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“MORE EXECUTIVE-MINDED THAN THE EXECUTIVE”: THE SUPREME COURT’S ROLE IN THE IMPLEMENTATION OF THE NRC

—Alok Prasanna Kumar*

Abstract The Supreme Court’s harsh and cruel approach to enforcing the National Register of Citizens should not be treated as an exceptional event for the judiciary at large or even the Supreme Court specifically. India’s judiciary having abandoned questions of procedure and propriety in the name of “public interest”, and any semblance of representativeness and diversity in the name of “independence”, such outcomes are going to get more frequent.

“I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive... It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.”
— Lord Atkin, in *Liversidge v. Anderson*, 1942 AC 206

I. INTRODUCTION

The preparation of the National Register of Citizens in Assam (‘NRC’), ostensibly to identify ‘illegal migrants’ who entered the state after 1971, has created more than its fair share of controversies – as any such process tends to. One unwanted, unique feature of the NRC process has been the fact that

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for the last five years, this process has been driven by the judiciary rather than the executive.¹ The observation that the judiciary, in this context, has been acting more like the executive than the executive itself has been made.² For anyone who believes that the judiciary is the last resort when protecting the rights of persons against the actions of the states, it is extremely disorienting to see the judiciary demand increasingly harsher and unjustified procedures while the lawyers of the Executive try to seek to ameliorate them.³

Explanations of why the court has taken up the exercise so fervently tend to be thin on the ground. Some attempt to explain this purely by reference to CJI Ranjan Gogoi's ethnic background.⁴ It cannot be denied that active monitoring of this case was taken up several years after it was filed, only once he was part of the bench (initially as a puisne judge, and later as CJI).⁵ Some of the observations made in the case and some of the orders passed⁶ are so far beyond the pale of legality, one has to even question if this is a legal proceeding at all. Not only has the court refused to consider the legal question at stake (the constitutional validity of Section 6A of the Citizenship Act, 1955),⁷ it has made it all but impossible for those detained for being foreigners from ever being released from detention.⁸

No doubt Gogoi's involvement has been a huge factor in the large scale immiseration caused by the NRC process, that however is not a full explanation. After all, the NRC's genesis goes back to the framing of the Constitution itself⁹ and the underlying concerns to 19th century British policies.¹⁰ It does lay bare some of the unresolved tensions over very fundamental questions of the

¹ Alok Prasanna Kumar, *To what end this exercise?*, THE HINDU (Aug. 2, 2018), <https://www.thehindu.com/opinion/lead/to-what-end-this-exercise/article24575843.ece>.

² Gautam Bhatia, *The SC is Exceeding Its Brief as the Apex Judicial Organ in the NRC Case*, THE WIRE (Apr. 26, 2019), <https://thewire.in/law/nrc-case-article-21-supreme-court>.

³ See generally Krishnadas Rajagopal, *SC orders States' chief secretaries to evict rejected claimants under Forest Rights Act*, THE HINDU (Feb. 21, 2019), <https://www.thehindu.com/news/national/sc-orders-states-chief-secretaries-to-evict-rejected-claimants-under-forest-rights-act/article26329407.ece>.

⁴ A Guwahati based Senior advocate Pradip Roy raised doubts along these lines, Apurva Vishwanath, *Guwahati advocate asks CJI Misra why Justice Gogoi, an Assamese, is hearing NRC case*, THE PRINT (Aug. 8, 2018), <https://theprint.in/india/governance/guwahati-advocate-asks-cji-misra-why-justice-gogoi-an-assamese-is-hearing-nrc-case/95509/>.

⁵ Kumar, *supra* note 1.

⁶ The Order passed on September 23, 2014 required the Coordinator to submit a report in sealed cover of the steps taken. [<https://www.sci.gov.in/jonew/bosir/orderpdfold/2070094.pdf>].

⁷ By late 2013-early 2014, the Court virtually took over the task of NRC preparation and paid heed to no other questions of law, Gautam Bhatia, *In the court of last resort*, THE HINDU (Oct. 3, 2018), <https://www.thehindu.com/opinion/lead/in-the-court-of-last-resort/article25105456.ece>.

⁸ Kumar, *supra* note 1.

⁹ Sanjay Barborra, *The Crisis of Citizenship in Assam*, THE INDIA FORUM (May 16, 2019), <https://www.theindiaforum.in/article/crisis-citizenship-assam>.

