



## UNDERSTANDING CITIZENSHIP, MIGRATION AND ITS LEGAL CHALLENGES IN ASSAM

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### Abstract

*This paper examines the historical, constitutional, and statutory dimensions of citizenship in India, with particular focus on its legal development and practical challenges. The paper explores how legal principles, political movements, and migration-related complexities have influenced Indian citizenship, following the development of citizenship from its colonial beginnings to the drafting of the Constitution and the passing of the Citizenship Act, 1955. Assam is given special emphasis because of its distinct legal environment brought about by the National Register of Citizens (NRC), undocumented migration, and the application of Section 6A. The role and validity of Foreigners' Tribunals, established under the Foreigners Act, 1946, are critically assessed in light of constitutional provisions, procedural fairness, and jurisdictional limitations. The paper argues for a clear legislative foundation and consistent procedural safeguards in citizenship determination processes to ensure alignment with the constitutional values of justice, equality, and due process. Starting with the historical context of citizenship at independence and the gradual evolution of nationality laws, the paper delves into the interplay between migration, regional concerns, and legislative amendments to address emerging challenges. Special focus is given to mechanisms like the National Register of Citizens and the Foreigners' Tribunal, evaluating their legal basis and impact on citizenship determination. The analysis highlights significant debates surrounding the constitutional validity of executive orders regulating immigration and citizenship determination, a subject matter exclusive to the Constitution, and also delves into the tension between national security and individual rights. By emphasising the need for reform and adherence to natural justice, the paper seeks to highlight how citizenship and foreigners have different set of rules governing them and how they cannot substitute the other and the intricacies surrounding the usage and applicability of migration laws on citizens to provide a comprehensive understanding of India's citizenship laws and their implications in a globalized world.*

### Introduction

The legal concept of citizenship serves as the cornerstone of individual-state relationships, determining a person's rights, responsibilities, and allegiance within a nation. In India, citizenship carries historical, constitutional, and socio-political significance, reflecting the country's colonial legacy and post-independence aspirations. Primarily governed by "Article 5 to Article 11 of the Constitution of India" and the "Citizenship Act, 1955" and its subsequent amendments, Indian citizenship laws have evolved corresponding to migration patterns, regional concerns, and national security issues. The contrast between nationality and citizenship in Indian law offers a unique insight into the complexities of managing a pluralistic and diverse society. Citizenship is limited to natural persons and involves civil and political rights,<sup>1</sup> while nationality encompasses broader rights under international law. Over the years, legislative amendments and judicial scrutiny have addressed issues like large-scale migration and the introduction of citizenship verification mechanisms such as the "National Register of Citizens (NRC)".

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<sup>1</sup> Kondo, Atsushi, ed. (2001). *Citizenship in a Global World*. [Palgrave Macmillan](#).



However, mechanisms like the Foreigners' Tribunal, created under the Foreigners (Tribunal) Order, 1964, have raised critical questions about their legality and constitutional validity. These tribunals are ultra vires to the Constitution as determination of citizenship is a subject matter exclusive to the authority of the Constitution. The tribunals operate under executive orders rather than parliamentary legislation, adjudicating on matters that directly affect fundamental rights. This raises concerns about their compliance with constitutional mandates, especially within the basic structure of the Constitution, particularly the exclusive legislative competence of Parliament over citizenship.

A comprehensive examination of the evolution of citizenship laws in India is thus imperative in order to navigate through the legal challenges surrounding immigration and naturalisation, and the ongoing debates on ensuring fairness and due process. By addressing the historical context, constitutional framework, and contemporary controversies, the study aims to contribute to the understanding of citizenship as a dynamic and contested domain in Indian law based exclusively on the Constitutional mandate.

## Content Analysis

### Historical Context of Citizenship in India

The notion of citizenship denotes the formal recognition of an individual's legal identity and political affiliation within a sovereign state. In the context of ancient India, the concept remained largely undeveloped and lacked institutional codification throughout both the classical and medieval periods. It was not until the consolidation of British colonial power that a more defined, albeit exclusionary, framework of citizenship emerged. The initial phases of British rule, particularly under the aegis of the British East India Company, reserved citizenship status exclusively for British nationals, thereby relegating the indigenous population to the status of subjects devoid of political rights or legal parity. British colonial governance treated the Indian subcontinent as a civilizational periphery, suitable primarily for the imposition of military discipline and legal order, rather than for fostering civic inclusion. As the British Empire expanded across continents, the imperial administration increasingly relied on the movement of colonial subjects for labour-intensive sectors such as agriculture, mining, and military service. Despite this demographic mobility, the legal recognition of citizenship for these migrant populations remained negligible. The imperial apparatus exploited ethnic and regional diversity not for integration but for mechanisms of segregation, displacement, and control within and across colonial boundaries. Adam Smith referred to the East India Company as the body 'for the appointment of plunderers of India.'<sup>2</sup>

In 1858 following the "Indian Rebellion of 1857," Queen Victoria issued a royal proclamation<sup>3</sup> through which the British government presented a vision of impartial justice and highlighted the principle of equality among all subjects of the Crown, regardless of race or background.<sup>4</sup> However, this principle was starkly contradicted by discriminatory immigration policies in other colonies and Dominions, which aimed to exclude non-white migrants, including Indian British subjects.<sup>5</sup> Australia, Canada, New

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<sup>2</sup> A. Smith (1776). *An inquiry into the nature and causes of the wealth of nations*. London, UK: W. Strahan and T. Cadell.

