020 of 2017, dated 05-12-20

17. The text of the clause is: “the names of persons who are originally inhabitants of the state of Assam and their children and descendants, who are citizens of India, shall be included in the consolidated list if the citizenship of such persons is ascertained beyond doubt and to the satisfaction of the registering authority”.

³⁸Supreme Court of India WP (c) of 274/2009

³⁹Supreme Court of India, Writ Petition (c) of 274/2009, court orders dated 31-11-2017.

⁴⁰Supreme Court of India, Writ Petition (c) of 274/2009, dated 02-07-2018

often keeping the proceedings under close wraps. In its orders dated 9th September 2018, Supreme Court directed NRC-SC “not to share any information pertaining to the ongoing exercise of updation of the NRC with any Executive, Legislative or Judicial authority of the state without the leave of the Court.”⁴³

- iii. There also seems little independent monitoring by the Supreme Court of the NRC updation, rather it seems to be relying wholly on the accounts of the NRC-SC. In its handling of the case, there is little evidence of court trying to balance interests of administrative convenience (by NRC-SC) with that of natural justice (for citizens), a good example being the acceptance without question of the identification of ‘original inhabitants’ among those having used GP certificates. It also does not seem to have kept open any independent channel of informing itself of the implementation of its directions. With little transparency allowed, and only occasional opportunity for private parties to be able to present their case before the court, this over-reliance on the NRC-SC, the body administering the updation, might have serious consequences for justice and fair-play. This opacity includes the court’s recent deliberations to have a sample of those already included in the draft NRC rechecked, hinting at its acknowledgement of errors in the NRC revision. Still it is the NRC-SC that the court expects to undertake the reverification, with NRC SewaKendras (NSK, local units)

from adjoining areas checking on each other.⁴⁴

- iv. The NRC-SC – an organ of the Assam State government - and the state administrative machinery that provides much of the basis for its working, is not seen, in the eyes of sections of the population, and definitely not of those excluded from the draft NRC, as fair and objective.⁴⁵ Similar doubts exist in the minds of those excluded about one of the members of the Supreme Court bench hearing the case, and now the Chief Justice of India – Justice Ranjan Gogoi, himself an Assamese, and a registered voter from the state, raising conflict of interest issues. A senior lawyer recently wrote to Justice Gogoi, asking him thus, to recuse himself from the case.⁴⁶ The special interest shown by the bench in the updation of the NRC might, in the circumstance, result in the space for those excluded from the NRC to be able to set right the administrative wrong, becoming that much narrow. With the Supreme Court effectively acting as ‘executive court’, on a matter affecting literally millions of individuals, there is strong possibility of relief eluding the excluded. This goes against the principle of natural justice viz., the rule against bias and the right to a fair hearing, and raises doubts about the Supreme Courts ‘duty to act fairly’.

7. Consequences: Detaining and Deporting

Government of India has provided no clue as to the fate of those who will ultimately be

⁴¹Supreme Court of India, Writ Petition (c) of 274/2009, dated 19-09-2018. The NRC State Coordinator proposed removing five key documents from List A, including 1951 NRC and Electoral Rolls upto March 1971. The proposal was eventually turned down by the SC.

⁴²Supreme Court of India, Writ Petition (c) of 274/2009, dated 31-11-2017.

⁴³Supreme Court of India, Writ Petition (c) of 274/2009, dated 19-09-2018

⁴⁴Supreme Court of India Writ Petition © 274/2009, dated 28-08-2018

⁴⁵The current Chief Minister of Assam was one of the parties in a Supreme Court case (SarbanandaSonowal vs Union Of India & Another, July 12, 2005) where the IMDT Act was declared unconstitutional in 2005. This also paved the way for NRC updating. The Assam state bureaucracy has also often been seen as being biased against specially Muslims and those from Bengali backgrounds.

