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Citizenship Deprivation as an Act of Persecution: Case Study of the Assam Citizen Exercise As A Precursor to A Nation-Wide Determination of Citizenship

Ishita Chakrabarty
Quill Foundation, New Delhi, India, ishita.chakrabarty24@gmail.com

Citizenship Deprivation as an Act of Persecution: Case Study of the Assam Citizen Exercise As A Precursor to A Nation-Wide Determination of Citizenship

By Ishita Chakrabarty*

Abstract

This essay explores the reasons behind describing India's Citizenship practices (now modified through the *Citizenship Amendment Act* 2019) as 'persecutory'. In doing so, the essay refers to the international law on citizenship conferment and withdrawal that has traditionally been viewed as exclusive to a state's sovereign domain. The essay also looks into the socio-political dynamics, past persecutory conduct exemplified by the Assam-NRC exercise and the lack of protection afforded by those entrusted with the legal duty of conferring and withdrawing citizenship. The essay further uses the Assam-NRC exercise as a case study to claim that there exist well-founded grounds for believing that a subsequent action of this nature will involve real risks for the country's 200 million Muslim population.

I Introduction

In December 2019, the Indian Government passed the *Citizenship Amendment Act* (CAA) 2019, on the pretext of providing citizenship to those fleeing religious persecution. Although the preamble of the Amendment Act contains no mention of "persecution",[1] the Statement of Objects and Reasons as it stood in the Bill at the time of introduction[2] and the Union government's own affidavit before the Supreme Court of India (SC)[3] claim that the Act serves a humanitarian purpose of providing relief to those who are "forced to seek shelter in India due to persecution on grounds of religion".[4]

* Research Officer at Quill Foundation, New Delhi, India, E-mail: ishita.chakrabarty24@gmail.com
[1] *Citizenship (Amendment) Act*, 2019, No. 47 of 2019, an Act further to amend the Citizenship Act, 1955, online: *The Gazette of India* <http://egazette.nic.in/WriteReadData/2019/214646.pdf> ["CAA, 2019"].
[2] Lok Sabha, "Synopsis of Debates" (2019), online (pdf): <http://loksabhadocs.nic.in/Synop/17/II/2Supp+Supp+Syn-09-12-2019.pdf>.
[3] *Indian Union of Muslim League v Union of India* (2019), Supreme Court of India, Counter Affidavit of the Union of India, Writ Petition (C) No. 1470 of 2019, online: <https://scobserver-production.s3.amazonaws.com/uploads/case_document/document_upload/1191/Counter_Affidavit_filed_by_Union.pdf>.
[4] The Amendment Bill was originally introduced in the Parliament in 2015.

The Act amends the provisions of the *Citizenship Act*, 1955, along with the provisions of the Foreigners Act, 1946 and the Passport Act, 1920 and their consequent rules. The 2019 Act declares that all those travelling from the Muslim-majority countries of Pakistan, Bangladesh and Afghanistan without valid documents or overstaying their travel limits, will not be categorized as "illegal migrants", as long as they are non-Muslims.[5] It further allows these individuals an expedited route to citizenship through naturalization, reducing the period under the 1955 Act from eleven years to five years, in case they entered the territory before 31 December 2014. Once naturalized, their citizenship status is backdated to this proposed cut-off date.[6]

The Act's enactment saw the breakout of large-scale protests and communal violence across the country.[7] Internationally as well, India's move drew condemnation from all quarters over the glaring omission of Muslims. The United Nations High Commissioner for Human Rights (UNHCR) filed an intervention application before the Supreme Court, on the ground that the Act, though commendable in its purpose, was clearly discriminatory and violated India's international obligations.[8] The Union Government rebutted with the flawed argument that Muslims could not face persecution in Muslim-majority countries, and even if they did, they could seek refuge in other Islamic nations.[9]

Noticeably, the intervention was confined to refugee-specific issues. As will be seen, limiting the question to issues of immigration, allows states to claim the ground of security and sovereignty to justify their actions. Most of the petitions challenging the constitutional validity of the Act are premised on how it contravenes principles of secularism and equality that rest with all persons, including refugees, and have been previously adjudged as part of the basic unalterable structure to the Indian Constitution.[10]

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[5] CAA, 2019, s. 2. The Act specifically exempts Hindus, Christians, Sikhs, Parsis, Jains and Buddhists from these documents.
[6] *Ibid* at s. 3.
[7] Sanya Mansoor & Billy Perrigo, "'This is not just a Muslim fight.' Inside the Anti-Citizenship Act Protests Rocking India", *Time* (19 December 2019), online: <https://time.com/5752186/india-protests-citizenship-act/>.
[8] *IFS (Retd). & Ors. V Union of India* (2019), W.P. (Civil) no. 1474 of 2019, "Application for intervention by United Nations High Commissioner for Human Rights", online: <https://www.scribd.com/document/449928296/Draft-Intervention-application-on-behalf-of-OHCHR#from_embed>
[9] Rajya Sabha, "Supplement to Synopsis of Debate", (11 December 2019) at 561, online (pdf): <http://164.100.47.5/newsynopsis1/englishsessionno/250/Suppl.%20Synopsis%20_E_%20dated%2011.12.pdf>.
[10] See, Sanya Talwar, "CAA Challenge: SC Issues Notice in Fresh Batch Of Petitions, Tags Them With 160 Pending Pleas Seeking Similar Prayer", *LiveLaw* (20 May 2020), online: <https://www.livelaw.in/top-stories/caa-challenge-sc-issues-notice-in-fresh-batch-of-petitions-tags-them-with-160-pending-pleas-seeking-similar-prayer-157076>.

But in March 2020, the US Commission on International Religious Freedom (USCIRF) convened a hearing where it was noted that the Act's effect – intended or unintended – could be the disenfranchisement of Indian Muslims.[11] Throughout the hearing, experts continued to draw parallels between the CAA and the Citizenship Act of Myanmar that has seen the ethnic cleansing of minority groups like the Rohingyas.[12]

Since then, discussions have largely revolved around how the Act, seen alongside the National Population Register (NPR) and the National Register of Citizens (NRC) - both of which arise from the Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules of 2003 - are mere hoodwinks for the larger statelessness project that the current populist regime has in its mind in an effort to create a 'Hindu state', tending to the Hindu majority.[13] The NRC is supposed to be a definitive list of who belongs to India, drawn from the larger NPR. The NPR is a dataset of 'usual residents' (at the local, sub-district, district, state and national levels), composed of persons who have resided in an area for 6 months or more or who intend on doing so.[14] The pilot project was supposed to commence in April 2020, but has since been deferred.

Amidst fears of inadequate documentation to prove citizenship, the Union Home Minister claimed that the government would "throw away all infiltrators", but no "Hindu, Sikh, Jain, Christian or Buddhist" need worry – clearly excluding the State's 200 million Muslim population.[15] Another Parliamentarian justified the exclusionary exercise under the CAA, claiming that Muslims are "not equal" to Hindus.[16] In the background of increased dehumanization, hate speeches, and physical violence against the Indian Muslim community, the

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[11] United States Commission on International Religious Freedom, "Legislation Factsheet India: The Citizenship (Amendment) Act India" (February 2020), online (pdf): <https://www.uscirf.gov/sites/default/files/2020%20Legislation%20Factsheet%20-%20India_0_0.pdf>.
[12] "United States Commission on International Religious Freedom Hearing: Citizenship Laws and Religious Freedom", *Atlantic Council* (4 March 2020), online: <https://www.atlanticcouncil.org/commentary/event-recap/united-states-commission-on-international-religious-freedom-hearing-citizenship-laws-and-religious-freedom/>; European Parliament, "Motion for a Resolution on India's Citizenship (Amendment) Act, 2019", Plenary Sitting (2020), B9-0079/2020, online(pdf): <https://www.europarl.europa.eu/doceo/document/B-9-2020-0079_EN.html>.
[13] Uday Chandra, "The Making of a Hindu India", *Al Jazeera* (24 August 2020), online: <https://www.aljazeera.com/indepth/opinion/making-hindu-india-200820104806024.html>.
[14] *Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules* (2003), [India]Central Government Act, rule 2(l).
[15] "Will throw out each infiltrator one by one, says Amit Shah", *Hindu BusinessLine* (1 October 2019), online: <https://www.thehindubusinessline.com/news/national/will-throw-out-each-infiltrator-one-by-one-says-amit-shah/article29567841.ece>.
[16] Vice News, "Interview of Subramaniam Swamy to Isobel Yeung" (1 April 2020), online: *Twitter* <https://twitter.com/i/status/1245413627504414720>

UN Special Adviser on Prevention of Genocide and Under-Secretary General, Adama Dieng, was forced to raise concerns.[17] Similar ministerial statements and the example of the Assam NRC have stoked fears about how the NPR and the NRC could disenfranchise certain communities, while allowing certain others to find their way through, under the CAA 2019.[18]

The NRC was first conceived and prepared in 1951 in the north-east Indian state of Assam under the Assam Accord, to put a check to immigration from its neighboring country (Bangladesh). It was drawn over the population census for the same year, and a revised version was under preparation in the state (after a brief halt) until 2019, when the final list was published.[19] This exercise to define citizenship has seen three lists, with the final list excluding up to 1.9 million people - and is now being contemplated in the rest of the nation. But the Assam exercise has been controversial for reasons beyond the resulting withdrawal of nationality; it has been additionally described as 'persecutory'.[20]

Several international bodies, including the UN Treaty mechanisms, had expressed their apprehensions over the particularly hostile attitude of NRC officials against Muslims, and those of Bengali descent, stating that the procedure could potentially exclude genuine citizens.[21] The State's move had even prompted the Genocide Watch to put Assam on the Watch List.[22]

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[17] United Nations, Press Release, "Note to Media on India by Under-Secretary General Adama Dieng, UN Special Adviser on the Prevention of Genocide" (18 May 2020), online: *UN Meetings Coverage & Press Releases* <https://www.un.org/en/genocideprevention/documents/18052020_SA%20note%20to%20media%20on%20India_final.pdf>.

