NNT/NL : 0000AIXM0000/000ED000

THÈSE DE DOCTORAT

Soutenue à Aix-Marseille Université
en cotutelle avec l'Université de Londres
le 15 Septembre 2023 par

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A global juridicial approach to the invisibilisation of minorities discrimination

106.516 words

Discipline
Droit

Spécialité
Droit public

École doctorale
ED 67 / École Doctorale Sciences Juridiques et Politiques

Laboratoire/Partenaires de recherche
Droits International, Comparé et Européen – Centre d'Études et de Recherches Internationales et Communautaires

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I, undersigned, Indira Boutier, hereby declare that the work presented in this manuscript is my own work, carried out under the scientific direction of Corinne Lennox, James Chiriyankandath and Ludovic Hennebel, in accordance with the principles of honesty, integrity and responsibility inherent to the research mission. The research work and the writing of this manuscript have been carried out in compliance with both the French national charter for Research Integrity and the Aix-Marseille University charter on the fight against plagiarism.

This work has not been submitted previously either in this country or in another country in the same or in a similar version to any other examination body.

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List of publications and participation in conferences

1) List of publications realised as part of the thesis project:
    1. Indira Boutier, Struggle for safe water: Respecting human rights in a developed country, *Canadian Yearbook of Human Rights*, Vol. III, 2019-2021, pp. 11-20
    2. Indira Boutier, First step towards a legal understanding of minority groups discrimination: the case of Kashmiri Pandits, *What's new in human rights doctoral research. A collection of critical literature review*, Vol. V, Padova University Press, pp. 57-78
    3. Indira Boutier, L'œuvre d'art entre propriété privée, spoliation d'une minorité et patrimoine national : l'affaire République d'Autriche c. Altmann, *L'observatuer des Nations Unies* (forthcoming)
    4. Indira Boutier, Pratiques judiciaire locales et droit international des droits de l'homme : l'Assam, l'Union Indienne et le traitement des minorités, *Enquête* (forthcoming)

2) Participation in conferences and summer schools during the thesis period:
    1. Hate speech against the catalan minority, UNPO & Asseamblea, 19 November 2020
    2. The dilemma of Indian media: propaganda vs. Human Rights, ASEAN conference on nationalism and crisis, Antwerp, 6 April 2022
    3. A review of the judiciary approach to deprivation of nationality in Assam, Centre de Sciences Humaines, New Delhi, 13 October 2022
    4. From Assam to the European Court of Human Rights: understanding the development of an international human rights *corpus juris*, EURAC Research, Bolzano, 1st December 2022

Abstract

This thesis analyses the visibility or invisibility of core minority rights' violations through the judicial system and the medium of judicial rulings. It examines cases of discriminatory legislation, practices and policies by the State and civil agents to see how the judiciary contributes to – or resists – discrimination that may be working at different levels, institutional and individual. Judicial decisions can be studied to evaluate the extent to which they may enact State policies. So too, agents like bureaucrats, play a critical role in implementing legislation on the ground level, and their practices towards minority groups are equally worthy of analysis. Whilst the judiciary has a legal and moral obligation to respect national legislation, judges are also expected to exercise their independence, and maintain neutrality.

The study follows two principal approaches. Firstly, a national approach with a focus on the case of India, which is not part of a regional human rights system. It will examine the case of a minority within the Muslim community in the Northeast state of Assam who are being deprived of their nationality in arbitrary ways. Secondly, the thesis adheres to an international perspective with a special focus on two regional human rights systems – the Inter-American Court of Human Rights and the European Court of Human Rights – to study their role in verifying States' respect for universal human rights principles. This analysis of regional courts allows us to check whether Indian judicial interpretations are consistent with interpretations in other regional systems regarding discrimination against minorities. If India may have retained a degree of anxiety about possible impositions of legal norms and principles coming from Western institutions because of its colonial past, it cannot extend its antipathy towards colonial legacies to Latin American States or their judicial systems and models.

Keywords : minority groups, discrimination, international human rights law, regional systems.

Résumé

Cette thèse analyse la visibilité ou l'invisibilité des violations des droits fondamentaux des minorités au prisme du système judiciaire. Elle examine les législations nationales, les pratiques et politiques discriminatoires de l'État et des agents civils pour comprendre comment le pouvoir judiciaire contribue – ou résiste – à la discrimination qui peut s'exercer aux niveaux institutionnel et individuel. L'étude évalue, à travers l'analyse des décisions judiciaires, comment le système judiciaire met en œuvre les politiques étatiques. En parallèle, la thèse souligne également le rôle des agents et des bureaucrates dans l'application des législations sur le terrain et leur impact sur les groupes minoritaires.

L'étude suit deux approches. Tout d'abord, une approche nationale centrée sur le cas de l'Inde, qui ne fait pas partie d'un système régional de protection des droits de l'homme, en examinant le cas d'une minorité au sein de la communauté musulmane de l'État d'Assam, dans le nord-est du pays, privée arbitrairement de sa nationalité. Deuxièmement, la thèse s'inscrit dans une perspective internationale en se concentrant sur deux systèmes régionaux de droits de l'homme – la Cour interaméricaine des droits de l'homme et la Cour européenne des droits de l'homme – afin d'étudier leur rôle dans la vérification du respect par les États des principes universels des droits de l'homme. Cette étude des systèmes régionaux a pour but de vérifier si les interprétations judiciaires indiennes sont cohérentes avec les interprétations d'autres systèmes régionaux concernant la discrimination à l'égard des minorités. Si l'Inde a pu conserver, en raison de son passé colonial, un certain degré d'anxiété face à d'éventuelles impositions de normes et de principes juridiques provenant d'institutions occidentales, cette attitude ne peut pas être étendue aux États latino-américains ou à leurs systèmes et modèles judiciaires.

Mots clés : groupes minoritaires, discrimination, droit international des droits de l'homme, systèmes régionaux.

Acknowledgments

There are many people I wish to thank for their help, support and contribution to this thesis. First of all, I would like to express my sincere gratitude to my supervisors Dr. Corinne Lennox, Dr. James Chiriyankandath and Professor Hennebel, who have assisted and encouraged over the last year. They helped me sharpened my focus, provided accurate and valuable criticism of my ideas and drafts. Each of them offered beneficial elements to understand the importance of not only an overall picture but the importance to focus on the specificity of my work. More importantly, they created a space where I felt encouraged to explore new ideas and approaches, by doing so they shaped my researched but also played a significant role in shaping me as a scholar. Professor Tigroudja, who examined and discussed my thesis, helped shape my current approach and brought clarification to some of my early ideas. Last but not least, my warm gratitude to Dr. Barakova without whom this entire process of a joint-PHD would not have gone so smoothly.

Grateful thanks to the jury members, Dr. Stephanie Berry and Dr. Indrajit Roy, who both offered the intellectual stimulus and constructive criticism of my work in the upgrade process.

I had the privilege to spend a semester at Leiden University, in the Institute of Area Studies, thanks to Professor Nira Wickramasinghe who not only supported my application process but shared with me her knowledge on South Asia, and thanks to whom I benefited from a more regional comparative approach to the question of citizenship. I also availed of constructive comments from Professor Titia Loenen around a nice hot cup of tea during my time in Leiden University. I wish to thank Professor Henry Odile, at the Centre de Sciences Humaines in New Delhi for enabling my research stay. On this note, I also wish to mention Meda Roberta, for her help and warm welcome at the EURAC Centre, and Luis Viveros**,** for his insightful comments on the Inter-American system. Finally, I am grateful to Dr. Joanna Gomula, Lauterpartch Centre – Cambridge University, for her feedback and warm encouragement.

To the people who helped me for my field work, a special thank you to Pami Singh for his intellectual curiosity and practical help. Further thanks goes to Santanam Swaminadhan, a

precious advisor on the field. Finally, to all those who participated in the process of interviews. I would like to mention in particular Sanjay Hedge, Avi Singh, and Anand Grover.

The doctoral students and members of the Institute for International Humanitarian Studies and Aix Global Justice, have been consistent companions and have enriched my work with their comments and suggestions.

I am particularly grateful to my friends, I made during this journey who helped me from near and far. A special thank you to my closest friends and partner, Adrian Garcia, who still listen to my reflections even if they do not always understand what this is all about. On an even more personal level, thank you to Philippe Boutry who sent me on this journey and for his kind and unfailing support, to Anna Teicher and Magarater Witakher, and to Matis Ringdal ultimate technical wizard and far more. Finally, the last thoughts of gratitude go to my parents and my sister Anya Boutier, who have stood by and encouraged me to always follow my dreams and convictions.

Table of contents

Table of abbreviations

AASU *: All Assam Students' Union*

ACHR *: American Convention on Human Rights*

African Charter *: African Charter on Human and Peoples' Rights*

African Commission *: African Commission on Human Rights and People's Rights*

African Court *: African Court on Human and Peoples' Rights*

AGP *: Asom Gana Parishad*

Arab League *: League of Arab States*

ASEAN *: Association of Southeast Asian Nations*

BJP *: Bharatiya Janata Party*

CAA *: Citizenship (Amendment) Act*

CAB *: Citizenship (Amendment) Bill*

CAD *: Constituent Assembly Debates*

CEDAW *: Committee on the Elimination of All Forms of Discrimination against Women*

CERD *: Committee on the Elimination of All Forms of Racial Discrimination*

CESCR *: Committee on Economic, Social and Cultural Rights*

Charter *: United Nations Charter*

CJEU *: Court of Justice of the European Union*

CRC *: Convention on the Rights of the Child*

ECHR *: European Convention of Human Rights*

ECI *: Election Commission of India*

ECtHR *: European Court of Human Rights*

EU *: European Union*

Framework Convention *: Framework Convention for the Protection of National Minorities*

FT *: Foreigners Tribunals*

FTO *: Foreigners (Tribunals) Order*

HCHR *: High Commissioner for Human Rights*

HRC *: Human Rights Committee*

IACmHR *: Inter-American Commission on Human Rights*

IACtHR *: Inter-American Court of Human Right*

IAHRS *: Inter-American Human Rights Systems*

ICA *: Indian Constituent Assembly*

ICCPR *: International Covenant on Civil and Political Rights*

ICEDAW *: Convention on the Elimination of All Forms of Discrimination against Women*

ICERD *: International Convention on the Elimination of All Forms of Racial Discrimination*

ICESCR *: International Covenant on Economic, Social and Cultural Rights*

ICJ *: International Court of Justice*

IDP *: Internally Displaced Persons*

IHRL *International Human Rights Law*

ILO *: International Labour Organization*

IMDT Act *: Illegal Migrant (Determination by Tribunal) Act*

IUML *: Indian Union Muslim League*

LIC *: Life Insurance Company*

MOA *: margin of appreciation*

NFHS *: National Family Health Survey*

NGO *: Non-Governmental Organisation*

NPR *: National Population Register*

NRC *: National Register of Citizens*

OAS *: Organisation of American States*

OCI *: Overseas Citizens of India*

PCIJ *: Permanent Court of International Justice*

PIL *: Public Interest Litigation*

RSS *: Rashtriya Swayamsevak Sangh*

RTI *: Right to Information*

SAARC *: South Asian Association for Regional Cooperation*

U.S *: United States*

UDHR *: Universal Declaration of Human Rights*

ULFA *: United Liberation Front of Assam*

UN *: United Nations*

UNHCR *: United Nations High Commissioner for Refugees*

WP *: writ petition*

Table of figures

Maps

Tables

Graphics

Introduction

This thesis focuses on the visibility and invisibility of minority groups' core human rights violations and their protection under international human rights law (IHRL), standards and principles. The complexity of discriminatory practices and policies faced by minority groups is linked to the simultaneous existence of different factors from ethnic, religious, gender, socio-economic to geographical. They are captured through the functioning of the judicial system in the context of State discrimination against minority groups. It examines whether the judicial system echoes this structural discrimination, which can operate at institutional or individual levels. Although the impact of discriminatory State practices, policies and legislation on an independent justice system is uneven and may differ from one country to another, a general trend can be discerned regarding the impact on vulnerable and marginalised groups.[1] In fact, from the perspective of international law, discrimination in the administration of justice constitutes a violation of judicial impartiality.[2]

For the historian Arlette Farge, individuals without a face and a voice are invisible.[3] However, invisibility is bigger than that, and the result of an intersectional phenomenon linked to historical, political and legal forms, which is visible and can be objectified.[4] It can be said that it is an active process where society, composed of individuals and institutions, plays a key role in masking experiences, or aggravating inequalities and injustice.[5] This understanding of invisibility is draw from Anna Arendt's perspective. She suggests that the visible is associated with the political sphere, while the invisible pertains to the social sphere.[6] Therefore, this notion of invisibility will serve as the framework for examining legal patterns and strategies employed to underscore the experiences of disadvantaged groups. In doing so, I seek to broaden the discussion around discrimination, and increase awareness on how the absence of legal concepts in rulings accentuate human rights abuses. An analysis of data permits us to perceive invisibility

[1] Terrance Sandalow, 'Judicial Protection of Minorities' (1977) 75 Mich. Law Rev. 1162; Mark S Hurwitz and Drew Noble Lanier, 'Explaining Judicial Diversity: The Differential Ability of Women and Minorities to Attain Seats on State Supreme and Appellate Courts' (2003) 3 SPPQ 329, 330.

[2] Guideline 13 (a) UN Guidelines on the Role of Prosecutors 1990.

[3] Arlette Farge, *Sans Visages: L'impossible Regard Sur Le Pauvre* (Bayard 2004).

[4] Mathilde Arrivé, 'Visibilizing Invisibility, An Introduction' [2020] 8.2 InMedia.

[5] Marion Borderon and others, 'The Risks of Invisibilization of Populations and Places in Environment-Migration Research' (2021) 8 Humanit Soc Sci Commun 1; Tara Polzer and Laura Hammond, 'Invisible Displacement' (2008) 21 J. Refug. Stud. 417.

[6] Sylvie Schmitt, 'Les errements d'Arendt' [2023] La Vie des idées.

or visibility as products of discriminatory practices, and understand how these impact minority groups by accentuating their vulnerability and marginality.

A central issue addressed by this study is the gap between the ideal model established within IHRL and the State's reaction to these principles. On the one hand, the judiciary and the legal system are expected to function as neutral, though committed to the highest ideals of equal treatment, and even to mould society in a progressive direction. This approach sees courts and judges as applying legal norms only by reference to statutes and laws, without allowing non-legal norms or social assumptions to interfere with their judgements. On the other hand, as legal academic Marc Galanter highlights, law can be a tool to promote social equality, and allow dissent.[7] Inevitable interactions between law and politics influence the operation of law: introducing tensions and oppositions between what is affirmed in legal principles and what is done in practice. An assumed objectivity is often seen to breakdown in local situations, where shared imperatives, interests or goals might be at variance with the laws. The importance of local context is clearly central to understanding how laws work. In fact, the interreference of political and social factors, and more importantly, prejudice, thus occupies a central place in the defence of legal rights.

An analysis of non-discrimination towards minorities through the angle of IHRL necessarily builds on a global approach. Since its elaboration, the concept of minority has been an international question, though constructed from different countries' and groups' experiences. This internationalisation and the use of a global language, has furthered a common vocabulary that underlies discriminatory situations. In turn, this permits us to understand that despite cultural and social particularisms, judicial rulings from different systems can be analysed, compared and shed light to common debates, evolutions or weaknesses. Therefore, judicial practices lie at the heart of this research, allowing us to grasp how invisibility of discrimination occurs in different systems, and to identify the existence of strategic uses of certain practices. Whilst the research focuses on a specific case of Assamese Muslims in India, it is essential to enlarge the framework to consider global development, and open reflection on an international

[7] Marc Galanter, *Law and Society in Modern India* (OUP 1989). In this book, Galanter points out that law is not only a body of rules but corresponds to a body of men.

scale through the example of Roma in the European Court of Human Rights (ECtHR) and indigenous groups in the Inter-American Court of Human Rights (IACtHR). Despite the focus on different groups, the research aims to understand and analyse if similar practices can be found in other minorities across systems. Whilst links between these minority groups and India do exist,[8] the legal reasoning behind this approach echoes more the will to demonstrate the existence of a global phenomenon around the treatment of minorities' discrimination before the judiciary. However, for the scope of this analysis, two systems will be excluded from the examination: the African Human Rights system and the League of Arab States (Arab League). Firstly, the African human rights system, which emerged in the mid-1980s under the auspices of the Organization of African Unity and later evolved with the African Union, primarily revolves around the African Charter on Human and Peoples' Rights (African Charter), and comprises key institutions such as the African Commission on Human Rights and People's Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court). It has developed its own body of jurisprudence and is a subject of extensive scholarly research.[9] Furthermore, it has grappled with the complex issue of minority groups within the context of post-colonial African states.[10] The struggle for these States to implement human rights conventions, including the African Charter, has been marked by challenges, which have led to a lack of full respect for human rights within national constitutions during the early 2000s.[11] This situation presents a fertile ground for an in-depth analysis of the tools used by the African Commission and African Court to protect minority groups against discrimination, and is indeed a significant area of research. Secondly, the Arab League who despite having an Arab

[8] For the Roma group see: Donald Kenrick, *The Romani World: A Historical Dictionary of the Gypsies* (University of Hertfordshire Press 2004); Johann Christian Christoph Rüdiger and Harald Haarmann, *Von Der Sprache Und Herkunft Der Zigeuner Aus Indien* (Buske 1990); Heinrich Grellmann, *Historischer Versuch Über Die Zigeuner* (Dietrich Verlag: Göttingen 1783); Jekatyerina Dunajeva and others, 'Collectivity and Empowermnet in Addressing Marginality: Roma and the Subaltern Communities of India' (2017) 78 IJSW 1.

[9] See: Olusola Ojo and Amadu Sesay, 'The O. A. U. and Human Rights: Prospects for the 1980s and Beyond' (1986) 8 Human Rights Quarterly 89; Kofi Oteng Kufuor, *The African Human Rights System: Origin and Evolution* (Palgrave Macmillan 2010); Emmanuel G Bello, 'The African Charter on Human and Peoples' Rights: A Legal Analysis' (1985) 194 RCADI 9; B Obinna Okere, 'The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems' (1984) 6 HRQ 141.

[10] B Dessalegn, 'The Normative Framework of the African Human Rights Regime on the Rights of Minorities' (2015) 8 Miz Law Rev 455; M Raymond Izarali, Oliver Masakure and Bonny Ibhawoh, *Expanding Perspectives on Human Rights in Africa* (Routledge 2019).

[11] EI Udogu, 'Human Rights and Minorities in Africa: A Theoretical and Conceptual Overview' [2001] J. Third World Stud.

Charter on Human Rights (1994) does not maintain a consistent approach to human rights[12] and lacks a robust enforcement mechanism. Unlike other regional human rights systems, the Arab League system does not establish a dedicated complaint mechanism, which is a critical component for ensuring effective access to justice for victims of human rights violations.[13] Furthermore, the Arab League Charter, which forms the foundation of this regional organization, did not incorporate fundamental provisions related to the protection of human rights in its foundings principles. The absence of a strong human rights framework within the core principles of the Arab League makes it a less comprehensive system for our analysis, as the focus is to delve into the nuanced jurisprudence and approaches developed by regional human rights systems in addressing discrimination against minority groups. While the Arab League's efforts in the field of human rights are noteworthy such as the establishment of the Arab Human Rights Committee (2009), the chosen angle seeks to provide an in-depth examination of well-established systems with a robust legal framework for minority groups protection. Furthermore, by narrowing the focus to two systems, the importance of the African system is not undermine, but rather reflects a strategic choice to ensure the depth and clarity of the analysis.

Therefore, the international analyses of these two regional systems will allow us to determine whether the situation in India is related to the evolution of IHRL and its use in relation to discrimination against minorities. Moreover, beyond the theoretical contribution, this work aims to bring a new approach in literature related to India and the regional system. At the national level the Muslim minority's deprivation of nationality in Assam is analysed. Assam's situation presents a multiplicity of factors – border location, targeted group, the media and judiciary's role, and the establishment of transit camps – which aggravate the invisibility of human rights violations.

While debates at the international level continue on the possible genocidal policies towards this minority in India,[14] the thesis follows a different approach to the legalisation of ethnic cleaning

[12] The Arab Charter faced criticism in regard to religious freedoms and gender equality due to its shortcomings in comparison to international human rights standards protected in different UN human conventions. Ahmed Almutawa, 'The Arab Court of Human Rights and the Enforcement of the Arab Charter on Human Rights' (2021) 21 Hum. Rights Law Rev. 506. Javaid Rehman, *International Human Rights Law* (Pearson Education Limited 2010) 377–384.

[13] Mervat Rishmawi, 'The Revised Arab Charter on Human Rights: A Step Forward?' (2005) 5 Hum. Rights Law Rev. 361, 365.

[14] *India: The Modi Question* (Directed by Richard Cookson, BBC 2023).

in the State. The politicisation of the genocide concept[15] has often led to its misuse in the Indian case and minimized the role of non-political institutions in increasing social disparity. Therefore, the thesis analyses the legislations and practices developed under an ethno-nationalist government since 2014, and the judicial application of political programs – the Citizenship (Amendment) Act, 2019 (CAA) and the National Register of Citizens (NRC) –, and the effects of 'incorporation' of political ideologies within the judiciary, leading to the Muslim minority's invisibility in Assam. Both approaches combine political policies and judicial intervention, to analyse the invisiblization of minorities from multiple angles.

The analysis of this case aims to study not only the practice of deprivation of nationality of the Muslim minority in a State lacking a regional, supra-state judicial system to which citizens could have recourse, but also the role of the judiciary in resisting human rights violations and thus delivering justice to minorities. Consequently, this part focuses on the functioning of legal institutions and judges' use of the law concerning minorities, through court decisions of various Indian legal bodies, the practices that accompany, precede or replace the appearance before the court, and the reports of non-governmental organisations (NGO). This legal approach differs from current literature on the application and impact of the NRC, which disregards the legal angle.[16] In fact, this thesis embraces factors of community, gender, geographical location, and economic status. It focuses on the complexity of human rights violations, as well as the extent of inequality, and the multiplicity of discriminatory practices in Indian society. It leads us to question whether, at the national level, intersectional discrimination in court decisions is a benchmark in minority cases.

The absence of a regional system in India limits to the field of IHRL, with comparison between the State-level and the UN-level. Yet the development of a "global law"[17] pushes to

[15] In January 2022, the Senate of New Jersey sponsored by the labor leader Stephen M. Sweeney, unanimously passed a resolution condemning the 1984 Sikh massacre in India and called it a genocide. Senate Resolution No. 142, State of New Jersey, 219th Legislature 2022.

[16] The most recent book on NRC "No Land's People" remains a personal story for the author. Abhishek Saha, *No Land's People: The Untold Story of Assam's NRC Crisis* (Harper Collins India 2021); Parichay Clinic and Abhishek Saha (Interview with Abishek Saha, India, 17 April 2021); Tathagat Sharma, 'The Pan India Experiment of NRC: History, Problems Associated and Lessons to Learn from Assam' (2020).

[17] Benoît Frydman, *Petit Manuel Pratique de Droit Global* (Académie royale de Belgique 2014); William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press 2009); Neil Walker, *Intimations of Global Law* (Cambridge University Press 2014).

overcome this institutional limitation. Furthermore, legal systems are often analysed through the perspective of legal factors. However, individuals are at the heart of the system and their rights violations must be understood through concepts that encompass their situation. The lens of regional human rights organs has importance. India has retained a degree of anxiety about the possible imposition of legal norms and principles from Western countries, mainly due to its colonial past.[18] Yet, with the development of a comprehensive global *corpus juris* of human rights law there is a certain relevance in considering the ECtHR and the IACtHR jurisprudence and orientations related to discrimination faced by minority groups. The analyses of these systems focus on the challenges of effective protection through an intersectional approach, and following a *pro persona* hermeneutics. This angle enables us to grasp the ability of both Courts to make minorities' discrimination visible and draw a general conclusion on the judicial approach to minorities, and its role in highlighting minorities' discrimination. Individuals are therefore put at the heart of the judicial order. Advanced by legal scholar Hélène Tigroudja to describe Judge Cançado Trindade's theoretical and practical approach, this idea advocates humanisation of international law.[19] Discourse of humanisation of law are interrelated to the theoretical approach of morality of law defended by jurists such as Kelsen,[20] Hart,[21] Fuller[22] or Dworkin.[23] In the case of the first concept, the premise is that international law should place community interests and individuals at the forefront of its legal framework.[24] Morality on the other hand deals with the ethical foundation and principles that underpin legal system, it questions whether laws are just, fair, and morally sound. The link between these two movements, lies in the pursuit of creating a legal system that is not only functional but also morally defensible. When law is humanised, it implies that it adheres to certain moral

[18] India deems that the 1951 Refugee Convention is Eurocentric and further fears that policies towards refugees theoretically driven by humanist concerns would open the door to possibilities of occidental intervention in its territory (Towards an Ethical Refugee Policy, India International Centre, Delhi - Centre for Equity Studies, 5 February 2020); Indira Boutier, 'The Non-Ratification of the 1951 Convention on Refugees: An Indian Paradoxical Approach to Human Rights' (2021) Hors-Série RQDI 115.

[19] Antônio Augusto Cançado Trindade, 'International Law for Humankind : Towards a New Jus Gentium (I) General Course on Public International Law', *Collected Courses of the Hague Academy of International Law* (Brill 2005) 77; Hélène Tigroudja, 'Le Droit International Des Droits de l'Homme Au Service Des Individus – Prendre Le Nouveau Jus Gentium Au Sérieux' (*Afronomicslaw.org*).

[20] Hans Kelsen, *Pure Theory of Law* (Lawbook Exchange 1967).

[21] HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harv. Law Rev 593, 599–601.

[22] Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 Harv. Law Rev. 630.

[23] Ronald M Dworkin, 'The Model of Rules' (1967) 35 U Chi L Rev 14.

[24] Gerd Oberleitner (ed), 'Context: The Humanization of International Law', *Human Rights in Armed Conflict: Law, Practice, Policy* (Cambridge University Press 2015).

principles, such as upholding human rights, treating individuals with dignity and ensuring equitable treatment. The humanisation of law, therefore, often involves infusing a sense of morality into the legal framework. Morality on the other hand, evaluates whether legal system aligns with ethical standards and whether it promotes justice and fairness. When legal systems are morally justifiable, they are more likely to be seen as humanised, as they prioritise the welfare and rights of individuals. Both concepts strive for a legal system that is not only functional but also ethically grounded and considerate of individuals human rights within society. However, the will to understand the role of a global *corpus juris* of human rights law in the protection of minority groups human rights pushes to primarily focus on humanisation, understood here as the integration of concepts that translate historical and social situations of individuals in rulings. This process ensures that cases at both the national and international levels are approached with a focus on recognizing and addressing the unique circumstances of various marginalized communities, such as the Roma, indigenous people, and Assamese Muslims.

1. Research question

In this thesis I intend to discover if judges, both at the international level through regional organs, and at the national level, react adequately to discrimination faced by minorities, or increase discrimination by rendering minorities invisible.

The overall research question posed in this work is:

Does international human rights law provide judges with the necessary tools to render discrimination faced by minorities sufficiently visible?

The two scales of examination lead to two distinct divisions in the research question:

Firstly, **to what extent does an examination of the Indian judiciary's handling of nationality deprivation among minority groups raise concerns about the judiciary's functioning and underscore the human rights abuses?**

Secondly, **how do regional human rights organs underline individuals' discrimination and integrate this in their legal reasoning?**

Through this approach, the thesis puts a key actor back in the spotlight: the judge. In the aftermath of the war, international law was rebuilt around the protection of the individual, and was no longer defined as being only an inter-state law. Through this actor, the thesis pursues a movement of global thinking, ultimately linking India to regional human rights systems through the angle of the (in)visibility of discrimination suffered by minorities. An approach that has so far remained absent from the academic world.

2. Research methodology

The questions raised call for an approach at variance from the state-centric. It therefore centres itself in a conjunction of two methodologies within the legal frame: pragmatic and interdisciplinary.

These two approaches base themselves on the idea that studying law should not be disassociated from social contexts in which it can be mobilised and produce effects.[25] This approach resonates with European scholars like Georges Gurvitch or Nicholas Timasheff,[26] and had already been formulated since 1913 by the Austrian jurist Eugen Ehrlich. Ehrlich argued that "the centre of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself".[27] Therefore, pragmatism permits an analysis of the human rights situation and of Courts as places where social interactions, concepts and procedures interreact, where concepts emerge and can be instrumentalised. Furthermore, through pragmatism, human rights are linked to context, perceived as more realistic and more flexible.[28] This approach calls for an interdisciplinary treatment that draws upon the fields of international and national law, human rights and political science. In this sense, while utilising legal perspectives, and positions, the investigation must include non-legal dimensions as equally significant factors.

[25] Benoît Frydman, 'Le Rapport Du Droit Aux Contextes Selon l'approche Pragmatique de l'Ecole de Bruxelles' (2013) 70 RIEJ 92, 95.

[26] Nicholas S Timasheff, *An Introduction to the Sociology of Law* (Transaction Publishers 1939); Georges Gurvitch, *Sociology of Law* (Kegan Paul 1973).

[27] Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* ((1913), Russel and Russel 1971) pt Foreword.

[28] Daniel Memmi, 'Human Rights Revisited: A Pragmatic Approach' 1 Prépublication: Montreal, QC, UQAM, 19; Solomon Dersso, *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* (PULP 2010) 3.

The core approach is to perceive law as a practice that is embedded in national politics and historical traditions, which permits a general picture of minorities' invisibility.

Interdisciplinarity is now in common usage, since its first appearance in the 1920s,[29] and can hold different meanings, referring to the use of two or more disciplines, or a wide range of academic inquiries. The idea behind interdisciplinarity lies in the possibility to build new links between normally separate fields. It can be considered as a form of interculturality which furthers a dialogue between fields.[30] The connection between law, history and political science sheds light on how rulings render discrimination invisible or visible. From a legal perspective, abuses experienced by minority groups cannot be understood through a single factor, as they are often shaped by several interacting factors. When it comes to social inequalities and their consideration before courts, unequal practices are not only the result of social divisions but of several aspects that influence each other. The use of interdisciplinarity as an analytical tool therefore allows for a better understanding of the complexity of human rights violations.

The core difficulties behind this intersection of approaches reside in the navigation between elements and the understanding that law, and therefore rulings, cannot be just analysed through the angle of conventions or rights. State-level opinions also highlight practices and tensions. Therefore, methodologies from outside the legal sciences can prove helpful to conduct case law analysis, such as the grounded theory method, developed by the sociologist Anselm Strauss.[31] It enables a broad and open approach to judgments and decisions, and provides an overview of the court's reasoning. Furthermore, it allows to construct and explain a legal theory that uncovers a pattern.[32] Highlighted by French jurist Raymond Saleilles at the beginning of the 20th century, comparative legal analysis is perceived as a tool to improve domestic law and legal doctrine.[33] Through this angle, contributions of each regional court to the IHRL "global

[29] Roberta Frank, '"Interdisciplinary": The First Half Century' (1988) 6 Issues in IDS 139.

[30] Violaine Lemay, 'Et Si on Entrait Dans La "Danse" de l'interdisciplinarité' (2017) 6 TrajEthos 5, 5–6; Juliette Defond, 'L'impérialisme Humanitaire: L'instrumentalisation de La Dynamique Globale Humanitaire Au Service de l'expansionnisme Capitaliste' (Aix-Marseille Université et Université de Montréal 2019) 53.

[31] Anselm Strauss and Barney Glaser, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine Transaction 1967).

[32] Ylona Chun Tie, Melanie Birks and Karen Francis, 'Grounded Theory Research: A Design Framework for Novice Researchers' (2019) 7 SAGE Open Medicine.

[33] Raymond Saleilles, 'Droit Civil et Droit Comparé' (1911) 61 Revue internationale de l'enseignement 5, 22.

law" become clear, and brings out similarities and dissimilarities between human rights systems.

Source material for this thesis consists of cases of jurisprudence, statutes, and other primary sources. Whilst the disciplinary core of this research mobilises the interpretive tools and critical techniques of law to evaluate legal rules, it also draws upon historical works and sources to identify the traditions and moments that shaped the specific relationship between the State and minorities. This approach will be mainly used for the research on Assam as it will study the political and public debates in legal platforms,[34] along with the national and local press,[35] which can provide the context of legal discourses. For the Indian study, the analysis of newspapers (in English and in Hindi), along with public debates, mirror current divergences and clashes on the question of citizenship besides clarifying the positions of the various actors involved, from political party representatives, public intellectuals, retired members of the judiciary, academics, to civil society groups. Furthermore, it will include international organisations reports, and interviews done in India during a field-work with local activists, civil society representatives, and lawyers. This will provide a variety of viewpoints and data on the situation of minorities in detention camps, the functioning of Foreigners Tribunals (FT), the impact of citizenship laws on vulnerable minorities, and the relation between India and IHRL. Additionally, subjective experiences offer comparison with official statements. Account is taken of the structure of the national and regional legal system. Adopting the choice of a case study permits a systematic and comparative analysis of not only the application of the universal protection system, but equally, a cross study of international and national texts and cases. Finally, it investigates individuals' experiences in Assam and in the Indian judiciary through interviews. Interviewers were selected for their knowledge and role in society (NGO directors, social activists, lawyers and researchers). Sociologists like Glasser and Strauss integrated qualitative interviews within research.[36] Here, the overall sample of interviews remains a relatively small, ten interviews, because of the phenomenological approach chosen. This has meant that focus is laid on how individuals interpret their social environment from a personal

[34] *Live Law* and *Bar and Bench*.

[35] For instance: *Navbharat Times, Janasata, Northeast now, The Hindu, the Indian Express, the Tribune, the Statesman, Frontline, the Assam Tribune, the Sentinal, Northeast Time, Purvoday, Purvanchal Prahari*.

[36] Barney G Glaser and Anselm L Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine Transaction 1967).

and professional perspective, thus building a conceptual and theoretical body of knowledge. It complements an interpretive dimension used in practical theory to support or challenge gathered data,[37] and elucidate various dimensions of the region's intricate socio-legal milieu. The inquiry encompassed several thematic dimensions. First, I explored the perceptions and experiences of individuals concerning the operational dynamics of foreigners' tribunals in Assam. The intent was to glean insights into the practical implications and inherent challenges confronted by both affected communities and legal practitioners engaged in addressing such cases. Furthermore, the dialogues delved into the nuanced challenges faced by legal practitioners when navigating these tribunal processes, thereby shedding light on the complex legal terrain they traverse. The aim was to encapsulate the tangible experiences and personal narratives of communities directly affected by these tribunals. In a parallel vein, the investigations extended to the domain of the Indian judiciary, with a specific emphasis on practices and phenomena observed at the Supreme Court level. The objective was to uncover hitherto underexplored insights, particularly pertaining to the rationale underpinning India's recourse to regional systems within the framework of these legal proceedings. These interviews have substantially enriched the scholarly discourse by furnishing first hand perspectives and unique empirical data, thereby advancing a nuanced understanding of Assam and India's legal and judicial ecosystem. In this perspective, two interview methods have been employed[38]: (i) unstructured, or "controlled conversations", developed mainly by ethnographers like Malinowski and Mead,[39] where interviews are informal, and based on instantaneous questions;[40] (ii) semi-structured, that is, based on specific and emerging questions, and topics that need to be explored.[41] The research process has encountered certain challenges that necessitate careful consideration. One of the notable difficulties lies in the discernment of which information collected can be effectively utilized. A wide array of data has been amassed during the interviews. Yet, it becomes incumbent to exercise judicious selection and filtering, given the imperative of data accuracy and reliability. The veracity of information gleaned, particularly from interviews conducted in Assam, sometimes poses a quandary due to the intricacies of the

[37] Stan Lester, 'An Introduction to Phenomenological Research' 1, 1.

[38] Shazia Jamshed, 'Qualitative Research Method-Interviewing and Observation' (2014) 5 JBCP 87.

[39] Bronislaw Malinowski, *Argonauts of the Western Pacific* (Routledge 1932); Margaret Mead, *The Changing Culture of an Indian Tribe* (1St Edition, Columbia University 1932).

[40] David E Gray, *Doing Research in the Real World* (SAGE 2021).

[41] Barbara Dicicco-Bloom and Benjamin F Crabtree, 'The Qualitative Research Interview' (2006) 40 Medical Education 314.

region's socio-political environment. These complexities, compounded by the dynamic nature of events and narratives, may render exactitude difficult to ascertain. Moreover, the current political climate in India imposes certain constraints on open and frank discussions regarding specific issues. These constraints are a significant impediment to comprehensive data gathering, as they potentially hinder the exploration of certain subjects.

These three scales of examination, international, national and regional, thus use different angles, so as to reflect critically on the production of legal jurisprudence, its influence on the elaboration of legal norms and practices, and their effect on the subjects for whom they are destined. It thus recognizes the importance of considering plural locations and their contribution to enacting legal rulings.

3. Research structure

The argument will be developed in four main parts.

The first part, “Reflections on Law and the politics of State”, is divided into three chapters related to a discussion of scholarly approaches to the concepts used. The understanding of the following concept is crucial in setting the stage for the subsequent chapters and for addressing the broader research questions. Chapter 1 on minority groups, teases out the tensions between human rights principles through the angle of the multicultural model, and a State’s geo-political logics that influence its approach to minority groups. Chapter 2 discusses the concept of discrimination, analysing its various interpretations at the international level and tracing its evolution over time. Chapter 3 offers a comprehensive exploration of the multifaceted studies related to Assam. It aims to provide a thorough understanding of how the state issues is underlined.

The second part, “Institutional, administrative and judicial erasure of religious and ethnic minorities” undertakes an empirical study of Assamese Muslims, a religious and ethnic minority in India which risks nationality deprivation through the NRC. Chapter 4 discusses the impact of political, social, economic and cultural factors on the discourse surrounding nationality in India. It traces the historical provisions from the Constituent Assembly Debates

(CAD) to subsequent Citizenship Acts from 1955 to 2019, until the application of the NRC in Assam and their implications for minority groups. Chapter 5 investigates the practical problems and dilemmas of implementing citizenship in a peripheral, economically disadvantaged state. It explores the judiciary's duty in ensuring equality justice for all and its impact on minority groups.

The third part, "Protecting minority rights within regional institutions" probes how international human rights conventions and standards are used at the regional level to protect minority groups facing discrimination. Before examining the specific practices and legal provisions that are mobilised to render groups invisible in the regional systems, Chapter 6 recalls the general Indian approach towards IHRL and regional systems jurisprudence, thus setting the stage for the regional analysis. Chapter 7 analyses the practices and rulings of the ECtHR concerning structural discrimination, with a focus on the Roma minorities. Chapter 8 explores cases related to the indigenous groups within the IACtHR. It is followed by a comparative analysis of the application of IHRL by regional and national judges.

Lastly, the fourth part, "Invisibility is a human right violation", seeks to contribute to the larger international human rights debate by underlining how and why rights violations perpetrated against minority groups lead to their invisibility. It explores the role of the judiciary in this process.

Part 1. Law and the politics of State: approaches to political and judicial frameworks

Introduction

Three analytic concepts – minority groups, the right to non-discrimination, and the rise of ethnic nationalism – are used to understand IHRL's evolution on the role of the judiciary in protecting human rights. These core themes are central to understanding whether in India current positions towards international human rights are linked to a general approach or specific to the country.

This examination is conducted in three chapters. Chapter 1 analyses scholarly approaches towards minorities in literature. Chapter 2 underlines the legal constituents of discrimination and international conventions. Chapter 3 highlights the current scholarly approaches to Assam.

Chapter 1. The legal construction of minority groups

Traditionally, the approach in international law has focused on States as central actors in the development of international legal systems. Ideally, the implementation of human rights undertaken by States presupposes equality in law and the enjoyment of all human rights,[42] which implies that group identity should not be an obstacle in the exercise of their core rights.[43] In practice, however, States, while recognising international standards, define their policies in the light of their own geopolitical interests and national challenges. Groups, such as religious communities or tribes, then occupy a central place in States' policies and legal systems, leading to favouring some to the detriment of others.[44]

Protecting minorities from discrimination has been one of the oldest concerns for international organisations and international law. These may counter the effects of policies of systemic exclusion, or stigmatisation that may be accompanied by distorted representations, produce low self-esteem and perpetuate negative stereotypes of that group.[45]

Literature on minority groups focuses on the evolution of their rights and protection.

1. An overview of legal definitions of minority groups

The United Nations (UN) estimates 10 to 20 percent of the world's population are part of a minority group.[46] Among judges to jurists, definitions of "minority" appear from 1930 with

[42] Articles 1, 2 and 55 International Covenant on Economic, Social and Cultural Rights 1976; Article 2 International Covenant on Civil and Political Rights 1976; Article 2 Universal Declaration of Human Rights 1948. 01/11/2023 10:57:00

[43] Corinne Lennox, 'Human Rights, Minority Rights, Non-Discrimination and Pluralism: A Mapping Study of Intersections for Practitioners' [2018] Global Centre for Pluralism 1.

[44] Fatemeh Mihandoost and Bahman Babajanian, 'The Rights of Minorities in International Law' (2016) 9 JPL 15.

[45] See: Patrick Thornberry, *International Law and the Rights of Minorities* (Clarendon Press 1991).

[46] 'United Nations Guide for Minorities' (*OHCHR*).

the Greco-Bulgarian "Communities" case before the Permanent Court of International Justice (PCIJ).[47] Minorities are defined by the PCIJ as a:

> group of persons living in a given country or locality, having a race, religion, language, and traditions of their own, and united by the identity of such race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, securing the instruction and upbringing of their children in accordance with the spirit and traditions of their race and mutually assisting one other.[48]

Here, the PCIJ established the existence of an objective element – "race, religion, language and tradition" – and a subjective one, with the "sentiment of solidarity" and the will to "preserve traditions". In 1979, the Italian jurist, Francesco Capotorti, in his study for the UN on the question of minority, further narrowed the definition with the introduction of a numerical factor, adding "non-dominant position".[49] These elements are also found in Judge Deschênes (1985) definition,[50] and recently in 2019 by the Special Rapporteur on minorities.[51] Former member of the Committee on the Elimination of All Forms of Racial Discrimination (CERD), Patrick Thornberry, while underlining the importance of the numerical aspect, adds another element, mainly the non-involvement of minorities in the government, and the groups united commitment to maintain their cultural, customs, religion, or language.[52] These multiple definitions led the UN to issue a compilation of all proposed definitions up to 1987.[53]

Identified features of minorities included numerical inferiority, non-dominant position of groups, possession of ethnic, religious or linguistic traits distinct from the rest of the population,

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[47] *Interpretation of the Convention Between Greece and Bulgaria Respecting Reciprocal Emigration, Signed at Neuilly-Sur-Seine on November 27th, 1919 (Question of the 'Communities')* [1939] PCIJ Series B N°17.

[48] ibid.

[49] Francesco Capotorti, 'Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities' (Subcommission on Prevention of Discrimination and Protection of Minorities 1979) Study E/CN 4 Sub2/384/Rev 1 para 568.

[50] Jules Deschênes, 'Promotion, Protection and Restoration of Human Rights at the National, Regional and International Levels: Prevention of Discrimination and Protection of Minorities - Proposal Concerning a Definition of the Term "Minority"' (Commission on Human Rights 1985) E/CN.4/Sub.2/1985/31 para 30.

[51] 'Effective Promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities' (General Assembly 2019) Resolution A/RES/74/160 para 53.

[52] Patrick Thornberry, *International Law and the Rights of Minorities* (Clarendon Press 1991).

[53] 'Compilation of Proposals Concerning the Definition of the Term "Minority"' (Commission on Human Rights 1986) Document E/CN.4/1987/WG.5/WP.1.

and the will to maintain a sense of solidarity directed to preserving their culture, traditions, religion or language.[54] Macklem argues how this definition protects minority rights on the postulate that religious, cultural, linguistic, and ethnic attachments are key elements for human beings.[55] In addition to the possible threat to their collective identity or rights, their inferior status in society, or their vulnerability to discrimination by the State or by private actors, is a crucial element. Yet, these characteristics are limited, for example they do not consider sexuality. Thus, the *Encyclopaedia Britannica*, refers to the use of minority by political and social sciences[56] defining the sociological understanding of minority as:

> a culturally, ethnically, or racially distinct group that coexists with but is subordinate to a more dominant group. As the term is used in the social sciences, this subordinacy is the chief defining characteristic of a minority group.[57]

This definition highlights the weaker position of minorities in society, and the absence of equality between majority and minority groups because of subordination.

Scholars and lawyers agree the absence of a universally accepted definition should not lead States to violate minorities' rights, such as the right to non-discrimination.[58] According to the political scientist Smihula, minorities are not only individuals within racial, ethnic, religious or linguistic groups, but equally individuals who are not part of a majority.[59] These minority groups are defined by legal scholars Mihandoost and Babajanian as groups of people who can be differentiated from the social majority.[60] They argue that social groups are distinct from minority groups in that the former hold a position of power in society as defined by law.

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[54] 'Effective Promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities' (n 59) para 53.

[55] Patrick Macklem, 'Minority Rights in International Law' (2008) 6 Int. J. Const. Law 531, 532.

