

6. Assam's unending search to exclude minorities: The aftermath of NRC

30th November 2019

It has been three months since the National Register of Citizens (NRC) for Assam was published, excluding over 1.9 million persons, effectively making them non-citizens, almost all linguistic and ethnic minorities, women and children making up the bulk. Authorities have emphasised that all those who have been excluded still have a right to appeal, through accessing Foreigners Tribunals (FT). Senior central and Assam state ministers have also been stating that government was bringing in legislation that would, in effect, obviate the need for some among the affected to appeal against their exclusion, rather guaranteeing them a fast track to citizenship. It is now being reported that government is also devising measures to safeguard 'indigenous Assamese' interests. Evidence shows that Bengal-origin Muslims will be excluded from all these ostensibly mitigating moves, rendering them particularly at risk to exclusion and statelessness. And in the latest moves, central and state ministers are claiming the final NRC is not acceptable to the government, and that an all-India NRC would be carried out, including afresh in Assam. This briefing paper seeks to provide update on developments in Assam since the final NRC was published on 31st August 2019, as those that are left off the list and their families, wait in anxious anticipation for a possible route back to citizenship.

1. Appealing against exclusion in Foreigners Tribunals

Authorities and the Supreme Court overseeing NRC updation, have sought to clarify that all those left off the NRC are not foreigners yet; that they will all be able to appeal against their exclusion in Foreigners Tribunals.¹⁶⁹ To give effect to this, central Government has notified procedures to enable Foreigners Tribunals to process appeals.¹⁷⁰ But these procedures are heavily weighted against appellants: all those already declared foreigners by any FT, as well as those against whom

169 'Those excluded from final NRC in Assam can appeal to Foreigners Tribunals: Home Ministry'. Business Standard. 20th August 2019. https://www.business-standard.com/article/news-ani/those-excluded-from-final-nrc-in-assam-can-appeal-to-foreigner-tribunals-home-ministry-119082001132_1.html

170 MHA Order, GSR 409(E) containing Foreigners (Tribunals) Amendment Order, 2019. Dated 30th May 2019.

proceedings are underway, are barred from making appeals. (Clause 7, 8). Not all eligible appeals too will see the light of day, with FTs having the discretion to decide whether a particular appeal has 'merit', without a clear definition. (Clause 10). This discretion also extends to how FTs will conduct trials (Clause 17). The 100 or so pre-existing FTs in Assam – that all follow own procedures, many in conflict with established judicial procedures, including those for tribunals - have had a long history of arbitrary and discriminatory practice targeted at linguistic and specially religious minorities.¹⁷¹ The additional 200 FTs established to process NRC appeals, are not inspiring much confidence, given how they are seen as being politicised, especially with an eye to further target Muslims.¹⁷² Several civil society groups have challenged the procedures in the Supreme Court (SC), also proposing model rules for FTs to use as standard in NRC appeals cases.¹⁷³ Despite the urgency of the matter and passage of time, these have not yet been heard by the SC.

Three months on from the publication of final NRC, government is yet to notify the commencement of the appeals process - a crucial document required for making appeals ('rejection certificates') is yet to be made available. Given there are potentially 1.9 million of these certificates to be issued, this itself will be an onerous task. Recent changes in NRC bureaucracy, as well as in the Supreme Court bench supervising NRC updation¹⁷⁴, means that the commencement of appeals is still some way off. This uncertainty is causing anxiety among those excluded, with families worried about members excluded from NRC, being declared foreigner and dragged away to detention centres. Women and Children make up the bulk of such left off cases. With the new NRC coordinator reported to have made several posts on social media targeting 'East Pakistani Muslims

171 'Worse than a death sentence: Inside India's sham trials that could strip millions of citizenship'. Vice News. 29th July 2019. https://news.vice.com/en_us/article/3k33qy/worse-than-a-death-sentence-inside-indias-sham-trials-that-could-strip-millions-of-citizenship

172 'Assam: Arbitrary powers to FTs while people are set to face citizenship test' <https://www.newsclick.in/NRC-Citizenship-Assam-Foreign-Tribunals-Powers>

173 These include ones by All Assam Minority Student Union (AAMSU), Justice Forum Assam, and Brahmaputra Valley Civil Society.