[18] *Supra* note 10. Similar concerns have been raised by the Petitioners in the *Indian Union Muslim League* case, that challenged the constitutionality of the Amendment.

[19] "Explained: What is the Assam Accord that is fueling protests in the State", *Indian Express* (13 December 2019), online: <https://indianexpress.com/article/explained/explained-what-is-the-assam-accord-citizenship-amendment-bill-protests-6164018/>.

[20] Abdul Kalam Azad, "Assam NRC: A History of Violence and Persecution", *The Wire* (15 August 2018), online: <https://thewire.in/rights/assam-nrc-a-history-of-violence-and-persecution>.

[21] Office of the United Nations High Commissioner for Human Rights, *Mandates of the Special Rapporteur on minority issues; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and the Special Rapporteur on freedom of religion or belief*, Special Procedures Commission Report, OL IND 13/2018 (11 June 2018) online: <https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=23884>; Office of the United Nations High Commissioner for Human Rights, *Mandates of the Working Group on Arbitrary Detention; the Special Rapporteur on freedom of religion or belief; the Special Rapporteur on minority issues and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, Special Procedures Commission Report, OL IND 29/2018 (13 December 2018) online: <https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=24247>.

[22] Dr. Gregory H. Stanton, "Genocide Watch for Assam, India – renewed", *Genocide Watch* (18 August 2019), online: <https://www.genocidewatch.com/single-post/2019/08/18/Genocide-Watch for-Assam-India---renewed>.

Although these are not necessarily legal assessments of whether genocide has occurred or is underway, they have political ramifications and often take into account State intent as visible in fact.[23]

This paper seeks to explore how the Assam NRC has been 'persecutory' and why there exists a fear of a subsequent all-India exercise being the same. As a preliminary matter, the first section deals with the right to a nationality and the stringent substantive and procedural safeguards preceding deprivations of nationality, leading to statelessness. The second section examines whether such deprivations could amount to 'persecution'. The final section deals with the preparation of the NRC in the state of Assam and its replication across the country.

II Nationality and Statelessness

Nationality or citizenship has been described as the "right to have rights", and the denial of this right, has been equated with a denial of juridical personality.[24] In its absence, states can disregard an individual's rights when asserted against the state or other individuals.[25] Both nationality and citizenship are markers of state membership. However, while nationality operates in the international realm, citizenship operates in the municipal realm and is understood in terms of the rights and obligations that a member bears under municipal laws.[26] The latter is thus variable in scope. For instance, in the absence of citizenship, the Rohingyas in Myanmar are prohibited from having more than two children, disbarred from holding property, have no rights to marry without prior permission, and so on.[27]

Article 15 of the Universal Declaration on Human Rights (UDHR), provided for the first time that everyone had a "right to a nationality", and the corollary right to not be arbitrarily deprived of it. Prior to this, nationality had been adjudged as lying solely within the state domain,[28] and

[23] See, David Scheffer, "Genocide and Atrocity Crimes" (2006) 1:3 Genocide Studies and Prevention 229.
[24] Alison Kesby, *The right to have rights: citizenship, humanity, and international law* (Oxford: Oxford University Press, 2012), ch 2 at 62.
[25] *Girls Yean and Bosico v Dominican Republic* (2005), Inter-Am Ct HR (Ser C) No 130 at paras 178-179.
[26] Paul Weiss, *Nationality and Statelessness In International Law*, 2nd ed (Germantown, Maryland: Sijthoff & Noordhoff, 1979) at 4-5.
[27] Engy Abdelkar, "The History of the Persecution of Myanmar's Rohingya", *The Conversation* (21 September 2017), online: <https://theconversation.com/the-history-of-the-persecution-of-myanmars-rohingya-84040>.
[28] Lassa Oppenheim, *International Law*, 8th ed (David Mckay Company Inc,1955) at 642; *Case of the Exchange of Greek and Turkish Populations* (1925), Advisory Opinion, PCIJ (Ser B) No. 10 at 19.

hence considered a "privilege".[29] This view was reiterated under the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, and in the famous *Nottebohm* judgement of the International Court of Justice.[30] Although both, the Convention and the judgement acknowledged that a state's municipal law on nationality should be consistent with international conventions, customs and general principles of international law, a state that acts in contravention of such international developments does not bear any repercussions, except that other states need not give recognition to such consequences.[31] Moreover, the right to nationality under the UDHR has been criticized for not putting the onus on a specific state to confer such nationality.[32] This conception of nationality being a privilege has also seeped into other Conventions subsequently enacted, such as the International Covenant on Civil and Political Rights,[33] the Convention on Elimination of All Forms of Racial Discrimination,[34] the Convention on the Rights of Child etc.,[35] which only make a passing reference to nationality, and more specifically to nationality of children.

Thus, former Secretary of State of the United Kingdom, David Owen, noted that Hannah Arendt's description of nationality as the "right to have rights" is still valid today in spite of a robust human rights framework. In his words, its loss is both "wrongful and harmful", since it deprives an individual of exercising his political rights, and exposes him to insecurity, because he is unable to access resources.[36] But more importantly, without nationality, an individual

[29] Flavia Zorzi Giustiniani, "Deprivation of Nationality: In Defence of a Principled Approach" (2016) 31 Questions of Int't L 5 at 19.
[30] *Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws*, 12 April 1930, 179 LNTS 89 (entered 1 July 1937); *Nottebohm Case (Liechtenstein v Guatemala)*(second phase), [1955] ICJ Rep 4 at 23.
[31] *Ibid*.
[32] David Owen, "On the Right to Have Nationality Rights: Statelessness, Citizenship and Human Rights" (2018) 65 Netherlands Int'l L Rev 299. Current provisions as they exist discuss how individuals are entitled to a nationality (for instance, Article 15 of the UDHR states, the right to "a" nationality). However, the debate must shift to an examination of the right to hold a particular state's nationality.
[33] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 arts 9—14 (entered into force 23 March 1976) [ICCPR].
[34] *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) at art. 5(iii).
[35] *United Nations Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) at art 5.
[36] Owen, *supra* note 32 at 300-301.

possesses no associated rights to residence within the borders and hence can be forcibly displaced and deported,[37] or even indefinitely detained.[38]

Article 1(1) of the 1954 Convention on Status of Stateless Persons defines a 'stateless person as one who is not considered a national by any state under the operation of its law';[39] whereas the 1961 Convention on the Reduction of Statelessness ("1961 Convention")[40] provides for measures to prevent and reduce statelessness. Several scholars have noted the lack of attention paid by the international community to stateless people (as opposed to refugees)[41] - apart from these two International Conventions, and one regional Convention (European Convention on Nationality, 1977), the literature on statelessness is rather sparse. This is also confirmed by the number of states that are signatories to the Refugee Convention (145) as opposed to the two Conventions on statelessness (74 states are signatories to the 1954 Convention; and 45 states are signatories to the 1961 Convention).

The 1961 Convention lays down what amounts to "withdrawal of nationality" that results in statelessness. Withdrawal can either be a consequence of operation of laws, also termed as "loss of nationality",[42] or through action of state authorities, also termed as "deprivation of nationality".[43] In the former case, withdrawal is usually on account of different practices of citizenship conferment (jus soli or jus sanguinis, or discriminatory gender provisions), state succession, transfer or incorporation of new territory. In the latter case, it could be a result of loss of birth certificates required for applications, lack of administrative capabilities, corruption or irregular processing of certificates, unrealistic time frames for registration, or even prior flight as a refugee. As will subsequently be demonstrated, statelessness does not operate between such binaries.

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[37] UNHCR, *Expert meeting — the concept of stateless persons under international law*, 2010 at para. B.7, online: <http://www.refworld.org/docid/4ca1a e002.html>.
[38] *Anudo Ochieng Anudo v Republic of Tanzania* (2018), African Court on Human and Peoples' Rights Judgment, App No 012/2015 at paras 118, 120-121.
[39] *Convention Relating to the Status of Stateless Persons*, 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960).
[40] *Convention on the Reduction of Statelessness*, 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975).
[41] See, Maryellen Fullerton, "The Intersection of Statelessness and Refugee Protection in US Asylum Policy", (2014) 2:3 J on Migration and Human Security 144("stateless persons are largely unnoticed"); Flavia Giustiniani, *supra* note 29.
[42] 1961 Convention, *supra* note 40 at articles 5-7.
[43] 1961 Convention, *supra* note 40 at articles 8 and 9.