<sup>3</sup> Mark R. Frost, *Imperial Citizenship or Else: Liberal Ideals and the India Unmaking of Empire, 1890–1919*, 46(5) *J. Imp. & Com. Hist.* 849 (2018).

<sup>4</sup> R.A. Huttenback, *The British Empire as a "White Man's Country" – Racial Attitudes and Immigration Legislation in the Colonies of White Settlement*, 13(1) *J. Brit. Stud.* 108–109, 118 (1973).

<sup>5</sup> R.A. Huttenback, *The British Empire as a "White Man's Country" – Racial Attitudes and Immigration Legislation in the Colonies of White Settlement*, 13(1) *J. Brit. Stud.* 117–118 (1973).



Zealand, and South Africa had implemented legislation to drastically limit Indian immigration by the early 20th century.<sup>6</sup> Indian civil rights movements throughout the Empire pushed for equal imperial citizenship with the same rights as British subjects in Europe, and these contradictions fuelled their demands.<sup>7</sup> Prioritizing the suppression of unrest over political resolution, the imperial authorities initially acknowledge these claims prior to “World War I”.<sup>8</sup> “Indian political movement” progressively shifted their attention toward independence as it becomes evident that within the Empire equality was unattainable.

On 15 August, 1947, British India was partitioned into two independent Dominions - the “Union of India” and the “Federation of Pakistan”. Before India’s status as a Commonwealth republic was formally established at the Commonwealth Prime Ministers’ Conference in 1949, the country initially maintained the “British monarchy” as its head of state.<sup>9</sup> Until the country passed its own nationality laws, Indians continued to be British subjects.<sup>10</sup> Individuals from princely states, who had previously been classified as British protected persons, after their state acceded to India were granted Indian citizenship.<sup>11</sup>

By transforming from a shared imperial nationality toward citizenship within specific Commonwealth countries, the “British Nationality Act of 1948” reinterpreted British subject status. This law permitted dual status and established “Commonwealth citizen” as a substitute for British subject. Indians and citizens of other Dominions without official citizenship laws were temporarily classified as “British subjects without citizenship” because India had not yet implemented its citizenship law when the “1948 Act” went into effect.<sup>12</sup>

Prior to complete enactment of the Indian Constitution and the nation’s transition to a republic on January 26, 1950, the document had already incorporated citizenship provisions on November 26, 1949. The partition of India and Pakistan triggered large-scale migrations, prompting the Constituent Assembly to limit initial citizenship provisions to address the immediate needs of migrants. The Citizenship Act of 1955 later established a comprehensive framework for Indian nationality.

If an individual was born in India, had a parent born in India, or had resided in the nation for at least five years prior to the commencement of the constitution, they were automatically granted citizenship. While individuals of Indian descent residing overseas could register for citizenship, obtaining foreign citizenship revoked their Indian nationality.<sup>13</sup>

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<sup>6</sup> R.A. Huttenback, *The British Empire as a “White Man’s Country” – Racial Attitudes and Immigration Legislation in the Colonies of White Settlement*, 13(1) J. Brit. Stud. 111, 116, 120, 134–135 (1973).

<sup>7</sup> Mark R. Frost, *Imperial Citizenship or Else: Liberal Ideals and the India Unmaking of Empire, 1890–1919*, 46(5) J. Imp. & Com. Hist. 850, 856, 860 (2018).

<sup>8</sup> Mark R. Frost, *Imperial Citizenship or Else: Liberal Ideals and the India Unmaking of Empire, 1890–1919*, 46(5) J. Imp. & Com. Hist. 859–860 (2018).

<sup>9</sup> S.H. Steinberg (ed.), *The Statesman’s Year-Book: Statistical and Historical Annual of the States of the World for the Year 1949* 39 (Palgrave Macmillan, 1949).

<sup>10</sup> Sarah Ansari, *Subjects or Citizens? India, Pakistan and the 1948 British Nationality Act*, 41(2) J. Imp. & Com. Hist. 287 (2013).

<sup>11</sup> Clive Parry, *Citizenship in the Commonwealth with Special Reference to India*, 10(2) India Q. 107 (1954).

<sup>12</sup> E.C.S. Wade, *British Nationality Act, 1948*, 30(3/4) J. Comp. Legis. & Int’l L. 69–70, 73 (1948).

<sup>13</sup> Ashna Ashesh & Arun Thiruvengadam, *Report on Citizenship Law: India* 8 (European University Institute, 2017).