174 On 18th October 2019, the SC ordered the administrative transfer of the NRC State Coordinator, Prateek Hajela. A new coordinator was given charge by state government only on 8th November 2019. This change of NRC leadership at a crucial juncture in the NRC process is seen as having slowed down the issue of rejection certificates. It is also being speculated that NRC will issue rejection certificates only after the SC gives its final approval to the list of those excluded from NRC. But rather than do that speedily, SC bench hearing the case has fixed 26th November for the next hearing. Ranjan Gogoi, the Chief Justice of India, leading the SC bench on the NRC matter, and one seen as – uniquely for a SC judge - driving rather than just overseeing the administrative process of NRC updation since 2014, when he took over the brief, is himself retiring on 17th November 2019, signalling further uncertainty.

residing in Assam' (i.e. Bengal-origin Muslims), the fears among minorities has just shot up several notches.¹⁷⁵

Authorities have also been assuring all that exclusion from NRC, even at the end of the appeals process, will not mean automatic designation as foreigner¹⁷⁶, and that only FTs following established procedure (under Foreigners Act 1946) would have the authority to decide that question.¹⁷⁷ But NRC appeals procedures notified already, requires that all those whose appeals against exclusion from NRC are rejected¹⁷⁸ will also automatically be proceeded against to determine whether they are foreigner, under provisions of the Foreigners Act 1946 [Section 2(A) (iv)].¹⁷⁹ The outcome of these referrals are foregone conclusions, with procedures themselves built to make foreigners of all those excluded from final NRC. The anxieties among those left off NRC and their family members then, about their future, are not unfounded.

2. Amending Citizenship laws, to include some

The ruling Bharatiya Janata Party (BJP) has been sensitive to these anxieties – but only selectively. Senior central ministers as well as Assam state leaders have been making noises about changing citizenship laws to obviate the need for Hindus excluded from final NRC to go through FTs, rather that they would all be offered naturalisation, part of a grand scheme to offer India as home to persecuted minorities (non-Muslims from Bangladesh and other Muslim-majority countries in the region). This effort is seen as responding to the realisation that – contrary to the long-held assertion by Assamese and Hindu nationalists that the foreigners issue in Assam was a Muslim problem – it is actually Bengali-origin Hindus that could make up at least half, if not more, of those excluded from NRC, rest being Nepalis, various indigenous groups, and Hindi-speaking persons, besides Bengal-origin Muslims.¹⁸⁰

BJP introduced the Citizenship (Amendment) Bill in Parliament in 2016 – to amend

175 'Can't accept foreigners even if they speak Assamese – New NRC coordinator said on Facebook'. The Print, 11th November 2019. <https://theprint.in/india/cant-accept-foreigners-even-if-they-speak-assamese-new-nrc-coordinator-said-on-facebook/319466/>

176 'Exclusion from NRC does not make one foreigner', Live Mint. 20th August. 2019. <https://www.livemint.com/news/india/exclusion-from-nrc-does-not-make-one-foreigner-says-govt-1566323081325.html>

177 Para 2, Public Notice (on final NRC), Addl Chief Secretary, Government of Assam, dated 27th August 2019

178 Governed by Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003

179 Foreigners Tribunal (Second Amend.) Order 2019, contained in MHA order # GSR 623 (E), 30th August 2019.

180 Since the NRC process is shrouded in secrecy, there is no way to know the truth of this assertion.

India's principal citizenship law, the Citizenship Act 1955 - to grant amnesty from 'illegal migrant' status and to fast-track naturalisation, for all those having entered India from Bangladesh, Pakistan and Afghanistan, whilst excluding Muslims from this scheme.¹⁸¹ Government could not muster a majority in the Upper House of Parliament, and the bill lapsed in 2018. Senior ministers and BJP leaders have recently, and especially since the final NRC was published, been claiming they will reintroduce the bill now to bail out Hindus among the excluded, some even claiming that first the laws would be changed and only then would FT appeals process commence.¹⁸² The bill is now listed in the legislative agenda of the current Winter session of Parliament (concluding 13th Dec. 2019), and media reports confirm government's efforts at ironing out some of the differences with tribal groups in the Northeast, for its introduction.¹⁸³ Now commanding a stronger majority, BJP led government is expected be able to carry it through. If this amendment to India's citizenship regime is legislated, it will create a clear 'religion test' for citizenship in India, in contravention of international law, in particular the right to nationality "without distinction as to race, colour, or national or ethnic origin" (Article 5, CERD), and against India's Constitution which guarantees equality before the law (Article 14) and does not permit discrimination on any ground (Article 15).¹⁸⁴

3. From identifying 'foreigners' to identifying the 'indigenous'

For Assamese nativists, who saw in the NRC a silver bullet to address their concerns over illegal migration, a figure of 1.9 million excluded from the list is underwhelming.¹⁸⁵ For Hindu nationalists among them, as well as for the BJP, fact

181 <https://economictimes.indiatimes.com/news/politics-and-nation/citizenship-amendment-bill-2016-joint-parliamentary-committee-fails-to-reach-consensus/articleshow/66837492.cms>

