

“THE RIGHT TO HAVE RIGHTS”: ASSAM AND THE LEGAL POLITICS OF CITIZENSHIP

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The historical contestations around documentary citizenship in Assam have led to a situation where people from ethno-religious minority groups find themselves at the fringes of citizenship. Through a closer look at case law being played out before Assam’s citizenship tribunals, this article seeks to explore the arbitrary bureaucratic barriers that are depriving people of their crucial right to access all other rights. This is framed in the context of the historical developments that have led to conflicts around identity in the region. Through my research, I argue that the use of documentation has served specific political goals which work in tandem with existing vulnerabilities to disenfranchise those who are already disadvantaged.

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I. INTRODUCTION

The exercise of citizenship is at its core a bureaucratic exercise, and like all bureaucratic practices, it mandates a paper trail. This paper trail is one that has to be in accordance with the rules and regulations that the state lays down, and if contested, it becomes a contest between the suspected person and the state that issues the selfsame documents. The verification of citizenship, in the words of Stevens, "...has no independent eyewitnesses, just state documents and their government curators".¹ If a citizenship document is to be considered a '*tool of the state*'² which imparts agency to the citizen, it is also to be perceived as an instrument of power exercised at the behest of the state. Documentation can and has been exercised as a tool to filter out those who are considered undesirable and unwanted by the state, with courtrooms acting as sites where contestation and negotiation around citizenship play out in different ways. Multiple cases reveal that courts have made evidentiary requirements around citizenship so stringent that respondents cannot meet them and become stateless,³ a situation where a person does not have the nationality of any one state.⁴ This effectively means that persons are denied the body of rights that come with the mantle of citizenship. This phenomenon has been playing out in the United Kingdom,⁵ Taiwan,⁶ and the United States,⁷ for instance, where documentation has become a significant challenge in terms of access to full citizenship.

A similar crisis has been unfolding in the state of Assam, positioned in India's northeast region. Historically, Assam has witnessed a decades-long movement against the presence of 'illegal' immigrants. Identifying and removing the body of the 'illegal' immigrant has dominated the political landscape of

¹ Jacqueline Stevens, 'Introduction' in BN Lawrance and J Stevens (eds), *Citizenship in Question: Evidentiary Birthright and Statelessness* (Duke University Press 2017) 2.

² Kamal Sadiq, 'Limits of Legal Citizenship: Narratives from South and Southeast Asia' in BN Lawrance and J Stevens (eds), *Citizenship in Question: Evidentiary Birthright and Statelessness* (Duke University Press 2017) 168.

³ Stevens (n 1).

⁴ Convention Relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960), art 1.

⁵ Benjamin Lawrance, 'Statelessness-in-Question: Expert Testimony and the Evidentiary Burden of Statelessness' in BN Lawrance and J Stevens (eds), *Citizenship in Question: Evidentiary Birthright and Statelessness* (Duke University Press 2017) 61. Immigration regulations have been found to place the burden of providing documents on individuals.

⁶ Sara L Friedman, 'Reproducing Uncertainty: Documenting Contested Sovereignty and Citizenship Across the Taiwan Strait' in BN Lawrance and J Stevens (eds), *Citizenship in Question: Evidentiary Birthright and Statelessness* (Duke University Press 2017) 81. A scrutiny of travel papers between Taiwan and China reveals the anomalies in Taiwanese citizenship.

⁷ Beatrice McKenzie, 'To Know a Citizen: Birthright Citizenship Documents Regimes in U.S. History' in BN Lawrance and J Stevens (eds), *Citizenship in Question: Evidentiary Birthright and Statelessness* (Duke University Press 2017) 118. Documentary claims of citizenship have been found to depend heavily on ethnicity, race, gender, and other extraneous factors.

the state since the era of the Partition, and multiple efforts have been initiated in order to achieve this end. In this paper, I have explored in depth, the issue of how the state manufactures illegality through the legal process. I argue that a documentary regime has become the primary tool of exclusion, reinforcing existing societal notions around the idea of immigrants. I begin by providing a contextual background to citizenship in Assam. This is followed by a brief analysis of the politics of documentation. I have then taken a closer look at the Foreigners Tribunal ('FT'), the main legal player in the politics of citizenship in Assam. Through a study of 90 foreigners' cases in the relevant judicial bodies of the state, I have attempted to cull out the main challenges that present themselves in the process of proving one's citizenship. Finally, I try to examine the implications of the nexus between the National Register of Citizens ('NRC') and the Foreigners Tribunal, on people's lives.

I have confined my analysis to the state of Assam, and have limited the discussion to the question of the NRC and FTs alone. The scope of this paper excludes a closer look at the Citizenship Amendment Act; this is a subject that I hope to scrutinize in a later work.

II. CITIZENSHIP AND ITS PERILS

A. Citizenship and Documentation

Political citizenship, at the risk of oversimplification, amounts to the right to vote and the right to hold office.⁸ An identity document is a crucial mechanism through which the state identifies and categorizes its citizens and allows for a 'softer governmentality' in terms of enabling welfare policies.⁹ It amounts to 'state technologies of power'.¹⁰ Stevens has gone so far as to posit that identity documents effectively aim to achieve stability of borders.¹¹ They are crucial in conferring legal status, a bundle of rights, as well as a form of identity.¹² In postcolonial South Asia, however, the conferral of documentation does not always follow citizenship. According to Jayal, the inverse happens, whereby documents are presented as proof of citizenship, and often rejected.¹³ This effectively means that the existence of documents alone is often not enough

⁸ Eileen McDonagh, 'Political Citizenship and Democratization: The Gender Paradox' (2002) 96(3) *The American Political Science Review* 535.

