

DESIGNED TO EXCLUDE

HOW INDIA'S COURTS ARE ALLOWING FOREIGNERS
TRIBUNALS TO RENDER PEOPLE STATELESS IN ASSAM

INDIA

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Cover Photo: Khatija* who was declared a foreigner has no more money to pay her
legal fees to fight for her nationality.

Photos: Devraj Chaliha

A woman waiting outside a Foreigners Tribunal in Guwahati
with all her documents. © Amnesty International India

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INTRODUCTION

ENTRY RESTRICTED

FOREIGNERS TRIBUNAL (Court)
NO-3, AMINGAON
KAMRUP(RURAL), ASSAM

ENTRY
RESTRICTED

A Foreigners Tribunal in Amingaon. © Amnesty International India

In this briefing, Amnesty International India demonstrates how the Foreigners Tribunals commit grave human rights violations in Assam. Riddled with bias, prejudices and arbitrary decision-making, they pass vague orders rendering people stateless. The judiciary is complicit in perpetuating this exclusion and abuse. It also extensively delves into some of the key judgements passed by the Supreme Court of India and the Gauhati High Court that have entrenched discriminatory practices on ground and emboldened the Foreigners Tribunal to function in total disregard for fair trial standards, besides analysing 16 cases of persons who were arbitrarily deprived of their citizenship by the Foreigners Tribunals. It also provides a comparative analysis of the citizenship and immigration laws in India with international human rights law and norms.

“Large scale illegal migration from East Pakistan/Bangladesh over several decades has been altering the demographic complexion of this State. It poses a grave threat both to the identity of the Assamese people and to our national security. Successive governments at the Centre and in the state have not adequately met this challenge.”¹

This is an excerpt from a report prepared by the Governor of Assam in 1998. The report warned the President of India and demanded suitable action *“to avert the grave danger that has been building up for some time”*. The former governor says in the report, *“If not effectively checked, [Bangladeshis] may swamp the Assamese people and may sever the North-East land mass from the rest of India. This will lead to disastrous strategic and economic results”*.²

However, on a closer look, it is clear that the former governor gave very little evidence to prove that migration into Assam represented a threat to the national security. Even the evidence furnished was not based on any comprehensive or credible data. The report acknowledges this shortcoming.

“Unfortunately, today we have no census report on the basis of which we can accurately define the contours of trans-border movement. Thus, we have to rely on broad estimates of theatrical extrapolations to work out the dimension of illegal migration that has taken place from East Pakistan/Bangladesh”, it goes on to say.³

Why is this report important? Because in 2005, Sarbananda Sonowal - the then President of the All India Assam Student Union (AASU) and current Chief Minister of Assam filed a petition in the Supreme Court of India claiming that large-scale migration continues to take place in Assam putting the Assamese population at risk. It heavily drew from this report. The Supreme Court of India held that Assam is indeed facing an “external aggression and internal disturbance”, which if unchecked, will lead to a constitutional breakdown.⁴ This judgement changed the face of citizenship determination in India.

The highest court of India legitimized the one-dimensional equation of migration with national security as endorsed by the report and justified the use of repressive laws and policies in response. It paved the way for repurposing the Foreigners Tribunal, created through the pre-constitutional and colonial Foreigners Act 1946 and under the Foreigners (Tribunal) Order 1964, to determine the citizenship of the people in Assam in 21st century India. These Foreigners Tribunals will now decide whether more than 1.9 million people who were left out of the National Register of Citizens (NRC) in Assam on 31 August 2019 are Indians or not.⁵

More than 100 Foreigners Tribunals function in Assam currently, and the Government of Assam plans to set up 200 more. In the absence of any appellate body and a highly restricted criterion laid down by the Gauhati High Court for judicial review, the orders of the tribunals are final. This raises concerns because Foreigners Tribunals are vested with extraordinary powers. They do not observe appropriate procedural safeguards that flow from Article 21 of the Constitution of India. On the contrary, each Foreigners Tribunal is allowed to devise and follow its own procedure that may not hold the scrutiny of domestic and international human rights law.

The members of the Foreigners Tribunal are recruited on a contractual basis and trained for only four days. The modalities

of the training are unknown. The extension of their tenure is dependent on their ‘performance’. In practice, Amnesty International India has found that the Assam government evaluates their performance based on how many people the members declare to be foreigners and accordingly extends their tenure. Members who declare foreigners at a rate of less than 10% stand the risk of being axed. The manipulation of foreigners tribunals for political ends is also evidenced by the gradually deteriorating eligibility criteria for recruiting Tribunal members and the undue emphasis on “knowledge of Assam’s historical background giving rise to foreigner’s issues” instead of competence in the area of citizenship and immigration laws.

Further, inadequate guidelines for investigating the cases of doubtful nationality gives the Border Police and Election Commission of India a wide discretion in referring a resident of Assam to a Foreigners Tribunal. This discretion is often abused.

The reasons given for declaring someone a foreigner are vague and steeped in discrimination. Samina Bibi,⁶ who Amnesty International India interviewed for this briefing was declared a foreigner by the Foreigners Tribunal. One of the reasons given by the quasi-judicial body was that she could not remember the constituency where her grandfather cast his vote. Abu Bakkar Siddiqui, on the other hand was declared a foreigner because his grandfather’s name was spelled Afer Ali in one document and Afer Ali in another. The orders of the Foreigners Tribunals are divorced from the reality of documentation on ground and disregard the culture and practices of communities in India. Most importantly, lack of documents alone must not lead to deprivation of citizenship, especially in India, where maintaining uniform documentation has always been a great challenge, even for the state.

For the last decade and a half, Foreigners Tribunals have wreaked havoc in Assam. They have not been held accountable by the courts, the Government of India and the Government of Assam. There is a need for a legislative regime that provides all the fair trial guarantees, including the access to a fair hearing before a court or independent body and access to judicial review, the people of Assam and now the rest of India deserve and need.

In November 2019, the Union Home Minister, Amit Shah responding to a question in the Parliament of India announced a nationwide NRC, including Assam.⁷ Those left out of this nationwide NRC will approach the same Foreigners Tribunals to prove their citizenship.

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1. Report on Illegal Migration into Assam, Submitted to the President of India by the Governor of Assam, Lt. Gen. (Retd.) S.K. Sinha, D.O. No. GSAG.3/98/, 8 Nov. 1998
 2. Report on Illegal Migration into Assam, Submitted to the President of India by the Governor of Assam, Lt. Gen. (Retd.) S.K. Sinha, D.O. No. GSAG.3/98/, 8 Nov. 1998, 20.
 3. Report on Illegal Migration into Assam, Submitted to the President of India by the Governor of Assam, Lt. Gen. (Retd.) S.K. Sinha, D.O. No. GSAG.3/98/, 8 Nov. 1998, 7.
 4. Sarbananda Sonowal v. Union of India, Writ Petition (Civil) 131 of 2000, <https://indiankanoon.org/doc/907725/>
 5. Bikash Singh, Those left out of NRC will know reasons next month, The Economic Times, 21 Oct. 2019, <https://economictimes.indiatimes.com/news/politics-and-nation/those-left-out-of-nrc-will-know-reasons-next-month/articleshow/71681116.cms?from=mdr>
 6. Name changed due to reasons of privacy.
 7. NRC will be implemented nationwide: Amit Shah, The Tribune, 20 Nov. 2019, <https://www.tribuneindia.com/news/nation/nrc-will-be-implemented-nationwide-amit-shah/863582.html>
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Seema Saha* with the Foreigners Tribunal's order that declared her a foreigner. © Amnesty International India

GLOSSARY

Doubtful Voter – A group of voters disenfranchised by the Election Commission of India in 1997.

Foreigner – A person who is not a citizen of India.

Gaon Burah – Village Headman appointed under the Assam Frontier (Administration of Justice) Regulations of 1945. They are responsible for all the development and law and order related duties in the village.

Gaon Panchayat – Self-governance body constituted under Section 5 of the Assam Panchayat Act, 1994 at the village level.

Irregular Immigrant – A person who has entered into India without a valid passport or valid document or has remained beyond the permitted time in India

Jamabandi - Revenue record in the form of a register consisting the details of village land owners and cultivators.

National Register of Citizens – A register maintained by the Government of India containing the details of Indian citizens in Assam under Rule 4A of the Schedule of the Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003.

OP – This stands for Opposite Party. A person who appears before a Foreigners Tribunal claiming to be an Indian citizen.

THE ASSAM CITIZENSHIP TIMELINE

1950

The Parliament of India passes Immigrants (Expulsion from Assam) Act. The Act allows authorities in Assam to expel immigrants whose entry and stay is *“detrimental to the interests of the general public of India or of any section thereof or of any Scheduled Tribe in Assam”*.

1950

The Prime Minister of India, Jawaharlal Nehru and the Prime Minister of Pakistan, Liaquat Ali Khan sign the Liaquat–Nehru Pact (or the Delhi Pact). The bilateral treaty guarantees the rights of minorities, including citizenship, irrespective of religion after the Partition of India in 1947.

1955

The Government of India passes the Citizenship Act.

1964

The Ministry of Home Affairs passes the Foreigners (Tribunal) Order under Section 3 of the Foreigners Act, 1946. Foreigners tribunals are created under Clause 2 of the Order in Assam.

1971

Bangladesh becomes a sovereign country after the War of Liberation.

1972

Meghalaya, Arunachal Pradesh and Mizoram are separated from Assam.

1985

The Government of India, the Government of Assam, AASU and AAGSP sign the Assam Accord in the presence of then Prime Minister, Rajiv Gandhi. It states, among other clauses, that foreigners who came to Assam on or after 25 March 1971 must be expelled.

1997-98

Election Commission of India conducts an intensive revision of the electoral rolls in Assam to identify non-citizens and detects 230,000 Doubtful or ‘D’ Voters.

2005

Supreme Court strikes down the IMDT Act holding it to be unconstitutional. Foreigners tribunals will now decide whether a person is a foreigner or not. The Government of India, Government of Assam and AASU decide to update the 1951 NRC.

2014

Supreme Court sets a period within which NRC should be completed.

2015

Updating of NRC process begins.

2017

Government of Assam publishes the first draft of NRC and excludes 19 million people out of 32.9 million applicants.



1957

The Government of India repeals the Immigrants (Expulsion from Assam) Act.

1962

Assam Police Border Organization is established to 'detect and deport' irregular foreigners.

1963

Nagaland is separated from Assam.

1979-85

Six-year-long Assam agitation is spearheaded by AASU and All Assam Gana Sangram Parishad (AAGSP) for 'detection, disenfranchisement and deportation' of foreigners.

1983

Violence breaks out in central part of Assam including Nellie and nearby villages. 1,800 people are killed. Unofficial data counts it to be somewhere between 3,000-5,000 dead.

1983

The Government of India passes the Illegal Migrants (Determination by Tribunals) Act to determine 'in a fair manner' whether a person is an irregular migrant for the Government of India to expel such a person from India. It applies to the whole of India but comes into force only in Assam.

2009

Assam Public Works (APW), an NGO, files a case in Supreme Court asking for the deletion of foreigners' name in electoral rolls and the updating of NRC.

2010

Pilot project starts in Chaygaon, Barpeta to update the NRC. Four killed in violence in Barpeta. Project shelved.

2013

Supreme Court takes up the APW petition, directs the Government of India and Government of Assam to begin the process for updating NRC under its oversight. NRC State Coordinator's office is set up.

2018

Government of Assam publishes second draft of NRC and excludes 4 million people.

August 2019

Government of Assam publishes final draft of NRC and excludes 1.9 million people.

November 2019

Minister of Home Affairs, Amit Shah says there will be a 'nation-wide' NRC, including Assam.





WHAT IS A FOREIGNERS TRIBUNAL?

A Foreigners Tribunal is a quasi-judicial body set up under the Foreigners (Tribunal) Order, 1964 to determine whether a person is a foreigner or not.⁸ In 1964, four foreigners tribunals were set up in Assam which were increased to nine by 1968.⁹ Since 2005, foreigners tribunals make the determination vis-à-vis Section 6A of the Citizenship Act, 1955 which codified a separate cut-off date for acquiring citizenship in Assam.¹⁰ Currently, 100 foreigners tribunals function across 33 districts of Assam.¹¹ The Government of Assam plans to set up 200 more.¹²

Foreigners Tribunals may receive cases through three channels:

1. **Border Police** - The Border Police, which may not be stationed at the border is empowered to refer a person it suspects to be a foreigner to a Foreigner Tribunal. All police stations across Assam have the presence of border police.
2. **Election Commission of India** - In 1997, the Election Commission of India undertook an intensive revision of the electoral rolls in Assam and marked over 230,000 people as Doubtful or 'D' voter.¹³ After the 2005 case of *Sarbananda Sonowal v. Union of India*¹⁴, all the cases were transferred to the Foreigners tribunals.
3. **National Register of Citizens** - On 31 August 2019, the National Register of Citizens, a Supreme Court-monitored bureaucratic exercise excluded more than 1.9 million people from its final list. After receiving the rejection orders, these people may appeal against their exclusion to the Foreigners tribunals, which would then have six months to give an opinion.

8. Clause 1, Foreigners (Tribunals) Order, 1964

9. White Paper on Foreigners, <https://cjp.org.in/wp-content/uploads/2018/10/White-Paper-On-Foreigners-Issue-20-10-2012.pdf>, 9.

10. See, Problematic Laws

11. 200 Additional Foreigners Tribunals in 33 Assam Districts: Govt, India Today, 27 Sept. 2019, <https://www.indiatoday.in/india/story/foreigners-tribunals-assam-nrc-1603811-2019-09-27>

12. 200 Additional Foreigners Tribunals in 33 Assam Districts: Govt, India Today, 27 Sept. 2019, <https://www.indiatoday.in/india/story/foreigners-tribunals-assam-nrc-1603811-2019-09-27>

13. White Paper on Foreigners, <https://cjp.org.in/wp-content/uploads/2018/10/White-Paper-On-Foreigners-Issue-20-10-2012.pdf>, 23.

14. 2005(5) SCC 665, <https://indiankanoon.org/doc/907725/>

COMPLICITY OF COURTS

In September 2019, Raveesh Kumar, the spokesperson of the Ministry of External Affairs, while laying out the future map of NRC in Assam said, “*All appeals and excluded cases will be examined by this tribunal i.e. a judicial process... Thereafter, anyone still aggrieved by any decision of being excluded will have the right to approach the High Court of Assam and then the Supreme Court*”.¹⁵

This does not instil confidence. Because, since 2005, the courts in India including the Supreme Court of India and Gauhati High Court have adopted and implemented a set of legislative measures with a clear goal in mind: to exclude people of Bengali-origin. They have achieved it by legitimizing the anti-immigrant, particularly the anti-Bengali immigrant rhetoric.

Amnesty International India believes that through their observations and decisions, both the courts have enabled state-sponsored machinery that arbitrarily deprives people of their most coveted right – the right to a nationality. In today’s Assam, the judiciary punishes and silences people on the strength and weakness of their identity documents, disregarding the circumstances of a flood-stricken Assam, the complexity of citizenship and shortcomings of documentation in India.

The judgments and decisions of the Supreme Court and High Court have severely weakened the separation of powers, consolidating judicial functions with the executive. In many cases, the courts have assumed the domain of the executive and passed orders. As a result, India stands at the brink of a statelessness crisis.

Holding governments accountable for the human rights abuses they commit has always been difficult. However, in this case, the judiciary has aided various governmental bodies in committing abuses with impunity.

In this section of the briefing, Amnesty International India analyses key judgments of the Supreme Court of India and Gauhati High Court to show a systematic pattern of entrenching discriminatory attitudes and practices on ground on one hand and overlooking the fair trial standards, on the other. Further, the section aims to demonstrate the complicity of the courts in peddling a narrative that looks at irregular migration from the singular lens of national security.

SUPREME COURT OF INDIA

SARBANANDA SONOWAL V. UNION OF INDIA, 2005

BACKGROUND

In 2005, the Supreme Court of India issued a judgment in the case of **Sarbananda Sonowal v. Union of India** that changed the face of citizenship determination in India.¹⁶

The current Chief Minister of Assam and then-President of AASU, Sarbananda Sonowal had filed a petition asking for the repeal of the Illegal Migrants (Determination by Tribunal) (IMDT) Act, 1983 and application of Foreigners Act, 1946 in Assam.¹⁷ Two years before the Assam Accord was signed, Government of India had enacted the IMDT Act to deal with the peculiar problem of irregular immigration in Assam.¹⁸

15. People excluded from NRC will enjoy all rights till they exhaust legal remedies: MEA, Business Today, 2 Sept. 2019, <https://www.businesstoday.in/current/economy-politics/people-excluded-from-nrc-will-enjoy-all-rights-till-they-exhaust-legal-remedies-mea/story/376705.html>

16. 2005(5) SCC 665, <https://indiankanoon.org/doc/907725/>

17. Article 32(1) of the Constitution of India provides for the right to move the Supreme Court by appropriate proceedings for the enforcement of the fundamental rights

18. <http://legislative.gov.in/sites/default/files/A1983-39.pdf>; However, the government has not provided any concrete data to substantiate the 'large-scale' nature of irregular migration in Assam. All the evidence has been either circumstantial or anecdotal.

In 1986, the central government amended the Citizenship Act to include Section 6A which divided the migrants coming to Assam into three categories: 1) those who came before 1 January 1966 2) those who came between 1 January 1966 and 25 March 1971 and 3) those who came after 25 March 1971.¹⁹ It declared the persons falling under the third category to be foreigners, ineligible to acquire Indian citizenship.

The aim of the IMDT Act was to determine whether a person is an irregular immigrant *vis-à-vis* Section 6A of the Citizenship Act. Contrary to the pre-constitutional and colonial Foreigners Act, 1946 that lays the burden of proof on the individual to show that he is not a foreigner, the IMDT Act required the state authorities to prove that an individual is not an Indian citizen.

Only a serving or retired District Judge or Additional District Judge could become a member of the Tribunal under the IMDT Act.²⁰ The procedure for referring a case to the Tribunal included vetting at multiple levels.²¹ In an event of an unfavourable opinion or difference of opinion between two members, an appellate tribunal was created for review of the opinion.²²

Sonowal claimed the IMDT Act was arbitrary and discriminated against the people of Assam. In a 44-page judgment, the Court repealed the IMDT Act for violating Article 14 and 355 of the Constitution of India. After the Act was struck down, the Foreigners Tribunal, created under the Foreigners Act, 1946 substituted the Tribunals under the IMDT Act for determining the allegations of doubtful citizenship in Assam. In doing so, the Supreme Court reversed the burden of proof and demanded the residents of Assam to produce adequate documents proving their Indian citizenship before the Foreigners Tribunals.