Migrants from Pakistan may become citizens of India if they or their ancestors were born in pre-partition India and had either resided in Indian Territory before July 19, 1948, or had been registered as Indian citizens by Dominion officials before the Constitution enactment. These individuals had to have resided in India for at least six months prior to applying for citizenship. However, those who relocated to Pakistan and established domicile there were not entitled to become citizens of India.<sup>14</sup>

While Indian nationality laws were initially inclusive at the republic's founding, successive governments, particularly since the 1980s, have introduced stricter measures to address evolving immigration challenges from neighbouring countries.<sup>15</sup>

### **Legal Framework Surrounding Citizenship in India**

The difference in the meaning of the terms citizenship and nationality is often blurred in the English language and varies from country to country. Nationality typically refers to a person's legal tie to a nation state and is the general term used internationally for identifying members of a state; citizenship refers to the set of rights and duties a person has within that nation.<sup>16</sup>

In general discourse within the Indian context, the terms 'citizenship' and 'nationality' are used synonymously. However, the Supreme Court of India provides a more precise definition applicable in Indian law – citizenship is a legal status that can only be held by natural persons and determines the civil and political rights a person may exercise, while nationality is a status that extends to both natural and legal persons that determines the rights that entity has in the context of international law.<sup>17</sup>

In India, citizenship refers to the legal status granted to an individual, recognizing them as a member of a sovereign state or nation under the law. Articles 5 to 11 of the Indian Constitution address the concept of citizenship, defining it as full membership in the state with associated civil and political rights. Citizenship establishes a formal relationship between an individual and the state. Like other modern nations, India categorizes people as either citizens or aliens. Citizens are individuals holding complete legal status within the Indian state, who are entitled to its civil and political rights, while non-citizens are excluded from these privileges.

The concept of citizenship inherently involves exclusion, as it differentiates citizens from non-citizens. Globally, two primary principles govern the grant of citizenship: *jus soli* (citizenship based on place of birth) and *jus sanguinis* (citizenship based on blood relations). Since the Motilal Nehru Committee's recommendations in 1928<sup>18</sup>, Indian leaders have supported the progressive idea of *jus soli*. The Constituent Assembly explicitly rejected the racially motivated *jus sanguinis* principle, considering it contrary to India's inclusive ethos.

India's framework for citizenship is primarily defined by Articles 5 to 11 of the Constitution of India and supplemented by legislative measures, notably the Citizenship Act, 1955. This Act has undergone several amendments, including the Citizenship (Amendment) Acts of 1986, 1992, 2003, and 2005.

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<sup>14</sup> AshnaAshesh&ArunThiruvengadam, *Report on Citizenship Law: India* 6–7 (European University Institute, 2017).

<sup>15</sup> NirajaGopalJaya, *Reconfiguring Citizenship in Contemporary India*, 42(1) South Asia: J. S. Asian Stud. 33–50, 34–35 (2019).

<sup>16</sup> Atsushi Kondo (ed.), *Citizenship in a Global World* 2–3 (Palgrave Macmillan, 2001).

<sup>17</sup> AshnaAshesh&ArunThiruvengadam, *Report on Citizenship Law: India* 1 (European University Institute, 2017).

<sup>18</sup> "Nehru Report", *Centre for Law & Policy Research*, available at <https://cadindia.clpr.org.in> (last visited Jun. 1, 2018).





Despite initial alignment with jus soli principles, nationality laws in India have gradually shifted towards jus sanguinis (citizenship by descent), reflecting a preference for bloodline-based criteria over birthplace-based entitlement. The following is a brief analysis of citizenship as in these aforementioned legislations concerning citizenship, i.e. the Constitution of India and the Citizenship Act, 1955.

### **Citizenship In The Constitution Of India**

Provisions for citizenship are outlined under Article 5-11 of the Constitution of India which address the status of citizenship of a person and establish a person's citizenship by birth, descent, migration and registration, etc., along with empowering the Parliament to regulate such matters.

**Article 5:** Citizenship at the commencement of the Constitution.-At the commencement of this Constitution, every person who has his domicile in the territory of India and- (a) who was born in the territory of India; or (b) either of whose parents was born in the territory of India; or (c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement, shall be a citizen of India.

**Article 6:** Rights of citizenship of certain persons who have migrated to India from Pakistan.- Notwithstanding anything in article 5, a person who has migrated to the territory of India from the territory now included in Pakistan shall be deemed to be a citizen of India at the commencement of this Constitution if- (a) he or either of his parents or any of his grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted); and (b)(i) in the case where such person has so migrated before the nineteenth day of July, 1948, he has been ordinarily resident in the territory of India since the date of his migration, or (ii) in the case where such person has so migrated on or after the nineteenth day of July, 1948, he has been registered as a citizen of India by an officer appointed in that behalf by the Government of the Dominion of India on an application made by him therefor to such officer before the commencement of this Constitution in the form and manner prescribed by that Government: Provided that no person shall be so registered unless he has been resident in the territory of India for at least six months immediately preceding the date of his application.

