

COMMENTARY

STATELESSNESS, DETENTION CENTRES AND THE OTHERISATION

AAKASH CHANDRAN*

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I THE NATIONAL REGISTER OF CITIZENS AND INDIA

The rise of populism, conservatism, the politics of hate and the rhetoric of ‘outsiders’ and ‘insiders’ haunts India now more than ever. The heightened and charged move by the state to accelerate the process of rendering a portion of its citizens stateless has received the support and legitimacy of the Indian judiciary. The *National Register of Citizens* (‘NRC’) is a Supreme Court-monitored exercise of updating the *1951 Register of Citizens* of the State of Assam to identify, locate and strip ‘illegal migrants’ of Indian citizenship.¹ The preparation of the NRC was triggered in 2014 by a petition challenging the legal validity of s 6A of the *Citizenship Act, 1955* in the case of *Assam Sanmilita Mahasangha & Ors v Union of India*.² The petition argued against the said provision as it facilitated the extension of citizenship to the ‘outsiders’ and posed a ‘threat to the security of people and that of the state’.³

Section 6A was introduced into the central legislation through a 1986 amendment that granted citizenship to Bangladeshis who entered India between 1 January 1966 and 24 March 1971, a day before Bangladesh declared its independence from Pakistan.⁴ This provision was added against the background of the *1985 Assam Accord*, an agreement signed between the Government of India, the Government of Assam and the representatives of the All Assam Students

* Aakash Chandran is a New Delhi-based lawyer and international law researcher. He holds a Masters-in-Law (LLM) in international law from the Faculty of Legal Studies, South Asian University (SAARC), India. The author would like to thank the Journal’s guest editor for their helpful comments and the production team for their brilliant edit support. All errors of substance and style remain that of the author. Email: chandran.aakash@yahoo.in

¹ Mohsin Alam Bhat, ‘On the NRC, Even the Supreme Court is Helpless’, *The Wire* (online, 7 January 2019) <<https://thewire.in/law/nrc-supreme-court-crisis>>.

² (2015) 3 SCC1.

³ *ibid* [30].

⁴ Anupama Roy, ‘Ambivalence of Citizenship in Assam’ (2016) 51(26–7) *Economic and Political Weekly* 45, 46 (‘Ambivalence of Citizenship’).

Union ('AASU').⁵ The legislative effort by the state came about as a result of widespread protests headed by the AASU demanding protection of the Assamese culture, heritage and linguistic identity.⁶ The 1986 amendment gave formal recognition to the *1985 Assam Accord*, laid the groundwork for the identification and 'sifting out the aliens', and provided for the exceptionalism within the citizenship law.⁷ Professor Anupama Roy calls the emergence of the Assamese-Indian citizenship as the 'hyphenated citizenship' within the 'universal' citizenship model of India.⁸ While the cut-off date for the rest of the Indian citizens remained 19 July 1948, there were three sets of dates for those in Assam.⁹ The people who migrated to India from East Pakistan (now Bangladesh) before 1 January 1966 were granted citizenship at par with the Indians (Category 1). Those who were of Indian origin and moved between 1 January 1966 – 24 March 1971 and had remained in Assam since then were deemed to be disenfranchised for 10 years and then be legitimised in phases (Category 2).¹⁰ Finally, those who migrated after 24 March 1971 were to be declared 'illegal' and deported (Category 3).¹¹

The transitional nature of the citizenship conflict in Assam has seen both violent movements on the ground directed at the Bengali-speaking population as well as recourse to the legal process. The two legislations that were put in place by the Government directly to identify the cross-border immigrants, assimilate and deport them were *The Foreigners Act, 1946* and *The Illegal Migrants (Determination by Tribunal) Act, 1983* ('IMDT Act').¹² While the application of both laws was simultaneous, the former legislation was applied to Category 2 citizens, whereas the latter was applied to Category 3 citizens.¹³ *The Immigrants (Expulsion from Assam) Act, 1950* further empowered the Central Government to expel the foreigners if their presence was 'detrimental to the interests of the general public of India' or to that of Assam.¹⁴

The *IMDT Act* established tribunals for the identification and expulsion of illegal immigrants from India.¹⁵ However, the Act was declared unconstitutional by the Supreme Court in 2005 on a petition filed by the former AASU president

⁵ *Accord between AASU, AAGSP, and the Central Government on the Foreign National Issue, (Assam Accord), All Assam Students' Union, All Assam Gana Sangram Parishad and Government of India*, signed 15 August 1985 (Memorandum of Settlement) ('*Assam Accord*').