182 'We will bring Citizenship bill before NRC: Amit Shah', The Times of India, 1st October 2019. <https://timesofindia.indiatimes.com/india/will-bring-citizenship-bill-before-nrc-amit-shah/articleshow/71401277.cms>

183 Amit Shah meets Northeast leaders over Citizenship Amendment bill. NDTV. 30th November 2019. <https://www.ndtv.com/india-news/amit-shah-meets-northeast-leaders-over-citizenship-amendment-bill-2141346>

184 The proposed law also fails the test of 'refugee protection', excluding as it does, Muslim 'micro-minorities', Ahmadis and Shias fleeing persecution in Pakistan or Hazaras from Afghanistan; besides Rohingyas from Myanmar; or Muslims and Tamils from Sri Lanka.

185 'Unhappy with exclusion figure in NRC list. AASU to move SC'. Business Today, 31st August 2019. <https://www.businesstoday.in/current/economy-politics/unhappy-with-exclusion-figure-in-nrc-list-aasu-to-move-sc/story/376475.html>

Supreme Court, whilst launching NRC updation process in 2014, had 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.

that a significant section of these could be Hindus, is disastrous. The aggressive pushing of Citizenship Amendment Bill is BJP's response to this unexpected outcome. But the possibility of such large numbers of 'illegal migrants', even if Hindu, being accepted as citizens of Assam, should citizenship law be amended, is causing much dismay among the Assamese.

To ameliorate Assamese concerns, Central government set up early in January 2019¹⁸⁶, reconstituted again in July 2019¹⁸⁷, High Level Committee to recommend measures to implement Clause 6 of the Assam Accord (1985).¹⁸⁸ Clause 6 talks about "Constitutional, legislative and administrative safeguards" that must be provided "to protect, preserve and promote the cultural, social, linguistic identity and heritage of the Assamese people".¹⁸⁹ While Union Home minister had noted, while setting up the committee in January 2019, that Clause 6 "wasn't fully implemented", All Assam Students Union (AASU), the prime mover of the Assam Movement and representing Assamese interests on the Assam Accord, characterised the HLC move as an effort (by Government of India) to mislead people before pushing the Citizenship (Amendment) Bill.¹⁹⁰ Government efforts since, seem to have borne fruits. The reconstituted HLC, has Chief Advisor of AASU, Samujjal Bhattacharjee, on it, besides other Assamese groups.

The mandate of the HLC is to "examine the effectiveness of actions taken since 1985 to implement Clause 6 of the Assam Accord, hold discussions with stakeholders, assess the appropriate level of reservation of seats in the state assembly and local bodies for the 'Assamese people'; and suggest measures to protect the Assamese and other indigenous languages of Assam, besides

The 5 million figure has been quoted at various times by Assamese groups too. Information collected recently by activists under the Right to Information Act 2015 has revealed that the 12 million figure quoted by the Court was based on hearsay, without any basis. Citizens Against Hate. 2018. 'Making Foreigner: Report on NRC updation in Assam, and the risk of mass statelessness'. New Delhi. (p4).

186 <https://indianexpress.com/article/explained/clause-6-assam-accord-fine-line-between-indian-citizen-and-assamese-5522438/>

187 <https://theprint.in/india/assam-accord-panel-that-failed-to-meet-even-once-due-to-citizenship-row-gets-new-members/263968/>

188 This was the agreement between Government of India and Assamese student and cultural bodies led by the All Assam Students Union (AASU), that brought to an end a protracted political, later also armed, movement, centred around the question of 'foreigners' in Assam, and the alleged 'step-motherly' treatment of the state by the Indian government. Updating the NRC was a key aspect of the Assam Accord, besides enhanced 'development'.

189 Government of Assam, Implementation of Assam Accord. <https://assamaccord.assam.gov.in/portlets/assam-accord-and-its-clauses#Clause%206%20:%20Constitutional,%20Legislative%20&%20Administrative%20safeguards>

190 <https://www.sentinelassam.com/news/mp-bezbaruah-resigns-as-chairman-of-clause-6-committee/>

recommending the appropriate level of reservation in employment under the government of Assam for the 'Assamese people'.¹⁹¹ The committee, which has a six months term, has been soliciting suggestions from the public, on how these safeguards could be formulated.