Holding the fair trial guarantees to be a barrier to 'detect' irregular migrants under the IMDT Act, the Supreme Court said:

"It is far easier to secure conviction of a person in a criminal trial where he may be awarded a capital punishment or imprisonment for life than to establish that a person is an illegal migrant on account of extremely difficult, cumbersome and time-consuming procedure laid down in the IMDT Act."

The Foreigners Act does not have an appellate body, does not give any guidance on referring a person to Foreigners Tribunal and has gradually diluted the eligibility criteria of Tribunal members. The Supreme Court preferred the quickness of Foreigner Tribunals to the fairness of the Tribunals under the IMDT Act. While the quickness of the Foreigners Tribunal has not led to more deportations, it has violated the human rights of residents of Assam declaring countless Indian citizens, stateless.²³

HOW DID THE SUPREME COURT EQUATE MIGRATION WITH 'EXTERNAL AGGRESSION'?

Article 355 is an 'emergency' provision laid down in Part XVIII of the Constitution.²⁴ It casts a duty upon the central government to protect the states against 'external aggression and internal disturbance'. The Court argued that by enacting the IMDT Act, which apparently failed to check irregular immigration, the Central Government failed in its duty to protect the citizens of Assam against 'external aggression and internal disturbance' warranting that the said legislation be repealed for being in violation of Article 355.

In the absence of any guidance given by the Constituent Assembly debates and previous case laws, the Court interpreted the term 'aggression' broadly, drawing interpretation from U.S., U.K. and international law. It argued that the word 'aggression' would include *"invasion of unarmed men in totally unmanageable proportion if it were to not only impair the economic and political well-being of the receiving victim State but to threaten its very existence."* The Court further relied on the 1931 report of C.S. Mulan, a Census Officer and the 1998 report of the former Governor of Assam, which claimed that irregular immigration was the primary cause for problems like insurgency and ethnic strife in Assam, sloppily linking irregular migration with external aggression. For all practical purposes, it equated migration with 'external aggression', and ruled that it has resulted in the constitutional breakdown in the state, setting a grossly wrong precedent.

Senior lawyers and civil society organisations in Assam have found the content of the reports of the former Governor of Assam and Census Officer used by the Supreme Court to repeal the IMDT Act to be questionable and biased. The Governor's report used xenophobic terms such as 'panic attack', 'demographic invasion', 'grave danger to our national security', 'illegal immigrant' and 'insurgency' for discriminating against people of Bengali-origin, both Muslims and Hindus.

Gautam Bhatia, an expert on the Constitution of India told Amnesty International India, *"It is a very self-serving judgement which departs from all principles the Supreme Court has followed in other cases. In addition, this has become the basis for everything that has followed. It has set the tone in terms of both rhetoric and legal doctrine to demonise immigration, to look down upon immigrants as a massive threat, to call it invasion and to justify all kinds of stringent measures. It departs from the principles of fairness."*²⁵

The Court also held that the Act fell short of the protection of equality afforded to every person before law under Article 14 of the Constitution. Comparing Foreigners Act, 1946 with the IMDT Act, the Court argued that under the IMDT Act, the irregular immigrants in Assam had far greater rights as compared to an irregular immigrant anywhere else in the country. It also observed that the IMDT Act did not have any rational nexus with the policy and object of the Act, which included expediting the process of identification and deportation of irregular immigrants. It completely disregarded the absolute lack of protection afforded to persons under the Foreigners Act, and held that it has been more effective in identifying and deporting foreigners than the IMDT Act.²⁶

Speaking to Amnesty International India, Sanjoy Hazarika, a senior journalist and International Director, Commonwealth Human Rights Initiative said, *"It is a flawed judgment. Supreme Court has always been a bulwark against authoritarian governments. However in this case, the Court acted, if not like an arm of the political executive but certainly with a similar approach. A challenge is overdue"*.²⁷

HOW THE JUDGMENT VIOLATES DOMESTIC LAW

According to constitutional experts, retired judges and human rights organisations in India, the judgment contravenes the landmark decision by the Supreme Court in the case of *S.R. Bommai v. Union of India*.²⁸ In *Bommai's* case, the Court had observed that Article 355 is not an independent source of power for the centre to interfere with the state's functioning but is in the nature of justification for measures to be adopted under Articles 356 and 357 of the Constitution, with limited judicial review available. Instead, the Court through the *Sonowal* judgment set a contradictory precedent where it could order the states to intervene in cases of some 'external aggression and internal disturbance' and even declare emergency in the state – which is clearly a domain of the executive branch of the government, particularly the President.

19. See, Problematic Laws

20. Section 5(2) of the IMDT Act, 1983.

21. Under Rule 4 of the Illegal Migrant (Determination by Tribunal) Rules, a Superintendent of Police or a Sub-Inspector of Police could call upon a person suspected to be irregular migrant to give particulars. However, the police officer had no power to compel the person to give the information sought. Under Rule 7, the Inquiry Officer was required to submit its report to the Screening Committee constituted under Rule 8, which consisted of the Sub-Divisional Officer and a Police Officer not below the rank of Deputy Superintendent of Police. Under Rule 8(2), the Screening Committee scrutinizes the information received from the Inquiry Officer and after considering the relevant materials made its recommendation to the Superintendent of Police as to whether the person mentioned in the report is or is not an 'illegal migrant'. It is only if the Screening Committee made its recommendation that the suspected person is an 'illegal migrant' that a reference could be made to the Tribunal under Rule 9.

22. Section 15 of the IMDT Act, 1983.

23. See, Foreigners Tribunals and their Impact On The Ground

24. "It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of this Constitution.", <https://indiankanoon.org/doc/490234/>

25. Telephone Interview with Gautam Bhatia, 20 October 2019, Bengaluru, India

26. "It is further averred that since the enforcement of the IMDT Act only 1494 illegal migrants had been deported from Assam up to 30th June, 2001. In contrast 489,046 number of Bangladeshi nationals had been actually deported under the Foreigners Act, 1946 from the State of West Bengal between 1983 and November 1998."

27. Interview with Sanjoy Hazarika, 8 November 2019, Delhi, India

28. AIR 1994 SC 1918, <https://indiankanoon.org/doc/60799/>

Speaking to Amnesty International India, retired Justice of the Supreme Court of India and former Chief Justice of the Gauhati High Court, **Madan B. Lokur** said: *“The inference has to be drawn assuming the facts are correct and we have to proceed accordingly. They may be exaggerated but you may still have to proceed on that basis. As far as the inference drawn from the factual position laid down by the report of the then Assam’s Governor is concerned, to say that there is external aggression because there was a large influx of persons coming from Bangladesh – I do not see how this can be called an ‘aggression’. The inference drawn of external aggression is not necessarily correct.”*²⁹

He further added: *“An aggression does not take place overnight. In a situation like this, it takes place over a period of time. It is protracted. What was the Government of India or State Government doing when it was facing the aggression? Was it not supposed to prevent the aggression, assuming it was indeed an external aggression? It is the obligation of the Government to prevent an external aggression. Tomorrow, hypothetically, an enemy country decides to conduct an external aggression into India – can the Government of India say that let it continue for two-three months? And we will see after two-three months. Therefore, the inferences are wrong.”*³⁰

This judgment has had far-reaching consequences for the residents of Assam. It has laid down the foundation for subsequent judgments delivered by the Supreme Court of India and Gauhati High Court on the issue of irregular migration, particularly restricting the rights of residents of Assam, inch by inch.

To illustrate, in the 2014 case of *Assam Sanhmita Mahasangha v. Union of India*,³¹ the Supreme Court heavily relied on the *Sonowal* judgment, particularly the report of former Governor of Assam to legitimize the urgency of updating the National Register of Citizens (NRC). It used statements such as ‘massive influx of illegal migrants’ and ‘invasion of a vast horde of land-hungry immigrants mostly Muslims from East Bengal’. The judiciary-backed-bureaucratic exercise of updating the NRC culminated in a ‘final draft’ on 31 August 2019, which excluded over 1.9 million people of Assam, about 6% of the state’s population.³²

HOW THE JUDGMENT VIOLATES INTERNATIONAL HUMAN RIGHTS LAW

While states have a right to establish principles about how nationality is acquired, renounced or lost, they must do so within the framework of international human rights law. In particular, domestic laws and practices must not violate the right to non-discrimination and the obligation to prevent statelessness.³³

The right to a nationality is a human right enshrined in several international human rights instruments to which India is a party.³⁴ International law imposes certain limits on what states may lawfully do, particularly if their actions could result in statelessness. The right to a nationality includes the right not to be arbitrarily deprived of one’s nationality.³⁵ In order to respect this right, measures leading to deprivation of nationality must meet certain conditions. These include: being in conformity with domestic law; serving a legitimate purpose that is consistent with international law and, in particular, the objectives of international human rights law; being the least intrusive instrument to achieve the desired result; and being proportional to the interest to be protected.³⁶ The notion of arbitrariness includes not only acts that are against the law but, more broadly, elements of inappropriateness, injustice and lack of predictability.³⁷

The decision of the Supreme Court of India was not consistent with these principles of legality and proportionality. It made Foreigners Tribunal the primary and only means of depriving people of their nationality, which has resulted in a large number of people being arbitrarily deprived of nationality and subsequently exposed to a situation of statelessness in Assam.

Further, in cases where deprivation of nationality may lead to statelessness, international experts agree that the burden of proving that the individual will not be rendered stateless to remain with the State.³⁸ The United Nations Special Rapporteurs on freedom of religion or belief; on minority and; on contemporary forms of racism, racial discrimination, xenophobia and related intolerance have also stressed that the burden of proof

should lie with the State and not with the individual, considering the 'discriminative and arbitrary nature of the current legal system' in Assam.³⁹

Those stripped of their citizenship by the Foreigners Tribunals in Assam owing to the Sonowal judgment, continue to live in a perpetual state of statelessness without any protection of law.⁴⁰ To illustrate, according to the data produced before the Parliament, over 117,000 people have been declared foreigners by the Foreigners Tribunal in Assam up to 31 March 2019, of whom only four have been deported until now. About 1,005 remain jailed across six detention centres, which share the premises with the adult prisons in Assam, according to the data produced before the Assam Legislative Assembly on 29 July 2019.⁴¹ The rest live deprived of all rights guaranteed to a citizen of India, within India.

ASSAM PUBLIC WORKS V. UNION OF INDIA, 2019

In its August 2019 decision in the case of *Assam Public Works v. Union of India*⁴², drawing from Section 3(1)(c)⁴³ of the Citizenship Act 1955, the Supreme Court extended the deprivation of citizenship to the children of doubtful voters, those declared to be foreigners and whose cases were pending before the Foreigners Tribunal. The section excludes a child born to an 'illegal immigrant' parent from acquiring Indian citizenship. Specifically, it held that for people born after 3 December 2004, if one of their parents belonged to one of these three categories, they might not be included in the NRC, notwithstanding the status of the other parent.

The decision of the Supreme Court is inconsistent with international law, besides being removed from the laws on ground. The Supreme Court applied its interpretation retroactively when it ruled those children of doubtful voters; those declared to be foreigners and those whose cases were pending before the Foreigners Tribunal, born after 3 December 2004, should be excluded from the National Register of Citizens.

The principle of non-retroactivity requires that the sanction must have been known (or it must be possible for it to be known) before the act or omission occurs in order for punishment for a violation of the law to be lawful.⁴⁴ Moreover, this effectively means that the children of an irregular migrant could no longer access Indian citizenship by virtue of being born to their parents. India, under the Convention on the Rights of the Child has an obligation to take every appropriate measure to ensure that no children are left stateless.⁴⁵ This judgment not only severely compromises the rights of the children born in India but also the country's human rights record.

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29. Interview with retired Justice Madan B. Lokur, 2 November 2019, New Delhi, India
 30. Interview with retired Justice Madan B. Lokur, 2 November 2019, New Delhi, India
 31. Writ Petition (Civil) No. 562 of 2012, <https://indiankanoon.org/doc/50798357/>
 32. BBC, Assam NRC: What next for 1.9 million 'stateless' Indians?, 31 Aug 2019, <https://www.bbc.com/news/world-asia-india-49520593>
 33. Article 1(1) of the Convention on the Reduction of Statelessness; Article 29 of the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families; Article 7(1) of the Convention on the Rights of the Child, and Article 24(3) of the International Covenant on Civil and Political Rights.
 34. Article 15 of the Universal Declaration of Human Rights With respect to children, in particular, the right to a nationality is enshrined in Article 7(1) of the Convention on the Rights of the Child and Article 24(3) of the International Covenant on Civil and Political Rights.
 35. Article 15 of the Universal Declaration of Human Rights.
 36. Human Rights and Arbitrary Deprivation of Nationality, A/HRC/25/28, Report of the Secretary General, para 4.
 37. Consider, for example, the contribution from UNHCR noting that "arbitrariness" includes elements of "inappropriateness, injustice and lack of predictability", A/HRC/10/34, para. 49
 38. Human Rights and Arbitrary Deprivation of Nationality, A/HRC/25/28, Report of the Secretary General, para 5.
 39. UN experts: Risk of statelessness for millions and instability in Assam, India, 3 July 2019, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24781&LangID=E>
 40. Government Affidavit submitted in Harsh Mander v. Union of India, Writ Petition(Civil) 1045 of 2018.
 41. <https://m.economictimes.com/news/politics-and-nation/1-17-lakh-people-declared-as-foreigners-by-tribunals-in-assam/articleshow/70244101.cms>
 42. Writ Petition (Civil) 274 of 2009
 43. Except as provided in sub-section (2), every person born in India on or after the commencement of the Citizenship (Amendment) Act, 2003 (6 of 2004), where i) both of his parents are citizens of India; or ii) one of whose parents is a citizen of India and the other is not an illegal migrant at the time of his birth, shall be a citizen of India by birth
 44. Report of the Independent Expert on Minority Issues, Gay McDougal. A/HRC/7/23, 28 February 2008, para 79, <https://www.refworld.org/docid/47d685ea2.html>
 45. Article 7 of the Convention on the Rights of the Child
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It also disregards the international law in so far as the independent nationality rights of children are concerned which protect the child's right 'to preserve his or her identity, including nationality'.⁴⁶ It explicitly prohibits the loss or deprivation of the nationality to dependents if statelessness would result, as in the case of people declared foreigners by the Foreigners Tribunals in Assam or marked as Doubtful Voters by the Election Commission of India.

Most importantly, the Foreigners Tribunals, under the Foreigners (Tribunal) Order 1964, are only mandated to determine whether a person is a foreigner or not under Section 2 of the Foreigners Act and not whether a person is an 'illegal immigrant' as defined under Section 2 (b) of the Citizenship Act. Therefore, attributing "illegality" to a person before a proper determination before a competent and independent body is in violation of a person's right to a fair trial, while blurring the mandates of two separate legislations to exclude people is absolutely unwarranted.

GAUHATI HIGH COURT

Amnesty International India analysed the key judgments that have defined the functioning of the Foreigners Tribunals in Assam. It is evident that, through its decisions, the highest court in Assam has enabled the violation of fair trial standards, such as allowing multiple litigation, the reversal of the burden of proof on the person who stands to be deprived of his/her citizenship, and extension of deprivation of nationality from one family member to another family member, to name the most egregious.

RESTRICTED RIGHT TO APPEAL

In the 2013 case of *State of Assam v. Moslem Mondal & Ors.*⁴⁷, the Gauhati High Court restricted the scope of judicial review with regard to the opinions of the Foreigners Tribunals. Despite the absence of an appellate tribunal to review the opinions of the Foreigners Tribunal, the High Court laid down that its writ jurisdiction, particularly the writ of certiorari can only be invoked in cases involving jurisdictional errors or when the Tribunal violates the principle of natural justice.⁴⁸ It also refused to review the finding of facts reached by the Tribunals, unless there is an error of law apparent on the face of the record. Therefore, the petitioners are left with a very narrow window for relief before the High Court.

The right to appeal is an essential element of a fair trial, aiming to ensure that a decision resulting from prejudicial errors of law or fact, or breaches of the accused's rights, does not become final.⁴⁹ Specifically, restricting nationality decisions to the exclusive competence of the executive, raises due process concerns as this leaves people more vulnerable to an abusive application of law.⁵⁰ International law also requires the state to suspend the effects of the decision, such that the individual continues to enjoy their nationality and related right until such time as the appeal has been settled.⁵¹ However, such is not the case in Assam.

Retired justice of the Supreme Court of India and former Chief Justice of the Gauhati High Court, Madan B. Lokur told Amnesty International India, "*Foreigners Tribunal in India are the last fact-finding authority. The Income Tax Appellate tribunal, for instance has two authorities under it to scrutinize the matter, then the Income Tax Officer, the Appellate Authority and then finally the Tribunal. Therefore, in that sense, while the Tribunal technically becomes the first authority, there is a lot of scrutiny that has already taken place before it reaches the Tribunal. However, so far as the Foreigners Tribunal are concerned, an authority gives you a notice and on the basis of that notice one goes to the tribunal. There is no adjudication before that. The Border Police, for instance, does not say that it has come to a definite conclusion that a particular person is not an Indian citizen based on the assessment of the following documents and facts. If it said so, a person could file an appeal before the Tribunal and say the findings are incorrect, and the determination could take place. But as the procedure stands right now, the first determination of a fact comes before the Foreigners Tribunal and against that there is no appeal. Now, if a person approaches the High Court in the absence of an appellate body, and the High Court says that it must be bound by the finding of the facts by the Foreigners Tribunal is unfair.*"⁵²

Understanding the significance of the right to a fair trial, the High Court in the *Moslem Mondal* case laid down certain guidelines for the Border Police to follow while investigating a person for doubtful citizenship. Notwithstanding the non-criminal nature of the proceedings, it observed that fair investigation is a fundamental right of a person under Article 21 of the Constitution and therefore, a person must be given ample opportunity by the investigating agency to demonstrate that s/he is not a foreigner at the investigating stage itself, before making a reference to the Tribunal.