⁶ Namrata Goswami, 'Illegal Migration in Assam: A Concern for India's National Security', *Manohar Parrikar Institute for Defence Studies and Analyses* (Web Page, 4 May 2006) <https://idsa.in/idsastrategiccomments/IllegalMigrationinAssam_NGoswami_040506>; Explained Desk, 'Explained: What is Clause 6 of Assam Accord', *The Indian Express* (online, 11 August 2020) <<https://indianexpress.com/article/explained/explained-what-is-clause-6-of-assam-accord-6550486/>>; Minakshi Bujarbaruah and Rituparna Kaushik Bhattacharya 'The Time Has Come For India to Recognise Why Assam Protests Against CAA' *The Wire* (online, 16 January 2020) <<https://thewire.in/rights/assam-anti-caa-protests>>.

⁷ Roy, 'Ambivalence of Citizenship' (n 4) 45.

⁸ *ibid* 45–46.

⁹ *ibid* 46.

¹⁰ *ibid*.

¹¹ *ibid*.

¹² *The Foreigners Act 1946* (India) ('*Foreigners Act*'); *The Illegal Migrants (Determination by Tribunals) Act 1983* (India) ('*IMDT Act*').

¹³ Roy 'Ambivalence of Citizenship' (n 4) 46.

¹⁴ *The Immigrants (Expulsion from Assam) Act 1950*, s 2 (India).

¹⁵ *IMDT Act* (n 12) s 5(1).

and the current Chief Minister of Assam, Mr Sarbananda Sonowal.¹⁶ The petition challenged the *IMDT Act* and the associated rules on the grounds of arbitrariness and discrimination against the Assamese people. Consequently, the Court unanimously repealed the *IMDT Act* and its rules as it was in violation of arts 14 ('Right to Equality') and 355 ('Duty of Union to Protect against External Aggression') of the *Constitution of India*.¹⁷ Although the decision of the Court was based on procedural grounds, it presented the problem of illegal immigration in the language of 'aggression' and 'infiltration' from which the citizens must be protected.¹⁸ The *IMDT Act* was seen as a 'pro-immigrant' law, as it placed the burden on the state to establish the individual's status as illegal.¹⁹ However, the Court's judgment brought all 'suspected citizens' under the ambit of the *Foreigners Act*, where the onus to prove an individual's citizenship rested on themselves.²⁰ The Court's legal imagining of cross-border migration as an *invasion* was based on a problematic report submitted by the then Lieutenant Governor of State of Assam (former Deputy Chief of the Army Staff). According to the report, the cross-border movement of people was supported by Bangladesh (and the militant organisations present therein) to convert Assam into a Muslim majority state which then would facilitate the cessation of the entire North-East region from India.²¹ Accepting the same flawed reasoning, the judges built the narrative of the 'Muslim invaders' who pose a high-security risk to India's national security through their potential to change the local demography.²²

II THE JUDICIAL CULPABILITY

Since 2014, the Supreme Court has reaffirmed the responsibility undertaken by the Government of India under the *Assam Accord* to revise the *1951 Register of Citizens* and has prescribed a time limit for the government to do this.²³ The *NRC* finds its origins in the 2003 amendment to the *Citizenship Act 1955* which excluded the grant of citizenship based on birth, paved the way for the citizenship test of descent²⁴ and set in motion the mechanism for issuing national identity cards.²⁵ This court-monitored process triggered a humongous bureaucratic exercise to meet the deadline for the preparation of the *NRC*. The first draft of the revised list, which was submitted in 2018, provided the names of over four million people who had failed to prove their citizenship. The final list drawn up in August

¹⁶ *Sarbananda Sonowal v Union of India* (2005) 5 SCC 665, [2], [58] ('*Sonowal*').