A crucial question that the HLC seems to be eliding in its deliberations is the definition of 'Assamese people', those that, according to Clause 6 of Assam Accord, will be eligible for the safeguards. In its public notices it has been using three separate formulations instead: 'Indigenous tribes', 'Indigenous Assamese', and 'Other Indigenous People of Assam'. Linguistic minorities, especially Bengali speaking sections, fear they will be excluded from all of these, a fear founded also on the fact that the HLC has little Bengali-speaking representation, certainly no Bengali-origin Muslims. It has been reported that submissions made to HLC by Assamese groups – including groups at the forefront of NRC updation (Assam Public Works, who submitted a list of 48 groups they consider indigenous) – have called for ethnic Assamese and indigenous tribals to be automatically included, whilst proposing a cut off of 1951 for the rest of the population.¹⁹² This not only adversely affects Bengali speaking persons – for who, under NRC process, the cut off was 24th March 1971 – but also 'tea tribes', one of the most marginalised communities in Assam, who are not considered indigenous to the state, having been settled in Assam from central India during British rule to work tea gardens.¹⁹³ Given the mandate of the HLC and its linkages to tangible questions of reservations in elected bodies and public employment, besides promoting language and culture, who is included and who is not in these definitions of Assamese People, is a crucial question. Notably, state government has already started using this formulation in its businesses, despite lack of finality on the definition. State cabinet recently decided to award land to landless 'indigenous' persons, as part of its new land use policy.¹⁹⁴

And characteristic of their disregard for human consequences of their actions, BJP state and central leaders are now also trashing the final NRC. Assam Finance

191 'Home Ministry Reconstitutes 'High-Level' Committee on Clause 6 of Assam Accord'. The Wire. 18th Jul 2019. <https://thewire.in/government/home-ministry-reconstitutes-high-level-committee-on-clause-6-of-assam-accord>

192 Assam Public Works (APW) gives list to Clause 6 panel. The Telegraph, 30th October 2019. <https://www.telegraphindia.com/states/north-east/assam-public-works-apw-gives-list-to-clause-6-panel/cid/1715370>

193 Talk of ST status for Assam Tea Tribes. First Post. 13th March 2019. <https://www.firstpost.com/india/talk-of-st-status-for-assams-tea-tribes-may-give-bjp-fillip-in-election-year-but-real-benefits-miles-away-at-ground-zero-6126691.html>

194 Assam Government to give three bighas of land to indigenous landless families. Newslive. October 22, 2019. <https://www.newslivetv.com/assam/assam-govt-to-give-three-bighas-of-land-to-indigenous-landless-families/>

Minister, Hemanta Biswa Sarma has claimed that the final NRC in its present form is not acceptable to the state government.¹⁹⁵ And union home minister, Amit Shah announced recently in the upper house of Parliament, government's commitment to prepare a country-wide NRC, that would also include it being carried out afresh in Assam.¹⁹⁶

4. The unending search to exclude

Fact that all these dynamics are playing out parallelly - the fallout of the NRC publication and the wait for the appeals process to commence; BJP's efforts to bring in the Citizenship Amendment Bill to safeguard a section of the excluded whilst also trashing the NRC, calling for redoing it all over again; and now a move to define those indigenous to Assam, and linking that to opportunities and services - have consequences, especially for those most vulnerable to exclusion. This gradual shift away from NRC (and its being the final test of who is a citizen and who is not) to new modes of defining citizens and citizenship, thus taking away the finality of the NRC process - after having spent Rs 1600 crores (\$ 222 million) on it over past ten years, resulting in the death of over 50 persons left off the NRC, by suicide - is remarkable. At a recent event, Ranjan Gogoi, the previous Chief Justice of India, and the man having driven the NRC process over the past years, himself an ethnic Assamese, signalled the shift, when he remarked recently, after the NRC was published:

*NRC, as it may finally emerge, is not a document of the moment. NRC exercise only attempted to ascertain with some degree of certainty the number of illegal migrants. 19 lakh (1.9 million) or 40 lakh (4 million) is not the point. It's a base document for future.*¹⁹⁷

The Supreme Court has been the arena for much contestation over NRC these past years, with several litigations challenging the basis of NRC or specific aspects of it, including one that questions the very use of 1971 as the cut-off date for NRC updation, battling rather for 1951, and which had been referred to the constitution

195 'Assam BJP rejects state NRC: Says it should be part of pan-India exercise'. News 18. November 21st 2019. <https://www.news18.com/news/india/assam-bjp-rejects-state-nrc-says-it-should-be-a-part-of-pan-india-exercise-2394497.html>

196 'Why Amit Shah's promise to extend all-India NRC to Assam will not be easy'. The Scroll. 22nd November 2019. <https://scroll.in/article/944460/why-amit-shahs-promise-to-extend-a-pan-india-nrc-to-assam-will-not-be-easy>