**Article 7:** Rights of citizenship of certain migrants to Pakistan.- Notwithstanding anything in articles 5 and 6, a person who has after the first day of March, 1947, migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India

Provided that nothing in this article shall apply to a person who, after having so migrated to the territory now included in Pakistan, has returned to the territory of India under a permit for resettlement or permanent return issued by or under the authority of any law and every such person shall for the purposes of clause (b) of article 6 be deemed to have migrated to the territory of India after the nineteenth day of July, 1948.

**Article 8:** Rights of citizenship of certain persons of Indian origin residing outside India.- Notwithstanding anything in article 5, any person who or either of whose parents or any of whose grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted), and who is ordinarily residing in any country outside India as so defined shall be deemed to be a citizen of India if he has been registered as a citizen of India by the diplomatic or consular representative of India in the country where he is for the time being residing on an application made by him therefor to such diplomatic or consular representative, whether before or after the commencement of this Constitution, in the form and manner prescribed by the Government of the Dominion of India or the Government of India.



**Article 9:** Persons voluntarily acquiring citizenship of a foreign State not to be citizens.-No person shall be a citizen of India by virtue of article 5, or be deemed to be a citizen of India by virtue of article 6 or article 8, if he has voluntarily acquired the citizenship of any foreign State.

**Article 10:** Continuance of the rights of citizenship.-Every person who is or is deemed to be a citizen of India under any of the foregoing provisions of this Part shall, subject to the provisions of any law that may be made by Parliament, continue to be such citizen.

**Article 11:** Parliament to regulate the right of citizenship by law.-Nothing in the foregoing provisions of this Part shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship.

### **Citizenship in the Citizenship Act, 1955**

Under the Citizenship Act, 1955, citizenship of India can be acquired in the following ways – by citizenship at the commencement of the Constitution, by birth, by descent, by registration, by naturalization, and through the incorporation of territory by the Government of India. Under the Act, the termination of citizenship is possible in three ways according to the Act – Firstly, if any citizen of India who is also a national of another country renounces his Indian citizenship through a declaration in the prescribed manner, he ceases to be an Indian citizen. When a male person ceases to be a citizen of India, every minor child of his also ceases to be a citizen of India. However, such a child may within one year after attaining full age become an Indian citizen by making a declaration of his intention to resume Indian citizenship. Secondly, Indian citizenship can be terminated if a citizen knowingly or voluntarily adopts the citizenship of any foreign country. And thirdly, the government of India can also deprive a person of his citizenship in some cases. But this is not applicable for all citizens. It is applicable only in the case of citizens who have acquired the citizenship by registration, naturalization, or only by Article 5 Clause (c) (which is citizenship at commencement for a domicile in India and who has ordinarily been a resident of India for not less than 5 years immediately preceding the commencement of the Constitution).

These are the laws governing citizenship in India in essence. These constitute everything that there is concerning citizenship in the Indian Constitution and the laws made thereunder, which includes its applicability, determination, acquisition, termination, etc. Apart from these, there are no other legislation under the Constitution that governs the subject matter of citizenship, especially with the issue of the determination of citizenship.

### **Assam and the Citizenship Issue**

Large-scale migration into Assam from Bengal began during colonial times when British officials encouraged relocation of workers from outside the region to provide labour for railway expansion, agricultural projects, and resource mining.<sup>19</sup> The National Register of Citizens (NRC) for Assam was established in the year 1951 to serve as an official ledger of the state's residents who were recognized as citizens of the state.<sup>20</sup> In its initial creation in 1951 after the first post-independence Census, the NRC

<sup>19</sup> Sarah Hilaly, *Imagining Colonial Assam: The Figuring of "Wastelands" in Its Making*, 51(3) Econ. & Pol. Wkly. 55–62, 59–61 (2016).

<sup>20</sup> Monish Bhatia, *State Violence in India: From Border Killings to the National Register of Citizens and the Citizenship Amendment Act*, in Monish Bhatia & Victoria Canning (eds.), *Stealing Time: Migration, Temporalities and State Violence* 171–192, 185 (Palgrave Macmillan, 2021).



documented the names, residences, and landholdings of individuals across villages. However, it was only published once and remained dormant until revived in Assam to address migration-related tensions. Along with the 1971 Electoral Roll, the 1951 NRC constitutes the “Legacy Data,” which is used to verify Indian citizenship for individuals and their descendants.