⁹ Vasudha Chhotray and Fiona McConnell, 'Certifications of Citizenship: The History, Politics and Materiality of Identity Documents in South Asian States and Diasporas' (2018) 26(2) *Contemporary South Asia* 111.

¹⁰ Fiona McConnell, 'Citizens and Refugees: Constructing and Negotiating Tibetan Identities in Exile' (2013) 103(4) *Annals of the Association of American Geographers* 967, 969.

¹¹ Stevens (n 1) 3.

¹² Chhotray and McConnell (n 9) 113.

¹³ Niraja Gopal Jayal, *Citizenship and Its Discontents: An Indian History* (Harvard University Press 2013) 71.

to prove citizenship. There is no clarity on what amounts to legitimate identity documentation. In India, case law has reflected the courts' unwillingness to provide any such clarification. It has been held, for instance, that Indian passports could well be acquired by fraud,¹⁴ and the presence of one's name on a voter list does not amount to proof of citizenship.¹⁵ Thus, the validity of all forms of official documentation has been called into question. This effectively implies that once one's citizenship is under question, reversing the presumption is of utmost difficulty, even if one puts forward multiple identification documents. This is evident from the way in which the legal process of citizenship has evolved in India.

B. The Evolution of India's Citizenship Regime

The regulation of the presence of foreigners in India began in the colonial period. In the wake of the Second World War, the British government felt the need to regulate the entry and exit of people to and from the country as an attempt towards stronger border security. It is in this context that the Foreigners Act 1946 was enacted,¹⁶ which placed the burden of proof on the person accused of being a foreigner.¹⁷ Following the Independence of India in 1947, citizenship became the basis of manifesting a shared identity that had emerged after a transition from subjecthood.¹⁸ The Constitution of India, in Articles 5-11, laid down the basis for identifying Indian citizens, which was framed in the context of the Partition.¹⁹ Article 11 laid down the foundation for the creation of an overarching legislation governing citizenship, namely the Citizenship Act, 1955.²⁰ The provisions of this legislation guarantee citizenship by four distinct avenues – birth, descent, registration, and naturalization.²¹ A combination of *jus soli*, i.e. citizenship by birth, and *jus sanguinis*, i.e. citizenship by descent, can be found in these clauses. Citizenship by birth extends to everyone born in India after the Constitution was framed, but before the 1986 amendment to the Citizenship Act was enacted.²² This amendment provided that a person born in India after 1986 would be considered a citizen if either of the parents were Indian citizens.²³ Though a person may be born within the territory of India, they will not be considered a citizen if one of their parents is found to be an illegal migrant at the time of birth.²⁴ The Act defines an illegal

¹⁴ *Razia Begum v State* 2008 SCC OnLine Del 933 (Delhi High Court).

¹⁵ *Bhanwaroo Khan v Union of India* (2002) 4 SCC 346 (Supreme Court of India).

¹⁶ Talha Abdul Rahman, 'Identifying the "Outsider": An Assessment of Foreigner Tribunals in the Indian State of Assam' (2020) 2(1) *The Statelessness & Citizenship Review* 112, 115.

¹⁷ *ibid.*

¹⁸ Anupama Roy, *Mapping Citizenship in India* (Oxford University Press 2010) 33.

¹⁹ Constitution of India 1950, arts 5-11.

²⁰ Roy (n 18) 34.

²¹ Citizenship Act 1955, s 3, 4, 5, and 6.

²² Citizenship Act 1955, s 3.

²³ Roy (n 18) 37.

²⁴ Citizenship Act 1955, s 3.

migrant as a foreigner who has entered India without valid travel documents, or has overstayed the validity of those documents.²⁵ Thus, the provisions of the Citizenship Act delineate the line between a citizen and the 'other'. They also take away rights of *jus soli* for persons who descend from the body of the migrant, even if they were born in the territory of India. As explored later in the paper, factors such as poverty, ethnic identity, and gender influence the construction of the 'citizen' and the 'outsider' dichotomy. This means that 'undesirable' persons, who are unable to procure documents, may find themselves outside the margins of legality. This question of identity and legality becomes crucial when we consider the history of Assam.

C. Contested Citizenship in Assam

Located in India's frontier northeastern region, the state of Assam has had a complex relationship with the question of immigration. Colonial expansion in the region led to an influx of Bengalis, both Hindu and Muslim. The former were brought in to play an administrative role, creating resentment among the indigenous Assamese population who felt excluded by the colonial policy.²⁶ The British government also encouraged migration by a significant population of East Bengali Muslims in order to clear and settle land in the Brahmaputra Valley.²⁷ This set the stage for anti-immigrant sentiments to arise through the perpetuation of the profile of the 'land-hungry immigrant'.²⁸ Partition also led to a surge in migration into Assam, and the post-Independence era saw attempts at trying to regulate this phenomenon.²⁹ The first National Register of Citizens ('NRC') was created in 1951 during the census enumeration, in the wake of the migration following the Partition.³⁰ The Central Government felt the need to identify and record the residents of the state given the flux of migrants at the time.³¹ This Register did not possess legal weight, and was considered to be fairly inconsequential in the larger scheme of things at the time.