However, on the ground, the High Court guidelines are not followed. On condition of anonymity, a lawyer practicing before the Foreigners Tribunal told Amnesty International India: “*There is no application of mind by the investigating authorities. In most cases, the reasons for making the reference are not properly explained. In some cases, the Border Police hands over blank inquiry reports with no grounds mentioned. It is common practice for the referral authorities to mechanically refer the cases to the Tribunal.*”⁵³

This lack of application of mind by the investigating authorities and the mechanical nature of orders passed by the Tribunals is apparent by the sheer magnitude of *ex-parte* orders, i.e. in the absence of the persons accused of doubtful citizenship passed by the Foreigners Tribunals. According to data placed by the Minister of State in the Ministry of Home Affairs in the Parliament, 63,959 people were declared foreigners by the Foreigners Tribunals between 1985 and February 2019 through *ex-parte* orders.⁵⁴

In the case of *Idrish Ali v. Union of India & Ors.*⁵⁵, the Gauhati High Court held that the combined reading of Court’s judgment in the *State of Assam v. Moslem Mondal*, two notifications of the Ministry of Home Affairs dated 1958 and 1976 and Section 6A of the Citizenship Act 1955 entitles the Border Police to summarily inquire into the citizenship of a person.⁵⁶ Although the initial burden lies on the State to establish that the grounds on which it claims the person to be a foreigner, including adequate evidence to file a reference against a person before the Foreigners Tribunal, such deliberation has been rendered absolutely redundant by the successive orders of the High Court including in *Idrish Ali*.⁵⁷

GENDER DISCRIMINATION

In the 2017 case of *Manowara Bewa v. Union of India & Ors.*⁵⁸, the Gauhati High Court held that the certificates issued by the secretary of *Gaon panchayats* are of private nature, do not have statutory authority and cannot be accepted as public documents under the Citizenship (Registration of Citizens and issue of National Identity Cards) Rules, 2003. The Court, while passing this judgment not only failed to consider the particular vulnerability of married women who migrate from their paternal homes to their marital homes at a young age but also overlooked the fact that most married women have documents proving their relationship with their respective husbands, but struggle to establish legacy to their parents. As a result, many who are married before the minimum age of 18 are compelled to rely on the

46. Human Rights and Arbitrary Deprivation of Nationality, A/HRC/25/28, Report of the Secretary General, para 24

47. 2013 (1) GLT (FB) 809

48. A writ or order by which a higher court reviews a case tried in a lower court.

49. Article 14(5) of the International Covenant on Civil and Political Rights

50. Human Rights and Arbitrary Deprivation of Nationality, A/HRC/25/28, Report of the Secretary General, para 32.

51. Human Rights and Arbitrary Deprivation of Nationality, A/HRC/25/28, Report of the Secretary General, para 33.

52. Interview with retired Justice Madan B. Lokur, 2 November 2019, New Delhi, India

53. Interview on 4 November 2019, Guwahati, Assam

54. Unstarred Question No. 1724, Answered on 2 July 2019, Government of India, Ministry of Home Affairs, <http://164.100.24.220/loksabhaquestions/annex/171/AU1724.pdf>

55. Writ Petition (Civil) No. 4989/2016, Gauhati High Court

56. Two notifications issued by the Ministry of Home Affairs, one dated 19.04.1958 and the other dated 17.02.1976, entrusted the Government of Assam, Superintendents of Police and Deputy Commissioners (In-charge of Police) to make orders of the nature specified in Sections 3(2)(a), (b), (c) and (cc), (e) and (f) after obtaining opinion from the Foreigners Tribunals by making reference under Paragraph 2(1) of the Foreigners (Tribunals) Orders 1964. Amnesty International India tried to secure the copies of these notifications by filing an application under Section 6(3) of the Right to Information Act, 2005. In the response received on 30 October 2019, Pramod Kumar, who holds the dual position of Director (Foreigners) and Central Public Information Officer in the Ministry of Home Affairs said “as the information sought is more than 20 years old, therefore, the same is exempt from disclosure under Section 6(3) of the R.T.I. Act, 2005”.

57. Writ Petition (Civil) No. 4989/2016, Gauhati High Court

58. Writ Petition (Civil) 2634 of 2016, Gauhati High Court

certificates issued by the *Gaon Panchayats* which authorize their permanent residence at a place, mostly that of the marital home. This has adversely affected the determination of a married woman's right to nationality in Assam.

It is worth noting that the Court leaned on *Sonowal and Assam Sanmilita* cases to invalidate certificates issued by secretaries of *Gaon panchayats* and validate the rhetoric surrounding migration. It used the statement of the Minister of Home Affairs which said that there are an estimated 5 million 'illegal Bangladeshi migrants' in Assam and loosely co-related it with the 4.6 million certificates issued by the Gaon Panchayat secretaries so far in the state to cast doubt over the legitimacy and misuse of the certificates. The discriminatory animus of the Court can be understood by its following statement:

"The figure is not only alarming but also has an uncanny resemblance to the estimated number of foreigners as per statement of Union Minister of State for Home Affairs made before the Parliament."

It indicates that the Gauhati High Court put the amorphous threat to national security first before the best interests of public, particularly women.

ACCESS TO JUSTICE

In the 2019 case of *Shariful Islam v. Union of India & Ors.*⁵⁹, the Gauhati High Court held that the proceedings from one Foreigners Tribunal cannot be transferred to another Foreigners Tribunal, which may be closer to the residence of the person suspected of doubtful citizenship because Foreigners Tribunals are quasi-judicial bodies and not civil courts. It reasoned that the benefits of Civil Procedure Code would not apply to Foreigners Tribunals due to its quasi-judicial nature.⁶⁰ The Gauhati High Court also ignored previous long-standing authoritative legal interpretations when it decided to take away this protection from the people appearing before Foreigners Tribunals.⁶¹

This decision does not only place a huge barrier to people's access to justice but also an insurmountable obstacle in people's path to fulfil their legal burden of proving their Indian citizenship.⁶² It also highlights the larger problem of Foreigners Tribunals being given an unlimited scope to determine their own procedures, even if it comes at the stake of undermining basic human rights guarantees of the people.

In the 2017 case of *Aktara Khatun @Aktara Begum v. Union of India & Ors*⁶³, the Gauhati High Court held that once the Foreigners Tribunal declare a person to be a foreigner, it has the power to direct the Border Police to initiate an inquiry into the citizenship status of such person's other family members. This effectively extends the deprivation of nationality of a person to his parents, spouse, siblings and children, raising concerns of mass statelessness, which is in complete contravention to India's obligation under the Convention on the Rights of the Child and International Covenant on Civil and Political Rights.⁶⁴ However, this process is not implemented in reverse, i.e. if a person has been declared Indian, his/her family is not granted citizenship, by way of extension.

In the 2018 case of *Amina Khatun v. Union of India*⁶⁵, the Gauhati High Court held that the principle of *res judicata* should not apply to the Foreigner Tribunal proceedings since a proceeding under the Foreigners Act and the Foreigners (Tribunals) Order is not of civil nature. The principle of *res judicata* gives finality to judicial decisions, prevents duplication and protects a person from multiple litigation arising from the same action. It states that once a question of fact or question of law has been decided between two parties, a future suit or proceeding between the same parties shall not be allowed.⁶⁶ In India, it is codified in Section 11 of the Civil Procedure Code in India.⁶⁷ In citizenship determination cases, this principle is of paramount importance. Application of *res judicata* upholds the security of citizenship and prevents non-discrimination and harassment.

The judgment of the Gauhati High Court particularly goes against the principle of legality, according to which people must know how the laws limit their conduct, and they must be precise, so that people can regulate their conduct accordingly. It places people of Assam in a continuing cycle of alienation and marginalization down the generations where those once declared as citizens can again be compelled to appear before the court for adjudication of their citizenship.

While the decision of the Gauhati High Court was repealed in the case of *Abdul Kuddus v. Union of India*⁶⁹ by the Supreme Court of India, Amnesty International India has found that the benefits have not yet translated on the ground.⁷⁰

Speaking to Amnesty International India, Sanjay Hegde, a senior Supreme Court lawyer said:

“The constitutional courts have been discretionary in their relief. There have been judges who have looked at this humanely and there are judges who have treated this as mere pieces of paper and have no sympathy. Consequently, they treat the tribunals as the courts of first and last resort and refuse to see any major glitch in their procedure. It is in only in the case of gross violations that the courts will intervene. It is very easy for constitutional courts to shut their eyes to the facts of each case and remember that behind the paper lies a human being who is at the risk of losing their nationality because they did not have any documents. The entire perspective emanates from a migrant-unfriendly culture bordering on xenophobia and a desire to keep this people from normal human existence.”⁷¹

PROBLEMATIC LAWS

The Constitution of India guarantees the right to life and liberty to all persons notwithstanding their citizenship and immigration status.⁷² The Central Government, as provided under the Indian Constitution governs the subject of ‘foreigners’ and ‘citizenship’.⁷³ As a result, it has the power to regulate the entry, stay and exit of foreigners in the country and determine who is and who is not an Indian citizen. However, over time the central government has delegated many of its power to state governments, such as issuing exit visas, arresting and investigating cases against foreigners and even determining who is an Indian citizen in the case of Assam.

India, unlike other countries does not have a consolidated immigration legislation and draws guidance from various laws in place such as Passport Act 1967, Foreigners Act 1946, Foreigners (Tribunal) Order 1964, Registration of Foreigners Act 1939 and Citizenship Act 1955, to name the most significant. The inter-dependence of the laws, either accidental or deliberate has resulted in a complex regime,

59. Writ Petition (Civil) 2780 of 2019, Gauhati High Court

60. Section 24 of Civil Procedure Code

61. Anita Khushwa v. Pushpa Sadan, 2016(7) SCALE 235, The Supreme Court of India held that access to justice flows from both Article 21 and 14 of the Constitution of India (which applies to not just citizens but also foreigners). It further held that of the four core elements of access to justice, one is the adjudicatory mechanism provided must be reasonably accessible in terms of distance.

62. “In many cases, almost all the residents of villages are being summoned at short notice (24 to 48 hours) to appear before the [Foreigner Tribunals], situated at distant places, in many cases they are 200 to 300 miles away,” Faizan Mustafa, Kangaroo Tribunals: Foreigners’ Tribunals Almost Another Arm of BJP Government in Assam, Indian Express, 8 Oct 2019, <https://indianexpress.com/article/opinion/columns/supreme-court-foreigners-tribunals-assam-nrc-6058158/>

63. Writ Petition (Civil) 260 of 2017, Gauhati High Court

64. Article 24 of the International Covenant on Civil and Political Rights and Article 7 of the Convention on the Rights of the Child

65. Writ Petition (Civil) 7339 of 2019, Gauhati High Court

66. Satyadhan Ghosal v. Deorjin Debi, AIR 1960 SC 941, <https://indiankanoon.org/doc/655045/>

67. “No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

68. Article 9(1) of the International Covenant on Civil and Political Rights

69. Special Leave Petition (Civil) 23127 of 2018, <https://indiankanoon.org/doc/34077895/>

70. See, Foreigners Tribunals and their Impact On The Ground

71. Interview with Sanjay Hegde, 7 November 2019, Delhi, India

72. Article 21 of Constitution of India

73. List 1, Seventh Schedule, Constitution of India

peculiar to each state for not just determining who is a foreigner but also an Indian citizen. Unfounded perceptions and unverified data on migration have heavily influenced the citizenship laws of the country, especially in Assam.

This section details the laws that exist in India and the prescriptive approach of the country to foreigners, its shortcomings and features that overlook and perpetuate the vulnerabilities of both the foreigners, including protection-seekers and Indian citizens, at the same time.

CITIZENSHIP ACT, 1955

In modern societies, citizenship is the most fundamental right of every individual, often called the “right to have rights”.⁷⁴ It is a right that unlocks access to other rights and privileges, such as education, healthcare, freedom of movement etc. Losing one’s citizenship means a social death.⁷⁵ Therefore, deprivation of citizenship must follow the most rigorous procedures available.

Yet, the leading legislation on citizenship in India, the Citizenship Act does not provide such a procedure. By power vested under Article 11 of the Constitution of India to make laws for acquisition and termination of citizenship, the Citizenship Act was enacted in 1955.⁷⁶ This Act, along with the Constitution, elaborates on the question of acquiring citizenship in India. The country allows for acquisition of citizenship through birth, descent, registration, naturalization, and incorporation of territory.⁷⁷

In unfolding the discourse on the issue of citizenship in India, three landmark developments may be identified.⁷⁸ The first development concerned the partition of India and the resultant movement of millions of people from the newly created state of Pakistan into India.⁷⁹ The second landmark development was the 1986 amendment in the Act, set against the serious turmoil in Assam politics.⁸⁰ Finally, the third landmark development was the 2003 amendment to the same Citizenship Act granting citizenship to persons of Indian origin living in select foreign countries.⁸¹ Over the years, citizenship in India has seen a tectonic shift from *jus soli*, i.e. birth-based citizenship to *jus sanguinis*, i.e. descent-based citizenship.⁸²

The briefing specifically analyses the consequences of the 1986 amendment. The issue of citizenship became complicated as the central government was called upon to deal with the agitation against “foreigners” that rocked Assam politics in the late 1970s and early 1980s. This raised the question: whether citizenship should have a pan-Indian application, or it could be state-specific as well. Accordingly, in 1986, the Citizenship Act of 1955 was amended by adding Section 6A to the legislation. In wake of the commonly perceived threat of irregular immigration from Bangladesh, the amendment created three categories, applicable only to Assam, namely:

1. Those who came into the state before 1966 were considered Indian citizens;
2. Those who came into the state between 1966 and 25 March 1971 were to be taken off the electoral rolls, and regularized after ten years; and
3. Those who came into the state on or after 25 March 1971 were to be “detected” and expelled in accordance with law.

While constitutionality of Section 6A is still being debated in the Supreme Court of India, the regime of 'detecting, detaining or deporting foreigners' is being actively carried out in Assam. The procedure of such detection and deportation is not laid down in the Citizenship Act. Instead, this procedure is drawn from a separate legislation that deals with “foreigners” in India called the Foreigners Act, 1946.

Using the foreigners legislation to determine the citizenship of long-term residents of Assam, who may have voted in general and state elections, hold passports or other form of identity documents, possess property and have served the government in various positions violates their basic due process rights under the Constitution of India.

Further, the provisions of Citizenship Act fall short of preventing statelessness. One of the ways of acquiring citizenship under the Citizenship Act, 1955 is by birth in India, if one of the parents is a citizen of India, while the other is not an irregular migrant.⁸³ The Citizenship Act falls short of encompassing the position of a child born in the territory of India, where both parents may not be citizens of India or either of the parents may be without a nationality. Moreover, the present provisions of the Citizenship Act do not provide nationality to children born in India who would otherwise be stateless.

The legislation also does not lay down any procedure or provision for ensuring that persons who are deprived of their nationality do not become stateless. It leaves in limbo the nationality of persons who were found to have entered India after 25th March 1971. Such 'foreigners' continue to be detected, deleted from electoral roll and expelled. The provisions governing such persons also does not provide for determination of nationality of such persons, before deporting them to a country which may or may not accept them or naturalize them as citizens, thus putting them at the risk of becoming stateless.

In 2016, the Bharatiya Janata Party-led ruling government introduced the Citizenship (Amendment) Bill.⁸⁴ It extends Indian citizenship to irregular immigrants who are Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan, through naturalization.⁸⁵ Further, it has drastically lowered the minimum years of residence required for naturalization in India from 11 years to 6 years for these groups. By categorically excluding Muslims from its ambit and making religion a yardstick, the Government of India has communalized the acquisition of citizenship in India. In the wake of a nationwide NRC, this not only pushes the Muslim community further to the margins, it also leaves out many groups who sought refuge in India decades ago but continue to be treated as migrants, such as the Sri Lankan Tamils. It also excludes other persecuted communities such as the Ahmediya Muslims of Pakistan and Rohingya Muslims of Myanmar.

The Bill was referred to a Joint Parliamentary Committee in August 2016 which submitted its report in January 2019. The Bill was passed by Lok Sabha (lower house of the Parliament) during the same time.⁸⁶ However, it led to protests in Assam and other states in the north-eastern part of India for being migrant-friendly.⁸⁷

It is slated to be heard in the ongoing session of the Rajya Sabha (upper house of the Parliament).⁸⁸

74. Hannah Arendt, *The Origins of Totalitarianism*, Schocken Books, 376

75. Amnesty International, *Arbitrary Deprivation of Citizenship*, Seminar Held on 31 Oct 2019, <https://www.amnesty.org/download/Documents/POL4073492017ENGLISH.pdf>, 8

76. *The Citizenship Act, 1955* (57 of 1955)

77. Section 3, 4, 5 and 6 of the *Citizenship Act, 1955*

78. *Mapping Citizenship In India*, Anupama Roy; See also, Partha S Ghosh, *The Citizenship Discourse in India*, *Economic and Political Weekly*, Vol. 46, No. 11, March 2011, 28-30

79. *Mapping Citizenship In India*, Anupama Roy; See also, Partha S Ghosh, *The Citizenship Discourse in India*, *Economic and Political Weekly*, Vol. 46, No. 11, March 2011, 28-30.

80. *Mapping Citizenship In India*, Anupama Roy; See also, Partha S Ghosh, *The Citizenship Discourse in India*, *Economic and Political Weekly*, Vol. 46, No. 11, March 2011, 28-30.

81. *Mapping Citizenship In India*, Anupama Roy; See also, Partha S Ghosh, *The Citizenship Discourse in India*, *Economic and Political Weekly*, Vol. 46, No. 11, March 2011, 28-30.

82. Niraja Gopal Jayal, *Faith-Based Citizenship, The Dangerous Path India is Choosing*, *The India Forum*, 13 Nov. 2019, <https://www.theindiaforum.in/article/faith-criterion-citizenship>

83. Section 3(1)(c) of the *Citizenship Act, 1955*

84. *The Citizenship (Amendment) Bill, 2016, Highlights of the Bill*, PRS Legislative Research, <https://www.prsindia.org/billtrack/the-citizenship-amendment-bill-2016-4348>

85. *The Citizenship (Amendment) Bill, 2016, Highlights of the Bill*, PRS Legislative Research, <https://www.prsindia.org/billtrack/the-citizenship-amendment-bill-2016-4348>; Section 6

86. *The Citizenship (Amendment) Bill, 2016, Highlights of the Bill*, PRS Legislative Research, <https://www.prsindia.org/billtrack/the-citizenship-amendment-bill-2016-4348>

87. *India Citizenship Amendment Bill dropped amid protests*, BBC, 13 Feb. 2019, <https://www.bbc.com/news/world-asia-india-47226858>

88. Poulomi Saha, *Parliament Winter Session begins today: From Citizenship Bill to slowdown, what's in store*, 18 Nov. 2019, <https://www.indiatoday.in/india/story/parliament-winter-session-begins-today-from-citizenship-bill-to-slowdown-what-s-in-store-1619939-2019-11-18>

FOREIGNERS ACT, 1946

Setting the groundwork for treatment of foreigners in the country, this colonial legislation defines who constitutes a foreigner, and operationalises a regime for their interface with the Indian territory. It explicitly entitles the Central Government to pass orders for prohibiting, regulating or restricting the entry, departure, presence or continued presence of either a group of or all foreigners. The law does not make any recognition or special provisions for protection-seekers, recreational travellers, economic migrants, irregular migrants and inadvertent border crossers as separate classes of foreigners. It clubs them under the label of “foreigner” who is defined “as a person who is not a citizen of India”.⁸⁹ Therefore, this legislation, as its name and title indicate, applies only to foreigners and ideally must not have application to a person who alleges to be a citizen of India, or has been treated as a citizen of India.