From the year 1901 to 1981, the state of Assam witnessed a significant growth in population compared to the rest of India.<sup>21</sup> Assam’s relationship with migration has long been fraught, with significant waves of migration from East Pakistan (now Bangladesh) altering its demographic landscape. The 1971 Bangladesh Liberation War further exacerbated this issue, with an estimated 18 lakhs people settled in the state in the 1970s, compared to 2,21,000 in the 1950s and 4,24,000 in the 1960s<sup>22</sup> leading to tensions over resources, identity, and culture. This culminated in the Assam Movement (1979-1985), led by the All-Assam Students’ Union (AASU), which demanded the deportation of illegal migrants and an updated NRC.<sup>23</sup> The Assam Accord of 1985, a landmark agreement between the central government and movement leaders, established March 25, 1971, as the cutoff date for identifying and deporting illegal migrants. This date was later incorporated into the Citizenship Act, 1955, via Section 6A, which outlines specific guidelines for determining citizenship in Assam.<sup>24</sup>

Efforts to identify illegal immigrants in Assam have faced significant challenges. The now-defunct Illegal Migrants (Determination by Tribunal) Act, 1983 (IMDT Act), was one such obstacle. Applicable only in Assam, unlike the Foreigners Act, 1946, which governs immigration across India, the IMDT Act placed the burden of proof on the complainant rather than the accused. This made it exceedingly difficult to deport illegal immigrants and drew criticism for its ineffectiveness. In 2005, the Supreme Court declared the IMDT Act unconstitutional in **SarbanandaSonowal v. Union of India**<sup>25</sup>. The Court ruled that the Act violated Article 14 by creating a geographically discriminatory framework and hampering the identification of illegal migrants. Following its repeal, the Foreigners (Tribunals for Assam) Order, 2006, was introduced to streamline migration-related processes but was struck down in 2007, further complicating the legal framework.

Section 6A of the Citizenship Act<sup>26</sup>, unique to Assam, provides a framework for addressing migration concerns. It grants citizenship to individuals who entered Assam before January 1, 1966, and offers a transitional 10-year period for those arriving between January 1, 1966, and March 25, 1971. However, these individuals remain disenfranchised during the interim period, although they are eligible for Indian passports. Migrants arriving after 1971 were all considered to have illegally immigrated.<sup>27</sup>

<sup>21</sup>Monish Bhatia, *State Violence in India: From Border Killings to the National Register of Citizens and the Citizenship Amendment Act*, in Monish Bhatia & Victoria Canning (eds.), *Stealing Time: Migration, Temporalities and State Violence* 171–192, 1187 (Palgrave Macmillan, 2021).

<sup>22</sup> Myron Weiner, *The Political Demography of Assam's Anti-Immigrant Movement*, 9(2) Pop. & Dev. Rev. 285–286 (1983).

<sup>23</sup>Walter Fernandes, *IMDT Act and Immigration in North-Eastern India*, 40(30) Econ.& Pol. Wkly. 3237–3240, 3237 (2005).

<sup>24</sup>AshnaAshesh&ArunThiruvengadam, *Report on Citizenship Law: India* 13 (European University Institute, 2017).

<sup>25</sup>*SarbanandaSonowal v. Union of India* 2005 (5) SCC 665

<sup>26</sup>The Citizenship Act, 1955, (Act 57 of 1955), s. 6A.

<sup>27</sup>NirajaGopalJoyal, *Reconfiguring Citizenship in Contemporary India*, 42(1) South Asia: J. S. Asian Stud. 33–50, 35 (2019).



The constitutionality of this section has been challenged, particularly in the case of *Assam Sanmilita Mahasangha v. Union of India* (2014)<sup>28</sup> where petitioners argued that the cut-off date for Assam should align with the rest of the country — July 19, 1949, as prescribed under Articles 5 and 6 of the Constitution. The Supreme Court referred the matter to a Constitution Bench to examine whether Section 6A violates the right to equality under Article 14, which, in a 4:1 majority, upheld the constitutional validity of Section 6A of the Citizenship Act, which provides citizenship criteria for migrants from Bangladesh to Assam based on the cut-off date of March 25, 1971. The Court ruled that Section 6A does not amend constitutional provisions on citizenship, complies with Article 14, and addresses migration concerns specific to Assam without infringing on Assamese cultural identity or other constitutional rights. It also rejected challenges based on temporal unreasonableness and implementation issues.

The National Register of Citizens for Assam was comprehensively updated in 2019, with every citizen in the state required to show proof of their citizenship and pre-1971 settlement.<sup>29</sup> 1.9 million people failed to provide sufficient documentation and were not listed on the register, leaving them stateless and subject to deportation.<sup>30</sup> The National Register of Citizens (NRC) has become a contentious issue in India, encapsulating deep concerns about illegal migration and the complexities of citizenship rights. The Citizenship (Amendment) Act (CAA), 2019<sup>31</sup>, has added a layer of complexity to the discourse surrounding the NRC. The Act provides a pathway to Indian citizenship for persecuted religious minorities, such as Hindus, Sikhs, Buddhists, Jains, Parsis, and Christians from Pakistan, Bangladesh, and Afghanistan who entered India before December 31, 2014. By reducing the residency requirement from 11 years to 5 years and exempting these individuals from the Passport Act and Foreigners Act, the CAA aims to address humanitarian concerns. However, it has faced significant opposition, particularly in Assam, where concerns focus on the perceived legitimisation of illegal immigration, even for religious minorities. Protests in Assam highlight fears of demographic changes and the erosion of Assamese identity.

The overlapping legal, political, and humanitarian dimensions of the NRC and migration-related laws in Assam underscore the need for a balanced approach that addresses national security and demographic concerns while safeguarding human rights and constitutional principles.