Following the Bangladesh War in 1971, the displacement of people led to a significant migratory flow, especially towards the state of Assam. This led to a sweeping regional movement, the Assam Agitation, which demanded that foreigners be identified and expelled from the state.³² The Assam Agitation was sparked off by an electoral controversy. Mangaldoi, a constituency located at the centre of the state, was in the process of holding a parliamentary

²⁵ Citizenship Act 1955, s 2.

²⁶ Chandan Kumar Sharma, 'The Immigration Issue in Assam and Conflicts Around It' (2012) 13(3) *Asian Ethnicity* 287, 290.

²⁷ *ibid.*

²⁸ *ibid.*

²⁹ *ibid.*

³⁰ Sangeeta Barooah Pisharoty, *Assam: The Accord, The Discord* (Penguin Random House India 2019).

³¹ *ibid.*

³² *ibid.*

by-election in 1979. An allegation was raised that the electoral rolls included the names of about 45,000 people who were not citizens of India.³³ The spectre of the illegal immigrant deceiving the democratic process in the country loomed large. The by-elections were cancelled. However, in 1980, a year when parliamentary elections were scheduled, the Chief Election Commissioner – whose office governs the electoral process in India – ordered state authorities to desist from deleting the ‘immigrant’ names, numbering 2 million state-wide,³⁴ from the rolls, stating that such a scrutiny could take place after the elections, so as to prevent delays.³⁵ The 1980 elections proceeded in the state, despite continued protests; however the protestors were able to boycott elections in 12 out of 14 districts.³⁶ The agitation therefore began in 1979 and gained momentum over the later years as a result of the All Assam Students’ Union’s (‘AASU’) demands that the electoral rolls be amended. Soon after, two organizations emerged to take the lead in organizing protests. The first was the AASU, which was the leading student organization at the time, and the second was the All Assam Gana Sangram Parishad, an umbrella organization created by the AASU during the movement.³⁷ These organizations wanted the following 1983 state elections to be completely boycotted until all grievances were resolved. This was in sharp contrast to the Bengali population, who supported these elections as a means of showing solidarity against the Agitation.³⁸ This Bengali-speaking population – particularly the body of Muslims - was marked as the ‘other’ during the six tumultuous years that characterized the Assam Agitation.³⁹ The aim was to articulate an *Axomiya* (indigenous to Assam) identity against the targeted entity represented by the body of the illegal immigrant.⁴⁰ This spoke to the power of Assamese subnationalism. The dominant narrative was built around the perceived threat to the very existence of Assamese autochthony.

There were several rounds of talks in the 1980s between the leaders of the movement and the then Prime Minister, Indira Gandhi, around the issue of deporting illegal immigrants.⁴¹ The leadership insisted on deporting all those who made their way into Assam after 1951, based on the NRC which had been prepared that year as a means of screening citizens. On the other hand, the

³³ Jaswant Singh, ‘Assam’s Crisis of Citizenship: An Examination of Political Errors’ (1984) 24(10) *Asian Survey* 1056, 1062.

³⁴ Navine Murshid, ‘Assam and the Foreigner Within: Illegal Bangladeshi or Bengali Muslims?’ (2016) 56(3) *Asian Survey* 581, 595.

³⁵ Singh (n 33) 1062.

³⁶ Jane S Wilson, ‘Turmoil in Assam’ (1992) 15(4) *Studies in Conflict & Terrorism* 251, 255.

³⁷ Murshid (n 34) 595.

³⁸ *ibid.*

³⁹ Apurba Baruah, ‘Chauvinism in Assamese Society and the Bengali Elite in Assam’ (Proceedings of the North East India History Association, IX Session, Guwahati, 1988) 427.

⁴⁰ Rafiul Ahmed, ‘Anxiety, Violence and the Postcolonial State: Understanding the “Anti-Bangladeshi” Rage in Assam, India’ (2014) 19(1) *Perceptions: Journal of International Affairs* 55, 56.

⁴¹ Makiko Kimura, *The Nellie Massacre of 1983: Agency of Rioters* (SAGE Publications 2013) 9.

Central Government bargained for this cutoff year to be fixed at 1971, the year that Bangladesh was formed. Between 1981-82, the force of the movement began to wane, but was reignited when the Central Government decided to hold elections in 1983 without revising the electoral rolls.⁴²

The emphasis on an ethnocentric identity took a decisive turn with the movement turning violent, infamously culminating in the 1983 massacre in the village of Nellie in Assam, at the hands of the Assamese and the Tiwa (an indigenous group from the area).⁴³ Over 2,000 Bengali Muslims were killed, and bridges, police stations, and government officers were attacked.⁴⁴ The state police failed to take action against the rioters, and allegedly assisted them by providing arms. The Central Government as well as the state government failed to conduct a full blown neutral investigation into the atrocities committed during the course of this incident, and the perpetrators were never brought to justice. The commission that was appointed was riddled with flaws, and was biased towards the perspectives of the student leaders at the helm of the agitation.⁴⁵ Apart from the Nellie Massacre, Kimura points towards evidence indicating multiple cases of assault, arson, murder, and explosions between 1979 and 1982.⁴⁶ Muslims faced the brunt of this violence.

