

5. The Risk of Mass Discriminatory Deprivation of Nationality caused by Updating the National Register of Citizens in Assam

4th September 2019

The Supplementary List of Inclusions and Exclusions (also called Final NRC) of Assam was published on 31st August 2019, raising fears that it risked arbitrarily depriving the nationality of close to 2 million persons and rendering them stateless. International law prohibits the arbitrary deprivation of nationality and obligates states to avoid statelessness, while guaranteeing the right of every child to acquire and preserve their nationality and to be protected from statelessness. The finalisation of the NRC coincides with the halfway mark of UNHCR's iBelong Campaign to end statelessness by 2024. On the day the final NRC was published, the UN High Commissioner for Refugees urged India to ensure that no one excluded from NRC is left stateless. The populations at risk are overwhelmingly from minority ethnic, religious and linguistic groups – mostly Muslims and Hindus of Bengali descent - with high percentages of women, children and daily wage workers, all among the most marginalized and excluded communities. The discriminatory and arbitrary manner in which this procedure is being carried out is causing despair among many and has, to-date, resulted in 58 suicides in recent months.¹³³

1. Background

The National Register of Citizens (NRC) currently being updated was originally prepared in 1951 and is intended to be the definitive register of citizens in Assam. The NRC is unique to Assam and the ongoing update is an outcome of the Assam Accord signed in 1985 between the Government of India and representatives of the Assam nationalist movement at the end of a long-drawn, often violent period. The movement had, as its principal demand, the preservation of Assamese ethnic identity and dominance in the state of Assam, predicated on an 'anti-immigrant' agenda which primarily targeted those of Bengali origin. This culminated in 1983 Nellie Massacre, which resulted in the killing of over 2,500 Bengali Muslims. The very essence of this Accord and the NRC updating process that has emerged from it¹³⁴, is contrary to the basic principles and values set out in the Constitution to protect minorities.

¹³³ file:///Users/sajjadhassan/Downloads/Assam-Suicide-List%20(1).pdf

¹³⁴ Section 4A(4) and Schedule to Citizenship (Registration of Citizenship and Issue of National Identity Cards) Rules, 2003

According to the procedure, inclusion in NRC was by application followed by a verification process. Those excluded face the risk of being declared “foreigners”, rendered stateless, locked up in detention centres, or excluded as disenfranchised citizens. There is no extradition treaty between India and Bangladesh, nor does Bangladesh or any other country recognise those excluded as its citizens, creating a risk of mass statelessness. This amounts to discriminatory deprivation of the right to a nationality protected under international human rights norms and standards. India is a party to most.

2. Undefined timelines

The NRC is being updated under a programme authorised and closely monitored by the Supreme Court (SC), the apex court of the country, with the Government of India and the Assam state government as key actors. NRC State Coordinator (NRC-SC) administered the exercise, under the direct orders of the Supreme Court. On 17th December 2014, SC approved a timeline for completion of NRC update process by 1st January 2016. This has been revised several times. A total of 32,900,000 applications were received by the application deadline of 31st August 2015. A first (partial) draft NRC was published on 31th December 2017, containing 19 million names. The complete draft NRC was published on 30th July 2018, with 28,983,677 names. A claims and objections process was opened on 25th September 2018, giving the 4,070,707 excluded from the complete draft NRC a second opportunity to be included. A total of 3.62 million claims were received, as well as about 200,000 objections¹³⁵, the bulk of the latter, according to media reports, on the very last day for accepting objections.¹³⁶ Initially planned for publication on the 31st of July 2019, Final NRC was published on 31st August 2019, excluding a total of 1,906,657 persons. These left out persons will get an opportunity to appeal before Foreigners Tribunals (FT), a quasi-judicial institution established under the Foreigners (Tribunal) Orders, 1964, and mandated to determine citizenship and detect illegal migrants.¹³⁷ Despite the show of due process, those whose appeals before FTs are unsuccessful will remain excluded from NRC, de facto ‘declared foreigners’, liable for internment in Detention Centres, awaiting their deportation from India, indefinitely, thus rendered stateless.