**The Legal Basis and Validity of the Foreigners' Tribunal:** The Foreigners' Tribunal serves a critical function in assessing the status of individuals suspected of being illegal immigrants in India. Despite its significance, the Tribunal's legal validity has frequently been challenged, particularly regarding its establishment, authority, and jurisdiction. A key point of contention revolves around its jurisdiction over matters affecting citizens' rights, given that its mandate is limited to adjudicating cases involving foreigners and not citizens. Foreigners by definition are distinct from the citizens. The Merriam-Webster dictionary defines it as "a person belonging to or owing allegiance to a foreign country"<sup>32</sup>. The

<sup>28</sup> *Assam Sanmilita Mahasangha v. Union of India* AIR 2015 SUPREME COURT 783

<sup>29</sup> Monish Bhatia, *State Violence in India: From Border Killings to the National Register of Citizens and the Citizenship Amendment Act*, in Monish Bhatia & Victoria Canning (eds.), *Stealing Time: Migration, Temporalities and State Violence* 171–192, 188 (Palgrave Macmillan, 2021).

<sup>30</sup> Jeffrey Gettleman & Suhasini Raj, "A Mass Citizenship Check in India Leaves 2 Million People in Limbo", *The New York Times*, Aug. 31, 2019, available at <https://www.nytimes.com> (last visited Jan. 12, 2021).

<sup>31</sup> The Citizenship (Amendment) Act, 2019, (Act 47 of 2019).

<sup>32</sup> "Foreigner," Merriam-Webster Dictionary





essence of the definition is that a foreigner is a person identifying with and belonging to a foreign country, as opposed to a citizen of a country in question this clearly distinguishes a citizen from a foreigner, who have clear and governable distinction between them. The citizenship, especially the determination of citizenship, is a subject matter exclusive to the Constitution, while the subject matter of foreigners is not. These cannot have interchangeable applicability.

### **Establishment of the Foreigners' Tribunal**

The Foreigners' Tribunals (FTs) in Assam operate under various legislations and Orders including the Foreigners' Act, 1946<sup>33</sup>, the Foreigners' (Tribunals) Order, 1964 and so on. These quasi-judicial bodies were established to address disputes over citizenship, particularly concerning alleged illegal immigration from Bangladesh. Their primary function is to determine whether an individual is an Indian citizen or a foreign national. Despite their intended role in adjudicating citizenship fairly, FTs have faced criticism for procedural opacity, inconsistent application of laws, and human rights concerns.

Assam's migration challenges date back to 1947 during the partition of India which prompted significant inflows of people. The issue intensified after the creation of Bangladesh in 1971, which led to substantial demographic shifts in Assam, sparking socio-political and economic tensions. In response, a treaty in 1985, known as the Assam Accord was signed between the Government of India and the All-Assam Students' Union (AASU), a representative student body emerging from the Assam movement. A critical provision of this agreement was the identification and removal of illegal immigrants entering Assam after March 25, 1971, which became the definitive cutoff date for determining citizenship. However, delays, inconsistencies, and controversy, leading to the establishment of Foreigners' Tribunals as a legal mechanism for resolution, has affected the proper implementation of the aforementioned treaty.

The Tribunals were established through Order 2 of the Foreigners (Tribunals) Order, 1964, enacted under section 3 of the Foreigners Act, 1946, to address the issue of undocumented migrants in regions governed by section 6-A of the Citizenship Act, 1955. While the Foreigners Act empowers the government to regulate and manage matters concerning foreigners, it does not explicitly grant authority to create judicial or quasi-judicial bodies like the FTs. This has raised questions about their legal foundations.

Over time, the Foreigners (Tribunals) Order, 1964, has been amended to enhance the Tribunals' operations. Notably, the 2019 amendment<sup>34</sup> expanded the scope of the Tribunals, allowing any individual, irrespective of a government or police referral, to approach them. This significantly broadened their function and impact. The process of identifying suspected foreigners begins with the police marking individuals as doubtful voters (D-voters). Such cases are then referred to the Foreigners' Tribunals, where the citizenship of such persons is determined based on their submissions in regard to Order 3(4) of the Foreigners (Tribunals) Order, 1964, which places the burden of proof on the proceeded to prove that he or she is not a foreigner. This has been the standard of operation for most officials in border areas, unbeknownst to whom are the implications of possible violations of fundamental rights of citizens in such processes.

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<sup>33</sup>The Foreigners' Act, 1946 (Act 31 of 1946).

<sup>34</sup> The Foreigners Act (Amendment), 2019. (Act 31 of 1946).



### Issues With The Foreigners' Tribunal

The Foreigners' Tribunal (FT) was established under the Foreigners (Tribunal) Order, 1964, which was issued as an executive order under the Foreigners Act, 1946. However, the lack of explicit legislative backing for these Tribunals raises critical questions about their legal validity. While the Foreigners Act 1946 allows for the government to regulate and manage matters concerning foreigners, it does not specifically authorize the creation of judicial bodies like the Tribunals. This absence of a clear statutory mandate has led to ambiguity and criticism, with opponents arguing that the Tribunals lack a firm legal foundation to adjudicate critical issues such as citizenship – a constitutionally protected domain.