In 1985, the Assam Accord was signed between the leadership of the movement and the Central Government. According to the terms of the Accord, 1966 was set as the base year for detecting and deleting foreigners.⁴⁷ Those who were found to have entered the state between 1966 and 1971 were to be deleted from the electoral rolls, and were required to register themselves before the Registration Officers of their respective districts. This category of people was to be reinstated on the rolls after ten years had passed. Foreigners who came to Assam after March 25, 1971 were to be detected and deported according to the provisions of the law.⁴⁸

One of the main prongs of the Assam Accord was the creation of a new National Register of Citizens ('NRC'). However, this did not materialize till 2009, when a body called the Assam Public Works filed a case calling for the deletion of names of illegal migrants from voter lists in Assam as well as an updation of the NRC.⁴⁹ The Supreme Court took up the mantle of ensuring

⁴² *ibid.*

⁴³ Kimura (n 41) 72.

⁴⁴ Myron Weiner, 'The Political Demography of Assam's Anti-Immigrant Movement' (1983) 9(2) *Population and Development Review* 279, 281.

⁴⁵ Ahmed (n 40) 62.

⁴⁶ Kimura (n 41) 69.

⁴⁷ Assam Accord 1985.

⁴⁸ Assam Accord 1985.

⁴⁹ *Assam Public Works v Union of India* (2018) 9 SCC 229 (Supreme Court of India).

that the NRC was updated with the latest numbers and bestowed itself with the authority to monitor the progress of state authorities under this exercise.⁵⁰

The legal home for the NRC rests within the 1986 Amendment to the Indian Citizenship Act, 1955. This Register solely includes the names of those who have been able to prove their Indian citizenship. The grounds for inclusion are based on the dates established in the Assam Accord. The names of those found in the 1951 Register and the electoral rolls prior to 1971 combine to create a database titled 'Legacy Data'. To prove citizenship, one has to establish a paper trail showing that their name finds a place in the Legacy Data, or prove a link by birth with such a person. An extensive list of documents ('List A') was provided, any one of which could be used as grounds for proving the former. Another set of documents was to be used to prove a relationship by birth with a citizen ('List B').⁵¹

LIST A	LIST B
1951 NRC	Birth Certificate
Electoral Rolls up to March 25, 1971	Land documents
Land and Tenancy Records	Board/University Certificate
Citizenship Certificate	Bank/LIC/Post Office Records
Permanent Residential Certificate	Circle Officer/GP Certificate
Passport	Electoral Roll
LIC	Ration Card
Government Issued License/Certificate	Other legally acceptable document
Refugee Registration Certificate	
Government Service or Employment Certificate	
Bank/Post Office accounts	
Birth Certificate	
Board/University Educational Certificate	
Court Records/Processes	

Anyone who was dissatisfied with the process could file claims and objections before the publication of the final list. These claims and objections could be made both by people whose names had not been included in the NRC as well as by those who objected to the inclusion of any name in the NRC.⁵²

⁵⁰ *Assam Sanmilita Mahasangha v Union of India* (2015) 3 SCC 1 (Supreme Court of India).

⁵¹ 'What Are the Admissible Documents?' (*Government of Assam*) <<http://www.nrcassam.nic.in/admin-documents.html>> accessed 30 May 2020.

⁵² 'Standard Operating Procedure (SOP)/Modalities for Disposal of Claims and Objections in the Updation of National Register of Citizens (NRC) 1951 in Assam' (*Government of Assam*) <<http://nrcassam.nic.in/pdf/SOP-claims-objections-final.pdf>> accessed 30 May 2020.

The outcome of the NRC process is well-documented.⁵³ 1.9 million people were left out of the final NRC list.⁵⁴ Multiple individuals claiming legacy from ancestors who migrated to Assam in the 1800s, as well as people whose ancestors' names were present in the 1951 NRC, all found themselves excluded from the NRC.⁵⁵ They are now suspended in limbo with their very nationality at risk. There has been little research done on the demography of those excluded from the list, but it would not be a stretch to conclude that a large majority of those excluded belonged to the poorest and most vulnerable segments of society, a categorization that often finds overlap with Bengali Muslims in the state.⁵⁶ Women face the brunt of such exclusions, given that documentary evidence is hugely challenging to obtain in the face of patriarchal socio-legal norms. They are often unable to produce land entitlements or establish a legacy with their birth families, given that access to land ownership is minimal for women.⁵⁷ Birth certificates and school certificates are scarce in the socio-economic backgrounds they occupy; most are born at home, and often do not complete their formal education.⁵⁸

Following the release of the final list, the authority to take decisions regarding citizenship lies at the door of the Foreigners Tribunal.⁵⁹

III. LEGAL REGIMES, ILLEGAL BODIES

A key player in determining who amounts to an illegal immigrant is the Foreigners Tribunal ('FT'). These are quasi-judicial bodies created by an order in 1964 to carry out the task of enforcing the provisions of the Foreigners Act, 1946. Per this Act, the burden of proof for determining the status of an

⁵³ Suhasini Raj and Jeffrey Gettleman, 'A Mass Citizenship Check in India Leaves 2 Million People in Limbo' *The New York Times* (31 August 2019) <<https://www.nytimes.com/2019/08/31/world/asia/india-muslim-citizen-list.html>> accessed 30 May 2020.