135 Supreme Court of India, Writ petition (c) No. 1020 of 2017, order dated 24th January 2019.

136 and mostly by local representatives of the All Assam Students Union (AASU), the youth group that was the spearhead of the Assam Movement <https://www.deccanherald.com/national/over-26-lakh-objections-filed-710969.html>

137 Para 8 of Schedule to Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules 2003

3. Arbitrary procedures and systematic discrimination

To be included in the updated NRC, an applicant was required to identify a legacy person (parents or grandparents), with a clear mapping of his or her relationship to that person through a family tree, to include all other persons claiming descent from the same legacy person. A set of admissible documents were prescribed as proof of citizenship of the legacy person (List A or Legacy documents). Another list provided illustrations of kind of documents needed to prove the family relationship of the applicant to the legacy person (List B or Linkage document).

The exclusion of such a large number of persons from the final NRC is an outcome of a mix of procedural and capacity failures of the NRC State Coordinator's Office. Discrimination and arbitrariness lie at the heart of this failure: populations have been segregated into 'original' and 'non-original' inhabitants – with Bengali and Nepali speaking minorities making up the bulk of the latter. Differential criteria were used to verify claims depending on whether they come from someone deemed an 'original' inhabitant or 'non-original', by NRC authorities. Despite attempts by parties, Supreme Court refused to define 'original inhabitants' or to provide a procedure to identify them.¹³⁸ The NRC bureaucracy used this fuzziness as license during physical verifications, to arbitrarily reject documents from those with 'non-original' backgrounds. NRC officers commonly based their determination on the assumption that only Assamese-speaking and some indigenous groups were 'original', whilst the rest of the population, mainly those of Bengali and Nepali descent, besides Hindi-speakers, were 'non-original' inhabitants. 'Original inhabitants', SC ordered, did not need to undergo any verification or scrutiny.

As an illustration, of the total 32.9 million applications, 4.7 million were made using Gram Panchayat (GP) certificates, as list B (Linkage) documents. For 1.74 million of these applications deemed 'original inhabitants', the SC ordered automatic acceptance of the certificates. But for some 2.25 million amongst this cohort deemed 'non-original', it put in place a two-step verification process of checking certificates.¹³⁹ This has disproportionately impacted minority women deemed 'non-original', who mostly relied on GP documents.

The modalities (called Standard Operating Procedure – SOP) used to process Claims and Objections did not provide much redress against these in-built

138 Supreme Court of India, Writ petition (c) No. 1020 of 2017, order dated 5th December 2017.

139 Supreme Court of India, Special Leave Petition No. 13256/2017, order dated 24th August 2017.

discriminations.¹⁴⁰ It required 'rigorous scrutiny' of select official records for them to be accepted, opening the door to arbitrary rejections – during physical verifications – of key documents of so-called 'non-original inhabitants'. These included, besides GP certificates used by women; birth certificates, school and college certificates and immunisation records used to establish linkage of children to their parents.¹⁴¹ Bona fide errors committed by applicants in providing 'legacy data', that they were prevented from correcting, and stringent 'family tree verification' process, together made a bad situation worse. These have resulted in disproportionate exclusion of women and children from final NRC, in many cases it is being reported, despite the rest of the family having been included.¹⁴² 'Special provisions' in the SOP meant as safeguards for children below 14 years of age whose parents had been included in draft NRC – including provision for written/oral evidence of parents as admissible - seems not to have helped matters much.