¹⁷ *ibid* 46 [58].

¹⁸ *Sonowal* (n 16).

¹⁹ Goswami (n 6).

²⁰ *Foreigners Act* (n 12) s 9.

²¹ *Sonowal* (n 16) [36]–[38].

²² *ibid* [37]–[38].

²³ Samanwaya Rautray, 'Supreme Court Extends Assam NRC Publication Deadline to Aug 31', *The Economic Times* (online, 23 July 2019) <<https://economictimes.indiatimes.com/news/politics-and-nation/sc-extends-nrc-deadline-to-aug-31-rejects-pleas-for-20-pc-sample-re-verification/articleshow/70346185.cms?from=mdr>>.

²⁴ Anupama Roy, 'The Citizenship (Amendment) Bill, 2016 and the Aporia of Citizenship' (2019) 54(49) *Economic and Political Weekly* 28, 29.

²⁵ See *Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules 2003* (India), ss 3(3), 13.

2019 excludes 1.9 million people and leaves them at risk of *de jure* statelessness.²⁶ Once the excluded people have received their certified copy of rejection from NRC authorities, they can appeal to the Foreigner's Tribunal against their exclusion.²⁷ If they fail to appeal, the Central or State Government may seek judicial determination on their citizenship status.²⁸ If this is sought by the Government, the Tribunal will adjudicate the individual's status and declare them either a citizen or non-citizen. Though the possibility of seeking an appeal before the High Court/Supreme Court remains, the scope of writ jurisdiction is limited and largely excludes questions of facts.²⁹

The process of ascertaining citizenship through the executive model has been mired in controversies and has crippled the lives of many in Assam. The daunting task of discharging the burden of proof lies on each individual: they are required to provide documentary evidence which establishes Indian ancestry dating back to 1971.³⁰ This requirement for evidentiary paperwork overlooks the fact that documentation and record-keeping is not part of the social practice of the rural, illiterate and poor population. The severe, annual floods in Assam make the possession of legacy data even more difficult for the less privileged.

These claims of citizenship have been and continue to be scrutinised by the quasi-judicial body called Foreigners Tribunal, whose working has been called out because of its opaque functioning, inherent bias, legal and factual inconsistencies.³¹ These Tribunals are often chaired by the executives and lawyers rather than judicially trained judges.³² It has led to situations where the officers have proceeded *ex parte* against the claimant and ended up 'manufactur[ing] ... foreigners'.³³ The lack of judicial independence can be seen from the fact that systemic rewards are set out by the Government for the officers who declare a large number of citizens as *foreigners*. In contrast, others have been terminated for being too lenient in their adjudication.³⁴

Once a person is declared a *foreigner* by the Tribunal, the person stands effectively stateless unless they can prove their link with any other country.³⁵ Although the Court has instructed the Government to devise a plan to deport the

²⁶ Sangeeta Barooah Pisharoty, 'Final NRC Published in Assam; 19.06 Lakh Applicants Left Out', *The Wire* (online, 31 August 2019) <<https://thewire.in/rights/final-nrc-published-assam>>.

²⁷ *The Foreigners (Tribunal) Amendment Order 2019* (India) s 3A.

²⁸ *ibid* s 3B.

²⁹ Talha Abdul Rahman, 'Identifying the "Outsider": An Assessment of Foreigner Tribunals in the Indian State of Assam' (2020) 2(1) *Statelessness and Citizenship Review* 112, 136.

³⁰ See *Nur Begum v Union of India* (2020) 3 GLT 347.

³¹ Rohini Mohan, 'Inside India's Sham Trials That Could Strip Millions of Citizenship', *Vice News* (online, 29 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>.

³² Prashant Bhushan and Cheryl D'souza, 'Conduct of Foreigners Tribunals in Assam is questionable', *The Indian Express* (online, 20 September 2019) <<https://indianexpress.com/article/opinion/columns/assam-nrc-final-list-foreigners-tribunals-6011356/>>.