¹⁰ Abdul Kalam Azad, *Assam NRC: A History of Violence and Persecution*, THE WIRE (Aug. 15, 2018), <https://thewire.in/rights/assam-nrc-a-history-of-violence-and-persecution>.

nature of the Indian state and who is an Indian. Be that as it may, I argue that the NRC case also reveals something larger about the Supreme Court beyond just the actions of Gogoi alone. In this article, I will show that the court's actions fit within the explanation provided by Anuj Bhuwania in his book 'Courting the People'¹¹ as to how and why Public Interest Litigation ('PILs') have been used to enhance unaccountable exercise of powers by the courts at the expense of human rights and democratic accountability. The approach and the actions of the Supreme Court of India in the NRC process are not by any means exceptional or unimaginable, but in fact another manifestation of the road that's been taken, with the active support of the Bar and the civil society.

In the first part of this article, I will briefly summarise the history of the NRC litigation and the status of its implementation as on the date this article was sent for publication. Given that this is an ongoing case, it is quite possible that there may be unexpected twists and turns that take place after this article has been published. However, whatever has come to pass and the fact that the future course of this case is unpredictable, is itself enough to make the point I intend to make. In the next part of this article, I intend to unpack Bhuwania's argument about the higher judiciary's use of PILs and how it helps explain the course taken by the NRC case so far. The final, concluding part of this article will summarise the article and link it to recent developments in the higher judiciary which only go to show that the NRC case is by no means an exception but a reflection of a deep dysfunction within the higher judiciary that has abandoned procedure and legalism in favour of 'panchayati justice'.

II. THE NRC CASE

The NRC itself dates back to 1951, to the founding of the Indian republic when the question of citizenship under the new Constitution proved to be the longest debated part of the Constitution.¹² The NRC was specifically introduced in Assam to address concerns that they would be 'swamped' by Bengali refugees from across the border in the years around Partition. This concern goes even further back, however, to the 19th century when there was a sustained campaign by colonial government to encourage immigration from Bengal to Assam. The first version of the NRC, prepared in 1951, was in response to concerns of Assamese Hindus in the new Indian state, but is widely recognized to be riddled with errors.¹³

¹¹ ANUJ BHUWANIA, *COURTING THE PEOPLE: PUBLIC INTEREST LITIGATION IN POST-EMERGENCY INDIA* PAGE NUMBER MISSING (Cambridge University Press 2017). [Page Number not relevant]

¹² See ORNIT SHANI, *HOW INDIA BECAME DEMOCRATIC: CITIZENSHIP AND THE MAKING OF THE UNIVERSAL FRANCHISE* PAGE NUMBER MISSING (Penguin Viking 2018). [Page number not relevant]

¹³ Sajal Nag, *National Register of Citizens: Old Divides and New Fissures*, 53(46) EPW PAGE NUMBER MISSING, 15 (2018). [Page number not relevant]

The present form of the NRC itself is the result of the Assam Accords entered into by the Indian Government with the representatives of the Assam movement to put an end to the violence that had engulfed the state over the issue of ‘outsiders’ overwhelming the ethnic Assamese.¹⁴ One part of the accords required that ‘foreigners’ who came to Assam on or after March 25, 1971, shall be expelled by the Government.¹⁵ This prompted the introduction of Section 6A to the Citizenship Act in 1986 which is applicable only to the State of Assam in furtherance of the Assam Accord.¹⁶

The litigation itself, in the present instance, began in 2009 with the filing of a PIL by an NGO called Assam Public Works, seeking implementation of Section 6A in the State of Assam, among other reliefs.¹⁷ The matter was pending for four years with little or no progress until May 8, 2013, when the Supreme Court took up the matter in right earnest. Since that hearing, which began with Justices H.L. Gokhale and Ranjan Gogoi, to say that the course of the hearings have been extraordinary is to mildly understate it.

The court’s orders in the NRC case don’t just amount to a parallel government, but one which has effectively supplanted the legitimately elected ones. Amounts have been directed to be released,¹⁸ allocations of staff have been made,¹⁹ even the concerns of the government itself have been brushed aside!²⁰ The court has chosen eight organizations representing various communities as ‘stakeholders’ in the process, but has nowhere mentioned how and where it chose these eight from.²¹

As things stand, and as of this paper being completed, a deadline of August 31, 2019 has been given for the publication of the NRC.²² The court has given absolutely no clarity on what happens afterwards to the lakhs of people who are going to find themselves outside the NRC. There’s no question of deportation since most do not have any verifiable citizenship of any other country. There’s simply no question of detaining these individuals overnight for an

¹⁴ *From Assam Accord to NRC discord: A timeline*, THE ECONOMIC TIMES (Aug. 2, 2018), <https://economictimes.indiatimes.com/news/et-explains/from-assam-accord-to-nrc-discord-a-timeline/articleshow/65237816.cms?from=mdr>.