⁵⁴ Joanna Slater and Niha Masih, 'In a Corner of India, 2 Million Risk Becoming Stateless After Release of Final Citizenship List' *The Washington Post* (31 August 2019) <https://www.washingtonpost.com/world/two-million-risk-becoming-stateless-after-indian-state-releases-final-list-of-citizens/2019/08/31/539d8d34-cb28-11e9-9615-8f1a32962e04_story.html> accessed 30 May 2020.

⁵⁵ Amit Ranjan, 'National Register of Citizen Update: History and Its Impact' [2019] *Asian Ethnicity* 1, 9.

⁵⁶ Jyotirmoy Talukdar, 'For Bengali Muslims Whose Names Are in the NRC, the Struggle Isn't Over Yet' (*The Wire*, 26 May 2019) <<https://thewire.in/rights/assam-nrc-bengal-muslims-objections>> accessed 5 August 2020.

⁵⁷ M Parwez, 'Marginalization of Women: Inheritance in Assam' in Prem Chowdhry (ed), *Gender Discrimination in Land Ownership: Land Reforms in India Volume 11* (SAGE Books 2009) 2.

⁵⁸ Nilanjana Bhownick, 'India's New Laws Hurt Women Most of All' (*Foreign Policy*, 4 February 2020) <<https://foreignpolicy.com/2020/02/04/india-citizenship-law-women/>> accessed 30 May 2020.

⁵⁹ Prashant Bhushan, 'Conduct of Foreigners Tribunals in Assam is Questionable' *The Indian Express* (20 September 2019) <<https://indianexpress.com/article/opinion/columns/assam-nrc-final-list-foreigners-tribunals-6011356/>> accessed 30 May 2020.

individual as a foreigner vests upon the person suspected.⁶⁰ Thus, the FTs are the main authorities entrusted with the power to determine who is a foreigner. They are given the same power as that of a civil court, and the flexibility to define their own procedure. FTs usually rely on inquiry reports by police officers or the Election Commission of India, on the basis of which notices are issued to people who fall under suspicion.⁶¹

The inherent flaws in the Tribunal process mandate elaboration. First, in the absence of a legislative home, FTs were created by an executive order.⁶² Further, FT members are selected by the executive branch without limitations imposed by legislation. This has led to a situation where anyone connected to the judicial branch, be it lawyers, judges, or civil servants, can be appointed to the FTs, and are not provided training.⁶³ Research has revealed that the members of these FTs are incentivized on the basis of the number of foreigners they declare. An appraisal report issued by the state government evaluating the performance of the FT members showed that members who had declared a greater number of foreigners were likelier to have their contracts renewed.⁶⁴ Moreover, given that the membership of these bodies is drawn from the same community which has a long history of anti-‘immigrant’ sentiment, it is not surprising that they are inclined to adjudicate along those lines. The appointment of FT members as well as the renewal of their membership vests on the state government and the Central Government, implying executive influence.⁶⁵ There are no appeals in the legal structure underlying these Tribunals; challenges have to be made via writ petitions before the High Court, which themselves are often aligned with the Tribunals’ opinions.⁶⁶ Thus, it is evident that the history of resentment against ‘immigrants’— which is a term now synonymous with a specific ethnic and religious minority — has been institutionalized in the FT process. Once a person is declared as a foreigner, they face the prospect of detention in anticipation of deportation, in one of the state’s six detention centers, living in deplorable conditions without the basic rights that prisoners are entitled to.⁶⁷ Thus, the stakes are extremely high in all FT cases, which is why it is imperative to scrutinize their functioning.

⁶⁰ Foreigners Act 1946, s 9.

⁶¹ Interview with Aman Wadud, Human Rights Lawyer at the Gauhati High Court (Telephonic Interview, 28 May 2020).

⁶² Rahman (n 16) 121.

⁶³ *ibid* 127.

⁶⁴ Sagar, ‘Case Closed’ (*The Caravan*, 6 November 2019) <<https://caravanmagazine.in/law/assam-foreigners-tribunals-function-like-kangaroo-courts-persecute-minorities>> accessed 30 May 2020.

⁶⁵ *ibid*.

⁶⁶ *ibid*.

⁶⁷ DHNS, ‘Harsh Mander’s Full Report to NHRC’ *Deccan Herald* (30 June 2018) <<https://www.deccanherald.com/national/top-national-stories/harsh-manders-full-report-nhrc-678127.html>> accessed 30 May 2020.

Documentation, as discussed before, stands at the heart of proving citizenship, and is critical to the FT process. In the absence of transparency on what amounts to appropriate proof of identity, tribunals have exercised free discretionary reign over the evidentiary process.

In brief, the FT process begins at the reference stage. The Border Police or the Election Commission makes a reference pointing out their suspicion that one is an illegal immigrant. This is followed by an investigation conducted by the police, following which the report is forwarded to the FT.⁶⁸ If the FT determines that there is a case, it sends a notice to the suspected party, who then has to attend a series of hearings and present documentary and oral evidence to prove their case. The FT finally looks over the evidence and issues a ruling which either bestows or strips away citizenship.