The other large category of applicants that have suffered discriminatory exclusion from NRC are those ensnared in Foreigners Tribunals. 'Doubtful voters' (DV); those whose cases were 'pending in FTs' (PFT) for a decision; and ones already Declared Foreigners (DF) by FTs, all entirely from 'non-original' backgrounds, were put 'on hold' by NRC authorities when the draft NRC was published in July 2018, thus excluded. Descendants of DV and DF were also included in this adhoc exclusion.¹⁴³ In recent months, state government has undertaken special drives to refer additional cases to FTs, increasing the number of PFTs especially. And in June 2019, NRC authorities published an 'Additional Draft Exclusion list' containing some 102,000 names, mostly DV, PFT and DF who they claimed had been included in error in the draft complete NRC (July 2018), and needed to be further verified.¹⁴⁴ In many such cases, applicants were unable to attend physical verification hearings to establish their claims because the notices for hearings arrived late, in some cases on the very day of the hearing, whilst the hearings scheduled several hundred miles away. Most such cases, as well as

140 Authorised by the Supreme Court (WP # 274/2009, dated 01-11-18 and 12-12-18)

141 NRC SC letter to all DRCRs (dt. May 1, 2018) No. SPMU/NRC/Dist-Co-Equip/68/2015/Pt-IV/177, regarding eligibility determination in cases of "weak documents" such as Affidavit, Gaonburha (Village Headman) Certificate, Private School/College Certificate, Immunization records, Ration Cards etc.

142 https://amp.scroll.in/article/935823/in-assam-many-women-children-fail-to-make-nrc-even-as-their-family-members-are-counted-as-citizens?_twitter_impression=true

143 NRC SC letter to Deputy Commissioners dated 2nd May 2018.

144 <https://www.thehindu.com/news/national/other-states/nrc-assam-publishes-102-lakh-names-in-additional-draft-exclusion-list/article28143347.ece>

all their descendants, seem to have been excluded from final NRC.¹⁴⁵ In effect, whilst most such persons had been marked as Doubtful Voter arbitrarily without any investigation whatsoever and disenfranchised since 1997, now even their children have been dropped from the final NRC.

An equally problematic provision of the NRC process was making it easier to file objections against wrongful inclusion, including removing the bar on number of objections, doing away with the requirement of the objector to be a local resident and that of a penalty against false and frivolous objections. All these the further compromised due process in NRC updation, and resulted in bulk objections being filed by those with vested interests, reportedly on the very last day for applications, defeating the purpose of NRC updation.¹⁴⁶ When it was reported to SC that Objectors were mostly absent at hearings and the objections did not fulfil administrative conditions, SC authorised NRC SC to resolve matters speedily. This resulted in objections hearings being conducted ex-parte¹⁴⁷, further making verification outcomes contingent on bureaucratic discretion. Anecdotal evidence points to several names having actually been excluded from final NRC due to objections made against them.

4. A context of discrimination and exclusion

This follows a pattern in how minorities, particularly Bengali-speaking Muslims, have been targeted in Assam's history of identifying and incarcerating make-belief foreigners. The use by the Assam Border Police of the Immigrants (Expulsion from Assam) Act, 1950 to identify suspected foreigners and the Election Commission of India to mark out only minorities as 'doubtful' voters are examples of this targeting. At best, shoddy investigations are made before referring these cases to Foreigners' Tribunals (FTs). That FTs, set up in Assam in pursuance of Foreigners (Tribunal) Orders 1964, test claims to citizenship made by these so-called 'suspected foreigners', using the Foreigners Act, 1946, suggests that the outcomes are foregone conclusions. The Foreigners Act 1946 shifts the burden of proof to the applicant (Sec. 9), who is required to satisfy the tribunal about the genuineness of his or her claim. The fact that victims are mostly destitute and poorly educated, and that government record-keeping is neither efficient nor accessible, makes this threshold arbitrarily high.

145 <https://scroll.in/article/935195/assams-nrc-these-children-could-be-stateless-soon>

146 <https://www.deccanherald.com/national/over-26-lakh-objections-filed-710969.html>