Although the conferral or withdrawal of nationality is a sovereign function of the state, international law prohibits any arbitrary withdrawal of nationality.[44] The UNHCR Guidelines to the 1961 Convention[45] define "arbitrary withdrawal" as one: (1) without any legal basis, (2) disproportionate to the aims sought, and (3) inflicted without due process safeguards. Arbitrary withdrawal can take several forms, including where the state authorities prevent individuals from acquiring or retaining their nationality, or where they cease to consider individuals or a collective as their national. Expulsion, confiscation of relevant documents, or statements proclaiming that the concerned persons are not their nationals, suffice to show such withdrawal.[46]

(a) Substantive Aspects of Deprivation

Usually, international law restricts withdrawal of citizenship from individuals who would otherwise be left stateless.[47] Any deprivation of citizenship must be legally prescribed[48] and limited to "naturalized persons" who have acquired nationality through fraudulent means or misrepresentation, or shown their allegiance to another state, or committed acts that are "seriously prejudicial" and "threaten vital interests of the state".[49] These are punitive measures that are allowed to the state - provided they also satisfy the condition of proportionality. That is, the state must usually look to other less intrusive measures.[50] Apart from this, human rights treaties impose more exacting requirements, where states must evaluate if deprivation could affect other rights, such as those of family and private life.[51] Usually acts of terrorism, or

[44] United Nations Human Rights Council, *Human rights and arbitrary deprivation of nationality: Report of the Secretary-General*, 13th Sess, UN Doc. A/HRC/13/34, December 2009 at para 23, online: <https://www.refworld.org/docid/4b83a9cb2.html>.
[45] The Guidelines serve as interpretative guidance for decision-makers and reveal existing treaty laws and customary international law, along with progressive developments in human rights. UNHCR, *Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness*, UN Doc, HCR/GS/20/05, May 2020, online: <https://www.refworld.org/docid/5ec5640c4.html>.
[46] *Ibid* at para 9.
[47] 1961 Convention, *supra* note 40 at art 8(1).
[48] *Supra* note 45 at para 55.
[49] 1961 Convention, *supra* note 40 at art 8(3).
[50] *Supra* note 45 at paras. 50-52, 61-62.
[51] See, *UDHR*, Article 12 read with Article 16(3); *ICCPR*, Articles 17(1) and 23; *ICESCR*, Article 10; *CRC*, Article 16; *ICRMW*, Article 44; and regional treaties such as *ECHR*, Article 8. See also, *Hoti v Croatia*, App No 63311/14 (ECtHR, 26 April 2018) at paras 96, 122 (discussing the positive obligation of states to ensure the effective enjoyment of private life and right to family and the fact that the Applicant had lived in Latvia for almost the entire duration of her life and had close contacts there, should have acted as a constraint upon the State); *Slivenko v Latvia*, App No 4832/199 (ECtHR, 9 October 2003) at para 122 (discussing that even in situations of national security', states must always make individualised statements taking into consideration the specific situations of the applicant).

adoption of citizenship by fraudulent means in the absence of which citizenship could have never been acquired by the individual, could be serious enough to meet this criterion.

However, deprivation - whether legislative or administrative - is absolutely prohibited if it is based on discriminatory grounds, irrespective of whether or not the person is left stateless.[52] This provision is thus broad enough to cover policies and actions where, although it is impossible to show a discriminatory intention, a discriminatory impact is apparent.[53] The absolute nature of this prohibition arises not merely from the cohort of Statelessness Conventions which anyway have few signatories, but from the jus cogens nature of the prohibition on racial discrimination.[54]

Thus, a perusal of the Statelessness Conventions shows that withdrawal of citizenship from certain categories of individuals is more onerous as compared to the others: it affords greater protection to those with single nationality (who would on withdrawal become stateless); and absolute protection to those deprived on the basis of their protected identities. Moreover, even under the most extreme situations, it limits deprivation to only "naturalized" citizens - leading to the presumption that birth citizens cannot be stripped of their nationality rights.[55]

(b) Procedural Aspects of Deprivation

Any act of deprivation must be subject to fair trial standards;[56] the individual must be provided with reasons in writing, so as to allow him the opportunity to challenge the decision. All such decisions must be based on individualized assessments,[57] and must be confirmed by a court or any other independent authority, after providing the individual with a hearing on the merits. In case of a confirmation, they are also entitled to an appeal. Individuals must continue to retain their nationality up till the conclusion of such hearings.[58]

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[52] 1961 Convention, art 9.
[53] *Expelled Dominicans and Haitians v Dominican Republic* (2014), Inter-AM Ct HR (Ser C) No 282 at para 263.
[54] International Law Commission, "Draft Articles on the Responsibility of States for Wrongful Acts, with commentaries'" (2001) 2:2 Yearbook of the Int'l L Commission 31, p. 85 at para 5.
[55] This appears to be the case, even though para. 112 of the UNHCR Guidelines mentions that no distinction must be drawn between naturalized and birth citizens. See, Luca Bucken and Rene de Groot, "Deprivation of Nationality under Article 8(3) of the 1961 Convention on the Reduction of Statelessness" (2018) 25:1 Maastricht J of European and Comparative L 38 (enlisting declarations submitted for grounds under which nationality can be withdrawn, including for crimes of terrorism, disloyalty to state, or criminal offences within a certain period after naturalization). Even in the most serious of cases, they have been limited to naturalized citizens.
[56] 1961 Convention, art 8(4).
[57] *Supra* note 45 at paras. 76-77.
[58] *Ibid* at paras 72-75, 98, 100.

Moreover, deprivation itself does not entitle the state to detain or restrict the individual's movements. The state must only resort to restrictions when necessary, and these restrictions must be periodically reviewed.[59] Otherwise, temporally indefinite restrictions - where individuals are kept without access to information and procedural rights - can assume the form of ill-treatment and torture.[60]

(c) Acts of Persecution?

The term "persecution" is mentioned under International Criminal Law (ICL), International Human Rights Law (IHRL) and International Refugee Law (IRL) regimes. ICL defines the crime of persecution as any act or omission which in fact, denies or violates a fundamental right as laid down under international treaty or customary law.[61] Apart from the actus reus, ICL also requires existence of the chapeau elements (widespread or systematic nature of actions) and showing of a "special intent" to discriminate on any of the prohibited grounds of race, religion, nationality, etc. These additional requirements are required for the limited purpose of imputing individual criminal responsibility upon specific actors.[62]

On the other hand, IHRL generally concerns itself with "discrimination", and confines itself to findings of state responsibility through the attribution of conduct, either under the primary or secondary rules.[63] Finally, the IRL regime has no accepted definition of "persecution", although the definition of a 'refugee' rests upon such a finding.[64] In fact, according to Hugo Storey, the only certainty offered by the refugee law text is over the interaction between the persecutor and the persecuted. The interaction is such that the individual cannot seek or refuses to seek the

[59] *Ibid* at para 102.
[60] United Nations Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 22nd Sess, UN Doc. A/HRC/37/50, February 2018 at para 27 online: <https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session37/Documents/A_HRC_37_50_EN.docx>.
[61] Elements of Crime, Article 7(1)(h) of the Rome Statute of the International Criminal Court (last amended 2010) (1998); *Prosecutor v Popovic et al*, IT-05-88-A, Appeal Judgment (30 January 2015) at para 762(International Criminal Tribunal for the former Yugoslavia, Appeals Chamber).
[62] *Ibid*.
[63] See, "State Responsibility: First Report on State Responsibility by James Crawford, Special Rapporteur" (1998), UN Doc. A/CN.4/490 and Add. 1–7 at paras 14-15, 27.
[64] Article 1A(2) of the Refugee Convention defines a Refugee as one who has a well-founded fear of being persecuted on the basis of his membership (real or perceived) with enlisted groups (race, religion, nationality, a social group, or those holding certain political beliefs).

assistance of his state (unable or unwilling standard). Additionally, such interaction must be currently persisting.[65]

Since the qualification of an act and the attribution of responsibility involve different evaluations, this paper draws primarily from IRL and the actus reus of the ICL regime. In fact, ICL and IRL have converged before in some instances.[66] To cite one such instance, IRL has assisted in the development of jurisprudence on gender-based persecution under the Rome Statute,[67] even though a full import of the former into the latter is not possible since their underlying purposes are different.[68]

As far as this paper is concerned showing a lack of state protection will suffice, discriminatory intent on the part of individual state officials does not need to be proved. Additionally, it draws upon the experiences of others from the same community to build into the persecution assessment; since the aim here is not to seek asylum, there arises no question of "individual circumstances". Finally, it relies on the showing of "past persecution" to claim that a rebuttable presumption of "well-founded fear" of subsequent persecution arises over the nationwide citizenship exercise proposed.[69]

This scheme of looking at the act, coupled with an institutional failure to protect or lack of redress, also has the advantage of obviating the presumption that only nationals from conflict-ridden, repressive, and failed states are persecuted. As an example, consider the following statement of the UNHCR: "The U.N. refugee agency warns populist politics and fearmongering about immigration are eroding international protection for refugees fleeing conflict and