⁴⁶The lawyer in his letter claimed that Justice Gogoi’s presence on the bench hearing the case, “creates ample doubt in the minds of other ethnicities about the delivery of the judgement”. <https://theprint.in/governance/guwahati-advocate-asks-cji-misra-why-justice-gogoi-an-assamese-is-hearing-nrc-case/95509/>

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excluded from the final NRC. A possible scenario is mass statelessness, with those excluded treated as foreigners, asked to prove their citizenship in so-called Foreigners Tribunals, and those declared as such held in detention camps. There are 6 detention centres in Assam for the detention of foreigners pending their deportation to their countries of origin. These centres are located in the district jails of Goalpara, Kokrajhar, Silchar, Dibrugarh, Jorhat and Tezpur. Until 2014 there were only two. In case of women and small children below the age of 6, the alleged foreigner is separated from spouse (in cases where both are detained) and is sent to Kokrajhar detention centre, the only woman's detention centre. The legal basis for such detention stems from Section 2 and 3(2)(e)

of the Foreigners Act, 1946 and Para 11(2) of the Foreigners Order, 1948, under which the Government of India has authorized the Government of Assam to set up such detention centres.

A recent enquiry by the National Human Rights Commission (NHRC) into 'detention centres' operational in Assam provides a chilling account. It speaks to the illegality of the centres, indefinite incarcerations and accompanying vulnerabilities suffered by the detainees, absence of parole, the separation of families from children, the lack of any legal redress whatsoever, and the sheer hopelessness of the detainees' situation. (NHRC, 2018). In the absence of a formal agreement between the Government of India and the Government of

Box 1: International conventions violated on account of detention centres

The International Covenant on Civil and Political Rights, 1966.

Ratified by India in 1979 The ICCPR establishes general prohibitions against incarceration in inhumane conditions as well as against arbitrary arrest and detention.

- Article 7: rights against torture or to cruel, inhuman or degrading treatment or punishment..."
- Article 9 (1): Right to liberty and security of person. Rights against arbitrary arrest or detention.
- 10(1): all to be treated with dignity and humanity

Universal Declaration of Human Rights, 1948

- Article 5: Rights against torture or to cruel, inhuman or degrading treatment or punishment.
- Rights against detention or exile.

UNHRC Detention guideline, 2012

- Underline rights of detainees
- An exceptional measure, only for legitimate purpose, else arbitrary
- Minimal periods in detention
- Indefinite detention is arbitrary

Report of the UN working group on arbitrary detentions, 2008

OHCHR, Working Group on arbitrary detentions

The European Committee for the Prevention of Torture (CPT), 2017

International Instruments on treatment of children in detention and Separation of families in detention: Humanitarian considerations and international law obligations require that families should not be separated under any circumstances.

Source: Compiled by author from various.

Bangladesh on deportation and repatriation of declared foreigners, their incarceration in detention centres pending deportation and repatriation, is indefinite and arbitrary. Indefinite detention, including of foreigners, violates Article 21 of the Indian Constitution, besides amounting to a violation of international human rights standards.⁴⁷

There is another, equally horrific, scenario: that declared foreigners are allowed freedom of movement, i.e. are not detained, but are divested of all their rights – to vote in elections and participate in the political process; to welfare schemes; to formal employment and to own land and property. There is a strong opinion within the state to confer work permits, allowing those declared foreigner, to work, as manual labour and in the informal sector mostly. This is detention by another means. There is already a precedent: as of 31st December 2017, there were 90,206 persons declared as foreigners across the state. In most of rest, proceedings were still underway. The 6 detention centres in Assam together hold 961 detainees.⁴⁸ The rest of the declared foreigners are all presumably out, disenfranchised and deprived of entitlements – the nowhere people!

8. Concretising discrimination – making citizenship contingent on religion

Another element to the foreigners' issue in Assam is the Citizenship (Amendment) Bill, 2016, introduced by the BJP-led government in the Centre in July 2016, to change the definition of illegal migrants. The amendment seeks to makes illegal migrants who are Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan, eligible for Indian citizenship. Currently, all those having entered India illegally are barred from

any (of the 3) routes to Indian citizenship. The bill excludes Muslims, also those not professing any faith, from the scope of its provisions. By making illegal migrants eligible for citizenship on the basis of religion, the bill violates Article 14 of the Constitution which guarantees right to equality.

The Citizenship (Amendment) Bill, 2016 fulfils BJP's promise made in 2014 election manifesto to provide shelter to Hindus from neighbouring countries. As a first step to realising this, the Centre issued two notifications, in 2015 and 2016, exempting illegal migrants who are Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan, and who arrived on or before 31st of December 2014, from provisions of the 1946 and the 1920 Acts.⁴⁹ This meant these groups of illegal migrants would not be deported or imprisoned for being in India without valid documents. Under the citizenship Act 1955, one of the requirements for citizenship by naturalisation is that the applicant must have resided in India during the last 12 months, and for 11 of the previous 14 years. The 2016 bill moves relaxes this 11 years requirement to 6 years now, for persons belonging to the 6 faith groups and the 3 countries.