A. What Really Happens at the FT: An Empirical Look

To arrive at a deeper understanding of the workings of the FT, I attempted to conduct a qualitative analysis of case law surrounding the FT process. To this effect, I read 90 judgments. 22 of these were orders passed by the Tribunals that I had been provided access to by a local lawyer working on citizenship matters. 68 were High Court judgments that I had selected at random from a publicly available legal database. I filtered out case law from one year – 2019⁶⁹ – pertaining to citizenship through specific keyword searches, and eliminated, after manual screening, cases that did not directly deal with FT judgments. At the end of this process, I was left with 88 judgments spanning from January 2019 to December 2019.

This combination of High Court judgments passed by the Gauhati High Court as well as orders issued by multiple FTs, brings to light multiple issues around documentation that plague the system. In this section, I have highlighted my findings.

1. *Flawed Reference Process*

FTs act on references made by the Border Police⁷⁰ or the Election Commission, which are often made on no clear basis and are wrought with anomalies. The police or the electoral officer is to conduct an inquiry into a person they suspected was a foreigner, and then forward that report to the FT. From my analysis of references, I found that that they lacked any mention of

⁶⁸ Interview with Wadud (n 61).

⁶⁹ This piece was conceptualized in early 2020, so I wanted to examine data from the previous year.

⁷⁰ 'Branches of Assam Police: Functions' (*Government of Assam*) <<https://police.assam.gov.in/portlet-sub-innerpage/functions>> accessed 20 July 2020.

the grounds for suspicion as specified in the reference. In all cases, the forms regarding verification by local authorities were unanimously blank, apart from the name and address of the defendant. This supports the conclusion that references are made without serious inquiries.⁷¹

2. *Jurisdiction Exceeded In Terms of Reference*

Cases are brought before the FTs only upon reference by the relevant authorities.⁷² Tribunals are confined to the jurisdiction of the reference and cannot go beyond it. These references specify whether the person is suspected of being a foreigner who entered Assam between January 1, 1966 and March 25, 1971, or subsequent to March 25, 1971. This is a crucial distinction, since the implications are vastly different for both these cases. In multiple cases, the reference is usually made by the Superintendent of Police (Border), to determine whether the proceedee is a foreigner who entered between 1966 and 1971. However, the FT glibly rules that they belong to the post 1971-stream. This is in clear violation of the FT's jurisdiction.

3. *Defective Notice Process*

The Foreigners (Tribunals) Order, 1964 provides for a clear procedure regarding the manner in which notice has to be served to the proceedee.⁷³ These rules provide that in the event that the person upon whom the notice has to be served changes their residence or place of work, a copy of the notice has to be fixed at their last known residence or place of work. In an overwhelming majority of the cases examined, it was found that there were procedural aberrations to this rule. The suspected persons were often not available at their given addresses, and the process server did not follow the rule prescribed. Thus, ex-parte orders were passed against the proceedee, without them even realizing that there was a citizenship case against them. In *Jahida Khatoon v Union of India*, for instance, "the petitioner could not be found at the given address for the purpose of service of notice and therefore, the notice was hung."⁷⁴ Similarly, in *Dilowara Bibi v Union of India*, the petitioner "... was not found in her residence and therefore, the notice was hung at a conspicuous place of the village in presence of witnesses."⁷⁵ Likewise, in *Rasul Begum v Union of India*, the High Court points out that, "...the report of the process

⁷¹ Rahman (n 16) 131.

⁷² Foreigners (Tribunal) Order 1964, rule 2(1A). The Central Government may by order, refer the question as to whether a person is not a foreigner within the meaning of the Foreigners Act 1946 (31 of 1946) to a Tribunal to be constituted for the purpose, for its opinion.

⁷³ Foreigners (Tribunal) Order 1964, rule 3(5)(f).

⁷⁴ *Jahida Khatoon v Union of India* WP (C) No 8489 of 2018, decided on 4-1-2019 (Gauhati High Court).

⁷⁵ *Dilowara Bibi v Union of India* WP (C) No 744 of 2019, order dated 11-2-2019 (Gauhati High Court).

server indicates that the notice was put up in some place as the petitioner was not found.”⁷⁶ These procedural violations – which have not been scrutinized in detail by the High Courts - strike at the heart of equity, and are indicative of the fact that FTs treat cases upon which the entire body of rights rests, with careless flippancy.

4. *Rejection of Multiple Documents on Arbitrary Grounds*

FTs rely almost exclusively on documentary evidence, without any clarity on what constitutes acceptable documentation to confirm one’s citizenship status.⁷⁷ Public documents such as voter lists and land records have to be presented through certified copies. Moreover, private documents have to be proven through the presence of the issuing authority. These requirements present a monumental challenge for low wage workers and labourers, who are usually the social group that falls under scrutiny.⁷⁸ Even if a body of documents is presented, the trend is that they are mostly dismissed on the basis of a wide range of grounds. It is assumed that the party “...has taken the help of some false and manipulated documents...miserably failed to discharge her burden to prove that she is not a foreigner”.⁷⁹

An analysis of randomized FT orders showcases the following grounds that have been presented to dismiss documents produced. It is seen that FTs rule against persons on the basis of minor discrepancies in the documentations, such as spelling errors and contradictory dates, disregarding all other evidence. These grounds are entirely discretionary.