³³ Rahul Karmakar, 'When You Can't Find Foreigners, You Manufacture Them: Human Rights Lawyer Aman Wadud', *The Hindu* (online, 27 June 2020) <<https://www.thehindu.com/society/when-you-cant-find-foreigners-you-manufacture-them-human-rights-lawyer-aman-wadud/article31922657.ece>>.

³⁴ Sagar, 'Case Closed', *The Caravan* (online, 6 November 2019) <<https://caravanmagazine.in/law/assam-foreigners-tribunals-function-like-kangaroo-courts-persecute-minorities>>.

³⁵ *Foreigners Act* (n 12) s 8.

foreigners in consultation with the Government of Bangladesh,³⁶ the Indian Government claims that the ‘entire process of the NRC’ is an ‘internal matter’.³⁷ In the absence of any bilateral agreement or understanding facilitating the deportation, it is becoming clear that the fate of the declared foreigners will be sealed within the four corners of the detention centres.³⁸ This indefinite detention of people brings out the oppression furthered through law and conveniently allows the state to couch the anti-immigrant politics within the confines of ‘due process of law’.

III DETENTION CENTRES AND THE ‘OTHERS’

While the Government denies the existence of NRC detention camps in Assam, the facts on the ground prove otherwise.³⁹ The state of Assam has six detention camps of its own and houses over 3,000 people.⁴⁰ To date, there have been over 30 reported deaths in the detention centres but they remain nothing more than mere statistics.⁴¹ With the COVID-19 outbreak and rising concerns about detention centres becoming hotspots, the Supreme Court ordered the release of prisoners under detention for more than two years on a personal bond of INR 5,000 and two sureties.⁴² However, only 308 foreigners were released out of the 802 present.⁴³

This trend of indefinite detention of migrants and refugees has caught the attention of the world since 2012 through the Australian Government’s offshore detention policy.⁴⁴ Refugees who successfully reach the Australian shore by boat are detained on Christmas Island or one of two remote Pacific islands, Nauru and Manus Island in Papua New Guinea. The Australian state policy has attracted widespread condemnation both within the domestic and international spheres. In fact, the inhuman living conditions in these centres have been alleged as an act of

³⁶ *Assam Sanmilita Mahasangha* (n 2) 40.

³⁷ ‘NRC Updation Internal Matter for India, Won’t Affect Bangladesh: Foreign Secretary Shringla’, *The Print* (online, 2 March 2020) <<https://theprint.in/diplomacy/nrc-updation-internal-matter-for-india-wont-affect-bangladesh-foreign-secretary-shringla/374217/>> .

³⁸ Shoaib Daniyal, ‘Bangladesh Government Expresses Concerns Over Assam’s NRC Process for the First Time’, *Scroll.in* (online, 18 July 2019) <<https://scroll.in/latest/930979/bangladesh-government-expresses-concerns-over-assams-nrc-process-for-first-time>>.

³⁹ JP Yadav and Umanand Jaiswal, ‘Detention Centres: Is PM Modi Saying the Truth, the Whole Truth and Nothing but the Truth?’, *The Telegraph* (online, 22 December 2019) <<https://www.telegraphindia.com/india/detention-centers-is-pm-modi-saying-the-truth-the-whole-truth-and-nothing-but-the-truth/cid/1729496>>.

⁴⁰ Rahul Karmakar, ‘30 “Foreigners” Dead in Assam’s Detention Centres’, *The Hindu* (online, 12 April 2020) <<https://www.thehindu.com/news/national/30-foreigners-dead-in-assams-detention-centres/article31325045.ece>> (‘30 Foreigners Dead’); ‘Govt Lodged 3,331 People in Assam Detention Centres, 10 Died Last Year’, *The Business Standard* (online, 17 March 2020) <https://www.business-standard.com/article/pti-stories/10-inmates-of-detention-centres-in-assam-died-in-last-one-year-govt-120031700816_1.html>.

⁴¹ Karmakar, ‘30 Foreigners Dead’ (n 40).

⁴² *Re: Contagion of COVID 19 Virus in Prisons* [2020] Suo Motu Writ Petition (Civil) (India).