Functioning as quasi-judicial bodies, the Tribunals are instrumental in determining citizenship status, decisions that significantly affect the rights and liberties guaranteed under the Constitution of India<sup>35</sup>. Traditionally, such determinations require robust statutory or constitutional safeguards to uphold fairness and the principles of natural justice. However, the procedural flexibility granted to these Tribunals often leads to inconsistencies, such as ex-parte judgments (where decisions are made without the accused being present) and inadequate access to legal representation for those accused of being foreigners.

Critics contend that the Tribunals operate beyond the authority conferred by the Foreigners Act, rendering them ultra vires (beyond their legal power). The adjudication of citizenship falls under the exclusive legislative competence of Parliament as specified in Entry 17 of List I in the Seventh Schedule of the Constitution<sup>36</sup>. The Tribunals' encroachment on this domain has raised questions about the constitutionality of their powers and functioning. The combination of a quasi-judicial nature, jurisdictional overreach, and the absence of a legislative foundation has resulted in significant legal and constitutional challenges for the Tribunal system.

The contentious aspect of the Tribunal system that critiques often express is its reversal of the principle of "innocent until proven guilty". This disproportionately affects marginalized groups, who often lack access to adequate documentation or legal resources. Moreover, cases referred to the Tribunals can remain unresolved for years. For instance, it takes an average of 6.7 years for the Gauhati High Court to resolve cases after they are first filed with the Tribunals. Initiatives like the National Register of Citizens (NRC) in Assam have exacerbated these challenges. The exclusion of over 1.9 million people from the NRC<sup>37</sup> has significantly increased the Tribunals' workload, created procedural bottlenecks and further strained the system.

**Judicial Scrutiny:** In *Sarbananda Sonowal v. Union of India (2005)*<sup>38</sup>, the Supreme Court upheld the necessity of Foreigners' Tribunals, emphasizing their role in addressing illegal immigration. The Court declared that unchecked illegal migration constituted "external aggression" on India and directed the expeditious functioning of Tribunals to address such cases. However, the judgment did not comprehensively examine the Tribunals' lack of legislative foundation, leaving critical questions about their constitutional validity unresolved. Critics have frequently highlighted concerns over the Tribunals' powers to decide matters as fundamental as citizenship, given their less rigorous procedural

<sup>35</sup>The Constitution of India, art. 21.

<sup>36</sup>The Constitution of India, Entry 17 of List I in the Seventh Schedule.

<sup>37</sup>Jeffrey Gettleman&Suhasini Raj, "A Mass Citizenship Check in India Leaves 2 Million People in Limbo", *The New York Times*, Aug. 31, 2019, available at <https://www.nytimes.com> (last visited Jan. 12, 2025).

<sup>38</sup>*SarbanandaSonowal v. Union of India* 2005 (5) SCC 665



standards compared to regular courts. This has led to allegations of unfair trials and arbitrary decisions affecting fundamental rights.

In **Naziruddin v. State of Assam (2017)**<sup>39</sup>, the Court identified issues such as improper evaluation of evidence and excessive reliance on limited documentation, undermining the fairness of the proceedings. Similarly, **SahidaBibi v. Union of India (2021)**<sup>40</sup> underscored the difficulties faced by individuals in proving their citizenship due to inadequate documentation. Despite her family's long-standing presence in India, SahebiBibi was declared a foreigner by the Tribunal. The Supreme Court of India later stayed this decision, emphasizing the need for a more compassionate and evidence-sensitive approach in such cases.

These examples reveal significant challenges in the Tribunal system, particularly its procedural inconsistencies and impact on vulnerable individuals. Calls for reform have focused on ensuring procedural fairness, enhancing evidentiary standards, and aligning Tribunal practices with constitutional protections for fundamental rights.

### Impact on Citizenship Determination

Being declared a foreigner by a Foreigners' Tribunal (FT) can have devastating consequences for individuals, often leading to detention in centres where they await deportation. However, the lack of clear and effective deportation agreements with Bangladesh means many individuals remain in legal limbo, languishing in detention centres for years. In **Harsh Mander v. Union of India (2018)**<sup>41</sup>, the Supreme Court of India raised serious concerns about the human rights conditions in these centres, comparing them to prisons and calling for urgent reforms. The system disproportionately impacts marginalized communities, including ethnic minorities and Muslims, who face significant challenges in proving their citizenship due to the need for decades-old documentation, making them particularly vulnerable to wrongful declarations of foreigner status.