There has been a strong push back in Assam and the rest of the northeastern region against the move, seen here as a ploy to legitimise illegal immigration. Bengali-speaking Hindus – seen as the main beneficiaries of the proposed changes – have also been targeted in violent attacks; and there are reports that youth in Assam are beginning to join the United Liberation Front of Assam (ULFA) – armed insurgent group at the forefront of protecting Assamese identity – in large numbers. Student

⁴⁷ The UN Working Group on Arbitrary Detention has noted that detention 'must not be for a potentially indefinite period of time. WGAD Report to the Seventh Session of the Human Rights Council, A/HRC/7/4/, 10 January 2008, available at: <http://www.unhcr.org/refworld/docid/502e0eb02.html>

⁴⁸ Assam legislative Assembly debates, dated 26-03-2018; Government of Assam

⁴⁹ G.S.R. 685 (E) and G.S.R. 686 (E), Gazette of India, September 7, 2015; G.S.R. 702(E) and G.S.R. 703(E), Gazette of India, July 18, 2016.

⁵⁰ These are in readiness for the the Joint Parliamentary Committee (JPC) on Citizenship (Amendment) Bill, 2016 that is expected to submit its draft report to the committee on November 20. Some members have suggested taking Bangladesh out of the purview of the Bill.

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organisations from the region too have planned a series of mass protests.⁵⁰

Opposition parties too have contested the idea of granting citizenship on the basis of religion. It is also argued that the bill, if finally made into law, will nullify the updated NRC. Non-Muslims from prescribed countries excluded from the NRC will be able to apply and obtain citizenship. Muslims, on the other hand, will be referred to FTs and in all likelihood end up in detention centres, after being declared foreigner. The bill will thus – at least as it applies to Assam – enable a backdoor entry to Hindus and other non-Muslims on the NRC, whilst discriminating against Muslims.

9. Conclusion

Assam has had a tumultuous history, partly on account of the long-drawn insurgency in the state, that is today at a low. This itself, as observers have explained, is founded on the tensions between pan-Indianism and Assamese sub-nationalism. (Baruah, 1999). The Assam Agitation that erupted with such force in 1979, was the political expression of the tension. The sentiments of the Assam Movement agitators was framed as a push back against Indian hegemony, with a strong subtext directed at 'foreigners', a shorthand for Bengali-speaking communities in the state accused of being illegal migrants from Bangladesh. Muslims among them were especially in the crosshairs of the agitators. Assam agitation continued with great vehemance until 1985 when the Assam Accord was signed between the Centre and the leaders of the movement, providing in return, many concessions to Assam, economic, cultural as well as political. Updating the 1951 NRC was one of those. With existing avenues for identifying and deporting suspected foreigners – The Foreigners Act 1946 and IMDT Act 1983 – not delivering the goods, updation of the NRC comes at long-last for Assamese nationalists, therefore.

In the process, Bengali speaking communities in Assam, particularly Muslims, have been stigmatised, and targeted. Literature

on the situation of the community is not plentiful, but various accounts are emerging now of the saga of discrimination faced by Bengali-speaking Muslims, forced both to eke out a living on the margins and prove their allegiance to the land.⁵¹ And they have suffered more than their share of the violence too. The case of the massacre in Nellie (in Morigaon district) in 1983 – at the peak of the Assam Movement – is well documented. On a single day that February, a total of 1853 persons (by official count, villagers claim a much higher figure of above 2000), mostly women and children, were murdered in what must be the biggest case of mass killings in India, in a single episode of violence. Not one person has been convicted of any wrongdoing to date. Other lesser known massacres of Bengali speaking Muslims have followed. (Box 2). Violence or the threat of it, is thus the other side of the coin of the disenfranchised lives of Assam's Bengali-speaking Muslims.