Contrary to the principles of customary international law, the Foreigners Act, 1946 places the burden of proof on the foreigner and not on the government.⁹⁰ However, in the specific case of Assam, where the Government considers those to be of specific nationality, i.e. Bangladeshi, the burden of proof must lie with the Government to prove the assertion, according to the balance of probabilities standards.

Further, the Act does not provide any machinery, nor does it lay down any procedure for determining whether a person is or is not a foreigner. It was commonly understood that the legislation governed the movement of those who are distinctly foreigners, and do not need any further determination, but required a framework guiding their movement and departure from the country.

Gradually, the Central Government delegated its power under the Foreigners Act to the Government of Assam.⁹¹ This allows the Assam Government to govern and manage the Border Police and Foreigners Tribunals with respect to ‘detecting’ a person suspected of doubtful citizenship and declaring him to be a foreigner, raising questions of independence and checks and balances on the power of the executive in determining whether a person is a foreigner or not. In the absence of any strict and adequate guidelines on investigating a person’s nationality and dispensing the initial burden of proof for making a reference against person, the Border Police runs amok.⁹²

FOREIGNERS (TRIBUNAL) ORDER 1964

On 23 September 1964, the Ministry of Home Affairs passed an executive order under Section 3 of the Foreigners Act 1946, known as the Foreigners (Tribunal) Order. The aim of the Order was to set up quasi-judicial bodies that shall determine whether a person is a foreigner or not, within the realm of the Foreigners Act, 1946.⁹³

Foreigners Tribunals are the only tribunals in the country formed by an executive body which perform semi-judicial functions. The Constitution of India, under Article 323(b) lays down that the legislature may create a tribunal by an appropriate law for the adjudication of trial of any disputes, complaints or offences mentioned in the following clause.⁹⁴ Notably, determination of citizenship is not one of the matters that the Constitution thought fit to be decided by the tribunals.⁹⁵

While the states have the sovereign right to determine its own nationals, it raises the question on whether Tribunals set up under a colonial legislation through the order of the executive, are fit to make such a critical determination - a determination that makes a person stateless.

Moving forward, the subsequent contents of the Order are in complete contradiction to the reality on ground. To illustrate, it only gives a petitioner ten days’ time to reply to the reference made against him by the Tribunal and another ten days to produce evidence in support of his case.⁹⁶ It further gives 60 days to the Tribunal from the date it makes a reference against a person for disposing a case.⁹⁷ Under the 2019 amendment, this time period has been increased for appeals against the exclusion from the NRC.

Cases before the Tribunals are based on the appreciation of evidence in the form of relevant citizenship-related documents. For the documents to be accepted by the Tribunals, they need to be certified copies. Photocopies of the documents are not accepted. In real terms, this means, verification and certification of voters lists and land documents before the Election Office and Revenue Office by people accused

of doubtful citizenship. In cases of private documents such as Marriage Certificate and Residence Certificate, the contents are required to be physically proved by the issuing authorities. Since the burden of proof lies on the person accused, the Tribunal does not issue summons for the presence of such authorities on its own unless specially requested by the person. To add, the Order states that the adjournment should only be very sparingly exercised and for reasons to be recorded in writing.⁹⁸

Delay in submitting documents or non-appearance is held against a person in these proceedings. The Order also allows for the detention of a person who is unable to meet the strict procedural standards. While the provision of bail has been made, in practice, the conditions for securing bail are agonizingly stringent.⁹⁹ This provision particularly impacts labourers and low-wage workers who migrate from one part of Assam to other. Unable to gather documents in such a short period and arrange money for securing bail, they are forced into detention, the inhumane conditions of which have been well-documented.¹⁰⁰

Further, the Tribunals are given the power to determine and regulate their own procedures.¹⁰¹ While most judicial forums including tribunals are regulated by the Civil Procedure Code or Code of Criminal Procedure, Tribunals are given absolute power to create their own procedures. In reality, this has resulted in the Tribunals selectively using the provisions of the Indian Evidence Act, 1972.¹⁰² In practice, Tribunals are seen to abuse this power by not providing the certified copies of documents submitted on record such as the written statement, exhibited documents, deposition of witnesses. These documents are essential for the person to approach the higher court.

The Order also does not provide an unrestricted right to appeal. It may reject the request for appeal at the threshold, in consultation with the District Magistrate, if it does not find merit without even hearing the appellant.¹⁰³ It does not provide any guidance in so far as the nature and content of such 'merits' are concerned, leaving ambiguity that may be abused, if left unchecked. In addition, the Supreme Court, in May 2019 held that the children of persons who have been declared foreigners by the Foreigners Tribunals, marked as Doubtful Voters or whose cases are currently pending before the Foreigners Tribunals, will not be included in the NRC. This leads to a situation where the Tribunals are concentrated with unwarranted power to decide the citizenship of a person. With lack of guidance on the criteria for review of their decision, it pushes the residents of Assam towards vulnerability and at complete mercy of the tribunals.

89. Section 2(1)(a) of the Foreigners Act, 1946

90. Section 9 of the Foreigners Act, 1946

91. The Ministry of Home Affairs, vide notification dated 17.02.1976 entrusted the Superintendents of Police and Deputy Commissioners (In-Charge of Police) under the Government of Assam the functions of the Central Government in making orders of the nature specified in clauses (a), (b), (c), (cc), (e) and (f) of sub-section (2) of Section 3 of the Foreigners Act, 1946.

92. See, Foreigners Tribunals and their Impact On The Ground

93. Clause 2 of the Foreigners (Tribunal) Order, 1964

94. "The appropriate Legislature may, by law, provide for the adjudication or trial by tribunals of any disputes, complaints, or offences with respect to all or any of the matters specified in clause (2) with respect to which such Legislature has power to make laws."

95. Levy, assessment collection and enforcement of any tax; foreign exchange, import and export across customs frontiers; industrial and labour disputes; land reforms by way of acquisition by the State of any estate as defined in Article 31A of or any rights therein or the extinguishment or modification of any such rights or by the way of ceiling on agricultural land or in any other way; ceiling on urban property; elections to their House of Parliament or the House or either House of the Legislature of a State, but excluding matters referred to in Article 329 and Article 329A; production, procurement, supply and distribution of foodstuffs (including edible oilseeds and oils) and such other goods as the President may, by public notification, declare to be essential goods for the purpose of this article and control of prices of such goods; offences against laws with respect to any of the matters specified in the above-mentioned matters and fees in respect of any of those matters; any matter incidental to any of the of the above-mentioned matters.

96. Clause 3(8) of the Foreigners (Tribunal) Order, 1964

97. Clause 3(14) of the Foreigners (Tribunal) Order, 1964

98. Clause 3 (12) of the Foreigners (Tribunal) Order, 1964

99. Clause 3(13) of the Foreigners (Tribunal) Order, 1964

100. Amnesty India, *Between Fear and Hatred: Surviving Migration Detention in Assam*, 2018

101. Clause 3A(17) of the Foreigners (Tribunal) Order, 1964

102. While the Tribunals stringently apply the standards laid down from Section 61 to 65 of the Indian Evidence Act, 1872 which govern the private and public documentation in India but overlook Section 50 which provides for reliance on the testimony of family members with respect to their relationship with other family members.

103. Clause 3A(10) of the Foreigners (Tribunal) Order, 1964

HOW DO THE LAWS VIOLATE INTERNATIONAL HUMAN RIGHTS LAW?

The right to a nationality is a human right enshrined in several international human rights instruments to which the India is a party.¹⁰⁴ International law imposes certain limits on what states may lawfully do, particularly if their actions could result in statelessness. The right to a nationality includes the right not to be arbitrarily deprived of one's nationality.¹⁰⁵ In order to respect this right, measures leading to deprivation of nationality must meet certain conditions. These include being in conformity with domestic law; serving a legitimate purpose that is consistent with international law and, in particular, the objectives of international human rights law; being the least intrusive instrument to achieve the desired result; and being proportional to the interest to be protected.¹⁰⁶ The notion of arbitrariness includes not only acts that are against the law but, more broadly, elements of inappropriateness, injustice and lack of predictability.¹⁰⁷

The immigration and citizenship laws of India are not consistent with these principles of legality and proportionality and may potentially result in a large number of people being arbitrary deprived of nationality and subsequently exposed to a situation of statelessness. These inconsistencies could be enumerated in the following manner:

1. Firstly, states carry the burden of proving that loss or deprivation of nationality will not result in the statelessness of a person.¹⁰⁸ The states are also required to demonstrate that such loss or deprivation is proportionate to the severe impact of statelessness. However, the Foreigners Tribunals, which are empowered to determine the nationality of millions of people, squarely place the responsibility of proving one's Indian citizenship on the person accused of doubtful citizenship.¹⁰⁹ It is concerning because the opinion of the Foreigners Tribunals declaring someone as a foreigner effectively renders such a person stateless. Furthermore, in case of deprivation of liberty which often succeeds deprivation of nationality in the case of Foreigners Tribunals, international law rests the burden on the state to establish the necessity and proportionality of depriving an individual of their liberty.¹¹⁰ Foreigners Tribunals, on the other hand, continue to place the burden on the accused person.
2. Secondly, the time that has elapsed between acquisition of nationality and discovery of fraud or misrepresentation needs to be considered and must be weighed against the consequences of denationalization.¹¹¹ However, the updating of the National Register of Citizens and determining the nationality of those referred to the Foreigners Tribunals, 48 years after the 1971 War of Liberation and the likelihood of its protraction even after the publication of the final list of NRC translates into an indefinite cycle of vulnerability and oppression and stands in clear violation of international standards.¹¹²

Anudo Ochieng Anudo was born and raised in Tanzania. He also held a birth certificate and passport of the country. The Tanzanian authorities accused him of fraud, confiscated his documentation and deported him to Kenya where he was convicted for being an irregular migrant. In the case of *Anudo Ochieng Anudo v. United Republic of Tanzania (012/2015)*, the African Commission of Human Rights drawing from the African Charter of Human Rights and international law held "since the Respondent State is contesting the Applicant's nationality held since his birth on the basis of legal documents established by the Respondent State itself, the burden is on the Respondent state to prove the contrary."

3. Thirdly, states must refrain from automatically extending the loss or deprivation of nationality to a person's dependents.¹¹³ However, Section 3(1)(c)(ii) of the Citizenship Act, 1955 and the recent Supreme Court order in the case of *Assam Public Works v. Union of India*¹¹⁴, which ruled that children born after 3 December 2004 are not eligible to be included in the NRC list, if any of the parent is a Doubtful Voter, Declared Foreigner or Persons with Cases Pending at Foreigners Tribunal, effectively extends the deprivation of nationality of a parent to his/her children.¹¹⁵ It even excluded the children of the persons who were not yet declared foreigners. It also runs counter to India's obligations under the Convention on the Rights of Children, which states that it

is in the best interests of the child to acquire a nationality at or soon after birth and that a child has a right to preserve his or her identity, including nationality.¹¹⁶

Over 25,000 people were taken off Slovenia's registry of permanent residents in 1991 after the Socialist Federal Republic of Yugoslavia broke up. On July 13, 2010, in the case of *Kuric v. Slovenia* (26828/06), the European Court Grand Chamber unanimously held that Slovenia had violated Article 8 of the European Convention on Human Rights which provides for right to respect for private and family life. In particular, the Chamber concluded that arbitrary denial of citizenship might in certain circumstances raise an issue that, because the applicants had developed an extensive network of relationships in Slovenia, they had a private and/or family life there at the material time. The protracted refusal to regulate the applicants' legal status amounted to an unlawful interference with these rights.

4. Fourthly, international law requires that stateless persons must be granted a residence permit valid for at least two years, extendable to five years with a possibility of renewing it further in the interests of stability.¹¹⁷ Foreigner Tribunals, on the other hand, have ordered for the detention over 1000 people and deportation of many other after declaring them as foreigners and leaving them stateless.
5. Fifthly, States must ensure that adequate procedural standards are in place and that decisions related to nationality must be "issued in writing and open to effective administrative or judicial review".¹¹⁸ International law requires States to provide for an opportunity for a meaningful review of nationality decision, including on substantive decisions and that a person must continue to be considered as a national during the appeal procedure.¹¹⁹ However, Foreigners Tribunals have been empowered to decide their own procedures, effectively encouraging the likelihood of every tribunal laying down its own different procedure. Moreover, while Foreigners Tribunals act as an appellate body for those excluded from the NRC, they have original jurisdiction for cases referred by the Border Police and Election Commission of India. While one may use the writ jurisdiction of the High Court and Supreme Court, in the case of *State of Assam v. Moslem Mondal*¹²⁰ the High Court narrowed down its writ jurisdiction and self-imposed restrictions to hear writs against the decisions of the Foreigner Tribunals.¹²¹

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104. Article 15 of the Universal Declaration of Human Right; With respect to children, in particular, Article 7(1) of the Convention on the Rights of the Child and Article 24(3) of the International Covenant on Civil and Political Rights.
 105. Article 15 of the Universal Declaration of Human Rights.
 106. Human Rights and Arbitrary Deprivation of Nationality, Report of the Secretary-General, (UN Doc. A/ HRC/13/34) 14 December 2009, para 25.
 107. Human Rights and Arbitrary Deprivation of Nationality, Report of the Secretary-General, (UN Doc. A/ HRC/13/34) 14 December 2009, para 25.
 108. Human Rights and Arbitrary Deprivation of Nationality, Report of the Secretary-General (UN Doc. A-HRC-25-28) 19 December 2013, para 39.
 109. Section 9 of the Foreigners Act, 1946.
 110. General Comment No. 27 (1999) of the Human Rights Committee, Freedom of Movement (Article 12 of the International Covenant on Civil and Political Rights)
 111. Human Rights and Arbitrary Deprivation of Nationality, Report of the Secretary-General (UN Doc. A-HRC-25-28) 19 December 2013, para 10.
 112. Arunabh Saikia, Made it to the NRC? You may still have to prove your citizenship at a foreigners tribunal, SCROLL.IN, Sept. 3, 2019, <https://scroll.in/article/936012/made-it-to-the-nrc-you-may-still-have-to-prove-your-citizenship-at-a-foreigners-tribunal>
 113. Human Rights and Arbitrary Deprivation of Nationality, Report of the Secretary-General (UN Doc. A-HRC-25-28) 19 December 2013, para 24.
 114. Writ Petition (Civil) No.274 of 2009
 115. Assam : Children Born After Dec 3, 2004 Not To Be Included In NRC If Any Of The Parent Is A 'D' Voter, Declared Foreigner Or Pending Case, LIVE LAW, Aug 13, 2019, <https://www.livelaw.in/top-stories/assam-nrc-children-born-after-december-3-2004-dv-df-pft-147161>
 116. Article 3, 7 and 8 of the Convention on the Rights of the Child
 117. See UNHCR, Guidelines on Statelessness No. 3: The Status of Stateless Persons at the National Level, 17 July 2012, HCR/GS/12/03, para. 29.
 118. Human Rights and Arbitrary Deprivation of Nationality, Report of the Secretary-General (UN Doc. A-HRC-25-28) 19 December 2013, para 31.
 119. Human Rights and Arbitrary Deprivation of Nationality, Report of the Secretary-General (UN Doc. A/HRC/13/34) 14 December 2009, para. 43
 120. 2013 (1) GLT (FB) 809
 121. Review Pet. No. 22/2010, WA Nos. 258/08, 264/08, 265/08, 266/08, 268/08, 280/08, 281/08, 370/08, 59/09, 71/09, 171/10 and 313/11, Gauhati High Court
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COMPETENCE AND INDEPENDENCE OF FOREIGNERS TRIBUNAL

On 16 May 2015, the Gauhati High Court, upon approval by the Government of Assam and Ministry of Home Affairs, issued a notification calling for the recruitment of 47 members for the Foreigners Tribunal.¹²²

The Government of Assam restricted the criteria to serving or retired District Judges or Additional District Judges and advocates aged 45 years or above with over 10 years of legal practice. The knowledge of Assam, Assamese and issues related to foreigners were key yardsticks. While the judges appointed as members were given a non-restricted tenure

until they turned 65, the tenure of the lawyers appointed as Members was limited to two years, extendable on the basis of 'need and performance'. Judicial officers belonging to other states and all lawyers were required to be interviewed before being selected.

On 29 July 2015, 63 persons were selected to be Members, of which only two were former or serving judicial officers. After a training session spanning across only 4 days, all the members were deputed to their respective posts across Assam.



A woman checking her documents with an advocate outside a Foreigners Tribunal in Guwahati. © Amnesty International India

Mamoni Rajkumari, a Member assigned to Nagaon district during this time later claimed that the support staffs in the Tribunals was “untrained and inadequate”. She also listed numerous infrastructural problems that the Tribunals suffered from, including lack of power and stationery.¹²³

Two years later, on 21 June 2017, an advertisement was again issued for appointment of Members in Foreigners Tribunals. This time it only called for advocates.¹²⁴

A day before issuing the advertisement, the tenure of 42 members was extended for another two years, while 19 members were denied extension. An analysis of the performance appraisal submitted by the Government of Assam to the Gauhati High Court shows a clear pattern of discrimination against those who did not declare foreigners at a high rate. Members who, on an average declared foreigners in less than 10% of their disposed cases were deemed to perform in an unsatisfactory manner, and thus stood the chance of being terminated.