¹⁵ Clause 5.8 of the Assam Accord, https://peacemaker.un.org/sites/peacemaker.un.org/files/IN_850815_Assam%20Accord.pdf.

¹⁶ Through the Citizenship (Amendment) Act, 1986.

¹⁷ *Assam Public Works v. Union of India*, WP(C) No. 274 of 2009 (SC) (Pending). All orders referred to in this article refer only to the orders passed in this case.

¹⁸ 2013 SCC OnLine SC 1412, <https://www.sci.gov.in/jonew/bosir/orderpdfold/1806367.pdf>.

¹⁹ 2019 SCC OnLine SC 775, https://www.sci.gov.in/supremecourt/2009/16113/16113_2009_Order_10-Apr-2019.pdf.

²⁰ WP(C) No. 274 of 2009, order dated 5-2-2019, https://sci.gov.in/supremecourt/2009/16113/16113_2009_Order_05-Feb-2019.pdf.

²¹ WP(C) No. 274 of 2009, order dated 16-8-2019, https://sci.gov.in/supremecourt/2009/16113/16113_2009_Order_16-Aug-2018.pdf.

²² 2019 SCC OnLine SC 1097, https://sci.gov.in/supremecourt/2009/16113/16113_2009_1_301_15372_Order_23-Jul-2019.pdf.

indefinite period of time because there is no infrastructure to do so. The only remedy seems to be to consign them to the Foreigners Tribunal – also an unrealistic option given the vast number of cases and the sheer lack of such forums in the state.

III. THE DANGEROUS "INFORMALISATION" OF THE JUSTICE SYSTEM

Bhuvania's critique of PILs and what they have wrought on the Indian judiciary stays well away from the tired debates around 'overreach' and refrains from a purely consequential analysis of Supreme Court and High Courts' orders in PILs. Rather, his focus is to look at what was the underlying ideology of the PIL movement in the context of its critique of the Indian legal system. He links PILs to the broader movement in the 1970s to 'Indianize' the legal system in several ways, seeing it as a colonial institution which ill served the purposes of the country. This view was taken not just by the political executive, but also by members of the judiciary itself – most notably Justices P.N. Bhagwati and Krishna Iyer. While tribunalisation was touted as a way to replace High Courts and *gram nyayalayas*, district courts, PILs were a way for the Supreme Court to cut through the clutter of procedure (as they saw it) to open the doors of the court to the public at large.²³ While the initial wave of PILs did have some positive impact, Bhuvania points out the dangers of procedural 'innovations' which allowed courts to arrogate to themselves vast powers of investigation, monitoring, and law making in the guise of enforcing constitutional rights. Although these innovations have been praised by many in their time, as Bhuvania's book shows, they were ripe for grave and enormous misuse.

This had terrible consequences on the most vulnerable sections of the Indian society. An instance of the same has been pointed out by Bhuvania in the context of the Delhi High Court's long-standing attempt to dismantle Delhi's slums and displace their inhabitants. A writ petition about an unauthorised floor being added to a building in South Delhi was turned by the court into a PIL to look into all kinds of unauthorised settlements and buildings across the city, leading eventually to the coerced movement of people out of their homes in the name of "rule of law" and proper urban planning. The trajectory of the case is recounted in great detail across a whole chapter of "Courting the People", but suffice it to say that the hearings bore little resemblance to what a court is expected to function as.

Three key aspects of PILs that Bhuvania highlights are significant to understanding the way the NRC case has proceeded:

²³ Kumar, *supra* note 1, at 32-33.

1. The court rendering the petitioner irrelevant to the cause and taking up the cause itself for an unclear and ill-defined agenda. The petitioner, Assam Public Works, had sought a direction from the court to the government to delete voters who did not have Indian citizenship and direct the government to complete the NRC process. Instead, the court has itself taken up the whole task of getting the NRC prepared without going into any of the legal issues in question.
2. Lack of concern for procedural correctness preferring to work through amicus curiae or select parties without hearing parties actually affected by its orders. Four million people found themselves out of the draft NRC which was prepared in 2018 and had no say in what happens next.²⁴ Although the court has afforded another opportunity to those left out, it is unclear as to what happens to those who are still not on the final NRC. The court seems unconcerned that the Foreigners Tribunals are directing the Union and Assam Governments to set up work like kangaroo courts with no due process, accountability, or responsibility.²⁵
3. Ignoring questions of competence and efficacy in passing orders with large ramifications. At no point has the court wondered what is the potential impact of its eventual orders. It has, at no point, showed any concern about the rights of the lakhs of persons who are quite likely to be stripped of their citizenship as a result of its overseeing of the NRC.²⁶

In many respects, the NRC case bears eerie resemblances to the slum demolition drives undertaken at the behest of the Delhi High Court in the late 1990s and early 2000s that displaced lakhs of citizens, all in the name of urban planning overseen by an unaccountable and unmovable High Court.