[65] Hugo Storey, "What Constitutes Persecution? Towards a Working Definition" (2014) 26:2 Int'l J of Refugee L 272.
[66] UN High Commissioner for Refugees, *Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law* (11-13 April 2011) at paras 4, 14-15 online: <https://www.refworld.org/pdfid/4e1729d52.pdf>.
[67] For more, see, Valerie Oosterveld, "Gender, Persecution and, the International Criminal Court: Refugee Law's Relevance to the Crime Against Humanity of Persecution" (2006) 17 Duke J of Int'l & Comparative L 49.
[68] See, *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgment (14 January 2000) (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), where the Trial Chamber itself has warned against such a full-scale import of persecution definition.
[69] Establishment of a 'well-founded fear' is closely linked to the question of 'return' (to the country of origin) and by corollary, availing international protection. See, House of Lords, Select Committee on the European Union, *Defining Refugee Status and those in need of International Protection*, (HL 2001-02, 156) Article 5 at para 19 online: <https://publications.parliament.uk/pa/ld200102/ldselect/ldeucom/156/156.pdf>.

persecution".[70] Thus, the general presumption is that those in need of international protection are the ones fleeing conflict or failed states, while populist states are merely the recipients of such individuals. In fact, populist regimes that survive through acts of 'othering' and claim to represent the will of the nation are more likely to be illiberal and capable of stripping the independence of institutions responsible for upholding civil liberties.[71]

III Defining Persecution and its Constitutive Elements

Several scholars have noted that there purposely exists no definition of persecution, since not all such acts can be listed. To do otherwise, would be limiting. Rather, it must be evaluated on a case-by-case basis, to see the nature of rights violated (such as those of dignity and integrity), and the manner and gravity of such violation.[72] Some state legislations, such as Australia's *Migration Act, 1958* (Cth) (amended in 2003), have attempted to define persecution. However, they are not comprehensive, since they exist for the limited purpose of an asylum seeker's admittance into a specific state,[73] and not for a larger question before the international community of whether persecution is underway. The benefit of the latter is that it would allow states to intervene before such persecution-related consequences (in this case, statelessness) are effected.

The English Court of Appeal has previously relied on Professor Hathaway's definition to hold that persecution comprises a systemic or sustained deprivation of core entitlements (non-derogable rights) or of derogable rights in a discriminatory manner, whether by the state or non-state actors (and there is no effective state remedy).[74] Nevertheless, threats to life or freedom,

[70] Lisa Schlein, "UN: Populist politics eroding international protection for refugees", *Voice of America* (4 October 2018), online: <https://www.voanews.com/europe/un-populist-politics-eroding-international-protection-refugees>.
[71] See, Dagny Anderson *et al*.,"The Global Implications of Populism on Democracy - Task Force 2018", *University of Washington: The Henry M. Jackson School of International Studies* (2018), online (pdf): <https://jsis.washington.edu/wordpress/wp-content/uploads/2018/04/Task-Force_C_2018_Pekkanen_robert.pdf>.
[72] Guy S Goodwin-Gill & Jane McAdam, *The Refugee in International Law*, 3rd ed, (Oxford: Oxford University Press, 2007) at 93-94; Volker Türk & Frances Nicholson, "Refugee protection in international law: an overall perspective" in Erika Feller, Volker Türk & Frances Nicholson, eds, *Refugee Protection in International Law* (Cambridge:Cambridge University Press, 2003) 3 at 39.
[73] Storey, *supra* note 65 at 275.
[74] *Ravichandran v Secretary of State for the Home Department*, United Kingdom: Court of Appeal [England and Wales], 11 October 1995, online: <https://www.refworld.org/cases,GBR_CA_CIV,3ae6b677c.html>.

acts that are likely to result in death or torture, or oppression of religious beliefs, mala fide imposition of penalties, are at minimum, accepted as acts of persecution.[75]

Further, state legislations, such as the *Migration Act, 1958* (Cth) of Australia (s. 91R), could still serve as an indicator for what states believe amounts to persecution. The provision states that persecution must result in "serious harm" and arise on account of the individual's membership, real or perceived, of a protected group. It must also be systematic. It then lists certain acts that could constitute "serious harm" such as: (a) threats to life and liberty, (b) significant physical harassment or ill treatment, (c) denial of access to basic services which directly threaten one's subsistence.

Hathaway's definition without the systematic (or persistent) element, has also been adopted by the EU's Qualification Directive (QD). The QD also includes legal, administrative, prosecutorial and judicial acts that are imposed discriminatorily, and denial of judicial redress, under a non-exhaustive list of acts that could amount to persecution.[76] Although Hugo Storey adds that such judicial measures must not be merely "shortcomings", but amount to "flagrant denial" of fair trial rights itself.[77] However, qualification purposes demand that there is precision on whether a specific act could amount to persecution. Otherwise, even broadly worded laws can be limited by subjective interpretations.[78] The following subsection deals with whether (or not) deprivation of nationality could amount to persecution.

(a) Denial of Nationality as Persecution

Lambert and Foster note that nationality withdrawals have not been particularly categorized as "persecution", since statelessness and refugee-hood have been traditionally conceived as

[75] Storey, *supra* note 65 at 275-278.
[76] Qualification Directive, 2004, Articles 9 (1) and (2). Article 9(2) head note reads as: "acts of persecution as identified in paragraph (1) can take the form of…".
[77] Storey, *supra* note 65 at p. 284.
[78] For instance, the Swiss law on persecution {Federal Law on Asylum, art. 3(2)} is seemingly broad (including threat to life, limb or freedom and 'measures that entail an unbearable psychological pressure'). Although the term was initially inferred as including measures that 'make it impossible for a person to lead a life of dignity', in several later cases, acts drastically limiting religious freedom of individuals or acts of ethnic cleansing without murder or torture, have been dismissed as not amounting to persecution. See, Francesco Maiani, "The Concept of "Persecution in Refugee Law: Indeterminacy, Context-sensitivity, and the Quest for a Principled Approach" (2020) online: *Les Dossiers du Grihl* <http://journals.openedition.org/dossiersgrihl/3896> at footnotes 22-24.

exclusive, and the former as lying within the sovereign domain.[79] The existing literature lacks in presuming that stateless individuals are vulnerable and in extreme instances could be exposed to persecution through "othering". What it fails to consider is that statelessness itself could be a result of persecution - the "final persecutory act".[80] For instance, the UNHCR handbook on Statelessness recommends states to carry out nationality campaigns and verification procedures,[81] without considering that states that have willingly divested individuals of their nationality are unlikely to bring them back into the body politic.

David Owen concedes that political dynamics could lead to an en masse deprivation of nationality, as in the case of the Rohingyas (overt exclusion of Rohingyas from recognized 'ethnic groups' conferred citizenship under the 1982 Act), or the European Romas (through discriminatory practices during processing of documents).[82] He notes how States use both overt and covert practices in depriving individuals of nationality by creating difficulties for certain communities as in the case of African countries, or through stringent interpretations of laws as in the case of Malaysia. In another instance in the Dominican Republic, the State excluded those of Haitian descent by initially refusing to confer birth certificates and later asking them to produce the same certificates – thereby retroactively stripping their citizenship.

But in 2010 and 2011, the US Federal Court passed two decisions, which according to Professor Fullerton,[83] allowed for at least raising a presumption of persecution in cases where the state withdrew an individual's nationality. Thus, in *Haile v. Holder*,[84] an Ethiopian citizen of Eritrean origin was deprived of his nationality, in the context of ethnic hostilities following Eritrea's independence.[85] Despite any additional evidence of his ever being harassed, arrested or targeted,[86] the Appeals Court held that the immigration authorities' decision denying persecution was unsustainable. While it did not adjudge the merits of the Appellant's claim, it observed that

[79] Helene Lambert & Michelle Foster, *International Refugee Law and the Protection of Stateless Persons* (Oxford: Oxford University Press, 2019), ch 5 at 146. Note that they approach the issue from the lens of failure of the host states in granting refugee status.
[80] *Ibid* at 146-147.
[81] See, Inter-Parliamentary Union with the United Nations High Commissioner for Refugees, "Nationality and Statelessness, Handbook for Parliamentarians No. 22" (July 2014) at 20, online (pdf): < https://www.refworld.org/docid/53d0a0974.html>
[82] Owen, *supra* note 32 at 303-308.
[83] See, Fullerton, *supra* note 41.
[84] 591 F.3d 572 (7th Cir. 2010)
[85] *Ibid* at 573-75.
[86] *Ibid* at 495.

there is a difference between denying citizenship (for instance, to long-term residents) and divesting someone of citizenship (in this case, a birth citizen). The latter, especially when undertaken over ethnic basis, could amount to a "particularly acute form of persecution".[87]

In another decision, *Stserba v. Holder*,[88] an Estonian citizen of Russian origin initially lost her citizenship after the former's independence (over newly enacted laws). Although she managed to regain her citizenship through naturalization, Estonia brought out a law that restricted economic opportunities for those who received their qualifications from Russian Universities.[89] With respect to her claim of persecution, the immigration judge noted that long-term residents of Russian origin could access most of the rights - including residence, travel documents, and political participation at the local level, and that 65,000 Russian origin Estonians, had already been naturalized.[90] The Appellate court again made some exemplary observations - that the question should not have been restricted to actual harm, since in the absence of citizenship, the rights that these individuals enjoyed stood on precarious grounds.[91] More importantly, it observed that even neutral-appearing laws could be used to target a vulnerable population.[92]

In brief, both these decisions show that (a) statelessness itself without anything further, suffices the "severe harm" standards - although it may not always amount to persecution;[93] (b) affirmative actions of state lead to a higher presumption of persecution as opposed to the failure to confer; (c) that the authorities must not only evaluate legislations and policies, but also look at their possible impact and the context behind such implementation; and (d) statelessness when linked with a protected ground, will always amount to persecution[94].