197 'CJI Ranjan Gogoi: NRC a base for future, not a document for the moment'. Indian Express, 3rd November 2019. <https://indianexpress.com/article/india/cji-ranjan-gogoi-assam-nrc-supreme-court-6100851/>

bench for adjudication.¹⁹⁸ It is telling that whilst NRC updation was underway, supervised closely by the Supreme Court, these foundational challenges to NRC process were not deemed important to resolve. With Justice Gogoi having demitted office, and the case being assigned to another bench of the Supreme Court, even the interest in taking the next steps in the legal process of the NRC, towards its closure, seems uncertain, jeopardising the 1.9 million persons left in limbo. The case was listed for hearing on 26th November last, when petitioners had hoped for the court to issue final directions to NRC authorities to issue 'rejection certificates', and on a clutch of applications challenging the subsequent appeals process in Foreigners Tribunals.¹⁹⁹ The case was never heard, and no new date has been fixed yet.

5. Multi-tiered citizenship and the road to statelessness

To conclude, it is Bengali-origin Muslims who, in this grand design of the coming together of Hindu nationalists and Assamese nativists, with Islamophobia animating both, are most vulnerable to disenfranchisement, at serious risk of statelessness.²⁰⁰ Community members - even as they wait in anticipation for closure of the torturous NRC process, or if it would indeed be nullified to be redone all over again - fear a bleak future of a 3-tiered citizenship regime emerging in Assam, with them at the lowest rung.

- i. At the top would be ethnic Assamese, and all those considered indigenous, all of who are also included in NRC. With central government pushing the citizenship amendment bill, Bengal-origin Hindus, whether included in NRC or not, will be able to find a place there
- ii. Bengal-origin Muslims, even those included in NRC, but not considered indigenous in the HLC scheme of things, will be considered only half-citizens. They will be excluded from reservations to elected bodies and in employment, besides being denied linguistic and cultural autonomy.
- iii. Bengal-origin Muslims excluded from NRC, and whose appeals are eventually rejected by FTs, will be declared foreigners. It is this section -

198 Assam Sanmihita Mahasangha vs. Uol & Others. 'Assam NRC cannot be final'. The Economic Times. August 27, 2019. <https://economictimes.indiatimes.com/news/politics-and-nation/august-31-nrc-cannot-be-final-assam-sanmihita-mahasangha/articleshow/70852487.cms?from=mdr>

199 Supreme Court Writ Petition (Civil) Order # 274 of 2009, dated 18th October 2019.

200 Recently Assam cabinet approved policy barring persons with more than 2 children from public employment, and from standing for elected office. Muslims in Assam, especially Bengal-origin, have often been the target, stereotyped for having large families. 'Assam announces two child limit for jobs in govt.'. Indian Express. October 23, 2019. <https://indianexpress.com/article/north-east-india/assam/assam-announces-two-child-limit-for-jobs-in-govt-6082931/>

counting, an estimated 30-40 per cent of the 1.9 million excluded - that stands most at risk of statelessness.

It is these 'non-citizens' that are also at highest risk of hate crime and targeting. A recent report by the campaign group Avaaz found hate speech targeted at minorities spreading unabated through Facebook, during the time NRC updation was underway. Bengali-speaking Muslims in particular, were often the targets of hate speech on Facebook. Avaaz found posts on the site calling them 'parasites', 'rats' and 'rapists', and for them to be exterminated, seen 5.4 million times.²⁰¹ In effect these posts were only echoing the hateful words of senior BJP leaders, now central cabinet ministers, who likened illegal migrants to 'termites'.²⁰² The situation in Assam draws parallels to the extremist Buddhist campaign in Myanmar, that forced 700,000 Rohingyas to flee their homes. Social media platforms like Facebook besides extremist offline mobilisation played dominant roles there. The parallels with Assam are chilling, something that had led Genocide Watch to renew its Watch for Assam in August 2019, first issued in July 2018, claiming "there are early signs of genocidal process."²⁰³

201 'Facebook was used to incite violence in Myanmar. A new report on hate speech shows it hasn't learned enough since then'. The Time. October 29, 2019. <https://time.com/5712366/facebook-hate-speech-violence/>

202 "The illegal migrants are like termites. They are eating the grain that should go to the poor. They are taking our jobs." Amit Shah, President, Bharatiya Janata Party, Raiganj, West Bengal, 11th April 2019. <https://www.indiatoday.in/elections/lok-sabha-2019/story/bjp-amit-shah-hindu-refugees-mamata-bannerjee-1499691-2019-04-11>

203 <https://www.genocidewatch.com/single-post/2019/08/18/Genocide-Watch-for-Assam-India---renewed>