⁴³ Rahul Karmakar, ‘308 “Foreigners” Released From Assam Detention Centres’, *The Hindu* (online, 20 May 2020) <<https://www.thehindu.com/news/national/other-states/308-foreigners-released-from-assam-detention-centres/article31632918.ece>>.

⁴⁴ See Ben Saul, ‘Dark Justice: Australia’s Indefinite Detention of Refugees on Security Grounds Under International Human Rights Law’ (2012) 13(2) *Melbourne Journal of International Law* 1, 2–4.

torture and crimes against humanity.⁴⁵ However, it is the United States that has notoriously followed the ‘detention as deterrence’ policy since the 1980s and its new manifestations have been against the Mexican and Central American immigrants.⁴⁶ While the purpose of civil detention is to facilitate the removal of ‘illegal immigrants’ from the country, the symbolic objective is to put an end to illegal movement and to send a message that the borders are closed.⁴⁷ Similarly, the *NRC* and the consequent indefinite detention are being implemented for three inherent objectives. First, as a check against illegal migration within the state. Second, to curb the potential movement of people into India. Third, to build trust and confidence in the present Government. This tripartite goal is reflected in a statement by the Governor of Assam, where he proudly claimed that the *NRC* has contained the fresh influx of illegal immigrants.⁴⁸

Instead of promoting the ‘risk of death or injury’ associated with illegal immigration as a tool for deterrence, the usage of ‘actual bodies’ in incarceration as state policy is problematised by Kevin Scott Jobbe within the context of the United States of America.⁴⁹ In the context of Assam, the irremovability of the detainees causes their prolonged detention within the camps. The possibility of deportation only comes into the picture when the detained persons are proven to be of a different nationality. But the *NRC* exercise applies a negative test and only establishes a person to be ‘non-Indian’, without successfully establishing their Bangladeshi (or any alternative) nationality. This public spectacle of prolonged detention is practiced and promoted in the name of deterrence even when it has minimal results on the ground.

The detention camps are often seen as the place where the ‘state of exception ... becomes the rule’ and the state operates directly upon the ‘bare life’.⁵⁰ The power of the state to regulate not just political life but also the condition of a human being is reflective of the ‘state of exception’.⁵¹ This control and the subsequent deprivation of life is facilitated by the conception of illegal migration as a ‘security threat’ by the Court in the *Sonowal* case.⁵² The reduction of the legal being to illegal and the elimination of the ‘unwanted population’ is carried out by the state in the name of ‘the citizens’, which is then stamped by the judicial institution as the lawful discharge by the sovereign. This violence of law in transforming a citizen into an alien creates the ‘Other’. Drawing from what Professor Sundhya Pahuja calls ‘defining exclusion’ with regards to the paradox of international law, it is through the exclusion of ‘foreigners’ that the defining

⁴⁵ Kevin Jon Heller, ‘ICC Communication About Australia’s Mistreatment of Refugees’, *OpinioJuris* (Web Page, 15 February 2017) <<http://opiniojuris.org/2017/02/15/icc-filing-about-australias-mistreatment-of-refugees/>>.

⁴⁶ Julia Preston, ‘Detention Center Presented as Deterrent to Border Crossings’, *The New York Times* (Dilley, Texas, 15 December 2014), 18.

⁴⁷ Margaret Taylor, ‘Symbolic Detention’ (1997) 20 *In Defense of the Alien* 153, 156–8.

⁴⁸ ‘NRC’s Biggest Success is Stopping Influx of Illegal Bangladeshis into Assam: Mukhi’, *Outlook* (online, 24 February 2019) <<https://www.outlookindia.com/newsscroll/nrcs-biggest-success-is-stopping-influx-of-illegal-bangladeshis-into-assam-mukhi/1484811>>.

⁴⁹ Kevin Scott Jobe, ‘The Militarization of Care: the Military-Medical Gaze and the US-Mexico Border’, *Critical Legal Thinking* (online, 20 May 2015) <https://criticallegalthinking.com/2015/05/20/the-militarization-of-care-the-military-medical-gaze-and-the-us-mexico-border/#_ftnref9>.

⁵⁰ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, tr Daniel Heller-Roazen (Stanford University Press, 1998) 168–9, 8.