In spite of the limited jurisprudence on statelessness per se amounting to persecution, both ICL[95] and IRL[96] agree that acts can also cumulatively lead to persecution. As mentioned previously, nationality rights are concomitant with other rights, including those of residence, liberty, access

[87] *Ibid* at 573-74 and *Haile v Gonzales*, 421 F. 3d 493, 496 (7th Cir. 2005).
[88] 646 F.3d 904 (6th Cir.).
[89] *Ibid* at 968-69.
[90] *Ibid* at 971-74.
[91] *Ibid* at 974.
[92] *Ibid* at 975.
[93] See, *Choudry v Canada*, [2011] FC 1406 (Can.), at paras. 32-40.
[94] Fullerton, supra note 41.
[95] *Prosecutor v Kvocka et al*, IT-98-30/1-A, Appeal Judgment (28 February 2005), at para 321.
[96] See statement of UNHCR Spokesperson, Erika Feller, cited in Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford: Oxford University Press, 2007) at 62.

to employment and basic services in the absence of which individuals can be forcibly displaced, restricted or detained, or face substantial risks to their livelihood.[97]

Despite the now growing body of literature on nationality rights and statelessness, there still exists drawbacks to state evaluations of persecution. For one, Foster and Lambert note that there is a general reluctance amongst scholars to discuss the historical and socio-political backgrounds to conferment or withdrawal of nationality, despite the overwhelming number of stateless people belonging to the minority community.[98] As an example, they observe how UK tribunals have rejected asylum applications from members of the Bidoon community – a minority in Kuwait – on the grounds that the state has already set up a review committee to evaluate whether the members of the community are eligible for citizenship, without assessing further if the committee's analysis is effective, and decision independently arrived at.[99]

In India, citizenship has largely been a function of communal, casteist, linguistic and sectarian tendencies, post-partition. However, religious antagonism seems to have overshadowed them all. Thus, to understand the dynamics of citizenship conferral and withdrawal that started with Assam and is now threatening to take effect over the rest of India, it would be necessary to examine the socio-political contexts within these entities.

(b) A Brief Account of Muslim Citizenship in A Majoritarian State

Several scholarly works, mostly within the context of politics and ethics of the Indian Constitution, have highlighted the construction of Muslim identities through citizenship in post-partition India. In fact, whether (or not) citizenship should be conferred on the basis of religious identities without anything further, formed an essential part of the Constituent Assembly Debates during the framing of the Constitution. Prior to the enactment of the Citizenship Act, 1955, the Constitution followed a unique combination of jus soli and jus sanguinis principles for acquisition of nationality – with all those born and resident in undivided India entitled to citizenship – unless they migrated to the newly created state of Pakistan.

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[97] For ICL cases, see, *Prosecutor v Milorad Krnojelac*, IT-97-25-A, Appeal Judgment (17 September 2003) at paras 221-222 (over forced displacement of civilian population); *Prosecutor v Kordic & Cerkez*, IT-95-14/2-A, Appeal Judgment (17 December 2004) at paras 1039-1043 (over deprivation of liberty). See, *Ming Dai v Sessions*, 884 F.3d 858, 870 (9th Cir. 2018) for decision on economic deprivation rising to the level of persecution. Such deprivation must not be generalized, and is usually at least state-sponsored.
[98] Lambert & Foster, *supra* note 79 at 150.
[99] *Ibid* at 151.

But several Hindu nationalist parties were in favour of reserving birth citizenship to Hindus and Sikhs, and questioned whether Muslims, whose forefathers, in their belief, acted towards the division of undivided India could ever pay true allegiance to India.[100] Others were of the opinion, that with renewed opportunities for creation of a nation-state, India should be restored to the position that existed before an "inglorious" Mughal (or Muslim) or British invasion. Legally too, the composition of India as a federal polity with a strong center (Union), emerged as a counter to strong Muslim representation from any Muslim-majority provinces, afraid that the consequence could be the demand for another separate state in the likes of Pakistan.[101]

Although the demand for privileging citizenship of certain religions over the other was ultimately discarded, several Constitutional scholars have noted the resurgence of Hindu majoritarianism, and assertion of superior claims to citizenship, with the rise of Hindu nationalist parties to power in the 1980s.[102] In other instances, religious minorities have been subjected to forcible assimilation with the majority community, particularly in matters of personal laws.[103]

IV Assam's Experience with the NRC

The north-east Indian state of Assam shares a rather long and porous boundary with its Muslim-majority neighbor, Bangladesh, which in imperial India existed as a part of the larger state of Bengal. On partition though, Bengal was divided into two parts over its religious composition, despite sharing linguistic commonalities.[104] Eastern Bengal became a part of Pakistan, until its independence in the 1971 Liberation war. Although the Islamic faith's presence in Assam dates to approximately the 12th century (while the British settled an additional number for migrant labor purposes in the 19th and 20th centuries),[105] Muslims have been primarily viewed as invaders and "illegal migrants" by most of the high-caste native Hindu Assamese speakers. This

[100] Sunil Khilnani, *The Idea of India* (London: Penguin, 1997) at 29-31.
[101] See, Pritam Singh, *Hindu Bias in Indian Constitution* (New Delhi, Critical Quest, 2017) at 7-11 (statements of CAD members such as Jagat Lal: "without centralization, history has seen it overpowered by foreign conquerors", Jaspat Roy Kapoor, and Ramchandra Gupta: "sympathies lying outside this country").
[102] Valerian Rodrigues, Citizenship & the Indian Constitution, 164, 174, and Nivedita Menon, "Citizenship & the Basic Revolution", in Rajeev Bhargava, ed, *Politics and Ethics of the Indian Constitution* (Oxford: Oxford University Press, 2009) 190, Paul R Brass, *The Politics of India Since Independence*, 2nd ed, (Cambridge: Cambridge University Press, 1994) at 228.
[103] Singh, *supra* note 101at 14-15.
[104] Navine Murshid, "Assam and The Foreigner Within" (2016) 56:3 Asian Survey 581 at 589. The Bengal province was divided for the first time in 1905, resulting in the three modern states of Assam, West Bengal (India) and East Bengal/Pakistan (now Bangladesh).
[105] Sir Edward Gait, *A History of Assam*, 5th ed (Guwahati, India:1992) at 2; Murshid at 589.

view is not isolated but coincides with the perception in the rest of India. Although this suspicion was initially directed at all Bengali speaking population (Hindus and Muslims) who in the eyes of the Assamese led to an erosion of their own "cultural and linguistic identities",[106] the constant stream of refugees from Bangladesh gave the impression that most of such immigrants were Muslims.[107]

In 2004, the Registrar General of India, responsible for overseeing the Census, released a data breakdown on religious basis showing that the state's Muslim population had risen at a higher rate when compared to that across India (and second only to the Muslim-majority territory of Kashmir).[108] This lent a communalistic spin to the primarily linguistic and cultural antagonism in the state, with claims of an Islamic infiltration from Bangladesh, particularly in the border districts.[109] Over the years, political leaders have appropriated this point to assert that the intention of the community was to reduce the Hindu-populace to a minority.[110]

(a) The Assam Accord

The Assam Accord of 1985, a trilateral agreement between the Government of India (GoI), the state of Assam and nationalist parties in the Assam state, laid the basis for the current update in the Citizen Register. The Accord's objective was to identify, detain and deport "illegal migrants" who entered the state after 1971. In 1951, the GoI enacted the Migrants (Expulsion from Assam)

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[106] See, *Assam Accord 1985*, Government of Assam, clause 6, online: <https://peacemaker.un.org/sites/peacemaker.un.org/files/IN_850815_Assam%20Accord.pdf>. The Clause promises to undertake constitutional and administrative safeguards for preserving, promoting and protecting the cultural, social and linguistic heritage and identity of the people.

[107] Murshid, *supra* note 104 at 589.

[108] Wasbir Hussain, "Demographic Jitters", *Outlook* (20 September 2004), online: <https://www.outlookindia.com/website/story/demographic-jitters/225190>.

[109] Pinku Muktiar, Prafulla Nath & Mahesh Deka, "The Communal Politics of Eviction Drives in Assam", *Economic and Political Weekly* (2018), online: <https://www.epw.in/engage/article/communal-politics-eviction-drives-assam>. 6 of Assam's 27 districts have a Muslim-majority. These claims fail to acknowledge that the border regions often undergo land swaps, and hence lands formerly lying within the Bangladesh territory, would obviously have a higher Muslim demography. Most of the Muslim population resides in the Brahmaputra region (riverine areas), and hence when they are forced to displace because of flood-like situations, they are more visible to the urban population that sees them as fresh migrants. In several cases they have also been forcefully evicted without compensation. Another explanation for the higher numbers was also that, following the Nehru-Liaqat pact, a number of Muslims who had left for East Pakistan during partition on account of violence, returned to their lands in 1951, but their names had not been included in the 1951 Census. When the census was conducted in 1961, these numbers were reflected. See, Anindita Dasgupta, "The Myth of the Assamese Bangladeshi", *Himal Mag* (31 July 2018), online: <https://www.himalmag.com/the-myth-of-the-assamese-bangladeshi/>.

