Lawfulness of Detention of Declared Foreigners in Assam under International Law

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Lawfulness of Detention ofDeclared Foreigners in Assam under International Law –SAHRDC Paper

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1. Introduction

1.1. Context

In the decades after 1947, the Indian government passed legislation to introduce structure into the bureaucratic and legal chaos that persisted following independence, and to create a legal framework to determine who would be a citizen of the new nation state, India. The first, the Foreigners Act, was passed in 1946 and sets out a basic framework for the treatment of any non-citizen staying in the newly founded state. The second, the Citizenship Act of 1955, lays out the definition for the term “illegal migrant” that is still used to refer to irregular migrants: a foreigner who entered India “(i) Without a valid passport or other prescribed travel documents: or (ii) With a valid passport or other prescribed travel documents but remains in India beyond the permitted period of time.”¹

Almost immediately, the north-eastern state of Assam posed challenges for the Central Government, due to its long border with then East Pakistan, now Bangladesh. It was then alleged that an undetermined number of non-citizens were residing within the state’s borders. It is important to note that the Assam Accord of 1985 codified that those people who had entered Assam before midnight of 31 December 1965 would be considered Indian citizens, those who had entered between the 1 January 1966 and the 24 March 1971 would have to register themselves as foreigners, and those who had entered afterwards would be identified as “illegal immigrants” and expelled from the country.²

![Figure 1 Timeline of Determination of Citizens as per the Assam Accord 1985](image)

This was in conflict with other legislation regarding citizenship in India, Assam curiously has exceptions in Indian law, often falling under exceptional paragraphs or trumping other clauses. Thus, although any child born on Indian territory between 26 January 1950 and 1 July 1987 should automatically be considered an Indian citizen as per the 1955 Citizenship Act, the Act

¹ The Citizenship Act 1955, No. 57 of 1955, passed by Lok Sabha, Central Government of India, §2(1)
² The Assam Accord (Union of India, Govt. of Assam, All Assam Student of Union, and All Assam Gana Sangram Parishad), agreement signed August 15, 1985
includes a provision laying out exceptional rules for Assam.\(^3\) By August 2017, local authorities had declared approximately 89,500 individuals as foreigners under the Assam Accord, and of these, 2000 people had been spread across Assam’s six detention centres pending a decision on their future as “illegal immigrants”.\(^4\) The time period between being declared as a foreigner and subsequent detention varies significantly from case to case, and in some cases, a ‘declared foreigner’ may experience no repercussions for decades. However, arrests are drastically increasing in numbers, and illiterate and less educated persons may not understand the reason behind their arrest. In fact, many cases have occurred in which individuals had not been not aware that they had been declared a foreigner until they were arrested, as declarations often occur within so-called *ex-parte* proceedings in which the individual’s presence is not required, and where an individual may not be aware of ongoing investigations in the first place.\(^5\)

Following increased pressure from the Ahom community in particular to identify immigrants in Assam, figures have increased rapidly, with 13,434 people being declared foreigners in the year 2017 alone.\(^6\) The National Register of Citizens (NRC), discussed in greater detail in the sections below, was released on 31 August 2019 – it excludes 1.9 million people who are now at risk of indefinite detention and potential statelessness.

### 1.2. Purpose

Through this paper, the South Asia Human Rights Documentation Centre (SAHRDC) seeks to bring attention to an issue that is long overdue and worsening: While many more laws and policies are at play, at the core of the issue are provisions contained in the Citizenship Act of 1955 and the 1946 Foreigners Act, which, working in conjunction, in their wording and consequences are in violation of India’s international human rights and humanitarian law obligations. SAHRDC submits, and in this paper explains, that both Acts permit excessively arbitrary forms of detention, and disregard established principles of legal procedure. This paper first shows that detention is not a means proportionate to the ends in this context. Second, it demonstrates that the Citizenship Act and the Foreigners Act provoke arbitrary detention that falls under the Categories III, IV and V established by the United Nations Working Group on

\(^3\)The Citizenship Act 1955, No. 57 of 1955, passed by Lok Sabha, Central Government of India, §6A

\(^4\) National Human Rights Commission of India, “NHRC Notice to the Government of Assam over Allegations of Harassment to the People in the Name of Verification of Their Nationality,” news release, November 15, 2017, www.nhrc.nic.in

\(^5\) This will be elaborated upon more explicitly below.

\(^6\) Between Fear and Hatred: Surviving Migration Detention in Assam, publication, Amnesty International India, 2018, 12
Arbitrary Detention. Finally, SAHRDC proposes solutions based on a discussion of best practices.

The paper draws on case studies available either through press or made available to the authors during their field visits. SAHRDC seeks to show, through this analysis, that the issue is serious enough to warrant a thorough study and an official opinion on the subject by the Government of India and the United Nations Human Rights bodies. The United Nations has previously published four statements on related issues. In June 2018, multiple UN Special Rapporteurs addressed the Indian government with concerns regarding the process of the NRC. The Indian government eventually responded on 23 August 2019, but did not address key substantive concerns of the UN experts regarding the NRC process and its implications. It merely described the NRC set-up and claimed that the process was “comprehensive, fair, objective and inclusive with multiple levels of remedies available” to those who might be excluded from the final list.

In December 2018, the Working Group on Arbitrary Detention together with several Special Rapporteurs issued another communication, highlighting the apparent discrimination of minority groups in the process of weeding out so-called foreigners for the NRC process. Next, a communication was published in February 2019 reiterating the same concern. Finally, on 27 May 2019, the same authors issued a third statement criticizing the status quo of the NRC process, specifically in regards to challenges that arise during the review of a decision to declare someone a foreigner. The communication highlights that the biased nature of the process, as

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7 This will be elaborated upon more explicitly below.
10 OL-IND-2/2019 - The Special Rapporteur on the human rights of migrants; the Special Rapporteur on minority issues; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; and the Special Rapporteur on freedom of religion or belief to Government of India, February 13, 2019, Palais des Nations, Geneva, Switzerland, available at: https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24333
well as a lack of appropriate training for those issuing the decisions regarding citizenship are reason for strong concern. While the statement briefly touches upon detentions, SAHRDC has compiled this document to address its primary concern: the arbitrariness of detentions imposed for ‘declared foreigners’.

2. Applicable Law

2.1. Domestic Law

Three legal documents passed by the Indian government are central to this discussion: The Citizenship Act of 1955 and its amendments, the 1946 Foreigners Act, and the 1964 Foreigners (Tribunal) Order. Instead of introducing each law in its entirety immediately, this document will lay out the specific provisions of the laws wherever relevant throughout this paper.

2.2. International Law

As indicated above, this paper seeks to show that specific provisions of Indian laws and their implementation violate core provisions of international law, leading to a high prevalence of arbitrary deprivation of liberty through detention. This analysis primarily draws upon the International Covenant on Civil and Political Rights (ICCPR), ratified by India on 10 April 1979, and the International Convention on the Elimination of Racial Discrimination (ICERD), ratified on 3 December 1968.

Of specific importance are Articles 9 and 14 of the ICCPR. Article 9 contains the negative obligation not to subject anyone to arbitrary arrest or detention. The deprivation of liberty of an individual is only permissible to the extent that it is in accordance with procedure established by law. Importantly, the drafting history of this provision confirms that “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. It must be noted that Article 9(1) specifies that arbitrary and unlawful deprivation of liberty do not necessarily describe the same thing, but that an arrest can be arbitrary while nonetheless being permissible under domestic

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12 OL-IND-11/2019 - 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 to Government of India, May 27, 2019, Palais Des Nations, Geneva, Switzerland

13 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR),§9(1)

law. In such a case, the lawfulness under domestic law does not preclude the deprivation of liberty being counter to international law. To help determine whether a deprivation of liberty is counter to Article 9 ICCPR, the UN Working Group on Arbitrary Detention has set up five categories.\textsuperscript{15} Three of them are relevant to this paper’s line of argument: Detention falls under Category III and is thus arbitrary if it involves the total or partial non-observance of the international norms relating to the right to a fair trial as enshrined in Article 14 ICCPR\textsuperscript{16}; Category IV applies if administrative custody for immigrants or refugees is prolonged without possibility of administrative or judicial review as required by Article 9 ICCPR\textsuperscript{17}; and Category V is relevant if detention is based on discriminatory grounds as documented in the ICERD.\textsuperscript{18}

3. Inappropriateness of Administrative Detention

As stated in the introduction, ‘declared foreigners’ are, at an undetermined time, arrested and placed in detention centres pending a decision on their deportation or work permit. As shown below, while such administrative detention may be permissible under domestic law, it is arbitrary under international law.

3.1. Domestically lawful detention

The grounds invoked by Indian law enforcement and the judiciary for arresting and detaining individuals declared as foreigners is Section 3(2) of the 1946 Foreigners Act, which states that “orders made under this section may provide that the foreigner— (g) shall be arrested and detained or confined.”\textsuperscript{19} While detention is therefore a permissible option, the Act also provides for other non-custodial alternatives such as reporting to authorities regularly, or imposing a travel ban from the region. Despite this, detention has become the default option in dealing with specific migrant groups in Assam. Apart from the 1946 Foreigners Act, the detention of foreigners is also dealt with in other legislation. The National Security Act of 1980, in fact, specifies the conditions of detention. Section 3(1) holds that

\begin{quote}
The Central Government or the State Government may,— (b) if satisfied with respect to any foreigner that with a view to regulating his continued presence in India or with a
\end{quote}

\textsuperscript{16} Ibid., 6
\textsuperscript{17} Ibid.
\textsuperscript{18} Ibid.
\textsuperscript{19} The Foreigners Act 1946, No. 31 of 1946, amended 2018, passed by Lok Sabha, Central Government of India, §3(2)
Hence, the law explicitly states that a detention is only lawful if its purpose is to regulate the individual’s presence in the country, and if it has been deemed necessary. Arguably, the wording of this provision is vague as it does not require detention to be “absolutely” necessary or require other non-custodial options to have been deemed ineffective. However, merely having a provision in domestic law permitting detention does not preclude its unlawfulness under international law. As stated by Nils Melzer, the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, on 26 February 2018:

> [T]he margins of permissibility of migration-related detention are narrow, both in terms of substantive justification and in terms of duration, and the mere fact that detention is authorized by domestic law does not exclude its arbitrariness under international law.\(^ {21}\)

### 3.2. Preventive detention for immigrants as a mandatory rule

As is evident from the wording of both above-mentioned provisions, the detention imposed is of a preventive nature. Preventive detention, while debated in international circles, is legal under Indian law – a legacy of the British colonial administration – provided, generally, that it does not extend beyond six months and that it is subject to review after three months.\(^ {22}\) In cases of immigration and citizenship law, however, so-called extraordinary laws apply, which provide for preventive detention of longer duration pending an order to expel the individual from the country.\(^ {23}\) However, according to the UN Working Group on Arbitrary Detention, detaining irregular migrants in order to regulate their presence within the country shall never be the rule, but may only be an exceptional measure.\(^ {24}\)

It is important to note that case law in Assam and India regarding Foreigners Tribunals and the detention of irregular migrants barely refers to the National Security Act of 1980, which requires detention to be at least “necessary”\(^ {25}\), and instead primarily refers to the 1946

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\(^{20}\) *The National Security Act 1980*, No. 65 of 1980, passed by Lok Sabha, Central Government of India, §3(1)


\(^{23}\) The specific provisions will be laid out below.