[56] In 1945 the American sociologist Louis Wirth defined minority as "a group of people who, because of their physical or cultural characteristics, are singled out from the others in the society in which they live for differential and unequal treatment, and who therefore regard themselves as objects of collective discrimination", Louis Wirth, 'The Problem of Minority Groups' in R Linton (ed), *The Science of Man in the World Crisis* (Columbia University Press 1945) 347.

[57] 'Minority | Definition & Facts' (*Encyclopedia Britannica*).

[58] Mihandoost and Babajanian (n 44) 15.

[59] Daniel Smihula, 'National Minorities in the Law of the EC/EU' (2008) 8 Rom. J. Eur. Aff. 51.

[60] Mihandoost and Babajanian (n 44) 16.

However, this absence of definition, stressed by scholars such as Arjmand (1998)[61] or Akermark, narrows this concept, which could exclude groups perceived as "making trouble",[62] but also prompts UN treaty body such as the Human Rights Committee's (HRC) to signal the protection granted through Article 27 of the International Covenant on Civil and Political Rights (ICCPR).[63] The HRC for instance underlines that minorities are protected even though they are not citizens of the State.[64]

2. Debating the place of minorities in a new international order

Legal scholar Innis Claude maintains that the international community after World War II was eager to remove any consideration of "ethnic particularisms".[65] It is significant that neither the words minority nor ethnicity come up in the United Nations Charter (Charter) or the Universal Declaration of Human Rights (UDHR).[66] This absence led decolonising States in South Asia and Southeast Asia to consider these concepts at the national level in constitutional debates.[67]

When Denmark, Yugoslavia, and the USSR proposed to include minority rights in the UDHR, opposing countries pointed out the possibility of fragmentation and separatist movements that could endanger national unity.[68] Latin American delegations even argued that minorities were

[61] Amir Arjmand A, *Worldwide Search: Reflections on Human Rights of Law Researches* (Shahid Beheshti University Publications 1998).

[62] Athanasia Spiliopoulou Åkermark, *Justifications of Minority Protection in International Law* (Kluwer Law International 1997) 86.

[63] 'General Comment No. 23: Article 27 (Rights of Minorities)' (HRC 1994) CCPR/C/21/Rev.1/Add.5; Ulrike Barten, 'Article 27 ICCPR: A First Point of Reference', *The United Nations Declaration on Minorities*, vol 9 (Martinus Nijhoff Publishers 2015).

[64] 'General Comment No. 23: Article 27 (Rights of Minorities)' (n 71) para 5.1.

[65] Innis Claude, National Minorities: An International Problem (Harvard, 1955) 211.

[66] The UDHR rejected identity claims and collective dimensions. Emmanuel De Jonge, 'La Déclaration Universelle Des Droits de l'Homme Comme l'expression d'une Vision Du Monde : Une Approche Topique et Généalogique' [2010] ADARR.

[67] Cindy Ewing, 'Codifying Minority Rights: Postcolonial Constitutionalism in Burma, Ceylon, and India' in A Dirk Moses, Marco Duranti and Roland Bruke (eds), *Decolonization, Self-Determination, and the Rise of Global Human Rights Politics* (Cambridge University Press 2020) 180.

[68] Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (University of Pennsylvania Press 1990) 71.

unknown in their part of the world.[69] Peter Hilpold, legal scholar, noted the "reluctance to act coupled with a request for more knowledge was a characterizing trait of the entire development of minority rights within the UN system."[70] Contrary to the UDHR, the ICCPR (1976) refers explicitly to minorities in Article 27 in individualistic terms: minority rights are not collective but individual rights.[71] This approach emphasises the HRC complaint procedure – independent experts within the Committee monitor the respect of the ICCPR by State Parties – which hears only individual and not collective claims.[72]

A second movement followed the move to introduce minority into the international framework of human rights in cases other than flagrant abuses. Protection guaranteed by IHRL to minority groups had to evolve and not reflect the fragile relationship between minority membership and universal value. In fact, in 1946, Pablo de Azcarate – former deputy secretary-general of the League of Nations (1922) – argued that protection of national minorities is "limited in time and space". He highlighted the importance of provisions and procedures related to minorities to consider the particular circumstances of each case.[73] The creation of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1947[74] was actually due to a Soviet initiative, in retaliation to the American proposal to institute a commission to further the cause of freedom of information.[75] In its Third Session (9 to 27 January 1950), the Sub-Commission adopted its own definition of the term minority.[76] After considering different definitions and classifications of minorities it drafted the future Article 27

[69] John P Humphrey, 'The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities' (1968) 62 AJIL 869, 873.

[70] Peter Hilpold, 'UN Standard-Setting in the Field of Minority Rights' (2007) 14 Int. J. Minor. Group Rights 181, 183.

[71] Macklem (n 63) 535.

[72] 'Complaints Procedures' (*OHCHR*); Markus G Schmidt, 'Individual Human Rights Complaints Procedures Based on United Nations Treaties and the Need for Reform' (1992) 41 ICLQ 645, 645.

[73] Pablo de Azcárate, 'Protection of Minorities and Human Rights' (1946) 243 Ann Am Acad Pol Soc Sci 124, 127–128.

[74] 'Economic and Social Council, Official Records, Second Year, Fourth Session, Supplement No. 3' (Commission on Human Rights) Report 4.

[75] Humphrey (n 77) 869–870.

[76] "only those non-dominant groups in a population which possess and wish to preserve stable ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population.", Yearbook on human rights for 1950 (1950) 490.

of the ICCPR known at that time as the International Covenant on Human Rights. In addition, it adopted resolutions on the prevention of discrimination.[77]

For Morsink, political scientist, the UDHR's drafting process was due to the Holocaust, which established all the rights protected at that time from a legal perspective.[78] Yet, the Declaration failed to address minority rights, or even address anti-Semitism.[79] This failure is the historical marker of Article 27 of the ICCPR. In fact, the General Assembly in its first sentence of the resolution 3/217C stated that the UN "cannot remain indifferent to the fate of minorities".[80] This led the General Assembly to request the HRC and the Sub-Commission to study the problem of minorities. The Sub-Commission agreed to submit not a study, but a draft treaty for the Covenant on minorities.[81] The HRC started working on the General Assembly's request in 1953 with three drafts: that of the Sub-Commission, and the Soviet and Yugoslav draft. The Yugoslav draft proposed a specific prohibition of discrimination, and just as the Soviet proposal stressed States' positive obligation, it included the right to be educated in its own language, and interestingly, referred to ethnic and linguistic groups. In addition, the Chile proposal to the HRC, wanted to considerer minorities as individuals already established in the country. Chile sought to differentiate between national minority groups and immigrants, in order to preserve national characteristics.[82] The HRC Draft was debated at the 3rd Committee of the General Assembly in 1961. African and Asian States like India followed the Western hemisphere's approach to the question of minority with the assimilation and integration policy. Ecuador, on the contrary, argued that the American continent did not have any minority groups, and Ghana and Upper Volta maintained that although there were minorities in their country, they had no problems. Finally, Australia insisted that aborigines could not be minorities as they were too primitive.[83]

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[77] ibid 489.

[78] Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press 1999) 90–91.

[79] Jacob Dolinger, 'The Failure of the Universal Declaration of Human Rights' (2016) 47 U. MIA IALR 164, 168.

[80] '217 C (III). Fate of Minorities' (General Assembly 1948) Resolution A/RES/3/217 C.

[81] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, Publisher 2005) 639.

[82] EW Vierdag, *The Concept of Discrimination in International Law: With Special Reference to Human Rights* (Springer Science & Business Media 2012) 153.

[83] Nowak (n 89) 640.

The third phase reached its peak in 1992 with the General Assembly proclamation of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. The preamble declares that the Declaration was "inspired by the provisions of article 27 of the International Covenant on Civil and Political Rights".[84] While the 1992 Declaration makes a list of the rights possessed by minorities (enjoy its own culture, practice its own religion, use its own language…) like Article 27 of the ICCPR it establishes these rights on an individual basis.[85] Moreover, both of them protect the same rights: cultural, religious, linguistic, political participation,[86] and freedom of association. Despite this individualistic approach, the HRC through its decisions, has interpreted Article 27 in a collective dimension.[87]

Issues surrounding minorities human rights violation received more visibility within the UN with: (i) the establishment of the Working Group on Minorities (1995); (ii) the 2005 appointment by the Human Rights Council of an independent expert on minority issues whose titled changed to Special Rapporteur on minority issues after the Human Rights Council resolution 25/5.[88]

Yet, Macklem sees an important ambiguity in IHRL concerning a State's obligation to secure the protection of minority rights, finding its sources in a larger framework which perceives human rights as a protection of individual interests conforming to universal values. [89] Consequently, to be protected minority rights must be considered as a fundamental criterion of being human. Thus, religious, cultural, linguistic rights are universal and undergird international minority protection. This protection implies that State should not discriminate against members of minority groups.

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[84] Preamble Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities 1992.

[85] Macklem (n 63) 536.

[86] 'Report of the Human Rights Committee' (HRC 1992) A/47/40 para 322.

[87] *Ivan Kitok v Sweden* [1988] HRC CCPR/C/33/D/197/1985; *Francis Hopu and Tepoaitu Bessert v France* [1997] HRC CCPR/C/60/D/549/1993.

[88] 'Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities' (Commission on Human Rights 2005) Resolution 2005/79; 'Mandate of the Independent Expert on Minority Issues' (Human Rights Council 2014) A/HRC/RES/25/5 para 11.

[89] Macklem (n 63) 540.

3. The contemporary challenges

Despite growing recognition of the deep connections between minority groups and the survival or stability of democracy,[90] their protection remains a challenge. In fact, in times of crises, minority groups become the first target. UN Special Rapporteur on minority issues, Fernand de Varennes, highlighted the alarming use of hate speech towards minorities during Covid-19, promoting discrimination towards these communities and violence.[91] Special Rapporteur on freedom of religion or belief, Ahmed Shaheed, also pointed to the proliferation of conspiracy theories attributing the development and spread of Covid-19 to minorities. He deplored the use of antisemitic hate speech,[92] and warned against discrimination faced by minorities in accessing public services.[93]

International law requires governments to ensure the non-violation of individual rights, and also expects them to provide procedural safeguards such as the right to a fair trial. Yet, the last few decades, especially since 9/11, have witnessed an expansion of State powers that tend to deprive individuals deemed a national security threat of their fundamental rights. In particular, with rising terrorist threats, States have developed legislation to deprive individuals of their citizenship. Since 2014, 9 European Union (EU) member States, notably France and United Kingdom, extended or introduced citizenship revocation legislation to tackle terrorism.[94] Often, individuals belonging to minority groups are also the most vulnerable. In practice, the application of nationality deprivation is seen to target nationals who "acquired

[90] Kwadwo Appiagyei-Atua, 'Minority Rights, Democracy and Development: The African Experience' (2012) 12 Afr. Hum. Rights Law J. 69.

[91] Fernand de Varennes (*@fernanddev, Twitter*, 28 December 2020); Panarat Thepgumpanat Tostevin Shoon Naing, Matthew, 'Anti-Myanmar Hate Speech Flares in Thailand over Virus' *Reuters* (24 December 2020); Fernand De Varennes (Covid-19: securitisation, minorities, diversity, European Centre for Minority Issues, 7 April 2021).

[92] 'Rise in Antisemitic Hatred during COVID-19 Must Be Countered with Tougher Measures, Says UN Expert' (*OHCHR*, 17 April 2020).

[93] 'UN Expert Warns against Religious Hatred and Intolerance during COVID-19 Outbreak' (*OHCHR*, 22 April 2020).

[94] Emilien Fargues (When States Take Rights Back - Citizenship Revocation and Its Discontents, Weatherhead Center For International Affairs - Harvard University, 22 February 2021); Sandra Mantu, '"Terrorist" Citizens and the Human Right to Nationality' (2018) 26 J. Contemp. Eur. Stud. 28.

nationality by naturalization or by descent while born abroad".[95] According to the UN High Commissioner for Refugees' (UNHCR) 2017 report, 75% of the world's stateless individuals belong to minority groups.[96]

The issue of minorities' questions the effectiveness of both international law and the rule of law implemented through the instrument of the judiciary and courts. Minorities are at the forefront in checking the drift that may occur in the name of national security, external aggression, or national consolidation. These developments in liberal democracies have not gone unnoticed or unchallenged in international forums or human rights groups. Civil society activists, lawyers, constitutional experts and UN treaty bodies, caution against the erosion of human rights under the guise of national security or majority ethnic nationalism. It is argued that respect of human rights, necessary to the preservation of democracy, depends on the individual's legal recognition by the State, which in turn must stand as guarantor of these rights.

In most multi-ethnic societies, dominant groups often tend to have a more important socio-economic and political position in comparison to minorities, leading to minorities' exclusion from decision-making processes and power centres. This situation pushes to emphasise on two concepts: vulnerability and marginalisation. Marginalisation is a core concept in legal research, yet it faces some difficulties, conceptually wise. It primarily serves as a doorway to broader discussions, it's equally valid to suggest that it's quite a narrow concept.[97] Within socio-legal studies, marginalisation turns out to be a synonym of disadvantage, exclusion, inequality, stigmatisation etc. These synonyms suggest a sense of exclusion and suppression, where voices go unheard. While describing the 'edge' of marginalised individuals, legal scholars have focus on the impact of marginalisation on individuals and their experiences.[98] Analysing

[95] 'Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary General' (Human Rights Council 2013) A/HRC/25/28 para 19; Noah Bialostozky, 'The Misuse of Terrorism Prosecution in Chile: The Need for Discrete Consideration of Minority and Indigenous Group Treatment in Rule of Law Analyses' (2008) 6 JHR 81.

[96] '"This Is Our Home" - Stateless Minorities and Their Search for Citizenship' (UNHCR 2017) 1.

[97] David Gurnham, 'Introduction: Marginalisation in Law, Policy and Society' (2022) 18 Int J Law Context 1, 1.

[98] Tunay Altay, Gökce Yurdakul and Anna Korteweg, 'Crossing Borders: The Intersectional Marginalisation of Bulgarian Muslim Trans*immigrant Sex Workers in Berlin' [2020] J. Ethn. Migr. Stud.; Peter Brooks, 'Narrative in and of the Law', *A Companion to Narrative Theory* (John Wiley & Sons, Ltd 2005).

marginalisation therefore led to a focus on individuals experiences and fell back to other concepts such as inequality, poverty or vulnerability. Marginalisation and vulnerability are not exclusive yet their typically overlap. Both these concepts rely on intersecting factors, and both are prominent concept in human rights.[99] However, while marginalisation has been analysed through the consequences on individuals, vulnerability has allowed to translate into legal terms individuals realities. This human rights legal awareness brought to light how vulnerabilities impact individuals, but some more than others.[100] Furthermore, the reference to vulnerability by legal bodies, in particular the European context, has had a positive contribution to the qualification of the subjects of rights in concrete context. The international human rights jurisprudence went beyond the field minority protection and has embraced a vulnerability language.[101] Yet, for both concepts stigmatisation and stereotypes of individuals may increase.[102] However, they allow to understand that individuals position makes some groups vulnerable to State and private actors' discriminatory practices and policies. These may range from outright denial of minorities, to insisting on their assimilation in order to enjoy equal citizenship rights with dominant groups, to accommodation.[103] As the philosopher Kymlicka underlines, if assimilation leads to a progressive erosion of identities and cultures of minorities, the policy of accommodation can help preserve their distinctive culture, language, religion, or traditions.[104] However, both require legal provisions that must be operatively binding, if minorities are to be protected. While there are various international legal instruments that have been ratified by States, their efficacy in dealing with the situation of minorities and preventing discrimination remains doubtful. Even though some of them are binding instruments, States often affirm their right to sovereignty, thus creating a situation where national laws could be violating international conventions and standards.

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[99] Francesca Ippolito, *Understanding Vulnerability in International Human Rights Law* (Editoriale Scientifica).

[100] Martha Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 Emory Law Journal 251.

[101] Mary Neal, 'Not Gods but Animals: Human Dignity and Vulnerable Subjecthood' (2012) 23 Liverpool Law Review 177.

[102] Alexandra Timmer and others, 'The Potential and Pitfalls of the Vulnerability Concept for Human Rights' (2021) 39 Neth. Q. Hum. Rights 190; Martha Albertson Fineman, 'Beyond Identities: The Limits of an Antidiscrimination Approach to Equality' (2012) 92 Boston University Law Review 1713, 1750.

[103] Minority accommodation varies in each country. In Canada for instance, for linguistic minorities, it is based on historical arrangements.

[104] Will Kymlicka, *Liberalism, Community, and Culture* (OUP 1989); John Tomasi, 'Kymlicka, Liberalism, and Respect for Cultural Minorities' (1995) 105 Ethics 580, 580.

4. Conclusion

Despite a sustained interest in the subject of minorities, and debates on the question, international law took its time to define the problem, and an exhaustive and universally accepted definition of the term 'minority' still eludes us. The internationalisation of the notion, far from establishing a consensus around legal provisions and practices, has multiplied the tensions between human rights principles, pitching States against groups and movements defending minority rights. From the States' perspective, minority rights can, and are sacrificed at the altar of the nation, and are subordinated to concerns of development, political unity, and social cohesion. From the perspective of minority groups themselves, the degree of tolerance today with instituted equations of power or accepted forms of discrimination has diminished greatly. In this battle, between assimilation and accommodation international law can play a critical role and has established itself as a central actor.

As States fix their own approach and policy towards their minorities, international provisions prohibiting discrimination acquire greater importance. In fact, leaving the question entirely in the hands of States to resolve has proved insufficient, besides engendering violation of the fundamental rights of persons belonging to minorities. How nations look upon and act against discriminatory practices and policies within their own territories often depends upon the equations of power between different groups, electoral needs, economic logic, or the weight of social customs and historical traditions. Social or cultural understandings of the concept of minorities may thus vary from one country to another, leading to critical discussions of what constitutes a minority.[105] Despite States obligation to recognise and protect minorities to enjoy their own culture through positive discrimination or establishing affirmative action,[106] in practice this international right collides with State practice. For instance, in the Indian case, the Constitution does not define the term minority which is integrated in a broader category.[107] It protects religious, linguistic and culturally distinctive groups. Thus, in October 1993, the

[105] Jennifer Preece Jackson, 'National Minority Rights vs. State Sovereignty in Europe: Changing Norms in International Relations?' (1997) 3 Nations Natl. 345, 351–354.

[106] 'General Comment No. 23: Article 27 (Rights of Minorities)' (n 71) para 1.

[107] Saroj Bohra, 'Minority Rights under Indian Constitution: A Critical Analysis' [2014] Bharati Law Review 11.

Congress government recognized Muslims, Christians, Sikhs, Buddhists, and Zoroastrians as national religious minorities.[108]

[108] *The Gazette of India 1993 [REGD. NO. D.L-33004/93]*.

Chapter 2. Addressing the right to non-discrimination

Discrimination is a fundamental concept and component of IHRL. Under this concept, individual's human rights must be equally respected, and the application of this right must be done without unreasonable exceptions which cannot be legally justified. For the IACtHR it is a *jus cogens*,[109] which implies that protection against discrimination is applied not only to individuals but also to groups more vulnerable than others,[110] and the International Court of Justice (ICJ) considered it an *erga omnes* obligations.[111] Furthermore, non-discrimination is often used interchangeably with the concept of equality. Equality being often perceived as the goal of non-discrimination, and non-discrimination establishes a legal frame or policy to achieve equality.[112] Strangely while international law does not establish a hierarchy between violations, for Hilary Charlesworth, a hierarchy of forms exists, under which racial discrimination is perceived as the most serious.[113]

Three dimensions of the principle of non-discrimination need to be highlighted to understand how discrimination leads to invisibility of minorities in India, and, at the regional level: (i) protection granted by international conventions;[114] (ii) recognising discrimination; and (iii) State's obligation.

[109] *Juridical Condition and rights of the undocumented migrants* [2003] IACtHR Advisory Opinion OC-18/03, Series A, No. 18 [101]; *Norín Catrimán et al (Mapuche Indigenous People) v Chile* [2014] IACtHR Merits, Reparations and Costs, Series C, No. 279 [197].

[110] Laurence Burgorgue-Larsen and Amaya Ubeda de Torres, *The Inter-American Court of Human Rights: Case Law and Commentary* (OUP 2011) para 20.30.

[111] *Belgium v Spain: Barcelona Traction, Light and Power Company, Limited* [1970] ICJ [1970] ICJ 1 [34].

[112] Jarlath Clifford, 'Equality' in Stephanie Farrior (ed), *Equality and Non-Discrimination under International Law*, vol 2 (Ashgate 2015).

[113] Hilary Charlesworth, 'Concept of Equality in International Law' in Grant Huscroft and Paul Rishworth (eds), *Litigating Rights: perspective from domestic and international law* (Hart Publishing 2002) 143.

[114] Concerning the regional protection, see: Part 4 – Chapters 7 and 8.

1. Protection against discrimination at the international level

Protecting individual's right to non-discrimination remained limited in scope before 1945 as it was only found in minority treaties.[115] The adoption of the Charter – considered as the foundation of modern international law[116] – contrary to the League Covenant, which excluded the reference to racial and religious equality, promoted equality and non-discrimination as a core right. In fact, the UN was perceived to be created to mainly combat discrimination.[117] While the word discrimination is not found in the Charter, the expression "without distinction" occurs in four Articles: 1§3, 13§2, 55§3 and 76§3. The Charter referred to distinction of race, sex, language and religion. In comparison, the UDHR identifies more grounds of discrimination: "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[118] Prohibition of distinction based on these elements affirms that any kind of differences of treatment are not lawful, also known as formal equality. Article 2 of the UDHR, while being innovative in the right to equal treatment does not establish a right but a principle, as it only protects the rights and freedoms protected by the Declaration. Non-binding documents do not create legal and enforceable obligation for States, but it has been argued that the UDHR can be declared as *jus cogens*, hence all the rights enumerated within the Declaration have this character.[119] Thus, despite States not ratifying the Declaration, the norms protected by the UDHR entail obligations for States.

The absence of a "binding instrument" against discrimination led to the twin Covenants: the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Both provided detailed provisions on the right to non-discrimination, equality before the law, and equal protection of the law without any discrimination. Their purpose was to codify the universal human rights established in the UDHR in the form of a treaty.[120]

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[115] For instance, between the Allies and Poland: Minorities treaty between the principal allied and associated powers (the British Empire, France, Italy, Japan and the United States) and Poland signed at Versailles 1919.

[116] See: Louis B Sohn, 'The New International Law: Protection of the Rights of Individuals Rather Than States' (1982) 32 Am. Univ. Law Rev. 1.

[117] 'Draft International Declaration of Human Rights (E/800)' (UN 1948) Hundredth Meeting A/C.3/SR.100 129.

[118] Article 2 UDHR.

[119] Li Weiwei, 'Equality and Non-Discrimination Under International Human Rights Law' (2004) Research Notes 03/2004 *The Norwegian Centre for Human Rights* 19; John P Humphrey, 'The Implementation of International Human Rights Law' (1978) 24 N. Y. L. Sch. L. Rev. 31, 32.

[120] 'General Comment No. 26: Continuity of Obligations' (HRC 1997) CCPR/C/21/Rev.1/Add.8/Rev.1 para 3.

The ICCPR established more legally binding rights and obligations. Article 26 of the ICCPR prohibits discrimination not only in law, but also protects individuals from public authorities, putting the focus on State obligations regarding their legislation.[121] Consequently, States' legislation should comply with Article 26 (equality before the law), and therefore, must not be discriminatory.[122] However, the ICCPR still does not provide a clear definition of discrimination. It was only in 1989 that the HRC filled this gap in the ICCPR, and provided a definition, arguing that discrimination is based on distinction, exclusion, restriction or preference based on "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."[123] The general expression "other status" refers to a non-exhaustive list of protected characteristics. In *Gueye v. France* (1989), the HRC found that discrimination on the grounds of nationality was an element of "other status".[124]

The ICESCR protects the right to non-discrimination at a general as well as specific level. Like the ICCPR, the ICESCR mentions the roots of discrimination in social customs (Article 5§2), recognised as cultural discrimination.[125] Such discrimination is rooted in traditions, dominant values[126] or stereotypes, and while today States question some of these practices, they still operate especially concerning women.[127] This element of practice is a core aspect of the right to non-discrimination in the ICESCR. In fact, the Covenant protects formal, *de jure* equality,

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[121] Mpoki Mwakagali, 'International Human Rights Law and Discrimination Protections: A Comparison of Regional and National Responses' in Holning Lau, *Sexual Orientation and Gender Identity Discrimination* (Brill 2021) 7.

[122] 'General Comment No. 18: Non-Discrimination' (HRC 1989) INT/CCPR/GEC/6622 para 12.

[123] ibid 7.

[124] *Ibrahim Gueye v France* [1989] HRC CCPR/C/35/D/196/1985 [9.4].

[125] Mwakagali 'International Human Rights Law and Discrimination Protections: A Comparison of Regional and National Responses' 14; Hélène Tigroudja, 'Droits Des Femmes et Élimination Des Discriminations'; Barbara Wilson, 'VIII. The Principle of Non-Discrimination in the International Covenant On Economic, Social And Cultural Rights' in Walter Kälin and others (eds), *International Law, Conflict and Development: The emergence of a Holistic Approach in International Affairs* (Brill | Martinus Nijhoff Publishers 2010).

[126] The CESCR mentioned this type of discrimination in: 'General Comment No. 16: Article 3 (the Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights)' (CESCR 2005) E/C.12/2005/3 para 5.

[127] In Nepal, the practice of the chhaupadi while still being practiced, was in 2004 declared illegal by the Nepalese Supreme Court (*Dil Bahadur Bishwokarma v HMG* [2004] SC of Nepal 2062-1-19 BS.) and on 9 August 2017 the Nepalese Parliament unanimously approved a law criminalising this practice (Section 168(3) of the Penal Code). Despite this ruling and legislation, women force themselves to conform to this practice according to the Nepali communist politician, Krishna Bhakta Pokhrel (see: 'Le Népal interdit « l'exil menstruel »' *Le Monde.fr* (9 August 2017)).

related to legislation and policy, as well as substantive, *de facto* equality, linked to practices, effects of laws, policies and practices of discrimination.[128] As in the ICCPR, no definition of discrimination is provided. However, the Committee on Economic, Social and Cultural Rights (CESCR) adopted the HRC's approach. Thus, in the General Comment No. 20, the CESCR argued that discrimination consists of:

> **distinction, exclusion, restriction** or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and **which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing**, of Covenant rights. Discrimination also includes incitement to discriminate and harassment.[129]

Despite its closeness to the HRC, the CESCR definition differs. Interestingly, it nearly copies the language of Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), it only misses the mentions to "fundamental freedoms in the political, economic, social, cultural or any other field of public life".[130] In parallel to these core conventions, specific international human rights conventions refer to discrimination. They focus on practices (e.g. torture, racial discrimination[131]) and social groups: women,[132] children,[133] person with disabilities,[134] and minorities.[135] In fact, the ICERD is the first treaty on non-discrimination adopted by the UN. Discrimination here only concerns race, colour, descent, national or ethnic origin. Consequently, the elements found in the other Human Rights instruments (sex, religion, social origin, political opinion) do not fall into the scope of the

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[128] Mwakagali, 'International Human Rights Law and Discrimination Protections: A Comparison of Regional and National Responses' (n 129) 14; 'General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (Art.2, Para. 2, of the ICESCR)' (CESCR 2009) E/C.12/GC/20 para 8.

[129] 'General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (Art.2, Para. 2, of the ICESCR)' (n 136) para 7. The elements underlined are similar with the HRC definition.

[130] Article 1 International Convention on the Elimination of All Forms of Racial Discrimination 1969.

[131] ibid; Egon Schwelb, 'The International Convention on the Elimination of All Forms of Racial Discrimination' (1966) 15 ICLQ 996, 997; Natan Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination* (Nijohoff 2015) 35.

[132] Convention on the Elimination of All Forms of Discrimination against Women 1979; Diana Zoelle, *Globalising Concern for Women's Human Rights: The Failure of the American Model* (St Martin's Press 2000) 5.

[133] Article 2 Convention on the Rights of the Child 1989.

[134] None of the international human rights convention refers to the rights of disabled individuals, leading to a degree of their invisibility in human rights discourse. Discrimination of persons with disabilities is linked to social structures, along with their segregation or exclusion from society. Preamble and Article 5 Convention on the Rights of Persons with Disabilities 2006; Mwakagali, 'International Human Rights Law and Discrimination Protections: A Comparison of Regional and National Responses' (n 129) 27; Marianne Schulze, *Understanding the United Nations Convention on the Rights of Persons with Disabilities* (Handicap International 2009) 10.

[135] Articles 2, 3 and 4 Declaration on Minorities.

convention. Furthermore, Article 1§2 establishes a clear cut between citizens and non-citizens which is not found in other international conventions. State parties can put in practice a "distinction, exclusion, restriction or preference" on the base of citizenship.[136] It was only in 2004 that the CERD finally took into consideration discrimination against non-citizens and argued that difference of treatment based on citizenship was considered discriminatory practices.[137]

Prohibiting discrimination is addressed in two different ways by international conventions. Firstly, by establishing a broad guarantee of equality. Secondly, by providing a list of grounds of discrimination, which is not exhaustive, and is often followed by the expression "and other status". This approach provides national and regional judges with a margin of manoeuvre to adopt new standards and extend the lists.[138]

2. When is there discrimination?

2.1. Qualifications

Discriminatory legislation, practices and policies' targets can be direct or indirect.

Direct discrimination – This consists of practices where "there must be a difference in the treatment of persons in relevantly similar situations",[139] targeting a precise group or a person and treating them less favourably on the basis of their protected characteristics such as racial or ethnic origin.[140] The difference of treatment that may potentially constitute direct

[136] Article 1§2 ICERD.

[137] 'General Recommendation No. 30: Discrimination against Non-Citizens' (CERD 2004) CERD/C/64/Misc.11/rev.3.

[138] Sandra Fredman, *Discrimination Law* (OUP 2011) 68.

[139] *Burden v the United Kingdom* [2008] ECtHR [GC] 13378/05 [60]; *DH v the Czech Republic* [2007] ECtHR [GC] 57325/00 [175]; *Willis v the United Kingdom* [2002] ECtHR 36042/97 [48]; *Okpisz v Germany* [2005] ECtHR 59140/00 [33]; *Zhdanov v Russia* [2019] ECtHR 12200/08 [178].

[140] Council Directive: Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin 2000 (2000/43/EC); 'General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (Art.2, Para. 2, of the ICESCR)' (n 136) para 10(a).

discrimination has three essential elements: a less favourable treatment; an analogous relationship with a specific treatment; and a pattern based on a protected characteristic.[141]

Indirect discrimination – In *Griggs v. Duke Power Co* (1971) the United States (U.S) SC recognised indirect discrimination, also known as disparate impact.[142] Since then, liberal democracies have used this concept more frequently.[143]

Its source lies in the principle of egalitarianism, and consists of applying a law to all individuals without considering their specificities, which could result in a different, and less favourable treatment.[144] Indirect discrimination needs to combine three elements: a disposition, a criterion or practice that is neutral in appearance; the application needs to produce an adverse effect or prejudice to an identifiable group; and finally, an element of comparability, as in the case of direct discrimination.[145] Furthermore, indirect discrimination does not require a discriminatory intent.[146] It may arise from a neutral rule[147] or from a *de jure* or *de facto* situation.[148]

Different definitions of indirect discrimination can be found at the regional and international level. A comparison can be made concerning the evocation of specific groups. At the European level, the different directives refer to specific elements such as racial or ethnic origin,[149] "religion or belief, disability, age, sexual orientation",[150] and "colour, language, religion, nationality".[151] On the contrary, Article 1§2 of the Inter-American Convention Against all Forms of Discrimination does not refer to a particular group but uses the following expression:

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[141] Ludovic Hennebel and Hélène Tigroudja, *Traité de Droit International Des Droits de l'homme* (A Pedone 2018) 762.

[142] *Griggs v Duke Power Co* [1971] SC of the US 401 US 424.

[143] Hugh Collins and Tarunabh Khaitan, *Foundations of Indirect Discrimination Law* (Hart Publishing 2018) 1.

[144] Hennebel and Tigroudja, *Traité* (n 149) 762.

[145] ibid.

[146] *Biao v Denmark* [2016] ECtHR [GC] 38590/10 [103]; *DH v the Czech Republic* (n 147) para 184.

[147] *Hoogendijk v the Netherlands* [2005] ECtHR 58641/00.

[148] *Zarb Adami v Malta* [2006] ECtHR 17209/02; *Xákmok Kásek Indigenous Community v Paraguay* [2010] IACtHR Merits, Reparations and Costs, Series C, No. 214 [271]; *Atala Riffo and Daughters v Chile* [2012] IACtHR Merits, Reparations and Costs, Series C, No. 239 [80]; *Pavez Pavez v Chile* [2022] IACtHR Merits, Reparations and Costs, Series C, No. 449 [67].

[149] Article 2§2(b) Council Directive 2000/43/EC.

[150] Article 2§2(b) Directive du Conseil portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail 2000 (2000/78/CE).

[151] ECRI General Policy Recommendation No. 7: National Legislation to Combat Racism and Racial Discrimination 2002.

"persons belonging to a specific group". The ECtHR and the IACtHR describe the specific impact of this discrimination on certain groups through their jurisprudence.[152] Even if the policy or measure may not target a particular group, it may still discriminate against them in an indirect way.[153]

It is noteworthy that the CESCR adopted a definition similar to those mentioned above, in its General Observation No. 20. While not referring to a specific group, it mentions ethnic minorities and non-nationals.

At the international level, the Conventions do not refer explicitly to direct and indirect discrimination. However, both the General Recommendation XXXII of the CERD[154] and General Recommendation No. 28 of the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW)[155] mention these two concepts. Despite recognising discrimination, the CERD does not often label indirect discrimination as such,[156] but labels indirect discrimination explicitly in cases of legislation.[157] In its recommendation, the CEDAW argues that direct discrimination against women "constitute different treatment explicitly based on grounds of sex and gender differences".[158] On the contrary, "indirect discrimination can exacerbate existing inequalities owing to failure to recognize structural and historical patterns of discrimination and unequal power relationships between women and men."[159]

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[152] *Biao v Denmark* (n 154) para 103; *DH v the Czech Republic* (n 147) para 184; *Sampanis v Greece* [2012] ECtHR 59608/09 "a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group"; 'General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (Art.2, Para. 2, of the ICESCR)' (n 136) para 10(b).

[153] *Hoogendijk* (n 155); *Hugh Jordan v the United Kingdom* [2001] ECtHR 24746/94 [154].

[154] 'General Recommendation No. 32: The Meaning and Scope of Special Measures in the ICERD' (CERD 2009) CERD/C/GC/32 3.

[155] 'General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the ICEDAW' (CEDAW 2010) CEDAW/C/2010/47/GC.2 3;4;5;8.

[156] 'Concluding Observations of the CERD: Brazil' (CERD 2004) CERD/C/64/CO/2 para 20.

[157] 'Observations Finales Du CERD: Suède' (CERD 2004) CERD/C/64/CO/8 para 9.

[158] 'General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the ICEDAW' (n 163) para 16.

[159] ibid.

In addition to these two main qualifiers, two other discriminations require mention: multiple and intersectional. Multiple discrimination is based on more than one ground of discrimination, often based on gender and another factor.[160] In 2001, in a case concerning women belonging to ethnic minorities the CERD underlined the multiple discrimination based on gender and ethnicity.[161] Multiple discrimination differs from intersectional discrimination, which also bases itself on multiple factors of discrimination, but culminates in a new type of discrimination. In intersectional discrimination, there are not only overt identifiable features that make the individuals liable to discrimination, for instant being Dalit, poor, and dark skinned are overt features, but there is a specific aspect that converges in a person, consisting of existing prejudices that are not openly admitted.[162] A recent analysis of Cagots – individuals suspected of leprosy – demonstrates this point. Victims of segregation, marginalised and discriminated from the XIIIth till XIXth century in Southwest France, they were forced to work only in wood-related craft professions and use distinctive surnames.[163] Furthermore, discriminations are multiple when the different elements operate separately. On the contrary, intersectionality, refers to interconnections between different factors to produce an overall discrimination. In fact, intersectionality enables identification of the scope and depth of discrimination.

2.2. Violation of the principle of equality

Direct and indirect discrimination is analysed through a comparation between litigious treatment with another type of treatment. The purpose is either to demonstrate that there is a difference of treatment despite a similarity in the situation, or on the contrary, to highlight that there is no difference, and therefore it produces an unfavourable impact on a group that is not in a similar situation due to a *de facto* inequality.

Analogous analysis is crucial to determining whether individuals are being discriminated. However, interpretation and appreciation often rely on the inclusion of subjective elements, and

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[160] Wouter Vandenhole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Intersentia 2005); Ludovic Hennebel and Hélène Tigroudja, *The American Convention on Human Rights: A Commentary* (OUP 2022) 73–74.

[161] 'Concluding Observations of the CERD: Uruguay' (CERD 2001) CERD/C/304/Add.78 para 10.

[162] Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 SLR 1241.

[163] Jacques Fonlupt, 'De La Race à La Lèpre : Les Derniers Cagots. Histoire de La Disparition Au XIXe Siècle d'un Phénomène Discriminatoire Français' (Université Paris-Saclay; Université Paris 1 Sorbonne 2021).

involve positions and assumptions on the treatment of certain categories of people.[164] Comparing situations remains a factual test, and therefore criteria cannot be the object of a definitive typology.[165] Nevertheless, examples of regional jurisdictions and UN treaty bodies can be cited to demonstrate difference of treatment between: national and foreign citizens;[166] couples or homosexual and heterosexual individuals;[167] adopted and biological children;[168] Romani students and others. [169]

2.3. Justifications of discrimination

In principle, when difference or indifference of treatment is established, the State has to justify it. According to the ECtHR, difference of treatment leads to discrimination when it has "no objective and reasonable justification", if "it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought".[170] The HRC follows the same position, in *G v. Australia* (2017), where it recalls that difference of treatments when reasonable and based on objective criteria and pursuing an aim that is legitimate under the Covenant, is not discriminatory.[171]

However, the State has a margin of appreciation (MOA) according to European jurisprudence, "in assessing whether and to what extent differences in otherwise similar

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[164] Hennebel and Tigroudja, *Traité* (n 149) 764.

[165] *Mümtaz Karakurt v Austria* [2002] HRC CCPR/C/74/D/965/2000 [8.4] : ' […] it is necessary to judge every case on its own facts.'

[166] *Moustaquim v Belgium* [1991] ECtHR 12313/86; *Karakurt* (n 173) para 8.4.

[167] *Young v Australia* [2003] HRC CCPR/C/78/D/941/2000 (discrimination in matters of allowances owed to war veterans); *Atala Riffo and Daughters v Chile* (n 156) (discrimination based on the mother sexual orientation).

[168] *Pla and Puncernau v Andorra* [2004] ECtHR 69498/01.

[169] *DH v the Czech Republic* (n 147) (discrimination due to the placement in special schools of Romani children); *Oršuš v Croatia* [2010] ECtHR 15766/03; *Sampanis (2012)* (n 160); *DH and others v the Czech Republic* [2007] European Court of Human Rights 57325/00; *Sampanis and others v Greece* [2008] European Court of Human Rights 32526/05.

[170] *Burden v the United Kingdom* (n 147) para 60.

[171] *G v Australia* [2017] HRC CCPR/C/119/D/2172/2012 [7.12]; *Muller and Engelhard v Namibia* [2002] HRC CCPR/C/74/D/919/2000 [6.7]; 'General Comment No. 18: Non-Discrimination' (n 130) para 13; *Jacob and Jantina Hendrika Van Oord v Netherlands* [1997] HRC CCPR/C/60/D/658/1995 (the difference of treatment was based on treaty arrangements); *Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' (merits)* [1968] ECtHR 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64.

situations justify a different treatment".[172] As explained in *Biao v. Denmark* (2016), the MOA is narrower for cases of allegations of racial discrimination.[173] On the contrary, a wider margin exists for "general measures concerning economic or social strategy".[174] This MOA allowed the ECtHR, more than the IACtHR, to establish a strategy aimed at avoiding discriminatory questions.[175]

3. States' obligations

Like any right protected by international human rights convention, non-discrimination places a duty on the State. Each international and regional human rights instrument develops its own obligation. However, a general negative and positive dichotomy in obligation can be found:

Negative obligation – It corresponds to the State's duty to not deny the enjoyment and exercise of individual rights. In terms of discrimination, this implies that the State cannot discriminate against individuals placed under its jurisdictions.[176]

[172] *Burden v the United Kingdom* (n 147) para 60; *Van Raalte v Netherlands* [1997] ECtHR 20060/92 [39]; *Stec v the United Kingdom* [2006] ECtHR [GC] 65731/01, 65900/01 [51].

[173] *Biao v Denmark* (n 154) para 118; *Hode and Abdi v the United Kingdom* [2012] ECtHR 22341/09 [53].

[174] *Burden Burden v the United Kingdom* (n 147) para 60; *Stec v the United Kingdom* (n 180) para 52; *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v the United Kingdom* [1997] ECtHR 21319/93; 21449/93; 21675/93 [80].

[175] Hennebel and Tigroudja, *Traité* (n 149) 766. For more information on the difference between the ECtHR and IACtHR see Part 4 – Chapter 8.

[176] Dinah Shelton and Ariel Gould, 'Positive and Negative Obligations' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013).

Positive obligations – States have the obligation to prevent, investigate,[177] punish[178] and repair or fulfil substantive equality,[179] establish provision of effective remedies,[180] prosecute,[181] and compensate for damages suffered because of discrimination.[182] Concretely this implies that States must adopt a series of behaviour that varies according to the vulnerability of individuals.[183]

The obligation to investigate, punish and repair results from a need to combat, and put an end to impunity.[184] In situations of extrajudicial executions or forced disappearances,[185] States have the obligation to establish an impartial and effective investigation[186] through independent and impartial investigation authorities.[187] The investigation has to follow several criteria: to be conducted with due diligence,[188] take place within the jurisdiction courts;[189] the State has an

[177] *Véliz Franco v Guatemala* [2014] IACtHR Preliminary Objections, Merits, Reparations and Costs, Series C, No. 277 [B.4]; *Abdu v Bulgaria* [2014] ECtHR 26827/08 [28]; *Mahali Dawas and Yousef Shava v Denmark* [2012] CERD CERD/C/80/D/46/2009 [7.4]; *Vicky Hernández v Honduras* [2021] IACtHR Merits, Reparations and Costs, Series C, No. 422 [174]. Vicky Hernández death reflects the violence and systematic discrimination faced by LGBTI community in Latin America. It is the first time that a member State of the Court has been found guilty of violence against the LGBTI community. This turning point in the jurisprudence marks an important step towards better protection of the LGBTI minority in Honduras.

[178] *Digna Ochoa y familiares v México* [2021] IACtHR Excepciones Preliminares, Fondo, Reparaciones y Costas, Series C, No. 447 [99]; *Sales Pimenta v Brasil* [2022] IACtHR Excepciones Preliminares, Fondo, Reparaciones y Costas, Sentencia, Series C, No. 454 [84].

[179] It corresponds to not only the respect of the right to non-discrimination but also States obligation to achieve equality in practice, through affirmative action. *Juridical Condition and rights of the undocumented migrants* (n 117) para 88.

[180] *LR v Slovak Republic* [2005] CERD CERD/CC/66/D/31/2003 [10.2-10.10]; *Calvelli and Ciglio v Italy* [2002] ECtHR 32967/96 [51]; *Tysiac v Poland* [2007] ECtHR 5410/03 [117]; *Rotaru v Romania* [2000] ECtHR 28341/95 [55–63]; *Mina Cuero v Ecuador* [2022] IACtHR Excepción Preliminar, Fondo, Reparaciones y Costas, Series C, No. 464 [116].

[181] *MC v Bulgaria* [2003] ECtHR 39272/98; *SVP v Bulgaria* [2012] CEDAW CEDAW/C/53/D/31/2011.

[182] *BJ v Denmark* [2000] CERD CERD/C/56/D/17/1999 [6.2; 6.3; 7] : 'the Committee recommends that the State party take the measures necessary to ensure that the victims of racial discrimination seeking just and adequate reparation or satisfaction in accordance with article 6 of the Convention, including economic compensation'.

[183] Hennebel and Tigroudja, *A Commentary* (n 168) 28.

[184] *'White Van' (Paniagua Morales et al) v Guatemala* [1998] IACtHR Merits, Series C, No. 37 [173].

[185] *Fernández Ortega v Mexico* [2010] IACtHR Preliminary Objection, Merits, Reparations, and Costs, Series C, No. 215 [183].

[186] *Giulani and Gaggio v Italy* [2011] ECtHR 23458/02 [298.29]; *El-Masri v the Former Yugoslav Republic of Macedonia* [2012] ECtHR 39630/09 [182].

[187] *Cantoral Huamaní and García Santa Cruz v Peru* [2007] IACtHR Preliminary Objection, Merits, Reparations and Costs, Series C, No. 167 [133].

[188] *Serrano Cruz Sisters v El Salvador* [2005] IACtHR Merits, Reparations and Costs, Series C, No. 120 [65]; *Leguizamón Zaván v Paragua* [2022] IACtHR Fondo, Reparaciones y Costas, Series C, No. 473 [72;97];.