147 Supreme Court of India, Writ petition (c) No. 274 of 2009, order dated 8th May 2019.

A recent investigation into working of Foreigners Tribunal, based on applications under Right to Information Act 2005, provides a grim window into the working of these quasi-judicial bodies.¹⁴⁸ In the tribunals studied, nearly nine out of 10 cases were against Muslims. Almost 90 per cent of those Muslims were declared 'foreigners' (illegal immigrants) — as compared with 40 per cent of Hindus tried. Every person the investigators found who had faced the tribunals was from Bengali-speaking ethnic group. Decisions by the FTs were deeply inconsistent, most having been passed ex-parte. Manned mostly by mid to senior lawyers, rather than judges, FTs followed varying procedures, on how notices should be served; whether grounds for complaints could be seen by applicants or their counsels; what documents could be submitted, the content of those statements; the time the accused had to produce witnesses and how witnesses would be examined, how documents would be verified, how hearings would be conducted. Some FTs accepted verbal explanations for variations in age or spellings of names on documents. Others declared people foreigners on the basis of what defendants called clerical errors. In most cases witness testimony was not weighted adequately. Since at least 2016, FTs are also reported coming under extraneous pressures, to declare more foreigners, diluting their ability to act as objective tribunals following due process. Since 1985, FTs have declared more than 100,000 persons foreigner, with a steep uptick since 2016. Of these, 63,959 persons were declared foreigner through ex-parte proceedings, i.e. the accused were not present to defend their case.¹⁴⁹

It is these deeply flawed bodies that have been tasked to process appeals expected to be made by the 1.9 million persons excluded from the Final NRC – without regard to the ability of these bodies to make the life and death decisions they will. Government has recently notified setting up an additional 200 FTs, taking the total to 300, especially to process NRC appeals.¹⁵⁰ In making appointment of FT members, government sharply reduced selection criteria: advocates with 7 years of experience, and retired civil servants too were eligible to apply, where as FTs were meant originally to be presided by senior judges. Appointments made recently, are contractual, one year at a time. A two-day programme of

148 https://news.vice.com/en_us/article/3k33qy/worse-than-a-death-sentence-inside-indias-sham-trials-that-could-strip-millions-of-citizenship

149 Lok Sabha debates, Unstarred Question No. 1724, providing figures for 1985 to 28th Feb. 2019. 2nd July 2019.

150 https://www.huffingtonpost.in/entry/assam-nrc-final-list-foreigners-tribunals-judges_in_5d6a9c7be4b09bbc9eefe635?utm_hp_ref=in-politics

orientation training was all it was felt was needed by these members to start to discharge their duties.¹⁵¹ The recent amendment to Foreigners (Tribunal) orders 1964¹⁵² makes the prospect of FTs acting as effective redress bodies even more remote. Allowing DMs to refer to FTs case of appellants for opinion as to their being foreigner (governed by Foreigners Act 1946), as part of the appeal against decision by NRC authority, governed by Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003 (Sec 6); and giving FTs discretion to judge merit of an appeal before initiating proceeding (Sec. 10), defeats the very purpose of the appeal, adversely impacting the chance of appellants getting a fair trial. And allowing FTs to determine their own procedures (Sec 17) encourages arbitrariness in the working of FTs, that we demonstrated earlier on, has resulted in serious miscarriage of justice. Given the politicisation of FTs, especially with an eye to target Muslims, the newly established FTs are not inspiring much confidence among the excluded. Several civil society groups have challenged the rules, also proposing model rules for all FTs to use as standard procedure in NRC appeals cases.¹⁵³ But there seems little chance that these challenges will be given due consideration.

State and central governments have of late repeatedly made the point that those whose appeals are rejected by FTs will still not be deemed foreigner, and they will still be able to avail of redress mechanisms. But reading Sec 6 of the rules, it is clear that those whose appeals are eventually rejected will automatically and parallelly have been proceeded against under Foreigners Act, 1946, thus also 'declared foreigner', foreclosing any further redress, except the usual through the High Court (HC) and Supreme Court (SC). Once there, to get HC and SC to reopen these cases will be nigh impossible.