\(^{24}\) Human Rights Council, “Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment,” A/HRC/37/50 (26 Feb 2018), ¶65(c)

\(^{25}\) *The National Security Act 1980*, No. 65 of 1980, passed by Lok Sabha, Central Government of India, §3(1)
Foreigners Act. This leads to a situation in which a person may be detained merely due to their status as a ‘declared foreigner’. Such criteria for detention are in clear violation of Article 9(1) of the ICCPR, as the law permitting detention thus does not differentiate between different individuals, but instead introduces a general rule for a broad category. As elaborated by the United Nations Human Rights Commission (UNHRC) in General Comment No. 35 on Article 9 of the ICCPR:

*Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in light of the circumstances, and reassessed as it extends in time. The decision must consider relevant factors case-by-case, and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties, or other conditions to prevent absconding...*

The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer, further concluded that “criminal or administrative detention based solely on migration status exceeds the legitimate interests of States in protecting their territory and regulating irregular migration and should be regarded as arbitrary.”

### 3.3. Proportionality of detention considering low likelihood of deportations

Per the Assam Accord of 1985, the official reason ‘declared foreigners’ are kept in detention centres is to facilitate their apprehension by the Border Security Forces (BSF) once the procedure for deportation to another country has been finalized. The Gauhati High Court has held that the purpose of detaining foreigners in detention centres immediately after detection is to ensure that they “do not perform the act of vanishing”. Apart from the non-differentiation between different individuals and their risk of absconding, detention is also excessive for the reason that in practice, deportation is highly unlikely to occur. According to an Amnesty International Report, by 31 August 2018, a mere 128 ‘declared foreigners’ had been deported to Bangladesh, their alleged country of origin. Notably, many of those detained have not even

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26 U.N. Human Rights Committee, *General comment no. 35, Article 9 (Liberty and security of person)* (Dec. 16, 2014) UN Doc. CCPR/C/GC/35, ¶18


28 Anand Kundu *v.* Union of India and Ors. 2009(5)GLT621, ¶28; and Md. Rustom Ali, S/o. Mohammad Ali *v.* The State of Assam, represented by the Commissioner and Secretary to the Government of Assam, Department of Home 2011 (3) GLT 684, ¶27

29 *Between Fear and Hatred: Surviving Migration Detention in Assam*, publication, Amnesty International India, 2018, 15
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yet been declared as foreigners, but fall within a category of “D-voters” – that is, those whose citizenship status is merely doubted or debated, and who have not in fact been declared as foreigners yet. For them, the prospect of deportation – which is the underlying motivation for preventive detention – is even more unlikely. In fact, because India declares individuals foreigners without consulting the individual’s alleged country of origin – usually Bangladesh – the responding country may refuse to allow the individual to be deported there, thus leading to a stagnation of the expelling process and to an indeterminately prolonged detention. This, again, stands clearly opposed to basic principles of international law, which hold that detention must end when it becomes apparent that deportation is not likely to occur within a reasonable period.

3.4. Location of Detention Centres

Finally, Article 9(1) of the ICCPR is to be interpreted in a way that individuals whose proper sentence or final decision is pending shall not be detained in prisons, but in separate detention facilities. This interpretation is established in the General Comment No. 35, which notes that “any necessary detention should take place in appropriate, sanitary, non-punitive facilities, and should not take place in prisons.” While the government of Assam established six detention facilities, all of them are located within district prisons, where ‘declared foreigners’ mingle with convicted criminals.

3.5. Conclusion

India appears to be violating Article 9 of the ICCPR on multiple grounds. First, detention has become the default action, even though it may legally only be applied when other means are not suitable. It is imperative that the Indian government instructs its law enforcement personnel in Assam to resort to non-custodial measures first. Second, orders for detention are issued based merely on the perception that an individual is a foreigner. Although preventive detention is

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31 Lt. Gen (Retd) S K Sinha, Report on Illegal Migration into Assam Submitted to the President of India by the Governor of Assam (Guwahati, Assam, 1998), 16; and White Paper on Foreigner’s Issue, report, Home & Political Department, Government of Assam (2012), 2.5.4, available at: https://bhrpc.wordpress.com/tag/white-paper-on-foreigners-issue/
32 U.N. Human Rights Committee, General comment no. 35, Article 9 (Liberty and security of person) (Dec. 16, 2014) UN Doc. CCPR/C/GC/35, ¶18
33 Ibid.
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legal under Indian law, it is an error of judgment to assume that all ‘declared foreigners’ will abscond pending a final decision on their future if not detained. India thus clearly violates Article 9(1) of the ICCPR, as there is no mechanism that evaluates the risk of absconding in each individual case. Finally, the purpose of detention is unclear, as it is officially being imposed to facilitate deportation, even though in reality such deportation rarely occurs. Therefore, while this form of preventive detention may be permissible under domestic law, it is arbitrary under international law.

4. Category III: Fair Trial Issues

In the preceding section, this paper argued that detaining ‘declared foreigners’ is a means disproportionate to the end and thus arbitrary. The argument can be extended by highlighting how the process of identifying a “foreigner” through so-called Foreigners Tribunals in itself violates core principles of international law.

4.1. Overview of Fair Trial Laws

As held above, the UN Working Group on Arbitrary Detention has reiterated that deprivation of liberty is unlawful if it falls under one or more of five categories. This section is concerned with Category III, which involves the total or partial non-observance of international norms relating to the right to a fair trial as enshrined in Article 14 of the ICCPR. In other words, an arrest or detention that is ordered through an unfair trial is by default arbitrary. The procedural safeguards held in the sub-provisions of Article 14 are extensive. First, they set out the requirement of a fair and public hearing by a competent, independent and impartial tribunal established by law, and codify the crucial principle that an individual must always be considered innocent until proven guilty. Additionally, fair trial guarantees require that an individual must be “informed promptly and in detail in a language which he understands of the nature and cause of the charge against him”, that must “have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing”, and that all persons have the right to attend their own hearings. Next, if a final decision was reached

36 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR),§14(1)
37 Ibid., §14(2)
38 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR),§14
in a case, the case may not be judged upon again in the same form.\textsuperscript{39} However, should there have been a miscarriage of justice, or should new facts arise that would exonerate the individual, the victim of the error shall receive compensation unless the error was attributable to him.\textsuperscript{40}

While the language used in Article 14 could be seen to indicate that the procedural safeguards apply only to those with criminal charges against them, these provisions are considered basic principles of due process that apply to civil proceedings as well.\textsuperscript{41}

### 4.2. Foreigners Tribunals

Within the ongoing process of updating the National Registry of Citizens (NRC), every individual in Assam is required to produce evidence regarding their citizenship.\textsuperscript{42} In case of irregularities or \textit{prima facie} contradictions, both the Assam Police and the Assam Border Police are authorized to start a preliminary enquiry into the case.\textsuperscript{43} If this enquiry gives grounds for suspicion, the police can then file a case in one of over 100 Foreigners Tribunals (FTs) in Assam.\textsuperscript{44} FTs are established and operated based on the mandate in the \textit{Foreigners (Tribunal) Order} of 1964. According to Article 2(1), “the Central Government may by order, refer the question as to whether a person is or is not a foreigner within the meaning of the Foreigners Act […] to a Tribunal to be constituted for the purpose, for its opinion [sic.].”\textsuperscript{45} Importantly, the 1964 Legislation does not specify any rules of procedure, and FTs thus function largely based on ad hoc rules and judges’ personal preference.\textsuperscript{46}

Applications filed by the Police to an FT must include concrete grounds for doubting the nationality of the person concerned. It is only at this point, after the application has been filed and the FT has agreed to launch a trial, that the accused is informed of the ongoing investigation and summoned to trial.\textsuperscript{47} An accused individual, ideally, must receive the summons to trial both digitally and as a physical copy, and must be informed of the concrete grounds on which his/her nationality is doubted.\textsuperscript{48} In practice, however, the summons are often unsatisfactory. The \textit{Caravan} magazine, for instance, reported the case of Kamala Begam, who in February 2012

\textsuperscript{39} Ibid.,§14(7)  
\textsuperscript{40} Ibid.,§14(6)  
\textsuperscript{41} Curtis Doebbler, \textit{Introduction to International Human Rights Law} (CD Publishing, 2006), 108  
\textsuperscript{42} This will be elaborated upon further below.  
\textsuperscript{43} \textit{White Paper on Foreigner's Issue}, report, Home & Political Department, Government of Assam (2012), 2.4.5  
\textsuperscript{44} Ibid.  
\textsuperscript{45} \textit{The Foreigners (Tribunals) Order 1964}, No. 31 of 1964, passed by Lok Sabha, Central Government of India, §2(1)  
\textsuperscript{46} \textit{White Paper on Foreigner's Issue}, report, Home & Political Department, Government of Assam (2012), 2.2.4  
\textsuperscript{47} Ibid.  
\textsuperscript{48} \textit{White Paper on Foreigner's Issue}, report, Home & Political Department, Government of Assam (2012), 2.4.2
was summoned to the FT in Barpeta, Assam, to submit documents that would demonstrate that she is not a foreign national.\footnote{Praveen Donthi, "How Assam's Supreme Court-mandated NRC Project Is Targeting and Detaining Bengali Muslims, Breaking Families," The Caravan, July 2, 2018, accessed July 8, 2019, https://caravanmagazine.in/politics/assam-supreme-court-nrc-muslim-families-breaking-detention} However, the notice did not specify the grounds on which the authorities doubted her nationality, and merely demanded she present her evidence in front of the tribunal within the next three weeks.\footnote{Ibid.} In other cases, individuals have been denied access to their own hearing if they only received a digital summons. Instead, they were told that they require a physical notice of summons in order to be allowed to submit evidence in their favour.\footnote{SAHRDC, NRC Factfinding, 26-30 June 2018 (unpublished notes from primary field research), 3} Hence, those accused often do not know what specifically is required, and understand little about what in fact awaits them, leading to an extreme power imbalance. In the following section, this paper discusses the elements of the FTs that are not merely inconvenient, but clear violations of basic principles of due process.