[110] Murshid, *supra* note 104 at 587-589 (the consolidation amongst the Hindus in Assam took place through construction of a common enemy).

Act to address the issue of migratory influx post-partition, and proceeded to prepare the 1951 NRC, recording data such as name, age, sex, occupation, spouse/parent names, nationality.[111] But the list did not materialize, since the Indian Citizenship Act was only enacted in 1955, and the Imperial legislation, Foreigners Act, 1946, was only amended in 1957 to include Pakistani nationals under its purview.[112] Without such amendment it would have been difficult to identify and proceed against a "foreigner".

In 1979, the issue of "illegal migration" peaked when these nationalist parties and their affiliates engaged in widespread violence. By 1983, the state experienced the infamous *Nellie massacre*, where the authorities failed to protect over 3000 individuals (mostly Muslims) from the native Assamese (mostly Hindu) population.[113] This trigger also led the GoI to concede ground to these nationalist parties' demands in 1985, in the form of the Assam Accord.

The parties agreed that the Home Ministry (GoI) along with the Implementation of Assam Accord Department would strive to implement the Accord. The year 1966 would serve as the base year to detect foreigners. All those who had entered the state before 1966 and whose names were present on the electoral rolls used in 1967, would stand regularized. Whereas those who entered between 1966 and 24 March 1971, would be detected under the Foreigners Act, 1946 and Foreigners (Tribunal) Orders, 1964, and their names would be struck off the rolls. They would need to register themselves with Registration Officers in their respective districts, but after ten years, would be naturalized. However, all those who entered/continue to enter the State after 25 March 1971, would be detected, and expelled.[114] The GoI would issue citizenship certificates to identified citizens, and only the signatory parties could bring complaints regarding any "irregular issue" of certificates.[115] To this effect, departments would be entrusted with maintenance of birth and death registers.[116]

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[111] Government of Assam: Home and Political Department, "White Paper on Foreigners Issue" (October 2012) at 3-6, online: *Citizens for Justice and Peace* <https://cjp.org.in/wp-content/uploads/2018/10/White-Paper-On-Foreigners-Issue-20-10-2012.pdf>.
[112] *Ibid* at 7. The Foreigners Act defined "foreigner" as a "non-British subject".
[113] See, Gyanendra Pandey, *Remembering Partition: Violence, Nationalism and History in India (Contemporary South Asia)* (Cambridge: Cambridge University Press, 2001) at 188.
[114] *Assam Accord*, clause 5.8.
[115] *Ibid* at clause 8.1. and 8.2.
[116] *Ibid* at clause 12.

The Accord was also legally adopted as Article 6A to the Indian Citizenship Act, 1955, to provide Assam with a different cut-off date for citizenship, from the rest of India.[117] Nevertheless, Section 3 of the same Act provides that irrespective of legality of entry, children born to "illegal migrants" could still be lawful birth citizens if, (a) they were born before 1 July 1987 (where both parents are 'illegal migrants'), or (b) before 3 December 2004 (where either parent is an 'illegal migrant'. However, there has hardly ever been an occasion to test how these two provisions operate outside the Assam situation – whether the Section 3 provision overshadows Article 6A provision.

(b) The NRC Procedure & the Inherent Arbitrariness

The procedure for carrying out the Assam NRC was prepared by a state level committee and approved by the GoI in 2014. It relies on two documents: List A legacy documents that prove that the individual or his ascendants are native to the region - including ownership documents, names on the electoral rolls for elections previously held, and List B Linkage documents that prove the individual's relationship with such ascendant - such as Gram Panchayat certificates (issued by village heads), birth and school certificates, etc.[118] It follows an application-verification method, where individuals submit an application form with their details, followed by an official/field verification by executive authorities. Accordingly, they draw up a family tree for establishing linkage between family members.[119] On this basis, individuals have been categorized as: Doubtful Voters (DV), those with cases pending against them before Foreigners Tribunals, and Declared Foreigners (DF). Since India has no existing extradition treaty with

[117] White Paper, *supra* note 111 at 21.
[118] Aminul Haque, State General Secretary & NCHRO Assam Chapter, "Note on Preparation/Updation of NRC" (NCHRO Convention on NRC, Citizenship and Dissent, India International Centre, 23 September 2018), online: <https://nchro.org/wp-content/uploads/2018/10/NCHRO-Convention-New-Delhi-NRC-Dissent-23.9.18-Paper1-Aminul-Haque.pdf> (as issued originally, the list of Legacy documents includes, (1) name in 1951 NRC, (2) Electoral rolls till 1971 midnight, (3) Land Records, (4) Citizenship Certificates, (5) PR Certificate, (6) Refugee Certificate, (7) Passport, (8) Life Insurance Certificate, (9) Certificate issued by any government entity, (10) Certificate of Government Job or Service, (11) Birth Certificate, (12) School Certificate, (13) Court records, (14) Bank or Post Office Accounts while the List of Linkage documents includes legally acceptable identifying documents such as Birth certificates, land documents which mention name of property for instance, jointly held by parent and children, Board certificates, Bank Accounts, Ration Cards.
[119] *Ibid* at 3.

Bangladesh,[120] those declared foreigners, could stand to be indefinitely detained, deported, or effectively reduced to individuals without any substantive rights.

Most importantly, the entire procedure has been fraught with overbreadth in executive discretion. The NRC has involved authorities of several ranks, including officials at the Election Commission of India, the Government of Assam, Home and Political Department, and the Assam High Court Registry. An official called the NRC Coordinator, has been responsible for overseeing the data collection and management along with other officials at subordinate levels (around 52,000 such subordinates were reportedly involved). These officials, whether at the top or at the subordinate levels have divided the population into "original" and "non-original" inhabitants, even in the absence of any definition or criterion. The latter have been subjected to disproportionate verification standards despite the possession of relevant documents,[121] while the former have been sometimes excused altogether from proof. Despite being brought to its notice, the judiciary (Supreme Court) has refused to intervene altogether or seek the executive's clarification.[122]

In a state where record-keeping is not done meticulously, and where individuals lack knowledge over procedures to apply for such documentation (or even that it is legally mandated), the NRC has left entire masses vulnerable. In several cases, officials have denied accepting ration-cards (akin to social-security cards) and delayed birth registration certificates,[123] even though the Supreme Court has observed that they can be used as linkage documents. In other instances, they have been rejected on flimsy technical grounds, such as spelling errors.[124]

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[120] See, Liz Mathew and Ravish Tiwari, "NRC Final List Released: 17 Resolutions Later, Tally Steals BJP's Migrant Bogey Thunder", *Indian Express* (1 September 2019), online: <https://indianexpress.com/article/north-east-india/nrc-final-list-released-17-resolutions-later-tally-steals-bjps-migrant-bogey-thunder-5955153/>.
[121] *Rupajan Begum v Union of India*, Special Leave Petition No 13256/2017 (24 August 2017) online: <https://indiankanoon.org/doc/44496730/>. The order was regarding the admissibility of GP Certificates as linkage documents. But post this order, the NRC Coordinator sent a letter addressed to all subordinate officials for segregating between Original and Non-Original applicants on basis of caste, religion and other extraneous matters.
[122] *Kamalakhya Dey v Union of India*, Writ Petition (Civil) No 1020/2017 (5 December 2017) online: <http://www.nrcassam.nic.in/pdf/KAMALAKHYA%20DEY%20(WP(C)%201020_2017)%20Judgment.pdf>.
[123] See, Office of the State Coordinator, NRC, "NRC SC Letter to all District Registrar of Citizen registration(DRCR)", No. SPMU/NRC/Dist-Co-Equip/68/2015/Pt-IV/177 (1 May 2018) (considering ration cards as "weak documents"), online: *Citizen for Justice and Peace*<https://cjp.org.in/wp-content/uploads/2018/07/may-1-2018-order.pdf>.
[124] Ibid. (refusing to accept affidavits over clerical errors).