Many persons we spoke with admitted that NRC updation was good for them. They felt it would set to rest, once and for all, the daily harassment, finger-pointing and name-calling they suffered. But as it turns out, a large number of persons have been excluded, and yet another chance of being counted among the ranks of citizens has been lost. We saw how this was on account of a range of factors: the inherent complexity of the NRC updation; difficult procedures; poor capacity; and ultimately deep-seated prejudice working against minority groups. Discrimination seems to have worked at both policy and practice levels: in the rules and procedures that SC authorised and central and state governments accepted, such as separating Original and non-Original Inhabitants arbitrarily; and in how the NRC bureaucracy of all ranks used this license not just to arbitrarily reject GP certificate for married women, but also school and birth certificates, through unfairly harsh verifications (resulting in mass rejections of these documents), in pockets with a concentration of Bengali speaking Muslims and

Hindus, and Nepali-speakers. Similar targeting of Bengali Muslims and also Hindus has been the trend, by Assam Border Police and in Foreigners' Tribunals, increasingly in the past 6 months, with most cases decided against the accused. Appeals against these decisions in higher courts do not find much favour. Discrimination is also writ large in attempts by the BJP ruled Central government seeking to

salvage the damage of the NRC and FT process on Bengali speaking Hindus, through attempting to change the rules and offer fast-track naturalisation to those having entered India even illegally from neighbouring countries, while cutting off Muslims completely from this offer.

Experience shows that exclusion,

Box 2: targeted violence against minorities in Assam

Nellie (1983): At the height of the (anti-foreigners) Assam Movement, on 18th February 1983, more than 2000 Muslims were massacred in Nellie, in Morigaon district. A similar massacre was orchestrated around the same time in ChaolkhuwaChapori in Darrang district, where according to public accounts, close to a thousand people were killed.

Kokrajhar and Bongaigaon (1993): In the first week of October 1993, largescale forced displacement and killings started in parts of Bongaigaon(now Chirang) and Kokrajhar districts. Bodo para-militia targeted Muslims living in the northern areas of undivided Bongaigaon and Kokrajhar districts. Officially 3658 families or about 18000 people were forcibly removed from their homes and communities⁵². More than 70 people were killed in the violence.⁵³

Bashbari Massacre, Barpeta (1994): In May 1994, suspected Bodo militants burnt houses in four villages belonging to Muslims. 21 persons were killed, more than 100 people injured and some 7000 displaced. Later in July, clashes broke out between Muslims and Bodos in Barpeta district (presently in Baksa). 21 persons were killed and 15 villages burnt down. More than 5000 persons were displaced in the violence. 7 policemen proceeding to investigate the matter, were killed, ambushed carried out by suspected Bodo militants. Bodo armed groups also attacked a Muslim relief camp in Bashbari High School near Manas National Park and killed at least 71 students and injured nearly 100. More than 54000 persons, mostly Muslims, were displaced.⁵⁴

Udalguri Violence (2008): In 2008, a Muslim students' union called a protest bandh across Assam against harassment of Muslims on the pretext of being illegal Bangladeshi immigrants. All Assam Students' Union (AASU) and All Bodo Students' Union (ABSU) opposed the bandh. The contest over the bandh resulted in large scale violence. At least 15 persons lost their lives, 11 went missing and 22 were injured. The violence soon got escalated and spread to Udalguri district, turning into full-fledged Bodo-Muslim riot. More than 50 persons were killed and over 200,000 displaced.⁵⁵

Assam Violence (2012): In mid - 2012, violence erupted in western Assam (Kokrajhar district and around) between Bodos and Muslims, following lynching of four former Bodo militants in a Muslim majority area. Bodo groups struck in retaliation. Full-fledged rioting continued for long, more than a hundred persons lost their lives and nearly half million were displaced - perhaps Independent India's largest human displacement.⁵⁶

Khagrabari Massacre (2014): Muslims were attacked in Baksa and Kokrajhar districts by suspected National Bodo FB (S) militias. More than 40 persons were killed, mostly children and women. This followed accusations by Pramila Rani Brahma, ex-legislator and minister from the area, holding Muslims responsible for the loss, in national parliamentary elections, 2014, of Chandan Brahma, the Bodo candidate in the prestigious Kokrajhar constituency.

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discrimination and inequality make minorities vulnerable, and that “patterns of discrimination against particular minorities in the political, social economic and cultural spheres can translate into abuse and systematic violation of basic human rights and can escalate into atrocity crimes”. (United Nations, 2014:7). Assam’s political history demonstrates amply how failures to prevent exclusion and discrimination against specific minorities opened the way for graver abuse of human rights and violence against those groups. The NRC updation process and associated dynamic of Foreigners’ Tribunals are mired in significant discrimination against the state’s minorities. The state’s leaders should be aware that the normalisation of this exclusion runs the risk of slipping into atrocity and violence against the groups. This is an outcome, they should do their best to avoid.