### 4.3. Legality and Independence

Article 14(1) of the ICCPR sets out the right to be tried by a competent, impartial and independent tribunal established by law.\footnote{International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), §14(1)} In order to universalise what makes a tribunal impartial and independent, the United Nations passed a resolution identifying common Basic Principles on the Independence of the Judiciary.\footnote{United Nations General Assembly, "Basic Principles on the Independence of the Judiciary," (adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985), available at: https://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx} Three paragraphs stand out specifically: First, the judiciary shall decide on cases brought to it “on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”\footnote{Ibid., ¶2} Second, “tribunals that do not use the duly established procedures of the legal process shall not be created” and all individuals have the right to be tried by an ordinary organ of the judiciary.\footnote{Ibid., ¶5} Third, those appointed as judges and lawyers shall have been trained in legal practice and shall have “appropriate […] qualifications in law.”\footnote{United Nations General Assembly, "Basic Principles on the Independence of the Judiciary," (adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985), ¶10}
4.3.1. Lack of Judicial Independence

Although the judiciary shall decide on cases brought to them “on the basis of facts and in accordance with the law, without any restrictions [such as] improper influences, inducements [or] pressures […]”⁵⁷, the procedures of Assam’s FTs have severe shortcomings in this regard. As mentioned above, there has been a significant increase in recent years in efforts to detain those who were previously declared as foreigners, and an even more striking increase in the number of those declared as foreigners in the first place.⁵⁸ According to the online portal *The Scroll*, the 2016 elections in Assam have contributed to increased efforts by the state government to fulfill the 1985 Assam Accord, and thus also contributed to increased pressures on the judiciary and executive to detain irregular migrants.⁵⁹ This can be seen in the increase in the number of FTs constructed post-2016⁶⁰, and in a statement made by Bhaskar Jyoti Mahanta, Assam’s additional Director General of the Border Police, who emphasized that: “We are supposed to be arresting everyone declared a foreigner. The court has chided us for not making arrests.”⁶¹ In 2017, the Chief Minister of Assam, Sarbananda Sonowal, stated in a media interview that 19 members who worked at an FT had been fired in 2017 “on the grounds of unsatisfactory performance.”⁶² He elaborated that members are given ratings based on how well they fulfil monthly targets.⁶³ Specifically, “if some member declares not just the accused as foreigner but manages to bring in the family members then their rating would be very high for that case[…].”⁶⁴

4.3.2. Prohibition of Tribunals That Do Not Use Established Legal Procedures

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⁵⁷ Ibid., ¶2
⁵⁸ *Between Fear and Hatred: Surviving Migration Detention in Assam*, publication, Amnesty International India, 2018, 12
⁶⁰ OL-IND-11/2019 - 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 to Government of India, May 27, 2019, Palais Des Nations, Geneva, Switzerland, 4
⁶³ Ibid.
Per Article 4 of the Foreigners (Tribunal) Order, FTs function under the Code of Civil Procedure of 1908, and thus have powers comparable to that of civil courts. Nonetheless, they are not in fact judicial bodies, and this paper argues that the role of FTs in the process of determining foreigners constitutes a violation of Article 14(1) of the ICCPR as it has not, until recently, used duly established procedures of the legal process. Importantly, the decisions issued by FTs are not referred to as binding anywhere in the Foreigners (Tribunal) Order, but merely as “opinions”. In fact, until a recent Amendment in May 2019, the concept of *res judicata* in practice often remained absent from proceedings at FTs, leading to a situation in which one person’s nationality could be subject at several trials at different tribunals, or where a person who had already successfully defended their case before an FT was summoned again.

While it must be admitted that one order by the Gauhati High Court has tackled the question of whether *res judicata* ought to apply to Foreigners Tribunals and ruled that yes, it should, this order cannot be said to have been enforced until recently. Only with the May 2019 Amendment, the element of *res judicata* was properly introduced to FTs. Nonetheless, decisions issued remain quasi-judicial, and do not serve as legal precedents for future cases.

4.3.3. Untrained Lawyers

In order to increase efficiency, the state government has in recent years set up more FTs. At the same time, there is a lack of skilled personnel that could be employed by the Tribunals. Hence, FTs have started employing lawyers with minimal experience or retired judges. This, again, stands in contradiction with the Basic Principles, specifically Paragraph 10, and thus may be construed as a violation of Article 14 of the ICCPR.

4.3.4. Hearings Not Public

The quasi-judicial nature of the FTs is not limited to the employment of untrained judges and, until recently, the disregard for *res judicata*. As per Article 14(1), everyone “shall be entitled...
to a fair and public hearing […].” 71 However, FTs do not permit open trials, and anyone seeking to attend a hearing must have a document permitting entry into the premises. 72 The hearings at the FTs thus lack transparency, leading to a situation in which potential procedural errors or mistakes on the merits cannot be traced easily.

4.4. No Compensation for Miscarriages of Justice

Despite the fact that individuals can now not be summoned to trial repeatedly for the same issue, many indeed have faced such harassment in the past years. However, there is no evidence that those affected by such a miscarriage of justice have been awarded any compensation as would be required by Article 14(6) of the ICCPR. In fact, none of the relevant legislation includes a provision that would provide for compensation in cases of error. Compensation would be called for in other cases, as well. A prime example is that of Mohammed Sanaullah, a 52-year old army veteran who had served in the Indian Army for 30 years. After retirement in 2017, he reportedly lived in the Kamrup District of Assam, where he then assisted the Border Police in identifying irregular migrants and bringing them before FTs. 73 However, investigations regarding his nationality had apparently already started in 2008, and on 23 May 2019 he himself was arrested on suspicion of being a foreigner and sent to a detention camp in Goalpara. Due to its irony – a presumably loyal army veteran alleged to be a foreigner – the case garnered mass support and triggered widespread media coverage, as a consequence of which authorities realized that there had been a case of mistaken identity. However, instead of being released unconditionally and immediately, Sanaullah was granted bail under the condition that he would furnish bonds, and that he would allow police to take a scan of his irises and fingerprints. 74 In an even more recent case, Madhumala Mandal, 59, who had been mistaken for a Madhubala Das, was released from the Kokrajhar Detention Centre after having spent more than two and half years there. 75 While her release is unconditional, she too has not

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71 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR),§14(1)
received any compensation. By failing to make up for the harm caused, the Indian government is thus clearly in breach not only of Article 14(6) of the ICCPR, but also of Article 9(5), which calls for compensation for individuals who were arbitrarily deprived of their liberty.

4.5. Reversed Burden of Proof

Another core principle pertaining to the right to a fair trial is that any individual shall be assumed innocent until proven guilty. However, the procedure by which individuals are declared foreigners at the FTs has reversed the burden of proof and requires individuals to provide evidence that they are not a foreigner. This is codified in the Foreigners Act of 1946, which states in Article 9 that

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\text{whether any person is or is not a foreigner or is or is not a foreigner of a particular class or description the onus of proving that such person is not a foreigner or is not a foreigner of such particular class or description, as the case may be, shall [...] lie upon such person.}
\]

Adding onto this, Section 3(1.1) of the Foreigners (Tribunal) Act 1964 provides that an FT is obliged to give anyone alleged to be a foreigner the opportunity to produce evidence that the allegations are unfounded. In doing so, the NRC, the updating of which required ‘foreigners’ to be identified in the first place, permitted a mere 16 documents to be used as legitimate evidence to support a case. Thus, documents issued by a Panchayat could not serve as a legitimate proof of Indian citizenship. Ultimately, individuals are therefore assumed guilty until proven innocent, which is in clear violation of Article 14(2) of the ICCPR.

4.6. Lack of Predictability

As stated above, if a preliminary investigation into a person’s citizenship leads to doubts, the police may request an FT to summon said person to trial. However, the process of assessing the documents presented to determine whether the individual is Indian or not has been criticized for being confusing at least, if not arbitrary. As in the cases of Mohammed Sanaullah and Madhumala Mandal, who were detained after having been mistaken for another person, minor errors in documents led to detrimental outcomes. Further, proceedings at FTs rarely make

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76 Ibid.
77 The Foreigners Act 1946, No. 31 of 1946, amended 2018, passed by Lok Sabha, Central Government of India,§9
78 The Foreigners Act 1946, No. 31 of 1946, amended 2018, passed by Lok Sabha, Central Government of India,§3(1.1)
79 SAHRDC, NRC Factfinding, 26-30 June 2018 (unpublished notes from primary field research)
80 A unit of local self government.
81 Ibid., 3
“allowances for the imperfections of bureaucratic processes.” Two cases exemplify the kinds of errors that occurred due to minor issues such as spelling mistakes in documents that were issued prior to India’s independence. Rehat Ali, aged 66, submitted a document to the FT he was summoned to in which his name was stated as Rehaja Ali. Being illiterate, he had never noticed the discrepancy in the spelling or the fact that the age documented was also different from the age he gave. His sister, despite having similar discrepancies in her documents, was declared ‘Indian’ by the FT. Ali, however, was declared a foreigner in 2015 and sent to Goalpara detention centre, where he was released only after the Supreme Court got notice of his case and ordered a re-investigation. After being released in May 2019 after over three and a half years in detention, he has not yet received compensation for the grave error of justice.

In an even more recent case, Azgar Ali was declared a foreigner by an FT on 14 July 2017 as his documents showed minor variations in the spelling of his father’s name. Although the documents were otherwise sufficient in proving that he was a regular citizen of India, he was arrested immediately and placed in Goalpara detention centre. When his lawyer directly reached out to the Supreme Court of India and filed a special leave petition, this was dismissed, leaving him in a much less fortunate situation than Rehaja Ali in the aforementioned case.

4.7. Prevalence of Ex-parte Proceedings

The determination of an individual’s citizenship often occurs in so-called ex-parte proceedings, in which the respondent party is not present at the hearing. Ex-parte proceedings are legal under Indian domestic law and other common law systems, and can only occur in civil matters, and only after the responding party did in fact repeatedly receive summons, but nonetheless does not appear in court. In the case of Assam, however, many individuals have legitimate justifications for not responding to the summons. First, some may not be inclined to respond to the notice not because they acquiesce to the outcome, but because they are illiterate. Second, 

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82 Ipsita Chakravarty, “Indian Army must do more than have ‘big heart’ for ex-soldier declared foreigner in Assam,” Scroll, June 4, 2019, accessed July 9, 2019, https://scroll.in/article/925803/indian-army-must-do-more-than-have-big-heart-for-ex-soldier-declared-foreigner-in-assam
84 Ibid.
85 Ibid.
87 Ibid.
88 Ibid.
due to issues with postal services, some notices only arrive digitally, whereas an individual must produce a physical copy in order to be granted access to the FT.\textsuperscript{89} Third, the notice of summons may be sent to an address that the individual no longer resides at.\textsuperscript{90} In all cases, the respondent is then declared absent despite summons, and the hearing proceeds \textit{ex-parte}. For instance, Unnati Begum, who was born in 1995, had moved from her birthplace to a different district when she got married.\textsuperscript{91} The notice of summons was sent to her old address thrice. Begum in fact possessed the documents needed to prove her citizenship, but failed to be present at the hearings.\textsuperscript{92} The police eventually located her, and she has been in Kokrajhar detention centre since, with her appeals case at the Gauhati High Court having been rejected.\textsuperscript{93}

Such a procedure is specifically detrimental as the burden of proof rests on the respondent. In fact, in the cornerstone judgment in \textit{State of Assam vs. Moslem Mondal} at the Gauhati High Court in Assam, the Court held that a Foreigners Tribunal, in the event of a repeatedly absent respondent, has no other alternative but to rule that the proceedee is a foreigner.\textsuperscript{94} As the FT is not mandated to collect evidence itself and to argue on behalf of the respondent, \textit{ex-parte} proceedings thus by default imply a judgment that is adverse to the respondent. Amnesty International, found that “30\% of the 1,037 detainees in detention centres as on 25 September 2018 were declared foreigners in proceedings they were not even aware of.”\textsuperscript{95} The Indian government itself in July 2019 added a more shocking and complete number, stating that since 1985, a total 63959 individuals have been declared foreigners in \textit{ex-parte} proceedings. Together with the above-mentioned pressure exerted onto FTs to declare high numbers of foreigners, this fact proves of a dangerous environment in which the only intervening factor needed is some issue with the notice of summons.