Human rights organizations, including Amnesty International, have criticized FTs for systemic human rights violations. Amnesty's reports<sup>42</sup> highlight the lack of access to legal representation for many individuals, severely impairing their ability to defend themselves. Critics argue that the FTs are designed more for exclusion than inclusion, prioritizing expulsion over the protection of fundamental rights. Allegations of sectarian bias further taint the process, with Bengali-origin Muslims disproportionately affected, reflecting underlying demographic and religious tensions in Assam. One of the most contentious aspects of the Tribunal system i.e. the burden of proof, falls especially hard on marginalized individuals who often lack the necessary documentation to substantiate their claims, placing them at greater risk of injustice.

Procedural irregularities within the Tribunals compound these challenges. Human rights reports and independent studies have found that many tribunal staff lack adequate training and judicial experience, leading to inconsistent and erroneous decisions. A 2020 study in the *Economic and Political Weekly*<sup>43</sup>

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<sup>39</sup> *Naziruddin v. State of Assam* WP(C) 6326/2018

<sup>40</sup> *SahidaBibi v. Union of India* WP(C)/4491/2018

<sup>41</sup> *Harsh Mander v. Union of India (2018)* AIR ONLINE 2018 DEL 1265

<sup>42</sup> Amnesty International, *Designed to Exclude*, (2010).

<sup>43</sup> AkhilRanjanDutta, *Political Destiny of Immigrants in Assam: National Register of Citizens*, 53 *Economic and Political Weekly* (Feb. 24, 2018).



highlighted these deficiencies, noting the significant impact on the accuracy of adjudications. Overworked and undertrained staffs exacerbate these issues, undermining the system's credibility. Transparency in tribunal operations is another critical concern. Unlike regular courts, FTs are not bound by the procedural safeguards of the Indian Evidence Act<sup>44</sup> or the Civil Procedure Code<sup>45</sup>, giving tribunal members considerable discretionary power. This latitude often results in subjective interpretations and arbitrary rulings.

While the Foreigners' Tribunals play a vital role in managing undocumented migration, their current legal and procedural framework raises significant constitutional and human rights concerns. The burning question remains, however, that whether the Foreigners' Tribunal legal validity and its jurisdiction over the determination of citizenship is justified? It is evident that the Foreigners Tribunal operates only under the Foreigners Act, 1946 and applies exclusively to individuals legally defined as foreigners, not to citizens. Questions of citizenship, however, fall solely within the authority of the Constitution and the Parliament, and cannot be determined through the Foreigners Act or the Foreigners (Tribunals) Order, 1964, which is merely an executive order. This creates a risk that any person who responds to a notice from the Foreigners Tribunal may be treated as a foreigner, placing their citizenship in jeopardy. A citizen cannot be tried as a foreigner before the Foreigners Tribunal unless they are first deemed to be a foreigner for the purposes of the Act of 1946. The issue of identifying and declaring of a D-Voter is, therefore, ultra vires to the powers and jurisdiction of the Foreigners Tribunal or any orders or procedures derived therefrom, especially in relation to the determination of citizenship.

## Conclusion

India's citizenship framework has evolved through a combination of historical experience, constitutional design, and statutory development. Rooted in the provisions of Articles 5 to 11 of the Constitution and further detailed in the Citizenship Act, 1955, the legal structure was intended to respond to the complexities of Partition and mass migration. The framers of the Constitution sought to create an inclusive and rights-based framework, which could accommodate displaced populations while upholding the sovereignty and integrity of the Indian state. Over time, this structure has expanded to include various modes of acquiring and terminating citizenship, but challenges remain in its practical application.

Nowhere are these challenges more evident than in Assam, where migration from neighbouring regions has led to longstanding concerns over identity, resources, and political representation. Section 6A of the Citizenship Act, 1955 and the update of the National Register of Citizens (NRC) were measures aimed at addressing these concerns. However, their implementation has led to widespread legal uncertainty and social disruption. The exclusion of nearly two million people from the NRC highlighted significant procedural gaps, particularly for those lacking access to historical documents or legal support. These developments have exposed a growing tension between administrative objectives and the rights of affected individuals.

Foreigners Tribunals, established under the Foreigners Act, 1946 and the 1964 Tribunal Order, were intended to resolve disputes regarding citizenship. However, these bodies operate without a detailed legislative framework and have been criticized for procedural inconsistencies and limited safeguards.

<sup>44</sup>Indian Evidence Act, 1872, (Act 1 of 1872).

<sup>45</sup>Code of Civil Procedure, 1908, (Act 5 of 1908).





The shifting of the burden of proof onto individuals accused of being foreigners, often without adequate legal representation, raises serious concerns of violations of fundamental rights under the Constitution. Moreover, the overlap between the constitutional framework for citizenship and the administrative powers under the Foreigners Act has created jurisdictional confusion, undermining the principle that citizenship must be determined by law, not by executive discretion.

To address these concerns, India's citizenship regime requires clearer statutory grounding and stronger procedural protections. Legal processes must be aligned with constitutional principles, ensuring transparency, accountability, and fairness. The distinction between foreign nationals and Indian citizens must be upheld without compromising on due process. A just and humane approach to citizenship determination, especially in regions with complex demographic histories, is essential to uphold the foundational values of the Constitution.

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