Moreover, the Assam High Court, the highest constitutional court in the state, belatedly decided that certain documents (such as Gram Panchayat certificates) would no longer be used for identification purposes, even while acknowledging this could lead to the exclusion of entire masses. Apparently, "public interest" would be better served considering the seriousness of the immigration issue.[125] The Supreme Court provided partial relief, holding that they could be used for establishing linkage (and not to show that they were Indian citizens), but only after "strict verification".[126] The judgement hit women and transgender applicants who lacked alternative documents the hardest: since the former on marriage, usually relocated to other districts; while the latter had to indulge in a lengthy explanation over why their present and former names, in addition to their residential addresses were different. The arbitrariness in the procedure is telling where individuals have been excluded even when their relatives have made it to the list, and the Supreme Court has only considered the relatives' inclusion to be a 'material' – not conclusive evidence for proof of nationality.[127]

(c) What State Protection? How the Judiciary Failed Its Citizens

A prerequisite to the claim of persecution, is not merely the showing of harm howsoever severe, but also the fact that there is no redressal available from the state. However international law recognizes that it is not merely an act of the state, but also refusal to act (or passivity) that contributes to persecution, even if it itself does not base such passivity on the protected identity of the individuals.[128] Doubts as to the fact of persecution arise where one state organ acts in a persecutory manner, and other state organs that are meant to intervene in such instances do not intervene.[129] Thus, the legislature, executive and judiciary, whether individually or in concert, could be carrying out persecutory policies, or enforcing neutral policies in a persecutory manner. When that occurs, a reasonable perception created that the individual cannot turn to the state any longer for protection.[130] This sub-section discusses why the judiciary, especially the Supreme

[125] *Rupajan Begum v Union of India*, Civil Appeal No 20858/2017 (5 December 2017) (upholding the decision of the state HC in Manowara Bewa v Union Of India and with special emphasis on paras 8 and 10),online: <https://indiankanoon.org/doc/72539677/>.
[126] *Ibid*.
[127] *Abdul Kuddus v. UOI*, Civil Appeal No. 5012 of 2019 (17 May 2019) (arising out of SLP 23127 of 2018).
[128] James C. Hathaway & Michelle Foster, "Failure of State Protection" in, *The Law of Refugee Status*, 2nd ed (Cambridge: Cambridge University Press, 2014) 288 at 294-295.
[129] *Ibid*. In brief, case laws over persecution have focused on tests such as efforts of the state towards protection and whether such efforts are truly effective.
[130] *Ibid* at 298.

Court, has been criticized as complicit in the entire process of citizenship deprivation through persecution.

In 2005, the Supreme Court struck down an Act titled, Illegal Migrants (Determination by Tribunals) Act, 1983, reversing the burden to prove citizenship upon a suspected foreigner applicant, on the Petition of the incumbent Head of the State. While equating the presence of migrants with 'external aggression', the Court was led by documents that showed, without further scrutiny, an overwhelming increase in the State's population.[131] In the aftermath of this Judgment, the Assam Government has dealt with suspected citizens under the Foreigners Act, 1946, and the Foreigners (Tribunal) Orders, 1964.

In 2014, a two-judge bench of the Supreme Court relied upon the same judgement and the inflated figures, to claim that the NRC had to be urgently updated because of 'land-hungry migrants, mostly Muslims' and a hypothetical 'Islamic fundamentalist vision of a larger country'.[132] According to sources, information collected over an Application under the Right to Information Act stated that the Government did not have any accurate estimates, although a 2001 census that the Supreme Court itself relied on, claimed that almost half of the twelve million "illegal migrants" resided in Assam.[133]

Critics have noted that despite first admitting a petition praying for implementation of the Assam Accord in 2009, the Supreme Court has played a more active role since 2014, involving itself in overseeing the procedure and appointments, and calling for regular updates by the NRC Coordinator seeking status of the detention centers as well as setting timelines.[134] Moreover, the Bench overseeing the matter has been presided on all occasions by a judge, who himself is an ethnic Assamese, and is known to have publicly supported the NRC process, raising

[131] *Sarbananda Sonowal v Union of India*, Writ Petition (Civil) No 131 of 2000 (12 July 2005), online: <https://indiankanoon.org/doc/907725/>.
[132] *Assam Public Works v Union of India*, Writ Petition (Civil) No 562/2012 (13 August 2019) online: <https://indiankanoon.org/doc/50798357/>.
[133] Debarshi Das & Prasenjit Bose, "Assam NRC: Govt Clueless About How Many Illegal Migrants Actually Live in India, RTI Shows", *HuffingtonPost* (16 November 2018), online: <https://www.huffpost.com/archive/in/entry/assam-nrc-govt-clueless-on-how-many-illegal-immigrants-actually-live-in-india-rti-shows_a_23591448>.
[134] Ananthakrishnan G, "How Supreme Court Drove the Final NRC Exercise", *Indian Express* (1 September 2019), online: <https://indianexpress.com/article/north-east-india/assam/how-supreme-court-drove-the-final-assam-nrc-exercise-5955098/&gt>.

apprehensions of bias.[135] When this was brought to his notice over an Application that sought his recusal from future hearings, not only did he reject the Application and struck off the Applicant's name from a connected petition, but also admonished the GoI over its failure to commence deportations which was not even an issue in the first place.[136]

In 2019, the same Bench clarified that the Assam case was an exception that although citizenship could be traced back to either parent, descendants whose one parent had been found to be a citizen, and the other marked as a DV, or had a pending case against them, would nevertheless be categorized as a foreigner.[137] In doing so, it also conflated the position of a DV (whose citizenship is only contested) with an illegal migrant (whose case might have been adjudged).

The procedures before the Foreigners Tribunals (FTs) likewise, fail all procedural safeguards. They are opaque and lack uniformity. FTs are quasi-judicial bodies which use summary procedures allowing 10 days to a suspect to reply, 10 days to present evidence, and a 60 day period within which they must dispose of cases.[138] They are free to decide what procedures, including rules of evidence, they should adopt, again allowing them excessive discretion in appreciating evidence.[139] They are presided upon by advocates, judges, retired civil servants and even contractual staffers. This detail too was submitted at the Supreme Court's disposal. Curiously, the position was taken that prior to its operation, a two day procedural training would be enough for the staff.[140]

They have also been vested with the powers to overhear appeals and the Assam High Court has previously refused to exercise its writ jurisdiction through self-imposed restrictions, except on

[135] Apoorva Mandhani, "Why CJI Gogoi is Under Fire For Defending Assam's NRC While It's Still Sub-Judice", *The Print* (6 November 2019), online: <https://theprint.in/theprint-essential/why-cji-gogoi-is-under-fire-for-defending-assams-nrc-while-its-still-sub-judice/316032/>.

[136] Application for the case is available here: "We Will Not Allow Any One To Disrupt The Institution", CJI Refused To Recuse From Hearing Assam Detention Centre Case, Instead Removes Harsh Mander From Petitioner's Place", *LiveLaw* (2 May 2019), online: <https://www.livelaw.in/top-stories/sc-dismisses-harsh-mandars-plea-seeking-recusal-of-cji-144713>.

[137] *Assam Public Works v Union of India*, Writ Petition (Civil) No 274/2009 (Order dated 13 August 2019) online: <https://indiankanoon.org/doc/135202420/>. The decision clearly runs against s. 3 of the Citizenship Act.

[138] FT Orders 1964, clauses 2, 3(8) and 3(14).

[139] FT (Orders) 1964, s 3A (17), 10 and 17 and accompanying amendments through the MHA Order GSR409 (E) dated 30 May 2019.

[140] In its 30 May, 2019 submission to the Supreme Court, the Solicitor General himself placed before the Court's disposal, information regarding the operation of 200 FTs and selection criteria for people to be staffed there. The staff would include advocates aged 35 and above who have practiced for 7 years, retired Judicial officers and retired Civil servants. See, *Assam Public Works v Union of India*, Writ Petition (Civil) No 274/2009 (Order dated 20 May 2019) online: <http://nrcassam.nic.in/pdf/16113_2009_1_1_14590_Order_30-May-2019.pdf>.

grounds of jurisdictional errors or violations of natural justice principles.[141] Moreover, DFs are excluded from appeals.[142] This is concerning, since there is no second appreciation of facts or evidence and more than often no 'judicial' application of mind. In several cases, appeal procedures have been reported as compromised, with individuals not even being issued speaking orders over their exclusion.[143]

Further, inclusion in the NRC and even citizenship determinations before civil courts, does not guarantee security. There exist procedures parallel to the application-verification method, where Electoral Registration Officers and the Border Police Organisation officials have the power to mark individuals as suspicious or DVs and refer them to the FTs.[144] In 2018, the GoI placed on record before the Court a Standard Operating Procedure meant for raising claims and objections (over inclusion or exclusion from the draft list).[145] But the procedure as it stands allows anybody to raise objections over the inclusion of an individual, with no penalties for false and frivolous complaints.[146] These provisions allow individuals to be dragged into the citizenship conundrum multiple times, without any finality. Some media reports have also claimed that former authorities who presided over these tribunals felt compelled to rule against individuals, as a precondition to renewal of their contracts which was done at the instance of a state established "monitoring committee".[147]

In 2008, the Assam High Court had directed the state to build detention camps for housing DFs and DVs.[148] These camps are built within carceral institutions, but individuals are not allowed