While there is an option to request a re-trial and refute the \textit{ex-parte} order, the burden to prove that the absence from the courtroom was justified again lies on the absentee. Such an application must be filed within 60 days, which is a nearly impossible deadline to meet if the respondent is

\begin{itemize}
  \item \textsuperscript{89}SAHRDC, \textit{NRC Factfinding, 26-30 June 2018} (unpublished notes from primary field research), 3
  \item \textsuperscript{91}SAHRDC, \textit{NRC Factfinding, 26-30 June 2018} (unpublished notes from primary field research), 12
  \item \textsuperscript{92}Ibid.
  \item \textsuperscript{93}SAHRDC, \textit{NRC Factfinding, 26-30 June 2018} (unpublished notes from primary field research), 12
  \item \textsuperscript{94}The \textit{State of Assam, Represented by the Commissioner and Secy and Others vs. Moslem Mondal and Others} 2010(3) Gauhati High Court Case No. 258, Order of 2013, ¶78
\end{itemize}
arrested immediately and must prepare the application while being detained.\textsuperscript{96} If an application is successfully filed, specific reasons must be given to justify the absence from the hearing; common reasons such as sickness were found to be inadmissible. For example, in the case of Dolly Roy, who had failed to show up for three hearings in the years between 2010 to 2014, the tribunal “rejected the medical certificates that she produced to claim she could not attend the hearings because of illness.”\textsuperscript{97} Overall, although ex-parte proceedings are commonly accepted as legally sound practices, the arbitrariness and lack of procedural consistency of ex-parte proceedings in Assam cannot be overlooked, and constitute a violation of Article 9 of the ICCPR.

4.8. Extraordinary Laws

Finally, certain procedures in Assam arise due to the special provisions that apply to the state in different pieces of legislation. For instance, only in Assam does Rule 4A of the Citizen’s Rules\textsuperscript{98} apply in which residents must go to a centre and fill out a form themselves, and thus initiate the process of registration as a citizen themselves.\textsuperscript{99} Additionally, it is explicitly stated that the Assamese judiciary may disregard precedents.\textsuperscript{100} In justifying such special status, the Supreme Court held that the Foreigners Act 1946 and the Citizenship Act 1955 are “extraordinary laws”, and that the provisions regarding Assam are therefore constitutionally sound despite violating fundamental fair trial rights.\textsuperscript{101} Fair trial guarantees are enshrined in the Indian Constitution under Article 22 whereby every person has the right to be informed of the grounds for arrest, the right to access a lawyer and to be produced before a magistrate within 24 hours of the arrest.\textsuperscript{102} Subclause 3, however, specifies that “Nothing in clauses (1) and (2) shall apply to […] (b) to any person who is arrested or detained under any law providing for preventive detention”, and hence to those detained through the Citizenship Act 1955 and the Foreigners Act 1946.

\textsuperscript{96} The Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules 2003, passed by Lok Sabha, Central Government of India, in exercise of the powers conferred by sub-sections (1) and (3) of Section 18 of the Citizenship Act, 1955 (57 of 1955), Special Provision As To Manner Of Preparation Of National Register Of Indian Citizen In State Of Assam, §8
\textsuperscript{98} The Citizen’s Rules are an addendum onto the 1955 Citizenship Act and the 1946 Foreigners Act.
\textsuperscript{99} The Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules 2003, passed by Lok Sabha, Central Government of India, in exercise of the powers conferred by sub-sections (1) and (3) of Section 18 of the Citizenship Act, 1955 (57 of 1955), §4(2)
\textsuperscript{100} Monica Encinas, “Migrant Rights and Extraordinary Law in India: The Cases of Assam and Jammu & Kashmir,” South Asia: Journal of South Asian Studies 40(3) (2017): 475
\textsuperscript{101} Ibid., 472
\textsuperscript{102} Constitution of the Republic of India of 1949, Amendment of January 12, 2019, §22(1) and §22(2)
While derogation from due process is explicitly provided for in the ICCPR, doing so requires a situation of public emergency which threatens the life of the nation. Additionally, such a public emergency must have been officially proclaimed. It thus appears that India is derogating from its fair trial obligations although the circumstances do not yet meet the threshold of permitting derogation.

4.9. Conclusion

Not only do the Foreigners Tribunals lack judicial independence by being under extreme pressure to declare foreigners, they are also merely quasi-judicial, and until recently disregarded core legal procedures such as res judicata. Additionally, hearings are not public, and the lawyers and judges employed often lack experience and training. Gross errors and miscarriages of justice frequently arise, but are not compensated for. That the onus to prove they are citizens of India lies on the respondent is in clear violation of core principles of due process, aggravated by the fact that whether or not the documents submitted will suffice is highly arbitrary. Although ex-parte proceedings may be lawful, individuals often do not even have the options to respond to summons, and thus are by default declared foreigners without having the opportunity to represent themselves despite being entitled to do so. Finally, the extraordinary laws under which the procedures are established cannot be justified through the exceptions permitted in the ICCPR. From the preceding paragraphs it thus becomes clear that the procedure of determining whether an individual is a foreigner, and thus “merits” what we have held to be disproportionate detention, cannot guarantee a fair trial, by reason of which an arrest is by default arbitrary.

5. Category IV: Review of Lawfulness of Detention

5.1. Review of Detention

Article 21 of the Indian Constitution prohibits the arbitrary deprivation of liberty of a person, and it is under this provision that an aggrieved party can file a habeas corpus writ petition. Apart from this opportunity, those deprived of liberty are entitled to a review of their detention by an advisory board after three months of detention. Additionally, an individual is entitled to legal representation after having been detained, and such representation shall serve

103 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR),§4(1)
104 Constitution of the Republic of India of 1949, Amendment of January 12, 2019, §21
105 Ibid., §22(4)
the explicit purpose of appealing against the detention order itself. In practice, however, the question whether detention is truly “necessary” is difficult to answer in legal terms. In fact, as ‘declared foreigners’ are detained preventatively in order to prevent their potential absconding, asserting that there is no such risk would require a highly subjective assessment by a judge. In order to avoid potential bias, the test that is therefore employed is whether the authority who ordered the detention was impaired in their capacity to judge. In fact, Justice Bhagwati lists several grounds on which a detention order can be annulled, two of which are specifically relevant for the case of Assam:

(iv) Where the authority has disabled itself from applying its mind to the facts of each individual case by self-created rules of policy or in any other manner.
(v) Where the satisfaction is based on the application of a wrong test or the misconstruction of a statute.

Arguably, (iv) may be satisfied as FTs employ ad hoc rules which could be seen as self-created rules of policy, and as detention is ordered without considering the likelihood of each individual’s absconding. Similarly, (v) may be satisfied as documental evidence is evaluated through arbitrary methods, in which spelling mistakes and illiteracy can be the crucial element leading to detention. Most habeas corpus petitions in the Gauhati High Court based on Article 21 are dismissed on the grounds that FTs are independent bodies whose decision need not be reviewed. The Gauhati High Court has also been reluctant to issue interim orders to release detainees who have filed writ petitions pending a final review of detention. Arguably, this may have to do with the fact that those detained do not limit themselves to filing a petition challenging the detention itself, but instead directly challenge the larger issue of them having been declared a foreigner. Hence, if the Gauhati High Court does in fact issue an interim

106 Ibid., §22(5)
108 Ibid.
110 For instance: *Smt. Abiran Bibi and Others vs. State of Assam and Others* (2012), Gauhati High Court, Writ Petition (Civil) No. 3502/2012, Final Order;
*Smt. Rekhna Rani Das and Others vs. Union of India and Others* (2011), Gauhati High Court, Writ Petition (Civil) No. 4833/2011, Final Order
111 Ibid.
112 For instance: *Smt. Abiran Bibi and Others vs. State of Assam and Others* (2012), Gauhati High Court, Writ Petition (Civil) No. 3502/2012, Final Order;
*Smti. Rekhna Rani Das and Others vs. Union of India and Others* (2011), Gauhati High Court, Writ Petition (Civil) No. 4833/2011, Final Order
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order, it is of such nature that prohibits the deportation of the detainee pending a final decision, and makes no mention of an interim release.

5.2. Conditional Release

Although the High Court does not on its own issue interim orders for release, or review whether a detention is proportionate to the ends sought, there are conditions under which a ‘declared foreigner’ may be released. These conditions were only introduced on 9 May 2019 by the Supreme Court, and apply to those ‘declared foreigners’ who have been detained for over three years.\(^{113}\) As seen in the above-mentioned cases, it is not unrealistic that someone would be detained for such a long period of time. However, even if a ‘declared foreigner’ satisfies this condition, s/he is not automatically released, but must provide guarantees of not absconding, as after all, the ultimate goal is still to regulate the ‘declared’ foreigner’s presence in the country.\(^{114}\)

In order to be granted bail, detainees must apply for bail themselves, and furnish bonds worth Indian Rupees 200,000 [approximately USD 2900] through two local sureties.\(^{115}\) In May 2019, shortly after the option was introduced, Mohammad Sanaullah, the army veteran who had been detained due to a case of mistaken identity, filed a petition for bail with the Gauhati High Court and managed to pay the bail bond.\(^{116}\) His case, however, is not exemplary, as many detainees do not have the financial means to satisfy the conditions for bail. While earlier, the government of Assam had proposed to grant bail to those who had been detained for more than five years instead of three, and for the deposit to be Indian Rupees 500,000, the current solution remains inconvenient and unacceptable.\(^{117}\)

5.3. Appeals against Decision of Foreigners Tribunal

While detainees can theoretically file a *habeas corpus* writ petition challenging the lawfulness of detention, they are either more concerned with the general decision of having been declared a foreigner, or their lawyer chooses to focus on the issue of nationality instead of the detention itself. This paragraph briefly touches upon the chances of success of such a *habeas corpus* writ,

\(^{113}\) *Supreme Court Legal Services Committee vs. Union of India & Anr.* (2018), Supreme Court of India, Writ Petition (Civil) No. 1045/2018, Final Order


\(^{115}\) Ibid.


as it would, if successful, lead to an unconditional release from detention. In the 2014 case of *Shah Mohammed Anwar Ali vs. the State of Assam*, the detainee petitioned against the fact that his hearing had taken place *ex-parte*, and requested a re-trial on the basis that he had sufficient evidence to prove his Indian citizenship.\(^{118}\) The High Court, however, dismissed his petition, claiming that sufficient summons had been sent, and that the Foreigners Tribunal could not be blamed for proceeding *ex-parte*. In fact, the High Court argued that it was not in a position to overrule the FT, as the conditions were such that the FT was perfectly capable of operating independently.\(^{119}\)

### 5.4. Interventions by the Supreme Court

In a small number of cases, detainees have been successfully released pending a final order for deportation or other measures. In those cases, the detainee owes the success to a coincidental intervention by the Supreme Court of India. In 2016, the Supreme Court ordered a re-investigation of the case of Moinal Mollah by the respective Foreigners Tribunal.\(^{120}\) By then, Mollah had been detained in Goalpara Detention Centre for nearly three years after having been declared a foreigner in an *ex-parte* proceeding.\(^{121}\) Pending the decision of the FT, the Supreme Court ordered that Mollah was to be conditionally released without having to pay bail.\(^{122}\) Mollah did not have the financial means to approach the Supreme Court himself, but it was nonetheless that very institution that came to his aid.\(^{123}\) Overall, interventions by the Supreme Court depend on the attitudes of its judges. On the one hand, the Supreme Court ordered the High Court of Assam to accept documents issued by *Panchayats* as proof of citizenship, thus ruling in favour of those forced to prove their citizenship.\(^{124}\) On the other hand, the Supreme Court twisted the wording of a petition filed by activist Harsh Mander in late 2018, interpreting it as a petition to deport those detained under inadequate detention conditions quickly, whereas the petition in fact requested an improvement of detention conditions.\(^{125}\)

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\(^{118}\) *Shah Mohammed Anwar Ali vs. the State of Assam* (2014), Gauhati High Court, Writ Petition(Civil) No. 31/2014

\(^{119}\) *Shah Mohammed Anwar Ali vs. the State of Assam* (2014), Gauhati High Court, Writ Petition(Civil) No. 31/2014


\(^{121}\) Ibid.