In the latest notification issued by the Gauhati High Court on 10 June 2019, the Government of Assam has further lowered the eligibility criteria for advocates, seeking those with a minimum of only seven years of practice and included retired civil servants with judicial experience. The age limit has been reduced from 45 to 35 years. The notification also condensed the period of appointment to one year, extendable on the basis of ‘need’.¹²⁵

The United Nations Special Rapporteurs on independence of judges and lawyers calls for the body responsible for appointment, promotion and discipline of judges to be independent of the executive in both its composition and its work.¹²⁶

The overwhelming influence both in terms of law and practice wielded by the Central Government and Government of Assam on the appointment, tenure and functioning of the Tribunal members defies all international standards. It corrupts the independence of the Tribunal and puts the rights of Indian citizens (which they continue to be until determined a foreigner by the Tribunal) at risk.

Further, rewarding Tribunal members on the basis of their rate of declaring Indian citizens as foreigners does not only amount to direct interference with the independence of the Tribunals, it also results in inducement. Tribunal Members must have the exclusive power to decide the cases before them and must remain autonomous. Until then, the opinions of the Members cannot be called unbiased and fair.

In another instance, on 19 September 2019, the Gauhati High Court set aside 57 orders of the Foreigners Tribunal in Morigaon for not carrying “an opinion on record [that] must carry the seal and signature of the *Presiding Officer of the Tribunal*.”¹²⁷ According to one email sent by the member of the Foreigners Tribunal 4, Morigaon to the Gauhati High Court and Government of Assam, an earlier member had disposed of 288 references without any detailed opinion.

While a State Level Screening Committee has been constituted to “study the merit of the cases dealt by the foreigners tribunals”, they only focus on the cases where a person has been declared an Indian citizen.¹²⁸

Speaking to Amnesty International India, *Sanjay Hegde*, Senior Supreme Court Lawyer said, “*If the conditions for hiring the Foreigner Tribunal members were applied for example to the Debt Recovery Tribunal, people would have yelled that injustice was being done to them. Clearly, we seem to place a lesser premium on human citizenship than on human debt.*”¹²⁹

122. The Office Memorandum no. PLB. 163/2010/229, on file with Amnesty International India, which laid down the eligibility criteria, tenure, salary and perks of the members was issued by the Political (B) Department of Assam Government. It stated that the Ministry of Home Affairs, considering the ‘dearth of eligible Judicial Officers’ issued terms and conditions for appointment of advocates as members. The role of the Gauhati High Court was limited to selecting the advocates who applied for the role of members in the Foreigners Tribunals.

123. Petition of Mamoni Rajkumari, a Foreigner Tribunal member to the Gauhati High Court alleging wrongful termination.

124. Advertisement No. HC.XXXVII-13/2017/2687/R.Cell, Gauhati High Court at Guwahati, 21 June 2017, on file with Amnesty International India

125. Advertisement No. HC.XXXVII-22/2019/442/R. Cell, Gauhati High Court at Guwahati, 10 June 2019, <http://ghconline.gov.in/Recruitment/Notification-10-06-2019.pdf>

126. Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaut, Human Rights Council, A/HRC/26/32.

127. Writ Petition (Civil) (Suo Moto) 11/2018

128. Sanjoy Ray, 145 more foreigners tribunal judgments to be reviewed, Assam Tribune, 24 Apr. 2019, <http://www.assamtribune.com/scripts/detailsnew.asp?id=apr2518/at061>

129. Interview with Sanjay Hegde, 7 November 2019, Delhi, India

Performance Appraisal of the newly appointed Members (Advocates) of

District	F.T. No.	Name of F. T. Members	Total cases disposed since beginning.	% age of disposal
Dhubri	F. T. 3rd	Kartik Ch. Ray	380	25.92
	F. T. 4th	Narayan Kr. Nath	460	15.85
	F. T. 5th	Abhijit Das	443	15.34
	F. T. 6th	Hemanta Mahanta	574	8.23
	F. T. 7th	Naba Kr. Barua	321	27.25
	F. T. 8th	Dhiraj Kr. Saikia	345	23.63
	F. T. 9th	Junmoni Borah	300	18.40
	F. T. 10th	Kalpana Baruah	249	12.12
Goalpara	F. T. 3rd	Rama Kanta Khakhlary	626	33.91
	F. T. 4th	Ajay Phukan	239	10.15
	F. T. 5th	Bibhas Barman	468	28.02
	F. T. 6th	Dilip Kr. Barman	485	26.30
	F. T. 7th	Bhaba Kt. Hazarika	494	42.66
	F. T. 8th	Kulendra Talukdar	326	24.96
Bongaigaon	F. T. 2nd	Nibedita Tamuli Nath	691	17.17
Barpeta	F. T. 5th	Dwijen Ch. Dutta	548	12.47
	F. T. 6th	Kamal Uddin Ahmed Choudhury	472	14.57
	F. T. 7th	Nilay Kanti Ghose	485	19.23
	F. T. 8th	Anurupa Dey	528	27.32
	F. T. 10th	Navanita Mitra	263	11.17
	F. T. 11th	Sachin Kr Sarma	238	9.03

Annexure-4

New Foreigners Tribunals as on 30.04.2017 (at the end of two years)

Total Nos. of Foreigners declared	% of foreigners declared	General views of the Govt. upon the Member	Whether may be considered for further retention or may be terminated
5	1.32	Not satisfactory	may be terminated ✓
159	34.57	good	may be retained
173	39.05	good	may be retained
88	41.67	Need to improve	may be retained with warning
240	74.77	good	may be retained
142	41.16	good	may be retained
76	25.33	good	may be retained
67	26.91	Need to improve	may be retained with warning
98	15.65	good	may be retained
150	19.38	good	may be retained
48	10.26	Need to improve	may be retained with warning
21	4.33	Not satisfactory	may be terminated ✓
12	2.43	Not satisfactory	may be terminated ✓
25	7.67	Not satisfactory	may be terminated ✓
404	58.47	good	may be retained
8	1.46	Not satisfactory	may be terminated ✓
5	1.06	Not satisfactory	may be terminated ✓
4	0.82	Not satisfactory	may be terminated ✓
61	11.55	Need to improve	may be retained with warning ✓
6	2.23	Not satisfactory	may be terminated ✓
78	32.71	Need to improve	may be retained with warning

FOREIGNERS TRIBUNALS AND THEIR IMPACT ON THE GROUND

International human rights law prohibits discrimination on the ground of nationality (or the lack thereof). However, the Foreigners Tribunals, in its making and functioning, are designed to discriminate. Created under the Foreigners Act, a pre-constitutional legislation, in the era of xenophobia, the Tribunals regulated the presence of people who were visibly and decidedly foreigners. Repurposing these bodies for determining whether the persons who have held Indian citizenship for decades, who are born and raised in India, who belong to the same race, and often the same ethnicity are foreigners or not, has unfolded a humanitarian crisis in the state of Assam.

Amnesty International India found that the Foreigners Tribunals members were often dismissive, used derogatory language, determined their own procedures and applied them in arbitrary ways. Passing opinions *en masse* without the presence of the person accused of doubtful citizenship, inordinately delaying the issuing of opinion copies and harassing people over minor anomalies in their documents were all too common.

In most cases, it endorsed detention, exclusion and humiliation of people for not carrying their Horoscope or knowing the voting constituency of their grandfather. While it extends deprivation of citizenship from a declared foreigner to his family, it does not apply it in reverse, i.e., declares a person Indian because his family has been declared Indian. Despite the right to a fair and public hearing, it does not allow anyone else besides the person accused and his lawyer to be present in the Tribunal. In a myriad of cases, the Foreigners Tribunals have declared persons to be foreigners *ex-parte*, i.e., without the physical presence of such persons or hearing their claim.

This section details the vagueness and arbitrariness of the Foreigners Tribunals' opinions and their harsh impact on the lives of those affected. It also demonstrates the mechanical nature in which the Tribunals pass their opinions without any application of mind or consideration to the special vulnerabilities of certain persons such as married or widowed women, inter-state migrants, and mentally ill persons. It further highlights the unreasonably high standards of burden of proof placed on the persons to prove that they are indeed Indian citizens, when the standards followed by the Border Police or the Election Commission to make the

initial references against such persons, are perfunctory. To be declared an Indian citizen, people of Assam have to produce two sets of documents: first, which show that their ancestors came to India before 1971 and second, which establish their legacy to the ancestors. These standards are antithetical to the reality of documentation in India. It raises concerns because the opinions of the Foreigners Tribunals render people stateless and push them outside the protection of law.

More than 1.9 million people excluded from the NRC may now approach the Foreigners Tribunals to have their fate decided.

GENDER DISCRIMINATION

Women, as a social class, have been struggling to prove a linkage with their parents and grandparents. The entire procedure heavily relies on identity documentation. However, women in most communities, even today are married before they turn 18 – the minimum legal age to marry and vote in India. Therefore, in many cases women are able to produce documents establishing links to their respective husbands but fail to prove the link to their parents. Many who are married before 18 are compelled to rely on the certificates issued by the *Gaon Panchayats* which authorize their permanent residence. The procedure, therefore, is completely removed from the social, cultural and economic reality of India wherein women continue to struggle to access any kind of state-issued documentation. The strict scrutiny weighed down by predisposed biases further marginalizes the community. This has adversely affected the determination of a married woman's right to nationality in Assam.

Speaking to Amnesty International India, *Sanjay Hegde*, a Senior Supreme Court lawyer said, *"When a woman is married at an early age, she is often not documented in the family of her birth. When she goes to a different village after marriage, she has no documentary life. Then when she approaches the Foreigners Tribunal she is declared an irregular immigrant. So now leaders are appealing to their communities to ensure there is some documentary link for women before marriage. These are the kinds of social situations which people sitting in tribunals do not necessarily consider. The procedures and laws fail to consider the acute gender discrimination."*



Women anxiously waiting outside a Foreigners Tribunal in Guwahati.
© Amnesty International India

SAMINA BIBI¹³¹

Eighteen years ago, Samina moved to her husband's village in Bongaigaon district.

In 2016, two personnel from the Border Police branch delivered the notice from Bongaigaon Foreigners Tribunal No. 1. Samina cannot read or write so someone else had to read the notice to her, wherein she was accused of being a foreigner who came to India from Bangladesh after 1971.

In the Tribunal's order, which Amnesty International India analysed, she submitted 10 documents including, her father's name in the 1951 NRC list, voter list of 1966, voter lists of 2015 and 2018, and her marriage certificate, among others. However, the marriage certificate and documents linking her to her parents were rejected because Samina Bibi could not 'authenticate its genuineness'.

In particular, the 1966 voter list was rejected because she could not remember the Lok Sabha Constituency of her grandfather, when asked by a Foreigners Tribunal member. The NRC list document was rejected because it was not a certified copy. The subsequent voter lists carried her name along with her husband's, but they were not helpful in establishing the legacy to her parents. Her electoral identity card was rejected not just as a valid proof of citizenship but also as a legacy document because it only proved her link to her husband.

Speaking to Amnesty International India about the proceedings, Riaz,¹³¹ Samina Bibi's husband said, *"The Tribunal member openly declared that regardless of the number of documents that Muslims bring, even if it is land deeds, I will send them directly to Bangladesh."*

"After we received the judgment copy, Samina stopped eating. After she did not eat for 4-5 days, I had to take her to the hospital and she had to be put on a saline drip. Her blood pressure had shot up," Riaz said. *"The doctor said she was depressed. Now she fears she'll be sent to Bangladesh, a place she knows nothing about."*

The names of her two children have been left out of the final NRC too.



131. Name changed due to reasons of privacy.



Samina's citizenship claim was rejected because she could not remember the constituency where her grandfather cast his vote.
© Amnesty International India



To prove her citizenship, Safina had to sell off their cattle and put their farmland on lease to pay the legal fees.

© Amnesty International India

SAFINA¹³²

When Safina first received the notice from the Border Police, she was so scared of being taken away to a detention centre that she went into hiding at her relative's place for a couple of days. *"I thought they were going to take me away,"* said Safina.

At the Foreigners Tribunal, she was asked to name her village, parents, grandparents and other details. *"I was a bit nervous while answering the questions but I managed to respond to all of them accurately,"* she said.

However, with no exposure to formal education and literacy, she didn't know what documents were submitted on her behalf to prove her citizenship.

Safina had submitted voter lists of 1966 and 1970 with her parents' name on it as her legacy data. She also submitted a *Gaon Burah* (head of the village) and *Gaon Panchayat* certificate as her linkage but the latter was not accepted because the issuing authority was not present to testify its authenticity. She also submitted voter lists, as well as a land document with her brother's name on it and a copy of an opinion from Foreigners Tribunal No. 2 in Morigaon district that declared her sister, Safura Khatun an Indian. However, she did not submit any document linking her with her brothers or her sister.

As per the Foreigners Tribunal order, she was declared a foreigner on the grounds that she was an adult before she got married yet her name did not appear in any of the voter lists, either with her parents or her brothers. *"The lawyer just told me that the case did not turn out in our favour, so we'll have to go to the Gauhati High Court."*

The process used by the Foreigners Tribunal is unbecoming of a quasi-judicial body empowered to determine the paramount right to nationality. To illustrate, the Foreigners Tribunal said:

"[T]he age of the eldest son of O.P. is 27 years. If we deduct 27 years from 2017 then we see that, the son of O.P. was born in 1990. As such I can take it for granted that, O.P.'s marriage was come off in 1988/89. And while the O.P.'s year of birth is 1961 as such in 1988/89 she should be of the age of 26 and 27 years of age. It means she was at her parent's house up to the age of 27 or 28 and as such her name should have enlisted in the voter list together with her purported Father and Mother and her Brothers in a same voter list as voters. But, the O.P. has failed to produce any such voter list containing their names been enlisted together. So, I see that, the O.P. has failed to establish her link with her parents and brothers."¹³³

Safina and her family have already spent around Rs. 150,000 for appealing the case in the Foreigners Tribunal and High Court, for which they have had to sell off their cattle and put their farmland on lease. But the heaviest cost that the family has had to bear is the deep trauma their eldest son suffered when he heard his mother has been declared a foreigner.

"He was normal before but after the court order, he started doing things like roaming around naked or having episodes of extreme paranoia that he'd start throwing things around the house," Safina said.

"He used to be our breadwinner," she said but now the family doesn't have the money to receive proper mental health and medical treatment for his condition. *"The doctor said we'd need at least Rs. 100,000 or more for him to be treated properly."*

Eventually, her son's wife left him and took her grandson along too. Now, Safina has become her son's full-time caretaker.

"Maybe this was just written in my fate," said Safina.

132. Name changed due to reasons of privacy.

133. On file with Amnesty International India.

MANOWARA BEWA

In January 2015, Manowara Bewa was arrested from her home in Gauripur village, Dhubri district. The border police arrested her after she was declared a foreigner and took her to the detention centre in Kokrajhar. Her son, Yunus, was working as a daily wage labourer in New Delhi. Only her daughter, Najuma Khatun, was at home when she was arrested.

The Foreigners Tribunal member while declaring her a foreigner found her legacy and linkage documents to be unreliable. For establishing legacy with her parents, she submitted her school certificate (she had studied up to class 4). This was found to be unreliable because she had not mentioned the school certificate in her written statement. Manowara had submitted a duplicate copy of the school certificate but the school headmaster was examined in person to attest the authenticity of her claim. For proving her legacy, she submitted the 1951 NRC list with her father's name. The Foreigners Tribunal member pointed out that her father's age and his relation with his wife had been overwritten in the document. Moreover, the member observed, that Manowara had not mentioned her mother's name anywhere in her written statement. The Foreigners Tribunal member observed, *"the OP with malafide intention has taken recourse to falsehood and tempering (sic) of document which itself establish that she is not a citizen of India and as such, she is suspected along with other documents produced by her during the course of evidence for genuineness and authenticity."*¹³⁴

The member also found discrepancies in her father's age mentioned in the 1966 electoral roll and her grandfather's name in a land document from 1966. Moreover, the Foreigner Tribunal member found the land document to be untrustworthy because she had not produced any sale receipts or other evidence as supportive proof.

When the Gauhati High Court examined the same evidence in 2016, they pointed out that the certificates issued by the secretaries of *Gaon Panchayats* are of private nature and they do not have statutory authority and cannot be accepted as public documents under the Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003.

It is important to note that the Court failed to consider the particular vulnerability of married women who migrate from their paternal homes at a young age to their marital homes and thus find it difficult to prove a documented linkage to their parents.

When Yunus returned from New Delhi, after his mother was sent to the detention centre, he had to close down his mother's grocery store in the market. He started a small tea stall right in front of his house to run the house from which they earn Rs. 4,000 a month.

The family has been surviving on the help of their maternal uncle. They had to sell some land for Rs. 20,000 but have spent close to Rs. 400,000 so far to fight their mother's case. *"I still have to pay the lawyer's fee every month, which is the entire amount I make from the shop," Yunus said.*

Both brother and sister were entirely clueless about the legal proceedings of the case. Most of all, their education and childhood has greatly suffered because of their mother's detention. She is the sole surviving parent after the father passed away in 2000.

Although they traced their legacy to the father, Yunus and Najuma's names have not appeared in the final NRC list. They have little clue about what may lie ahead for them. *"What if the same thing was to happen as it happened with my mother? I don't know what to do?"* said Yunus. Najuma was quiet and withdrawn for the most part. At the time of our meeting, the children were told that Manowara Bewa will be home in a month's time from Kokrajhar. She has completed more than three years' time in the detention centre, making her eligible for release on a bond and surety from two persons, as per a recent Supreme Court order.

Yunus visits her at least three times a month in the detention centre; he says she is miserable. *"She told me that the food served to them in prison was pathetic. We usually give her some money and fruits whenever I visit. I'm looking forward to her return but they have been delaying her release for the past six months."*



After his mother was taken to the detention centre, Yunus (on the left) had to close down the grocery store his mother ran.
© Amnesty International India

MINOR VARIATIONS IN NAME AND AGE

Expecting the highest standards of documentary evidence to support a person's claim of Indian citizenship completely ignores the distinctive history of the Indian subcontinent where identity documents have long-served as a crucial instrument of state power. It also disregards the fractured state of identity documents in India.

This was, in fact, addressed by the Gauhati High Court in its earlier judgment in the case of *Abdur Rahim v. Union of India*,¹³⁵ where it said, “The learned Appellate Court below ought to have taken judicial notice to the fact that in our country, majority of the population are illiterate and where till recently there existed no system for registration of birth of a child even in urban areas, it was too much to expect from a villager to produce documentary evidence in support of their birth in India.”