10. Recommendations

For state parties

General

- examine the legal regime on citizenship and for detection and deportation of foreigners, as they apply to Assam, aligning those to international norms and conventions, ensuring India’s obligations under international human rights law and standards are met; strengthen the due process provisions of the laws; also to prevent arbitrariness and discrimination
 - relook the proposed Citizenship (Amendment) Bill 2016, to remove their discriminatory provisions of excluding Muslims and those without any professed faith, from the purview of the proposed changes.
- make public disaggregated data on the race, ethnicity and religion of individuals who have been excluded from the draft NRC as well as individuals against whom reference cases have been initiated by the Border Police; individuals who have been declared foreigners by Foreigners’ Tribunals, and those in Detention Centres.

Specific

- a. families of those committed suicide in distress
 - provide support to family members to file NRC applications, should they be excluded, or in Foreigners’ Tribunals
 - provide compensation to families
 - provide Psycho-social support, and counselling
- b. NRC updation:
 - ensure those excluded from draft NRC have a fair and just chance to make claims. This must include removing discriminatory provisions in procedures, and a claims verification process that is non-arbitrary, besides being transparent.
 - ensure wide public awareness during the verification process, and proactive measures to ensure all those making claims are provided assistance to enable them to prove their legacy and linkage claims. This to include making access to relevant documents easy for applicants
 - ensure action for adequate training of NRC authorities on relevant human rights norms and standards, particularly those relating to non- discrimination and to persons belonging to ethnic, religious and linguistic minorities.

⁵² Goswami, Uddipana. “Nobody’s People: Muslim IDPs of Western Assam.” In *Blister on Their Feet: Tales of IDPs in India’s Northeast*, by Samir Kumar Das, 176-188. Sage, 2008.

⁵³ <http://www.humanrights.asia/resources/journals-magazines/eia/EIAV8N6/EIAV8N6P7>

⁵⁴ *Minority At Risk*, Centre for International Development and Conflict Management, University of Maryland Link: <http://www.mar.umd.edu/chronology.asp?groupId=75015>

⁵⁵ Justice P C Phukan Commission of Inquiry Report.

⁵⁶ *Humanitarian Crisis in the BTAD of Assam: A view from the Field* by Dr. Samrat Sinha Indian Defence Review Link: <http://www.indiandefencereview.com/news/humanitarian-crisis-in-the-btad-of-assam-a-view-from-the-field/>

⁵⁷ Inspired by those in NHRC’s report on Detention centres in Assam (Feb. 2018)

- ensure independent oversight of the NRC updation process, with observers - made up of persons of eminence from all over India - empowered to intervene where they see discrimination and foul play
 - ensure access to effective remedies for individuals excluded from the NRC.
 - ensure no one is rendered statelessness and that human rights violations do not occur, including arbitrary deprivation of citizenship, mass expulsions, and arbitrary detention.
- c. Foreigners Tribunals (and Border Police)
- Given Foreigners Act 1946 reverses the burden of proof, ensure there are safeguards to prevent abuse against the accused. This must include scrutiny of police and FT practices, to ensure the accused are not being discriminated
 - make access to documents easy for those accused, and accessible verification of the documents
 - ensure action for adequate training of Foreigners' Tribunals, police authorities on relevant human rights norms and standards, particularly those relating to non-discrimination and to persons belonging to ethnic, religious and linguistic minorities.
 - ensure no one is rendered statelessness and that human rights violations do not occur, including arbitrary deprivation of citizenship, mass expulsions, and arbitrary detention.
- d. Detention Centres
- Establish a clear legal regime for detention
 - Should not be indefinite
 - Do not separate families
 - Follow due process
 - Ensure early deportation for those that do not contest their being foreigner
 - Apply juvenile justice law
 - Special care for patients with mental health issues and the old
 - Legal aid to detainees
 - Must be housed in same district as families
- For International community*
- Monitoring and tracking updation of NRC and Foreigners' Tribunal working, including documentation and evidence gathering
 - Engaging state parties in India, to encourage them to be mindful of India's obligations under international human rights law and standards, working towards meeting those
 - Providing support and technical assistance where needed, to improve capacity of Indian agencies to deliver the tasks whilst being mindful of human rights and due process
- For civil society and CBOs*
- Need greater investment in community capacity to document, track, advocate and lobby for demanding rights and entitlements
 - Providing practical hands-on support, including legal and with paperwork, to applicants of NRC and those with FT cases.