\(^{122}\) Ibid.

\(^{123}\) Ibid.

\(^{124}\) Ibid.

\(^{125}\) Ibid.
The few positive interventions by the Supreme Court do not take away from the fact that it has been inconsistent in its approach to issues of civil liberties – its capacity to serve as custodian and upholder of fundamental rights is increasingly under question.

5.5. End of a Flawed Process – And the Beginning of Another

As if in exasperation at a process that it had chosen to initiate and supervise itself, the Supreme Court refused to extend the deadline for the final draft of the NRC beyond 31 August 2019. The final draft excludes more than 1.9 million persons, who must now go through the FTs for a determination of their citizenship status. After having permitted the presentation of submissions and documents by the state in ‘sealed covers’ and having presided over a process in which the terms and goalposts relating to documentation required of NRC applicants kept shifting\(^\text{126}\), the Court now appears to have washed its hands of the exercise even as thousands grapple with the spectre of indefinite detention. As the badly flawed FTs kick into action, the Supreme Court’s role as guide and monitor is even more crucial and essential.

5.6. Conclusion

Per the UN Working Group on Arbitrary Detention, a detention is considered arbitrary if it falls within Category IV – that is, if immigrants or refugees are submitted to prolonged administrative custody without possibility of administrative or judicial review as required by Article 9 ICCPR.\(^\text{127}\) As held in the preceding paragraphs, while there may \textit{de jure} be the possibility for review of the lawfulness of detention, this option is rarely resorted to. Overall, the success of petitions meant to review the decision of an FT largely depends on the discretion of the Supreme Court.

6. Category V: Discrimination

The final category set out by the UN Working Group on Arbitrary Detention explains that any deprivation of liberty based on

\textit{discrimination based on birth, national, ethnic or social origin, language, religion},


results in the deprivation of liberty being of an arbitrary nature. As noted in the communication
OL IND 2/2019 issued by various mandates of the United Nations, the Citizenship Act of
1955 as amended in 2016 “introduces provisions, which appear to be discriminatory against a
number of ethnic and religious minorities […].” Importantly, the Amendment codifies an
option for ‘declared foreigners’ belonging to certain religious groups to apply for citizenship
post-declaration. While this may seem to be a viable solution to the situation, as people are
given a chance to apply for permanent residency and not get deported, most of those ‘declared
foreigners’ are of Muslim faith, precluding them from the option laid out in the Amendment.

The communication alleges that the laws employed during the NRC process arbitrarily exclude
certain minorities from Indian citizenship. The communication finally states that its
investigations have highlighted that there is reason to believe that “the Government’s alleged
intention behind the bill is to ultimately provoke demographic changes in these regions, which
are heavily populated by Muslim and other ethnic and religious minorities.”

7. Recommendations and Best Practices

7.1. Preventing Statelessness

Most literature and policy papers containing best practices on procedures to determine
citizenship were written to remind the reader of standards pertaining to the concept of
statelessness. The United Nations High Commissioner on Refugees (UNHCR) published a

128 The Working Group on Arbitrary Detention, "Revised Fact Sheet No. 26,"(February 8, 2019) OHCHR,
129 The Special Rapporteur on the human rights of migrants; the Special Rapporteur on minority issues; the
Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance;
and the Special Rapporteur on freedom of religion or belief
130 OL-IND-2/2019 - The Special Rapporteur on the human rights of migrants; the Special Rapporteur on
minority issues; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and
related intolerance; and the Special Rapporteur on freedom of religion or belief to Government of India,
February 13, 2019, Palais des Nations, Geneva, Switzerland
131 The Citizenship (Amendment) Bill 2016, Bill No. 172/2016, passed by Lok Sabha, Central Government of
India
132 Ibid., §2
133 OL-IND-2/2019 - The Special Rapporteur on the human rights of migrants; the Special Rapporteur on
minority issues; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and
related intolerance; and the Special Rapporteur on freedom of religion or belief to Government of India,
February 13, 2019, Palais des Nations, Geneva, Switzerland
134 Ibid., 2
135 For instance:
paper with an extensive checklist for states to resort to when preventing statelessness. Importantly, the UNHCR identifies that prevention requires the

identification of domestic laws and practices that may lead to the creation of statelessness and the introduction of concrete measures to prevent statelessness from occurring or from perpetuating across generations.136

Questions from the checklist have been selected and partially rephrased to ensure they are specific to the present topic:

- Does present nationality legislation ensure that statelessness is not created and provide solutions for existing cases?137
- If an individual is stateless, for whatever reason, are there any facilitated procedures for their naturalization, for example by relying on reasonable use of residency and language criteria?138
- Do other provisions in the citizenship law discriminate or have discriminatory effect, causing groups or individuals to be deprived of or denied citizenship (on account of race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status)?139
- Do the national authorities have procedures in place to assist migrants who have difficulties in establishing their identity, including their nationality (e.g. migrants who have no genuine travel or other identity documents)?140
- Do national authorities actively seek the cooperation of other countries for the verification of the nationality of migrants?141

It is in the context of this checklist that the Government of India must seek to improve its

Emilie Irwin and Mark Manly, eds., *Statelessness: An Analytical Framework for Prevention, Reduction and Protection*, United Nations High Commissioner for Refugees (Geneva, 2008);
Gabor Gyulai, *Determination and the Protection Status of Stateless Persons*, European Network on Statelessness (2013);
Andrew Brouwer, *Statelessness in the Canadian Context: An updated discussion paper*, United Nations High Commissioner for Refugees (2012);
137 Ibid.
138 Brad K. Blitz, *Statelessness, protection and equality*, Refugee Studies Centre (University of Oxford, 2009), 35
139 Emilie Irwin and Mark Manly, eds., *Statelessness: An Analytical Framework for Prevention, Reduction and Protection*, United Nations High Commissioner for Refugees (Geneva, 2008), 12
140 Emilie Irwin and Mark Manly, eds., *Statelessness: An Analytical Framework for Prevention, Reduction and Protection*, United Nations High Commissioner for Refugees (Geneva, 2008), 14
141 Ibid.
legislation and practices in order to adhere to its international obligations to not arbitrary deprive anyone of a nationality. This document seeks to assist India in the process, and lays out potential best practices derived from Canada, Kyrgyzstan and Germany.

7.2. Best Practice #1: Canada
7.2.1. Introduction

The case of Canada is worthy of consideration due to changes that have occurred in the past years as to the revocation of citizenship and subsequent deportation. Under the Conservative government of Prime Minister Stephen Harper in 2014, a legal system was introduced in which “citizenship could be revoked after a simple issuing of a written notice, without any hearing, and without consideration of any mitigating circumstances in the citizen's case.” Reasons for revocation of citizenship included, for instance, dual citizens committing “acts against national interest”. The aim had been to “fast-track” the proceedings, but in practice this led to a situation in which essential fair trial rights were being violated. The successor government therefore proceeded to introduce safeguards in the procedure and reduce arbitrariness, albeit not ruling out the option to revoke citizenship altogether.

7.2.2. Comparability

This document draws on Canadian procedural law as a best practice, although it must be admitted that Canada and India cannot be compared perfectly. Nonetheless, some cases that have previously arisen in Canada show strong similarities to cases documented in Assam. Born in Fiji and granted Fijian citizenship by birth, Thomas Gucake, for instance, moved to Canada as a child and acquired dual citizenship. As an adult, Gucake joined the Canadian army and served in Afghanistan thrice. In 2015, however, the Canadian government informed Gucake that he had failed to disclose upon applying for citizenship that his father had been convicted of a minor criminal offence in Australia, and that Gucake's Canadian citizenship was therefore to be revoked.

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143 Ibid.
Undoubtedly, the case of Mr. Gucake bares stark similarities to that of Mohammed Sanaullah laid out above, who had served in the Indian Army, but was declared a foreigner and subsequently detained due to minor inconsistencies in his documents. While assessing the following paragraphs, it must be kept in mind, however, that the procedures do not serve to determine whether an individual is a citizen of Canada or not, but to determine whether someone should be stripped of their Canadian citizenship or residency permit. Hence, the main issue at hand is not the determination of citizenship, but its revocation. As to the potential argument that Canada does not face nearly as many cases as India does, it must be noted that in the case of civil and political rights such as the right to liberty and the right to a fair trial, it may never be an excuse for a government to allege that its resources are not sufficient or that it is overburdened.

7.2.3. Decision on Revocation of Citizenship

One of the changes legislated in June 2017 was the Bill C-6, by which the only legitimate grounds to revoke citizenship could be if it was initially obtained by false representation or fraud, or if the individual concerned has been convicted of terrorism. Bill C-6 also holds that the central decision-making body in complicated cases of citizenship revocation should be the Federal Court, instead of the Ministry of Immigration, Refugees and Citizenship who had previously been the decision-maker by default. The law thus differentiates between different types of cases, and holds that routine cases should be handled by the Ministry, while those requiring more investigation should be handled by the primary judicial body of the country.

7.2.4. Routine cases: Equivalent of Foreigners Tribunals

The process in Canada this document seeks to evaluate is that of the determination whether a permanent resident or other foreign national should be inadmissible to Canadian territory. The process is initiated in a manner similar to that of Assam: If the police believe that someone should be declared inadmissible, they must note down all relevant facts in a report that will then be handed over to the Ministry of Immigration, Refugees and Citizenship. The Ministry may then grant permission for a review of the lawfulness of the person's stay in the country, and

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146 Ibid.
147 Ibid.
149 The Immigration and Refugee Protection Act 2001, No. 27 of 2001, last amended 2018, passed by the Government of Canada, §44(1)
proceed to refer the case to the Immigration Division of the Refugee Board of Canada.\textsuperscript{150} It varies from the Assam situation in that the Ministry serves as an intermediary and the police cannot directly file an application to the Immigration Division. As in Assam, the individual concerned is then invited for an Admissibility Hearing.\textsuperscript{151} Importantly, it is common practice for the Immigration Division to impose conditions it considers necessary to ensure that the individual concerned does not abscond, including paying a deposit or being detained.\textsuperscript{152}

The Admissibility Hearing follows the procedure of a "tribunal process".\textsuperscript{153} This means that the body conducting the hearing is constituted similarly to an administrative tribunal, but is significantly less formal, thus leaving room for flexibility when needed.\textsuperscript{154} At first glance, such discretion and quasi-judicial nature strongly resembles the procedure in Assam. However, in practice and as per the website of the Immigration Division, the hearing leaves significant room for individual circumstances, and the person concerned is often granted the benefit of doubt. For instance, there is no official obligation to present documentary evidence, and every document a person chooses to bring forth may be taken under consideration. Similarly, a person may also bring witnesses on their behalf.\textsuperscript{155} While individuals are subjected to a question-answer-type interrogation, they may also provide their own version of the story outside of this framework.\textsuperscript{156} Most importantly, the police having submitted the report leading to the Admissibility Hearing are also asked to defend their position. The hearing is thus truly adversarial, as is typical for common law country, and splits the burden of proof between the two opposing parties.\textsuperscript{157} In other words: Canada assumes that merely because an application to review the status of an individual was found to be not ill-founded, this does not mean that it can automatically be assumed to be well-founded. However, the burden of proof lies primarily on the individuals when it comes to proving that they do not have a second nationality.\textsuperscript{158} This

\textsuperscript{151} The Immigration and Refugee Protection Act 2001, No. 27 of 2001, last amended 2018, passed by the Government of Canada, §44(2)
\textsuperscript{152} Ibid., §44(3)
\textsuperscript{154} Ibid.
issue becomes relevant in cases in which someone is to be stripped of their Canadian citizenship. As Canada acknowledges that it legally cannot render anyone stateless, the burden of proof is based on a “balance of probabilities”, and the individual therefore is also granted to benefit of doubt.