Addressing the minor variations in names and age and the Tribunal's scope for review, in 2015 again, the Gauhati High Court in the case of *Abdul Matali v. Union of India*¹³⁶ had observed:

“The ages so recorded in those documents no doubt point out discrepancies but they are not so major so as to totally disbelieve, disregard and belie the evidence of the appellant/

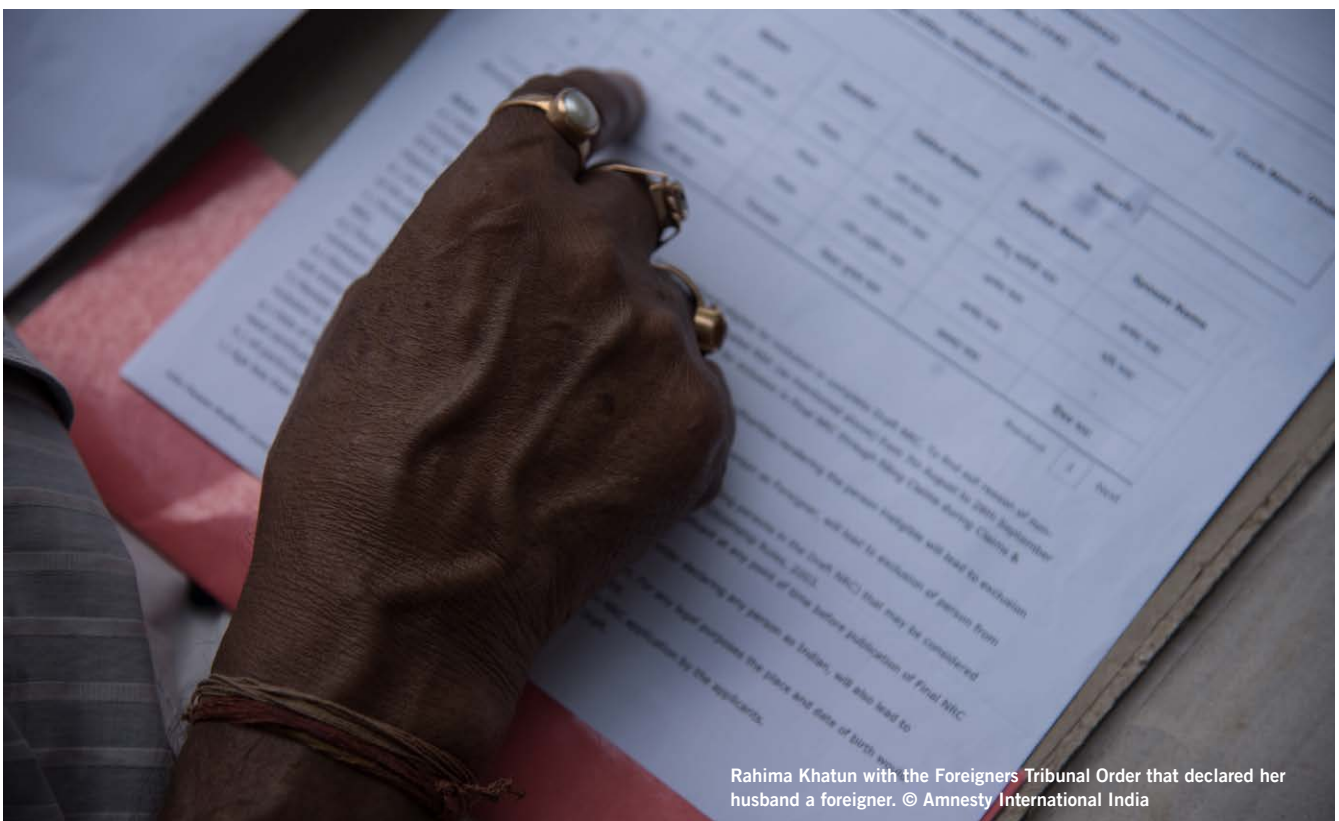
petitioner so as to disrobe the precious-most right of the citizen of a country. On the face of the failure of the prosecution to rebut the case of the appellant, the Tribunal cannot supplement the said rule and even the benefit of doubt, if any, be waived in favour of the appellant.”

Speaking to Amnesty International India, retired Justice of the Supreme Court of India and former Chief Justice of Gauhati High Court **Madan B. Lokur** said, “There are many nuances. There are dozen ways of spelling Mohammad. All these have to be considered and looked into. Just because there is a spelling mistake and you say the person is not a citizen and that he is a foreigner and needs to be detained, that is stretching things too far. That's where one has to look at it in a compassionate and sympathetic manner, in a realistic manner. What is the state trying to look at? If it is looking at who is a foreigner then just because there is a spelling mistake does not make a person a foreigner, just because the pronunciation of a name is different doesn't make him a foreigner. There has to be something more.”¹³⁷

135. 1992 (1), G.L.R. 29

136. WA 129/2013

137. Interview with retired Justice Madan B. Lokur, 2 November 2019, New Delhi, India



Rahima Khatun with the Foreigners Tribunal Order that declared her husband a foreigner. © Amnesty International India

ABU BAKKAR SIDDIQUI

Seven years ago, when Abu Bakkar Siddiqui, a daily wage labourer, reached Jorhat, from his village in Adabari (Dhubri district), he was questioned by the Assam Police on whether he was a foreigner or not.

His wife, Rahima Khatun, says that soon after, they received a notice for him to appear before a Foreigners Tribunal in Jorhat. He went for his hearings alone, was declared a foreigner and was arrested on the same day in 2016.

The Foreigners Tribunal declared him a foreigner based on a minor error in the name of his grandfather, Aper Ali Sheikh alias Afer Ali Sheikh. He submitted nine documents, including legacy documents of his grandfather whose name in the 1966 and 1970 voter lists is written as 'Afer Ali'. However, Rahima Khatun says in his deposition he had said his grandfather's name was Aper Ali.

Although Abu Bakkar Siddiqui submitted an affidavit stating that both are the same person, the Tribunal member said it was done 'too late in the day' and that the affidavit was submitted only after the proceedings against him had begun. The Tribunal member concluded that because Abu Bakkar could not prove the existence of Aper Ali, he could not establish that his ancestors were in India before 1971.

When the case went to the Gauhati High Court for appeal, the bench scrutinized his age based on his oral testimony and the material evidence he provided in the form of voter lists and found discrepancies.

Similarly, the *Gaon Panchayat* certificate submitted by him attesting that Abu Bakkar is the son of Sikandar Ali was also considered 'too late' and not reliable because the *Gaon Panchayat* authority, who issued the certificate, did not appear before the Foreigners Tribunal physically to confirm the contents of the certificate.

Abu Bakkar Siddiqui was declared a foreigner by the High Court and was sent to a detention centre. He has been in detention for about three years now and bail bonds and sureties from two persons have already been arranged for his release.

"Since he has been detained, the house is lying neglected. The children's education has also suffered immensely and we don't have money to buy new clothes for them or ourselves," his wife, Rahima Khatun told Amnesty International India. *"Whenever we go to meet him in jail, he feels bad for missing out on all things happening in the family."*

Their youngest son was an infant when he was taken away. *"He has only seen his youngest son through the jail bars but hasn't been able to touch him or hold him in his arms",* Rahima Khatun said.

The family said that they have observed visible deterioration in his mental condition, the last few times they visited him.

"He told us to take him away from there as soon as possible. If not, he might end up taking his own life," said Abu Jehan, Abu Bakkar Siddiqui's younger brother.



Abu Bakkar Siddiqui's wife observed a visible deterioration in his mental condition in the last few times they visited him in the detention centre. © Amnesty International India

KHATIJA KHATUN 138

In 1997, Khatija Khatun of Durabandhi village in Morigaon district was identified as a Doubtful Voter. However, she received a notice from the Foreigners Tribunal No. 5 in Morigaon, only in 2017.

While she couldn't read the notice herself, the person who read it said there was a discrepancy in the given name, which was Khatija. Khatija is a common alias to her name, Khadija Khatun.

"The Foreigners Tribunal member asked me the names of my father, grandfather as well as my husband. They asked why there was a discrepancy in the spelling of my name and I just said, maybe someone wrote it down like that," she said.

Khatija said she was cross-examined for about 30 minutes. She has not had any formal education and was married off at a very young age, most likely before she turned 18.

In the Tribunal order, which Amnesty International India accessed, she submitted the 1966 voter list with her father's name as legacy data, two Gaon Burah certificates as linkage documents, a computerized copy of her father's land document that she has acquired as well as voter lists with her and husband's name on it.

The Foreigner Tribunal member observed that the year of birth and the year of her first vote, as per her voter list submission, were too far apart. The member observed, "Khatija Khatun was at her father's house itself up to the age of 22/23 years and as such her name should have enlisted in the voter list of 1981/1982 or 1983 together with her parents."

The mere fact that she voted for the very first time only after her marriage made her claim of nationality suspicious before

the Foreigner Tribunal, which declared her a foreigner. This is despite the *Gaon Burah* of one of her villages testifying to the authenticity of the certificate he issued, which was also disregarded by the Tribunal.

Her claim to Indian citizenship was rejected due to minor discrepancies in the names of her father and mother in the 1966 voter list from her written statement. Her father's name was recorded as Sahar Uddin, Saharuddin Sheikh and Sabar Uddin in the voter list, *jamabandi* and linkage affidavit produced before the Tribunal respectively. Similarly, her mother's name was recorded as Khudeja Banu and Khudeja Bibi in different documents. The Tribunal member failed to recognize that these are very common variations in names.

Typographical errors in identity documentation are a common practice in India. Disregarding the pathetic state of documentation and lack of sensitization on its importance in India, and using it to strip a person of her nationality is problematic. Moreover, persons belonging to economically, socially and culturally marginalized communities are most likely to be affected by such practices, as is evident from Khatija's case.

Khatija did not expect to be declared a foreigner considering she has voted in every election, whether assembly or Lok Sabha. *"If I have been casting my vote in every election, how did I suddenly become a foreigner?"* The family has filed an appeal in the Gauhati High Court.

"Everyone's names have made it to the NRC. Only mine hasn't," she says in a worried tone. *"I haven't been able to sleep or eat properly. I don't feel like I have my heart in any thing I do these days."*

138. Name changed due to reasons of privacy.



Khatija cooks for her family. © Amnesty International India

EX-PARTE OPINIONS

According to the answer given by the Minister of Home Affairs to a question asked by Shashi Tharoor, a Member of the Parliament, around 64,000 people in Assam had been declared foreigners through *ex-parte* opinions until February 2019.¹³⁹ *Ex-parte* opinions are given against persons accused of doubtful citizenship without their physical presence in the courts. While many fail to appear at all in the Foreigners Tribunals, others are unable to appear after the first or second time, limited by financial constraints. Local activists have said that often people have to sell cattle and whatever land they own, to defend their citizenship.



BISHAKA BALA DAS

Bishakha Bala Das was abruptly taken away from her home in Bijni, Chirang district to the Kokrajhar District Jail in 2015. There was no one at home when she was taken away because her children work as daily wage labourers in other states in the country.

“Our father passed away early so we grew up working in other people’s homes,” said her son, Dulal Das. He said that they weren’t even aware when the notice had not come for his mother nor did anyone in their house inform them.

The Foreigners Tribunal in Bongaigaon declared her a foreigner in an *ex-parte* order after she failed to appear for 37 hearings that were fixed in her case. The High Court upheld the order on the grounds that *“a person who is not diligent and/or is mindful in taking steps to safeguard his/her interest; it is done so at their own risk and peril”*. Bishaka who used to clean houses for a living was not aware about the legal consequences of the notices issued by the Foreigners Tribunal.

In the Gauhati High Court, Bishaka submitted various documents including voters list of 1966 and 1970 in the name of her father to prove her nationality. But the writ was dismissed as she didn’t appear before court regularly after receiving the notice.

Dulal said he was quite unhappy with their lawyer. *“He has taken Rs. 90,000 from us but we haven’t since heard from him on the status of the case. My mother has spent more than 3 years now in jail and we have been told she’ll be home soon,”* he said.

“We go once every 1-2 months to see her. The food is really bad there. She’s quite aged now and her eyes are also very weak. She’ll pass away in 2-3 years.”

Dulal is worried that his mother might die inside the jail.

It has been more than three years since Bishaka has been in detention. According to the recent order of the Supreme Court in the case of *Harsh Mander v. Union of India*¹⁴⁰, the Court ordered for the release of all foreigners who were kept in detention in Assam beyond a period of three years. The Court however made it contingent on executing a bond with two sureties of Rs. 100,000 each, besides submitting their biometric data, iris and finger prints. But Bishaka does not have the money to secure her freedom.

139. Unstarred Question No. 1724, Answered on 2 July 2019, Government of India, Ministry of Home Affairs, <http://164.100.24.220/loksabhaquestions/annex/171/AU1724.pdf>

140. Writ Petition (Civil) 1045 of 2018, <https://indiankanoon.org/doc/88761484/>



Bishaka Bala Das's brother was declared an Indian. © Amnesty International India

KISMAT ALI AND ASHRAF ALI

On 12 August 2015, a force of 30 police personnel stormed into Kismat's house. They ordered him to dress and come with them. *"I kept asking them what were the charges against me but they wouldn't answer. My younger brother tried to call my older brother but the police snatched the phone from him,"* Kismat said. They, then, proceeded to Ashraf Ali's home, a few kilometres away in the same town of Dimakuchi, to pick him up. Ashraf Ali, who used to run a groceries shop in front of his house, said that he never got any notice in his name and had been consistently voting in every election. *"The Border Police had come about 15 days before my arrest with a letter, which had something written in English. They said that a foreigner case had been lodged against me and showed me that many others had signed that document, so I signed it,"* he said. Ashraf is literate but cannot read or write English.

The two of them were then taken to the Dimakuchi police station where they were forced to sign a hand-written statement, written in Assamese, which said that their fathers came from Bangladesh. The next day they were taken in for a medical examination and then locked up in Udalguri Police Station. When their families came to the station, they were

told to approach the courts. Kismat and Ashraf were taken to a detention centre.

"Once we got there, we realized that it was not a detention centre but a jail. We were kept inside a room, which had a sign bearing it could hold a capacity of 40 persons. But there were already 90 people inside," Ashraf said. *"There was no place for us to even squat."*

Babul Hussain, Kismat's older brother, said that they found out he was 'ex-parte' declared a foreigner. They hired a lawyer, who asked them for Rs. 70,000 to take his case to the Gauhati High Court, where the case was dismissed. Fifteen months had already passed until then with no relief or bail.

"I have a sister, who works in a beauty parlour in Pune, she happened to know an army officer who put us in touch with a Supreme Court lawyer in Delhi," he said. *"They didn't take any money from us."*

Ashraf's family after finding out that he was 'ex-parte' declared a foreigner, said they had to spend around Rs. 200,000 for his case. *"We sold off our gold and silver but it wasn't enough so had to mortgage our tea garden for some loans,"* said his wife, Tarabhanu Khatun. *"There was not*



Ashraf has still not been able to reopen his shop.
© Amnesty International India

enough food for us to eat that time and our daughters had to drop out of a private school to go to a government school.”

Kismat said that inside the prison, there were no provisions for declared foreigners to be given paid labour work. The 40-room capacity had declared foreigners, convicted prisoners and undertrial detainees all housed together.

“We never got to see a glimpse of the outside world and were living in perpetual fear. People around us would be sobbing all day, missing their homes and families. I often thought that it'd be better to die here inside than to go on”, Kismat said. The only comfort and support he had was in Ashraf, who became his closest friend and confidante in prison.

When their case came for hearing in the Supreme Court, the court ordered an inquiry by the Central Bureau of Investigation (CBI) in their cases. In Kismat's case, the CBI found that his father's name had appeared in the 1965 voter list of Chapia village in Deoria district of Uttar Pradesh (UP) as well as in the land revenue records, a driving license issued in Tezpur district of Assam in 1956, a death certificate of his father issued in Udalguri district in 2016, Kismat's name in a school transfer certificate from and his mother's death certificate from Udalguri in Assam.

In the case of Ashraf, the CBI found a Bihar School Board Examination certificate in the name of his father from 1975, a letter from the Sarpanch of his village in Siwan district of Bihar confirming that his family had moved out of the village, his father's death certificate from Udalguri in Assam, his school leaving certificate from Udalguri, along with his name in the school register and a letter from the Principal.

Based on the documents put forth by the CBI, the Supreme Court dismissed the earlier orders of the High Court and the Foreigners Tribunal respectively and ordered the Tribunal to dispose of the matter. It further ordered the Tribunal to not be influenced by its earlier determination.

Both of them have been struggling to make ends meet after they got out of prison. While Kismat managed to open his shop again, the business is yet to take off and he is worried about all the loans he still hasn't paid off. Ashraf's shop has been dismantled and he divides his time between working as a daily wage labour (making about Rs. 300 a day) and helping his brother in law in his business. Their families said they haven't been able to get back on their feet, even two years after Kismat and Ashraf came back.



RES JUDICATA

“A matter that has been adjudicated by a competent court and therefore may not be pursued further by the same parties.”¹⁴¹

There have been many instances wherein a person who was declared to be an Indian by the Foreigners Tribunal was subsequently declared a foreigner by the very same Foreigners Tribunal. The Supreme Court of India, in its 17 May 2019 order in the case of *Abdul Kuddus v. Union of India*,¹⁴² held that the opinion of the Foreigners Tribunal whether it declares a person to be an Indian or a foreigner cannot be changed by the Foreigners Tribunal. However, Amnesty International India found many cases where the observations of the Supreme Court have not translated into reality.

FAROUKH ALI¹⁴³

Faroukh Ali said he got a notice from the Foreigners Tribunal No.1 in Darrang, Mangaldai district in 2010.

“I have always cast my vote,” Hassen said, with no clue as to why he was suspected to be a foreigner in the first place.

Faroukh Ali submitted legal documents with his father's name in the electoral rolls of 1966 and 1971 along with his voter ID as linkage document and his own name in the 2013 voter list to the Foreigners Tribunal. Based on these documents, he was declared an Indian citizen according to the Foreigners Tribunal order dated 17 October 2015.



Faroukh Ali still doesn't know why he was declared a foreigner.
© Amnesty International India

Three years later, he was again sent a notice, this time from Foreigners Tribunal No. 4 in Darrang, Mangaldai. *“I told the Border Police that I have already been declared an Indian. Why am I getting this notice again?”* Faroukh said. *“They told me there was a new case against me. But I felt like I was being repeatedly harassed.”*

The second time around, Faroukh was cross-examined by a member, who asked questions such as, *‘What is your father's name? How many brothers do you have and what are their names? What is your mother's name?’*

Faroukh pointed out that the Tribunal member asked him these questions in a loud voice and in an arrogant manner. But Hassen said, *“I wasn't scared or nervous. I had and still have all the documents needed to prove that I am an Indian citizen.”*

Faroukh submitted more documents this time around as proof, including the 1985 voter list where his name was first recorded in the electoral rolls along with voter lists till 2017 as well as a copy of his previous Tribunal order.