While appeals against decisions by NRC authorities (under the Citizenship Rules, 2003), and that against Foreigners' Tribunals (under Foreigners Tribunal Rules 1964) play out, there are two possibilities for all those who are ensnared in these processes. One is to be interned in Detention Centres. The 6 detention centres spread across Assam house 1133 'declared foreigners'. 335 of these have been detained for more than three years.¹⁵⁴ Enquiry by a special monitor of the National

151 Supreme Court of India, Writ petition (c) No. 1045 of 2018. Order dated 30th May 2019.

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

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

154 Lok Sabha debates, Unstarred Question No. 1724, providing figures as of 25th June 2019.

Human Rights Commission (NHRC) provides a chilling account.¹⁵⁵ It highlights the illegality of the centres; indefinite incarcerations and accompanying vulnerabilities suffered by detainees; the lack of any legal redress whatsoever; and the sheer hopelessness of detention conditions. Victims are detained in conditions like convicted prisoners, but without enjoying associated rights, including parole or freedom from indefinite incarceration. In July 2019, Assam government revealed that 25 persons had died in detention, including a 45-days-old child and an 85-year-old partially immobile man.¹⁵⁶ The NHRC has, to date, not been reported to have taken any action on the findings. A recent intervention on detention centres in the SC has resulted in minor relief for the detainees without mitigating their stateless status: detenus having done more 3 years could be released, subject to execution of bond with two securities, and their biometric and fingerprints being captured, among others.¹⁵⁷ With the threshold being what it is, the relief has meant little help to most detenus.

The other possibility, given it will be impractical (and a very bad press!) for the state to detain all those among the 1.9 million declared foreigner, will be to strip away at their citizenship rights, reducing the lot formally to 'half-citizens'. All 4.2 million excluded from the draft list (July 2018) have had their biometrics recorded in a separate database. It is being claimed that the 1.9 million finally excluded, will have their biometrics shared across the various databases maintained by welfare authorities nationally, to prevent them from obtaining aadhar and other registration, now a requirement for accessing most basic services and entitlements.¹⁵⁸ And their names will likely also formally be struck off the electoral list.

Senior leaders of the ruling Bharatiya Janata Party (BJP), including state and central ministers, have been reported expressing concerns at the reported large exclusion of Bengali-speaking Hindus from the final NRC. Assam Chief Minister Sarbananda Sonowal, is reported to have said that the Centre may consider a law to remove foreigners who could have entered the list and add genuine citizens who could have been left out. And his deputy, Finance minister Himanta Biswa Sarma was quoted claiming "at Dispur (Assam state capital) and Delhi we have

155 Report on NHRC Mission to Assam's Detention Centres from 22 to 24 January 2018.

156 <https://scroll.in/article/935337/detention-in-assam-a-baby-and-old-man-died-despite-their-families-having-proof-of-citizenship?fbclid=IwAR0IPLqPHDho7FOC49N6WX7-fts2FoMyR6j3xF8FVjGi3JybcXadEcPzi5s>

157 Supreme Court of India, Writ petition (c) No. 1045 of 2018. Order dated 10th May 2019.

158 https://www.indiatoday.in/amp/india/story/aadhaar-get-entry-final-nrc-those-cant-prove-citizenship-1593649-2019-08-30?fbclid=IwAR068_k9PAWLL153aLw9kXn1CSjSRR6GjMqAJBoa3JdTWCI7i8QGu9xpNVI

already started fresh strategy on how we can drive out the illegal migrants and we will so come up with new plans”, warning “NRC is no quarter final, semi-final and final for driving out Bangladeshis...wait a while and you will see more finals under the BJP regime.”¹⁵⁹

This anxiety among BJP leadership could embolden efforts at revival of past unsuccessful attempts by the Government of India to salvage the damage of the NRC and Foreigners Tribunal exclusions on Bengali-speaking Hindus, through attempting to amend the Citizenship Act, 1955. The Citizenship Amendment Bill introduced in the Parliament in 2016 sought to fast-track naturalisation for those having entered India – either legally or illegally – from neighbouring countries, whilst excluding Muslims from this scheme.¹⁶⁰ Already all except Muslims from Bangladesh, Pakistan and Afghanistan in India illegally, have been granted general amnesty from illegal immigrant status.¹⁶¹ The bill lapsed before it could be passed, as the BJP did not have a majority in the Upper House of Parliament. This time round, the party could be better able to cobble together a majority.