[189] *Rochela Massacre v Colombia* [2007] IACtHR Merits, Reparations and Costs, Series C, No. 163.

obligation to coordinate different institutions,[190] and authorities have an obligation to collaborate during the investigation.[191]

Protecting human rights requires the State to take steps towards the prevention of human rights violation. While this is a general obligation found across international human rights conventions, certain national systems still stay attached to the notion of equality. However, the IACtHR and the ECtHR abandoned this idea.[192] In fact, the IACtHR rapidly used the positive obligation theory to order States to implement regulations guaranteeing actual equality, and thus avoid situations of formal equality leading to discrimination, particularly, in cases concerning indigenous groups.[193] At the European level, the concept of vulnerability and positive obligation used together prompted the ECtHR to require States to introduce measures of positive discrimination for these vulnerable groups. Consequently, more cases related to racism were brought before the Court.[194]

This obligation includes legal, political, administrative, and cultural[195] factors, and aims to promote human rights protection.[196] In *Velasquez-Rodriguez v. Honduras* (1988), the Court argued that no detailed list could be established, as it considers the laws and conditions of each State. However, an obligation to protect needs is general.[197] State agents and private actors must

[190] *Cepeda Vargas v Colombia* [2010] IACtHR Preliminary Objections, Merits, Reparations and Costs, Series C, No. 213 [216]; *Omeara Carrascal v Colombia* [2018] IACtHR Fondo, Reparaciones y Costas, Series C, No. 368 [293].

[191] *Myrna Mack Chang v Guatemala* [2003] IACtHR Merits, Reparations and Costs, Series C, No. 101; *Río Negro Massacres v Guatemala* [2012] IACtHR Preliminary Objection, Merits, Reparations, and Costs, Series C, No. 250 [209].

[192] *Thlimmenos v Greece* [2000] ECtHR [GC] 34369/97 [44]; *Chapman v the United Kingdom* [2001] ECtHR [GC] 27238/95 [94].

[193] *Yatama Case v Nicaragua* [2005] IACtHR Preliminary Objections, Merits, Reparations and Costs [201].

[194] *Nachova v Bulgaria* [2005] ECtHR 43577/98; 43579/98; *Moldovan v Romania (no 2)* [2005] ECtHR 41138/98; 64320/01; *Bekos and Koutropoulos v Greece* [2005] ECtHR 15250/02; *Timishev v Russia* [2005] ECtHR 55762/00; 55974/00; *DH v the Czech Republic* (n 147).

[195] *Escher v Brazil* [2009] IACtHR Preliminary Objections, Merits, Reparations, and Costs, Series C, No. 200 [172] (facilitate human rights defenders work); *Perozo v Venezuela* [2009] IACtHR Preliminary Objections, Merits, Reparations, and Costs, Series C, No. 195 [117] (freedom of expression through establishing informative pluralism).

[196] *Velasquez Rodriguez v Honduras* [1988] IACtHR Merits, Series C, No. 4 [175].

[197] *Juan Humberto Sánchez v Honduras* [2003] IACtHR Preliminary Objection, Merits, Reparations and Costs, Series C, No. 99 [110]; *Montero Aranguren et al (Detention Center of Catia) v Venezuela* [2006] IACtHR Preliminary Objection, Merits, Reparations and Costs, Series C, No. 150 [75] (State agents); *Juridical Condition and rights of the undocumented migrants* (n 117) para 140 (private actors).

develop a legal, procedural[198] and administrative framework, alongside specific actions by the State for establishing prevention measures in case of a risk.

4. Scholarly perspectives on discrimination

Scholars have underlined that in the social sciences, the concept of minority refers to individuals who have a lower position and exercise less power in society. Interestingly, the concept of minority groups has developed and gained importance in the 20th century under the thrust of civil and collective rights movements. In certain countries this position has resulted in practices of discrimination, as individuals are perceived only through their membership of a minority group, and not with respect to their personal achievements.

Analysing caste discrimination underlines a more general element: the impact of individuals classification on their exclusion from society. Discrimination relies on this core element of the exclusion of groups from social spheres. In fact, economist Amartya Sen highlights the active exclusionary dimension of the caste system, which consists of government or private agencies blocking opportunities for certain castes.[199] Sen underlines the eliminatory consequences of such active exclusion, and the fact that individuals are affected by these policies.[200] Thorat and Newman, reflecting on the problems of "Caste and Economic Discrimination" (2007) refer to Sen's 2000 article, to argue that active exclusion through discrimination enables agents to practice a systematic refusal in hiring individuals of a particular social group, even though they may be qualified and possess the required skills to do the job.[201] Similar forms of discrimination are found outside India, ranging from injustice, socio-economic discrimination, and even participation in public and political life.[202]

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[198] Have a procedure which allows individuals to complain about their human rights violations. *Xákmok Kásek Indigenous Community v Paraguay* (n 156) para 141.

[199] Amartya Sen, 'Social Exclusion: Concept, Application and Scrutiny' (2000) 1 Office of Environment and Social Development, Asian Development Bank, Social Development Papers 1, 16.

[200] ibid 20.

[201] Sukhadeo Thorat and Katherine S Newman, 'Caste and Economic Discrimination: Causes, Consequences and Remedies' (2007) 42 EPW 4121, 4121–4122.

[202] Kevin Brown and others, 'Caste Discrimination Outside India: Caste as a Protected Characteristic in UK and US Antidiscrimination Law' (Law Faculty Equality and Diversity, 13 May 2021); Isabel Wilkerson, *Caste: The Lies That Divide Us* (Penguin 2020); Li-ann Thio, 'Battling Balkanization: Regional Approaches toward Minority

This type of discrimination has been highlighted in the U.S through the angle of race,[203] and in India, through the caste system.[204] Although the Indian constitution declares untouchability illegal (Article 17), discrimination based on caste remains an important aspect of social functioning.[205] Some disagreements have been expressed on the centrality of caste in modern Indian society. M. N. Srinivas, noted for his anthropological and sociological case studies and fieldwork on the caste system, argued that the social hierarchy of the caste system was being destroyed by the concepts of democracy, equality, and individual self-respect, and that a shift from status to contract was taking place in rural Indian societies.[206]

Scholars have examined the Indian caste system from the economic angle: they see it as based on a hierarchical division of the population, determined by birth and heredity, into social groups, which consequently determines the economic rights of the caste members.[207] This division of society increases discrimination towards minority groups like Dalits[208], also characterised as Depressed Classes under the British Raj, and Schedule Castes in the Indian Constitution and the Indian Census, as they lie at the bottom of the social order, following old traditions and practices of economic, social, historical and cultural exclusion. According to

Protection beyond Europe' (2002) 43 Harv. Int. Law J. 409; Aftab Alam, 'Minority Rights under International Law' (2015) 57 JILI 376, 383.

[203] Devah Pager, 'The Mark of a Criminal Record' (2003) 108 Am. J. Sociol. 937.

[204] Thomas Weisskopf, *Affirmative Action in the United States and India: A Comparative Perspective* (Routledge 2004); Sukhadeo Thorat, Aryama and Negi Prashant, *Reservation and Private Sector, India* (Rawat 2005).

[205] In the Tokyo Olympics game 2021, India women's hockey teamed lost at the semi-final to Argentina. In reaction to this result, upper caste individuals verbally abused one of the Dalit players family, Vandana Katariya, using slurs and saying how the "Indian team lost because of too many Dalits" in the team. Support in favor Vandana Katariya was rapidly found on twitter, with the #IsupportVandanaKatariya. MS Nawaz, 'Vandana Katariya: Casteist Slurs, Abuses Thrown at Olympic Star Vandana Katariya's Family' *The Times of India* (5 August 2021).

[206] Mysore Narasimhachar Srinivas, 'An Obituary on Caste as a System' (2003) 38 EPW 455, 459.

[207] George Akerlof, 'The Economics of Caste and of the Rat Race and Other Woeful Tales' (1976) 90 The Quarterly Journal of Economics 599; James Scoville, 'Towards a Model of Caste Economy' in James Scoville (ed), *Status Influences in Third World Labour Markets Caste, Gender and Custom* (Walter de Gruyter 1991); Deepak Lal, *The Hindu Equilibrium,* vol I: Cultural Stability and Economic Stagnation-India c. 1500 B.C.-A.D. 1980 (Clarendon Press 1989); Bhimrao Ramji Ambedkar, 'Philosophy of Hinduism' in Vasant Moon (ed), *Dr Bbasaheb Ambedkar: Writings and Speeches*, vol 3 (Department of Education, Government of Maharashtra, Bombay 1987); Kaivan Munshi, 'Caste and the Indian Economy' (2019) 57 JEL 781.

[208] 'Caste-Based Discrimination in South Asia: Situational Overview, Responses and Ways Fordward' (Study commissioned by the European Commission to the International Dalit Solidarity Network 2009).

human development criteria, this group consists of the poorest in Indian society. The different reports of the National Commission for Scheduled Tribes highlighted the discrimination faced by the Scheduled Castes and Tribes in India.

Three points have been identified to demonstrate the economic exclusion and discrimination of Dalits by Sukhadeo Thorat in *Dalits in India* (2009): firstly, in finding employment, buying agricultural land, accessing education, housing, and health; secondly, Brahminical Hindu tradition held that Dalits could not work in other caste occupations, and they thus face a further form of exclusion; thirdly, they are not only subjected to a difference in salaries within the job market, but also on the price of land, houses, and services (water and electricity).[209] According to ActionAid, in 11 Indian States, in 24.5% of the villages, Dalits are subject to discrimination in their salary and are paid less for the same work.[210] Sagarika Ghose too points out this form of discrimination in the job market: "He is generally never a member of the higher judiciary, an eminent lawyer, industrialist or journalist".[211] This conclusion remains valid, despite some prominent examples of lower caste individuals occupying positions of power in private companies or in the government. Notable examples are Jagjivan Ram, who held various portfolios in Indian cabinets (1946-1979), Meira Kumar (Ram's daughter), the Speaker of the Lok Sabha (2009-2014), and K.R. Narayanan (1997-2002), Ram Nath Kovind (2017-2022) and Droupadi Murmu since 2022, who have served as presidents of India. However, such figures intended to demonstrate the success of state policies of reservation remain an "alibi", to use Simone de Beauvoir's words.[212] As she noted, the professional success and visibility of certain women held out the hope that it was possible for all women to attain similar positions, masking the deep inequalities, which women experienced, and which denied them the development of their capacities and their potential. On the larger scale, the insidious and everyday discrimination and violence faced by Dalit groups continues and is testified by recent crimes such as the Hathras rape case.[213]

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[209] Sukhadeo Thorat, *Dalits in India - Search for a Common Destiny* (SAGE Publications India Pvt Ltd 2009) 139.

[210] ibid 140; Ghanshyam Shah and others, *Untouchability in Rural India* (SAGE Publications India Pvt Ltd 2006).

[211] Sagarika Ghose, 'The Dalit in India' (2003) 70 Social Research 83, 83; AM Shah, 'Caste in the 21st Century: From System to Elements' (2007) 42 EPW 109.

[212] Pierre Viansson-Ponté, 'Simone de Beauvoir au « monde », en 1978 : « J'ai cru trop vite à une proche victoire des femmes »' *Le Monde* (8 March 2019).

[213] 'Ethos of Justice and Its Adversaries' (2015) 55 EPW 7.

5. Conclusion

Human rights bodies established multiplied criteria to determine discrimination between persons in similar situations, whose differential treatment cannot be objectively and rationally justified.[214]

At the simplest level, discrimination can be understood as the violation of the basic principle that all persons should be treated equally in equal circumstances. It can be grounded on various protected characteristics such as race, ethnicity or nationality, gender and sex, sexual orientation, language, religion or opinions, birth, economic situation, disability or illness, or even age. The complexity of discrimination is heightened by the intersectionality of these categories and social experiences.[215] As victims of discriminatory legislation, minorities find themselves affected in their public and personal lives both through social practices and legal policies.

[214] Hennebel and Tigroudja, *Traité* (n 149) 761.

[215] Eero Olli and Birgitte Olsen, 'Towards Common Measures for Discrimination II - Recommendations for Improving Measurement of Discrimination' (European Commission 2006).

Chapter 3. Assam in academic discourse: a review of existing literature

Current human rights violations in Assam centred on depriving citizens of their nationality cannot be understood without considering the region's ethno-geopolitical history. Nationality issues and ethnic diversity in Assam results from administrative changes under the colonial period, geopolitical reorganisation after Partition, and the successive movements of population from Bengal and Bangladesh. These three successive periods of change have shaped the actual problem of citizenship in Assam, embroiling it with questions such as identifying foreigners, or deciding the legitimacy of different ethnic claims to ownership of land and belonging.

The determination of nationality issues is analysed through two angles: ethnic affiliation and citizenship. Common to both are political developments. Works undertaken by Indian political and social scientists accord centrality to government policies and approaches to the region after independence. Analysing this aspect is critical to understanding the contemporary violations of the right to nationality in Assam.

1. Ethnicity in Assam

Until the 1920s, ethnicity was described by anthropologists as a "primordial identity", "given at birth" and considered a permanent feature.[216] After the 1950s, social sciences argued that ethnicity was not primordial but, on the contrary, subject to change, and though culturally defined, changeable, and politically manipulable.[217] As sociologist Wsevolod Isajiw

[216] Clifford Geertz, 'The Integrative Revolution: Primordial Sentiments and Civil Politics in the New States' in Clifford Geertz (ed), *Old Societies and New States* (Free Press 1963) 105–157; Harold Isaacs, 'Basic Group Identity: The Idols of the Tribe' in N Glazer and DP Moynihan (eds), *Ethnicity: Theory and Experience* (Harvard University Press 1975) 29–52; Pierre L van den Berghe, 'Race and Ethnicity: A Sociobiological Perspective' (1978) 1 Ethn. Racial Stud. 401, 401; John F Stack (ed), *The Primordial Challenge* (Wesport, CT: Greenwood Press 1986).

[217] See: Fredrik Barth (ed), *Ethnic Groups and Boundaries: The Social Organization of Culture Difference* (George Allen and Unwin 1969).

highlighted, we are not faced with a case where an ethnic group precedes ethnicity,[218] but rather as anthropologist Jack David Eller underlined, ethnicity is rather the process which gives rise to ethnic groups.[219]

Since the 19th century, historians, anthropologists and sociologist have analysed Assam's ethnic diversity through three prisms: (i) a long-term perspective and historical approach, emphasizing British colonial administrative decisions in shaping quarrels of belonging and status; (ii) the complex issue of population migration into the region; and (iii) the ethnic conflicts between groups.

1.1. Colonial interventions in the ethnic landscape

In Assam, ethnic complexity is multiplied by the entry of waves of culturally diverse groups going back to the 8th century. Academics have analysed the region's ethnic landscape before the arrival of British in the region.[220] The historian Barpujari describes Northeast India as a significant crossroads of migration routes,[221] also known as the Assam-Burma routes.[222] Barpujari and Hazarika look at the historical roots of migration, from the penetration by the Tai into the Brahmaputra Valley in the 8th century to the expansion of the Ahom kingdom in 1512.[223]

However, no work on Assam's complex citizenship question can ignore the critical actions of the colonial government, which shaped the relations between hills and plains, sowing the seeds of future troubled relations. Queen Victoria's promise in 1858 of non-interference in

[218] Wsevolod W Isajiw, 'Definition and Dimensions of Ethnicity: A Theoretical Framework' (Joint Canada-United States Conference on the Measurement of Ethnicity, Ottawa, Ontario, Canada, 2 April 1992) 5.

[219] Jack David Eller, 'Ethnicity, Culture, and "The Past"' (1997) 36 MQR.

[220] Udayon Misra, 'Immigration and Identity Transformation in Assam' (1999) 34 EPW 1264, 1264–1265.

[221] HK Barpujari, *The Comprehensive History of Assam Vol. II Medieval Period: Political From Thirteenth Century A.D. To the Treaty of Yandabo 1826* (Publication Board Assam 1992) 35.

[222] Jaysankar Hazarika, *Geopolitics of North-East India: A Strategical Study* (Gyan Publishing House 1996) 41.

[223] ibid 59.

the customs, traditions and social practices of her Indian subjects,[224] created the necessary conditions for preserving ethnic identities, which Max Weber and sociologists since have characterized as a shared belief in their origins, religion, language, or common cultural practices.[225]

One of the earliest works on the question of British colonisation of the region by an administrator, Alexander Mackenzie, offers a good description of British imperial imperatives and concerns about fixing the loose-knit society of this region.[226] Assam's creation as a province in 1874 distinguished undeveloped tribal tracts from the rest of the region. Further, an inner line system that required a permit to cross introduced a first bureaucratic impediment to movement and erected both physical and cultural barriers between the hills and the plains. Thus, administrative policies during colonisation, and socio-economic factors encouraged ethnic groups to retain their distinctiveness and not let themselves be absorbed into the dominant and unique 'Axamiya' identity.[227] No official definition exists for this concept, yet it resonates with an ethnic identity among residents of Assam. It often refers to the Assamese community whose mother tongue is Assamese.[228]

This stratification of ethnic groups was exacerbated by the administrative impact of colonial policies.

Firstly, due to the changing status of the hill areas, from tribal, to backward (1919), to 'excluded or partly excluded' (1936).[229] This reinforced their linguistic, cultural separation from the plains' populations. The colonial anthropological approach determined the status of different communities, determining the range of their rights related to cultivation, land ownership, forest

[224] Proclamation by the Queen in Council to the Princes, Chiefs and people of India 1858.

[225] Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Roth Guenther and Wittich Claus eds, Bedminster Press 1968) 389; Rodolfo Stavenhagen, *Problèmes et perspectives des États à ethnies multiples: conference donnée le 27 mars 1986 a Lomé, Togo* (Universite des Nations Unies 1986) 4.

[226] Alexander Mackenzie, *A History of the Relations of the Government with the Hill Tribes of the North-East Frontier of Bengal* (1884).

[227] Uddipana Goswami, *Conflict and Reconciliation: The Politics of Ethnicity in Assam* (Routledge India 2014) 68.

[228] Kasturi Bharadwaj, 'Ethnicity in Assam: Understanding the Complexities of Ethnic Identities and Conflicts' (2016) 62 Indian Journal of Public Administration 546, 549.

[229] ML Bose, *Development of Administration in Assam: With Special Reference to Land Revenue Justice and Police 1874-1920* (Concept Publishing Company Pvt Ltd 2010) 1874–1920.

access, or development of professional skills, level of education and exercise of power. It increased traditional discontent and animosity amongst indigenous populations against Bengalis. Already in the second half of the 20th century a differentiated landscape was being defined of who had right to what, depending on their geographical locations in the hills or in the plains.

Secondly, the colonial government, or what anthropologist Nicholas Dirks has termed "ethnographic state", defined the rights of populations categorised according to their customs, kinship behaviours or rituals.[230] Under the larger discursive frames of savages and primitives, the population was divided into castes and tribes. Manasjyoti Bordoloi underlines how colonial policy targeted two distinct groups of migrants and tribes, leading to substantial demographic changes.[231] This increased with the 1873 Bengal Eastern Frontier Regulation. Bordoloi argues that this created a new internal frontier, or an Inner Line along the Assam foot-hill tracts.

These policies, which brought with them material advantages (land ownership for instance), consolidated tribal identity within the mosaic of the ethnic group, and privileged specific territorial affiliations that lay within the pale of British India rather than on the periphery. As Arvind Sharma cogently argues, they encouraged migratory groups to affirm their Indic[232] ritual status and belonging.[233]

Imperial policy in Assam between 1836 and 1871 suppressed Assamese language in favour of Bengali. Known as the dark period of Assamese language, literature and culture, it deepened the divisions within Assam.[234] In 1837, Bengali was declared the official language in courts and in education, replacing Assamese.[235] Bengalis were more acquainted with British

[230] Nicholas B Dirks, *Castes of Mind: Colonialism and the Making of Modern India* (Princeton University Press 2001).

[231] Manasjyoti Bordoloi, 'Impact of Colonial Anthropology on Identity Politics and Conflicts in Assam' (2014) 49 EPW 47, 51.

[232] Indic religious refers to Hinduism, Buddhism, Jainism and Sikhism.

[233] Arvind Sharma (ed), *Goddesses and Women in the Indic Religious Tradition* (Brill 2005) 45–49.

[234] Sanjib Baruah, *India against Itself: Assam and the Politics of Nationality* (OUP 1998) 71.

[235] HK Barpujari (ed), *North-East India, Problem Prospect and Politics* (Spectrum Publishers 1998) 109; P Majumdar, *Colonialism, Language and Politics, Origins of the Language Dispute in Assam* (DVS Publishers 2014) 57.

administration than the Assamese[236] and Bengali recruitment into the local administration and schools accelerated stoked differences between the local middle class and immigrants.

Both Bengalis and Assamese viewed the state government and institution as an instrument to consolidate their own positions in society.[237] Political scientist, Weiner emphasizes this factor as decisive in the relationship between Bengali Hindus and Bengali Muslims from the 19th century. In the 19th and 20th century, Bengali Hindus, benefiting from higher education, were able to consolidate their position in the administration. With independence in 1947, the Assamese in power then tried to promote Assamese cultural identity and win equality with Bengali Hindus in the economic sphere and in society.[238]

Anti-colonial movements attempted to create new solidarities beyond old social divisions and ethnic identities, seeking to forge a unity, which Anthony Smith considers a core point for State survival.[239] Their search for a shared Indian identity above traditional identities came up against the web of ethnic identities.[240]

The formation of political parties, like the Assam Tribal League can be traced to this context. It would take up the cause of their community interests and continue in the postcolonial landscape under different labels.

1.2. Emergence of micro-nationalism

Largely associated with the 20th and 21st century, the concept of micro nationalism corresponds to the emergence of small entities bound, according to the political scientist Snyder by history, tradition, culture, and a sense of nationalist sentiment.[241] Baruah, using a political

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[236] Paramananda Majumdar, 'Introduction of the Bengali Language in the 19th Century Assam: Role of the British' (2006) 67 P.I.H.C. 787, 787.

[237] Myron Weiner, 'The Political Demography of Assam's Anti-Immigrant Movement' (1983) 9 Population and Development Review 279, 284; ML Bose, *Social History of Assam,* (Ashok Kumar Mittal Concept Publishing Company 1989) 91.

[238] Weiner (n 245).

[239] Anthony D Smith, 'Nationalism and Classical Social Theory' (1983) 34 Br J Sociol 19.

[240] Hiren Gohain, 'Ethnic Unrest in the North-East' (1997) 32 EPW 389, 389.

[241] Louis L Snyder, *Encyclopedia of Nationalism* (Paragon House 1990) 212.

science approach, uses the concept in Assam, to highlight the nationalist political atmosphere[242] produced in the ethnic landscape after independence. The determination of regional political groups and the Assamese students movement for greater autonomy, created a micro nationalist movement.

Baruah emphasizes ethnicity as an evolving phenomenon, responding to political and administrative policies. This constructivist approach,[243] apprehends ethnic identity as bound to a specific social and historical context. He addresses the challenges ethnicity raises for nation building as well as for the emergence of modern nation states. The problem was confronted by sociologists, principally Weber, following 19th century European nationalist ideology that looked upon ethnic groups as a danger for nation-building, and the emergence of modern national states.[244] In the context of the territorial re-configurations of Northeast India, ethnicity served as a means to differentiate individuals from other groups.[245]

Baruah and Jogendra Das advance the idea that the emergence of these micro-nationalist movements is linked to the region's underdevelopment.[246] Das further argues that autonomy movements in Assam and the increase of ethnic and sub-nationality movements not only destabilised the social landscape, but also the state's economy.[247]

These positions correspond to those of anthropologists like Abner Cohen,[248] or political scientists Paul Brass and Ted Gurr. They draw attention to the manipulation by leaders of modern states using ethnic identity to promote their own agendas. In the same vein,

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[242] Sanjib Baruah, '"Ethnic" Conflict as State—Society Struggle: The Poetics and Politics of Assamese Micro-Nationalism' (1994) 28 MAS 649, 650;654.

[243] Andreas Wimmer, 'The Making and Unmaking of Ethnic Boundaries: A Multilevel Process Theory' (2008) 113 Am. J. Sociol. 970; Kanchan Chandra, 'Cumulative Findings in the Study of Ethnic Politics' (2001) 12 APSA-CP 7, 7.

[244] Mörner Magnus, 'Ethnicidad, Movilidad Social y Mestizaje En La Historia Colonial Hispanoamericana' in Jan-Åke Alvarsson and Hernán Horna (eds), *Ethnicity in Latin America* (Uppsala University 1990) 30.

[245] George A De Vos, 'Ethnic Pluralism: Conflict and Accommodation: The Role of Ethnicity in Social History' in George A De Vos and Lola Romanucci-Ross (eds), *Ethnic Identity: Cultural Continuities and Change* (Palo Alto: Mayfield Publishing Company 1975) 16.

[246] Baruah, '"Ethnic" Conflict as State' (n 250) 654.

[247] Jogendra Kr Das, 'Assam: The Post-Colonial Political Developments' (2005) 66 IJPS 873, 873.

[248] Abner Cohen, 'Introduction: The Lesson of Ethnicity' in Abner Cohen (ed), *Urban Ethnicity* (Tavistock Publications 1974); Abner Cohen, *Custom and Politics in Urban Africa* (University of California Press 1969).

anthropologist Jay Sokolovski argues that ethnic groups are perceived as a product of political myths, and are thus created and manipulated by elites.[249]

Indeed, state policies after independence furthered the consolidation of ethnic movements in Northeast India.[250] The creation of the state of Assam highlighted the reality of a multi-ethnic society on the one hand, and on the other, a political determination to weave these together into a uniform regional identity.

1.3. Politicisation of ethnic conflicts

Conflict in Assam is multiple in nature. It extends from ethnic conflicts between groups to the struggle for control by the state, and tussles with local power structures. Feminist researcher, Goswani highlights the confrontation between ethnic groups over ownership of an 'Axamiya' identity.[251]

Scholars highlight several elements to explain these ethnic conflicts.

Militarisation – Till the end of the 1990s literature on ethnic consolidation followed primordialist theories,[252] which also argued that different communities are more prone to fighting amongst themselves. In 1997, Das' work on ethnic insurgencies in the region stressed the political contingent of ethnicity.[253] He saw the political angle as crucial for understanding continuities in inter-ethnic conflicts and their resolution.

Social scientists see the role of organisations in sustaining ethnic identity movements in Assam as an important aspect of ethnic conflict in the region.[254] Baruah argues that in Assam, ethnic categories have served as ammunition for political projects, which has affected peace in the

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[249] Jay Sokolovsky, 'Ethnicity, Culture and Aging: Do Differences Really Make A Difference?' (1985) 4 J Appl Gerontol 6.

[250] Gohain, 'Ethnic Unrest in the North-East' (n 248) 391.

[251] Goswami (n 217) 87; Misra, 'Immigration and Identity Transformation in Assam' (n 228) 1265.

[252] Geertz, 'The Integrative Revolution: Primordial Sentiments and Civil Politics in the New States' (n 224); Isaacs (n 224); Stack (n 224).

[253] Samir Kumar Das, 'Ethnic Insurgencies in North-Eastern India: A Framework for Analysis' in B Pakem (ed), *Insurgency in North-Eastern India* (Omsons 1997).

[254] Parag Moni Sarma, 'Ethnicity, Identity and Cartography: Possession/Dispossession, Homecoming/Homelessness in Contemporary Assam' (2011) 3 Stud. Transit. States Soc 24, 25–26.

region, and led to conflict since India's independence.[255] These in turn have affected the traditional balance of ethnic groups in the region and fomented conflicts.[256] The situation was aggravated with independence. Gohain shows that the arrival of foreigners in Assam was perceived as a threat to the Assamese speaking community.[257] This led to discriminatory practices: a process of assimilation for tribal communities, but not for immigrant Muslims;[258] and linguistic nationalist policies by NGOs such as the *Asam Sahitya Sabha*, which mobilised support for ethnic separatism in the region.[259] Gohain sees this situation as the result of the rise of militancy among ethnic groups due to State failure in dealing with changing socio-economic contexts.[260] Equally, Sanjib Baruah,[261] Manorama Sharma,[262] Gail Omvedt,[263] and Udayon Mishra,[264] see militancy rooted in the backward economic and political development in the region. Udayon Mishra maintains that these conflicts can be perceived as the 'periphery strikes back'.[265] Das shows how the region's reorganisation has encouraged small communities and elites to increase their demands for reorganisation.[266]

Peripheral location – This structural condition is considered by scholars to be the main cause of violence. At the start of the 1990s, new policies were introduced in the region, opening its

[255] Sanjib Baruah, 'Immigration, Ethnic Conflict, and Political Turmoil Assam, 1979-1985' (1986) 26 Asian Survey 1184, 1185.

[256] N Dutta, *Question of Identity in Assam: Location, Migration, Hybridity* (Sage 2012) 144.

[257] Gohain, 'Ethnic Unrest in the North-East' (n 248) 390.

[258] Hiren Gohain, 'Once More on Ethnicity and the North-East' (2008) 43 EPW 18, 19.

[259] Baruah, '"Ethnic" Conflict as State' (n 250) 665–666.

[260] Gohain, 'Ethnic Unrest in the North-East' (n 248) 391.

[261] Baruah, *India against Itself: Assam and the Politics of Nationality* (n 242); Sanjib Baruah, *Durable Disorder: Understanding the Politics of Northeast India* (OUP 2005).

[262] Manorama Sharma, *Social and Economic Change in Assam: Middle Class Hegemony* (Ajanta Publications 1990).

[263] Gail Omvedt, *Reinventing Revolution: New Social Movements and the Social Tradition in India* (East Gate 1990).

[264] Udayon Misra, *North East India - Quest for Identity* (Omsons 1988).

[265] Udayon Misra, *The Periphery Strikes Back: Challenges to the Nation-State in Assam and Nagaland* (Indian Institute of Advanced Study 2000).

[266] Samir Kumar Das, 'The State and the Middle Class: The Case of Assam (1979-1990)' in B Datta Ray and SP Agrawal (eds), *Reorganization of North-East India since 1947* (Concept 1996).

economy to wider markets. For B.G. Verghese,[267] Gulshan Sachdeva,[268] Sikdar Sujit and Devadas Bhorali,[269] development was perceived as the solution to end ethnic conflict. While for Baruah, connecting the region with its neighbours was not a solution to conflict, violence and insurgency movements.[270] He held that development, rather than serving as a key to end violence may, on the contrary, aggravate conflicts over power, land or jobs. Dutta argues that development should be pursued in respect of human security.[271]

Official language – Scholars attribute the discontent of hill people who speak the Singpho dialect, to the imposition of Assamese as the official language of the state in 1960. This deepened tribal communities' fears of a future disintegration, and their assimilation into the Assamese community through economic pressures. Nevertheless, government reports assessed that the Assam hills had done well, with a rise in per capita income.[272] Linguistic tensions, and violence between the hill people, and the Assamese and Bengali speaking peoples, also saw the emergence of new pressure groups such as the All-Party Hill Leaders Conference, demanding separation, resulting in the establishment of Meghalaya state in 1972.

Population displacements and anti-immigration movement – Migration in Northeast India deeply affected ethnic interrelations. Ranabir Samaddar's work on migration from Bangladesh to West Bengal since 1947, pinpoints the historical conditions responsible for these flows and their links with collective violence and politics.[273] Other scholars like Mridula Dhekial Phukan argue that violence was directed towards ethnic and religious groups migrating from one place

[267] BG Verghese, *India's Northeast Resurgent: Ethnicity, Insurgency, Governance, Development* (Konark Publishers 1997).

[268] Gulshan Sachdeva, *Economy of the North-East: Policy, Present Conditions, and Future Possibilities* (Konark Publishers 2000).

[269] Sikdar Sujit and Devadas Bhorali, 'Resource Mobilisation, Distribution Effect and Economic Development of the North-Eastern Region' in Gurudas Das and RK Purkayastha (eds), *Liberalisation and India's North East* (Commonwealth Publishers 1998).

[270] Chandra Nath Baruah, 'Assamese Response to Regionalism: A Study Based on 1985 and 1991 Elections' in Girin Phukon and Adil-Ul Yasin (eds), *Working of Parliamentary Democracy and Electoral Politics in Northeast India* (South Asian Publishers 1998).

[271] Akhil Ranjan Dutta (ed), *Human Security in North-East India: Issues and Policies* (Anwesha 2010).

[272] 'Report of the Commission on the Hill Areas of Assam 1965-66, Pataskar Report' (Government of India 1966).

[273] Ranabir Samaddar, *The Marginal Nation - Transborder Migration from Bangladesh to West Bengal* (SAGE Publications 1999).

to another.[274] Work on population displacement and their evolution has been seen as a key element in understanding political responses.

Migration flux in the region has promoted policy responses by the central government. Yet, these measures, though adopted within the legal framework, are perceived as further dividing communities and increasing violence towards them. Amarjeet Singh highlights this point by examining the promulgation of the Illegal Migrant (Determination by Tribunal) Act, 1983 (IMDT Act). The anti-immigration movement in Assam pushed the federal government to enact new legislation aimed at identifying non-citizens in the state. This legal measure created divisions between individuals and communities. In fact, with the abolition of the IMDT Act, Muslims who initially supported it, protested that their community would be harassed by police forces.[275]

Social movements in Assam have appeared as a voice for anti-immigration policies. This corresponds to Fuchs and Linkenbach's understanding that they are rational undertakings by movements who give voice to collective projects through their mobilizing efforts.[276] In Assam, anti-immigration movements turned violent during Partition, and Bangladesh's independence (1971). Anti-immigration protest escalated under the United Liberation Front of Assam (ULFA) group after 1979. Initially perceived as a moderate movement, it became rapidly more militant.[277] Representing the tribal and ethnic groups of Assam, ULFA functioned as a platform of protest against the central government in the 1990s. Their radicalisation was a consequence of two elements: the inaction and repression of the government, and the legitimisation and acceptance of the use of violence.[278]

Anti-immigration movements in Assam, while addressing issues of illegal immigration in the region, focused attention on their claims, legitimised violence, used terrorists' techniques,[279]

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[274] Mridula Dhekial Phukan, 'Ethnicity, Conflict and Population Displacement in Northeast India' (2013) 1 AJSSH 91.

[275] M Amarjeet Singh, 'The Politics of Migration in India: What It Is; and What to Do?' (2013) 1 Third Front Journal of Humanities and Social Science 1, 10.

[276] Martin Fuchs and Antje Linkenback, 'Social Movements' in Veena Das (ed), *The Oxford India Companion to Sociology and Social Anthropology* (OUP 2003).

[277] Samir Kumar Das, *Civil Society, Conflict and Peace* (East West Center 2007).

[278] Jennifer M Hazen, 'From Social Movement to Armed Groups: A Case Study of Nigeria' in Keith Krause (ed), *Armed Groups and Contemporary Conflicts: Challenging the Weberian State* (Routledge 2010) 81.

[279] Nani Gopal Mahanta, *Confronting the State: ULFA's Quest for Sovereignty* (Sage Publications 2013).

and created insecurity for Muslim Assamese, questioning their assimilation in society.[280] The Nellie massacre of February 1983, in which nearly 1800 Muslims peasants of East Bengali origin were killed following attacks by indigenous Assamese and Tiwas**,** was the biggest collective act of violence in Assam.[281] The focus on the causes and circumstances of communal violence linked with the rise of right-wing Hindu politics,[282] draws upon studies on collective violence in history, sociology, anthropology and political science in the mid-1990s. Paul Brass' analyses of the politicisation of differences between religious groups in North India offers a detailed picture of the means and channels of instrumentalization and manipulation[283] of communal violence by political parties[284] and Asghar Ali Engineer's studies of communal riots between Hindus and Muslims puts the blame squarely on politicians.[285]

2. Citizenship in Assam

Citizenship in the Indian modern State system is linked to the drawing of state boundaries after Partition. In theory, citizenship and ethnicity should not be linked, yet in many States that operate a *jus sanguinis* citizenship policy, both concepts are intrinsically linked. In India these concepts are not detachable. In the current literature three approaches stand out to the question.

Religious belongings – In Assam, the citizenship issue is intertwined with ethnic conflict within the state. Hindu-Muslims riots since 1947 imposed religious belonging in discussions on citizenship. Further, the notion of foreigner intensified with the entry of immigrants added

[280] ANS Ahmed and Adil-Ul Yasin, 'Problems of Identity, Assimilation and Nation Building: A Case of the Muslims of Assam' in Phukan Girin and NL Dutta (eds), *Politics of Identity and Nation Building in North-East India* (South Asian Publishers 1997) 148.

[281] Makiko Kimura, *The Nellie Massacre of 1983: Agency of Rioters* (SAGE Publications 2013) 1; *Times of India* (22 February 1983).

[282] See: Veena Das (ed), *Mirrors of Violence: Communities, Riots and Survivors in South Asia* (OUP 1990); Surendra K Gupta and Indira B Gupta, *Conflict and Communication: Mass Upsurge in Assam.* (Har-Anand 1990); Nag Sajal, *Roots of Ethnic Conflict: Nationality Question in North-East India* (Manohar 1990); Makiko Kimura, 'Memories of the Massacre: Violence and Collective Identity in the Narratives on the Nellie Incident' (2003) 4 Asian Ethnicity 225.

[283] Jaideep Saikia, *Frontier in Flames: North-East India in Turmoil* (Viking 2007); Subir Bhaumik, *Troubled Periphery: Crisis of India's North East* (SAGE 2010).

[284] Paul R Brass, *The Production of Hindu–Muslim Violence in Contemporary India* (OUP 2003) 25.

[285] Asghar Ali Engineer, 'Bhagalpur Riot Inquiry Commission Report' (1995) 30 EPW 1729, 1729.

to the complexity of the ethnic tangle. Bengali Muslims and immigrant Bangladeshis considered as 'foreigners', became common enemies of Asomiya speaking peoples and the tribal and ethnic groups of the region. For Jaswant Singh, a founding member of the BJP, the immigration situation offered a favourable terrain to win support by raising the spectre of 'uncontrolled and mostly illegal immigration'.[286] Sanjib Baruah describes how the Assam movement of 1979-1985, whilst forging an Assamese unity, redefined who was a foreigner in Assam.[287] Illegal immigrant, citizenship and ethnic conflict in Assam thus became inseparable and enmeshed in religious identities in the literature.[288] Kustavmoni Boruah's[289] and Navine Murshid's[290] discussion of the foreigner recalls the distinction between Hindu insiders and Muslim (Bengali) outsiders. For Murshid, this sentiment is clearly a post-independence construction.

Historical line – This approach to citizenship in India is broadly shared by among scholars. Anupama Roy follows a chronological and historical approach to the evolution of citizenship across three landmark dates that determined the nation's citizenship criteria. She highlights the State practice of considering political factors, both domestic and external.[291] Firstly, she singles out the Partition and the migratory flux between Pakistan and India in 1947, emphasizing the continuity of this flux after the borders were settled. Secondly, she analyses the 1986 CAA in relation to the political turmoil in Assam and the rise of separatism in the state. Finally, she examines the 2003 CAA which gives citizenship to individuals of Indian origin living abroad. Indeed, this Amendment raised fundamental questions about the criteria of Indian citizenship.

Continuing this approach Niraja Gopal Jayal (2013) underlines the constitutional and democratic processes that determined citizenship after independence. She situates the concept within the longer framework of Indian colonial governance practices and anticolonial

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[286] Jaswant Singh, 'Assam's Crisis of Citizenship: An Examination of Political Errors' (1984) 24 Asian Survey 1056, 1060.

[287] Baruah, 'Immigration, Ethnic Conflict, and Political Turmoil Assam' (n 263).

[288] Walter Fernandes, 'IMDT Act and Immigration in North-Eastern India' (2005) 40 EPW 3237; Shahiuz Zaman Ahmed, 'Identity Issue, Foreigner's Deportation Movement and Erstwhile East Bengal (Present Bangladesh) Origin People of Assam' (2006) 67 PIHC 624.

[289] Kaustavmoni Boruah, '"Foreigners" in Assam and Assamese Middle Class' (1980) 8 Social Scientist 44.

[290] Navine Murshid, 'Assam and the Foreigner Within: Illegal Bangladeshis or Bengali Muslims?' (2016) 56 Asian Survey 581.

[291] Anupama Roy, *Mapping Citizenship in India* (OUP 2010).

nationalist discourses while linking concept to the country's complex social architecture. Two core points are raised. First, compared to European countries, India's recognition of rights is on a collective, rather than the individual level. Second, social citizenship gained importance within a political environment, which emphasized State withdrawal from its obligation of public provisions.[292]

2019 CAA – Scholars have recalled the importance of the citizenship concept and its link with the Indian republic's values of justice, liberty, equality and fraternity. The historical dimension is recalled in the book *On citizenship,* by the historian, Romila Thapar, and the political commentator N.Ram.[293] Thapar in her chapter entitled 'The right to be a citizen' explores the evolution of citizenship in India and focuses on citizens' rights and the State's obligations towards its citizens. Ram in his chapter, 'The evolving politics of citizenship in republican India', provides a political history of the concept within India's democracy. Despite India's adherence to principles of *jus domicilli, jus soli* and *jus sanguinis,* Ornit Shani argues that Indian policy on citizenship considers divisions and conflicts within the population, thus elaborating a more complex notion of citizenship that acknowledges different groups, from family, community, caste, to eventually, the nation.[294] The concept of citizenship remains closely tied to ethnicity, considering not only social complexities but also geopolitical questions. Citizenship is therefore perceived as a tool to incorporate individuals, whilst respecting their membership of smaller social units.[295] It allows a sense of membership within the nation, while including belonging to other groups. However, it leads to a confusion between citizenship and ethnicity according to Oommen,[296] opening discussions amongst historians on "Can a Muslim be an Indian?".[297] While Pakistan declared itself a Muslim homeland, India refused identification with one religion or an ethnicity. Yet, with ethno-nationalism gaining legitimacy, political parties like the BJP do question Muslim belonging to the country and call for proof of

[292] Niraja Gopal Jayal, *Citizenship and Its Discontents: An Indian History* (Harvard University Press 2013) 19;164.

[293] Romila Thapar and others, *On Citizenship* (Aleph Book Company 2021).

[294] Ornit Shani, 'Conceptions of Citizenship in India and the "Muslim Question"' (2010) 44 MAS 145.

[295] Gershon Shafir and Yoav Peled, 'Citizenship and Stratification in an Ethnic Democracy' (1998) 21 Ethn. Racial Stud. 408, 409.

[296] TK Oommen, *Citizenship, Nationality and Ethnicity: Reconciling Competing Identities* (Polity Press 1996).

[297] Gyanendra Pandey, 'Can a Muslim Be an Indian?' (1999) 41 CSSH 608.

their loyalty.[298] India's post-independence record seems to have constructed Muslims as a minority.[299]

3. Conclusion: Assam through a long-term approach

The works discussed here testify that ethnic diversity in Assam is marked by tensions, and rivalry for greater share in power and resources. These reflect the many layers of accumulated discontent between different groups produced by a succession of administrative measures under the colonial state and post-1947. While there is general agreement about colonial responsibility in creating and breeding antagonisms between communities, there is an equal consensus about the failure of the post-colonial State to resolve these issues, ensure equality to all its citizens, and guarantee fundamental rights, as promised by the constitution. On the one hand, the central government's disregard for economic development in the region is held at fault. On the other, a principal reason for the current imbroglio in Assam is attributed to the ineffective political strategies of governments in power, and their inability to negotiate with regional political parties. At the same time, myths and fears about foreigners have taken root and favoured their exploitation by political parties seeking to establish territorial unity through ethnic homogeneity. Post 2019 CAA literature, following a top-down approach, highlights the failure in creating a national community.

[298] Vasundhara Sirnate, 'The RSS and Citizenship: The Construction of the Muslim Minority Identity in India' in Mushirul Hasan (ed), *Living with secularism: the destiny of India's Muslim* (Manohar New Delhi 2007) 232–233.

[299] Pandey (n 305).

Conclusion

Minority groups and discrimination are concepts that regularly interact, both positively with States protecting them, or negatively with violations of their core rights. Since the UN's creation the right to non-discrimination is clearly established and has been developed within IHRL. These concepts are certainly not a recent preoccupation. Scholars have deliberated on them through different prisms, as highlighted in the literature review above, and developed an important corpus of work.

Yet, India's case shows, how, in practice, minority groups, despite international legal provisions are victims of political developments, especially heightened ethnic nationalism.

The succeeding chapters analyse the functioning of law in the Indian democracy by examining the role of courts and judges in the application of the recent citizenship agenda that seeks to determine who belongs and who is an alien. Here, the judiciary appears as a parallel democratic arena to protect individual rights. These chapters study the effects of the constraints imposed by an ethnic nationalist regime on the judiciary's role in protecting minority rights. Ideally, the implementation of legal rights is undertaken by States without discrimination.[300] It presupposes equality in law and in the enjoyment of all human rights, which enjoins that group identity should not be an obstacle in the exercise of core human rights.[301] If democratic culture signifies political pluralism, representation, and non-discrimination in the extension of civil rights as well as tolerance, the case of Assam offers a rich terrain to study the problems in the development of this political culture.

[300] Article 1 and 55 United Nations Charter 1945; Article 2 UDHR; Article 2 ICESCR; Article 2 ICCPR.