[141] *State of Assam v Moslem Mandal*, 2013 (1) GLT (FB) 809.
[142] FT (Orders) 1964, clauses 7 and 8.
[143] Abhishek Saha, "Glaring gaps in orders: Gauhati HC indicts a Foreigners' Tribunal", *Indian Express* (7 October 2019), online: <https://indianexpress.com/article/north-east-india/assam/glaring-gaps-in-orders-gauhati-hc-indicts-a-foreigners-tribunal/>.
[144] White Paper, *supra* note 11 at 7, 23 (initially vested under sections 3(2) (a), (b), (c) and (cc) of the Foreigners Act, 1946 upon police authorities and local administrative officials).
[145] *Assam Public Works v Union of India*, Writ Petition (Civil) No 274/2009 (Order dated 1 November 2018 & 12 December 2018) online: <https://cjp.org.in/wp-content/uploads/2018/08/20180816-SC-Order-on-NRC-Claims-and-Objections-Modalities-Assam-Public-Works-vs-Union-of-India.pdf>.
[146] "Standard Operating Procedure (SOP)/modalities for disposal of claims and objections in the updation of National Register of Citizens (NRC) 1951 in Assam", *Citizens for Justice and Peace* at para. 3(1)(d), online: <https://cjp.org.in/wp-content/uploads/2019/05/SOP-Modalities-Claims-Objections.pdf>.
[147] Arunabh Saikia, "The Highest Wicket-Tacker: Assam's Tribunals are Competing to Declare People Foreigners", *Scroll* (19 June 2019), online: <https://scroll.in/article/927025/the-highest-wicket-taker-assams-tribunals-are-competing-to-declare-people-foreigners>.
[148] Nazimuddin Siddique, "Inside Assam's Detention Camps: How the Current Citizenship Crisis Disenfranchises Indians" (15 February 2020) 55:7 *Economic and Political Weekly*, online: <https://www.epw.in/engage/article/inside-assams-detention-camps-how-current>.

parole leaves, or prison visits. On the contrary, the Supreme Court through its own order has set stringent conditions for release - only to those with three years of detention and exorbitant bail bonds.[149]

(d) Replicating an Assam model across India: Well-Founded Basis of Fear?

The evaluation of the well-founded basis of the fear of replicating an Assam model across India is premised largely on current and former persecutory conduct that give a reasonable impression that the individual could face future risks from a related action. Under IRL, once past conduct is shown, there emerges a rebuttable presumption of risk over future conduct – unless there have been fundamental changes to the circumstances, [150] in this case, change in governance perhaps or other protective measures undertaken by the judiciary. This sub-section shows, why such protection does not appear to be forthcoming.

Despite its roots in a parliamentary system, India's constitutional courts have wide powers of judicial review, including the power to strike down any executive, legislative and even constitutive moves, which has the potential to alter the "basic structure" of the Constitution - including rights to equality, secularism and the rights to approach courts for redress.[151] In the NRC matter, not only have the courts failed to halt a procedure commenced and supervised by themselves, but they have also knocked on the executive for not concluding it sooner (by July 2019). In the Court's opinion, all objections over the procedure, including the fact that millions of children who are descendants of individuals that have either not been found to be foreigners, or who have been termed so through compromised processes, could be handled as "incidental issues".[152]

The Assam Accord's implementation was supposed to be confined to the issue of 'illegal migration'- irrespective of a religious criterion - at least on paper.[153] But the discriminatory

[149] *Supreme Court Legal Services v Union of I*ndia, Writ Petition (Civil) No 1045 of 2018 (Order dated 10 May 2019) online: <https://indiankanoon.org/doc/131586928/>.
[150] For instance, see, *Singh v Whitaker*, 914 F 3d 654, 659 (9th Cir. 2019).
[151] See, Upendra Baxi, "Justice of Human Rights in Indian Constitutionalism: Preliminary Notes" in V.R. Mehta and Thomas Pantham, eds., *Political Ideas in Modern India: Thematic Explorations* (New Delhi, Sage Publications, 2007) at 270-271. (Professor Baxi, terms these features as "judicial governance").
[152] *Assam Public Works v Union of India*, Writ Petition (Civil) No 274/2009 (Order dated 8 May 2019) online: <https://indiankanoon.org/doc/160487049/>.
[153] Although some could argue that the motive right from the commencement of the Accord, was to exclude Muslims. See, Murshid, *supra* note 78 at 597, footnote 36 referring to the statements of the former Election

practices at implementation level have rendered many potentially stateless. Many individuals and communities who have resided for generations, now stand excluded over their perceived foreignness, although the term "illegal migrant" applies first and foremost to Muslims. This tendency of finding Bengali Hindus as insiders, and Muslims as outsiders, has been apparent through statements of senior functionaries, including those of the NRC Coordinator who has specifically singled out "East-Pakistan Muslims" as cause for concern.[154] Sources have widely reported that almost nine out of ten FT cases were against Muslims, and almost ninety percent of such cases resulted in a finding against the Applicant, as opposed to forty percent of findings against Hindu Applicants.[155] However, out of the 1.9 million excluded, there were several Hindus, a result not anticipated by certain political groups for whom the majority Hindu population serves as the vote bank. Following this outcome, these parties appealed to the Supreme Court seeking a re-verification in the Muslim-majority districts. The petition was however rejected by the Court.[156]

Nevertheless, the CAA combined with the NRC would allow all non-Muslim communities to find their way through into the citizenry lists – whether (or not) they were 'illegal migrants' - and at the same time exclude genuine Indian Muslims who would be at the mercy of executive discretion. In fact, this was legally affirmed in a recent case before the Karnataka High Court, *Archana Purnima Pramanik v State of Karnataka*,[157] where criminal proceedings under the Foreigners Act, 1946, had been brought against the Applicant on the ground that she was a Bangladeshi national who had been residing in the state at least since 2003, based on fraudulent documentation. The Applicant in her Bail Application claimed that she was entitled to the benefit of the newly amended CAA. In allowing her prayer, the Constitutional Court observed that her

Commissioner and the Chief of Indian Army correlating the rising Muslim population in the state with illegal immigration and through a circular reasoning, presuming that Muslims constitute illegal migrants.

[154] Bismee Taskin and Regina Mihindukulasuriya, "Can't Accept Foreigners Even If They Speak Assamese", *The Print* (11 November 2019), online: <https://theprint.in/india/cant-accept-foreigners-even-if-they-speak-assamese-new-nrccoordinator-said-on-facebook/319466/>.

[155] Rohini Modan, "Worse than a Death Sentence: Inside India's Sham Trials That Could Strip Millions of Citizenship", *Vice India* (29 July 2019), online: <https://news.vice.com/en_us/article/3k33qy/worse-than-a-death-sentence-inside-indias-sham-trials-that-could-stripmillions-of-citizenship>.

[156] Arunabh Saikia, "Assam government releases confidential district-wise numbers of people excluded from draft NRC", *Scroll* (1 August 2019), online: <https://scroll.in/latest/932527/assam-government-releases-confidential-district-wise-numbers-of-people-excluded-from-draft-nrc>.

[157] *Smt Archona Purnima Pramanik v State Of Karnataka*, Criminal Petition No. 279 of 2020 (27 January 2020) online: <https://indiankanoon.org/doc/46746234/>.

religion entitled her to contest that she could not be categorized as an "illegal migrant" and in light of the same, even the charges under the Foreigners Act, 1946, could be dropped against her. This is the same provision that also allows individuals to claim "persecution" for naturalization.

Finally, the Assam NRC has not been a stand-alone exercise, but has been preceded and followed by widespread lynching of Muslims, perceived as "cow slaughterers"; anti-conversion laws, including recently enacted legislations reminiscent of racial segregation, to curtail what the state terms as attempts by Muslims to proselytize Hindus by luring women; targeting of religious symbols; alteration of the autonomous status of the only Muslim-majority territory, Kashmir; transferal of ownership of a contested land which was destroyed by Hindu majoritarian groups in favor of the Hindu majority party, despite acknowledging the illegality of their acts and by subjecting the minority to a higher standard of evidentiary requirements; excessive use of anti-terror legislations against the minority community without substantial evidence; and hate acts of violence and speeches not only considered as dehumanizing but with the potency to incite violence.

In July 2019, the Indian government published a Notification about conducting a door-to-door exercise of NPR to cull out a shorter list of citizens (NRC).[158] The pilot project was to commence earlier in 2020, despite there being no further instructions passed since 2019 – virtually leaving it to officials to decide how it is implemented; thereby renewing fears amongst the community over well-founded grounds of sustaining a nation-wide persecution where the only options are between deportation, mass incarceration or survival as second-class citizens.

V Conclusion

The international community's response to the Indian citizenship practices has either been restricted to the overt exclusion of Muslim refugees from naturalization, or have been described as persecutory, without any preceding legal assessment. But legal assessments too, must not completely skirt questions of politics and the fact that lawfully enacted neutral-appearing laws can also possess adverse consequences. Prima facie, the Legislation appears to only exclude all Muslim 'refugees' from naturalization – but Ministerial statements and practices, have actively linked the Legislation with the preparation of a National Register of Citizens (NRC) to exclude

[158] *Registrar General Citizenship Registration Notification*, SO 2753 (E) (31 July 2019), online: <http://dnh.nic.in/eGazette/13Sep2019/ESeries1SrNo11Dated12Sep2019.pdf>.

'infiltrators' from the country, and the judiciary has been shown to be either complicit or otherwise hesitant to correct executive positions. Assam has emerged as a mass-statelessness project where the fate of over 1.9 million people hangs in a limbo – whether because of administrative practices and errors, or through the mandatory requirement of documents and proof which were never required under law; or in other cases, from a deliberate effort to exclude. The current act of othering on religious and ethnic lines thus stands to preclude entire communities from retaining their nationalities, although everyone barring Muslims would be entitled to claim persecution as a ground for re-entry into the citizens' lists.