Finally, the hearing is open to the public, including media, leading to the process being overall more transparent. Therefore, the performance of the members of the Immigration Division is not assessed based on figures, but can be based on how well a member adheres to the internal code of conduct.

7.2.5. Compensation for Miscarriages of Justice

As stated above, the current Canadian government has introduced legislation that departs from the rather unfair procedures of its predecessor government in revoking citizenship.

The Federal Court, the country’s primary independent judicial body, seeks to compensate for procedural injustices that occurred previously. In May 2017, Justice Russel Zinn ordered the reversal of the revocation of citizenship of 312 people, who had lost their citizenship on allegations of fraud. Crucially, citizenship had been revoked in a sweep and collectively, thus withholding the right to individual hearings. Per the Court order, the citizenship of all individuals must be restored, although this does not preclude the option of the Immigration Department subsequently launching a procedurally sound investigation against the same. This case is exemplary of current affairs in Canada, where hundreds of individuals are successfully challenging the revocation of their citizenship under unfair procedures, and are demanding a proper hearing as per the recently legislated standards.

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159 *Citizenship Act 1985*, No. 29 of 1985, last amended 2018, passed by the Government of Canada, §4.1(a)(i) and §10(1)


164 Ibid.
7.2.6. Order by the Immigration Division and Judicial Review

After the Admissibility Hearing, the members of the Immigration Division, themselves legal officers, are authorized to either order that the person leave the country, or to give permission for the individual to stay within Canada. In doing so, the members may impose conditions, such as being placed under detention.\textsuperscript{165} However, it is held in the 1985 Citizenship Act of Canada that the Minister must inform the individual prior to revoking citizenship in writing of their right to make written representations, and must provide detailed information as to how this can be done.\textsuperscript{166} Additionally, the Minister must give the individual the choice to either refer the case to the Federal Court, or have a final decision made by the Minister himself.\textsuperscript{167} The deadline for the individual to respond to this written information is 60 days, until which citizenship may not yet be revoked.\textsuperscript{168} Judicial review of the resulting final declaration requires special permission from the Federal Court or the Ministry of Immigration, Refugees and Citizenship.\textsuperscript{169} The process of judicial review is thus integrated in the general process itself, as the decision reached by a quasi-judicial body requires an official sanction by a court, unless the individuals themselves decline this option.

7.2.7. Rules Regarding Detention

Canadian law does not prohibit the detention of those whose citizenship has been or is to be revoked. In fact, detention may be justified under Canadian law both prior to an Admissibility Hearing as well as afterwards. However, the website of the Immigration Department spells out explicit conditions and tests to be applied in order to prevent an arbitrary detention of liberty. Someone may only be arrested and detained if:

- … their presence in Canada is a danger to the public.\textsuperscript{170}
- … there is a risk of flight; that is: the individual is unlikely to appear at an “examination, an admissibility hearing, removal, or at a proceeding that could lead to the Minister issuing a removal order”.\textsuperscript{171} This paragraph clearly shows that those detained under this

\begin{itemize}
  \item \textsuperscript{166} \textit{Citizenship Act 1985}, No. 29 of 1985, last amended 2018, passed by the Government of Canada, §10(3)
  \item \textsuperscript{167} Ibid., §19(3)(d)
  \item \textsuperscript{168} Ibid., §10(3.1)
  \item \textsuperscript{171} Ibid.
condition must be released when the hearing is over, or otherwise that the ultimate aim of detention is removal from the country.

- … the detention occurs within the context of an ongoing investigation based on reasonable suspicion into whether the individual was involved in “violating human or international rights, serious criminality, criminality or organized criminality”, and a decision is pending.\footnote{172}{Ibid.}
- … the “identity of the person concerned has not been established”, and the risk of the above-mentioned can therefore not yet be ascertained.\footnote{173}{Ibid.}

Importantly, the Immigration Department is obliged to carry out a review of the lawfulness of the detention at multiple points in time: First within 48 hours of the start of the detention, then again seven days after the first review, and subsequently at least once every 30 days.\footnote{174}{Ibid.} This has to do with the fact that the longer detention carries on, the stronger the grounds for detention have to be in order to justify prolonged custody.\footnote{175}{U.N. Human Rights Committee, \textit{General comment no. 35, Article 9 (Liberty and security of person)} (Dec. 16, 2014) UN Doc. CCPR/C/GC/35, ¶38}

### 7.2.8. Conclusion

Although Canada does not face the same scale of citizenship-related cases as India, and although Canada is more concerned with revoking the documented citizenship of those it deems inappropriate owners, significant lessons can be learnt from the Canadian system. Concerning the hearing itself, the Canadian model offers guarantees of procedural fairness through multiple angles:

1. Police cannot directly submit an application to the Immigration Division, but must go through the Ministry of Immigration, Refugees and Citizenship.
2. The fact that Admissibility Hearings are open to the public offers transparency.
3. The police must also defend its choice to file an application. The hearing is thus adversarial and the burden of proof is shared.
4. No strict evidence criteria are laid out, wherefore the members can evaluate existing evidence on a case-by-case basis, and also accept oral evidence from witnesses.
5. Judicial review is integrated in the general process itself unless the Central Government intervenes.
6. Review of the lawfulness of detention occurs regularly.
7. Detention is not the default option, and criteria are laid down in the government’s guidelines to determine whether detention of an individual is necessary.
8. The individual can respond to the decision up to 60 days after the decision was communicated, and citizenship cannot be revoked until the period has passed.

7.3. Best Practice #2: Kyrgyzstan

7.3.1. Introduction and Comparability

The example of Canada was drawn upon to refer to best practices concerning tribunals and the revocation of citizenship. However, it helps little when seeking humane solutions for non-citizens who seek to make a living in the country they reside in without proper documentation. Internationally, Kyrgyzstan is known to be a prime example of a country that successfully addressed the statelessness of thousands of refugees from Tajikistan. After the dissolution of the Soviet Union (USSR) to which many modern countries in the region had belonged (including Kyrgyzstan, Uzbekistan, Kazakhstan, Tajikistan, etc.), Kyrgyzstan became one of the primary destinations for migrants and refugees from what is today Tajikistan in the early 1990s. Although the dissolution of the USSR gave individuals the opportunity to now consider their regional affiliation their nationality and apply for official documents, many of the Tajiks that had fled to Kyrgyzstan were rendered stateless as they continued to only hold their USSR passport instead of official documents indicating an updated nationality.

In 2007, Kyrgyzstan passed a new Citizenship Law, by which it actively sought to reduce statelessness and recognize former citizens of the USSR as citizens. The main condition for such naturalization was that they could prove that they had resided in Kyrgyzstan for at least the preceding five years. If this condition was fulfilled, citizenship would automatically be granted.\textsuperscript{176} Similarly, those who could prove “a link” with Kyrgyzstan would be able to apply for citizenship through a facilitated process.\textsuperscript{177} The new Citizenship Law also introduced provisions to help those residing within the country to determine whether they already have Kyrgyz citizenship. Overall, the provisions are said to offer “the best procedural guarantees in

\textsuperscript{176} United Nations High Commissioner for Refugees, Good Practices Paper – Action 1: Resolving Existing Major Situations of Statelessness, Campaign to End Statelessness Within 10 Years (2015), 14
\textsuperscript{177} United Nations High Commissioner for Refugees, Good Practices Paper – Action 1: Resolving Existing Major Situations of Statelessness, Campaign to End Statelessness Within 10 Years (2015), 13
the region for applicants for citizenship and persons seeking to confirm whether they are Kyrgyz citizens.\textsuperscript{178}

The example of Kyrgyzstan may be studied in two ways: First, by considering the best practices Kyrgyzstan offers in determining whether an individual already has Kyrgyz citizenship, and second, in the light of preventing statelessness.

7.3.2. \textit{Equivalent to Foreigners Tribunals}

The new legislation of 2007 introduced changes in which bodies were to consider cases of citizenship, and conferred final decision-powers upon the President of Kyrgyzstan. Within the Department for Passport and Visa Control that exists in each of Kyrgyzstan’s provinces, so-called Conflict Commissions were converted into newly founded \textit{Commissions for Citizenship Determination}, in which three civil servants or more would together consider each case brought to it. Importantly, these Commissions were given the mandate to not only determine whether someone is Kyrgyz or not, but also to investigate whether he is a citizen of a third State, or to declare someone stateless.\textsuperscript{179} While specific procedures are to be determined by the Commission itself, they require approval of the central government and most conform to the general framework laid out in the law itself.\textsuperscript{180} For instance, the Commission is required to not only study “far and wide” the reasoning of the person claiming citizenship, but also to consider in depth “opinions of state agencies and attached documents listed in Article 33 of this Law.”\textsuperscript{181} Additionally, the Commission must take detailed minutes, which must be signed by all the members present in making the decision, and which must then be passed on to the office of the Kyrgyz President for validation.\textsuperscript{182} If the President validates the decision, it is then published online within three days, and an explicit notification is sent to the person affected.\textsuperscript{183} Importantly, if it is held that an individual does not have automatic Kyrgyz citizenship, the notification must explain its reasoning, and must also introduce additional procedures to obtain

\textsuperscript{178} Marjorie Farquharson, \textit{Statelessness in Central Asia}, United Nations High Commissioner for Refugees (2011), 29
\textsuperscript{179} \textit{The Law of the Kyrgyz Republic on Citizenship of the Kyrgyz Republic 2007}, as amended in 2012, No. 23 of 2012, passed by the Government of Kyrgyzstan, §36
\textsuperscript{180} Ibid., §36(1)
\textsuperscript{181} Ibid., §36(2)
\textsuperscript{182} Ibid., §36(4) and §36(5)
\textsuperscript{183} Ibid., §36(5)
a permanent residence permit.\textsuperscript{184} Appeals are permitted, and must be made within six months to a provincial court. The Court may then overrule the Commission.\textsuperscript{185}

7.3.3. \textit{Burden of Proof}

To reiterate, in the context of Kyrgyzstan, many Tajik refugees had been rendered stateless following the dissolution of the USSR. Hence, they often neither possessed any documents that would tie them to a Tajik citizenship, nor any Kyrgyz passport. For this reason, the government explicitly states in its legislation that the primary criterion for citizenship determination is whether an individual has proof of residency in Kyrgyzstan dating back at least five years. However, the Commissions naturally first seek to determine whether an individual truly does not have a valid passport in their possession. In this regard, both the Commission and the individual share the burden of proof, and authorities “have interpreted a lack of response as evidence that the applicants were not regarded as that State’s nationals.”\textsuperscript{186}