[301] Lennox (n 43).

Part 2. Institutional, administrative and judicial erasure of religious and ethnic minorities: a case study of Assamese Muslims

> "I want to tell them frankly … that mere declarations of loyalty to the Indian Union will not help them at this critical juncture. They must give practical proof of their declaration."[302]

[302] Vallabhbhai Patel's - leading member of the Indian National Congress - speech at a public meeting in Lucknow on 6 January 1948. Vallabhbhai Patel, *For a United India: Speeches of Sardar Patel, 1947-1950* (Publications Division, Ministry of Information and Broadcasting, Govt of India 1967) 64.

Introduction

Investigating the role of the judiciary, particularly judges, is crucial in a political system where a government in power seeks to impose a strong Hindu State. More than a state-centric approach is required along with the need to consider other actors at the national level.

The inquiry proceeds in two steps: the first examines at the national level SC decisions on questions of the right to nationality within the framework of the Indian constitutional system that affirms the essential plurality and religious multiplicity of the State. The second takes a regional approach to evaluate the extent to which judges' decisions are determined by government directives, and the constraints it can impose on them, or if the judiciary is relatively independent. With this purpose it studies the functioning and decisions of FT and their supervision by the Gauhati High Court and the Assam Government since 2014 in a climate of aggressive Hindu nationalism. It thus permits for an examination of how judges may maintain their independence when the State becomes the principal violator of human rights through discriminatory legislation. This approach underlines how the current issue of nationality in India cannot be analysed exclusively through the prism of majority versus minority or a simple dichotomy between two religious' groups, i.e., Hindus versus Muslims. It should be understood as part of a structural discrimination that functions through judicial rulings towards minorities and is closely tied to the rise of ethnic nationalism in India, promoted by the Bharatiya Janata Party (BJP).[303]

This analysis is conducted is analysed in a precise context. India offers an example of a democratic State, which confirms core universal human rights standards in its Constitution. After gaining independence in 1947 it committed itself to promote and protect its cultural diversity. Nonetheless, India has witnessed violent conflict between religious groups. The Indian legal system today faces a double crisis: first, a critical revision of the engagements taken by the State to defend the customs of its diverse communities, and the constitutional recognition of minority groups and their rights; secondly, ideological change underpinning judicial decisions against the principles of the "rule of law".

[303] Christophe Jaffrelot and Cynthia Schoch, *Modi's India: Hindu Nationalism and the Rise of Ethnic Democracy* (Princeton University Press 2021).

One of the questions addressed in this case study is how an ethno-nationalist system that influences legislation and judicial practice cohabit with the norms and standards of human rights advocated by international conventions.[304] Furthermore, what latitude does the co-existence of these different bodies of laws – international, national and customary – offer the State, the courts, the judicial representatives as well as minorities, in defining and respecting minorities? Do they, as legal scholar Helen Quane claims, contribute to promoting a dialogue between all relevant stakeholders? Or do they make for incoherence and harden oppositions between minority communities and the State? Also, what is the role of the judiciary?

To understand the invisibility of one religious and ethnic minority in Assam (map 1) the thesis examines the ways in which discriminatory legislation, practices, and policies work. It investigates their role in the functioning of democracy and the rule of law. In December 2019, the government of India introduced a first comprehensive NRC, based on the compilation of a National Population Register (NPR), whose data collection was deferred to September 2022.[305] It was backed by a CAA, 2019. The NRC's implementation led to the exclusion of 1.9 million people of a population of 30.94 million being deprived of their citizenship and made stateless.[306]

Map 1: Localisation of the state of Assam in India

[304] A particular source of contention in India has been the BJP's demand for a uniform civil code as a means to extend equal treatment to religious minorities. It is contested by critics as a denial of identity and rights. Nivedita Menon, 'A Uniform Civil Cod in India: The State of the Debate in 2014' (2014) 40 Feminist Studies 480. Upendra Baxi, 'Siting Secularism in the Uniform Civil Code: A "Riddle Wrapped inside an Enigma"?' in Anuradha Dingwaney Needham and Raheswaru Sunder Rajan (eds), *The crisis of secularism in India* (Duke University Press 2007).

[305] Vijaita Singh, 'Census First Phase, NPR Data Collection Put off till September' *The Hindu* (2 January 2022).

[306] Priyali Sur, 'A Year After Rendering Millions Stateless, India Has Yet to Hear a Single Appeal' (*Foreign Policy*, 10 September 2020); 'Contested Citizenship in Assam: Public Hearing on Constitutional Processes and the Human Cost - Background Note' (Indian Society of International Law 2019).

Source: Assam – Wikipedia

Located in the North-East of India, the state of Assam with its 33 districts borders Bhutan and Bangladesh. The 270 km border with Bangladesh makes it difficult to control trans-border movements. Assam's population includes multiple indigenous groups (with at least twenty-three groups of tribes), which has made the introduction of equal citizenship more complex and layered.[307] The situation going back to the colonial period was aggravated with Partition, which created new national frontiers and divided the area into five Northeastern states. The consequences of civil war in Bangladesh (1971) drew in a large number of Hindus and Muslims migrants with roots in Bangladesh. Their arrival and the subsequent tensions with local populations in a region whose rich oil-reserves make it a precious resource for India, added political urgency in the 1980s to legalizing the situation of Assamese inhabitants, through confirmation of citizenship.

The analyses is done across two chapters, following a more a less chronological approach. Starting with the analyses of then the establishment of the legal concept of nationality since India's independence in 1947 (Chapter 4), and finishes by examining the current context of discrimination towards minorities and their invisibility through nationality deprivation in Assam (Chapter 5).

[307] Indigenous groups, known as *Adivasis*, often do not have proofs of their citizenship. Their exclusion from the NRC has led to their arrest and detention in transition camps. Some of the *Adivasis* living in the Saranda Forest of Jharkhand, do not have the required documents to prove their citizenship. 'Indian Citizenship Laws Have Deep Impact on Adivasis' (*International Work Group for Indigenous Affairs*, 5 February 2020).

In order to understand the development of legal norms defining nationality and citizenship, the following chapters are based on the analysis of Indian legal sources (legislation), newspapers in English and interview data. These shed light on some of the significant national and regional public debates on the question of citizenship, and the positions of the various actors involved: from political parties, public intellectuals, retired members of the judiciary, and academics, to civil society groups.

It is argued that respect of human rights depends on the individual's legal recognition by the State. This part attempts to understand and analyse some of the issues that can become an impediment to the cause of defending the right to nationality.

Chapter 4. Constitutional and legal structure of nationality

Ethno-nationalist political movements whilst aiming to rally people within a common national frame undeniably hit vulnerable and marginal groups negatively, through discrimination. Their impact can be easily perceived in social behaviour, and less obviously though more powerfully, through legislation and legal rulings. This observation applies to India but equally to Eastern and Central Europe and South America. Therefore, when analysing minority discrimination, the role of these political movements must be kept in mind, in order to understand the blurred frontiers between the legality provided by legislations, and the abuses arising during the application of these laws by judges. Scholars have singled out three general features of ethno-nationalist political movements that affect the nation's unity and individuals. The Indian case must be considered in this broad context to understand its particularities.

Firstly, extreme ethnic nationalism is often described as a sociological condition and must be analysed through the classification of empirical cases.[308] This approach does not consider political and economic complexities, nor does it integrate the impact of colonialism.[309]

Secondly, ethnic affiliations are at the heart of the discourse of ethno-nationalist parties. Individuals need to see their identity recognised by ruling governments, and while this element can be found in all modern Sates,[310] according to the anthropologist Clifford Geertz postcolonial states confront more extreme forms.[311] For Geertz, the place of ethnic affiliations in the construction of a modern nation is linked to two factors: (i) the need for public recognition of a distinct identity; and (ii) the will to be part of the new State.[312] States' diversity in terms of social structure, language, diet, or dress codes impact the socio-political dimension, and in extreme cases, democratic consolidation and nation-building. Primordial sentiments, understood here as the idea that nations and ethnic identities are fixed, can be used to define ethnic identities according to their historical importance and the role they may play

[308] Partha Chatterjee, *Nationalist Thought and the Colonial World* (Zed Books for the United Nations University 1986) 1–6; 3–4.

[309] Mohammad Shahabuddin, *Minorities and the Making of Postcolonial States in International Law* (Cambridge University Press 2021) 24.

[310] Extremist Rights political parties often recalled the national identity, such as the French party, le Rassemblement National.

[311] Clifford Geertz, *The Interpretation of Cultures* ((1973), Basic Books 2017) 258–260.

[312] ibid 258; Isaiah Berlin, *Two Concepts of Liberty* (Clarendon Press 1958) 42; Edward Shils, 'Political Development in the New States' (1960) 2 CSSH 265.

politically.[313] For new postcolonial States, despite the affirmation of key democratic values such as diversity, and the respect of the rule of law, primordialism remains fundamental (mainly for tribes or religious groups[314]) and governments, both central and regional, take cognizance of this factor.

Finally, it is certain that anticolonialism permeated ethno-nationalist ideologies in colonial States,[315] as nationalism became a synonym for patriotism.[316] In the Indian case, during the Ramgarh Conference of the Indian National Congress in 1940, Abul Kalam Azad, senior leader of the party, while referring to minorities and India's political future, stressed the impact of British imperialism in fomenting divisions within Indian society to consolidate its own power.[317]

Nationalists engaged in anticolonial struggles held colonial policy responsible for the promotion of ethno-nationalist programs. Even today, the consequences of such politics continue to affect the democratic system.[318] In many decolonised States under authoritarian governments, ethnic and religious divisions amongst the populations have led to recurrent crises at the regional level and undermined the legitimacy of the State. In the Nigerian case, also colonised by Great Britain, colonial administrative policies built around the principles of "us versus them", aggravated community and social divisions. Religious and ethnic differences,

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[313] Richard H Thompson, *Theories of Ethnicity – A Critical Appraisal* (Greenwood Press 1989) 53; Shahabuddin (n 319) 26; John D Huber and Pavithra Suryanarayan, 'Ethnic Inequality and the Ethnification of Political Parties: Evidence from India' (2016) 68 World Politics 149; Harjit Singh, 'Ethnic Identity Consciousness in the Developing Countries: Indian Experience' (2008) 69 IJPS 493; Craig Calhoun, 'Nationalism and Ethnicity' (2003) 19 Annu. Rev. Sociol. 211; Steven Ian Wilkinson, 'India, Consociational Theory, and Ethnic Violence' (2000) 40 Asian Survey 767; Atul Kohli, 'Can Democracies Accommodate Ethnic Nationalism? Rise and Decline of Self-Determination Movements in India' (1997) 56 J. Asian Stud. 325; Anthony D Smith, 'Culture, Community and Territory: The Politics of Ethnicity and Nationalism' (1996) 72 International Affairs 445; G Palanithurai, 'Ethnic Identity and National Loyalty of an Ethnic Group in India' (1990) 51 IJPS 84.

[314] Geertz, *The Interpretation of Cultures* (n 340) 270.

[315] Donald L Horowitz, *Ethnic Groups in Conflict* ((1985), University of California Press 2001) 157.

[316] Anthony H Richmond, *Immigration and Ethnic Conflict* (Macmillan Press 1988) 170–171.

[317] AM Zaidi, *Congress Presidential Addresses, Volume Five: 1940-1985* (Indian Institute of Applied Political Research 1985) pt Presidential Address to the Fifty-Third Session of the Indian National Congress Ramgarh, 1940 by Abul Kalam Azad (1888-1958). This divisive policy was traced back to 1821, and more precisely to the Latin expression "*divide et impera*" (divide and rule) used by a British officer, Commander of Moradabad in the 19th century. The idea is to be found in civil servant John Strachey's book *India* (1888). See: Rajani Palme Dutt, *India Today* ((1940), Publishing House Ltd 2008) 456; Baman Das Basu, *Consolidation of the Christian Power in India* (R Chatterjee 1927) 74; John Strachey, *India* (Kegan Paul & Co 1888) 255.

[318] Pamela Price, 'Democracy and Ethnic Conflict in India: Precolonial Legacies in Tamil Nadu' (1993) 33 Asian Survey 493; Ramachandra Guha, 'Democracy and Violence in India and Beyond' (2013) 48 EPW 34.

mainly between Muslims and Christians, made for socioeconomic imbalances and increased the primacy of identity awareness.[319]

In India, these differences along with socioeconomic, regional imbalances inherited from the colonial period, favoured the success of ethno-nationalism ideologies. The evolution of citizenship debates and laws requires an in-depth analyses to understand that the issues linked today to citizenship in reality did not emerge with the success of ethno-nationalist ideologies but are in fact deeply rooted in Indian politics and date back to 1947. In line with the historical trajectory of States emerging from colonial rule, the enduring influence of the colonizers' historical legacy and practices remains ingrained in contemporary society. Therefore, the effectively analyses and comprehension of human rights violations linked to the right to nationality, leads to an imperative critical examination of political debates.

1. Requirements for a new nation

On the morrow of Partition,[320] as Britain withdrew, Pakistan and India were free to elaborate their independent policies regarding citizenship. Pakistan was created on arguments of nationhood based on a Muslim religious identity[321] and India as a multi-religious nation, comprising a majority Hindu population but also Muslims, Sikhs, Christians, Parsis and Jains.

[319] GC Sokoh, 'Primordial Sentiments, Nation Building and the Continuing Crises of Democracy in Nigeria' (2019) 7 GJPSET 9, 12; James D Fearon and David D Laitin, 'Ethnicity, Insurgency, and Civil War' (2003) 97 APSR 75, 82.

[320] For an overview of Partition historiography, see: Joya Chatterji, 'Partition Studies: Prospects and Pitfalls' (2014) 73 J. Asian Stud. 309; Asim Roy, 'The High Politics of India's Partition: The Revisionist Perspective' (1990) 24 MAS 385; Yasmin Khan, *The Great Partition: The Making of India and Pakistan* (Yale University Press 2017); Nonica Datta, 'Partition and Many Nationalisms' (2005) 40 EPW 3000; Kushwant Singh, *Train to Pakistan* (Chatto & Windus 1956).

[321] See: Ayesha Jalal, *Democracy and Authoritarianism in South Asia: A Comparative and Historical Perspective* (Cambridge University Press 1995); Sunil Khilnani, *The Idea of India* (Farrar, Straus and Giroux 1999).

Citizenship in India[322] has been produced by an ongoing dialogue between four approaches: liberal, republican, ethno-nationalist and a non-State conception.[323] Firstly, the liberal conception, which can be perceived as universal, considers that individuals have a set of rights which protect their personal liberties. Secondly, the republican approach holds that rights are granted to individuals in accordance with their contribution to the common good. Whilst this concept can be seen as a contribution to solidarity, it can equally serve to accentuate discrimination between individuals. Thirdly, the ethno-nationalist notion is based on individuals' membership to descent groups, and thus excludes any individuals who do not have any blood-ties. A parallel can be drawn between this approach and the "historic-biological" citizenship approach,[324] as both link identity claims to membership of the political community. These first three elements are primarily defined from the perspective of the State, as citizenship corresponds to the creation of the State, and secondly, they can be generalised to any State. Yet, the fourth is specific to the case of India, and derives from Gandhi's ideas about colonial subjecthood and the State. According to him, institutions cannot control the right of individuals to be heard.[325] Colonial subjects who enjoyed minimum rights in the colonial State therefore were entitled to engage in civil disobedience acts.[326]

The dialogue amongst these approaches, led to a multiplicity of citizenship regulations, and produced three key Indian features: (i) some groups were excluded from the citizenship regime; (ii) individuals despite their social identities have various ways of being Indian; and (iii) institutions and governments can change positions in contexts of contestations and dissent. Consequently, acquisition of citizenship not only provides a link between individuals, social groups and the State, and maintains balance between the different religious and geographical groups, but it can more significantly determine the degree of inclusion versus exclusion within the body of the nation.

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[322] India does not make a distinction between citizenship and nationality. Both these terms are synonymous in Indian laws, despite the Constitution referring only to citizenship in its articles 5 to 11. Thus, IHRL's approach to nationality will be applied to the Indian concept of citizenship.

[323] Shani, 'Conceptions of Citizenship in India and the "Muslim Question"' (n 302) 150.

[324] It looks at nationality with respect to history or culture of the nation, or a social identity. Alfred Michael Boll, *Multiple Nationality and International Law* (Martinus Nijhoff Publishers 2007) 69.

[325] Javeed Alam, 'The Nation and The State in India: A Difficult Bond' in Zoya Hasan, E Sridharan and R Sudarshan (eds), *India's Living Constitution: Ideas, Practices, Controversies* (Permanent Black 2002) 96.

[326] Mohandas Karamchand Gandhi, *The Collected Works of Mahatma Gandhi (Electronic Book)*, vol 25: 27 October 1921–22 January 1922 ((1958), Publications Division Government of India 1999) 391–392.

With independence, tensions emerged between the ethno-nationalist and the liberal currents. Whilst the Congress upheld the goal of a nation based on diversity (caste, language, religion), within the context of Partition, ethno-nationalism gained ground, building upon, and promoting local patriotism.[327] In the Indian Constituent Assembly (ICA), doubts were cast on the national credentials and patriotism of individuals who were members of certain groups, such as the Muslim community. This would give rise to a thorny problem that continues to plague the Indian political and social landscape: can a Muslim be an Indian?[328] This approach interrogates whether nationality still corresponds to a relation between individual and the State.

In addition to the question of their belonging to a country, Muslims were no longer defined by their social categories, caste or geographical locations, but were simply homogenised as part of a community. Such a reduction of an identity allowed party leaders like Vallabhbhai Patel to create an easy distinction between Hindus ('we' and 'us') and Muslims.[329]

1.1. Consolidation of unity in the context of Partition

The CAD on nationality revolved around this difference in the treatment of refugees by the Indian State,[330] during the two partitions in 1947: (i) the province of Punjab;[331] and (ii) the province of Bengal. In fact, the refugee influx from East Bengal, though less dramatic in 1947, was the more drawn-out. It has been argued that individuals in the Northwestern regions

[327] On the formation of regional patriotisms in India see Christopher Bayly, *Origins of Nationality in South Asia* (OUP 1998).

[328] Pandey (n 305) 615.

[329] *Constituent Assembly Debates*, vol. V, s 5.44.100, 28 August 1947.

[330] Joya Chatterji, *Bengal Divided. Hindu Communalism and Partition, 1932-1947* (Cambridge University Press 1995).

[331] The case study focusing on the Northeast region, will not delve into the Partition events in Punjab. Here, violence due to Partition was particularly acute, provoking mass migrations: "*On both sides of the 35-mile-long road between Amritsar and Lahore, there were heaps of corpses. It appeared as if the entire territory had been converted into an extensive graveyard*." Ian Talbot and Gurharpal Singh, *The Partition of India* (Cambridge University Press 2009) 66–67; 161.

received more attention and aid from the new Indian State than individuals from Eastern Bengal,[332] mainly due to the varying scales of violence.

In the intense displacement of Hindus and Muslims, the citizenship question was strongly dominated by concerns for national security and the desire to consolidate national unity. The subcontinent's partition, and the accompanying communal riots, triggered the displacement of around 14.5 million people and led to human rights violations such as of the *right to life* and *physical integrity*. On the one hand, the territorial amputations of Punjab in the west and Bengal in the east had rendered alien certain segments of the population: 4,7 million Hindus and Sikhs fled West Punjab, and in parallel, 2,5 million Hindus fled East Pakistan in the direction of West Bengal, Assam and Tripura. Those who had considered themselves Indian suddenly found themselves to be residents of Pakistan. Others consciously chose to flee so that they could be Indian citizens.[333] The adoption of new legislation often comes in response to episodes of rupture and violence. India's legal attitude and process was marked by the Partition, not only because of the population influx, but equally because of the scale of community violence. This context of violence influenced the elaboration of a legal system.

In Eastern Bengal, the migration process was protracted. It started in 1946 with the Noakhali district riots,[334] and was rendered complex by the interplay of ethnicity, social tensions, and its geographical repercussion. Similar issues affected Assam. Firstly, until 17 August 1947, tribes in the region of East-Bengal did not know clearly if their land was in India or East Bengal. Secondly, until March 1948, a standstill agreement between India and Pakistan accepted a porous border that allowed individuals to cross the border in East-Bengal, to attend to their business, or their seasonal farming activities.

[332] Prafulla K Chakrabarty, *The Marginal Men: The Refugees and the Left Political Syndrome in West Bengal* (Naya Udyog 1999) 280–290.

[333] Arundhati Virmani, *Atlas Historique de l'Inde* (Autrement 2012).

[334] These riots touched the Hindu community who were subject to rapes, abductions, forced conversion to Islam and were slaughtered. The peace process established by Gandhi failed and led to an exodus from a majority of the survivors to West Bengal, Tripura and Assam.

Partition events thrust the Indian government in a position of protector of its citizens. The new Constitution setting down the rights of citizens was adopted in a climate of civil unrest, ethnic and religious discord. Furthermore, armed insurgency in Kashmir and in the Northeast heightened national insecurity, providing the framework in which the Indian State systematised its formal-legal regime of nationality.

Partition to a large extent was used to justify and morally legitimize India's future positions on nationality, and its respect of or distance from IHRL. While ten expert committees were set up to deal with the administrative aspects[335] at this time of power transfer and division of resources, no committee was created to deal with the potential problem of mass migration.

1.2. The Indian Constituent Assembly Debates

Negotiations between the leaders of the Indian nationalist movement for independence and the British Cabinet Mission led in 1946 to the establishment of the ICA (1946-1950). The CAD offer important insights into the discussions on the fundamental principles of citizenship.

It consisted of 389 members: 292 members of Provincial Legislative Assemblies, 93 from Princely States and Chief Commissioner's Provinces and 4 ICA members. With Partition and the creation of Pakistan, the seats diminished to 299.[336]

Granting West Punjab and East Bengal refugees' Indian nationality became a moral urgency in the light of their traumatic experience and losses. The notion of refugee was thus closely linked to the statute of nationality on the morrow of Partition. But the matter of Indians abroad, across the British empire (Burma, Sri Lanka, Fiji…) also had to be kept in mind.[337] As these decolonised countries defined their own nationality laws, many Indians were reduced to either statelessness or secondary citizens. In short, they fell into a state of refugeehood, understood as a sum of predicaments, status, and rights.[338] While no definition was given of

[335] Urvashi Butalia, *The Other Side of Silence: Voices from the Partition of India* (Penguin Books India 1998) 57.

[336] 'Constitution Making Process: Constituent Assembly' (*Constitution of India*).

[337] *Constituent Assembly Debates*, vol IX s 9.116.138, 11 August 1949.

[338] Cathryn Costello, 'On Refugeehood and Citizenship' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (OUP 2017).

"refugee", one element showed up throughout the debates: refugees in India were individuals who had fled in the context of Partition, fearful for their lives and security.

As already stated, even though international law explicitly distinguishes between nationality and citizenship, ICA debates focused only on citizenship. Did they for all that ignore the questions derived from the issue of nationality? A close examination of these debates and political declarations of these years reveals that the obsession with citizenship led to nationality being approached through the rights of the citizens.

A significant space was occupied by the question of minorities and their rights in the new Republic. Aware of the political importance of reassuring minority groups and calming fears about India becoming a theocracy like Pakistan, the ICA President, Rajendra Prasad, affirmed the principle of equality that would guide the future position of the government:

> To all the minorities in India we give the assurance that they will receive fair and just treatment and there will be no discrimination in any form against them. Their religion, their culture and their language are safe and they will enjoy all the rights and privileges of citizenship, and will be expected in turn to render loyalty to the country in which they live and to its constitution.[339]

His discourse carried a reassurance about their rights but equally mentioned their duties, mainly loyalty to their country. Despite official proclamations, heated arguments took place in the Assembly over who was Indian, the grounds on which Indian citizenship would be based, and even the prescriptive date and year for granting citizenship. Two elements stand out in this debate: to begin with, the citizenship question came to be inevitably linked with religious identity; unwittingly, because of the centrality of religious conflicts in the formation of the nation, religion was inextricably woven into the question of citizenship. Muslims were held responsible for the amputation of India, resentment ran high against Muslims who had opted for Pakistan, and their killings of Hindus. Thus, Muslims who remained in India became easy target of such anger, as illustrated in the Urdu novelist Ismat Chughtai story "Garm Hawa",[340] popular anger was fuelled by right wing Hindu groups. In turn, this gave rise to a further conflictual issue, mainly the delicate matter of which citizens could claim compensation for loss of agricultural land and the even more thorny issue of evacuee property. These aspects

[339] *Constituent Assembly Debates*, vol V, s 5.36.6, 14 August 1947.

[340] *Garm Hawa* (Directed by Mysore Srinivas Sathyu, 1973).

were of crucial interest to Hindu, Punjabi and Sikh lobbies in the Assembly speaking for their communities' losses in the recent violence. At the same time, less orthodox, partisan groups, led by Nehru or Ambedkar argued for the State's commitment to secularism, and the need to incorporate more universal human international principles of equity and justice while deciding the laws of citizenship. The debate on the proposed constitutional Article 5 (citizenship), which for the most part was discussed on 10, 11 and 12 August 1949, invited 130 amendments. In fact, Nehru declared that the articles on citizenship had "probably received far more thought and consideration […] than any other article contained in this constitution".[341]

Jurist and politician B. R. Ambedkar proposed the first draft of the article surrounding citizenship (Article 5).[342] It distinguished five categories of citizens: (i) individuals domiciled in India and born in India (Article 5-A-B); (ii) individuals domiciled in India, not born in India but residing in India (Article 5-C); (iii) individuals residing in India but who migrated to Pakistan (Article 5-A); (iv) individuals residing in Pakistan and have migrated to India (Article 5-A); and (v) individuals born of parents born in India but residing outside India (Article 5-B). These five categories contained, three main doctrines: *jus soli*, *jus sanguinis* and *jus domicilii*.

According to P. S. Deshmukh,[343] social activist, educationist and defender of peasants' rights, the drafting committee's citizenship provision formulated by Ambedkar would make "Indian citizenship the cheapest on earth".[344] For Deshmukh, *jus soli* was problematic, and he was dissatisfied with citizenship by birth. He argued that in this case, even a child born of a lady while she was transiting through the port of Bombay would get citizenship.[345] Consequently, he urged one amendment: being born in India should not be sufficient, the child should be born of Indian parents. [346] Despite such opposition, *jus soli* remains the main doctrine of Indian citizenship. Another element came to reinforce the choice of *jus soli* as the main basis

[341] *Constituent Assembly Debates*, vol IX, s 9.117.24, 12 August 1949.

[342] ibid IX, s 9.115.154-155, 10 August 1949. See Annex – 1.

[343] Deshmukh, as elected member of the Assembly from Central Provinces and Berar played a key role in the CAD on citizenship and federalism.

[344] *Constituent Assembly Debates*, vol IX, s 9.116.26-27, 11 August 1949.

[345] ibid s 9.116.27, 11 August 1949.

[346] ibid s 9.116.11, 11 August 1949.

of citizenship: the Partition context and the possibility of considering the residence (*jus domicilii*). Equally the proposed article (5-A) included rights of persons who migrated from Pakistan to India during partition, and Article 5-AA regulated citizenship claims of persons who migrated to Pakistan. Bhopinder Singh Mann, Sikh member of the Assembly from East Punjab, argued against the Drafting Committee's proposal laying down 19 July 1948 as the prescription date to grant Indian citizenship. He maintained that any person who fled the partition riots in Pakistan and came over to India before the adoption of the Constitution should be automatically granted Indian citizenship. On the contrary, after the Constitution's adoption, the person had to go to a registering authority and prove a six-month domicile in India in order to claim Indian citizenship.[347] Discussion on *jus domicilli* was marked by the adoption of the "Permit system" (19 July 1948). This ordinance declared that no person could enter India after that date unless he had a permit. It established temporary and permanent permit for resettlement or permanent return. Only the last category of permit – mainly, permit for resettlement or permanent return – would be included in Article 5. Following the *jus domicilii* principle, Thakur Das Bhargava[348] pushed for an extension of the naturalization process from five to ten years.

While *jus soli* and *jus domicilii* were in the frontline of the debate, *jus sanguinis* was largely accepted and considered as the primarily source of citizenship acquisition.[349] An interesting and quick debate in response to Shibban Lal Saxena's question,[350] addressed the problem of defining 'Indian parents' for the *jus sanguinis* principle.[351] It ended rapidly with Deshmukh drawing a parallel with the Polish Constitution, which does not define who is a Polish citizen,[352] other than saying they are persons born of Polish parents in Article 34 of the Constitution. Deshmukh referred to this as a model for India.

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[347] ibid s 9.116.220, 11 August 1949.

[348] Congress elected Member from East Punjab, Bhargava spoke on the role of the Vice President (ibid VII, s 7.74.119 - 123, 28 December 1948.) and the ban on cow slaughter (ibid s 7.59.89 - 96, 24 November 1948).

[349] *Constituent Assembly Debates*, vol IX, s 9.116.32, 11 August 1949.

[350] The Congress Party member from the United Provinces, Saxena, favoured banning cow slaughter (*Constituent Assembly Debates*, vol VII, s 7.59.136, 24 November 1948.) and removing the ban on drugs and alcohol (ibid s 7.59.6-8, 24 November 1948.).

[351] *Constituent Assembly Debates*, vol IX, s 9.116.35, 11 August 1949.

[352] ibid s 9.116.38, 11 August 1949.

Amongst ICA members, the critical element quickly revealed itself to be the religious factor. It made Article 5 clearly the most contested article. Deshmukh, called it "*the most ill-fated*", proposing Amendment No. 1:

> (iii) every person who is a Hindu or a Sikh by religion and is not a citizen of any other State, wherever he resides shall be entitled to be a citizen of India.[353]

A strong group of members, largely Hindus and Sikhs, favoured an ethno-nationalist citizenship approach. They pleaded for opening citizenship to Hindus and Sikhs, while introducing restrictive clauses for other religious communities, mainly Muslims. According to Deshmukh, all Hindus and Sikhs, residing anywhere in the world, should be entitled to Indian citizenship. His position in favour of Hindus and Sikhs received support from Das Bhargava, Bhopinder Singh (speaking for Sikh refugees), and Rohini Kumar Chaudhury, representing Assamese Hindus. Finally, Amendment No.1 of List I of Amendments to Amendments, was rejected when put to the vote. It reflected the Partition trauma, which forged the view that individuals fled because of religious insecurity, and that thus the Constitution should consider the religious roots of communal violence.

Standing against this group were champions of a secular Republic, both Muslim and Hindu. They saw India as a mosaic of different communities, religions, languages, ethnies … and argued for broader, inclusive frames for deciding citizenship. Thus, Mahboob Ali Baig Sahib Bahadur, a Muslim member from Madras, spoke against granting citizenship based on religion. He reminded assembly members of Gandhi's teachings on the fundamental oneness in religions. Brajeshwar Prasad,[354] insisted that the deep-rooted fraternity between Hindus and Muslims should not be forgotten despite the recent violent events.[355] He even went to the extent of proposing a common citizenship for all Asians and as a preliminary step, a common citizenship between India and Pakistan.[356] R. K. Sidhva[357] underlined that specifying a particular community (Hindus) for citizenship in the Constitution would look as if they were

[353] ibid s 9.116.34, 11 August 1949.

[354] Member of the Indian National Congress, from Bihar.

[355] *Constituent Assembly Debates*, vol. IX, s 9.117.52, 12 August 1949.

[356] *Constituent Assembly Debates*, vol. IX, s 9.117.49, 12 August 1949.

[357] Member of the Congress from the Central Provinces and Berar.

ignoring other communities like Parsis who, though living in Iran, must also be considered.[358] Jawaharlal Nehru defended the secular principles of the state as the hallmark of every modern country. He was supported by Alladi Krishnaswamy Aiyar, a leading liberal voice from Madras, who confirmed that they could not decide citizenship on racial or religious grounds.[359] The secular group prevailed at the time. Article 5 of the Constitution did not recognize citizenship by religion.

The debate on citizenship principles extended to a consideration of property as a core element. In reality, citizenship debates had an important financial implication. Muslims who had left for Pakistan still possessed property in India. The evacuated properties were to be decided by an official body, the Ministry of Relief and Rehabilitation, set up in September 1947. But in most cases, Muslim property was allocated to Hindu and Sikh refugees, and they could be evicted only on the condition if another accommodation was given to them.[360] On this matter, too, community interests clashed with principles of equity and justice. Nehru argued for the latter:

> to argue against that amendment is to argue definitely for injustice, definitely for discrimination [...][361]

In 1946, Nehru had highlighted the *jus sanguinis* principle during his visit to Singapore. He declared that Indians overseas would be Indian unless they chose otherwise.[362] This principle opposed the Indian British law of nationality that followed a *jus soli* doctrine. The choice appeared coherent at the time for it underlined the Indian nationalist movement's opposition to the British Empire. But barely four years later, the ICA voted for the establishment

[358] *Constituent Assembly Debates*, vol. I, s 1.18.27, 18 December 1946.

[359] *Constituent Assembly Debates*, vol. IX, s 9.117.40, 12 August 1949.

[360] Vasira Fazila and Yaccobali Zamindar, *The Long Partition and the Making of Modern South Asia: Refugees, Boundaries, Histories* (Viking Books 2007) 28–29.

[361] *Constituent Assembly Debates*, vol IX, s 9.117.34, 12 August 1949.

[362] Gyanesh Kudaisya, 'Indian Leadership and the Diaspora' in Brij Vilash Lal (ed), *Encyclopaedia of the Indian diaspora* (OUP 2006) 84.

of an inclusive *jus soli* regime,[363] justifying it by its presumed "enlightened modern civilized" aspect.[364]

It was the Punjab situation and the communal tensions on the Western border, that strongly coloured the tone and outcome of the debate on citizenship. Starting from a debate in which the religious element played an important role, the final decision of the ICA would finally discard this dimension and rely essentially on territorial criteria to define citizenship.

1.3. Judicial understandings and interpretation of nationality

In many cases dealing with individuals' citizenship, in practice, Courts were inclined to defer the question to the executive.[365] Yet, a shift occurred. In *Md. Elabi v. The State of West Bengal* (2008),[366] the Calcutta High Court dismissed the petitioner's claim of being an Indian citizen. Determining who was a citizen and who was a foreigner became crucial in a post-Partition context. Indian Court rulings not only determined the difference between aliens and citizen, but equally, provided reminders that the cut-off date for citizenship established in the Constitution had affected individuals who were not aware of the legislative transitions and changes. In *Shabbir Hussain v. The State of Uttar Pradesh* (1951), the Court argued:

> The mere visits of persons residing in the territories of India to those now included in Pakistan between the 1st March and 15th August 1947 could not have been considered sufficient to take away citizenship right.[367]

1.3.1. Articles 5 to 11 of the Constitution

At the conclusion of the debate around Ambedkar's draft, the ICA adopted the Constitution on 26 November 1949, enacting it on 26 January 1950. It contains seven articles relating to citizenship (Article 5 to 11). Article 5 defines an Indian citizen at the "commencement of the Constitution" as any individual who lives on "the territory of India",

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[363] Niraja Gopal Jayal, *Citizenship and Its Discontents: And Indian History* (n 300) 52.

[364] *Constituent Assembly Debates*, vol III, s 3.18.183, 29 April 1947.

[365] Gopal Jayal, *Citizenship and Its Discontents: An Indian History* (n 300) 295.

[366] *Md Elabi v the State of West Bengal* [2008] Calcutta High Court CRA 25 of 2014.

[367] *Shabbir Hussain v The State of Uttar Pradesh* [1951] Allahabad High Court AIR 1952 All 257.

was born in India or one of whose parents was born here, or who has been a resident of India for not less than five years preceding the commencement of the Constitution. Article 5-A states that (i) those who came before 19 July 1948 are automatically Indian's citizens; (ii) those who have come after 19 July 1948 and before the commencement of the Constitution are entitled to citizenship provided the procedure for attainment of citizenship is followed. Article 6 states that migrants from Pakistan are citizens of India if they, their parents or grandparents were born in India (as defined by the Government of India Act, 1935), if they migrated to India before 19 July 1948, and lived here since, or if they applied for citizenship before the commencement of the Constitution, even if they migrated on or after 19 July 1948. According to Article 7, anyone migrating from India to Pakistan after 1 March 1947, will not be an Indian citizen. In contrast, those who advocated Article 7 favoured a more inclusive conception of legal citizenship. They argued that the Muslim migrants who had left India because of the communal riots and violence should be welcomed back. Their loyalties and intentions could not be treated as suspect because of the uncertain situation, to quote Mahajan MC, former SC Justice, in *Central Bank v. Ram Narain* (1954).[368] Article 8 stated that an individual, who lives outside India but was born in India, or whose parent or grandparent was born in India, can apply for citizenship with an Indian diplomatic or consular representative where he/she lives. Article 9 states that voluntarily acquiring the citizenship of another country leads to the loss of Indian citizenship. Article 10 argues that a person considered a citizen under the provisions of Part II will also be subject to the citizenship law made by Parliament. Finally, Article 11 says that nothing in Part II shall detract from the Parliament's power to enact a law on citizenship, to make any provision with respect to acquisition and termination of citizenship and every other matter concerning citizenship.

1.3.2. Residency from women and children's perspective

Citizenship was an eminently politically sensitive question as it affirmed the newly created State's rights over its population. Once debated and adopted in the Assembly, it was also open to judicial understanding and interpretations. Courts were called to rule on controversial cases, and some of the decisions during these years shed light on the arguments and reasonings mobilized that would in their turn create significant precedents. The respective

[368] *Central Bank of India v Ram Narain* [1954] SC of India 1955 SCR (1) 697.

positions and differences between the executive and the judiciary on this matter merit discussion. They reflect (i) the independence of the judicial branch in deciding citizenship issues, and (ii) the judiciary's role in advancing the cause of human rights over and above national political concerns. In fact, although the Indian Constitution does not contain an explicit provision on the separation of powers, the judiciary's independence is an essential principle in a democratic system. It is the SC jurisprudence which sustains the separation of powers doctrine at the level of basic structure of the Constitution.[369] This independence ranges from tenure security to freedom from monetary needs and influence.[370]

From 1951 to 2009, out of thirty-eight High Court and SC rulings, approximately half the cases concerning citizenship were related to the legal impact of Partition on individuals from the two new countries,[371] and especially on the question of domicile. Only a few cases on citizenship since 1950 are unrelated to the event of Partition. One of these is the *State Trading Corporation* (1963) case,[372] where the issue was whether or not the Corporation could be an Indian citizen and thus enjoy the rights belonging to a citizen.

In many of the cases concerning individuals, two recurring elements revolved around: (i) the act of crossing borders during Partition; and (ii) the Indian Constitution or the Citizenship Act of 1955. The combination of these two elements led to considerable litigations between the State and individuals.

The absence of definition concerning "domicile" in Article 5 of the Constitution was at the heart of judicial cases, and led to differences between domicile of origin and domicile of choice. In *Louis de Raedt v. Union of India* (1991) the SC ruled that residence in the country could not constitute domicile, and that intention to make the country a permanent home needed

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[369] *Ram Jawaya Kapoor v State of Punjab* [1955] SC of India AIR 1955 SC 549; *Indira Gandhi v Raj Narain* [1975] SC of India 1975 Supp CC1; *State Bihar v Bal Mukund Sah* [2000] SC of India AIR 2000 SC 1296.

[370] Arghya Sengupta, *Independence and Accountability of the Higher Indian Judiciary* (Cambridge University Press 2019); Dr More Atul Lalasaheb, *An Appraisal Of The Judicial System In India: A Critical Study On Judicial Independence Vis-À-Vis Judicial Accountability* (Lulu Publication 2015); Rana Ayyub, 'Opinion | The Destruction of India's Judicial Independence Is Almost Complete' *Washington Post* (24 March 2020).

[371] Gopal Jayal, *Citizenship and Its Discontents: An Indian History* (n 300) 68.

[372] *State Trading Corporation of India v The Commercial Tax Officer* [1963] SC of India 1963 AIR 1811.

to be demonstrated.[373] For the Court, the fact that Louis de Raedt had applied in 1980 for a one-year extension of his permit did not indicate the will to reside permanently in India. The SC recalled the importance of state of mind for the acquisition of domicile of choice:

> it must be shown that the person concerned had a certain state of mind, the animus manendi. If he claims that he acquired a new domicile at a particular time, he must prove that he had formed the intention of making his permanent home in the country of residence and of continuing to reside there permanently. Residence alone, unaccompanied by this state of mind, is insufficient.[374]

The Indian SC recalled the principle of *animus manendi* on several occasions. Yet the Court underlines the fact that intention and place of residence are essential even if by themselves they are not sufficient. In *Central Bank of India v. Ram Narain* (1951), Ram Narain was accused of an offence committed in Pakistan in November 1947. The defendant had taken an advance from the Central Bank of India on behalf of his firm. However, during Partition, the goods were stolen by Ram Narain. Narain had moved his family to Gurgaon, a city near Delhi, and joined them in November 1947. For the Indian jurisdiction, the question was whether or not India had jurisdiction on this case. Ram Narain therefore pleaded that at the time of the offence he was not an Indian citizen but rather a Pakistani national and consequently, Indian courts did not have jurisdiction. The Punjab and Haryana High Court ruled that Narain could not be regarded as a "potential or prospective citizen of India",[375] until he had migrated to India. Thus, Indian courts did not have jurisdiction over this case. The SC judgment in 1954 went further, and ruled that despite the *animus* that could be perceived in Ram Narain family relocating to India, Narain did not become an Indian citizen until he left Pakistan for India. Thus, without relocation and despite *animus manendi*, Ram Narain could not be considered domiciled in India at the time of the offence.[376]

After 1 March 1947, women's domicile was closely linked to their fathers and husbands' choice of domicile. Both Pakistan and India governments considered women as subordinate or as victims.[377] This approach created a patriarchal form of citizenship, for not only did women

[373] *Louis de Raedt v Union of India* [1991] SC of India 1991 SCR (3) 149 [3.1].

[374] *Louis de Raedt* (n 383).

[375] *Ram Narain v Central Bank of India LTD* [1951] Punjab and Haryana High Court AIR 1952 P H 178.

[376] *Central Bank of India v Ram Narain* (n 378).

[377] Butalia, *The Other Side of Silence* (n 345) 109.

not have a choice concerning their citizenship, but women's citizenship was now subjected to a double domination: (i) the citizenship of the father or the husband; and (ii) the religion at birth.

Women's citizenship was an extension of their husband's citizenship. Thus, if a woman had migrated from India to Pakistan with her husband before December 1947, she would lose her Indian domicile and consequently lose her citizenship. However, judicial interpretation could introduce deviant interpretations. Thus, in the case of *Kumar Amar*, the SC in 1955 chose to decide the woman's citizenship independently of her husband, and ruled that Article 7 of the Constitution did not apply in her situation, as despite being married to an Indian citizen, Kumar Amar had gone to Pakistan with an intention to establish a permanent domicile.[378] This case reversed the trend of women's legal dependence on their husband or father and the SC accepted that women could migrate on their own.

This subordination of women's citizenship to their husband's was problematic in the case of abducted women, whose number during Partition was estimated to be 100,000.[379] The recovery program established by India and Pakistan seeking to restore biological citizenship to women, treated them as integral parts of the nation, therefore, to be protected. This program introduced in the aftermath of Partition, targeted abducted women forced to live with men of the other religious community: both Muslim women forced to live in India, and Hindu and Sikh women in Pakistan. Indeed, the Abducted Persons (Recovery and Restoration) Act passed in December 1949 by the ICA, set a date, after which even mixed marriages were treated as cases of abducted women.

Children's situation too was complicated. Despite the principle that minors accompanying their fathers to Pakistan in 1947 were considered to have migrated and therefore lost their Indian citizenship, Indian court rulings differed from this principle. Thus, in *Kulathil Mammu v. the State of Kerala* (1966), the SC argued that in case of a minor's migration, intention cannot be considered as the minor "could not be imputed with any such intention".[380]

[378] *State of Bihar v Kumar Amar Singh* [1955] SC of India 1955 SCR (1) 1259.

[379] Although no reliable numbers are available, the Indian anthropologist Veena Das, who worked on this question endorses the justice of Punjab High Court, G.D. Khosla report. See: Veena Das, *Life and Words, Violence and the Descent into the Ordinary* (University of California Press 2007) 20.

[380] *Kulathil Mammu v the State of Kerala* [1966] SC of India 1966 SCR (3) 706.

In 1973, the Delhi High Court in *State (Delhi Administration) v. Master Tameej*, highlighted the impossibility of a 3 or 4 year-old child having voluntarily moved from India to Pakistan with his maternal grand-parents.[381] Thus, Tameej was not considered to have migrated, and his domicile could not have changed. Consequently, Maser Tameej remained an Indian citizen, with full rights as spelt out in Article 5 of the Constitution.