But despite this, the Foreigners Tribunal declared Faroukh a foreigner. The order said that Faroukh in his written statement has stated that Sakiton Nessa was his step mother however, Faroukh did not disclose his step mother's date of marriage with Faroukh's father Kefat Mandal. The Tribunal member also stated that Faroukh's photo voter identification card had only his father's first name, Kefat, which was found to be insufficient to establish the relationship of father and son, especially in the absence of an issuing authority.

The member noted that the previous Foreigner Tribunal case was against 'Faroukh Ali S/O Late Kibet Mandal' of Barbari village under Sipajhar Police Station limits but this Foreigner Tribunal case was against 'Faroukh Ali S/O of Late Kipet Mandal'. On Amnesty International India's analysis of the first Foreigner Tribunal order, the only discrepancy observed was in his father's name, which was written as 'Kibot Mandal', a common practice in the community.

Despite the Supreme Court's order in May 2019, Faroukh, continues to fight for his nationality. He has spent more than Rs. 100,000 so far in for his case. *“I've had to sell my cattle and mortgage my 3 bigha (approximately an acre) land. Meanwhile, I have been surviving by working on someone else's farm land,”* he said.

The fight has taken a toll on his mental health, for which he holds the government accountable. *“Sometimes, I think of committing suicide. But then if I did that, my family would suffer. So why should I?”*

141. *Abdul Kuddus v. Union of India*, Civil Appeal 5012 of 2019

142. Civil Appeal 5012 of 2019

143. Name changed due to reasons of privacy.

FATIMA BEGUM¹⁴⁴

On 30 July 2018, to Fatima Begum's relief, she was declared an Indian citizen by the Foreigners Tribunal in Ulubari in Kamrup Rural district.

Before the Tribunal, to prove her nationality, Fatima submitted a copy of the 1966 and 1970 voter list. She also submitted two *Gaon Burah* certificates and a bank identity card as linkage documents to her father, and a name correction affidavit for a minor discrepancy in her father's name in the documents. Apart from herself, she produced four other witnesses to prove her nationality which the Foreigners Tribunal found to be satisfactory and declared her an Indian citizen.

Fatima, a homemaker, and her family were relieved. But tragedy struck them again when she received a notice to appear before the Foreigners Tribunal in Kamrup (Rural) from the *Gaon Burah*.

This time, during the hearing, Fatima said she was asked more or less the same questions. But certain questions about her family were obscure and unexpected for people to normally know. *"I was asked about my grandfather's place of birth, which I didn't know. I got very nervous and kept quiet,"* Fatima said.

"To me, it felt like the judge was trying to corner me into confusion by asking the same questions in a twisted manner,

say by paraphrasing them. When I didn't seem very sure about something, she noted it down in her diary."

Despite this, Fatima was confident that the Foreigners Tribunal's 'verdict' would be in her favour because she had submitted the same documents as affidavits along with a copy of her previous order declaring her an Indian.

However, this time the Tribunal member took a far more stringent look at her documents and found minor discrepancies in the spelling of her mother's name in the voter lists. The voter lists with Fatima's name along with her husband's, were not accepted since they were photo copies. The *Gaon Burah* certificates were not accepted because the issuing authorities had not been produced before the member in court. The bank ID card could not 'solely be relied upon' and an affidavit was considered a 'mere self-declaration'. The fact that she did not produce voter lists after 1970 with her parents' names was not explained satisfactorily enough for the member. Thus, Fatima Begum was declared a foreigner.

"I tried to tell the magistrate that I have already been proven to be an Indian. But she replied saying, "this order is wrong, you're a Bangladeshi", Fatima said. "If my father and mother are from India, then how can I be a Bangladeshi?"

144. Name changed due to reasons of privacy.



After being declared an Indian, the same Foreigners Tribunal declared her a foreigner.
© Amnesty International India

RIGHT TO (NOT) VOTE



Jamal was declared a foreigner while his brother was declared an Indian.
© Amnesty International India

Amnesty International India found cases where people were declared foreigners primarily because they did not exercise their right to vote. This even took precedence over the fact that Foreigners Tribunal had declared everyone in the family of such a person, an Indian citizen.

It is the right of every citizen to exercise his or her choice, including the right to not vote. The Gujarat High Court took a similar stand during a petition challenging the Gujarat Local Authorities (Amendment) Act 2009, which aimed to make voting mandatory in local body polls in the state.¹⁴⁵ The High Court, while staying the implementation of the law, held that the right to vote itself provides the right to refrain from voting and cannot be turned into a duty of voting.¹⁴⁶

Amnesty International India believes that the contention of the Government Counsel in many cases is akin to not only ensuring citizen participation by coercion but also using it as an instrument to harass.

KALAM AND JAMAL¹⁴⁷

The two brothers, Kalam and Jamal, received separate notices from the Foreigners Tribunal No. 2 in Boko, Kamrup (Rural) in 2017.

The trial of both the brothers took place at the same time, during which they submitted the same documents. They both submitted their father's land documents from 1946-47 and 1963-64 as well as his name on the voter lists of 1966 and 1970-71 to prove his presence prior to 1971. For continuity, they also submitted the voter lists of 1989, 1997, 2005 and 2010 as well as their own names in the voter lists of 1989, 1997, 2005, 2010, 2014 and 2017.

Kalam had been marked a Doubtful voter in 2005, for which he submitted a name correction affidavit and a *Gaon Burah* certificate from his village. The *Gaon Burah* was also present as a witness to testify the authenticity of the document. A retired teacher of the government school, where Kalam had studied in his initial years, and the President of the Village Duty Police of Tamuldi, his village, also testified in his favour. Convinced by these documents and testimonies, the Foreigners Tribunal member declared him an Indian national on 12 March 2018.

Barely two months later, when Jamal's case came up before the Foreigners Tribunal the same member, found the same set of documents and oral testimony to be inadequate. According

to the documents, their father had cast his vote from 1966 up to 2013. However, the lead counsel for the Government contended that even though Jamal in his statement had said that his father died in 2014, "*practically the father of the proceedee did not cast his vote after the year 1997 and he died in the year 2014, which means there's a gap of 17 years and the opposite party has not mentioned the reasons for not voting during that period*". The government counsel did not provide any evidence for such a contention.

Jamal was declared a foreigner on 25 May 2018 because of 'the false statement in the written statement and affidavit evidence regarding the voter certified copies of 2005, 2010 and 2013 in the name of the father of the Proceedee that creates a doubt with respect to the documents and background of the opposite party'.

Kalam and Jamal's case is symptomatic of the arbitrariness that surrounds the proceedings before the Foreigners Tribunals.

Jamal doesn't know where his oral evidence and affidavits fell short, when his brother was declared an Indian national one just a few weeks before. Both the brothers are daily wage labourers who work as farm hands on someone else's labour. "*We had to take a loan of 15,000 rupees, besides selling off whatever poultry and cattle we had,*" Jamal said.

Kalam is not sure what to make of the twist in his brother's fate. With great difficulty, they have placed an appeal before the Gauhati High Court for which they've spent another 15,000 rupees in lawyer's fee.

"*As long as we can remember now, we've only faced hardships,*" said Kalam. A foreigner tag on one brother is an equal hardship for the other brother, who now has to think about taking care of both their families, if Jamal is taken away.

147. Mahesh Langa, Gujarat HC stays compulsory voting in local polls, *The Hindu*, 21 Aug. 2015, <https://www.thehindu.com/news/national/other-states/gujarat-hc-stays-compulsory-voting/article7565684.ece>

148. Ashok KM, Gujarat High Court halts State Government's move to make voting compulsory, *LiveLaw*, 21 Aug. 2019, <https://www.livelaw.in/voting-cannot-be-made-compulsory-since-as-it-would-violate-right-of-freedom-of-speech-and-expression-ec-says-to-sc/>

149. Name changed due to reasons of privacy

STRINGENT STANDARDS OF DISPENSING BURDEN OF PROOF

The *Sonowal* judgment reversed the burden of proving that a person is an Indian citizen on the person suspected of being a foreigner. On ground, this has translated into an atmosphere of hostility and confusion.

Amnesty International India found that many persons, despite having all the requisite documents, are put through an oral examination by the Foreigners Tribunal. In this examination, the questions may range from the minute details of their parents' voting constituencies to whether the parents lived with the person. The answers to these questions are critical because, a delay of a few seconds or a wrong answer may cost people their citizenship.

In the absence of any guidelines, the Tribunals often over-emphasize the oral evidence and ignore the documentary evidence. In some cases, it looks at the documentary evidence and ignores the oral testimony.

Under international human rights law, restrictions on liberty must obey the principle of legality: they must be adequately accessible, so that people know how the laws limit their conduct, and they must be precise, so that people can regulate their conduct accordingly.¹⁴⁸

On the contrary, the lack of predictability in the procedures of the Foreigners Tribunals leaves space for arbitrariness, thus violating international law.

SEEMA SAHA¹⁴⁹

The border police first visited Seema Saha in 2008. They approached Seema and her sister at a tea stall that they operate together in the market in NK Darranga village in Tamulpur (Baksa district). *"They asked my sister to show them some identification documents. They seemed satisfied with whatever we showed them,"* she told Amnesty International India. She said they even took some money for *chai pani* (petty expenses).

In 2016, the border police officials visited her again at her residence stating that a 'Bangladeshi notice' had come in her name. Seema was surprised that she was suspected of being a *bideshi*, a euphemism for Bangladeshi in Assam. *"I have all my documents with me and I was born here,"* she said.

The police officials had come from the border branch of Tamulpur Police Station. She showed legacy documents like

her father's name in the voter lists of 1966 and 71, which also has her older sister's name on it. She submitted her Permanent Account Number (PAN) card as linkage. Later, they even submitted her father's land documents from her village in Barpeta district, where she was born and raised.

Her son, Sanjeet, showed Amnesty International India the inquiry form (attached with the order of the Foreigners Tribunal) in which the names of three witnesses were listed, who had testified against her, one of whom was their *Gaon Burah*.

"One of the three witnesses who testified against my mother is a person who blackmails people by enlisting their names with the Border Police. Those who do not pay him get a notice sent against them. Sometimes, those who pay him still get accused of being a foreigner," said Sanjeet.

In the Tribunal, Seema Saha was asked questions about her father and husband and the details of when they had passed away. *"I was asked if I know where I came from. I told them that I was from Barpeta. But when they asked me where my parents came from, I couldn't answer because all of us were born here,"* said Seema Saha.

The Foreigners Tribunal declared her a foreigner, stating that during cross examination, Seema Saha did not know where her forefathers came from in Bangladesh. Both the *Gaon Burah* was brought on as witnesses on the stand. However, the *Gaon Burah* of NK Darranga (her present village) said that although he had not seen any legacy data nor had any record or proof but he knew her for the past 32 years. The *Gaon Burah* of Balikuri (her native home) said that he had not seen Seema's father personally and did not keep any record of villagers except the certificate issue register.

While concluding that the Seema is a foreigner, the member quoted a Gauhati High Court order from 2 May 2017, which says, *'it has to be borne in mind that once a proceedee is declared to be a foreigner, it would only be a logical corollary to such declaration that his brothers, sisters, children and other family members would also be foreigners'*. The Foreigners Tribunal member further said it would be the duty of the Superintendent of Police to inquire the brothers, sisters, children and other family members of the declared foreigner and make a reference to the Foreigners Tribunal against such members.

The 1955 Citizenship Act of India does not lay down the knowledge of one's parents' and grandparents' domicile as

a pre-condition to allowing access to citizenship in India. Similarly, a village headman's personal knowledge of a person's parents is also not a pre-requisite to access citizenship in India. The Tribunal's persistent emphasis on the absence of Seema's name in the voter list along with her father in 1966 and 1971 is also unfounded considering the minor age of Seema at that time. Put next to this, the Tribunal's lack of reasoning for outright rejecting all the documents pre-dating 1970 produced by Seema to prove her parents' Indian citizenship makes the proceedings in Seema's case highly problematic.

Most importantly, the Foreigners Tribunals under the Foreigners (Tribunal) Order, 1964 and Foreigners Act, 1946 are not empowered to order for a person's deportation. Their mandate is limited to determining whether a person is a foreigner or not, and issuing an opinion accordingly.

In August 2019, Seema's family filed an appeal in the Gauhati High Court. *"Once we get a date from court, we are thinking of getting another lawyer. This one is very lazy,"* said Sanjeet.

Meanwhile, Sanjeet is keeping a close watch on his mother. *"She has been under a lot of tension especially because people from the village have been sent to the detention centre. Some of them came back though,"* he said. *"They are outright harassing Indian citizens. This case has completely disturbed our lives and peace of mind."*

NARAYAN DAS

The world of 25-year old Amrit Das and 18-year old Jhuma Das came crashing down when their parents, Narayan Das and Amari Das were arrested and sent to the Goalpara district jail and Kokrajahar district jail in 2017, three months after being declared foreigners by the Foreigners Tribunal in Tamulpur, Baksa district.

"They were picked up from the bus stand on the day they were going to file an appeal in the Gauhati High Court," said Amrit. *"Only a day before, did they receive a copy of the Foreigners Tribunal opinion".*

Narayan Das, received the notice from the Foreigners Tribunal in 2015 and a year later, his wife, Amari Das also received a notice in her name. The Border Police had tried to serve Narayan notices several times before but due to discrepancies found in his surname, he did not accept the summons. Narayan had changed his surname from Biswas to Das *"Earlier notices had a wrong surname or address. The Border*

police then got the correct address from the Gaon Burah (village headman) of Betna village in Baksa district," said Amrit.

In their possession were voter lists from 1965, which has their grandfather's name, and from 1979 with their father's name. Amrit said his father had to go to the Foreigner Tribunal at least 8-10 times.

Narayan Das exhibited his 1965 voters list with the name of his father; he also submitted the 1979 voters list where his name is recorded as Narayan Biswas. Subsequently he started writing his name as Narayan Das but according to the Foreigners Tribunal, he could not provide any substantial evidence towards the legitimate change of name.

The Foreigners Tribunal on 18 March 2018, declared Narayan a foreigner which was challenged in the Gauhati High Court the same year. On 31 January 2019, the high court passed an order stating that Narayan Das must prove the name as claimed before the Foreigners Tribunal, failing which the previous order will remain in force.

After the case came to the Foreigners Tribunal again, the member found Narayan's deposition, which was produced as a witness for the second time, to be the same. Moreover, Narayan's wife's name did not appear in any electoral rolls after 1979, which appeared to be suspicious to the Tribunal member. For these reasons, their citizenship remained status quo.

In their mother's case, Amrit said there was a problem in proving linkage to her father although they had obtained a certificate from the *Gaon Burah* of her natal village. It's fairly common in these parts for young girls to be married before turning 18 or completing formal schooling. In the absence of a birth certificate or school certificate to show linkage, they have to rely on a certificate issued by their *Gaon Burah*.

"I was most shocked when she was declared a foreigner because there were no discrepancies in her name in any of the documents," said Amrit.

The brother and sister visit their parents at least once or twice a month in the detention centre. Their mother spent a year in Kokrajhar jail. *"The food is really bad there. My mom rinses off the potatoes from the curry and then eats it. There's nothing much to do there except just sit around all day in a cramped space. About 50 detainees are in a single room,"* said Narayan's daughter Jhuma. She said that her parents claim there's some sort of medication mixed in the food, which induces a bloating feeling in their stomach.

148. UN Doc. A/HRC/13/34, para 25

149. Name changed due to reasons of privacy.

Jhuma was to appear for her class 10 board exams the year her parents were taken away to detention centres and her brother became the sole breadwinner. *“My school year got disrupted and we didn’t have money to pay the fees. My parents told me to continue studying but even if I could go back to school, who will take care of the house now?”* asked Jhuma.

The brother and sister have been struggling since then. *“We’ve had to sell off all our expensive belongings like my mother’s jewellery and have taken loans from several places to fight their cases,”* Jhuma said. *“They are suffering inside and we are barely surviving here.”*



A detention centre under construction in Assam.
© Amnesty International India

Speaking to Amnesty International India, **Gautam Bhatia**, an expert on the Constitution of India said, “*The standard logic of putting the burden of proof on the person proving his/her nationality is that it is easier for them to produce the relevant documents, a principle found in another common law countries as well. However, in India, documentation has always been sketchy, particularly with vulnerable communities. I think the question which needs to be asked is that in a country like India where the government has chosen to borrow principle of reverse burden of proof from countries such as UK and US, and made documents the basis to dispense that burden, who is likely to suffer the most? The people living on the margins in India. It is an ill-thought remedy.*”¹⁵⁰

MOHAMMAD ASHRAF¹⁵¹

Mohammad Ashraf, a school teacher, and his brother Mohammad Abul Hussain recall receiving notices from the Foreigners Tribunal on 19 June 2015. Two police personnel from the Border Police branch of Manikpur PS hand delivered the notices to them.

“We were having a village meeting, when we were informed that the police were at our doorstep. They told us that we’ll have to go to the Bongaigaon Foreigners Tribunal and hire a lawyer to represent us with all our documents,” Ashraf told Amnesty International India.

Ashraf said that the police made two people, one of whom is Ashraf’s cousin, sign on a blank sheet of paper. *“The police said that they needed the signatures as proof that we came to the village. My cousin can sign his name but cannot read or write much beyond that.”*

Later, they found out, that the signatories were turned into witnesses to testify that they had come from Bangladesh after 1971. A 2018 affidavit filed by Soleman SK, one of the witnesses, states that he never recorded a statement for the Border Police officials about the nationality of the said individuals nor provided any home address in Bangladesh. This was shared with Amnesty International India.

The case in the Foreigners Tribunal went on for about a year and in 2016, his brother and mother were declared Indians and Ashraf was declared a foreigner of post-1966 stream. His name was removed from the voter lists for 10 years. He said that while the three of them had submitted the 1951 NRC list with their grandfather’s name on it, the lawyer failed to mention the submission only in Ashraf’s written statement.

“I was taken to a Foreigners Regional Registration Office where I was asked for my address in Bangladesh but I have never been to Bangladesh. The police wrote down an address and told me to corroborate it if anyone asks. When I refused, they threatened me by saying that the police will take me away,” said Ashraf.

When they filed an appeal in the Gauhati High Court with the petition that if his brother and mother were Indians, Mohammad Ashraf must also be an Indian, the court set aside not only his Foreigners Tribunal order, but his mother’s and brother’s as well and asked the Tribunal in Bongaigaon to arrive at an opinion within 60 days.