5. Due Process under a cloud

Supreme Court's order of 2014 kick-starting the NRC update process asked for it to be completed in a time-bound manner, due apparently to what the SC claimed was the 'magnitude of the Bangladeshi infiltration in Assam'. Allegedly relying on a Government of India statistic from December 2001, the Court stated that there were 12 million illegal Bangladeshi immigrants in India, out of which 5 million were in Assam.¹⁶² Information collected using the Right to Information Act, 2015 – suggests that the figure quoted by the Court was based on hearsay, and that the Government of India does not have “accurate estimate of such illegal migrants, including Bangladeshi immigrants living in the country.”¹⁶³ This raises questions

159 <https://www.ndtv.com/india-news/assam-nrc-not-interested-in-nrc-it-wont-work-says-assam-minister-himanta-sarma-2093322>

160 'Citizenship (Amendment) Bill, 2016: Joint Parliamentary Committee fails to reach consensus'. The Economic Times. November 28, 2018. <https://economictimes.indiatimes.com/news/politics-and-nation/citizenship-amendment-bill-2016-joint-parliamentary-committee-fails-to-reach-consensus/articleshow/66837492.cms>

161 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, exempting illegal Hindu, Sikh, Buddhist, Jain, Parsi and Christian migrants from Afghanistan, Bangladesh and Pakistan, and who arrived on or before 31st December 2014, from provisions of The Foreigners Act 1946 and the Indian Passport Act 1920 Act.

162 Supreme Court of India, Writ petition (c) No. 274 of 2009. Order dated 17th December 2014.

163 '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/

about the SC's role in this exercise. The Supreme Court bench hearing the Assam NRC case is led by Justice Ranjan Gogoi, himself an ethnic Assamese and an NRC applicant, raising conflict of interest issues.¹⁶⁴ Justice Gogoi was elevated as the Chief Justice of India on 3rd October, 2018 and continues to hear NRC cases.

6. Unheeded warnings

In a significant move, four UN Special Rapporteurs jointly addressed a letter to the Government of India in June 2018, communicating concerns that "local authorities in Assam, deemed particularly hostile towards Muslims and people of Bengali descent, may manipulate the verification system in an attempt to exclude genuine Indian citizens from the updated NRC", warning that "if these allegations are founded, the updated register poses a dire risk to thousands of Indian citizens who may wrongfully be declared as "foreigners" and consequently rendered stateless".¹⁶⁵ In what is unprecedented, the UN experts have followed this up with two more letters since, reiterating their concerns and issuing warnings.¹⁶⁶ OHCHR website informs none of these letters have elicited any response from Indian authorities. Just prior to publication of Final NRC, United States Commission on International Religious Freedom (USCIRF) raised alarm about "the potential abuse of the National Register of Citizens in Assam and the resulting introduction of a religious requirement for citizenship", claiming that the 'religious test' for Muslims in Assam "had the effect of undermining the religious freedom for vulnerable religious minorities".¹⁶⁷ And in August 2019, Genocide Watch renewed its Watch for Assam, first issued in July 2018, claiming "there are early signs of genocidal process".¹⁶⁸

164 'Guwahati advocate asks CJI Misra why Justice Gogoi, an Assamese, is hearing NRC case'. The Print. 8th Aug. 2018 <https://theprint.in/governance/guwahati-advocate-asks-cji-misra-why-justice-gogoi-an-assamese-is-hearing-nrc-case/95509/> & 'In the court of last resort'. The Hindu. 3rd October, 2018. <https://www.thehindu.com/opinion/lead/in-the-court-of-last-resort/article25105456.ece>

165 Special Rapporteur (SR) on minority issues; SR on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance; SR on the Promotion and Protection of the Right to Freedom of Opinion and Expression; and SR on Freedom of Religion or Belief, joint letter to Government of India, 11th of June 2018. <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?qId=23884>

166 Dated 13th Dec. 2018 and 27th May 2019. <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?qId=24247>

167 <https://www.uscifr.gov/news-room/press-releases-statements/uscifr-statement-indian-government-s-religious-test-muslims-in>

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