In the above cases, Indian Courts determined and clarified the relationship between domicile and citizenship, and established a clear correlation between domicile and migration. In 1961, the Court narrowed its interpretation and defined migration as coming to India with the intention of permanent residence.[382]

1.3.3. Citizenship through fraud

In parallel to these cases, Indian Courts also had to deal with cases where individuals had acquired Pakistani passports. Here, the Courts considered other elements to determine whether or not the individual was an Indian citizen, despite the possession of a Pakistani passport. In *State of Gujarat v. Saiyad Aga Mohmed Saiyedm Ohmed* (1978), the Court ruled that the possession of a Pakistani passport was not a crucial proof of Pakistani nationality:

> If a plea is raised by the citizen that he had not voluntarily obtained the passport, the citizen must be provided an opportunity to prove that fact. Cases may be visualized in which on account of force a person may be compelled or on account of fraud or misrepresentation he may be induced, without any intention of renunciation of his Indian citizenship to obtain a passport from a foreign country.[383]

However, the value of official documents such as passports, habitually considered as proof of a national identity, could also be questioned. Passports were granted on the submission of documents like electoral cards or ration cards that offered proof of residence. But in certain situations, illegal migrants from Bangladesh were judged to have acquired these documents far too easily through the intermediary of political parties keen on enlarging their vote banks. Sometimes, Courts judged them to be insufficient proof of Indian citizenship. In *Azia Begum v.*

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[381] *State (Delhi Administration) v Master Tameej* [1973] Delhi High Court 1974 CriLJ 100.

[382] *Smt Shanno Devi v Mangal Sain* [1960] SC of India 1961 SCR (1) 576.

[383] *State of Gujarat v Saiyad Aga Mohmed Saiyedm Ohmed* [1978] Gujarat High Court (1979) 1 GLR 71 [§15].

State (2008), the Court ruled that acquisition of an Indian passport was based on "forged and fabricated documents", and therefore deemed it to be a case of fraudulent acquisition of nationality.[384]

1.4. The Citizenship Act, 1955 and its evolution

Like the Constitution, the Citizenship Act, 1955 tried to settle the legacy of Partition by interpreting the elements enunciated in the Constitution. The Citizenship Act mainly classifies citizenship by acquisition: birth (Section 3), descent (Section 4), registration (Section 5)[385], naturalization (Section 6) and incorporation of territory (Section 7). Section 3 and 6 directly address the concern with illegal immigration from Bangladesh. Section 7 corresponds to a will to provide legal elements for overseas citizenship of India.

In 2003, the CAA brought about changes in the Citizenship Act, 1955. Paragraph 2 of section 3 originally laid down two exceptions for citizenship at birth: (a) if either one of the parents possesses diplomatic immunity; and (ii) if one of the parents is considered as an enemy alien, and if the birth occurs in a place under enemy occupation. While these two exceptions remained in the CAA, 2003, two new elements were included in paragraph 1 in response to the influx of migrants from Bangladesh:

> (b) on or after the 1st day of July, 1987, but before the commencement of the Citizenship (Amendment) Act, 2003 and either of whose parents is a citizen of India at the time of his birth;
>
> (c) on or after the commencement of the Citizenship (Amendment}- Act, 2003, where- I
>
> (i) both of his parents are citizens of India; or
>
> (ii) one of whose parents is a citizen of India and the other is not an illegal migrant at the time of his birth, shall be a citizen of India by birth.

Section 3(b) enables citizenship acquisition by any individual born before the 2003 Amendment on the condition that at the time of birth one of the parents is an Indian citizen. On the contrary,

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[384] *Azia Begum v State* [2008] Delhi High Court WP (Crl) 677/2008 [9].

[385] *National Human Rights Commission v State of Arunachal Pradesh* [1996] SC of India 1996 SCC (1) 742.

section 3(c) excludes any individual born not only after the 2003 Amendment but also born from one parent who is an illegal migrant.

The CAA, 1992 allowed India to remain outside the set of 27 countries in 2015, which had a discriminatory policy towards women by conferring their nationality to their children.[386] Until 1992, Section 4 (citizenship by descent) established that individuals born outside India could access citizenship if the father was an Indian citizen:

> (2) A person born outside India, -
>
> (a)on or after the 26th January, 1950, but before the commencement of the Citizenship (Amendment) Act, 1992, **shall be a citizen of India by descent if his father** is a citizen of India at the time of his birth.[387]

The 1992 Amendment inaugurated a gender-neutral policy towards individuals born outside India. Consequently, the father or the mother, citizen of India, can transmit his or her citizenship (*jus sanguinis* doctrine) to their children. The rights were changed with the 2004 and 2005 Amendments on residence requirement, first from five years to two years, to finally one year in the CAB, 2005.

In the 2004 and 2005 Amendments, a new category appeared: the Overseas Citizens of India (OCI). It includes an individual who is eligible to be a citizen of India at the moment of adoption of the 1950 Constitution or is a child or grandchild of an Indian citizen. An exception related to OCI was introduced in the 2004 and 2005 Amendments, as individuals living in Pakistan and Bangladesh could not apply in this category. Though OCI's have a lifelong multiple-entry visa to India, they are not allowed to vote or contest election to public office or be recruited for government jobs. These individuals are thus considered citizens but not nationals of India, as the country does not accept double nationality.

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[386] 'Background Note on Gender Equality, Nationality Laws and Statelessness 2015' (UNHCR 2015).

[387] Section 4 The Citizenship Act, 1955 [emphasis added].

In 1950, at the end of heated debates, the Constitution based citizenship on *jus soli*. The transformations of Indian society, the economic strength and influence of a strong, middle-class diaspora has more recently led to expand citizenship into different categories, beginning with Persons of Indian Origin, then extending to OCI, and Non-Resident Indians. But *jus soli* intervenes nonetheless, as these are only weak categories of citizenship, for they lack the indispensable link with national territory and soil.

1.5. Conclusion

Three principal opposing interpretations marked the approach to citizenship: (i) Gandhi's vision, quite removed from standard contemporary notions of citizenship, saw individuals as autonomous, unconstrained by their relationship with the colonial State; (ii) the Nehruvian model perceived citizenship as a means of creating national unity, and defined it in universal, secular terms, divorced from religion, and (iii) a Hindu nationalist approach that favoured an ethno-nationalist model. This sought to privilege Hindus and Sikhs while treating Muslims as foreigners or as citizens whose loyalty had to be proved before they were admitted to the ranks of Indian citizens.

Following Gandhi's assassination in 1948, Prime Minister Nehru banned the Rashtriya Swayamsevak Sangh (RSS) and succeeded in imposing his ideas of citizenship. Indian citizenship laws reflected his influence, backed by the lawyer B. R. Ambedkar, who belonged to the caste of so-called 'untouchables'. Both were determined to affirm the principle of equality as a constitutional guarantee. The Nehruvian approach maintained a status quo of populations in the two divided countries, India and Pakistan. Indian law therefore did not distinguish between Hindu and Muslim arrivals from Pakistan or Bangladesh, except in the context of the immediate post-Partition years, and that too only by implication. Both categories of migrants were foreigners. If they wished to become Indian citizens, they could, but only through a legal process resembling naturalization.

Nehru's ideas of citizenship based on universal principles, were expanded by Indira Gandhi, who as prime minister from 1966 onwards, introduced an amendment to the

Constitution Preamble that explicitly used "secular" to define India. Article 51-A spelt out ten basic duties of every citizen that included protecting the unity and integrity of India, and promoting a spirit of common brotherhood beyond sectional diversities. In this way, a universalist, national and secular definition of Indian citizenship was further legitimised.[388] However, this legislation varies with the Indian political landscape.

2. Contemporary politics: using nationality to build a Hindu nation

India's political landscape is dominated by six national political parties: Bahujan Samaj Party, BJP, Communist Party of India (Marxist), Indian National Congress, National People's Party and since 2012 the Aam Aadmi party. Currently two parties have been in government the longest (Table 1): Congress Party (54 years[389]) and the BJP (15 years[390]). The Bofors Affair (1986) – a corruption case leading to the fall of the Rajiv Gandhi government – insurgency movements in Punjab, Assam and Kashmir, and the rise of Hindu nationalism spearheaded by the BJP at the beginning of the 1990s precipitated the end of the Congress Party's dominance.[391] This political turbulence, notwithstanding 5 national elections in less than 10 years (1989, 1991, 1996, 1998 and 1999), brought minority governments to power.[392] But more importantly, it deepened a crisis of Indian secularism and the state of liberal democracy with the emergence of the BJP and its arrival in power.[393]

Table 1: Prime ministers of India

[388] Constitution of India.

[389] Jawaharlal Nehru, Gulzarilal Nanda, Lal Bahadur Shastri, Indira Gandhi, Rajiv Gandhi, P. V. Narasimha Rao and Manmohan Singh.

[390] Atal Bihari Vajpayee and Narendra Modi.

[391] See: Atul Kohli, *Democracy and Discontent: India's Growing Crisis of Governability* (Cambridge University Press 1991).

[392] See: ibid; Atul Kohli, *The Success of India's Democracy* (Cambridge University Press 2001); Debasish Roy Chowdhury and John Keane, *To Kill a Democracy: India's Passage to Despotism* (OUP 2021); Gyan Prakash, *Emergency Chronicles: Indira Gandhi and Democracy's Turning Point* (Princeton University Press 2021).

[393] See: Tambiah Stanley, 'The Crisis of Secularism in India' in Bhargava Rajeev (ed), *Secularism and its Critics* (OUP 1998); Anuradha Dingwaney Needham and Rajeswari Sunder Rajan, *The Crisis of Secularism in India* (Duke University Press 2007); Srimati Basu, 'Shading the Secular: Law at Work in the Indian Higher Courts' (2003) 15 Cultural Dynamics 131.

Prime Minister	Period of Office	Party
Jawaharlal Nehru	1947-1964	Congress
Lal Bahadur Shastri	1964-1966	Congress
Indira Ghandi	1966-1977	Congress
Morarji Desai*	1977-1979	Janata
Choudhary Charan Singh	1979-1980	Janata
Indira Gandhi	1980-1984	Congress
Rajiv Gandhi	1984-1989	Congress
Vishwanath Pratap Singh*	1989-1990	Janata Dal
Chandra Sekhar	1990-1991	Janata Dal
P.V. Narasimha Rao	1991-1996	Congress
Atal Behari Vajpayee*	1996 (13 days)	BJP
H.D. Deve Gowda*	1996-1997	Janata Dal / United Front
Inder Kumar Gujral	1997-1998	Janata Dal / United Front
Atal Behari Vajpayee	1998-2004	BJP / National Democratic Alliance
Manmohan Singh	2004-2014	Congress / United Progressive Alliance
Narendra Modi	2014 -	BJP

** The Prime Minister ended office with his resignation and not an electoral defeat*

Since the beginning of the 1990s, particularly after the destruction of the mosque at Ayodhya (1992), Hindu nationalism in India gained ground. Sudipta Kaviraj links the decline of the Congress Party and the rise of the BJP to two elements: firstly, the failure to develop a common political language with voters,[394] and secondly, the Congress Party's clientelist

[394] Sudipta Kaviraj, 'On State, Society and Discourse in India' in James Manor (ed), *Rethinking Third World Politics* (Longman 1991).

relations with upper social classes. In 1991, the BJP's electoral victory announced its emergence as a critical political actor.[395]

Politically, it is interesting to note that the BJP support has expanded over the years. Initially, it was perceived as an upper-caste party, but rapidly it made inroads amongst the unprivileged and subordinate groups.[396] The link between the increase of communal violence and the BJP governments highlights the importance of political control, affecting democracy and the rule of law. Around 1989-90, violence against Muslims and Christians in Rajasthan, Gujarat and Orissa, escalated under BJP governments.[397] The trend continues today, notably in Uttar Pradesh.

Hindu Right wing movements polarise religious identities, highlighting differences, especially between Hindus and Muslims, seeing religious belonging as a test of national loyalty, and questioning the national sentiment of minorities.[398] Significant changes occurred in the right of nationality mobilising laws protected by IHRL. Developments around the NRC and the CAA further this political agenda, placing individual membership to a religious group above a legal connection to the State. The two processes, the NRC and the CAA, seems distinct at first sight, in reality they converge in this new legal conception: the end of individualism in Indian law. While IHRL privileges individualism, according to which the individual must be perceived as a separate entity, Indian law, through the right to nationality, undermines this idea and develops the idea of collectivity.

[395] Shaila Seshia, 'Divide and Rule in Indian Party Politics: The Rise of the Bharatiya Janata Party' (1998) 38 Asian Surv. 1036, 1045.

[396] Shubh Mathur, *The Everyday Life of Hindu Nationalism: An Ethnographic Account* (Three Essays Collective 2008) 7.

[397] ibid 4-Communities and Power.

[398] Sunil Khilnani, *The Idea of India* (Hamish Hamilton 1997) 59.

2.1. Controlling citizenship through the National Register of Citizens

The new NRC published in 2019 sought to update the earlier 1951 NRC – incomplete particularly in Muslim majority district – whose purpose was to record citizens and their goods. In terms of cost, the NRC has cost 12 billion rupees (126 million pound) to implement the exercise in Assam.[399] It was initiated and supervised by the SC since 2014.[400] The NRC coordinator reported directedly to the SC.[401] Consequently, the SC became an executive supervisory body in an administrative mechanism.[402]

The project of compiling a NRC added further complexity to the debate surrounding the CAA. The NRC is an official list of legal Indian citizens. According to Home Minister Amit Shah, NRC's aims to identify and expel infiltrators before 2004.[403] In Assam, in 2018 of 33 million individuals who had submitted documents, 4 million (12%) were not on the list when it was first published.[404] In 2019, in its final publication 1.9 million individuals were excluded: 5.56 lakhs Hindus and 11 lakhs Muslims.[405]

According to the Associate Fellow at the Centre for Policy Research, Angshuman Choudhury, the NRC operation clearly caused deaths, along with mental health issues. Mental health problems carry a strong stigma in India, but they are mostly disregarded and underestimated.[406] The National Campaign Against Torture, confirmed 31 cases of suicides between 2015 and 2019 due to NRC.[407] They were also linked to the mental trauma of exclusion from the NRC

[399] 'Annual Report 2018-19' (Government of India - Ministry of Home Affairs 2020) 278.

[400] *Assam Sanmilita Mahasangha v Union of India* [2014] SC of India WP (C) No. 562 Of 2012.

[401] Interview with Bhaskar Barua (5 June 2022), Gauhati (India), Assamese consultant, by Zoom.

[402] Anubhav Dutt Tiwari and Prashant Singh, 'Experiencing the Violence of Law: Contextualising the NRC Process in Assam' (2021) 12 Jindal global law review 29, 46.

[403] 'Amit Shah Sets Pan-India NRC Deadline: Will Drive out Illegal Immigrants before 2024' *The Indian Express* (2 December 2019).

[404] Rohini Mohan, '"Worse than a Death Sentence": Inside Assam's Sham Trials That Could Strip Millions of Citizenship' *Scroll.in* (30 July 2019); Arunabh Saikia, 'In a Hindu Colony in Assam's Barak Valley, Every Family Has Someone Left out of the NRC' *Scroll.in* (4 August 2018).

[405] Abhishek Saha, '2019 NRC List Not "Final"; 4,700 Names Ineligible, Guwahati HC Told' *The Indian Express* (10 December 2020).

[406] Interview with Angshuman Choudhury (21 October 2022), Associate Fellow at the Centre for Policy Research, New Delhi (India)

[407] 'Assam's NRC: Four Million Tales of Mental Torture, Trauma & Humiliation' (National Campaign Against Torture 2019) 51.

harassment from NRC authorities, fear of detention and deportation, fear of losing their own or family members' citizenship.[408] Individuals living in poverty were particularly affected.[409]

Official certificates informing them of their exclusion were never received, and no list was published.[410] Rapidly, the discriminatory aspect of NRC became apparent with most Muslims excluded from the final list. Even for those championing the NRC cause, two problems arose: (i) the operating methodology; and (ii) its implementation.[411]

2.1.1. Political genesis

In 2014 the SC ordered that the NRC be updated in all parts of Assam in accordance with the Citizenship Act, 1955, and the Citizenship Rules, 2003.[412] The state-specific exercise of constituting a data base of legal citizens of India with their demographic information involved the identification and deportation of illegal migrants, so as to preserve the ethnic uniqueness of Assam. The Assam NRC was mandated as a special exception of the state in the Citizenship Act, 2003. Only those individuals who could prove they came to India before 24 March 1971, a day before Bangladesh's independence could qualify, as citizens of India.

Besides mobilising at least 52,000 state government officials, hundreds social service units (Seva Kendra's) were engaged to process the documents under the apex court's supervision.[413] Not only was there an important lack of front-line officials, but officials often received training only for one day.[414] In addition, officials received different information about the type of documents required, leading to increased arbitrariness. In Upper Assam, out of 48

[408] ibid 51–53.

[409] ibid 53–54.

[410] Interview with Ravi Hemadri (21 October 2022), New Delhi (India), social activist and secretary of the Development and Justice initiative.

[411] Interview with Barua (n 411).

[412] *Assam Sanmilita Mahasangha v Union of India* (n 410).

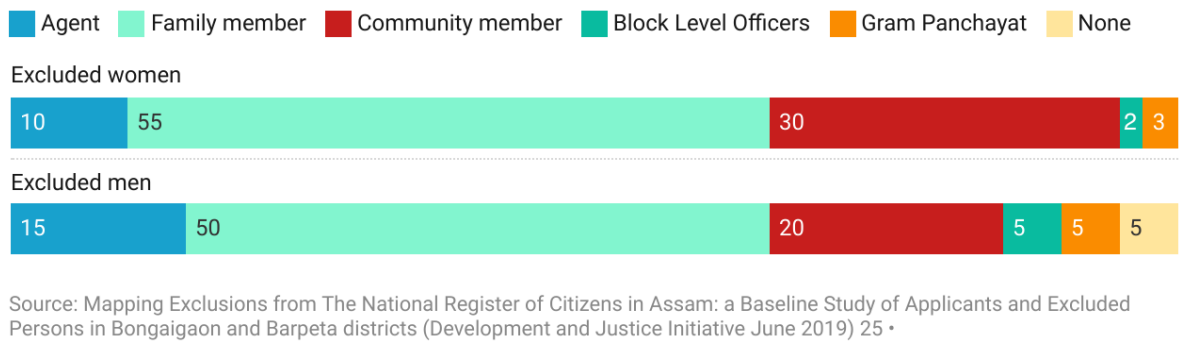
[413] 'Understanding NRC: What It Is and If It Can Be Implemented across the Country' *The Economic Times* (23 December 2019).

[414] Jessica Field and others, 'Bureaucratic Failings in the National Register of Citizens Process Have Worsened Life for the Vulnerable in Assam' (Development And Justice Initiative, Jindal University 2019) 4.

people, 15% visited the office once, 15% twice and 69 % more than three times to verify their papers.[415]

In parallel, centres (*kendras*), along with political and religious leaders were mobilised to help individuals acquire or submit the required legal documents.[416] A majority of individuals also received help from family members and community members (graphic 1). Educated community members set up groups with necessary skills to guide community members in the process, some even received threats.[417] Insufficient aid from official agents specifically to women can be explained by the latter's isolation, fewer contact with officials because of inadequate NRC assistance infrastructure, low mobile penetration – in 2018 of 65% of women owned a phone, and only 8%, mostly in urban areas, used the internet – and digital literacy.[418]

Graphic 1: Type of assistance received by excluded individuals from the NRC in the Bongaigaon district - in percentage



Source: Mapping Exclusions from The National Register of Citizens in Assam: a Baseline Study of Applicants and Excluded Persons in Bongaigaon and Barpeta districts (Development and Justice Initiative June 2019) 25 •

For a central government that has affirmed its plans to weed out all illegal infiltrators from India this seems a next logical step: a pan-India extension of the Assam model through the implementation of a NPR[419] would appear as asking all Indians to reconfirm their citizenship. A declaration on 18 November 2019, during a parliamentary session confirmed this

[415] ibid.

[416] Interview with Barua (n 411).

[417] Interview with Abdul Kalam Azad (14 November 2022), Amsterdam (Netherlands), researcher and member of the Miya community, by Zoom.

[418] Field and others, 'Bureaucratic Failings in the National Register of Citizens Process Have Worsened Life for the Vulnerable in Assam' (n 424) 3; Ted O'Callahan, 'Can Teaching Tea Workers In India To Read Have a Larger Impact?' (*Yale Insights*); Oliver Rowntree, 'Connected Women: The Mobile Gender Gap, Report 2018' (GSMA 2018) 15.

[419] The NPR corresponds to the creation of an identity database of residents in India or living in the country for the past six months or planning to live in the State for the six coming months.

intention.[420] New funds for an operation were approved by the prime minister's cabinet in December 2019 to conduct the NPR in 2020. Though government officials deny that NPR and NRC are connected, – "the data collected for the NPR will not be used in the NRC"[421]– NPR will include a question about parents' birthplace. Home Minister Shah refutes this connection, but Rule 4 of the 2003 Citizens Rules states that data collected in the NPR can be used to generate the NRC. This has led critics to believe that it will be used to identify "doubtful citizens," who will then bear the burden of establishing their Indian lineage.[422]

2.1.2. Regimes of legal regulations

The Citizenship Act, 1955 clearly stated that anyone born in India on or after 26 January 1950 up to 1 July 1987 is an Indian citizen by birth. Anyone born on or after 1 July 1987, but before the commencement of the CAA, 2003, and either of whose parents is an Indian citizen at the time of his birth is an Indian citizen. Anyone born after the commencement of the CAA, 2003, and whose both parents are Indian citizens at the time of his/her birth is an Indian citizen. Those born after 26 January 1950 and residing in India without proper documents would be considered illegal immigrants. They would be subject to the Foreigners Act, 1946 and Passport (Entry into India) Act, 1920 and tribunals empowered to detect, detain and deport them. Instead of elaborating new legislation, old legislation established during colonial times was activated.[423]

The only exception to this is Assam, whereby according to the 1985 Assam Accord, foreigners who entered the state before 1 January 1966 would to be regularized as Indian citizens.[424] Those

[420] Bista Shri Raju, 'Regarding Long Pending Demand of People of Darjeeling Hills, Terai and Dooars, West Bengal' 1960.

[421] Rahul Tripathi and Sanjay Singh, 'Government Bites NPR Bullet, Says Not Linked to NRC' *The Economic Times* (25 December 2019).

[422] Soumya Shankar, 'India's Citizenship Law, in Tandem With National Registry, Could Make BJP's Discriminatory Targeting of Muslims Easier' (*The Intercept*, 30 January 2020).

[423] Interview with Advocate Sanjay Hedge (15 October 2022), New Delhi (India), senior advocate of the Indian SC.

[424] Section 6A The Citizenship Act, 1955.

settling between 2 January 1966 and 24 March 1971 were to be regularized and would get the right to vote after a period of ten years.[425]

An applicant has to choose one of the documents under List A and List B. List A includes 14 documents and they had to fall within the cut-off date of 24 March 1971: (i) 1951 NRC; (ii) electoral roll up to 24 March (midnight), 1971; (iii) land and tenancy records; (iv) citizenship certificate; (v) permanent residential certificate; (vi) refugee registration certificate; (vii) any government issued license/certificate; (viii) government service/employment certificate; (ix) bank or post office accounts; (x) birth certificate; (xi) state educational board or university educational certificate; (xii) court records/processes; (xiii) passport; (xiv) any Life Insurance Company (LIC) policy.

Those who did not have any 1971 documents that mentioned their name could show any one of the documents named in this list if it mentioned their parents/grandparents along with one more document from List B, to establish a connection. List B includes: (i) birth certificate; (ii) land document; (iii) board/university certificate; (iv) bank/LIC/post office records; (v) circle officer or *gaon panchayat* secretary certificate in case of married women; (vi) electoral roll; (vii) ration card; (viii) any legally acceptable document.

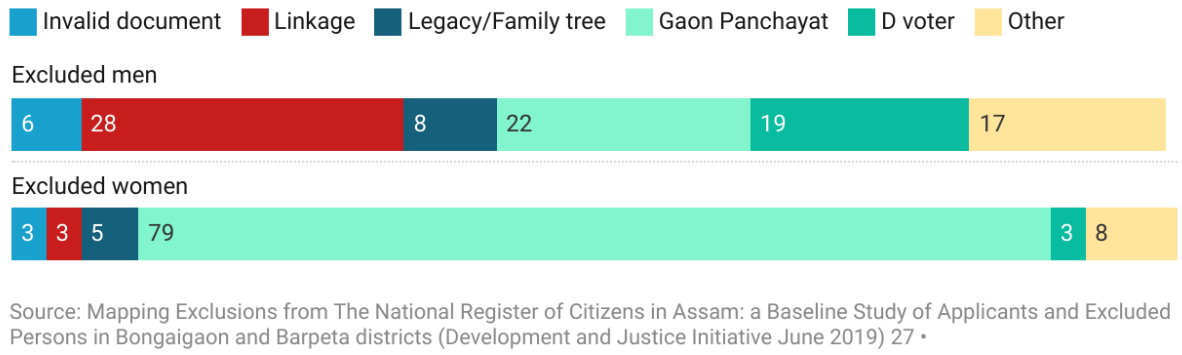
From a social perspective, poor and vulnerable people, especially women, are less likely to have documents.[426] For women who had married in other places and had no documents from list B to prove a family link, the state allowed: (i) circle officer or *gaon panchayat* secretary's certificate that was not necessarily on or before the 1971 date; or (ii) a ration card issued on or before the 1971 date.[427] Despite, the acceptance of *gaon panchayat* certificates, in principle two-thirds of adults excluded were due to an inadmissibility of this certificate (graphic 2), women once more being more affected by it than men.

Graphic 2: Adults exclusion from the NRC

[425] Clause 5.6 Assam Accord 1985.

[426] Interview with Advocate Hedge (n 433).

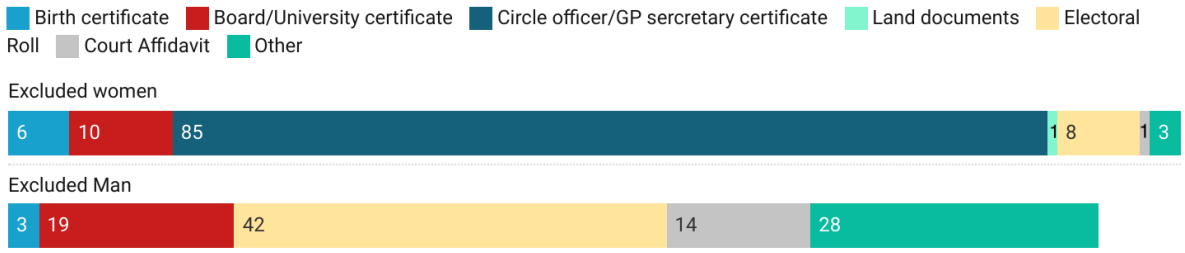
[427] 'Pan India NRC: A Lesson to Be Learnt from Assam' *The Economic Times.*



Source: Mapping Exclusions from The National Register of Citizens in Assam: a Baseline Study of Applicants and Excluded Persons in Bongaigaon and Barpeta districts (Development and Justice Initiative June 2019) 27 •

The non-profit Indian organisation, the NGOs Development and Justice Initiative, analysed the type of documents submitted under List B by individuals excluded (adult women and men) from the NRC in Bongaigaon district (graphic 3). It highlights the small percentage of birth certificates submitted during the NRC process.

Graphic 3: Document submitted under List B by excluded adults



Source: Mapping Exclusions from The National Register of Citizens in Assam: a Baseline Study of Applicants and Excluded Persons in Bongaigaon and Barpeta districts (Development and Justice Initiative June 2019) 23 •

2.1.3. Impact on vulnerable groups

For some lawyers, this process corresponds to an expression from the computer sciences *gigo* (garbage in, garbage out), which implies that if wrong data is inserted then wrong data will come out.[428]

In 2017 concerns about the implementation of the NRC were being voiced. They were felt to be confirmed when the operation in Assam was completed in 2018. On 31 August 2019, residents of Assam excluded from the list were trapped in a situation where they could be

[428] Interview with Advocate Hedge (n 433).

classified as "illegal immigrants". In addition, as Bangladesh refuses to open its border to these people, and as no bilateral agreement between the two countries has been signed, these individuals potentially risk becoming stateless.[429]

The majority of those excluded by the NRC were from vulnerable groups, women, children, minority groups (ethnic Bengali and the Muslim community), poor people and internally displaced persons[430] (IDP). The local authorities did not consider factors, such as illiteracy, no access to administrative documents to prove their citizenship,[431] internal displacement linked to natural disasters[432] or violence,[433] as relevant to an individual's situation. In terms of numbers, India's has the highest level of IDP due to disasters in South Asia,[434] which implies that these individuals may not have the required administrative documents to prove their citizenship, and thus will not be on the NRC list. They are therefore left to the mercy of administrative officials.

This situation seeds into and is in fact based on legal violence. According to Abrego and Lakhani, legal violence is "the internalisation of social inequalities by individuals who, through repeated exposure to various forms of inequality, become inured to them". More importantly,

[429] Kanchan Gupta, 'Beyond the Poll Rhetoric of BJP's Contentious Citizenship Amendment Bill' (Observer Research Foundation 2019) 89.

[430] Assam has the highest number of IDPs in the world linked to conflict with 300000 individuals, mainly Adivasis – tribes of the Indian continent – in 85 camps. 'Assam: The Largest Conflict Induced IDPs of the World in 2014 Reel under a Massive Humanitarian Crisis' (Asian Centre for Human Rights 2015) 1.

[431] Certain voice in Assam argue that administrative documents are not enough, and a scientific approach should be followed such as DNA profiling. Interview with Barua (n 411).

[432] In September 2012, due to climate change, approximately 1.4 million people near the Brahmaputra River were forced into involuntary displacement. From 2010 to 2015, 880 villages from 18 of the 27 districts of Assam were lost. 36.981 families were rendered homeless due to adverse impacts of environmental degradation, in the form of floods, land erosion, and decreasing landmass. Instead of benefitting from planned relocation, or any state policy of rehabilitation, these villagers were forced to migrate or landed up in relief camps. Deprived of residency rights, social entitlements, and reduced to forced migration, climate refugees risk deprivation of nationality. As proof of citizenship individuals can submit pre-1971 land ownership documents. However, the Assamese government's decision in 2017 to not tax land lost due to erosion and floods deprived these people of their tax receipts, which was the only official attestation of residency they possessed. Further, ownership documents of land lost due to erosion, have no value in the eyes of the administration. These groups have been consequently deprived of any recognized proof of belonging. They have found themselves assimilated in the ranks of illegal immigrants from Bangladesh, and thus placed in detention camps. Chandrani Sinha, 'Climate Refugees Stripped of Citizenship in Assam' (The Third Pole, 8 November 2019).

[433] '"Shoot the Traitors": Discrimination Against Muslims under India's New Citizenship Policy' (Human Rights Watch 2020).

[434] 'India Data' (*IDMC*).

it "encourages people to take patterns of inequality for granted and, instead of attempting to dismantle the structural apparatuses that sustain them, accept responsibility for their position in the social hierarchy".[435]

Consequently, poor people are the most affected by the NRC. This has disproportionately affected women[436] and children directly.[437] In light of the statistics given by the National Family Health Survey (NFHS) of 2015-2016 (graphic 4), out of half million people, 79.7% of children under five have been registered with the municipality (88.8 %in urban areas compared to 76.1 % in rural areas).[438] In the NFHS of 2019-2021 only 89.1% of children under five registered with the civil authority, 93.3% were registered in urban areas in comparison to 87.5% in rural areas.[439]

In the 2015-2016 NFHS survey, only 62% of children under five possessed birth certificates – legal document under the Registration of Birth and Deaths Act, 1969. In contrast, the privileged groups in Indian society engage in the process of child registration.[440] The social aspect of birth certificates resides in the bureaucratic delay and in some cases the corruption underlying its acquisition.[441]

Graphic 4: Children under 5 with a birth certificate – in percentage

[435] Leisy J Abrego and Sarah M Lakhani, 'Incomplete Inclusion: Legal Violence and Immigrants in Liminal Legal Statuses' (2015) 37 Law & Policy 265, 267–268.

[436] Nilanjana Bhowmick, 'India's New Laws Hurt Women Most of All' (*Foreign Policy*, 4 February 2020); Sidharth Yadav, '"Poor, Women Will Bear Brunt of CAA, NRC"' *The Hindu* (3 January 2020).

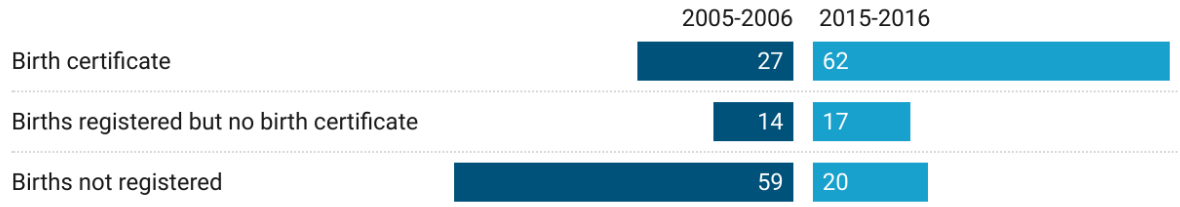
[437] 'Communication Letter: Mandates of the Working Group on Arbitrary Detention; the Special Rapporteur on Freedom of Religion or Belief; the Special Rapporteur on Minority Issues and the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance' (Special Rapporteur 2018) OL IND 29/2018 pt 1(a). Interestingly, the Indian government has not replied to this communication letter. 'Communication Letter: Mandates of the Working Group on Arbitrary Detention; the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression; the Special Rapporteur on Minority Issues; the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance and the Special Rapporteur on Freedom of Religion or Belief' (Special Rapporteur 2019) OL IND 11/2019.

[438] 'NFHS: 2015 - 2016' (Government of India, Ministry of Health and Family Welfare 2017) NFHS-4 40.

[439] 'NFHS: 2019 - 2021' (Government of India, Ministry of Health & Family Welfare) 3.

[440] 'NFHS: 2015 - 2016' (n 448) 39.

[441] Interview with Hemadri (n 420).

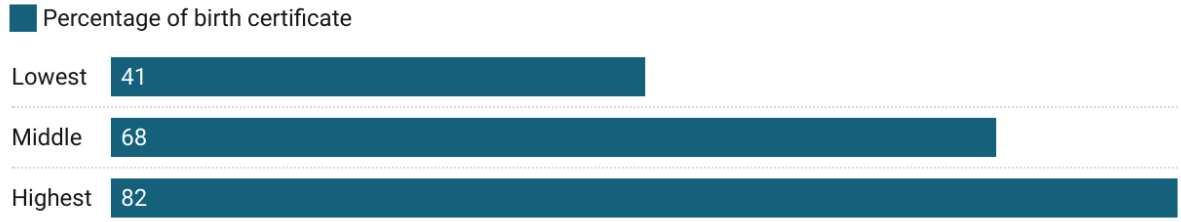


Source: National Family Health Survey: 2015-2016' (Government of India, Ministry of Health and Family Welfare 2017) NFHS-4 40 •

Birth registration and birth certification are essential pillars of the right to nationality. While the right to nationality is a universal right,[442] its protection is still closely linked to individual economical wealth (graphic 5). While the absence of a birth registration does not automatically entail statelessness, it may increase the risk of deprivation of nationality. An open letter by retired high government administrative officers published in 2020 in a daily online journal in English pointed out these aspects:

> Worrying reports are already coming in of people in different parts of India rushing in panic to obtain the necessary birth documents. The problem is magnified in a country where the **maintenance of birth records is poor**, **coupled with highly inefficient birth registration systems**. Errors of inclusion and exclusion have been a feature of all large-scale surveys in India.[443]

Graphic 5: Children under 5 who have a birth certificate according to their parent's wealth



Source: National Family Health Survey: 2015-2016' (Government of India, Ministry of Health and Family Welfare 2017) NFHS-4 39 •

According to social activist, Ravi Hemadri, in a small survey made in Bongaigaon, on 1080 children, 70% of the children between 6 and 18 years old did not have a birth certificate. Even if parents are part of the NRC, there is a risk of statelessness for these children. On the contrary,

[442] Article 15 UDHR; Article 24§3 ICCPR; Article 7 CRC; Article 9 CERDW; Article 18§1-a Convention on the Rights of Persons with Disabilities; Article 5-d-iii ICERD; Article 29 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 2003.

[443] 'India Does Not Need CAA-NPR-NRC, Say 106 Former Civil Servants in Open Letter' *The Wire* (10 January 2020).

children between 0 and 6 years old had certificates, when parents became aware of their importance, after the NRC operation.[444] Furthermore, while children are accounted by the system, only birth certificates are accepted as a legal document.[445] However, FT will not accept it as proof, if delivered three months after birth.[446]

The impact of statelessness on children revolves around accessing rights and services (social security, healthcare, education), but more importantly, it exposes them to risks of exploitation (child marriage,[447] sexual and human trafficking, forced labour).[448]

Religious affiliation also plays a role, as Muslims are least likely to undertake the process of child registration and consequently, are even less likely to have birth certificates (graphic 6).[449]

Graphic 6: Share of children under 5 who have a birth certificate according to their religion – in percentage

[444] Interview with Hemadri (n 420).

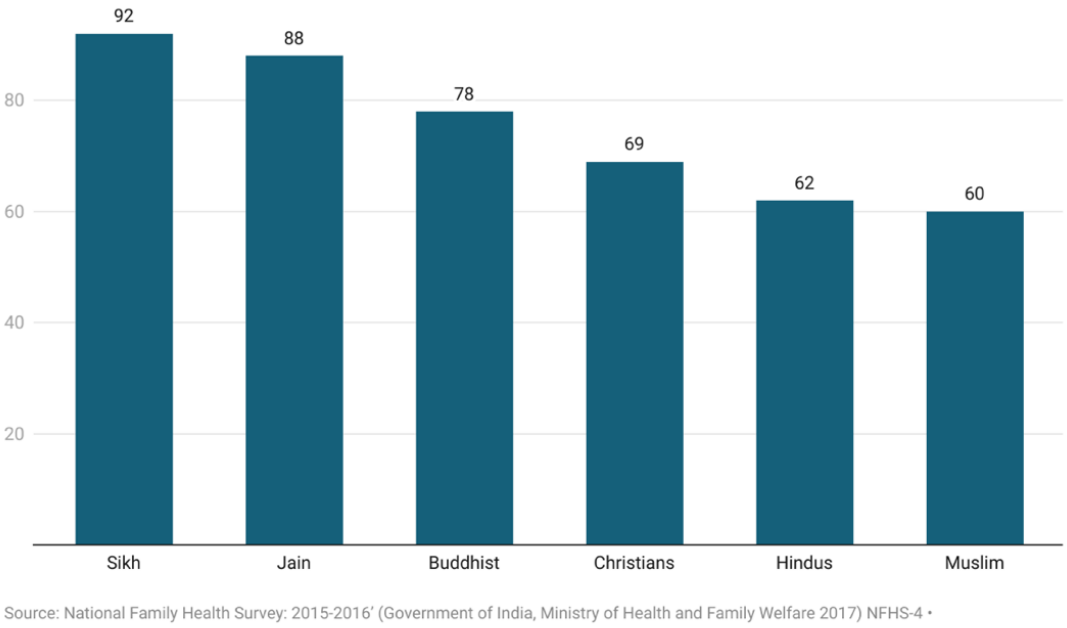
[445] ibid.

[446] Ravi Hemadri (Exploring the right to nationality in the context of India, 6 February 2021).

[447] In cases of child marriage and physical and verbal abuses, children are scared to lodge a complaint against their husband due to their parents statelessness. Furthermore, numbers of child marriage have increased because of NRC or fear of FT rulings. Interview with Azad (n 427).

[448] Alison Huyghe, 'Why Europe Needs to Work with Other Regions to Find Creative Solutions to Birth Registration and Documentation of Children Born in Conflict Zones' (*European Network on Statelessness*, 4 November 2021).

[449] 'NFHS: 2015 - 2016' (n 448).



As far as women are concerned, they form part of the marginalised and oppressed groups, who often face difficulty in proving their citizenship under the NRC, as documents required deal with land, lineage, education or other administrative evidence.[450] Many women are entirely excluded from administrative registrations, and thus have no documentation to prove their Indian citizenship. NRC seems to have highlighted such discrimination faced by women. This had already been pointed out to international institutions,[451] or by the CEDAW which drew attention to the bureaucratic obstacles faced by women, preventing them from registering births, and obtaining birth certificates for their children.[452]

This lack of access to administrative documents on grounds of social position increased the discriminatory and arbitrary abuses of NRC by authorities.

[450] 'WSS Fact Finding On The Updating Of The NRC In Assam' (*WSS*, 28 November 2019).

[451] 'Report of the Office of the United Nations High Commissioner for Human Rights: Compilation on India' (Human Rights Council 2017) A/HRC/WG.6/27/IND/2.

[452] 'Concluding Observations on the Combined Fourth and Fifth Periodic Reports of India' (CEDAW 2014) CEDAW/C/IND/CO/4-5 34.

2.1.4. International Human Rights Law violations

The Central Government is considered by its opponents, (political parties including the Congress, state parties like the Trinamool Congress or the Communist Party in Kerala, but also a large body of public intellectuals, civil groups and NGO, lawyers, and of course representative bodies of the Muslim community), to have used the NRC legislation as a witch hunt against Muslims and consequently, held to violate IHRL via the non-protection of minorities rights.[453]

Through the deprivation of individual citizenship in an arbitrary and discriminate manner, the BJP government is accused of having violated its positive obligation (to ensure the respect of human rights) and even its negative obligation (to abstain, that is, to refrain from committing an unlawful act). It is held to have violated national laws, and thus breached international human rights principles. Such violations are seen as mirrored in the errors found in NRC formulas, highlighting prejudice against individuals from the Muslim community, thus further eroding the fundamental principle of equality[454] that forms an essential feature of democracy.[455] An open letter from civil servants in January 2020 pointed out these dangers:

> We are apprehensive that the vast powers to include or exclude a person from the Local Register of Indian Citizens that is going to be vested in the bureaucracy at a fairly junior level has the scope to be employed in an **arbitrary and discriminatory manner**, subject to **local pressures and to meet specific political objectives**, not to mention the unbridled scope for **large-scale corruption**.[456]

The violation of the State's negative obligation arises from its violation of the right to non-discrimination because of its deprivation of citizenship on the grounds of ethnicity and religion, and the arbitrary deprivation of citizenship. Arbitrary procedures were based on systematic discrimination in the reading of NRC applications in Assam leading to a segregation between

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[453] Angshuman Choudhury, 'Oppose the NRC, but Not Just for the Bureaucratic Incompetence Accompanying It' *The Wire*; Saha, *No Land's People* (n 16); 'Assam's Politics and the NRC' (2015) 55 EPW 7; Rajat Sethi and Angshuman Choudhury, 'Citizenship Determination Processes in Assam: The National Register of Citizens (NRC) and Beyond' (Institute of Peace and Conflict Studies 2018); 'Civil Society Groups Hold "People's Tribunal" on NRC' *The Hindu* (New Delhi, 8 September 2019); 'Left Parties Compelled to Protest against CAA, NRC, NPR: CPI' *Business Standard India* (27 December 2019); 'Left Parties Protest against CAA, NRC; Lash out at Govt' *The Tribune*.

[454] The difficulty in being equal before the law increases the risks of marginalisation for certain groups and the likelihood of abuses against them. Minority groups are the first to be affected.

[455] 'India: Assam's Citizen Identification Can Exclude 4 Million People' (*Human Rights Watch*, 31 July 2018).

[456] 'India Does Not Need CAA-NPR-NRC, Say 106 Former Civil Servants in Open Letter' (n 453).

original Assamese and non-original residents. This separation was achieved by the application of different criteria by NRC authorities. The SC's refusal to define original inhabitants or to provide a specific procedure to identify them[457] led NRC bureaucracy to arbitrarily reject documents from individuals considered as non-original residents.[458] For NRC officers, the difference between these two categories was made on the assumption that "original" were those who were Assamese speaking, while "non-original" were those of Bengali and Nepali descent. For individuals considered original residents, certificates were automatically accepted. On the contrary, for the 2.25 million deemed non-original, a two-step verification process to check the certificate was followed.[459] The impact of this arbitrary and discriminatory policy led some of the family members to be excluded from the NRC list, despite the entire family being on the NRC list.

Equally these violations led the State to violate its positive obligations, as it did not establish adequate measures to respect IHRL and did not investigate the violations, which led discriminatory and arbitrary mass deprivation of nationality. In addition, the only appeal instituted by the States was through FT, which is a questionable procedure.

2.1.5. Conclusion

Assam's complex experience with preparing its NRC, first mooted in 1951 and finalized in 2019, offers enough examples of violations of human rights issues in separating "aliens" from citizens. Among these difficulties are poor and inadequate legacy documentation in a country where record-keeping is uneven and poor. Furthermore, the NRC's arbitrariness and unpredictability linked to the lack of due process and the violation of the rule of law makes the entire operation dangerous for minorities. State policy and bureaucratic practices of local authorities involve delay in treating documents, harassing individuals or by demanding more documents than necessary. They have resulted in depriving individuals of citizenship, violated

[457] *[2017] SC of India WP (C) No. 1020 of 2017.*

[458] 'Contested Citizenship in Assam: Public Hearing on Constitutional Processes and the Human Cost - Background Note' (n 314).