7.3.4. \textit{Proving Residency}

Once it has been established that an individual does not have any official documentation of their citizenship, or may not even be an official citizen of Kyrgyzstan at all, the 2007 Law makes sure to provide individuals with an option to be swiftly granted a citizenship in order to not be left stateless and without protection. Presidential Decree #473 specifies that an application to a Commission must include:

- an original and a photocopy of a document confirming identity (this document may also be an expired USSR passport or a birth certificate);
- a detailed biography;
- two photos;
- and a document which proves that the individual has resided permanently and continuously in the territory of the Kyrgyz Republic for at least the past five years. Importantly, the law is flexible and unspecific on what documents are acceptable. In the past, documents such as a registration document, a military service book, certificates

\textsuperscript{184} United Nations High Commissioner for Refugees, \textit{Good Practices Paper – Action 1: Resolving Existing Major Situations of Statelessness}, Campaign to End Statelessness Within 10 Years (2015), 17
\textsuperscript{185} The Law of the Kyrgyz Republic on Citizenship of the Kyrgyz Republic 2007, as amended in 2012, No. 23 of 2012, passed by the Government of Kyrgyzstan, §41(1) and §41(2)
\textsuperscript{186} Marjorie Farquharson, \textit{Statelessness in Central Asia}, United Nations High Commissioner for Refugees (2011), 33
from work places, diplomas from educational institutions as well as certificates from the place of residence were accepted.\textsuperscript{187}

In cases in which individual fail to confirm their identity, they are asked to establish their identity in Court through late birth registration. While this process is laborious, they can then apply to the Commission again. Should the applicants be unable to fulfil any of the other criteria, they are invited to explain in detail why this is the case; an example of a valid reason in the past has been that documents were lost in regional armed conflict in the 1990s. This demonstrates that the Commissions grant individuals the benefit of doubt and share the burden of proof.\textsuperscript{188}

\subsection*{7.3.5. Procedure Post-Rejection}

The decision by a Commission and its subsequent approval by the Office of the President that an individual does not have automatic Kyrgyz citizenship does not yet imply permission to deport the individual from the country. Instead, the notification must contain an explanation of the steps an individual can take post-rejection, and the options for standard naturalization that are open to the person. In practice, a Court order is needed to issue an expulsion order, which generally occurs should the individual not resort to such an option. This expulsion order, again, is open to judicial appeal.\textsuperscript{189}

\subsection*{7.3.6. Conclusion}

Evidently, the intricacies of the Kyrgyz procedure are much more complicated than they may appear in this brief exposé, and the procedure is not flawless. Nonetheless, important lessons can be learnt from this case study:

\begin{itemize}
\item 1. People who are stateless must be granted some citizenship. For this reason, the Commissions also have the mandate to determine if someone is stateless and requires protection.
\item 2. As the large number of cases may possibly overburden the Commissions and lead to unfair outcomes, the procedure is simplified and primarily based on proof of continuous residency.
\end{itemize}

\textsuperscript{187} United Nations High Commissioner for Refugees, \textit{Good Practices Paper – Action 1: Resolving Existing Major Situations of Statelessness, Campaign to End Statelessness Within 10 Years} (2015), 16
\textsuperscript{188} Marjorie Farquharson, \textit{Statelessness in Central Asia}, United Nations High Commissioner for Refugees (2011), 25
\textsuperscript{189} Ibid., 38
3. The Citizenship Law does not set a cut-off date that could be outdated easily, but is timeless in that it specifies a timespan of five years.

4. All individuals are assumed “innocent” until proven “guilty”. This implies that the fact that many documents were destroyed in armed conflict or are no longer valid is taken into consideration.

5. Failure to provide one document initially merely halts the process until the person has been given the chance to resort to alternative means of proving their identity.

6. Those who are declared non-citizens are granted the opportunity to regularly apply for citizenship or a residency permit.

7. The Commission does not have the final decision-making capacity, but requires official sanction.

8. Both appeals and orders for deportation can only be done by a proper judicial body.

7.4. Best Practice #3: Germany

7.4.1 Introduction

The last case is that of Germany, which until 1999 was infamous for its high barriers to obtaining citizenship. However, legal reforms over the years lowered the threshold as the need arose to regularize those Turkish, Polish and other citizens who had sought work in the country as part of a Migrant Worker Program by the German Government many years before.

7.4.2 Influx of Guest Workers and Solutions to the Residency Question

In the 1960s, Germany urgently needed labour force, and hence opened its labour market to workers who were mainly from Italy, Poland and, most importantly, Turkey. By the 1970s, the labour market was saturated, and Germany stopped accepting so-called "guest-workers". Those already in the country, however, were given extended work permits by the companies that employed them, and the German government was thus pressured to create conditions in which the Turkish workers could properly settle with their families and make a living. In 1991, the government passed a law creating a facilitated naturalisation process for children of guest workers if they had grown up in Germany, and for those guest workers who had lived in

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191 Ibid.
192 Ibid.
Germany for a longer period of time. In practice, however, while the residency and citizenship status of the children generation was clarified, that of the parent generation remained uncertain.\(^{193}\)

In 2000, the German government introduced legislation by which children of foreign citizens who had lived in Germany for more than eight years and had an unconditional residency permit would automatically be granted German citizenship at birth.\(^{194}\) The law ruled out dual citizenship, and thus proscribed that Turkish-German citizens who had been granted both nationalities at birth would have to choose one nationality by the age of 23.\(^{195}\) For those German-Turkish citizens with dual citizenship this meant having to renounce either their Turkish or German passport, wherefore approximately 1400 German-Turkish citizens handed in their German passport.\(^{196}\) According to official procedures, they were then entitled to reapply for German citizenship five years later.\(^{197}\) In this application, they would have to pass a citizenship test and submit documents proving a steady income. Since 2005, 524 Turkish citizens submitted such an application, of which 448 were granted.\(^{198}\) Those who were rejected received a conditional residency permit for an initial three years, which can be extended when it expires.\(^{199}\)

### 7.4.3 Criteria for Citizenship

Present-day considerations of who “deserves” German citizenship are based primarily on individual residency and integration, rather than on descent or documents. This can be seen in the fact that an important criterion in granting citizenship is that the individual must have resided in Germany for the last eight years.\(^{200}\) As this may be interpreted in different ways, the government specified that it means that one has had their ‘regular’ residency in Germany, and that the “focal point of one's life” is life in Germany.\(^{201}\) Additionally, the German government places great emphasis on family unification. Specifically, while spouse and children should

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194 Ibid.
195 Ibid.
197 Ibid.
198 Ibid.
199 Ibid.
201 Ibid., 21
fulfil the general criteria for citizenship (e.g. not having a grave criminal record, and speaking German), they must not necessarily have resided in Germany for the full eight years. Finally, the government provides for exceptions, for instance in writing that it can take health issues into consideration if these may make the process of applying for citizenship more strenuous.

Of the parent generation, however, the majority until today continues to live with a permanent unconditional residency permit, instead of with German citizenship, even though they are legally entitled to such. This has to do with the fact that applying for citizenship is a long and weary process, but also with the fact that the permanent and unconditional residency permit already provides nearly similar social benefits as actual citizenship would.

### 7.4.4 Discretion in Complicated Cases

One specific legal case may serve as a conceptual precedent for the treatment of those who on the basis of mere technicalities would have to be expelled from the country. A Turkish-German woman, Nimet Yavuz, had lived in Germany for 40 years after moving there when she was nine years old. In 2002, she was found to have dual citizenship, although this had been prohibited by law for two years. She had re-applied for Turkish citizenship without informing the German government, as her daughter studied in Turkey and this would enable her to visit her daughter. Nonetheless, Yavuz was a regular resident in Germany. After the government found out that she had dual citizenship, they revoked her German citizenship, leaving her with a conditional residency permit, by which she could not leave Germany for more than 6 months per year. However, during a visit to Turkey, her health deteriorated, leading to Yavuz taking a flight back to Germany eleven days later than she had originally intended. This meant that she had exceeded her maximum stay period outside of Germany. Germany declared she had violated the conditions and announced her deportation. However, she appealed the decision,
pleading for a "Härtefall", which can roughly be translated with “tough circumstances”, and managed to convince the Commission to not be deported after all.

The Commission that determined Yavuz’s future may well be comparable to the Foreigners Tribunal in Assam in its purpose. Although the German Commission also deals with cases other than citizenship and immigration, it showed discretion on her ability to abide by the immigration conditions. Specifically, it concluded that she was not able to enter Germany on time due to her health. Such a consideration for personal circumstances would also be due at India’s Foreigners Tribunals, where the members show no apparent consideration for the illiteracy or lack of education of those summoned to a hearing. Additionally, the German government explicitly writes in its immigration guidelines that the Immigration Department can make an exception to the conditions in cases in which “refusal of naturalisation would be especially harmful to the person concerned.”\textsuperscript{210} It continues that this may be the case for stateless people, who cannot possibly be left without a nationality, or for those who have not been able to prove their financial stability due to immigration reasons they have no fault in.\textsuperscript{211} Importantly, the conditions under which such discretion can be applied shall be noted down in "administrative guidelines".\textsuperscript{212}

### 7.4.5 Conclusion

The practices in Germany can assist in improving the process in India regarding those who have lived in the country for a long time, but nonetheless do not have citizenship status. Key conclusions are:

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<tr>
<td>1.</td>
<td>Whether or not someone is eligible for citizenship is based primarily on individual residency and integration rather than on descent.</td>
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<td>2.</td>
<td>Children automatically acquire German citizenship based only on whether their parents have lived in Germany for at least eight years.</td>
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<td>3.</td>
<td>German law is timeless in that it only specifies a timespan instead of setting a cut-off date that can get outdated easily.</td>
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<tr>
<td>4.</td>
<td>Instead of acquiring citizenship, many non-nationals are issued an unconditional, permanent residency permit due to their close connection with Germany.</td>
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\textsuperscript{210} Aydan Özoguz, \textit{Wege zur Einbürgerung: Wie werde ich Deutsche – wie werde ich Deutscher?}, Die Beauftragte der Bundesregierung für Migration, Flüchtlinge und Integration (Berlin, 2014),39 \textsuperscript{211} Ibid., 40 \textsuperscript{212} Ibid.
5. Individual circumstances such as health or potential risks to life associated with declining citizenship are taken into consideration by the Commission responsible.

7.5 Best Practice #4: India

While the previous sections have looked at practices outside India in order to compare different legal systems and find common denominators, good examples are also available within India. Courts all over India have set important precedents in showing leniency to immigrants and refugees who have lived in India for a long time without proper documentation. While many more exist (for instance by the High Court in Meghalaya, or the High Court of Karnataka), the following cases have been selected due to their particular relevance.

7.5.1 Tamil Nadu High Court Regarding Tamils

The most recent precedent is set by the High Court in Chennai, which ruled on 20 June 2019 that 65 Tamils originally from Sri Lanka would be allowed to submit a new application for citizenship despite *prima facie* not being eligible for it under the 1955 Citizenship Act. The individuals had arrived in India without a valid travel document and are therefore still considered “illegal immigrants” who ought to be deported. However, instead of being deported, the Tamil Nadu government had placed them in a transit camp in Kottapattu, where they had remained for 35 years. Due to their absence from Sri Lankan territory, their citizenship there was also effectively renounced, rendering them stateless at least *de facto*, if not *de jure*. The High Court held that because of the prolonged, unjustified detention, Article 21 of the Constitution had been violated, wherefore the individuals were owed compensation. As the Tamils felt more Tamil-Indian than Tamil-Sri Lankan, having resided in India for an extensive period of time, the Court ruled that the most appropriate compensation would be to allow them to apply for citizenship. However, the most important aspect of this precedent is arguably the statement by Justice G.R. Swaminathan, who stated that “citizenship falls within the exclusive executive domain of the Central government.”