Type of document	Grounds for dismissal
Land Record	Damaged or illegible document; Unable to recollect details on examination; Linkage not established, so land record rendered invalid; Rewritten by cutting name; Photocopy cannot be appreciated as evidence
Marriage Certificate	Issuing authority not produced to testify; Different spelling (minor) in marriage certificate

⁷⁶ *Rasul Begum v Union of India* WP (C) 132 of 2019, order dated 25-1-2019 (Gauhati High Court).

⁷⁷ Manu Sebastian, ‘Which Documents Prove Indian Citizenship?’ (*Live Law*, 21 February 2020) <<https://www.livelaw.in/columns/which-documents-prove-indian-citizenship-153027>> accessed 30 May 2020.

⁷⁸ *ibid.*

⁷⁹ *State v Kad Bhanu* FT 5th 407/16 (Foreigners Tribunal 5th – Barpeta).

Type of document	Grounds for dismissal
Examination Admit Card	Father's name not mentioned
School Leaving Certificate	Issuing authority not produced to testify
Voter List	Inclusion of name not sufficient to prove citizenship; Proceegee failed to corroborate other names on the voter list; Genuineness not proven by comparing with primary evidence; Post-1971 documents do not prove citizenship; Reasons for address change in different years' voters lists not mentioned; Age discrepancies in different voters lists; Photocopy cannot be appreciated as evidence; Rejected without reason
Gaonburah Certificate	Issuing authority's evidence not convincing; State emblem embossed over the document in violation of the law; ⁸⁰ Issuing authority not produced before the court; Link certificate not proven to be based on any record; Authority who issued it did not personally know the party
Sale Deed	Not proved by evidence of the author; Linkage not established, so deed rendered invalid
1951 NRC	Photocopy presented only; Age of persons not mentioned
Ration Card	Issued after March 25, 1971, and has no value

5. *Strict Evidentiary Standard Which Cannot be Met, Even Upon Production of Documents*

FTs apply provisions of the Indian Evidence Act, 1872 in an extraordinarily stringent and selective manner, effectively using the same standard as that of a criminal trial. This is disproportionate, given that FT proceedings are civil in nature. In the case of marriage certificates or residence certificates, the content has to be proven in the FT by the authorities who issued it.⁸¹ The onus

⁸⁰ The State Emblem of India (Prohibition of Improper Use) Act 2005.

⁸¹ 'Designed to Exclude: How India's Courts Are Allowing Foreigners Tribunal to Render People Stateless in Assam' (Amnesty International 2019) <<https://amnesty.org.in/wp-content/uploads/2019/11/Assam-Foreigners-Tribunals-Report-1.pdf>> accessed 30 May 2020.

is on the person proving their citizenship to make sure that these authorities are present before the FT. Deposition by family members (who are citizens) attesting to their relationship with the person accused is often disregarded, in clear contradiction to the principles of Section 50 of the Indian Evidence Act.⁸² Little reason was mentioned for the same in the orders, with most judges labelling the witnesses as 'unreliable'.

6. Gender Specific Challenges

Women face the brunt of these challenges disproportionately, as the system hinges on the notion of patrilineal descent. Despite there being proof of women's names appearing in voter lists, in the absence of proven linkage with the father's side of the family, they are declared as foreigners.⁸³ In numerous existing cases before the FTs, it is seen that women suffer and are declared as foreigners on account of having no linkage to their father as proven through a voter list; many attain adulthood only after marriage and therefore have their names registered with reference to their husband. This is not considered sufficient ground for citizenship. A *Panchayat* (an elected village council) Secretary's certificate verifying that the woman in question is the child of her father stands in lieu of a birth certificate; however, given that it is considered a private document under evidence law, it requires the issuing authority to testify before court.⁸⁴ In many instances, this is rendered impossible as the relevant authorities are reluctant to appear before a judicial body. Therefore, structural barriers render it difficult for women to meet the documentary requirements demanded by the legal system.

IV. CONCLUSION: DOCUMENTATION AND STATELESSNESS

Many have argued that the power of documentation is exercised by the state to magnify its reach in the lives of people and is the source of exclusion.⁸⁵ From my analysis, it can be seen that the power of exclusion has been exercised to a visible degree in the case of Assam. Through complicated

⁸² Indian Evidence Act 1872, s 50. Opinion on relationship, when relevant. When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, or any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact.

⁸³ Utpal Parashar, 'As High Court Rejects Assam Woman's Plea, a Look at What Exactly is Needed to Prove Citizenship in the State' *Hindustan Times* (19 February 2020) <<https://www.hindustantimes.com/india-news/as-high-court-rejects-assam-woman-s-plea-a-look-at-what-exactly-is-needed-to-prove-citizenship-in-the-state/story-Cdb4Vf LOMgcWGILUn1uKXK.html>> accessed 5 August 2020.

⁸⁴ Interview with Aman Wadud, Human Rights Lawyer at the Gauhati High Court (Telephonic Interview, 28 May 2020).