[459] [2017] SC of India Special Leave Petititon No 13256/2017.

individuals core human rights through discriminatory policies,[460] involved arbitrary decisions,[461] and non-protection of minorities rights.[462]

In the case of drawing up a NRC in Assam, inadequate safeguards have been instituted to prevent statelessness. Emphasis is on the technical aspects of proving belonging and residence, while the human rights dimension has been completely ignored. Hence, the large number of human stories of distress and anguish, helplessness and despair that are reported since the operation began. The belie the principles of international law that underlines the importance including provisions to prevent rendering persons stateless.

Paradoxically, the BJP government was equally discontented with this updated NRC as the list stripped a lot of Bengali Hindus – a strong voter base for that party – from the list. While the Assamese-speaking people felt betrayed by the BJP, which had vowed to detect and deport illegal immigrants, Muslims considered the law discriminatory, and Bengali-speaking Hindus too found they had been left out of the NRC list. The current Assamese government and the All Assam Students' Union (AASU) has asked for the review of the NRC[463] with the aim of increasing numbers of exclusions. In fact, for the AASU, the number of illegal migrants is more than 1.9 million. The organisation, known for its anti-foreigner's movement in the state, backed complaints against the inclusion of individuals in the NRC. In Barpeta district, located in Lower Assam, with 70.74% Muslims, mostly of Bengal origin, more than 70.000 complaints were filed mostly on the last day.[464] The local administration suspects the involvement of the AASU, a hypothesis confirmed by AASU advisor Samujjal Bhattacharya.

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[460] Article 2 and 4§1 UDHR; Article 2§1 ICCPR; Article 2§2 ICESCR; Article 2§1 CRC; Article 3 Declaration on Minorities.

[461] Article 15 UDHR.

[462] Article 27 ICCPR; Article 30 CRC; Declaration on Minorities.

[463] "In a meeting with AASU attended by my esteemed colleagues, we discussed a host of critical issues. The implementation framework would also include updating of NRC […].", Himanta Biswa Sarma, 'In a Meeting with AASU' (*@himantabiswa, Twitter*, 7 September 2021).

[464] 'NRC Objections See a Drastic Spike at Eleventh Hour, Thanks to AASU' *The Hindustan Times* (1 January 2019).

In May 2021, Assam Chief Minister, Himanta Biswa Sarma, maintained the BJP government's intention to re-verify the NRC at a 20% level, in districts sharing a border with Bangladesh and 10% in other districts.[465] The method is commonly used by a number of States, including France, whose demographic statistical services have recourse to the method of sampling during a population census. But in the prevailing context of Assam and the stakes involved, the verification could be politically motivated.

2.2. The political project of the Citizenship Amendment Act

2.2.1. Ideological shifts from Nehru to today

The Indian Citizenship Act, 1955 passed by the Congress party under Jawaharlal Nehru provided two channels for foreigners to acquire Indian citizenship: (i) citizenship by registration, where the government may grant Indian citizenship on application under Section 5(1)(a) of the Act; (ii) citizenship through naturalization after 12 years of residence in India.

In 1986, the Act underwent a first revision, privileging the *jus sanguinis* principle. Further amendments in 1992, 2003, 2005 and 2015, discussed above, were made in a background of Hindutva and economic growth.

The BJP spokesman, Sudhanshu Trivedi, declared that the current government prioritised the 2019 amendment:

> We have to distinguish between the infiltrators and genuine persecuted refugees. This is the right time for India to assert its security concerns, because we are living with neighbours who are the biggest security threats in the entire world.[466]

This statement recalls the CAD and the clashes between the concept of refugees and the right to citizenship. But equally, it shows a continuity in the use of a security threat as a main argument to violate fundamental human rights. The continued displacement of foreigners from neighbouring countries to India has been presented as the logical consequence of tensions and conflicts in the South-Asian region. This approach was advanced in the 1980s by Jaswant Singh, foreign minister from 1998 to 2002 in the first BJP government, but a moderate voice

[465] Rokibuz Zaman, 'Assam NRC Coordinator Seeks Timely Re-Verification of Draft' *The Times Of India* (13 May 2021).

01/11/2023 10:57:00[466] Sam Gringlas, 'India Passes Controversial Citizenship Bill That Would Exclude Muslims' *NPR* (11 December 2019).

of Hindu nationalism.[467] More radical Hindu nationalists adhere to a hard version of this logic. They see sinister plots aimed at turning Assam or North-East India into a Muslim majority region[468] like Kashmir.

This background explains the latest revision, mainly the Citizenship (Amendment) Bill (CAB). In 2016, the central government, headed by Narendra Modi, introduced the CAB in the Lok Sabha, adopted as the CAA, 2019. The Bill's main purpose was to redefine the term "illegal immigrant" found in Section 2(1)(b) of the Citizenship Act, 1955, principally to be able to provide shelter to religious minorities persecuted in countries such as Pakistan, Afghanistan and Bangladesh, which have a Muslim majority:

> Provided that any person belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community from Afghanistan, Bangladesh or Pakistan, who entered into India on or before the 31st day of December, 2014 and who has been exempted by the Central Government by or under clause (c) of sub-section (2) of section 3 of the Passport (Entry into India) Act, 1920 or from the application of the provisions of the Foreigners Act, 1946 or any rule or order made thereunder **shall not be treated as illegal migrant for the purposes of this Act**.[469]

Accordingly, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from these three countries are no longer to be treated as "illegal immigrants". The Act makes these six minorities, fleeing persecution from three Muslim-majority countries (Bangladesh, Pakistan and Afghanistan) eligible for Indian citizenship on the condition that they had entered India by 31 December 2014, and had suffered "religious persecution or fear of religious persecution" in their country of origin.[470] For these communities, acquiring citizenship through the process of naturalisation was reduced from eleven years to six. Under the CAA, the time limit of six was reduced to five years. The proposed law also relaxes procedures for Hindu refugees: it reduces the registration fees from Rs. 3000 to Rs. 100, and delegates authority from the Union government to district

[467] Singh, 'Assam's Crisis of Citizenship: An Examination of Political Errors' (n 294).

[468] Jagdamba Mall, 'Invasion of North-East' *Organiser* (19 September 2004); Sanjib Baruah, 'Postfrontier Blues: Toward a New Policy Framework for Northeast India' (2007) 33 Policy Studies 1, 42–47.

[469] Section 2 The Citizenship (Amendment) Act, 2019 (No 47 of 2019). [emphasis added]

[470] Helen Regan, Swati Gupta and Omar Khan, 'India Passes Controversial Citizenship Bill That Excludes Muslims' (*CNN*).

magistrates for speedy processing of applications. On the contrary, Muslims from these countries, despite facing persecution cannot receive the same treatment.

Such a difference between communities from these three countries[471] is also found in the Passport (Entry Into India) Amendments Rules, 2015 and Article 3A of the Foreigners (Amendment) Order, 2015. These amendments allow non-Muslims to stay in India if they seek shelter due to religious persecution or fear it, and enter the country with valid documents or papers that lapsed before 31 December 2014.[472] In practice, Courts have often not demanded proof of religious persecution. For instance, in *Ranjit Kumar Mazumdar v. The State of West Bengal* (2016), the Court ruled that the Appellant accused of rape, and in possession of a fake birth certificate and ration card was protected from prosecution under the Foreigners (Amendment) Order, 2006.[473] In another case, the High Court of Kerala ruled to grant bail to the petitioner as she was living in India since 2002, and was a Christian from Bangladesh. Despite an accusation of having false identity papers, she was released.[474] The Allahabad High Court followed the Kerala High Court ruling, and in 2020, granted bail to a member of a minority group from Bangladesh accused of holding false Indian identity papers.[475] In both cases, the High Courts refused to use the term "illegal immigrant". These cases highlight the different degrees of treatment for "outsiders" within India. Although in Assam, a political agenda pursues arrests and detentions, in other states practices and rulings differ and produce what appears to be a less severe system of justice.

The CAA, 2019 differs from the 2015 notifications. Firstly, it restrains the definition of "illegal immigrant". Secondly, it broadens the eligibility criteria for individuals from specific communities who can now apply for citizenship by registration (Section 5[476]) and naturalisation (Section 6). The Amendment removed the restriction on the category of exempted individuals.

[471] On 18 July 2016, Afghanistan was added.

[472] Article 2 Passport (Entry into India) Amendment Rules, 2015.

[473] *Ranjit Kumar Mazumder v The State of West Bengal* [2016] Calcutta High Court C.R.M. No. 10076 of 2015 [9].

[474] *Smt Archona Purnima Pramanik v State of Karnataka* [2020] Karnataka High Court Criminal Petition No. 279 of 2020.

[475] *Anil Kumar @ Anantnag v State of UP* [2020] Allahabad High Court Criminal Misc. Bail Application No.- 36509 of 2020.

[476] Section 5(1) only concerns individuals of Indian origin. 'Form IC-5(1)(A)' (*Foreigners Division Ministry of Home Affairs Government of India*).

Additionally, on 28 May 2021, an order issued by the Ministry of Home Affairs under Section 16 of the Citizenship Act, 1955, introduced a specific procedure for these two sections (5 and 6). It concerns the same minority communities and countries mentioned in the CAA. With this mediation, the Indian government gave collectors or the Secretary of the Home Department of 13 districts in five states[477] with a high migrant population, the power to grant citizenship to these groups from the three countries. This simple delegation of powers ends the three-level procedure that went through the Collector, the State Government/Union Territory administration, and the Central Government, who made the final decision to grant citizenship. By ending this procedure described in rules 11 to 15 of the Citizenship Rules, 2009, the Home Ministry not only eliminates an independent scrutiny procedure, but in addition, shortens and diminishes the process for registration and naturalisation. The Collector verifies the application, and grants citizenship if satisfied. Consequently, not only do the state Government or the Central Government not conduct inquiries into the suitability of the application, but this also leaves a greater flexibility for the Collector.

So, while these three level procedures still function for Muslim applicants who have experienced persecution, non-Muslims benefit from a quicker and easier procedure. These groups are exempted from prosecution as "illegal migrants" and enjoy a fast track to citizenship.

Clear difference of treatment can be perceived with the 2021 Order. Under Section 6(1), members of Hindu and Sikh communities from Afghanistan and Pakistan do not need to provide details of a valid passport as it is optional.[478] However, Muslims are not entitled to this exception. It benefits only minority groups who arrived with valid documents before 31 December 2014, or even subsequently, whether or not they are affected by persecutions.

In response to this modification, the Indian Union Muslim League (IUML) challenged the notification in an Interlocutory Application through a writ petition (WP) under Article 32 of the Constitution.[479] It argued that through this notification the Union Government is trying

[477] Gujarat, Rajasthan, Chhattisgarh, Haryana, Punjab.

[478] 'Form IC-6(1)' (*Foreigners Division Ministry of Home Affairs Government of India*).

[479] A WP can be filed under Article 226 of the Constitution in the High Court and under Article 32 of the Constitution in the SC. The Indian constitution allows five types of WPs: *habea corpus*, mandamus, prohibition, certiorari and quo warranto. *Indian Union Muslim League v Union of India* [2021] SC of India I.A. No. of 2021 In WP (C) No 1470 of 2019.

to implement the CAA 2019, even though the CAA rules were still awaited. On 14 June 2021, the Union Home Ministry filed an affidavit[480] in the SC, arguing that this notification was not related to the CAA as it only considers individuals in possession of valid documents (e.g., passport and visa) and thus not illegal immigrants,[481] and that it delegates power for two classes of applicants and thus does not deprive any other applicant of the right to apply for citizenship.[482]

2.2.2. Challenges and controversies

Both the CAB and the CAA can be viewed as the most controversial citizenship laws. The 2016 CAB needed approval of both Parliament houses. It faced obstacles in the Rajya Sabha where it was submitted two days after the Bill was passed by the Lok Sabha. While Congress and IUML opposition was certain, for the Act pointedly excluded any mention of Muslims as beneficiaries of this proposed law,[483] and was therefore regarded by both as unconstitutional and anti-secular, other parties like the Janata Dal (United), and the critics of the Shiv Sena could also vote against it.[484] Human rights activist Harsh Mander analysed the Bill as an attack on the secular foundations of the country, as outlined in the Constitution. In his opinion the CAA is,

> "without exaggeration, probably the most dangerous piece of legislation that we've had because it amounts to truly destroying the very character of the Indian state and the constitution".[485]

It was finally approved with 125 votes in favour and 99 against.[486]

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[480] Affidavits are confidential documents.

[481] Ashish Sinha, 'Home Ministry's Notification on Citizenship Unrelated to CAA, Centre Tells SC' (*The Daily Guardian*, 14 June 2021).

[482] 'CAA Revisited: How the May 2021 Order of the MHA Furthers a Discriminatory Citizenship Regime' (*Parichay - The Blog*, 6 August 2021); 'CAA: Writ Petition Summary (Indian Union Muslim League)' (*Supreme Court Observer*).

[483] Kunhalikutty P.K, Ray Sougata 'Government Bills - Introduced' 120;123.

[484] 'Controversial Citizenship Amendment Bill Faces Crucial Rajya Sabha Test Today' *India Today* (11 December 2019).

[485] Helen Regan, Swati Gupta and Omar Khan, 'India Passes Controversial Citizenship Bill That Exclude Muslims' (n 480).

[486] 'Government Bills - Introduced' (n 493).

A strong argument made against the CAB was that it violates Article 14 of the Constitution, which guarantees the key right to equality to all persons.[487] For the opposition, the diminution of required residency in India from 11 to 6 years for certain religious groups, legally designated members of the Muslim community as second-class citizens, and provided a preferential treatment to other groups.[488] According to Intelligence Bureau records, there will be over 30,000 immediate beneficiaries of the bill: 25,447 Hindus, 5,807 Sikhs, 55 Christians, 2 Buddhists and 2 Parsis.[489] Despite this strong complaint, Amit Shah, repeatedly argued in 2020, even after the New Delhi riots and protests in Assam, that existing legislations already establishes a difference between religious groups, yet it is not considered discriminatory or a violation of the right to equality. In the northeast states, especially in Assam, the Bill revived all the old fears about demographic changes following immigration: protestors maintain that the CAB's implementation, and hence the regularisation of illegal Bengali Hindu migrants from Bangladesh would threaten the state's cultural and linguistic identity.[490]

The CAA led to widespread protests, clashes, riots, public debates and splits in political parties**.** Public demonstrations were held in nearly all the states of India, from Maharashtra in the west to Bengal in the east, to Kerala in the south. Protests in New Delhi and in Assam since December 2019, followed by riots in February 2020, saw human rights violation by the police and a proliferation of hate speech discourses by politicians.[491] Marked by police passivity in situations of violence and even intervention in favour of the rioters,[492] they questioned the role of both the police and the judiciary in a democracy. Judges dealing with Delhi riots' cases were

[487] Sougata Ray ibid 105.

[488] 'Citizenship (Amendment) Act 2019: What Is It and Why Is It Seen as a Problem' *The Economic Times* (31 December 2019).

[489] Abhishek Saha, 'Explained: Why Assam, Northeast Are Angry' *The Indian Express* (20 January 2019).

[490] 'Citizenship (Amendment) Act 2019: What Is It and Why Is It Seen as a Problem' (n 498).

[491] 'Communication Letter' (Special Rapporteur 2020) AL IND 15/2020; Kapil Mishra (*@KapilMishra_IND, Twitter*, 23 January 2020); Kapil Mishra (*@KapilMishra_IND, Twitter*, 23 January 2020); 'Wages of Hate Speech' (*Telangana Today English*, 26 February 2020); 'CAA Violence: HC Makes Centre Party in PIL for FIRs over Hate Speech by 3 BJP Leaders' *The Tribune*.

[492] Jeffrey Gettleman and others, 'How Delhi's Police Turned Against Muslims' *The New York Times* (12 March 2020); 'Video Verification: Delhi Cops Beating Injured Men, Forcing Them to Sing National Anthem' (*Alt News*, 25 February 2020).

transferred.[493] Judge Vinod Yadav, who argued that the police investigation was made in a "farcical and casual manner" was transferred as a Special CBI Judge.[494] Finally, the Indian government intervened through President Ram Nath Kovind to ensure the appointment of Special Public Prosecutors chosen by the Delhi Police, notably the controversial pro-BJP Solicitor General, Tushar Mehta.[495]

The BJP government argued that Muslims can turn to 26 Muslim majority countries to seek shelter, whilst Hindus have only one country: India.[496] For the BJP, the CAA therefore protects religious minorities who flee to India to avoid persecution, by allowing them to become citizens. Following this argument, Amit Shah declared:

> It is well known that those minorities who chose to make Pakistan, Bangladesh and Afghanistan their home had to constantly live in the fear of extinction. This amended legislation by Modi government will allow India to extend them dignity and an opportunity to rebuild their lives.[497]

An unstated consequence of the CAA would be to aid Bengali-speaking Hindus, Buddhists and Christians who migrated from Bangladesh into India and have been living in India as "illegal immigrants". Consequently, the CAA only applies to individuals facing persecution on religious grounds, and to applicants who entered India before 31 December 2014.[498] It clearly affirms a citizenship pathway based on religion.[499] It also does not include migrants fleeing persecution from non-Muslim countries to India: Rohingya refugees from Myanmar, Hindu refugees from Sri Lanka, or Buddhist refugees from Tibet, China. It is India's first law on citizenship that openly proclaims an ethno-nationalist approach to citizenship, defined by

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[493] Shaik Zakeer Hussain, 'Judge Who Ordered FIR Against BJP Leaders Transferred' (*The Cognate*, 12 March 2020).

[494] Nupur Thapliyal, '"Inefficient", "Poor Standard", 'Lackadaisical': Critical Observations Made By Now Transferred ASJ Vinod Yadav Against Delhi Police Probe In Riots Cases' *Livelaw.In* (7 October 2021).

[495] 'Plea against Appointment of SPPs in Delhi Riots Cases; HC Seeks Centre, AAP Govt. Stand' *The Hindu* (9 November 2020).

[496] Kanchan Gupta, 'Losing Citizenship Bill Battle Has Provoked BJP to Take Polarisation Agenda beyond Assam' *The Print* (7 May 2019).

[497] Amit Shah, 'It Is Well Known ...' (*@AmitShah, Twitter*, 9 December 2019).

[498] 'What Is Citizenship (Amendment) Bill 2019 and Whom Does It Impact - What Does the Citizenship Amendment Bill (CAB) Do?' *The Economic Times* (9 December 2019).

[499] Kunhalikutty P.K, Ray Sougata 'Government Bills - Introduced' (n 493) 336.

religious affiliation and ethnic identity, and shifts from the secular principles of its Constitution. It has been argued that:

> The bill uses the language of refuge and sanctuary but discriminates on religious grounds in violation of international law.[500]

Religious discrimination consists of treating a person or a group differently due to their particular religious beliefs, and to discourage this practice IHRL guarantees protection against it through the ICCPR,[501] ICERD,[502] ICESCR,[503] UDHR[504], Convention on the Rights of the Child (CRC)[505], and the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.[506] Furthermore, resolution 2005/40 of the Commission on Human Rights recalls the danger of legal distinction based on faith, and urges States to eschew such practices.[507] Even though the CAA is also in favour of people belonging to religious minorities other than Hindus such as Christians, Buddhists etc, the greatest percentage of people profiting from the amendment are Hindus.[508] The 1992 Declaration on Minorities in its Article 4 had established that States must take the necessary measures to ensure that individuals belonging to minority groups may "exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law". Apart from its repercussions on certain minorities, the CAA also affects women and girls' citizenship rights, thus violating Article 9 of the CEDAW.

At the national level, the Constitution does guarantee equal fundamental rights (Article 14), and non-discrimination (Article 15) based on religion. Yet, according to the Parliamentary Joint

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[500] Meenakshi Ganguly, South Asia director at Human Rights Watch, in Helen Regan, Swati Gupta and Omar Khan, 'India Passes Controversial Citizenship Bill That Exclude Muslims' (n 480); 'Communication Letter' (Special Rapporteur 2019) OL IND 2/2019.

[501] Articles 2§1, 5§1, 26 and 27 ICCPR.

[502] Article 5 ICERD.

[503] Article 2§2 ICESCR.

[504] Articles 2, 6 and 7 UDHR.

[505] Article 30 CRC.

[506] Articles 2§1, 3, 4§1 and §2 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981.

[507] 'Resolution 2005/40 on Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief' (Commission on Human Rights 2005) E/CN.4/RES/2005/40 para 4(g)-7-8-9–10.

[508] 'Intelligence Bureau to Tap RAW to Verify Citizenship Claims' *The Telegraph online* (8 January 2019).

Committee examining the measure, the CAA violates these articles.[509] On these grounds, around 143 petitions were filed in the Indian SC[510], and a petition by the state of Kerala, arguing that the CAA violates the Constitution and secularism.[511] They held that the religious criteria to access citizenship through naturalisation violated the principle of equality.[512] Furthermore, using religion and religious persecution as a factor to access citizenship, and at the same time refusing to recognise it for other groups, violated the principles of secularism,[513] and went against SC precedent. In *State of Karnataka v. Praveen Bhai Thogadia (Dr.)* (2004), the SC argued that individual religion, faith or belief should not be considered as decisive factors to rule on individual citizens:

> Welfare of the people is the ultimate goal of all laws, and State action and above all the Constitution. They have one common object, that is to promote the well-being and larger interest of the society as a whole and not of any individual or particular groups carrying any brand names.[514]

In 2021, in *Madras Bar Association v. Union of India*, the SC went further, arguing that in the case of a legislation contradicting the Constitution's essential structure, the legislation could be struck down, thus giving it a final voice over the executive in the Indian system.[515] However, for this system to work, the SC has to interfere and rule on the legislation, which it is still to do.

Further, compelling individuals to divulge their religion to the administration can be considered a violation of the right to privacy as held in *Justice K.S. Puttaswamy v. Union of India* (2018).[516] But it can also be perceived as a violation of the unconstitutional condition doctrine.[517] Under

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[509] 'Report of the Joint Committee on the Citizenship (Amendment) Bill, 2016' (Parliament of India, Lok Sabha 2019) 151.

[510] 'No Stay on CAA for Now; SC Gives Centre 4 Weeks to Respond' *The Hindu - Business Line* (22 January 2020).

[511] Arvind Gunasekar, 'Kerala Challenges Citizenship Act In Supreme Court, First State To Do So' *NDTV* (14 January 2020).

[512] The HRC in its General Comment No. 19 noted that the rights protected by the ICCPR applies to the acquisition or loss of nationality. In 2004, the CERD argued that governments should "ensure that particular groups of non-citizens are not discriminated against, regarding access to citizenship or naturalization". 'General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses' (HRC 1990) 19; 'General Recommendation No. 30: Discrimination against Non-Citizens' (n 145) 13.

[513] *Kesavananda Bharati Sripadagalvaru & Ors v State of Kerala & Anr* [1973] SC of India AIR 1973 SC 1461; *S R Bommai v Union of India* [1994] SC of India 1994 AIR 1918.

[514] *State Of Karnataka And Anr v Dr Praveen Bhai Thogadia* [2004] SC of India (2004) 4 SCC 684.

[515] *Madras Bar Association v Union of India* [2014] SC of India (2014) 10 SCC 1 [53].

[516] *Justice KS Puttaswamy (Retd) v Union of India* [2018] SC of India (2017) 10 SCC 1.

[517] Concerning the unconstitutional condition references are made in: *LIC of India v Consumer Education & Research* [1995] SC of India 1995 AIR 1811.

this doctrine, government should not give benefit to individuals on the condition of their giving up a constitutional right.[518] In *Ahmedabad St Xavier's College v. State of Gujarat* (1974), the Court defined this concept:

> means any stipulation imposed upon the grant of a governmental privilege which in effect requires the recipient of the privilege to relinquish some constitutional right.[519]

Beside religious discrimination, the CAA initiated debates on refugees. Its main purpose is to provide protection through shelter to vulnerable and persecuted religious groups whose basic rights are at risk. In fact, the CAA clashes with the tenets of international refugee law. Although India is not a signatory to the 1951 Refugee Convention, granting refuge based on humanitarian considerations is a form of customary international law. The CAA is seen to contain fallacies on these grounds. First, it qualifies people from minority religions as migrants when they might actually not be migrants but refugees. Migrant refers to the voluntary movement of people. In contrast, a refugee makes an involuntary act of forced movement. Moreover, refugees raise questions of human rights and safety. According to Amit Shah, "there is a fundamental difference between a refugee and an infiltrator… this bill is for refugees".[520] The underlying suggestion that excluding Muslims from the CAA, is because they are infiltrators cannot be ignored. On the other hand, non-Muslims are treated as refugees, because they are seen as victims, escaping from persecution in three Muslim-majority countries.

Providing shelter to individuals of a selected religion defeats not only the intention but also the rationality of refugee policy. If the government intends to protect religiously persecuted people in the neighbourhood, they should also, according to critics, consider the situation of Muslim refugees, like the 36,000 Rohingya Muslims from Myanmar who fled to India in the wake of the 2015 insurgency.[521] The government argues that Muslims cannot be persecuted in Muslim-dominated countries, and therefore all Muslim immigrants are excluded from the Act. Hence,

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[518] Maurice Merrill, 'Unconstitutional Conditions' (1929) 77 Univ. Pa. Law Rev. 879; Kathleen M Sullivan, 'Unconstitutional Conditions' (1989) 102 Harv. Law Rev. 1413, 1415.

[519] *Ahmedabad St Xavier's College v State of Gujarat* [1974] SC of India (1974) 1 SCC 717. In this case, the SC refers to the United States SC ruling: *Frost & Frost Trucking Co v Railroad Comm'n* [1926] SC of the US 271 U.S. 583 (1926).

[520] Deeptiman Tiwary and Avishek G Dastidar, 'Lok Sabha Clears Citizenship Amendment Bill: Amit Shah Invokes "Partition on Basis of Religion" to Defend Bill' *The Indian Express* (10 December 2019).

[521] Lovish Garg, 'If India Wants to Remain Secular, the New Citizenship Bill Isn't the Way to Go' *The Wire* (21 September 2016).

members of the Ahmadiyya and Shia communities of Pakistan[522] or the Hazaras from Afghanistan, despite being persistently targeted by extremists, will not be able to seek refuge in India.[523] This, even though the Indian government has raised the persecution issue of Shia and Ahmadiyya communities in Pakistan in international forums.[524]

Exclusion of Muslims' as well as undocumented immigrants from Sri Lanka, Nepal or Myanmar, led critics to accuse the Indian government of being concerned only with the persecution of minorities if they occur in Muslim-majority countries, and manifest indifference to the persecution of minorities in non-Muslim majority countries.[525] On the contrary, these flows are perceived by the government as a threat to the country, and it tries to force them out.[526] On 4 January 2019, the UNHCR revealed that a detained Rohingya family was expelled to Myanmar by the Indian administration on grounds of illegal entry.[527] For international law, this nationalist, discriminatory treatment contradicts the human rights perspective that governs the pathway to acquisition of nationality.

Most of the arguments advanced against the CAA apply equally to the May 2021 notification *mutatis mutandis*. The notification establishes a discrimination between individuals of Indian origin from Afghanistan, Pakistan or Bangladesh who belong to a specific minority, and Muslims of Indian origin from these countries. Consequently, Muslims of Indian origin do not benefit from this process of registration.

[522] Section 298 C Pakistan Penal Code 1860: criminalises the action of any person from the Ahmadiyya community to "directly or indirectly, poses himself as Muslim, … or preaches or propagates his faith…" with a maximum punishment of three years.

[523] Apoorvanand, 'The New Citizenship Bill and the Hinduisation of India' *AlJazeera* (12 January 2019).

[524] Aryan Vimarsh, 'Second Right of Reply by India under Agenda Item 2 at the 41st Session of the Human Rights Council Delivered by Mr. Vimarsh Aryan' (*Permanent Mission of India in Geneva*, 25 June 2019).

[525] Ibid.

[526] Helen Regan, Swati Gupta and Omar Khan, 'India Passes Controversial Citizenship Bill That Exclude Muslims' (n 480).

[527] Kristy Siegfried, 'The Refugee Brief - 4 January 2019' (*The Refugee Brief*, 4 January 2019).

Respecting the Constitution marks a shift from the "culture of authority" to the "culture of justification". This distinction, made clear through the SC rulings[528] leads to the requirement that States' action must be publicly justifiable[529]:

> It must lead to a culture of justification –a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command.[530]

The law shifts India's citizenship policy on *jus soli* toward the racially manifested *jus sanguine* principle.

2.2.3. Judicial actions before the Supreme Court

Deb Mukherjee, an Indian Foreign Service officer, petitioned against the CAA, 2019 by highlighting core and constitutional arguments.[531] Besides recalling the dictum "citizenship is a most precious right",[532] the seven lawyers[533] argued that the CAA creates division amongst persecuted individuals,[534] refugees and asylum seekers within the Indian territory on grounds of their faith and nationality of origin,[535] and draws a distinction based on religion, between communities.

The Petitioners referred to the violation of Articles 14 and 21 of the Indian Constitution arguing: laws concerning citizenship have to be subjected to rigorous standards of judicial review; laws do not have to entrench and perpetuate existing disadvantage without any reasonable justification; they have to respect the doctrine of reasonable classification for a legitimate

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[528] *Justice KS Puttaswamy (Retd) v Union of India* (n 526); *Kalpana Mehta v Union of India* [2018] SC of India (2018) 7 SCC 1; *Govt of Nct of Delhi v Union of India* [2018] SC of India (2018) 8 SCC 501.

[529] *Petition* [2019] SC of India WP (C) No._____ Of 2019 [YY].

[530] Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 Afr. J. Hum. Rights 31, 32; David Dyzenhaus, 'Law as Justification: Etienne Mureinik's Conception of Legal Culture' (1998) 14 Afr. J. Hum. Rights 11, 11.

[531] *Petition* (n 539).

[532] *State of Arunachal Pradesh v Khudiram Chakma* [1993] SC of India 1993 SCR (3) 401.

[533] Gautam Bhatia, Abhinav Sekhri, Jahnavi Sindhu, Shruti Narayan, Suhrith Parthasarathy, Bharat Gupta and Shadan Farasat.

[534] *Petition* (n 539) 1.

[535] ibid 3.

purpose; they must not be arbitrary, and must respect Article 21 (right to life, personal liberty, and right to privacy). In contrast to other WP, the argumentation refers to national principles, IHRL, and global law.

To begin with, the right to citizenship is not being perceived as a fundamental right in the Constitution, even though the SC recalled its importance in *State of Arunachal Pradesh v. Khudiram Chakma* (1993), where it refers to the U.S. SC (*Kennedy v. Mendoza-Martinez*, 1963) dictum that "citizenship is a most precious right".[536] Yet "citizenship laws" must follow a rigorous standard of scrutiny: it is considered to be the right to have rights; deprivation of citizenship mostly affects minority groups; international conventions lay down the right against statelessness. Statelessness is recalled in the Petition through national (U.S and India)[537] and international (ICJ)[538] jurisprudences, and Article 15 of the UDHR. The ICJ case underlines that the right to nationality is part of customary law. The Indian SC recalled the binding aspect of customary international law principles.[539]

Second, violation of Article 14 (equality before the law)[540] focuses on the prohibition of entrenchment or perpetuation of disadvantage, based on Indian jurisprudence evolution. It argues that violation occurs through three aspects: "if (a) taken in context and with a view to social realities, (b) its effect or impact is to (c) entrench or perpetuate disadvantages suffered by individuals or groups." Based on these arguments, it recalls the *Navtej Johar* (2018), case decriminalising all consensual sex between adults, where the SC argued that "article 14 […] reflects the quest for ensuring fair treatment of the individual in every aspect of human

[536] *Kennedy v Mendoza-Martinez* [1963] SC of the US 372 U.S. 144, 159 [1963]; *State of Arunachal Pradesh v. Khudiram Chakma* (n 542).

[537] 'Guidelines on Statelessness No. 1: The Definition of "Stateless Person" in Article 1(1) of the 1954 Convention Relating to the Status of Stateless Persons' (United Nations High Commissioner for Refugees 2012) HCR/GS/12/01.

[538] For the Court, M. Nottebohm, a German and Liechtenstein national living in Guatemala, could not be protected by the State due to the nature and quality of his Liechtenstein nationality, as it was insufficient. Consequently, while the Court argued about the very essence of nationality, it looked at the application of the rights arising from nationality. In fact, M. Nottebohm's subsequent conduct – he did not abandon his residence and business activities in Guatemala, nor was he incorporated in the politic body of Liechtenstein – led to the submission of the application of the right to protection. This case highlighted the importance of the relation between a national and the State as it offers diplomatic protection. This national right is also a State responsibility and its duty. Yet, the State may or may not exercise this right. *Liechtenstein v Guatemala* [1955] ICJ [1955] ICJ 1.

[539] *Vellore Citizens Welfare Forum v Union of India* [1996] SC of India (1996) 5 SCC 647; *The Chairman, Railway Board v Mrs Chandrima Das* [2000] SC of India AIR 2000 SC 98.

[540] *Petition* (n 539) para N.

endeavour and in every facet of human existence".[541] The Petitioners, underline the effect of systemic discrimination on disadvantage group with *Joseph Shine v. Union of India* (2018) case:

> Justness postulates equality. In consonance with constitutional morality, substantive equality is '**directed at eliminating individual, institutional and systemic discrimination against disadvantaged groups** which effectively undermines their full and equal social, economic, political and cultural participation in society.' To move away from a formalistic notion of equality which disregards **social realities**, the Court must take into account **the impact** of the rule or provision in the lives of citizens. The primary enquiry to be undertaken by the Court towards the realization of substantive equality is to determine whether the provision contributes to the **subordination of a disadvantaged group of individuals**.[542]

Using two jurisprudences related to Article 14 underlines the evolution of India's jurisprudence. *Joseph Shine* pinpoints the different types and layers of discrimination faced by disadvantaged groups: individual, institutional and systemic. Petitioners argue that while the State is entitled to withdraw a 'privilege' it cannot follow such a policy in discriminatory ways or on arbitrary grounds.[543] Equal protection of law varies according to the scale of people affected by State action. This was deemed unacceptable in *Justice (Retd.) K.S. Puttaswamy v. Union of India* (2018). For the SC, the Constitution does not apply to a few or minority of the people of India, but "We the people".[544] With these elements, the Petitioners target the Statement of Objects and Reasons, which justifies the different categories.[545] Three core elements stand out: (i) the historical border between India and the three countries, and the migration flux; (ii) before Partition, different religious communities cohabited these areas – however Afghanistan was not part of the Union of India –; and (iii), the creation of non-secular States led to the persecution

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[541] *Navtej Singh Johar v Union of India* [2018] SC of India (2018) 10 SCC 1 [26].

[542] *Joseph Shine v Union of India* [2018] SC of India (2019) 3 SCC 39 [38]. [emphasis added]

[543] In *E.P. Royappa* (1973), the validity of state action was made subject to the test of arbitrariness: "Equality is a dynamic concept with many aspects and dimensions, and it cannot be "cribbed cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Art.14…" *E P Royappa v State of Tamil Nadu* [1973] SC of India 1974 AIR 555.

[544] *Justice KS Puttaswamy (Retd) v Union of India* (n 526) para 14.

[545] "It is a historical fact that trans-border migration of population has been happening continuously between the territories of India and the areas presently comprised in Pakistan, Afghanistan and Bangladesh […] The constitutions of Pakistan, Afghanistan and Bangladesh provide for a specific state religion. As a result, many persons belonging to Hindu, Sikh, Buddhist, Jain, Parsi and Christian communities have faced persecution on grounds of religion in those countries." Statement of Objects and Reasons, The Citizenship (Amendment) Act, 2019 para 2.

of religious groups in these countries. There's no link with the above sentence. However, while these countries all share an official State religion, the case of the Rohingyas proves that the absence of a State religion does not indicate that there is no religious persecution. As the Report of the Independent International Fact-Finding Mission on Myanmar revealed, Rohingyas are victims of ethnic cleansing and genocide.[546] The example of Sri Lanka, which is not included in the CAA's list of countries, provides another instance of Sri Lankan Tamils' persecution by the State – which recognizes Buddhism as the State religion. Their flight to India, Indian Courts' judgements[547] and government policies buttress the Petitioners arguments. Classification of individuals reveals other problems. The legislative classification based on "intrinsic and core" individual traits would *ipso facto* fail the test of Article 14.[548] In this instance, the criteria of religion and country of origin are considered intrinsic and essential aspects of individuals, and are consequently, according to the SC jurisprudence *ipso facto* unreasonable. Moreover, the distinction between refugees and asylum seekers of a certain faith and countries, fails the test of reasonable classification for a legitimate purpose. Hence, the absence of grounds for the *rational nexus* as it is not inclusive towards the selected countries. Lastly, individuals classification in this case underlines the necessity to consider the "direct and inevitable consequence" [549] of legislation as pointed out by the *Bachan Singh* (1980) case.[550]

Thirdly, the SC considers human dignity as a pillar of the Constitution.[551] The Indian and American SC established a judge-made doctrine around this concept by linking Articles 14 and 21. Human dignity is used in SC rulings as a pillar for equality and the right to non-discrimination.[552] For the Petitioners, the State conveys a public message through this Act that those belonging to specific faiths and a country of origin being ineligible to the naturalisation process are "less worthy of the State's concern" and thus the legislation denies individuals'

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[546] According to the UN, Myanmar government did establish preferential treatment towards the Buddhism community. In addition, since 2019, the Myanmar government faces charges of genocide before the ICJ. 'Report of the Independent International Fact-Finding Mission on Myanmar' (Human Rights Council 2019) A/HRC/42/50 para 18.

[547] *P Ulaganathan v Government of India* [2019] Madras High Court WP (MD) No. 5253 of 2009.

[548] "Where a legislation discriminates on the basis of an intrinsic and core trait of an individual, it cannot form a reasonable classification based on an intelligible differentia." *Navtej Singh Johar v Union of India* (n 551).

[549] *Bachan Singh v State of Punjab* [1980] SC of India AIR 1980 SC 898 [46].

[550] *Petition* (n 539) para I.

[551] *Navtej Singh Johar v Union of India* (n 551); *Justice KS Puttaswamy (Retd) v Union of India* (n 526).

[552] Concerning the right to human dignity see: *Justice KS Puttaswamy (Retd) v Union of India* (n 526); *National Legal Ser Auth v Union Of India* [2014] SC of India (2014) 5 SCC 438; *Jeeja Ghosh v Union Of India* [2016] SC of India WP (C) No. 98/2012.

identity, attacks plurality and diversity.[553] Thus, the CAA denigrates individuals on the grounds of their religion and country of origin, and consequently violates their human dignity. Within the Indian border, it indirectly affects Muslims and other religious minority groups as the law considers only certain groups within the naturalisation process.

2.2.4. International responses

The violation of the right to nationality and the right to non-discrimination led to an expressions of indignation internationally.

It took different forms, including submission of an *Amicus curia* in the Indian SC by the UN High Commissioner for Human Rights (HCHR),[554] to the UN Human rights tweet on the "fundamentally discriminatory"[555] aspect of the CAA, also highlighted by the UN HCHR[556] and the European Parliament ("discriminatory in nature and dangerously divisive" [557]), the UN Secretary General's concern about the correlation between CAA implementation and the risk of statelessness,[558] the U.S Congress' "alarm",[559] even China or Malaysia's reactions.[560]

These interventions were dismissed by the BJP government, which argued that the CAA was an internal matter and that "no foreign party has any *locus standi* on issues pertaining to India's sovereignty".[561] But Filippo Grandi, serving as UNHCR, drew attention to the consequences for international law of what India considered an internal matter. He called on the government to refrain from stripping individuals of their nationality of as it can be an enormous blow to

[553] *Petition* (n 539) para SS.

[554] *Deb Mukherji, IFS (Retd) v Union of India* [2020] SC of India WP (C) No. 1474/2019.

[555] @UNHumanRights, '#India' (*Twitter*, 13 December 2019).

[556] 'New Citizenship Law in India "Fundamentally Discriminatory": UN Human Rights Office' (*UN News*, 13 December 2019).

[557] 'European Parliament Debates Anti-CAA Motion, Vote Delayed till March' *India Today* (30 January 2020).

[558] 'Citizenship Amendment Act May Leave Muslims Stateless, Says U.N. Secretary-General António Guterres' *The Hindu* (19 February 2020).

[559] Sriram Lakshman, 'CAA, NRC Raised during Congressional Hearing on Global Human Rights' *The Hindu* (29 January 2020).

[560] Prithvi Iyer, 'Analyzing Global Response to the Controversial Citizenship Amendment Act' (*ORF*, 26 December 2019).

[561] Geeta Mohan, 'UN Human Rights Body Moves Supreme Court over CAA, India Hits Back Saying Citizenship Law Internal Matter' *India Today* (4 March 2020).

global efforts at eradicating statelessness.[562] As Guy Goodwin-Gill argued, statelessness is not simply a technical problem but a broad human right issue. This has long been perceived as a challenge for the international community.[563]

Before the HRC, India highlighted two principal elements: the respect of Constitutional values through a reaffirmation of the "faith and commitment to secularism"; the respect of a democratic process and the vote by the two houses of the Parliament.[564] Yet, groups like the PUCL (People's Union for Civil Liberties) asserted in December 2019 that the CAA stripped away the secular value of the Indian Constitution.[565] In fact, international organisations such as Amnesty International and Human Rights Watch spoke up about the current government's drift from the secular spirit of the Indian Constitution.[566] The Forty-second Amendment of the Constitution (1976) added secularism in the preamble, and established it as one its core values.[567] Indian secularism makes religious tolerance the cornerstone of the Indian republic. In 1974, the SC declared:

> Secularism is neither anti-God, nor pro-God; it treats alike the devout, the agnostic and the atheist. It eliminates God from the matters of the State and ensures that no one shall be discriminated against on the ground of religion.[568]

This principle must be understood in correlation with the right to equality (Article 14) and the prohibition of discrimination on grounds of religion, race, caste, sex or place of birth (Article 15). In 1997, the SC ruled:

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[562] 'UN Refugee Chief Urges India to Ensure No One Is Left "Stateless"' *Business Standard India* (1 September 2019).

[563] Quoted in Michelle Foster and Hélène Lambert, 'Statelessness as a Human Rights Issue: A Concept Whose Time Has Come?' (2016) 28 Int. J. Refug. Law 1, 565; Guy S Goodwin-Gill, 'International Law and Human Rights: Trends Concerning International Migrants and Refugees' (1989) 23 Int. Migr. Rev. 526.

[564] 'Fourth Periodic Report Submitted by India under Article 40 of the Covenant Pursuant to the Optional Reporting Procedure, Due in 2020' (HRC 2022) CCPR/C/IND/4 para 149.

[565] 'Citizenship Amendment Act, 2019: A Hate Driven Move PUCL Call to Citizens to Launch Non-Cooperation Movement against CAA & NRC' (People's Union for Civil Liberties 2019).

[566] '"Shoot the Traitors": Discrimination Against Muslims under India's New Citizenship Policy' (n 443); 'Six Months Since Delhi Riots, Delhi Police Continue To Enjoy Impunity Despite Evidence Of Human Rights Violations' (Amnesty International 2020).

[567] Preamble Constitution of India 1950: "We, the people of India, having solemnly resolved to constitute India into a sovereign socialist secular democratic republic and to secure to all its citizens".

[568] *Ahmedabad St Xavier's College v State of Gujarat* (n 529).

> Unity in diversity is the Indian culture and ethos. **The tolerance of all religious faiths, respect for each other's religion are our ethos**.[569]

While India's answer before the HRC does not evoke the risk of statelessness and discrimination, it uses a legal constructive argument based on Constitutional supremacy, and the respect of the rule of law.

2.2.5. Conclusion

The BJP's political agenda underlying this Act, which has received backing from Hindu nationalist groups (Vishva Hindu Parishad, RSS), aims to consolidate a strong Hindu nation, protect Hindu identity, and affirm the supremacy of Hindu civilization. The Central government sees the northeast states as a particularly important site to achieve this.[570] They view this region as a bulwark against external aggression by neighbouring China. In fact, Himanta Biswa Sarma, who joined the BJP in 2015 after resigning from the Congress Party and became Chief Minister of Assam in 2021, argued:

> If this Bill is not passed, then Hindus in Assam will become a minority in just next five years. That will be advantageous to those elements who want Assam to be another Kashmir and a part of the uncertain phase there.[571]

Soon after the bill was passed in 2016, he also argued that this decision may have prevented Muslims from taking control of 17 seats in Assam and the Muslim leader of the AIUDF, Badruddin Ajmal from becoming the chief minister.[572]

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[569] *Sri Adi Visheshwara Of Kashi Vishwanath Temple, Varanasi v State of UP* [1997] SC of India 4 SCC 606.

[570] Sanjoy Hazarika and Niyati Singh, 'The State and the States: The Northeast in the Centre's Vision' (Institute of Peace and Conflict Studies 2017); H Srikanth, 'Communalising Assam: AGP's Loss Is BJP's Gain' (1999) 34 EPW 3412; Wasbir Hussain, Arunav Goswami and Rani Pathak Das, 'Building Synergies: The Northeast & India's New Government' (Institute of Peace and Conflict Studies 2015).

[571] 'Hindus in Assam Will Become Minority in 5 Years If Citizenship Bill Not Passed: Assam Minister, Indian Express', *Indian Express* (7 January 2019).

[572]Prabin Kalita, 'Without Citizenship Bill, 17 Seats Would Have Gone to Jinnah: Himanta Biswa Sarma' *Times of India* (8 January 2019).