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214 Ibid.
215 Ibid.
216 Ibid.
to ignore precedents, the Chennai High Court ruling indicates that such special treatment is not justified.

7.5.2 Supreme Court Regarding Chakma and Hajong Refugees

Another precedent is from the Supreme Court of India, although it will be shown that the ruling is not uncontested. The case concerns both the Buddhist-majority Chakma and the Hindu-majority Hajong people, who migrated from what is now Bangladesh in the 1960s after their land had been seized from them.\textsuperscript{217} Initially, these refugees settled in modern-day Assam, but the government relocated them to what is today the state of Arunachal Pradesh in an effort to prevent potential clashes with the indigenous population.\textsuperscript{218} As early as 1972, the Central Government of India in agreement with Bangladesh decided to grant both the Chakma and the Hajong Indian citizenship, but the movement was blocked by the Arunachal Pradesh government as they feared that the rights of the state’s indigenous peoples would be compromised.\textsuperscript{219} The issue was taken up again in 2015, when the Supreme Court of India ruled that both the Central Government and the Arunachal Pradesh Government should grant citizenship to the nearly 100,000 people within three months of the ruling. The judgment claimed that not doing so, but instead considering claims for citizenship through different procedure than that which is usually applicable would be unfair discrimination.\textsuperscript{220} Swiftly afterwards, the Central Government announced that it would follow the Supreme Court’s order, but Arunachali citizens again began protests, claiming that such a move would undermine the rights of indigenous peoples.\textsuperscript{221} When violence erupted against the Chakma community, Union Minister Kiren Rijiju announced that the order would not be implemented in its current form, and urged the Supreme Court to modify the order.\textsuperscript{222}


\textsuperscript{218} Ibid.

\textsuperscript{219} Ibid.


\textsuperscript{221} The reasons for this are complex and have to do with special rights granted only to tribal and indigenous peoples in North-East India.

Although the Supreme Court judgment is thus evidently contested, it shows that there is a will in the government to adhere to rule of law principles. Importantly, the Supreme Court was not urged to annul the order, but merely to modify it to find a workable solution. A suggestion circulated was that of granting a “limited citizenship” to the Chakma and Hajong, which would award them less land rights than the scheduled tribes in Arunachal Pradesh, but would nonetheless establish their legal status as Indians. Another important lesson learnt from the aftermath of the judgment is the implications religion apparently has on citizenship.

According to Dai, the secretary of the All Arunachal Pradesh Student’s Union:

_There seems to be different yardsticks for different refugees […] The Chakma are Hindus and the Hajong are Buddhists, so the BJP seems to be okay with giving them citizenship at our cost, but the Muslim Rohingyas are a security threat, it seems._

### 7.5.3 Delhi High Court #1

The Delhi High Court has passed several judgments on related issues, two of which are of particular relevance to this paper. In the first, passed in 2013, the High Court discussed the issue of the stateless Shaikh Abdul Aziz who had entered India illegally in 2005, and subsequently attempted to settle in the northern state of Jammu and Kashmir. After being detected, he was sentenced to a year in Tihar Jail, but on the grounds of being labelled a “terror suspect”, he was not released even after seven years had passed. When the High Court inquired into the matter and the Ministry of Home Affairs revealed that Aziz’s antecedents could not be established, the Court ordered immediate release and compensation. Importantly, the compensation was to take the form of Aziz being granted permission to approach the passport office and request a certification proving statelessness as well as a long-term visa. The Court also ordered the state of Jammu and Kashmir to pay Aziz 2,00,000 rupees (approximately 2900 US dollars) to compensate for the prolonged detention.

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226 Ibid.

227 Ibid.

228 Ibid.
7.5.4 Delhi High Court #2

On the issue of irregular migrants in Assam, Foreigners Tribunals mainly refer to the Assam Accord of 1985, which holds that whoever entered Assam before midnight of March 1971 would be considered Indian citizens or at least permitted to stay, while those who had entered afterwards would be identified as “illegal immigrants” and expelled from the country.\(^{229}\) This order seems to contradict core provisions of the Citizenship Act of 1955, in which it is clearly stated that anyone born on Indian territory between 26 January 1950 and 1 July 1987 would automatically be considered an Indian citizen.\(^{230}\) However, the Citizenship Act contains special provisions for Assam, in which exceptional rules are laid out. As per the 2010 case of *Namgyal Dolkar vs Government of India* at the Delhi High Court, it may, however, be legally unsound to apply these exceptional provisions, and instead would be appropriate to consider those born before 1 July 1987 Indian citizens. In this specific case, the petitioner was born in 1986, and thus before the cut-off date set in the Citizenship Act. However, as her parents were Tibetan and she had a Tibetan refugee status, the Passport Authority hesitated in issuing her an Indian passport when she applied for one in 2008.\(^{231}\) In the Court case itself, the government representative referred to a policy document by the Ministry of Home Affairs, in which it was held that “a Tibetan national who entered India after March 1959 will not be granted citizenship […].”\(^{232}\) As the policy document only referred to naturalisation, and not to obtaining citizenship at birth, the High Court of Delhi concluded its discussion on the merits by deciding that the applicant could not be denied the Indian citizenship she had obtained at birth.\(^{233}\)

The judgment extensively discusses various aspects of citizenship law. Importantly, it highlights that the Citizenship Act bestows those born before the cut-off date with citizenship at birth, which can only be reversed if the individual subsequently acquires another nationality.\(^{234}\) Therefore, while the Assam Accord of 1985 states that those who entered Assam after 1971 would be declared foreigners, this cannot annul the granting of citizenship retrospectively. In this context, and although the judgment does not explicitly mention this, it is important to consider the established principle of legality, which implies that laws may only

\(^{229}\) *The Assam Accord* (Union of India, Govt. of Assam, All Assam Student of Union, and All Assam Gana Sangram Parishad), agreement signed August 15, 1985

\(^{230}\) *The Citizenship Act 1955*, No. 57 of 1955, passed by Lok Sabha, Central Government of India, §3

\(^{231}\) *Namgyal Dolkar vs. the Government of India*, Ministry of External Affairs (2009), Delhi High Court, Writ Petition(Civil) No. 12179/2009, Decision of 2010

\(^{232}\) Ibid., ¶12

\(^{233}\) Ibid., ¶31

\(^{234}\) Ibid., ¶24
be applied retrospectively if they grant more rights, not if they take them away.\textsuperscript{235} Hence, the existence of the Assam Accord as such cannot lead to reason that many of those bestowed with citizenship at birth are now foreigners.

8. Conclusion

This document has sought to highlight that provisions contained in the Citizenship Act of 1955, as well as the 1946 Foreigners Act in their wording and consequences are in violation of India’s international obligations. Specifically, both Acts permit excessively arbitrary forms of detention, which are detrimental to both the lives of those affected, and also to the general rule of law in India. ‘Declared foreigners’ are, at an undetermined time, arrested and placed in detention centres pending a decision on their deportation or future residency status. Not only is their detention a means disproportionate to the ends in this context, but the Citizenship Act and the Foreigners Act additionally permit and promote arbitrary detention that falls under the Categories III, IV and V as established by the United Nations Working Group on Arbitrary Detention. It is thus evident that India’s legislation violates key provisions in the International Covenant on Civil and Political Rights, including, but not limited to, Articles 2, 9 and 14. In the past months, United Nations human rights experts have issued three communications on related issues within the process of updating the National Registry of Citizens. The Indian government’s response failed to address the substantive concerns raised in those communications. The National Human Rights Commission has merely issued one public statement that focused on discrimination occurring inside Assamese detention centres, despite conducting a two-day field visit to Assam in January 2018.\textsuperscript{236} India’s disregard for basic humans rights is detrimental to the rule of law globally.

This document has reviewed best practices regarding the treatment of undesired foreigners and individuals whose citizenship status is under doubt. Overall, the conclusions indicate that the following practices should be followed by India:

\textsuperscript{235}International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR),§15(1)

\textsuperscript{236}National Human Rights Commission of India, "NHRC Notice to the Government of Assam over Allegations of Harassment to the People in the Name of Verification of Their Nationality," news release, November 15, 2017, www.nhrc.nic.in
Foreigners Tribunals

1. FTs should also employ due diligence when sending out summons and enquire as to whether the address it is sent to is correct.

2. As in the best practices laid out, the burden of proof should be shared between the government and the individual, and the government must consider the individual innocent until proven guilty. Importantly, the government should take into consideration that many of the respondents may be illiterate or may have lost the documents over the years.

3. The evidence regulations should be made more flexible as to accommodate different cases. FTs should also consider accepting oral witness testimonies.

4. The independence of FTs should be ensured by reducing pressures to meet target goals, by prohibiting the discharge of staff merely because they do not meet these targets, and by making the hearings publicly accessible.

5. Foreigners Tribunals should be reformed, inter alia, to assess, as is indicated by domestic law, whether the detention of a ‘declared foreigner’ is in fact necessary. Another solution would be to require that the detention order be issued by a judicial body, or to integrate an automatic judicial review into the order by the FT.

6. A separate budget should be established to fund appeals and habeas corpus writs, and to ensure that skilled and diligent lawyers are provided to those summoned to a hearing and to detainees.

7. The Indian government should ensure that those who were victims of miscarriages of justice are duly compensated.

Detention

1. The Indian government should instruct its law enforcement personnel in Assam to resort to non-custodial measures first.

2. As the police initiates the procedure, there should be procedural guarantees that there is no abuse of power or corruption involved in the filing of applications or in detaining ‘declared foreigners’.

3. The conditions for bail should be significantly revised to guarantee that an indefinite detention does not occur in cases in which the detainee lacks financial resources. There should be an enforceable right to judicial review of the lawfulness of the detention.

4. The arbitrary deprivation of liberty should be duly compensated. As indicated by the
Tamil Nadu High Court, adequate compensation for arbitrary and prolonged detention may involve the granting of permission to apply for citizenship.

Citizenship Law

1. The citizenship of those bestowed with it at birth should be recognized, as it trumps the provisions in the Assam Accord.
2. India should revise the Assam Accord of 1985 in order to make it timeless, for instance by changing the cut-off date to a time period.
3. Those who are declared foreigners should be given the opportunity to apply for citizenship and should not be rendered stateless. In this context, the Citizenship Act should be amended to annul the discriminatory provision on facilitated naturalisation of certain minority groups, but not others.
4. The government of Assam should find workable solutions to regulate the residency of those declared foreigners. It could, for instance, apply the concept of “limited citizenship” that it introduced for the Chakma and Hajong people.
5. The granting of citizenship should depend on individual factors such as the duration of residency in the country as opposed to religion, descent, or family heritage.
6. As held by the Tamil Nadu High Court, citizenship should be primarily dealt with by the Central Government.
7. The role of the Supreme Court should be clarified, specifically that of the Chief Justice, in order to ensure predictability as to when and how the Supreme Court will intervene regarding citizenship.
8. The deadline for the NRC process should not be postponed at random moments, but should be abolished altogether. The mental health of those involved suffers greatly from such unpredictable delays.

END