⁸⁵ *ibid.*

bureaucratic processes, the state has completely undermined the social status of citizens belonging to minority communities in Assam. While FTs themselves do not follow any standardized procedure and exercise arbitrary discretion, people hauled up before the FTs are, conversely, expected to fulfil excessively stringent documentation requirements. Moreover, even when people provide different forms of documentation before the court, there is a legislative vacuum in terms of what constitutes valid documentation. Courts seem to have taken advantage of this gap to dismiss people's claims on arbitrary grounds. Further, failure of procedural due process has manifested as an insurmountable barrier, as litigants struggle with defective reference and notice processes, fatal jurisdiction errors, and unpredictable evidentiary norms.

To complicate matters, India is not a signatory to the two conventions tasked with mitigating statelessness and its impacts.⁸⁶ However, the body of international human rights treaties that India is party to – the UDHR,⁸⁷ CEDAW,⁸⁸ CRC⁸⁹ *inter alia* – enshrine the protection of the right to nationality. Thus, the actions of the FTs, which deprive people of their citizenship, are effectively leading up to a statelessness crisis in violation of international human rights law. 23,000 people have been declared as 'foreigners' over the last year alone, and very few of them have been deported to other countries - the all-India figure for 2019 was 1,351,⁹⁰ of which just 8 were from Assam.⁹¹ 802 declared 'foreigners' are perishing inside the state's detention centres.⁹² The rest remain suspended in limbo, with little certainty about their future. Being a part of a stateless population leads to the stripping away of entitlements to education, employment, healthcare, and legal due process;⁹³ as in the case of the Rohingya, it also leads to arbitrary detention that can go on for years.⁹⁴ Further, statelessness has been seen to disproportionately impact

⁸⁶ Vatsal Raj, 'Statelessness in India – Seeking Solutions in International Law' (*Cambridge International Law Journal*, 11 February 2020) <<http://cilj.co.uk/2020/02/11/statelessness-in-india-seeking-solutions-in-international-law/>> accessed 30 May 2020.

⁸⁷ Universal Declaration of Human Rights (adopted 10 December 1948, entered into force 23 March 1976), art 15.

⁸⁸ The Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981), art 9.

⁸⁹ Convention on the Rights of the Child (Adopted 20 November 1989, entered into force 2 September 1990), art 7.

⁹⁰ Ministry of Home Affairs, 'Rajya Sabha Starred Question No 44 - Increase in Illegal Immigrants' (Government of India 5 February 2020) <<https://www.mha.gov.in/MHA1/Par2017/pdfs/par2020-pdfs/rs-05022020/44.pdf>> accessed 30 May 2020.

⁹¹ Padmini Baruah, 'The Blind Side: India's Tryst with Citizenship, Deprivation and Statelessness' (*The Fletcher Forum of World Affairs*, 12 May 2020) <<http://www.fletcherforum.org/the-rostrum/2020/5/11/the-blind-side-indias-tryst-with-citizenship-deprivation-and-statelessness?rq=padmini>> accessed 30 May 2020.

⁹² *ibid.*

⁹³ Lindsey N Kingston, 'Worthy of Rights' in Tendayi Bloom, Katherine Tonkiss, and Phillip Cole (eds), *Understanding Statelessness* (Routledge 2017) 19.

⁹⁴ Directorate-General for External Policies, 'Addressing the Human Rights Impact of Statelessness in the EU's External Action' (European Parliament 2014) <<https://www.europarl.europa.eu/press-articles/2014/04/addressing-the-human-rights-impact-of-statelessness-in-the-eus-external-action/>>

minorities, a fact that plays out in Assam. A study conducted on cases decided by the FTs found that nine out of ten cases were against Muslims, and 90% of Muslims were declared illegal immigrants, as compared to 40% of the Hindus tried.⁹⁵ This is the prospect that awaits 1.9 million people, who are now poised to prove themselves before quasi-legal bodies riddled with unjust, inconsistent procedures.

Despite Assam's diverse ethnic composition, its colonial history has created deep-rooted divisions between the 'Assamese' representing an 'indigenous' body, and the 'Bengali', particularly the Bengali Muslim, who was posited as the 'infiltrator'. Throughout the history of the Assamese postcolonial state, identifying the outsider and stripping them of their citizenship status has been of utmost political priority. This forms the framework within which we must consider the NRC. It is incontrovertible that FTs are deeply flawed in their functioning and have, over the years, continued to strip people of their citizenship on flimsy grounds. In the words of Hannah Arendt, citizenship is the 'right to have rights'. Those excluded thus have their basic rights at stake, which are stripped with alacrity through flawed procedural mechanisms. This situation mandates a policy intervention at the earliest. The complex tangle of bureaucracy and judicial process must not disenfranchise citizens who already occupy a vulnerable position, lest the violent history of Assamese xenophobia repeat itself.

europa.eu/RegData/etudes/STUD/2014/534983/IPOL_STU%282014%29534983_EN.pdf> accessed 30 May 2020.

⁹⁵ Rohini Mohan, 'Worse Than a Death Sentence: Inside India's Sham Trials That Could Strip Millions of Citizenship' (*Vice News*, 29 July 2019) <https://news.vice.com/en_us/article/3k33qy/worse-than-a-death-sentence-inside-indias-sham-trials-that-could-strip-millions-of-citizenship> accessed on 30 May 2020.