Such arguments appeal to local politicians and parties who seek power in the Northeast. Assembly polls in Assam in April 2021 hinged on Assamese *jatiotabad* (sub-nationalism) and nationalism leading politicians to change their positions from opposing the CAA to supporting it, with the BJP attempting to replace Assamese nationalism with Hindutva.[573]

3. Conclusion

Critics fear that the NRC and the CAA are being used in conjunction to bolster Hindutva in the region, increase the BJP's clout and power, by reducing the number of Indian citizens of Muslim religion. While the NRC might be used to strip and exclude Muslims living in India from their citizenship, at the same time the CAA is used to grant citizenship to people from a religious background more aligned to the government's ideology.[574]

Although the demands for legislation came from the Assamese themselves, the NRC's implementation created discontent. However, their protests against the CAA have little to do with concerns about the exclusionary aspect of the Act or the threat to secularism. It is understood by indigenous Assamese in more anti-migrant nativist terms in relation to Bengalis and other migrant communities. The CAA has opened up a Pandora's box, and deepened old fault lines, by reigniting historical tensions, stoking fears of disposition, deprivation of citizenship, and distrust in the fairness of procedures in guaranteeing one of the most basic, fundamental human rights. More importantly, it has exposed the Indian State's approach to statelessness.

The next chapter will examine this problematic link with national territory by focusing on Assam, where citizenship has become a major site of acute political and judicial battles.

[573] Sangeeta Barooah Pisharoty, 'Will Anti-CAA Political Formations Dent the BJP's Chances in 2021 Assam Polls?' *The Wire* (26 August 2020).

[574] Joseph Allchin, 'Why Hindu Nationalists Trialed India's Citizenship Law in Assam' *The New York Review of Books* (6 December 2020); Soutik Biswas, 'Why Has India's Assam Erupted over an "anti-Muslim" Law?' *BBC News* (13 December 2019).

Chapter 5. Exclusion vs inclusion

"Making a person stateless is worse than a death sentence."[575]

Assam's case offers an example of the problems in implementing citizenship provisions in a relatively peripheral, economically disadvantaged state. Defining Indian citizenship in Assam has long been problematic and conflictual.[576] Constitutional adherence to the diversity of India did not rule out discrimination towards Northeast states including their economic growth. This created a climate of discontent and complaints of being treated like a stepdaughter by a powerful Central government. Assam enjoyed some political stability for about 15 years after its integration into the Republic of India, but its political problems, compounded by a history of ethnic conflicts, go back to its inclusion in the British Empire from 1826 onwards. Its economic restructuring through the introduction of the plantation system and cash-crops opened the state to a flow of migrant labour, breeding socio-political conflict between local ethnic groups and foreigners, deemed to be all who were not native to the region. A second influx in the 1930s-40s consisted of labour from neighbouring provinces to work in the fields under the Grow-More-Food campaign. The re-drawing of boundaries in 1947 brought a third big wave of migrants. When Bangladesh was founded in 1971 following its war of liberation, the wave of migrants generated fresh resentments towards recently arrived Muslim Bengali peasants. Unlike the western border, where the constitutional deadline for migrants from Pakistan to claim citizenship in India was treated as final, the eastern border remained permeable for quite some time. This led to the establishment of a special law even before the commencement of the Constitution. The Immigrants (Expulsion from Assam) Act, 1950 was enforced before the citizenship law was drafted in 1955.

Despite a long-drawn-out student agitation, and the conclusion of Centre-state accords, the problem of migrants, and deportation[577] of illegal entrants has persisted. More than other

[575] Rohini Mohan, '"Worse than a Death Sentence": Inside Assam's Sham Trials That Could Strip Millions of Citizenship' (n 414).

[576] Pranjal Kishore, 'Assam NRC : The Danger In Leaving The Issue Of Citizenship To Foreigners Tribunals' *Livelaw.in* (2 September 2019).

[577] Deportation consists of the expulsion of a foreigner from the resident country to the country of origin by an authority invested to do so by law. Under Indian law (Article 21 of the Constitution) and more precisely by a 1978

states, Assam, partly because of its geographical distance from the centre, and its poor infrastructural development (roads, railways, schools, hospitals…) has felt itself to be the *desi* (local) Cinderella,[578] uncared for and exploited, its cultural roots and identity threatened by the unceasing influx of Bengalis, Bangladeshis, and now Rohingyas. Citizenship debates in Assam have been marked by the imprint of the colonial settlement of non-Assamese, and later in the 1970s by the entry of East Bengali Muslim immigrants in the area.

In 1978, by-elections in Assam showed 70,000 new names in the voter list, triggering a major student-led agitation. It culminated in February 1983 with the massacre of more than 2000 Muslim immigrants from East Bengal (Nellie massacre) after Indira Gandhi's government decided to give 4 million immigrants from Bangladesh the right to vote.[579] Local resentments against outsiders, though not new, have intensified consistently, making Assam particularly sensitive to legal interventions on the issue of who holds the rights of citizenship.

Migration of Muslims from East-Bengal is perceived as a shift in Assam's religious demography: from 24.56% in 1971 to 34.22% in 2011.[580] Assam has the third highest Muslim population in India after the union territories of Lakshadweep (97%) and Jammu and Kashmir (68%). This has allowed Assamese BJP politicians to assert that Muslims in Assam are not a minority, since they are a majority in nine of Assam's twenty-seven districts[581]: Barpeta, Bongaigaon, Darrang, Dhubri, Goalpara, Hailakandi, Karimganj, Morigaon, Nagaon. All these districts are closely situated, and some even share a border with Bangladesh, thus supporting the idea that Bengali migration has contributed significantly to this demographic trend.

SC ruling, a deportation order has to be just, fair and reasonable. *Maneka Gandhi v Union of India* [1978] SC of India 1978 AIR 597.

[578] The expression "Cinderella state" was forged in the context of colonial politics to qualify a state that considers itself politically disadvantaged, neglected or unrecognized as compared to other states.

[579] Makiko Kimura, *The Nellie Massacre of 1983: Agency of Rioters* (n 289); Makiko Kimura, 'Memories of the Massacre: Violence and Collective Identity in the Narratives on the Nellie Incident' (n 290).

[580] 'Assam Religion Hindu/Muslim Data' (*Census 2011*).

[581] Sanjib Baruah, *In the Name of the Nation: India and Its Northeast* (Stanford University Press 2020); Interview with Barua (n 411).

These factors exacerbate political tensions around citizenship, furthered by the rise of the BJP. In fact, the "detection, deletion and deportation" of illegal migrants has been on the agenda of the BJP since 1996.[582] The interference of political ideology in a core human right invites inquiry into the ways in which governmental and judicial practices can challenge the right to non-discrimination and increase individual's invisibility. Through the angle of judicial independence, the Assamese case highlights the role of political power in aggravating human rights violation. This will be analysed through four steps: firstly, the ethnic tensions within the region and its politicisation; secondly their concretisation through the 1985 Assam Accord; thirdly, the FT roles in increasing discrimination towards minorities; finally, the function of detention camps to finalise the invisibility of minorities.

1. Reaffirming Assamese identity: the context

While religious conflicts in India are commonly rooted in the dichotomy between Hindus versus Muslims, in the multi-ethnic state of Assam the opposition extends to Assamese and non-Assamese. As highlighted earlier, the roots of this tension go back to the colonial period and Partition, and an understanding of the contemporary issues about citizenship must be considered in this long-term perspective.[583]

1.1. Historical dynamics

Assamese position on immigrants has become emotionally charged and divided, in the last decade, affecting citizenship status in the state. The subject provoked street protests, civil disorder and violence. Its explosive nature was clearly recognized by the British. In 1931, a British colonial administrator, C.S. Mullan, offered a lucid analysis:

> **Immigration is likely to alter permanently the whole future of Assam and to destroy** […], Assamese culture and civilization… (It) has been the invasion of a

[582] Kanchan Gupta, 'Beyond the Poll Rhetoric of BJP's Contentious Citizenship Amendment Bill' (n 439).

[583] In the case of Africa, variations in citizenship within several colonial territories have facilitated processes of inequality among individuals. LA Jinadu, 'Explaining and Managing Ethnic Conflict in Africa: Towards a Theory of Democracy' (2007) 1 Claude Ake Memorial Papers 1, 15. On the various waves of migration into Assam see: Myron Weiner, *Sons of the Soil: Migration and Ethnic Conflict in India* (Princeton Legacy Library, 1978) ch 3: When migrants succeed and natives fail: Assam and its migrants.

> vast horde of land-hungry Bengali immigrants, mostly Muslims, from the districts of Eastern Bengal and in particular from Mymensingh… It is sad but by no means improbable that in another thirty years Sibsagar district will be the only part of Assam in which the Assamese will find himself at home.[584]

While Mullan predicted the demographic transformation of Assam, he could not have entirely anticipated the scale and extent of its sociological and political consequences.[585] Assam's complex, layered historical relationship with migrants and refugees after 1947 is characterised by three elements: (i) fear of insufficient space or land within the state; (ii) resentment of Bengali Hindus and Muslims; and (iii) survival of Assamese language and fear of its marginalisation, or worse, disappearance, because of the arrival of Bengali refugees and migrants.[586]

Demographic balance favoured the Muslim community: from 9% in 1921, it rose to 23% in 1941.[587] Rapidly, conflicts broke out between these immigrants and locals over land rights. Administrative counter measures included a Line System conceived in 1916 and adopted in 1920. This racial segregation system followed the principle that immigrants could only settle in certain areas, and prevented migrant peasants from buying land within specified areas. Consequently, villages were also categorised in three categories – (i) only for immigrants; (ii) only for locals; and (iii) for both –, to protect Assamese and aboriginal inhabitants, and secondly, to avoid any escalation of violence.[588] However, in ten years, the arrivals increased from 300,000 in 1921 to nearly half a million in 1931.[589] The "Grow More Food" slogan was interpreted by officials as "Grow More Muslims", culminating in the removal of the Line System.[590]

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[584] Amit Ranjan, *India-Bangladesh Border Disputes: History and Post-LBA Dynamics* (Springer Nature Singapore Pte Ltd 2018) 92. [emphasis added]

[585] Baruah, *In the Name of the Nation* (n 591).

[586] Antara Datta, *Refugees and Borders in South Asia: The Great Exodus of 1971* (Routledge 2012) 92.

[587] Arun Chandra Bhuyan (ed), *Political History of Assam: 1920-1939* (Department for the Preparation of Political History of Assam, Government of Assam 1978) 308.

[588] Amalendu Guha, 'East Bengal Immigrants and Maulana Abdul Hamid Khan Bhasani in Assam Politics, 1928-47' (1976) 13 Indian Econ. Soc. Hist. Rev. 419, 420.

[589] 'Census of India' (1951) vol XII, Part. II A, 73.

[590] Sajal (n 290) 9.

Concern about immigration from East-Bengal was vigorously voiced by the Assam Sahitya Sabha, a non-governmental organization founded in December 1917 to promote the Assamese culture. It pleaded for limiting the entry of outsiders into Assam, and for the promotion of the local language and culture.

1.2. Political perspectives on migration

Tension between regional patriotism and national loyalties that has grown recently is not a new development. It was already simmering in 1937, when visiting Congress president Jawaharlal Nehru called upon the Assamese to give priority to national problems over provincial issues, thus suggesting that the concern for immigration from East-Bengal was provincial.[591] The Assamese public intellectual, Jnananath Bora, criticised Nehru for not understanding local issues.[592] This confirmed the Assamese feeling of being ignored by the national parties, whom they accused of not understanding Assam's priorities.

Migration from East-Bengal thus became politically explosive. The process of counting the number of outsiders in Assam proved to be fraught with difficulties, largely due to linguistic reasons. A new category of immigrants appeared: the *na asaymiya* (the new Assamese) also known as the Miya[593] community – originally Bengali Muslim peasants brought into Assam during the colonial period –[594] who after their long presence on the land declared Assamese as their native language.[595] Between 1911 and 1971, this category increased exponentially by 966 per cent, with an increase of 64 per cent in the number of Bengali speakers.[596] *Na asaymiya*, until 1971, found themselves closer to the Assamese than to the Hindu Bengalis who resisted

[591] Sanjib Baruah, 'Assam, Northeast India and the "Unfinished Business" of Partition' *Frontline*.

[592] ibid.

[593] Miya is an Urdu word that means "gentleman". Today, it is use as a word of abuse against the Muslims in Char Chapori, region of Assam.

[594] Abdul Kalam Azad, 'Mass Production of Statelessness in India: Helplessness and Resilience' (Centre for Applied Human Rights, University of York, 3 November 2021).

[595] Owen Bennet-Jones, *Pakistan: Eye of the Storm* (Yale University Press 2002) 149.

[596] ibid 150.

adopting the local language. This proximity worked until 1971, when a new alliance between language and religion marginalised the Miya. Henceforth, approximately, 10% of the Miya community living mainly in the *Char Chapori* area found their names on the NRC list.[597] Their exclusion illustrates the structural discrimination faced by the community.[598]

Immigration flux was seen by some Assamese as jeopardising their cultural life, economy and security. They perceived it as a threat to their culture, even conditional to the survival of their ethnic group.[599] Assamese desire to preserve their own language and culture prompted Assamese Hindus to raise slogans of the Assamese race being in danger.[600] They could point to the fact that in 1838, twelve years after the annexation of Assam by the British Empire, Bengali was introduced as the official language, and it was only in 1873 that Assamese language was allowed to be used in judicial and revenue proceedings through an order of the Lieutenant Governor.[601]

The legal status of migrants from across the border remained unresolved. While on the Punjab border, migrants were labelled refugees, in Assam, migrants were often seen as infiltrators or even trafficked humans.[602] There was little compassion for them, and a great deal of apathy. It did not help that these migrants acknowledged the primacy of Assamese language, even if it was an opportunistic move to affirm their rights of belonging to the state. Indeed, in the 1951 census, the Bengali-speaking Muslim settlers registered Assamese as their mother tongue, thus almost doubling the percentage of Assamese speaking people in the state as compared to 1931. However, such claims to a linguistic identity, through cultural productions like Miya poetry were rejected by the Assamese, and in recent times have come under vicious

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[597] Natasha Badhwar, '"Poetry Will Be Turmeric Caught in the Cracks"' *Mint* (4 August 2019).

[598] Urmitapa Dutta and others, 'From Rhetorical "Inclusion" toward Decolonial Futures: Building Communities of Resistance against Structural Violence' (2022) 69 AJCP 355.

[599] Chandra Bhuyan, *Political History of Assam: 1920-1939* (n 597) 308.

[600] Guha, 'East Bengal Immigrants and Maulana Abdul Hamid Khan Bhasani in Assam Politics, 1928-47' (n 598) 420.

[601] DP Bhattacharya, 'CAA Protests in Assam: Why It Is Different from the Rest of the Country' *The Economic Times* (17 December 2019).

[602] Willem van Schendel, 'Repatriates? Infiltrators? Trafficked Humans? Cross-Border Migrants in Bengal' (2000) 2 South Asia Refugee Watch 30, 33.

attack from those Assamese who had been protesting against their presence all along (1979-1985). They were determined to weed out the *Bideshi* (foreigner), essentially directing their ire towards the Bengali speaking population.

1.3. Poetic responses to discrimination

Today, modern Miya poetry remains at the centre of controversies. It first came to light in 1939 with the journalist Maulana Bande Ali's poem "A Charuwa's Proposition",[603] even though the poet does not mention the word Miya it talks about Muslim oppression in the region. The use of the label Miya spread after the Nellie massacre (1983) with Khabir Ahmed's poem "I Beg to State That" (1985) which questioned the minority group denomination by the majority.[604]

Poetry, diffused through social media since 2016 by the Char Chapori community, became a means to highlight the plight of Miyas.[605] It served to amplify the community voice and can be perceived as a form of resistance or even revolutionary poetry.[606] Rehna Sultana expressed her group's discontent and reproaches in 2016 in her poem "My Mother" (2016).[607] The repeated evocation of "Ma" (mother) refers to the strong ties that bind Miyas to India (also from the right to land perspective) despite the government's disregard, and lack of trust in those who looked or dressed differently. Visible differences (lunghi and the beard) highlight distinctions between "Assamese Muslim" and Miyas, feeding discrimination in the process of deprivation of nationality.

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[603] See Annex – 2.1.

[604] See Annex – 2.2.

[605] Currently, there is 7 to 8 million people in the community. Abdul Kalam Azad, Divya Nadkarni and Joske GF Bunders-Aelen, 'Beyond Resistance, beyond Assimilation: Reimagining Citizenship through Poetry' [2022] J. Hum. Rights Pract. 1, 4.

[606] '"We Are Asomiya": Miya Poetry and Maulana Bande Ali' (*Daak: Postcards from the Attic*, 29 October 2018); Mashra Hassan, '"We the Sons of Bitches Are Doing Fine": The Dissent of Miya Poetry' (*Jamhoor*, 7 August 2021).

[607] See Annex – 2.3. *I Am Miya - Reclaiming Identity through Protest Poetry* (Directed by NewsClickin, 2019); 'Rehna Sultana – Writer(s) – Asymptote Blog'.

State alarm at the political power of such verses was mirrored in four police complaints filed against this poetry in 2019.[608] Another case against ten people, mainly Bengali Muslim was filed.[609] Subsequently, 10 Miya poets were arrested under the Indian Penal Code and the Telecommunications Act on grounds that Miya poetry is xenophobic and obstructs the NRC. Such accusations of disloyalty reflect the general prejudices towards marginalised minority movements, while making human rights violations visible.

Retaliation can occur through the judicial machinery. FIR by an Assamese journalist filed at the Panbazar Police station (Gauhati) against Hafiz Ahmed's poem, "Write Down 'I am Miya'" offers an example.[610] Inspired by Palestinian Mahmoud Darwish's poem "Identity card" (1964), Ahmed belongs to the first generation of Miya poets, who relate their plight as an in international condition.

Taken collectively, sentiments expressed in Miya poetry increase awareness about the community's marginalised status and neglect by the State. It underscores their strong integration in the environment (earth, soil, water), through their labour, which the state exploits. Instead of receiving recognition, they are victims of an identity-based violence, (through dispossession of their land, attribution of official numbers in lieu of identity) or discrimination. Sometimes echoing sentiments of other politically marginalised groups like the Palestinians, they place the Miya struggle on the plane of human rights violation related to citizenship deprivation.[611] Although Miya poetry, as Assamese scholar Hiren Gohain maintains, is directed more to a national and international audience than the local community, with the objective to "legitimize their rather arbitrary mission",[612] in the particular context of Assam, it echoes a rampant fear of dispossession, forced displacement, and loss of their fundamental rights through

[608] ibid.

[609] 'Assam: FIR Filed against 10 People for Poem Criticising National Register of Citizens' *Scroll.in* (12 July 2019).

[610] Hafiz Ahmed, 'Write Down "I Am Miya"'. For more poems see: Badhwar, '"Poetry Will Be Turmeric Caught in the Cracks"' (n 607). See Annex – 2.4.

[611] In "Digging a Grave", Kazi Neel refers to the relationship between Miya's and the environment. *Witness Us - A Reading of Miyah Poetry* (2020) pt 3mn51.

[612] Hiren Gohain, 'Debate: Miyah Poetry in the Assam Context' *The Wire* (9 July 2019).

the implementation of the NRC. Confronted with a rigorous enactment of citizenship norms, Miya poets voice their helplessness and anger through their own cultural and linguistic medium, thus defending their specific heritage, as well as their right to their land and place in the Indian Union.

Poetry is however not the only response to the anti-Miya movement. The continuous flows of migrants was viewed with alarm both by Assamese political parties and elites who apprehended that migrants would take over Assam. This situation led to the anti-foreigner's movement of the late 1970s and early 1980s.[613]

2. The 1985 Assam Accord

Assamese determination to protect their language, traditions, and more generally, their cultural patrimony, which defines them as a group, has affected citizenship debates and legislation in India from the 1970s onwards. In the following decades, this issue was greatly politicised and used in electoral campaigns to harness popular support.

Political initiatives to resolve the deep-seated problem of citizenship in Assam responded to violent protests against the massive wave of immigration from Bangladesh.[614] Strongly resented by the native Assamese, it provoked another uprising in 1979 after the names of foreigners appeared in voters' lists. It unleashed a process in favour of a subnational identity, distinct from, and yet coexistent with an Indian nationality. The construction of this subnational identity built itself on the category of "migrant alien".

2.1. Dividing citizens: Article 6A of the Assam Accord

Failure to subdue the agitation led the Congress government to negotiate an Assam

[613] Thongkholal Haokip, *India's Look East Policy and the Northeast* (SAGE Publications 2015) ch 6: India's Northeast Policy.

[614] Sanjib Baruah, 'The State and Separatist Militancy in Assam: Winning a Battle and Losing the War?' (1994) 34 Asian Survey 863, 868.

Accord with the AASU. The 1985 Accord signed by Prime Minister Rajiv Gandhi and the leaders of Assam's campaign against "foreigners" marked the end of six years of agitation (1979-1985) by the AASU. It considered every individual entering Assam after 1971 an "illegal immigrant". The word held an underlying reference to Muslims, who were now disqualified from obtaining Indian citizenship, even though many had been residing in the state for one and a half decades. Their franchise was withdrawn. In 2003, the National Democratic Alliance in power at the Centre, amended Section 3 of the Citizenship Act to try and further suppress citizenship rights of all children born to such "illegal immigrants". The CAA of 2004 for the first time codified an implicit religious criteria for citizenship. Act 6 of 2004 diminished the *jus soli* principle of citizenship by stating that an individual born in India from a parent who is an illegal migrant at the time of his birth cannot be eligible for citizenship by birth. While it does not clearly mention religious criteria, the reference to migrants from Bangladesh was implicit.

The Assam Accord heralded a hierarchised model of citizenship. All those who migrated before 1966 would be regularised, and thus treated as citizens.[615] Individuals who migrated between 1966 and 1971 were considered foreigners but could stay on if they undertook the official process of registration.[616] Finally, all those who arrived after 25 March 1971 were considered illegal immigrants and should be expelled.[617] The illegality of their presence was to be confirmed by the IMDT Act.

"Different yet equal" citizenship received legal recognition subsequent to the Assam Accord through an amendment in the Citizenship Act in 1986. As mentioned earlier, the Citizenship Act, 1986, introduced a sixth category of citizenship, restricted exclusively and exceptionally to Assam. Migration in 1986 was thus solely associated with illegality.

The Assam Accord was incorporated through article 6A into the Citizenship Act at the national level. The addition of Article 6A laid down that all persons of Indian origin who came to Assam before 1 January 1966 from a specified territory (territories included in Bangladesh) and had

[615] Article 5.2, Clause 5 Assam Accord.

[616] Articles 5.3 - 5.4 ibid.

[617] Article 5.8 ibid.

been resident in Assam, are considered citizens of India from that date, except in cases of (a) person of Indian origin from the specified territories who came on or after 1 January 1966, but before 25 March 1971 and have been resident in Assam since, and (b) have been detected in accordance with the provisions of the Foreigners Act, 1946 and Foreigners (Tribunals) Orders, 1964 (FTO), (c) upon registration, will be considered as citizens of India, from the date of expiry of a period of ten years from the date of detection as a foreigner. In the interim period, they will enjoy all facilities, including Indian passports, but will not have the right to vote.

The IMDT Act passed by Parliament in 1983 under a Congress government at the Centre laid down the procedures to detect illegal immigrants (from Bangladesh) and expel them from Assam despite their documents of citizenship. The IMDT Act was justified as providing special protections against harassment to minorities affected by the Assam Agitation. In reality, the term illegal immigrant could be mobilised to target Muslims who had entered the state, even if Hindu Bengalis fell in this category.

The Act provided a judicial mechanism of tribunals against the "network of complicity"[618] used by illegal immigrants. Tribunals were to be directed by serving or retired judges (District Judge or Additional District Judge).[619] They would determine the nationality of suspect individuals. Complaints would be judged by a tribunal, which would rule on whether or not the individual was an illegal migrant and if so, would then proceed to deport him or her. This judicial process put an end to police machinery and abuses, but only on paper.

In practice, since both the Foreigners and IMDT Act were applied simultaneously and prescribed different modes of determining citizenship in a situation of continuous immigrant flows from Bangladesh, the residual citizens occupied a zone of perpetually indeterminate citizenship and suspected legality. The IMDT Act was more "protective of immigrants" interests, since it shifted responsibility of proving legal residence of persons "identified", to a "prescribed authority", and demanded a "*locus standi*" from applicants identifying an "illegal migrant". The 1986 amendment introduced an exception into the legal-formal frameworks of

[618] Kamal Sadiq, *Paper Citizens: How Illegal Immigrants Acquire Citizenship in Developing Countries* (OUP 2008) ch 2: Network of complicity.

[619] Section 5(2) Illegal Migrants (Determination by Tribunals) Act 1983.

citizenship in India, by granting legal recognition of special circumstances that existed in Assam. Yet, the Central government retained the power to determine illegality on its own terms.

The constitutional validity of Section 6A of the Citizenship Act, 1955[620] was challenged in 2012 before the SC in a petition by Assam Sanmilita Mahasangha, a civil society organisation based in Gauhati, and two other organisations. The three petitioners, all indigenous groups, questioned the separate dates for individuals' entry into Assam in comparison to the rest of the country.[621] One of the thirteen questions addressed to the Court, dealt with violation of the rule of law through political opportunism rather than lawful government. The case is still pending. A new bench has to be constituted since the retirement of three members of the five judge bench established on 19 April 2017.

2.2. Legalising arbitrariness

Though States' sovereignty extends to the establishment of laws dealing with the acquisition of citizenship and regulates the procedures of loss of citizenship or renouncing citizenship, States are expected to apply procedures within the framework of IHRL. They must especially respect the non-violation of the right to non-discrimination,[622] and accept its obligation to prevent statelessness.[623] The right to nationality includes the right to not be arbitrarily[624] deprived of one's nationality, and is protected by Article 15 of the UDHR. A deprivation that is arbitrary corresponds not only to a measure or an act, which is contradictory to national or international law, but equally, consists of an inappropriate injustice and reflects

[620] Section 6A of the Citizenship Act, 1955 and the Assam Accord are perceived as the "genesis of the updated NRC". 'India Exclusion Report, 2019-2020' (Centre for Equity Studies 2020) ch Citizenship and the Mass Production of Statelessness in Assam 194.

[621] *Assam Accord: Writ Petition on Belhaf of Assam Sanmilita Mahasangha* [2012] SC of India WP (C) No. 562 Of 2012.

[622] Article 2 UDHR; Article 2§1 ICCPR; Article 2§2 ICESCR. These articles correspond only to the treaties signed by India.

[623] Article 7§1 CRC; Article 24§3 ICCPR. These articles correspond only to the treaties signed by India.

[624] Arbitration concerns not only actions that are contrary to the law, but more largely includes elements of "inappropriateness, injustice and lack of predictability". 'Arbitrary Deprivation of Nationality: Report of the Secretary-General' (Human Rights Council, 2009) A/HRC/10/34 para 49.

a lack of predictability.[625] Decisions leading to a deprivation of nationality must follow certain conditions, such as being in conformity with domestic law, serving a legitimate purpose that is in conformity with IHRL. The process must not be intrusive, and further, must be proportionate to the interest to be protected.[626]

The 1983 Act created an exception to India's law on foreigners. It was applicable only to Assam as opposed to other states where detection of foreigners was undertaken under The Foreigners Act, 1946. The new legal situation in Assam shifted the burden of proof from the accused to the complainant. This contrasts with the pan-India Foreigners Act 1946,[627] where burden of proof was on the person and not with the authorities.[628] The 1988 Amendment made those who resided within a radius of three kilometres eligible to submit a complaint,[629] allowing neighbours to file complaints reporting illegal immigrants in their area.[630] However, the Human Rights Council supported by the SCs of the Netherlands and the United Kingdom,[631] have argued that the burden of proof lies with the State in cases of statelessness and deprivation or loss of nationality.[632]

On 28 August 2000, the Asom Gana Parishad (AGP) party, which formed the Assam government, filed an affidavit in the SC, claiming that they had asked the Central government to abrogate the IMDT Act, as it was contradictory to national interest and encouraged vote bank politics in favour of the Congress. However, the victory of the Congress party, in the 2001

[625]ibid.

[626] 'Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary General' (n 103) para 4.

[627] Section 9 The Foreigners Act, 1946: "Burden of proof.—If in any case not falling under section 8 any question arises with reference to this Act or any order made or direction given thereunder, whether any person is or is not a foreigner of a particular class or description the onus of proving that such person is not a foreigner or is not a foreigner of such particular class or description, as the case may be, shall, notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872), lie upon such person."

[628] *Izhar Admad Khan v Union of India* [1962] SC of India 1962 AIR 1052; *Sham Roj v Addl Superintendent of Police* [1977] Calcutta High Court AIR 1978 Cal 252; *Smt Fatma v State of UP* [2017] Allahabad High Court Criminal Appeal No.-7049 of 2011.

[629] Wasbir Hussain, 'Citizenship Politics' (*Outlook India*, 22 July 2005).

[630] Gopal Jayal, *Citizenship and Its Discontents: An Indian History* (n 300) 64.

[631] 'Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary General' (n 103) 5 Foot note 12.

[632] ibid 5.

elections of 201, with 71 seats (and 39.75% of the popular vote) in the Assembly versus the AGP's 20 seats (20.02%),[633] a change occurred regarding the IMDT Act. On 8 August 2001, the Congress party in Assam moved a petition to the SC, asking that the state be allowed to withdraw the earlier affidavit (I.A. No.5 of 2001) – made under AGP's rule – and submit a new affidavit.[634] According to the Congress Assam leaders' position on 28 June 2001, the application filed by the AGP government did not "reflect the correct position of law and hence a new affidavit is required to be filed".[635] The Congress government further added that the IMDT Act was constitutional and there was no question of repealing or striking down the Act.[636] The Congress party thus unequivocally supported the IMDT Act reinstating it despite the 2005 judgment.

The SC noted that 310,759 cases had been initiated under the IMDT Act, under which 10,015 were illegal migrants and of these migrants 1,481 had been physically expelled by 30 April 2000.[637] These numbers allowed the AGP and the BJP to maintain that the Act was actually designed to protect illegal immigrants. On the contrary, for the Congress, the expulsion highlighted the Act's effectiveness and its protection of Indian citizens who could be wrongfully deported.[638]

Other statistics for identification and deportation of illegal migrants are cited to demonstrate that despite accusations of a political anti-migrants' agenda in Assam, the numbers under AGP and the National Democratic Alliance led by the BJP from 1985 until 2005 remain low, despite rising cases before the IMDT Tribunals (Table 2).

Table 2: Identification and deportation of illegal migrants before the IMDT Tribunals

[633] 'Assam Assembly Elections Results (2001 - 2011)' (*Statistics Times*).

[634] Gopal Krishna Agarwal, 'Vote-Banks and Foreigners' *The Indian Express* (14 August 2018).

[635] *Sarbananda Sonowal v Union of India* [2005] SC of India WP (C) No. 131 of 2000 [6].

[636] ibid.

[637] ibid 39.

[638] Gopal Jayal, *Citizenship and Its Discontents: An Indian History* (n 300) 65.

Period	Cases referred	Cases disposed	Cases pending	Number of persons declared as foreigners	Numbers of deportations
1985-90	22,682	6,486	16,196	6,724	521
1991-95	3,488	7,335	12,349	2,577	792
1996-2000	17,623	4,420	25,552	902	179
2001 to July 2005	68,998	5,780	88,770	2,643	55
Total	112,791	24,021	142,867	12,846	1,547

Source: White Paper on Foreigners' Issue' (Home & Political Department, Government of Assam 2012) 17 s 2.3.2 •

2.3. Sonowal v. Union of India: the politicisation of Justice

In 2000, the IMDT Act was elicited in a petition to the SC by Sarbananda Sonowal, later the chief minister of Assam (2016-2021), former president of the AASU, former AGP Member of the Legislative Assembly, and member of Parliament. He argued that the Act is *ultra vires* the Constitution because it:

> […]is wholly arbitrary, unreasonable and discriminates against a class of citizens of India, making it impossible for citizens who are residents in Assam to secure the detection and deportation of foreigners from Indian soil.[639]

The SC ruled in his favour in *Sarbananda Sonowal v. Union of India* (2005).[640] It viewed illegal migration of Bangladeshi nationals as a threat to the state of Assam and judged in 2005 that the 1983 IMDT Act is "ultra vires of the Constitution of India and are struck down".[641] The Court scrapped the IMDT Act for being discriminatory. In its view, the Act violated Articles 14 (equality before the law) and 355 of the Constitution (duty of the Union to protect States against external aggression and internal disturbance).

The application of the IMDT Act in Assam was denying these immigrants their rights, in comparison to the situation of illegal immigrants in West Bengal, Tripura or Meghalaya. Additionally, it denied the core protection guaranteed to individuals under the Foreigners

[639] *Sarbananda Sonowal* (n 645).

[640] In September 2021, this case was quoted 212 times by High Courts and 7 times by the SC.

[641] *Sarbananda Sonowal* (n 645) para 58.

Act.[642] Moreover, the judges held that the IMDT Act was a major obstacle to the identification and deportation of illegal migrants.[643] They observed that the conviction rate under this act as less than half a per cent of the cases initiated.[644] Yet while admitting violation of Article 14, the Court accepted and even justified the practice of repressive laws and policies in response to illegal migration.[645]

This ruling contradicted the 1994 historical decision of the SC in *S.R. Bommai v. Union of India*,[646] where the Court tried to put an end to abuses of Article 356 of the Constitution by imposing limits. This article allows the President to rule in states by proclaiming a state of emergency. The Court set a contradictory precedent in the *Sonowal* judgment by arguing that the Centre can intervene in a situation of external aggression and internal disturbance, and even announce and establish an emergency statute in the state, under the President's prerogative.

For the Court, migration is therefore not only an illegal entry into foreign territory but an act of aggression. It considered that the IMDT Act failed to detect illegal immigrants, and led to the Central government's failure to protect Assamese citizens against "external aggression and internal disturbance". In the absence of a definition of "aggression" the Court considered interpretations from the U.S SC, the United Kingdom, and international law (resolution 3314 of the UN General Assembly).[647] Finally, the Court argued that aggression corresponds to:

> invasion of unarmed men in totally unmanageable proportion to not only impair the economic and political well-being of the receiving victim State but to threaten its very existence.[648]

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[642] *ibid 5.*

[643] " […] there cannot be even a slightest doubt that the application of the IMDT Act and the Rules made thereunder in the State of Assam has created the biggest hurdle and is the main impediment or barrier in identification and deportation of illegal migrants.", in ibid 39.

[644] ibid 28.

[645] 'Designed to Exclude: How India's Court Are Allowing Foreigners Tribunals to Render People Stateless in Assam' (Amnesty International India 2019) 5.

[646] *S. R. Bommai* (n 523).

[647] *Sarbananda Sonowal* (n 645) paras 35–36; *Chae Chan Ping v United States* [1889] SC of the US 130 U.S. 581; Alfred Denning, *The Due Process of Law* (OUP 1980); 'Resolution 3314 (XXIX): Definition of Aggression' (General Assembly 1974).

[648] *Sarbananda Sonowal* (n 645) para 34.

Furthermore, the Court did not hesitate to mobilise colonial assessments. It used C.S. Mullan's 1931 Report, as well as the 1998 report of the Government of Assam on "Illegal Migration into Assam", [649] which not only assumed that irregular immigration was the core cause for ethnic conflicts in Assam, but equally, linked it to external aggression by equating illegal immigration and "external aggression". The 1998 report, attributes demographic alteration to illegal migration, considered a threat to Assamese identity and national security. Yet, it is not grounded on precise data but on "broad estimates",[650] on discussions with political leaders and the Indian Ambassador in Bangladesh at that time.[651] The judges marked out the migrant on account of being an alien, but also Muslim, thus duplicating the dominant political-ideological positions of the political party in power at the Centre.

In light of a global analyses of political interference in the judiciary, this report does strengthen a political statement. The ideological position of judges is often used to explain their rulings, yet political proofs also play a critical role.

For civil society organizations in Assam, the SC's use of the 1998 report was questionable.[652] In fact, throughout the 1998 report, certain words used repeatedly lent it a xenophobic character for they legitimised discrimination of individuals of Bengali origin, whether Muslims or Hindu: "demographic invasion",[653] "grave danger to our national security",[654] "illegal migrant",[655] "insurgency".[656] The Court alludes to another report of the General Secretaries to the Seventh General Conference of the North-Eastern Congress (I) Co-Ordination Committee of 3 July 1992:

> The silent and invidious demographic invasion of Assam may result in the loss of the geostrategically vital districts of lower Assam. The influx of these illegal migrants is **turning these districts into a Muslim majority region**. It will then only be a matter of time when a demand for their merger with Bangladesh may be made.

[649] 'Illegal Migration into Assam' (The Governor of Assam 1998) D. O. No. GSAG.3/98/.

[650] ibid 7.

[651] Aman Wadud (Exploring the right to nationality in the context of India, 6 February 2021); Aman Wadud, 'Judiciary Must Re-Examine How It Has Viewed Citizenship Question in Assam' *The Indian Express* (24 September 2021).

[652] 'Designed to Exclude: How India's Court Are Allowing Foreigners Tribunals to Render People Stateless in Assam' (n 655) 13.

[653] 'Illegal Migration into Assam' (n 659) ch II para 24.

[654] 'Illegal Migration into Assam' (n 659) Appendix, para 1.

[655] 63 times throughout the report, see: ibid.

[656] 3 times throughout the report, see: ibid. [emphasis added]

> The rapid growth of international Islamic fundamentalism may provide a driving force for this demand. In this context, it is pertinent that Bangladesh has long discarded secularism and has chosen to become an Islamic State.[657]

The judgement referred to the demographic shifts in Assam in terms of its linguistic profile (as was the case earlier) but as the above quote shows, more importantly, in terms of the religious profile of the state. It emphasised the increasing population, and the threat it posed not only to Assam but to the whole of India.[658] Both the Assam State and the central government supported the WP. In fact, the BJP argued before the court that not only was the IMDT Act discriminatory, as it was applicable only to one state in India, but equally, that the migration flux directly affected internal security.[659]

The case underlines the impact of the question of illegal migrants from Bangladesh, and the xenophobia it produced. It also highlights the interventions of central political parties who used the situation to win public support, and expand their electorate to consolidate a Hindu political ideology.

Despite the 2005 Court ruling, which declared the IMDT Act unconstitutional, the Congress government passed two significant notifications in 2006, altering legal procedures to deal with foreigners: (i) the Foreigners (Tribunals) Amendment Order 2006, which, contrary to the 1964 version, applies to every Indian state and the suspected foreigner has to prove an Indian citizenship; (ii) the Foreigners (Tribunals for Assam) Order, 2006 where like the IMDT Act, 1983, the complainant must prove his claim of non-Indian citizenship of the suspected individual. This in itself was not an innovation. Article 2(1) of the FTO, 1964, established that a tribunal may be constituted to verify an individual's citizenship.[660] More importantly, the

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[657] *Sarbananda Sonowal* (n 645) para 24.

[658] Interestingly for some Assamese, if illegal-immigrant where not concentrate only in Assam but would be "spread" in India, it would not be an issue. Roy (n 281); Interview with Barua (n 411).

[659] *Sarbananda Sonowal* (n 645) para 5.

[660] Article 2(1) FTO, 1964: "The Central Government may by order, refer the question as to whether a person is or is not a foreigner within the meaning of the Foreigners Act, 1946 (31 of 1946) to a Tribunal to be constituted for the purpose, for its opinion."

2006 Order's core principle held that no one should be and would be deported without a hearing. However, in practice, border police practices deny the right to a fair hearing.[661]

In the Foreigners (Tribunals for Assam) Order, 2006, the tribunal was declared a mandatory tribunal. Despite changes made by the Congress Government, it was declared by the SC in 2006 to be "unreasonable and issued in an arbitrary exercise of power", and hence illegal.[662] The central government was held not to have established proper rules for the tribunals to determine this illegality, despite the Court's order.[663] Four months were given to establish these tribunals.

3. Phase one: Foreigners Tribunals

The FT purpose is to establish who is a foreigner and who is an Indian citizen only in Assam, contrary to the 1964 FTO. With the termination of the IMDT Act by the SC, FT became the only means to deprive an individual of nationality. The 21 FT replaced the 21 IMDT Tribunals.[664] The administration, staff and judges of the IMDT Tribunals were hired by the FT. This was in fact not an untoward development. With the end of the IMDT Tribunals, FT cases have increased (Table 3).

In 2023, 100 FT were functioning in Assam: 36 FT until 2014 and 64 were added after 2014.[665] Depending on the district and the number of cases, their number varies from 2-3 to 10.[666] In 2019, in the aftermath of the NRC, the Assamese government wished to establish 200 more FT.[667] According to an Assamese senior official in the ministry for national security, 800 were

[661] Shuchi Purohit, 'Foreigners' Tribunals' (*Parichay - The Blog*, 10 July 2021).

[662] *Sarbananda Sonowal (II) v Union of India* [2006] SC of India WP (C) No. 117 of 2006 65.

[663] Santosh Chaubey, 'How Congress Misused Foreigners Act in Assam' *India Today* (4 August 2018).

[664] 'White Paper on Foreigners' Issue' (Home & Political Department, Government of Assam 2012) 17 s 2.3.5.

[665] 'Foreigners Tribunal' (*Government of Assam, Home & Political*); Interview with Hemadri (n 420).

[666] Interview with Hemadri (n 420).

[667] 'Assam Illegal Immigrants to Be Identified Digitally' *Northeast Now* (31 December 2019).

being envisaged.[668] However, on 22 September 2022, members' terms were not extended by the Political (B) Department.[669]

Table 3: Identification and deportation of illegal migrants before the FT

Period	Cases referred	Cases disposed	Cases pending	Number of persons declared as foreigners	Numbers of deportations
1985 – 1990	32,991	15,929	17,062	14,801	133
1991 – 1995	482	5,909	11,635	4,005	267
1996 – 2000	2,986	3,552	11,069	6,026	235
2001 – 2005	6,094	2,216	14,947	4,593	39
2006 – July 2012	65,666	45,456	35,157	12,913	221
Total	108,219	73,062	89,870	42,338	895

Indication: no general data can be found after 2012 on the FT

Source: White Paper on Foreigners' Issue (Home & Political Department, Government of Assam 2012) 18 s 2.3.5 •

Two inter-connected issues emerged with FT functioning. Firstly, FT rulings seem to target the Muslim community. Of 818 orders passed by FT No. 4 in Hajo (2017 and 2019), 98% of the individuals were Muslim[670] in a town where 44% of the population is Muslim. This data underlines the high percentage of Muslims before FT. Secondly, these tribunals question the concept of independence and impartiality of judicial organs. In theory, these two core concepts protect individuals against arbitrary laws and arbitrary application of legislation. They are accepted fundamental elements of the rule of law. From Montesquieu, and Rousseau to Sieyes

[668] Rohini Mohan, '"Worse than a Death Sentence": Inside Assam's Sham Trials That Could Strip Millions of Citizenship' (n 414).

[669] Interview with Hemadri (n 420); Interview with Advocate Aman Wadud (5 October 2022), Gauhati (India), human rights lawyer, by Zoom; 'Cloud over 200 Additional Foreigners' Tribunals, in Assam' *The Hindu* (30 September 2022).

[670] 'The Search for Foreigners in Assam – An Analysis of Cases Before a Foreigners' Tribunal and the High Court' (*Parichay - The Blog*, 23 June 2021).

and Weber, enlightenment philosophers defended the importance of separation of powers between the legislature, executive and judiciary. The FT analysis reveals current challenges confronting the judiciary in the framework of the Indian legal system. Along with the separation between judiciary and executive, the rule of law equally concerns the competence and qualification of judges. Unqualified or insufficiently competent judicial judges can weaken the rule of law by questioning the judiciary's legitimacy.[671]

3.1. Procedural arrangements leading to Foreigners Tribunals

Individuals can be sent to the FT in three different situations: reference case through the Border Police, D voter with the Election Commission of India (ECI), and those excluded from the NRC.[672] In these procedures, not only discriminatory practices, based on cultural and social contexts, increases individuals vulnerability before FTs, but more dangerously, it aggravates their invisibility.

3.1.1. The role of Border Police

The Border Police is a branch of the police.[673] Their inquiries, investigations and denunciations send individuals before FT, even before the NRC process. Whilst the numbers of "arrest" by the Border Police recently decreased due to Covid-19, discriminatory practices continue.[674] However, statistics are not available for Border Police are protected from the Right

[671] *Union of India v Namit Sharma* [2013] SC of India 10 SCC 359; *Madras Bar Association v. Union of India* (n 523).

[672] For the NRC exclusion see: Part 2 - Chapter 4.

[673] The Assamese Border Police established in 1962, gained organisational independence in 1974. Currently, 4,037 personnel are employed in the Border Organisation. One of their five objectives includes the detection and deportation of illegal foreigners. 'History and Objectives | Assam Police' (*Government of Assam, Home & Political, Assam Police*).

[674] Interview with Choudhury (n 416).

to Information Act (RTI).[675] Under no obligation to release data or information concerning their functioning,[676] there is no check to their arbitrary practices.