IV. CONCLUSIONS

The NRC case is by no means the sole recent example of this large scale ‘*panchayati* justice’ that the Supreme Court has indulged in.²⁷ An equally egregious example was seen in the [forest dwellers case] where the court callously

²⁴ Manogya Loiwal, *40 lakh left out of Assam NRC get another shot at citizenship*, INDIA TODAY (Sep. 25, 2018), <https://www.indiatoday.in/india/story/40-lakh-left-out-of-assam-nrc-get-another-shot-at-citizenship-1348594-2018-09-25>.

²⁵ Rohini Mohan, *Inside India's Sham Trials That Could Strip Millions of Citizenship*, VICE NEWS (Jul. 29, 2019), https://news.vice.com/en_us/article/3k33qy/worse-than-a-death-sentence-inside-indias-sham-trials-that-could-strip-millions-of-citizenship.

²⁶ Kumar, *supra* note 1.

²⁷ Bhuwania, *supra* note 11.

ordered the displacement of more than 10 million forest dwellers in a PIL to ostensibly "protect" forests. Like the NRC, this too was done without giving the affected parties any sort of hearing or fair procedure with whatever bureaucratic process adopted by the states deemed to be lawful and justified. Disaster was averted only due to the large scale mobilisation of *adivasi* organisations and the Union Government firmly backing them ahead of the impending elections.²⁸ It remains to be seen whether the court continues on this disastrous path of large scale evictions of forest dwellers following the elections. Prior to that, we saw the Supreme Court decide to make singing of the national anthem mandatory before the screening of films across the nation with no statutory or legal basis.²⁹

This is by no means limited to the Supreme Court alone. High Courts have passed all sorts of orders 'banning' everything from social media³⁰ to driving licenses for unlettered drivers.³¹ Some of these bizarre orders have been set aside by superior courts or recalled by the High Courts themselves, but they only go to show that the dysfunction within the judiciary, in so far as it relates to the problems of informalism, go deep and wide.

As Bhuwania's book shows, this is not a recent phenomenon. The courts giving a complete go by to basic principles of natural justice, fairness, rules of evidence, and even the most basic right of being heard before being condemned, started in the 80s as a rejection of the formal rules of procedure as being an alien imposition on India's native legal culture. While it was hailed for the good consequences it initially provided, the seeds were also sown for the mass deprivation of rights that the courts would oversee. Whether it was in the evictions in Delhi or the NRC, India's higher judiciary has, far from protecting any individual rights guaranteed under the Constitution, overseen and ensured the large scale destruction of the same.

What makes the situation even worse is perhaps the fact that the higher judiciary is largely dominated by Savarna men who also act as gatekeepers controlling future appointments to the higher judiciary. While there is token representation for women, Dalits, minorities, and other groups, the character of the institution does not change as a result. With the court deciding cases less through law and procedure, and more on the basis of the personal predilections of judges with disastrous consequences, the court is functioning less and less like a court and more like an executive authority with uncontrolled powers.

²⁸ Samanwaya Rautray, *SC to hear Centre's plea seeking stay on possible eviction of tribals, forest dwellers*, THE ECONOMIC TIMES (Feb. 28, 2019), <https://economictimes.indiatimes.com/news/politics-and-nation/sc-to-hear-centres-plea-seeking-stay-on-possible-eviction-of-tribals-forest-dwellers/articleshow/68181047.cms?from=mdr>.

²⁹ *Shyam Narayan Chouksey v. Union of India*, 2016 SCC OnLine SC 1449.

³⁰ *S. Muthukumar v. Telecom Regulatory Authority of India*, WP (MD) No. 7855 of 2019, decided on 24-4-2019 (Mad).

³¹ *Deepak Singh v. State of Rajasthan*, 2019 SCC OnLine Raj 671.

Though Lord Atkin's quote, with which I began this article, was uttered in a different context, it seems to be most apt in the context of the Indian judiciary – a body which not only thinks like the executive, but behaves in much the same unaccountable and arbitrary way.