⁵¹ *ibid.*

⁵² *Sonowal* (n 16) [38].

characteristics of the ‘citizen’ are retained.⁵³ The exclusion of the ‘illegal immigrants’ (claimed to be Bangladeshi Muslims), performed in the name of the NRC, works well with the current Government’s idea of *Akhand Bharat* (undivided India) which includes territories of Pakistan and Bangladesh.⁵⁴ While they would be included territorially within undivided India, they would be expelled owing to their otherness (non-Hindu).

It is then that the paradox of the visuals takes central stage. The public spectacle of indefinite detention allows the state to put up a show of deterrence while making the stateless invisible and removing them from the public view. In the backdrop of the NRC, the detention of citizens because of the failure to document their citizenship takes away their status as a political right-bearing person and hides the violence perpetrated against them.

With the establishment of the detention camps, the state asserts its control over the borders by maintaining the grip over actual bodies. Building on Agamben’s conception of the ‘camps as the site of exception’, the detention camps produce and present the declared foreigners as a *danger* from which the community must be protected.⁵⁵ The exceptionalism of the state of affairs requires suspension of the rights-based legal order to safeguard the interests of the nation-state and leads to the legitimation of the Other as a target. In the camp, there is a collapse of the distinction between human and non-human. It is where the state, through its control over the ‘bare life’, manages life and death as an everyday statistical affair.⁵⁶ In a 2019 statement, the Indian Home Minister called illegal immigrants’ ‘termites’ and vowed to throw them in the Bay of Bengal, which reflects the continuous exposure to death under the command of the sovereign.⁵⁷

The insensitivity and incoherence prevailing within the Government machinery in understanding the nuances of statelessness were aptly called out by a mourning relative in Assam.⁵⁸ The family of the deceased refused to accept the body of an individual who was declared a foreigner and died in detention. They asked the Government to send the body to Bangladesh. This act of acquisition of *nationality on death* in contrast to when alive highlights the paradox and the anxiety furthered through law. While Hannah Arendt’s phrase ‘rights to have rights’ is popularly viewed as the catchphrase for the refugees, it must be understood that it speaks for all those who have been marginalised within the society and are unable to speak on their own.⁵⁹ The problem of statelessness is only removed with the assumption of a valid legal national identity. Thus, in the absence of the recognition of such a

⁵³ Sundhya Pahuja, ‘The Postcoloniality of International Law’ (2005) 46(2) *Harvard International Law Journal* 459, 461.

⁵⁴ Rimple Mehta, ‘“Illegal” Bangladeshis in Akhand Bharat: Inscriptions of Race and Religion on Citizenship’ (2018) 53(7) *Economic and Political Weekly* 62, 66.

⁵⁵ Agamben (n 50); Amy O’Donoghue, ‘Sovereign Exception: Notes on the Thought of Giorgio Agamben’ *Critical Legal Thinking* (online, 2 July 2015) <<https://criticallegalthinking.com/2015/07/02/sovereign-exception-notes-on-the-thought-of-giorgio-agamben/>>.

⁵⁶ Jessica Whyte, *Catastrophe and Redemption: The Political Thought of Giorgio Agamben* (SUNY Press, 2013) 91.

⁵⁷ Devjyot Ghoshal, ‘Amit Shah Vows to Throw Illegal Immigrants into Bay of Bengal’, *Reuters* (online, 12 April 2019) <<https://www.reuters.com/article/india-election-speech/amit-shah-vows-to-throw-illegal-immigrants-into-bay-of-bengal-idUSKCN1RO1YD>>.

⁵⁸ Abdul Gani, ‘Twenty-six Deaths In Assam’s Detention Centres Magnify Fallacy Of NRC Exercise, But Who Cares’, *Outlook* (online, 4 November 2019) <<https://www.outlookindia.com/magazine/story/india-news-twenty-six-deaths-in-assams-detention-centres-magnify-fallacy-of-nrc-exercise-but-who-cares/302284>>.

⁵⁹ Hannah Arendt, *The Origins of Totalitarianism* (Meridian Books, 1958) 296–7.

population by the Government of Bangladesh, the detention centre will become and remain the site of violence and death for many.