Mohammad Ashraf says when they approached the Foreigners Tribunal again; the member was hostile to him. He said that he grilled him for four hours continuously. *“He asked me if I have a birth certificate, my grandfather’s voter list as well as his constituency name, and voter serial number. I answered all his questions,”* Ashraf said.

However, in the Foreigners Tribunal order, accessed by Amnesty International India, the member had written that Ashraf could not answer questions about ‘the death of his grandparents’ and ‘was unable to say the voter serial number, holding number, and polling station number of his grandparents.

“I remembered my grandfather’s serial number – 99,” he said, *“I asked the Foreigners Tribunal member whether he knows the serial number of his voter list?”*

His brother, Abul, said that the same Foreigner Tribunal member had taken a very threatening tone with him. *“He kept asking me where in Bangladesh I came from. I denied having any connection to Bangladesh and that I was born and raised here just like my parents, but he kept pressing on.”* His mother was asked similar questions about her village in Bangladesh. The member asked them all the questions in Hindi, a language they didn’t comprehend well.

On 18 May 2018, the three of them were declared foreigners by the Foreigners Tribunal.

150. Telephone Interview with Gautam Bhatia, 20 October 2019, Bengaluru, India

151. Name changed due to reasons of privacy

INTER-STATE MIGRANTS

The citizenship determination processes that are peculiar to Assam do not consider the magnitude of inter-state migration in India. The 2017 Economic Survey of India estimated that close to 9 million people migrated internally between 2011 and 2016.¹⁵² According to the 2011 Census, there were 139 million internal migrants in the country.¹⁵³ Amnesty International India found that in order to prove the Indian citizenship of one's parents or grandparents who migrated from one state in India to another, people have to produce documents demonstrating land ownership and voting rights from their state of origin. In the absence of any streamlined processes to map the documentary evidence of one's family tree going back decades at a stretch, people run pillar to post to obtain documents from government offices within an unreasonably short window. They have to fight the labyrinth of bureaucratic paperwork to find documents considered adequate by the Foreigners Tribunal.

The Tribunal Members, with little or no judicial experience and appointed based on their knowledge of Assam and its history, often fail to appreciate the specific features of documentation maintenance and management in other states. It also brings a unique challenge to Section 6A of the Citizenship Act 1955, which provides separate cut-off dates for determining citizenship in Assam, to fore.

IMRAN ALI¹⁵⁴

In 2010, when Imran Ali was at his native village near Kolkata in West Bengal, police officials had come to his residence in Guwahati to make an inquiry. Imran Ali is from West Bengal but he has been living in Assam since 1965. When he returned to Guwahati, the neighbours notified them and Imran decided to take his documents, including his voter ID from West Bengal issued in 1995, to the Paltan Bazar police. Imran submitted the necessary documents to the police.

In 2015, the Border Police came to their residence again this time with a notice from the Foreigners Tribunal, Kamrup (Metro) No. 1. The notice said Imran Ali had to prove his nationality.

Imran Ali hired a lawyer they knew through common friends, who assured them that the case will easily get resolved. "We even submitted an affidavit saying that we had been residing here since 1965 along with his voter ID and ration card that was issued in Assam," said Zishan, Imran Ali's nephew.

Imran Ali told Zishan that during the Foreigners Tribunal hearings he answered all the questions that were asked by the Tribunal member except the district he belonged to before he migrated to Assam. "We've been in Assam for a much longer time so we're more familiar with the districts here," Zishan explained.

On 14 July 2017, they found that Imran Ali was declared a foreigner and the Foreigners Tribunal had ordered that he be arrested and sent to an detention centre. "We were shocked because we were expecting a positive opinion especially since we submitted a 1966 voter list with his name on it," Zishan said. "Imran was sobbing and wanted to run away."

The Foreigners Tribunal rejected Imran's nationality declaring him "to be a foreigner, who had illegally entered into India (Assam) from Bangladesh after 25.03.1971". The Tribunal observed that the electoral roll of 1966 of No. 141 Ballygunge Assembly constituency was not valid because the Director of State Archives, Higher Education Department, Government of Bengal was not the custodian of the electoral roll of 1966.

Moreover, the Tribunal observed, "The opposite party has produced his voter identity card marked as Exhibit C issued on 01.01.1995 by the Electoral Registration Officer for Ballygunge Assembly Constituency. But the opposite party has not submitted his horoscope, birth certificate etc. to prove the fact that he was born prior to 31st July 1987 to acquire the right of Indian citizenship by birth as per provision of section 3 (1)(a) of the Citizenship Act, 1955".

While he produced a certificate issued by the Councillor of the Kolkata Municipal Corporation (KMC), Ward No. 65, to prove that his father was an Indian citizen, the Tribunal said that the document could not be relied upon since they did not produce her as a witness nor called for the records maintained by the KMC.

When Imran challenged the order of the Foreigners Tribunal in the Gauhati High Court, he also submitted the voter list from 1961 which has his parents' name on it. This was certified by the Assistant Director, Directorate of State Archives, Higher Education Department and the Govt. of West Bengal. The judge, however, said that the Election Officer, Kolkata was the custodian of the Electoral roll of 1966 of 141 Ballygunge constituency under Section 76 of the Indian Evidence Act, 1877 and therefore, rejected the submitted voter list.

The High Court order also pointed to variances in his father's name and age in different identity cards and voter lists as the basis for dismissing Imran's case.

By then, the family had spent 1.7 lakh rupees. *"All our family members had pooled in money to help him out. It's only at the Supreme Court level that we found a lawyer who hasn't taken much from us. Another lawyer had quoted around 400,000 rupees as his fee, which we could not afford,"* said Zishan.

In order to file an appeal in the Supreme Court, the family needed some of the original certified copies from the Foreigners Tribunal. *"But the Tribunal said that only a direct relative can come and collect this. Even his wife was not allowed so we had to bring his aged father from Kolkata for this. The 85-year-old man could not even stand properly,"* said Zishan.

Further, speaking to Amnesty International India, Anees Tanveer, the lawyer who represented Imran Ali at the Gauhati High Court said, *"In the High Court, we filed a response received from the Directorate of State Archives, Higher Education Department, Government of West Bengal under the Right to Information Act, 2005. In the response, the Department acknowledged and confirmed that they are indeed the custodian of the 1966 voter list. However, at that point, the Court did not even look at this aspect."*

A quick look at the official website of the Directorate of State Archives reveals that the Directorate is *"the official custodian of all non-current records of the government"*.

The reversal of burden of proof aggravates the misery of the individuals who are further weighed down by the onus of bringing the issuing authorities before the Tribunal to prove the contents of the documents.

Zishan had gone to meet Imran recently at the Goalpara jail where he has been detained for the past two years. *"He said it's better to die instead of living here. If they have declared me as a Bangladeshi, why can't they just deport me? They are not even granting me bail,"* Zishan told Amnesty International India.

The overreach of the Tribunal is not only limited to this. The Foreigners Tribunals under the Foreigner (Tribunal) Order, 1964 do not have the power to determine whether a person is an illegal immigrant from Bangladesh or not. In Imran Ali's case, however, the Foreigners Tribunal, Kamrup (Metro) No. 2 took the liberty to not just declare him a foreigner, but also an immigrant and attribute a Bangladeshi nationality without pondering over any evidence in favour of these claims.

The case has been dismissed by the Supreme Court.

152. Krishnavatar Sharma, India has 139 million internal migrants. They must not be forgotten, World Economic Forum, 1 Oct 2017, <https://www.weforum.org/agenda/2017/10/india-has-139-million-internal-migrants-we-must-not-forget-them/>

153. Krishnavatar Sharma, India has 139 million internal migrants. They must not be forgotten, World Economic Forum, 1 Oct 2017, <https://www.weforum.org/agenda/2017/10/india-has-139-million-internal-migrants-we-must-not-forget-them/>

154. Name changed due to reasons of privacy.

MENTALLY ILL PERSONS

The procedures before the Foreigners Tribunal do not consider the unique vulnerabilities of people who approach the Foreigners Tribunal. For instance, there are no provisions of mandatory legal aid for people suffering from mental illnesses. Often, their mental condition is not considered before depriving them of their nationality and liberty.



Relatives and friends outside Dulal's house to pay their last respects.
© Amnesty International India

DULAL CHANDRA PAUL

Dulal Chandra Paul, a daily wage labourer, died in the Guwahati Medical College Hospital (GMCH) on 13 October 2019. Two years before, the Foreigners Tribunal No. 9 in Dhekiajuli at Sonitpur district had declared him a foreigner and sent him to a detention centre.

A copy of a letter from the Border Police branch at Sonitpur to the Border Headquarter office in Guwahati, which Amnesty International India accessed, said that he had been admitted at the GMCH on 28 September 2019 due to his 'deteriorating health condition'.

Dulal's death was widely reported by the news media since his family had refused to accept his body until he was declared 'Indian'. Amnesty International India met Dulal's family which accused the Tezpur District jail, where he was lodged since 2017 and hospital authorities of neglect given his mental health condition.

According to the data produced before the Assam Legislative Assembly on 29 July 2019, 25 persons have died in the detention centre till date, of which one was a minor.¹⁵⁵

In the year 2016, Dulal's second son, Ashok, recalls two police officials who came from the Border Police branch in Dhekiajuli and served notices accusing his mother and father of being foreigners. At the Foreigners Tribunal his mother, Belu Rani Paul, proved herself as an Indian national but Dulal was not as lucky. "My mother, in fact, did not have as many documents as my father," said Ashok.

Dulal in his written statement to the Tribunal said that his father, originally a resident of Sailiakanda district in Myemensingh in East Pakistan, came to India in 1956 with his brothers and their families. In 1965, the three brothers purchased a plot of land in Alisanga village, where Dulal used to reside, and he had submitted the land document (purchase deed and sale receipt) to prove his legacy prior to 1971.

He also submitted his family identity and 'share' identity card along with a *Gaon Burah* certificate, which was not cited therefore not accepted as reliable. While in his statement, he said that he had voted in 1993, 1997, 2005, 2009 and 2016 – he only submitted the 2017 voter list as evidence.

While declaring Dulal a foreigner in 2017, the Tribunal member said that while Dulal in his written statement said that his father and brothers migrated to India escaping insurgency in East Pakistan, their names were not registered in any citizenship registration certificate. The Foreigner Tribunal observed that the name of Dulal's mother does not appear in any voter lists prior to 1993 although he admitted his father had never cast his vote. The Foreigners Tribunal

also observed that Dulal's father's name does not appear as deceased in any of the voter lists and that his father name only appears in the registered sale deed.

From the documents produced by Dulal before the Tribunal, it was apparent that his parents entered Assam far before the cut-off date of 1966, according to Section 6A of the Citizenship Act. Exercising one's right to not vote in elections could be held against a person when the proceedings are mandated to determine whether a person is a voter or not but not whether a person is a foreigner or not. In addition, no specific reasons were cited by the Tribunal to reject the documents produced by Dulal.

Despite suffering from mental illness, Dulal was sent to detention centre. The Tribunal further ordered for his name to be deleted from the voters' list, and his other documents such as ration card and card issued under the Mahatma Gandhi National Rural Employment Guarantee Act be cancelled – a far overreach of a Tribunal's mandate.

Ashok said that his father often complained about the quality of food inside the prison and wanted his son to get him out from there as soon as possible. "About a month after he was taken to prison, the authorities took him to the mental hospital and administered shock therapy on him," Ashok alleged. "This was the first time for him. Before that, he would only take sleeping pills."

Ashok said his father's demise happened under very suspicious circumstances. "I was called by the jail authorities saying that my father was ill and was taken to the hospital. I went to Tezpur hospital to find he wasn't there. Then I went to the district jail, where the jailor for the very first time asked me to come and sit inside. He told me, 'Don't raise any alarm with the civil society bodies but your father's health condition had deteriorated very badly so we've sent him to Guwahati, where the government will take care of his hospital expenses'. That's when I got suspicious."

When Ashok went to the hospital in Guwahati, instead of the ICU, he found his father lying on the floor of the hospital. "There was no one to give him water and no one was attending to him. He told me to take him home or else he'll end up dead inside the jail."

155. Affidavit produced before the Gauhati High Court in the case of Mamoni Rajkumari v. State of Assam

SADIQUE ALI¹⁵⁶

Sadique Ali from Bongaigaon district has a speech impairment and an intellectual disability. When Amnesty International India visited him at his residence, he had been down with tuberculosis for more than a month. Due to his illness, and in the absence of a mental health professional, Amnesty International India did not directly interview him. Instead, it spoke extensively to his brother, Amjad Ali, who represented him in the Foreigners Tribunal.

Sadique's statement to the notice issued by the Foreigners Tribunal No. 2 in Bongaigaon says that 'he is a psychiatric ill patient, unable to understand and answer properly. Furthermore, he is also a person of impaired hearing (deaf person) ...'¹⁵⁷

Amjad said that the Foreigners Tribunal member took major objection to a mistake he made in the cross examination. *"He asked me if our parents were alive in 2012 and I said yes. Then he asked me if my parents were still alive and I told him that my father passed away in 1995. Because I made a mistake saying that my father was alive in 2012, the member got irritated and accused me of lying,"* he told Amnesty International India.

The Tribunal while rejecting Sadique's identity says that the family did not submit any documentary evidence like a death certificate of Sadique's father. Despite the family submitting land document from Bongaigaon district, the member noted that no sale deed of the land had been submitted. Along with this, the issuing authority of the *Gaon Panchayat* certificate and the *Gaon Burah* were also not produced, because of which the member found these documents to be untrustworthy.

Sadique is on bail from the Gauhati High Court, where he had appealed the Foreigners Tribunal opinion for review. The family, however, remains very nervous about the process, which can be seen in the way his brother frantically looks for documents when asked simple questions about dates and information about the trial.

The Foreigners Tribunal did not give a reason for rejecting the voters list of 1966 and 1970, which is the basis of a citizenship case. These lists carried his father's name. But the Tribunal questioned why the death certificate of his father had not been submitted. Minor variations in the name of his father were also questioned.

Sadique's younger daughter's name has not appeared in the NRC list. His elder daughter, who got married before the NRC process began, has made it to the list. Meanwhile, Sadique lies restlessly in his room. His family says that he remains unaware of what's going on around him.

"He still doesn't know that he is a bideshi in the eyes of his own country," said Amjad.



156. Name changed due to reasons of privacy

157. On file with Amnesty International India.

RECOMMENDATIONS



AMNESTY INTERNATIONAL INDIA CALLS UPON THE GOVERNMENT OF INDIA TO:

- Immediately sign and ratify the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness;
- Recognize the impact of the judgment in Sarbananda Sonowal v. Union of India and acknowledge the scale of the problem of statelessness it is likely to create in Assam, as a first step towards the identification and implementation of comprehensive and effective measures for its eradication;
- Restore citizenship to people where it can be shown that the deprivation of citizenship was done through arbitrary-decision making and constituted a human rights violation;
- In consultation with the human rights organisations, review the existing regime of determining nationality of Indian citizens and make amendments in line with the international and national fair trial standards and other human rights guarantees;
- Reverse the burden of proof on the state, particularly in cases where the person suspected of being a foreigner does not hold any other nationality and stands the risk of becoming stateless;
- Establish an appellate body in processes used to deprive people of their citizenship;
- Take steps to ensure that a person is not deprived of their citizenship due to lack of documentation;
- Provide full reparation to all persons arbitrarily deprived of their citizenship by the Foreigners Tribunals;
- Provide free, efficient and quality legal aid to persons accused of doubtful nationality at the time of both interrogation by the Border Police and proceedings before the Foreigner Tribunal;
- Take active efforts to regularize migration by promoting access to safe and orderly channels;

AMNESTY INTERNATIONAL INDIA CALLS UPON THE GOVERNMENT OF ASSAM TO:

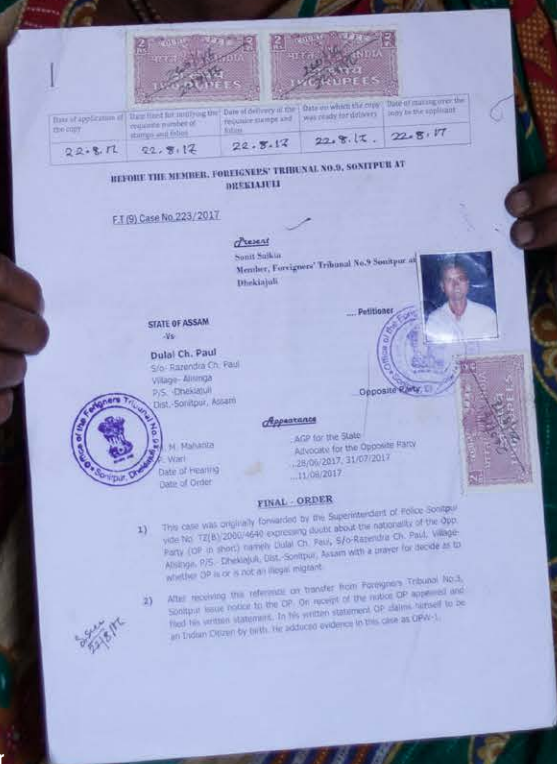
- Review the opinions of the Foreigners Tribunals in their cases to determine whether fair trial standards enshrined in national and international law were followed in determining their nationality and take immediate and concrete steps to restore the nationality of the persons who were arbitrarily deprived of their nationality;
- Carry out a comprehensive census or mapping exercise to identify all those who are stateless and at risk of statelessness, compiling disaggregated data by gender, age, status and location, in cooperation with National Human Rights Commission and other human rights organisation.

PENDING THE REPEAL OF THE EXISTING REGIME:

Foreigners Tribunals

- Review the recruitment process of Foreigners Tribunal members and ensure they are protected from undue influence of the executive bodies such as Home & Political Department of Assam. The process must include a written examination and intensive training by the National Judicial Academy;
- Fix the tenure of the members of the Foreigners Tribunals;
- Conduct public hearings in line with human rights standards;
- Publicly make available the orders of Foreigners Tribunal under Section 4 of the Right to Information Act, 2005.

Dulal's wife with the Foreigners Tribunal order that declared him a foreigner.
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Indians For Amnesty International Trust
#235, Ground Floor, 13th Cross, Indira Nagar,
2nd Stage, Bangalore – 560038, Karnataka, India
www.amnesty.org.in

CONTACT US

 contact@amnesty.org.in
 +91 80 49388000

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