References

- Baruah, Sanjib. 1999. *India Against Itself: Assam and the Politics of Nationality*. New Delhi: Oxford University Press
- Government of Assam. 2012. *White Paper on Foreigners' Issue*. Guwahati: Home & Political Department.
- NHRC. 2018. *Report on NHRC Mission to Assam's Detention Centres from 22 to 24 January 2018*.
- Office of the High Commissioner for Human Rights. 2018. *Letter to Government of India on the Reference: OL IND 13/2018*

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Annex

List of NRC related suicide deaths

S. No.	Date	Name	Address	Category	Remarks
1	15-Jul	Angat Sutradhar	Pakoriguri, Salbari Police Station, Baksa	NRC	
2	1/7/2015	Saibun Nesa Laskar	Sonai, Cachar	NRC	Failed to gather the legacy data.
3	15-Nov	Jamir Khan	Tikak China Basti, Ledo Police Station, Tinsukia	NRC/D Voter	
4	6/9/2016	AklimaBewa	Dankinamari, Majgaon, Bongaigaon	Reference Case	Daughter notice as suspected foreigner by Border Police.
5	1/12/2017	Anowar Hussain	Bahmura, Goalpara	NRC	Daughter received notice from border police. Consumed poison.
6	3/12/2017	Akram Uddin Barbhuyan	New Ramnagar, Silchar	NRC	Insufficient document during the NRC verification
7	1/1/2018	Hanif Khan	Kashipur (Part-II), Cachar, Silchar	NRC	Did not figure in 1st list of NRC
8	19/03/2018	Bijit Sen	Silchar, Near National High Way	NRC	Wife's name did not find mention in 1st draft NRC
9	23/03/2018	Lalson Ali	Shatagaon, Barpeta	D Voter	Despite having legacy data and other documents, marked D voter.
10	9/4/2018	Ratan Rai	Pandu, Guwahati	NRC	Did not find mention in 1st NRC list
11	10/4/2018	Sahimoon Bibi	Near Dibyapara Railway Station, Dhubri	NRC	No legacy data, as from outside state. Twice attempted suicide.
12	11/6/2018	Gopal Das	Nislamari, Tangla, Udalguri	Reference Case	Family received notice from Foreigners' Tribunal.
13	18-Jul	Balijan Bibi	Jogighopa, Bongaigaon	Detainee/D Voter	Earlier incarcerated in detention centre. And then husband was listed as D Voter.
14	18-Jul	Abola Roy	Halakura, Dhubri	D Voter	Served D voters notice. He first tried to kill his wife and then kill himself
15	7/7/2018	Khorgo Bahadur Gurung	Sadia, Tinsukia	NRC	Entire family excluded from NRC
16	7/8/2018	Deben Barman	Dhubri	NRC	Son and two grandchildren missed the NRC draft.
17	8/8/2018	Rajesh Singh	Nakhuti Village (p-II), Majbat, Udalguri	NRC/ Detention	Mother served D Voter notice, and on absence, declared foreigner ex parte, and remanded in detention Centre for 18 months. Unable to hire lawyers to help. Then entire family excluded from draft NRC.

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18	8/9/2018	Binay Chanda	Tamulpur, Baksa	NRC	Excluded from NRC and his mother's D voter case is pending in FT
19	14/10/2018	Bimal Chandra Ghosh	Karimchowk, Mangaldoi, Darrang	NRC	Retired teachers, worked in NRC but his name didn't appear
20	20/10/2018	Nirod Baran Roy	Kharupetia	NRC	Declared a foreigner recently by FT.
21	28/10/2018	Deepak Debnath	Gagra Village in Udalguri	NRC	Received notice from FT in Udalguri. However, his name appeared in the both NRC drafts.
22	11/11/2018	Abdul Jalil	Abhayapuri	NRC	Wife and son excluded from draft NRC.
23	14/11/2018	SamsulHaque	Barpeta	NRC	Wife, a suspected foreigner, fought the case and successfully defended her Indian citizenship last year. But didn't figure in the draft NRC.
24	19/11/2018	Surendra Barman	Srirampur, Gossaigaon, Kokrajhar	Reference Case/NRC	Police registered a reference case.
25	20/11/2018	Monnas Ali	SonitpurThelamara	NRC	Name missing from draft NRC.