Most of the cases handled by the Assamese lawyer, Aman Wadud, involving cases of nationality deprivation since 2015, are linked to Border Police actions. He argues that the Border Police implement the spirit of the NRC too zealously.[677]

Border Police investigations proceed in two phases: (i) a preliminary inquiry when it gives notice to the person, who then has twenty days to produce identity and birth documents; and (ii) in case citizenship has not been proved in the preliminary phase, the Superintendent of Police signs an official inquiry. The twenty-day period to deliver citizenship documents raises several problems: for migrant workers this is insufficient time; and often Border Police notifications do not reach individuals.[678] In addition, according to Ravi Hemadri, in most cases inquiries are not even held.[679]

According to a Gauhati High Court ruling (2013) and civil society organisations, Border Police do not always follow procedures and investigatory guidelines,[680] and abuse their powers in identifying alleged foreigners. For the human rights defender, Anjuman Ara Begum, systemic discrimination in FT has its source in Border Police work practices of respecting monthly quotas, even if these vary from one police station to another.[681]

This pressure pushes the Border Police to target individuals who cannot defend themselves, through the practice of "lookism". The concept, emerging in 1978 in the U.S, refers to the prevalence of stereotypes and discrimination based on physical appearance. Whilst it frequently

[675] The RTI Act came into force in October 2005 after being passed by the Indian Parliament in June 2005. It allows Indian citizens to request information to the government. For individuals below the poverty line, the application is free, for others a fee of 10 rupees will occur. The online RTI request form can be done through the following link: https://rtionline.gov.in/request/request.php

[676] Ipsita Chakravarty, 'Declaring Foreigners: How Assam's Border Police and Tribunals Form a Secretive System of Justice' *Scroll.in* (19 August 2018).

[677] Interview with Advocate Wadud (n 679).

[678] Rohini Mohan, '"Worse than a Death Sentence": Inside Assam's Sham Trials That Could Strip Millions of Citizenship' (n 414).

[679] Interview with Hemadri (n 420).

[680] Mohan, '"Worse than a Death Sentence": Inside Assam's Sham Trials That Could Strip Millions of Citizenship' (n 414); *State of Assam v Moslem Mondal* [2013] Gauhati High Court 2013 (1) GLT (FB) 809.

[681] Interview with Anjuman Ara Begum (24 May 2022); Interview with Advocate Wadud (n 679).

underlies discriminatory practices in the workplace, in Assam, it draws upon widespread cultural practices. Migrant workers or married women considered "suspicious" by locals or simply marginalised people are more likely to be targeted on the basis of their attire (*lungis*) or their physiognomy.[682] As mentioned earlier, married women possess fewer administrative documents in poor rural areas, a problem signalled by police officers, advocates and the state prosecutor.

Thus, investigations are rare, and even when held, superficial and biased due to prevailing prejudices.[683] In 1961, the Census Report declared that in Assam 220,691 immigrants had arrived from East Pakistan during 1951-1961.[684] This census prompted the Border Police to pursue a policy of detection and deportation of any foreigner without any judicial process.[685]

Furthermore, investigation forms registering details of the individuals, supposedly filled by the police in the presence of individuals, are often left empty.[686] One of the local lawyers practicing before the FT reported:

> In most cases, the reasons for making the reference are not properly explained. In some cases, the Border Police hands over blank inquiry reports with no grounds mentioned. It is common practice for the referral authorities to mechanically refer the cases to the Tribunal.[687]

In Dhubri – West district – a state prosecutor argued that errors in the application documents are committed deliberately:

> But the burden of proof lies on the accused. He is given no chance to question the referral authorities, even if they have made out a wrong case against him.[688]

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[682] Chakravarty, 'Declaring Foreigners: How Assam's Border Police and Tribunals Form a Secretive System of Justice' (n 686).

[683] Mohan, '"Worse than a Death Sentence": Inside Assam's Sham Trials That Could Strip Millions of Citizenship' (n 414); Interview with Advocate Wadud (n 679).

[684] Pakytein, 'Part I-A, General Report' PRG 38(N) (D)/75 124.

[685] Purohit, 'Foreigners' Tribunals' (n 671).

[686] Chakravarty, 'Declaring Foreigners: How Assam's Border Police and Tribunals Form a Secretive System of Justice' (n 686).

[687] Interview on 4 November 2019, Guwahati, Assam, in 'Designed to Exclude: How India's Court Are Allowing Foreigners Tribunals to Render People Stateless in Assam' (n 655) 17; 'The Search for Foreigners in Assam – An Analysis of Cases Before a Foreigners' Tribunal and the High Court' (n 680).

[688] Chakravarty, 'Declaring Foreigners: How Assam's Border Police and Tribunals Form a Secretive System of Justice' (n 686).

The burden of proof in fact, lies on the residents of Assam, who must produce documents proving their Indian citizenship before the Tribunal.

These abuses were highlighted in media reports on the detention of an Indian army serviceman and former employee of the Border Police, Mohammad Sanaulla. He was declared an illegal immigrant by the Boko tribunal in 2019.[689] The policeman in charge of the complaint, Chandramal Das, argued that Sanaulla was not the individual he had investigated in May 2008 and August 2009 and a mix-up in the reports had occurred at the administrative level.[690] This case, one amongst other, confirms the inefficiency of the State apparatus and increased individual vulnerability to administrative abuses.

3.1.2. The "D" voters category

The "D" letter added to some people's names in Assam's electoral lists, can lead the ECI, to refer them to the Border Police for further investigation. Denoting "doubtful" or "dubious", may lead to the loss of voting rights, until their citizen status is cleared. In 1997, the ECI identified 2.20.209 'D' voters.[691] In *Mameza Khatun* (2015), the Court indicated that individuals' whose cases were pending before FT automatically became 'D' voters in the electoral list.[692] The ECI procedure appears arbitrary as executing officers exercised discretionary powers, without an investigation.[693] On 2 July 2019, during the Lok Sabha session, Sri Abdul Khaleque – representing the Barpeta constituency in Assam – demanded the abolition of the 'D' voter system in the state as "Indian Citizens are being harassed".[694] However in 2021, 'D' voters still existed (Table 4). Individuals are often targeted through their

[689] Ratnadip Choudhury, 'Ex-Soldier Declared "Foreigner" In Assam Released From Detention Centre' *NDTV* (8 June 2019).

[690] Ratnadip Choudhury, '"Probe Report Fake": Huge Twist After Army Man Declared Illegal Immigrant' *NDTV* (4 June 2019).

[691] Hemanta Kumar Nath, '1.08 Lakh D-Voters Barred from Casting Votes in Upcoming Assam Assembly Polls' *India Today* (4 March 2021).

[692] *Government of Assam v Mameza Khatun* [2015] Gauhati High Court WA No. 114 of 2011 [14].

[693] Prashant Bhushan and Cheryl D'souza, 'Conduct of Foreigners Tribunals in Assam Is Questionable' *The Indian Express* (20 September 2019); Sagar, 'How Assam's Foreigners Tribunals, Aided by the High Court, Function like Kangaroo Courts and Persecute Its Minorities' (*The Caravan,* 6 November 2019).

[694] Written Answers to Questions: (xv) regarding publication of final NRC 2019.

names, and Muslim and Bengali Hindus[695] are disproportionately affected by the D-voters system. Even local ethnic groups like the Rajbanshi from lower Assam became targets as they bear names similar to Bengali Hindus.

Lawyers highlight the arbitrariness of this procedure. Advocate Riyaz Khan and Saadullah Hoque underlines two cases: (i) the individual was not marked as D voter in the 1966 to 2021 lists yet, received a D voter notice; (ii) after her divorce, a woman was listed as a voter in two separate places, yet in one, she was eligible to vote, whilst in the other she was declared a D voter.[696]

Table 4: Numbers of D voters in Assam districts in 2021

[695] Nazimuddin Siddique, 'Inside Assam's Detention Camps: How the Current Citizenship Crisis Disenfranchises Indians' (2020) 55 EPW 1, 3.

[696] Abdul Sikdar Rahman, 'Preliminary Challenges to Jurisdiction' (Foreigners' Tribunals cases, Gauhati, 5 February 2022).

	District	D-voters
1	Barpeta	17,599
2	Sonitpur	16,358
3	Nagaon	10,688
4	Dhubri	8,208
5	Goalpara	6,430
6	Darrang	4,451
7	Morigaon	4,411
8	Kamrup (Metro)	4,245
9	Cachar	3,832
10	Biswanath	3,252
11	Baksa	2,616
12	Hojai	2,411
13	Golaghat	1,956
14	Kamrup	1,705
15	Karimganj	1,530

Note: the D-voters numbers may vary according to the newspaper

Source: Hemanta Kumar Nath, 1.08 lakh D-voters barred from casting votes in upcoming Assam assembly polls, India Today (4 March 2021) •

The practice was questioned before the Gauhati High Court in *HRA Choudhury v. Election Commission of India* (2002), and rejected as illegal under section 16(1) of the Representation of Peoples Act, 1950:

> (1) A person shall be disqualified for registration in an electoral roll if he — (a) is not a citizen of India; or (b) is of unsound mind and stands so declared by a competent court; or (c) is for the time being disqualified from voting under the provisions of any law relating to corrupt practices and other offenses in connection with elections.[697]

In different rulings, the Gauhati High Court maintained the impermanent nature of this system.[698] Even so, in *Assam Public Works* (2019), the SC argued that children of D voters can be deprived of nationality. Section 3(1)(c) of the CAA, 2004, excludes children born of illegal immigrant parents. Children born after 3 December 2004 will be excluded from the NRC, under

[697] *HRA Chaoudhury v Election Commission of India* [2002] Gauhati High Court 2002 (1) GLT [16].

[698] Dharmananda Deb, 'Citizenship Dilemma: Delay By Foreigners Tribunals Adding To The Woes Of "D" Marked Voters Of Assam' *Livelaw.in* (18 June 2019).

three clauses: (i) if their parents are D voters; (ii) are declared foreigners by the FT; and (iii) whose cases are pending in front of the FT.[699] Consequently, a child born of an 'illegal immigrant' does not have access to Indian citizenship, and violating Article 7 of the CRC which obliges State Parties to the Convention to ensure that children are not left stateless.

Recently, in *Denny Zhao v. Netherlands* (2020), the HRC recalled State obligation regarding child protection from statelessness under Article 24§3 of the ICCPR.[700] In this case, the Committee underscored the right of children to be specially protected as a minority.[701] The State is obliged to adopt measures to ensure that every child has a nationality, and consequently, acquisition of nationality must not be discriminatory, especially with regard to the nationality status of one or both of parents.[702]

This significant ruling marks not only a first step for the Committee but paves the way for future decisions in regional jurisdictions, or in WP and national courts in India to defend the right of children to acquire a nationality.

[699] *Assam Public Works v Union of India* [2019] SC of India WP (C) 274 of 2009 [1].

[700] *Zhao v Netherlands* [2020] HRC CCPR/C/130/D/2918/2016 [8.2]. Two individual opinions can be found on this case. Yadh Ben Achour's concurring opinion concerns the State's obligation and the absence of consideration by the Committee of the long jurisprudence since 1990s on article 2 of the Covenant and the 'incoherence' of the ruling concerning this article and its previous jurisprudence mainly in the case *Rabbae et al. v. Netherlands*. Hélène Tigroudja, on the contrary, points out the Committee's lack of elaboration on the other branch of nationality and its impact on individuals: recognition of legal personality (article 16) and human treatment (article 7). While the claimant did not base his demand on these two articles, the Committee should have, according to Hélène Tigroudja, considered it. Her analysis points to the African Court on Human and Peoples' Rights and the IACtHR jurisprudence. *Rabbae et al v Netherlands* [2016] HRC CCPR/C/117/D/2124/2011 [9.7]; *Yean and Bosico Girls v Dominican Republic* [2005] IACtHR Preliminary Objections, Merits, Reparations and Costs [134, 178]; *Expelled Dominicans and Haitians v Dominican Republic* [2014] IACtHR Preliminary Objections, Merits, Reparations and Costs [265-f]; *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica* [1984] IACtHR Advisory Opinion OC-4/84, Series A, No. 4 [32–33]; *Open Society Justice Initiative v Côte d'Ivoire* [2015] African Commission on Human and Peoples' Rights Petition No. 318/06; *Penessis v United Republic of Tanzania* [2019] African Court on Human and Peoples' Rights No 013/2015 [87].

[701] *Zhao* (n 710) para 8.2; 'General Comment No. 17: Article 24 (Rights of the Child)' (HRC 1989) para 4; *Mónaco de Gallicchio v Argentina* [1990] HRC CCPR/C/53/D/400/1990 [10.5].

[702] *Zhao* (n 710) para 8.2; *Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari v Australia* [2003] HRC CCPR/C/79/D/1069/2002 [8].

3.2. The weakening of judicial grounds

3.2.1. Recourse to quasi-judicial bodies

FT are quasi-judicial bodies, which determine citizenship under the Foreigners' Act, 1946.[703] As quasi-judicial bodies, FT, are strictly speaking non-judicial bodies, empowered to interpret the law. It can be a public administrative agency, exercising similar power, and procedures as legal courts and judges. One of the core differences with a judicial organ remains the obligation for a quasi-judicial body to base its decision on conclusion of existing law, with no obligation to follow rules of evidence and procedure. In the *Indian National Congress (I)* case, the SC argued that quasi-judicial acts are different from an administrative act and quasi-judicial authorities are required to act according to the rules.[704]

The government has borrowed its forms and vocabulary from the judicial system to set up FT but strictly speaking these tribunals are not part of the judicial system. Nevertheless, the borrowed term "tribunal" suggests that the bodies' decisions would be based on judicial system procedures and respect of principles of neutrality and impartiality. Although FT are not an institution of the judicial system, they are expected to respect judicial norms and legal procedures.

Furthermore, they are quasi-judicial because established by the government. In theory, they are created to assist and expedite the judicial system. Yet, in practice they tend to slow down the process. According to Ravi Hemadri, some cases before the FT take 7 to 8 years to reach a conclusion.[705] On an average, FTs take 3.3 years to rule over a case. In contrast, in the High Court, these cases generally take 1.3 years. In comparison non-FT cases take approximately 0.7 years.[706]

[703] Dharmananda Deb, 'Foreigners Tribunals In Assam : Practice & Procedure' *Livelaw.in* (13 June 2019).

[704] *Indian National Congress (I) v Institute of Social Welfare* [2022] SC of India Appeal (civil) 3320-21 of 2001.

[705] Interview with Hemadri (n 420).

[706] Shruthi Naik and Leah Verghese, 'What 787 Cases in the Gauhati HC Tell Us About How "Suspected Foreigner" Cases Are Decided' (*The Wire*, 11 March 2020).

Implemented under the FTO, 1964, FT are bound neither by criminal, civil procedure codes nor by the Indian Evidence Act. Consequently, as per the 1964 Order, FT regulate their own procedure, even though these may violate domestic law and IHRL. Two aspects were highlighted by Angshuman Choudhury: (i) cases are reopened; and (ii) procedures varies daily: some days a certain number of documents are required, the next day others.[707] The *modus operandi* of declaring an individual Indian and thereafter a foreigner was revealed in a recent case of Hasina Bhanu. In August 2016, FT-I in Mangaldai declared Hasina Bhanu an Indian citizen. Yet, the Assam Border Police brought another case against Hasina Bhanu before the same FT in 2017, which declared her a foreigner in March 2021. The practice had been, declared 'illegal' by the SC in the *Abdul Kuddus* case, where it ruled that FT could not change their opinion on declaring an individual Indian or a foreigner.[708] Nonetheless, in October 2021, Hasina Bhanu was arrested and sent to Tezpur detention camp. In December 2021, she was finally released through the intervention of the Gauhati High Court.[709] These practices, promotes discriminatory and arbitrary practices. The SC and the Gauhati High Court stand on these questions shows their margin of action to regulate FT practices.[710]

FT clearly tend to go beyond their jurisdiction, issuing warrants and ordering arrests, detention or deportation of individuals, even in mid-proceedings.[711] This abuse of power was sanctioned by the Gauhati High Court in 2011.[712] Secondly, due to the nature of their bodies, the *res judicata* principle does not apply to FT as argued in *Amina Khatun v. Union of India* (2018).[713] Under this principle, a case can be re-opened by the same parties after a ruling is made on the same issue.[714] Yet, the SC overturned this principle in *Abdul Kuddus v. Union of*

[707] Interview with Choudhury (n 416).

[708] *Abdul Kuddus v Union of India* [2019] SC of India (2019) 6 SCC 304.

[709] Tora Argawala, 'Gauhati High Court Orders Release of Woman First Declared "Indian", Later a "Foreigner"' *The Indian Express* (16 December 2021).

[710] 'Designed to Exclude: How India's Court Are Allowing Foreigners Tribunals to Render People Stateless in Assam' (n 655).

[711] 'Institutional Discrimination and Statelessness in India' (2020) 8.

[712] *Md Rustom Ali v The State of Assam* [2011] Gauhati High Court WP (C) No 3236/2009.

[713] *Amina Khatun (musstt) v Union Of India* [2018] Guwahati High Court WP (C) Nos. 7339 of 2015 [65.3]. The argument relies on different SC rulings such as: *Pondicherry Khandi and Village Industries Bd v P Kulothangan* [2003] SC of India (2004) 1 SCC 68; *Workmen of The Straw Board Manufacturing Company Limited v M/s Straw Board Manufacturing Company Limited* [1974] SC of India (1974) 4 SCC 681.

[714] Section 11 Code of Civil Procedure, 1908.

India (2019), where it argued that FT while being a quasi-judicial organ still have civil consequences and therefore the *res judicata* doctrine applies.[715] This ruling inflected the Gauhati High Court's approach. In *Jahir Ali v. Union of India* (2021),[716] it argued that in the 2015 and 2018 rulings the FT did not have to follow the precedent of *Amina Khatun*. However, through the application of the *res judicata* principle, the Court asked the FT to review the case and see if the individual was the same person as in 2015. Finally, the individual was declared an Indian citizen in 2021.[717]

The use of such a body, highlights the situation's specificity. So far, all the cases mentioned afore relating to individual's nationality were treated by the judiciary. But in Assam, a new body has appeared, adapted to a political context. By establishing a quasi-judicial body, the executive trespasses in the judicial sphere. It borrows judicial tools to do work that is not in its domain. For advocate Sanjay Hedge, and an Assamese legal worker, FT are without any doubt part of the Indian judiciary, but Aman Wadud and Angshuman Choudhury disagree.[718] FT are not treated as part of the judiciary, are not transparent and rulings are not available online. They raised the questions whether decisions related to constitutional rights should be delivered by an administration body. These differences of opinion invite an examination of FT through the angle of judicial functioning.

3.2.2. Denial of due process

FT exclusive competence on deciding foreigner status raises the question of due process as it leaves people mainly women and children vulnerable to an abusive application of law.[719]

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[715] *Abdul Kuddus v Union of India* (n 718) para 23.

[716] Jahir Ali was declared a foreigner by the FT of Mangaldai in 2018 even though in 2015 the same FT declared him an Indian citizen. *Jahir Ali v Union of India* [2021] Gauhati High Court WP (C) No. 3402/2020.

[717] In the following cases individuals were declared Indian and subsequently foreigners by the FT in two different rulings. The Court considered the *res judicata* principle and declared the petitioners as Indian citizens. In fact, in the Bulbuli Bibi case, the Court argued that the small difference in the names of the petitioners was minor and that the individual was the same. *Alal Uddin v Union of India* [2021] Gauhati High Court WP (C) 3172/2020; *Bulbuli Bibi v Union of India* [2021] Gauhati High Court WP (C) 7810/2019.

[718] Interview with Advocate Wadud (n 679); Interview with Advocate Sanjay Hegde (26 October 2022), New Delhi (India); Interview with Choudhury (n 416); Interview with Anonymous (18 October 2022).

[719] 'Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary General' (n 103) para 32.

Due process entails the right to be treated fairly by the administration of justice, and places limitation on laws and legal proceedings to guarantee fundamental justice and fairness. The absence of consideration of women in the Indian social, cultural and economic systems, and their difficulty to access required administrative documents raises questions about due process in FT. The 2017 *Manowara Bewa* case, highlighted this element.[720] The Gauhati High Court, declared that the *Gaon panchayats* certificates were of a private nature, and thus could not be accepted by the Tribunal as proof of citizenship. However, for married women under 18, the *Gaon Panchayats* certificate provided proof of their permanent residence.[721] This new regulation, negatively affected married women's right to nationality, as women from the poor classes often do not possess a birth certificate. With this new rule, the Court not only turned a blind eye to women's vulnerable in India, especially in patriarchal communities, and poor areas, marked by low marriage age, and illiteracy. Women thus have greater difficulty in establishing a legal link with their parents (graphic 7). Headmen from the parents' or husbands' villages can produce the necessary certificate, acceptable only on condition that the headman bring a record of the life events. Still, they are often rejected due to insufficient evidence produced.[722] Furthermore, oral evidence is frequently not examined particularly in cases of parentage and kin relationship, where it is decisive to prove residency.[723]

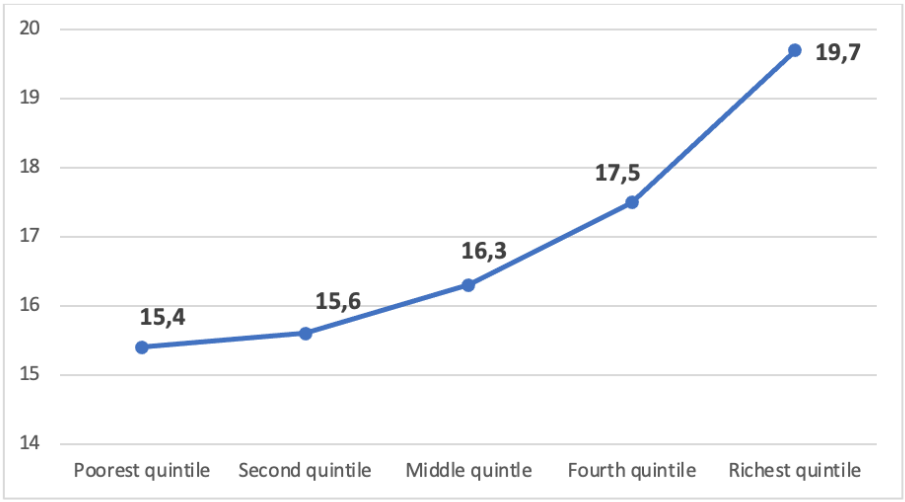
Graphic 7: Median age at first marriage or union among women aged 25 to 49 years, by wealth quintile in India in 2014

[720] *Manowara Bewa v Union of India* [2017] Gauhati High Court WP (C) No. 2634 of 2016 [43.3].

[721] 'Designed to Exclude: How India's Court Are Allowing Foreigners Tribunals to Render People Stateless in Assam' (n 655) 18.

[722] Rohini Mohan, '"Worse than a Death Sentence": Inside Assam's Sham Trials That Could Strip Millions of Citizenship' (n 414).

[723] *Asia Khatoon v Union of India* [2019] Gauhati High Court WP (C) 4020/2017; Section 50 Indian Evidence Act, 1872 "In a proceeding under the Foreigners Act, 1946 and the Foreigners (Tribunals) Order, 1964 the evidentiary value of oral testimony without support of documentary evidence is wholly insignificant.".



Source: 'Ending Child Marriage: Progress and Prospects' (UNICEF 2014) 3 •

In rural areas, child marriages and lack of education limits women's administrative papers to either the voter list or ration card, where they appear under their husband's name. Hence, no official record can prove their link with their parents. In Kamrup Rural, nearly 71% of the women were thus declared illegal immigrants.[724]

3.2.3. Mobilising criminal and civil law

Using the proper legal vocabulary to analyse FT practices proves problematic. In theory, as FT cases are not classified as criminal, the tribunal is neither bound by criminal nor by civil procedure codes. However, the analyses of FT procedures mainly around burden of proof and type of "punishment", raises questions about the use of specific IHRL concepts. A mixture of civil and criminal law practices can be found. To begin with, the burden of proof follows civil law as it falls upon the plaintiff, who must produce evidence of nationality. It also follows criminal law as the case is filed by government institutions and administrations and may result in the incarceration of the plaintiff.

The mix between two branches of law produces an adapted vocabulary particularly surrounding the right to a fair trial. According to the HRC, the right to a fair trial[725] concerns individuals

[724] Rohini Mohan, '"Worse than a Death Sentence": Inside Assam's Sham Trials That Could Strip Millions of Citizenship' (n 414).

[725] Articles 10 and 11 UDHR; Article 14 ICCPR.

facing criminal charges[726] or their rights and obligations in a suit at law. The civil character of this right according to the Committee, is based on its nature rather than the legal forum provided by a national legal system to determine specific rights.[727] From a civil perspective, the right to a fair trial encompasses judicial procedures around the rights of contract, property, torts in the field of private law, administrative law, and other procedures which must be evaluated on a case-by-case basis.[728]

Though neither linked to criminal nor civil procedure codes, FT practices highlight a problematic approach to law. They do not fall within a clearly distinguishable set of laws, criminal or civil, for they mobilise aspects of each category, which is quite unsettling. From a legal perspective, this introduces the necessity to abandon a traditional approach that considers rights to be rooted in specific legal frameworks. Consequently, the concept of the right to a fair trial helps to understand the illegality of FT approach to individual loss of right and liberty.

3.3. Tracing illegal procedures through the right to a fair trial

Despite evidence of clear violations of individuals rights, the situation in Assam does not lend itself to a simple analysis. While in practice, the deprivation of nationality process is easily summarised, the legal aspect remains difficult to expose, and from a legal perspective illegality of acts can be complex to exercise.

3.3.1. Judging without justification

While visible differences between Assamese and non-Assamese can be found,[729] this should not lead to individuals being labelled illegal foreigners. The Indian SC argued in

[726] It corresponds to acts punishable under domestic criminal law or acts which are criminal in nature and therefore must be regarded as penal due to the severity of the act. *Paul Perterer v Austria* [2004] HRC CCPR/C/81/D/1015/2001 [9.2].

[727] *YL v Canada* [1986] HRC CCPR/C/27/D/112/1981 [9.1-9.2].

[728] 'General Comment No. 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial' (HRC 2007) CCPR/C/GC/32.

[729] Interview with Barua (n 411).

Sarbananda Sonowal (II) (2006) that grounds on which individuals are suspected must be reasonable and relevant.[730] Therefore, if the suspicion is based on the individual's clothing, this motif is not valid as sartorial difference is acceptable and thus constitutes irrelevant evidence. In that case, the Tribunal would not be able to issue a ruling and would reject the inquiry against the individual. Yet in practice, as highlighted earlier, individuals are targeted due to social suspicions, based mainly on appearance or even accent.

As quasi-judicial bodies, FT do not need to follow rules of evidence and procedure. Yet, a minimum of procedure is established through Section 3(1) of the FTO which argues that once the Tribunal rules on the issue, the individual receives a copy within ten days, on the core motifs on whose grounds he or she is alleged to be a foreigner.[731] However, in practice no uniform procedure has been adopted or established by Tribunals for the notification, and the grounds are rarely mentioned in the notices. Furthermore, no written statements, exhibited documents or witness depositions are given.[732] This method, justified by tribunal members and Border Police officers, is due to the absence of updated records by individuals who live on islands, are victims of climate change, and inclined to go into hiding on receiving the summons.[733] Yet, these justifications can be very easily responded, for judges are aware that Border Police often declare they cannot find the accused without any justification.

3.3.2. Uses of ex-parte rulings

Once a notice is issued, individuals are required to appear before the Tribunal. In case of absence, they are *in absentia* declared foreigner.[734] However, individuals can also contest and

[730] *Sarbananda Sonowal (II)* (n 672) para 60.

[731] Section 3(1) FTO.

[732] 'Designed to Exclude: How India's Court Are Allowing Foreigners Tribunals to Render People Stateless in Assam' (n 655) 23.

[733] Rohini Mohan, '"Worse than a Death Sentence": Inside Assam's Sham Trials That Could Strip Millions of Citizenship' (n 414).

[734] *State of Assam v Moslem Mondal* (n 690).

appeal their case within 120 days.[735] Though possible, the Foreigners Act and the FTO have not established a specific appeal body to the FT. On 30 May 2019, the Central Government amended the FTO, 1964, to create the Foreigners (Tribunals) Amendment Order, 2019, which allows appeals to be made if individuals are not satisfied with the outcome of claims and objections filed against the NRC.

Appeals must be made to the Gauhati High Court in the Assamese case, and to the SC through a writ jurisdiction. In practice, appeal is restricted,[736] and cases often get blocked at the High Court.[737]

Besides, according to advocate Wadud a structural problem occurs. High Court cases not only are pending, but acts cannot be challenged in the appeal. Even though that is the most important element in these cases, the High Court only considers the jurisdiction issue. Furthermore, because of this structural issue lawyers have less chance of winning cases.[738] In addition, materials impediments like geographical location, costs, or appeal duration prevent accused persons from appealing. The lockdown during the Covid-19 pandemic, and floods in the state, further slowed the process. People whose names are not on the NRC list, have not received rejection slips, without which they cannot challenge their exclusion before the FT.[739] This restriction of the right to appeal erodes respect of the right to fair trial before FT, as the essential aim of the right to appeal is to ensure that rulings are not final, and Higher Courts can rectify prejudicial errors.[740] Judicial violation of this right accentuates the vulnerability of marginalised and minority groups through abusive application of the law.[741]

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[735] Interestingly, the right to appeal is not absolute and States can establish restrictions on this right. However the ICCPR does protect this right (Article 14§5). 'Assam NRC Final List 2019: Over 19 Lakh Excluded, 3.11 Crore Included in List' *The Indian Express* (31 August 2019).

[736] *State of Assam v Moslem Mondal* (n 690).

[737] Interview with Anonymous (n 728).

[738] Interview with Advocate Wadud (n 679).

[739] Umanand Jaiswal, 'Assam Wants Fresh Scan on a Part of NRC' *The Telegraph online* (2 September 2020).

[740] Article 14§5 ICCPR; 'General Comment No. 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial' (n 738).

[741] This element of vulnerability has been highlighted by the report of the UN Secretary General: 'Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary General' (n 103) para 32.

In 2021, Gauhati High Court Judge Kotiswar Singh, reputed for invalidating FT rulings argued for the importance of FT analysing evidence produced rather than by way of default as done in *ex-parte* cases. In the same case, he highlighted the correlation between citizenship and the right to dignity:

> It is through citizenship that a person can enjoy and enforce fundamental rights and other legal rights conferred by the Constitution and other statutes, without which a person cannot lead a meaningful life with dignity.[742]

Generally, these *ex-parte* rulings occurred when notices were not duly issued. In Kamrup Rural district, FT judge communicated that over a period of six months, every individual was declared an illegal immigrant because of his/her absence during the hearing, similarly in Hajo tribunal, over a period of six months in 2018, all the 299 judgments declared people illegal foreigners in the physical absence of the individual.[743]

For advocate Wadud, two reasons explain these *ex-parte* rulings: (i) before the NRC people were not aware of the process, and often on receiving sudden notices simply avoided tribunals; (ii) notice issues were not delivered properly and often deposited in strange places (trees, lamps, shops) so that people were unaware of their convocation.[744] Thus, Amrit Lal, an Assamese social worker, discovered that his mother had been declared an illegal immigrant on the suspension of the family ration card. *Ex-parte* practices in a sense question the Indian judiciary's capacity to act against a misuse of law.

From 1985 to 28 February 2019, 63,959 individuals in Assam were declared foreigners through the practice of *ex-parte* opinions.[745] Till 2016, 80,194 people were declared foreigners by the FT, among them 26,026 cases (32%) were by *ex-parte* judgments.[746]

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[742] *Khadiza Begum @Khudeza v Union of India, the Election Commissioner of India, the State of Assam* [2021] Gauhati High Court WP(C)/6725/2019.

[743] Rohini Mohan, '"Worse than a Death Sentence": Inside Assam's Sham Trials That Could Strip Millions of Citizenship' (n 414).

[744] Interview with Advocate Wadud (n 679).

[745] Lok Sabha Unstarred Question No. 1724 2019.

[746] Aman Wadud in *Between Hatred And Fear: Surviving Detention In Assam* (Directed by Amnesty International India, 2018) pt 5:30.

The right to be present[747] is a necessary component of the right to a fair trial, and is often taken for granted.[748] Variations often exist from one country to another but more importantly between fields (civil law and criminal courts). The right to a fair trial is linked to other rights: mainly, to understand the case charges or be present during its hearing. When individuals are unaware of the grounds on which they are being charged, and when the burden of proof relies on the person alleged to be a foreigner, the grounds of right to a fair trial are weakened. FT practices, render almost impossible to present a coherent case before the judges, especially when individuals are mostly illiterate, poor and have difficulty accessing legal aid. Although the Legal Services Authorities Act, 1987 provides free legal aid for marginalised individuals, in practice this appears ineffective.

In the cases analysed between 2017 and 2019 at Hajo, 96% of the rulings were *ex-parte*, and in none did the police present evidence. Because the burden of proof lay on individuals, absence of evidence led to them being declared Bangladeshi.[749] Additionally, the cases were decided in a period of 39 days, starting with the date of receipt of the report.[750] Only in 31 cases were individuals allowed to refute the allegations. These cases were passed under Judge Giti Kakati Das, who subsequently saw her contract terminated, as she had not declared a sufficient number of foreigners.[751]

Recently, in *Asor Uddin v. Union of India* (2021) concerning *ex-parte* rulings by the FT, the Gauhati High Court ruled the need for the petitioner to appear before the FT as:

> citizenship, being an important right of a person, ordinarily, should be decided on the basis of merit by considering the material evidences that may be adduced by the person concerned **and not by way of default as happened in the present case**[752]

While this ruling signals an abuse of *ex-parte* practices, the judgment does not highlight the FT abusive practice in serving notices to individuals. In *Kabir Uddin* (2021) where the petitioner was unaware he had been declared a foreigner by FT in an *ex-parte* decision, the Gauhati High Court argued that Order 3(5) of the FTO did not consider posting notices in public places as a

[747] Article 14§3(d) ICCPR.

[748] Amal Clooney and Philippa Webb, *The Right to a Fair Trial in International Law* (OUP 2021) 446.

[749] 'The Search for Foreigners in Assam – An Analysis of Cases Before a Foreigners' Tribunal and the High Court' (n 680).

[750] ibid.

[751] *Mrs Mamoni Rajkumari v The State of Assam* [2017] Gauhati High Court WP (C) Nos. 4476/2017 & Ors.

[752] *Asor Uddin v Union of India* [2021] Gauhati High Court WP (C) 6544/2019 [7], [emphasis added].

practice to serve notice.[753] Consequently, the notice was not delivered properly, therefore the *ex-parte* practice should not continue. In this ruling the High Court argued that the Tribunal should take necessary measures to serve notices properly to individuals.

Although the Gauhati High Court unmasked FT negligence with the practice of *ex-parte* through notifications, it did not clearly denounce this system's abuse on citizenship, and the judicial structural problems in the functioning of the Tribunals.[754]

Once declared a foreigner in absentia, the individual has 30 days to challenge the ruling. According to the *Moslem Mandal* case, the FT may review its decisions if the defendant files an application within 30 days from the first judgment, or if he proves that he was prevented by a sufficient cause from appearing before the Tribunal.[755] The individual must submit a written statement to the tribunal, with photocopies of documents showing his or her Indian citizenship. Two categories of documents are required: (i) proof of their ancestors' arrival in India before 1971, the Assam accord cut-off date; (ii) proof of their ancestry.[756]

In 41% of FT cases that reached the Gauhati High Court, between 2017-2019, 61% had their names on electoral rolls, and 39% had residential certificates or certificates from the panchayat. However, the FT found this documentation unsatisfactory in 66% of the cases, and in 38% of cases the documentation was refused due to spellings that did not match. In fact, documents with irregularities are generally put aside,[757] and it has been noted that illegally obtained documents are accepted.[758] Furthermore, in 71% of cases, copies of documents were rejected on two grounds: firstly, the copies were not certified; secondly, due to absence of the person

[753] *Kabir Uddin v Union of India,* [2021] Gauhati High Court WP (C) 7901/2019.

[754] See: Wadud, 'Judiciary Must Re-Examine How It Has Viewed Citizenship Question in Assam' (n 661).

[755] Dharmananda Deb, 'Foreigners Tribunals In Assam : Practice & Procedure' (n 713).

[756] 'Designed to Exclude: How India's Court Are Allowing Foreigners Tribunals to Render People Stateless in Assam' (n 655) 30.

[757] In the *Sultana Begum* case, the Court held that documents which improperly use the state emblem will not be accepted. *Sultana Begum v The Union of India* [2019] Gauhati High Court WP (C) No. 7115/2016 [6].

[758] "even if, evidence is illegally obtained it is admissible.", *R M Malkani v State Of Maharashtra* [1972] SC of India 1973 AIR 157.

who created them, for instance a panchayat member. Consequently, one out of two individuals were declared foreigners because the authority who issued the document was absent.[759]

The Tribunal's opinion must be given within a sixty-day period after the defendant's appearance. The decision can be challenged before the High Court due to the Tribunal's errors such as: absence of jurisdiction, illegal actions in the exercise of its competence or violations of the party's rights. However, the Court cannot review the conclusions reached by the Tribunal. No provision for an appeal exists for FT rulings. The order of the Tribunal is final. This raises concern that the Tribunal may not respect the appropriate procedural guarantees in Article 21 of the Constitution but also Article 8 of the UDHR.[760] At the international human rights level, it raises another question. In principle, the State must suspend the effects of the decisions until the appeal has been settled. In this way, the individual can continue to enjoy his or her nationality.[761] However, this is not so in Assam.

Furthermore, an allegation of a "money-making industry" was made against judges, police and lawyers in the Morigaon FT.[762] Amir Hussain's incapacity in No.3 Morigaon FT to pay Rs. 2 lakhs in cash led to him being declared a foreigner.[763]

[759] 'The Search for Foreigners in Assam – An Analysis of Cases Before a Foreigners' Tribunal and the High Court' (n 680).

[760] 'Designed to Exclude: How India's Court Are Allowing Foreigners Tribunals to Render People Stateless in Assam' (n 655).

[761] 'Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary General' (n 103) para 33.

[762] Interview with Choudhury (n 416).

[763] 'Declared "Foreigner", a Money Mongering Option Now' (*Pratidin Time*).

3.3.3. Denying the right to access to justice because of sustained and chronic deprivation of resources

Disregard of local contexts by judges, is a problem for due process. Yet, poverty in the region, is another concern. It is quite rare to find "well-off" individuals appearing before the FT, the majority are poor and vulnerable individuals.[764]

For Arjun Sepgupta, former UN Independent Expert on Extreme Poverty, poverty results from a combination of three factors: income poverty, human development poverty, and social exclusion.[765] Additionally, for the CESCR, poverty culminates in the deprivation of civil, cultural, economic, political and social rights.[766] Consequently, poverty not only leads to deprivation of economic and material resources, or to the violation of human dignity,[767] but the right to access justice. Despite being a yardstick of a society, access to justice, and therefore access to jurisdiction must not only be presumed, but well beyond that, it must be effective.

While difficult to define, access to justice was elaborated through the interpretation of the HRC,[768] the IACtHR[769] and the ECtHR.[770] The HRC prompted other UN treaty bodies to consider and interpret this concept. Access to justice is not only an established international standard considered as a basic human right, but is clearly a tool designed to protect other universal human rights. It is the right of individuals to use the legal machinery and judicial mechanisms as tools to protect their other rights. Not respecting positive and negative obligations, resulting from this right, can be due to practice or legal obstacles.[771] Lack of access to justice, particularly for vulnerable individuals signifies the violation of an effective judicial

[764] Interview with Anonymous (n 728).

[765] Arjun Sengupta, 'Human Rights and Extreme Poverty: Report of the Independent Expert on the Question of Human Rights and Extreme Poverty' (Commission on Human Rights 2005) E/CN.4/2005/49 2.

[766] 'Substantive Issues Arising in the Implementation of the ICESCR: Poverty and the ICESCR' (CESCR 2001) E/C.12/2001/10 para 8.

[767] Irene Hadiprayitno, 'Poverty and International Human Rights Law' [2004] SSRN Electronic Journal.

[768] 'General Comment No. 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial' (n 738).

[769] *Cantos v Argentina* [2002] IACtHR Merits, Reparations and Costs, Series C, No. 97 [54].

[770] *Golder v United Kingdom* [1975] ECtHR 4451/70 [36].

[771] Ricardo Lillo Lobos, *Understanding Due Process in Non-Criminal Matters: How to Harmonize Procedural Guarantees with the Right to Access to Justice*, vol 97 (Springer) 28; *Golder v United Kingdom* (n 780) para 26; *Fernández Ortega (2010)* (n 193) para 201.

protection. It questions whether individuals are considered in their own right or through the prism of social values and place in society.

Justice stands as a safeguard to dissent or social movements, and mirrors society's advance towards a more egalitarian structure, or on the contrary its slide towards a regressive model. It is the symbol of effective democracy and the rule of law. Paragraphs 12 and 13 of the Declaration of the High-Level Meeting on the Rule of Law (November 2012), holds that access to justice is a basic principle of the rule of law. The UN General Assembly's resolution 67/1 on the rule of law at the national and international level, affirms the importance of guaranteeing the right of equal access to justice, especially to individuals considered vulnerable. [772]

From a legal perspective, access to justice relies on judges and lawyers. Whilst often put aside, lawyers must be accountable regarding their professional functions, and follow ethical standards and established norms of behaviour.[773] Lawyers are core actors in the protection and promotion of human rights.[774] For the Indian lawyer and former UN Special Rapporteur on the Right to Health (2008-2014), Anand Grover, lawyers play a key role in the judiciary's independence, and individual access to justice.[775] They may face pressure and interference to influence or control judicial proceedings.[776] Assamese lawyers working on these cases are

[772] The right to equality before the law is protected by the following conventions: Article 7 UDHR; Articles 14§1 and 26 ICCPR; Articles 8§2 and 24 American Convention on Human Rights 1969; Article 3 African Charter on Human and Peoples' Rights 1986; Article 20 European Union Charter of Fundamental Rights 1998; Article 3 Association of Southeast Asian Nations Human Rights Declaration 2012; Article 4§1 Framework Convention for the Protection of National Minorities 1994; Article 18 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Article 15 CERDW. Jorge A Marabotto Lugaro, 'Un derecho humano esencial: el acceso a la justicia' (2003) 1 Anuario de Derecho Constitucional Latinoamericano 291; Valesca Lima and Miriam Gomez, 'Access to Justice: Promoting the Legal System as a Human Right', *Peace, Justice and Strong Institutions* (Springer International Publishing 2020); Declaration of the high-level meeting of the General Assembly on the rule of law at national and international levels 2012 (A/67/L1) paras 14–15.

[773] International Commission of Jurists, 'International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: Practitioners Guide No.1' (2007) 68.

[774] 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul' (Human Rights Council 2014) A/HRC/26/32 para 63.

[775] Interview with Advocate Anand Grover (18 October 2022), former UN Special Rapporteur on the right to health and Advocate in India.

[776] 'Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, Mission to Maldives' (Human Rights Council 2013) A/HRC/23/43/Add.3 para 86; Interview with Advocate Grover (n 785); Interview with Advocate Hedge (n 433). In the Indian context, see the case against the human rights lawyers Surendra Gadling – arrested under the Unlawful Activities (Prevention) Act for delivering hate speeches in connection with the Bhima Koregaon violence –, and Anand Grover, vocal on criticism of executive excess, and of the Indian government.

stigmatised and often call "Bangladeshi lawyers".[777] Yet some of them, are complicit in rendering access justice impossible. Whilst some lawyers provide free service (*pro bono* cases), others may charge four or five hundred thousand rupees.[778] Difficulty in obtaining bank loans because of the absence of documents drive individuals to sell their residential plots or other possessions.[779]

Since most of the cases are defended by lawyers, when they do not follow ethical standards and behaviours, they become part of the problem to access justice. Money issues, absence of fair trial, fair investigation, and prejudice raises the question whether access to justice a protected right in these cases.[780]

In Assam, geographical factors aggravated by poverty render access to justice difficult. Sixth from the top in the headcount ratio, 32.67% of the Assamese population is multidimensionally poor, and with Covid-19, the poverty ratio has increased.[781] This measure provides an overall picture of the multiple disadvantages faced by individuals, alongside inadequate nutrition, health, education and standard of living.

In 2019, the Gauhati High Court ruled that FT cases cannot be transferred to another FT even when individuals are closer to that tribunal.[782] Individuals may be forced to sell their animals and cattle, or even jewellers to reach the FT.[783] Despite their differences, these individuals stories recall the post-Partition period, during which women often had to sell their jewellery to survive.

The Court refers to access to justice throughout its judgment, leaving FT a MOA to consider individual situations case by case.[784] The awareness of FT approach to cases, the high number

[777] Interview with Anonymous (n 728).

[778] Interview with Advocate Wadud (n 679).

[779] ibid.

[780] ibid.

[781] 'India - National Multidimensional Poverty Index, Baseline Report' (NITI Aayog 2021) 34.

[782] *Shariful Islam v Union of India & Ors* [2019] Gauhati High Court WP (C) 2780/2019.

[783] Saha, *No Land's People* (n 16).

[784] *Shariful Islam v Union of India & Ors* (n 792) para 19.

of *ex-parte* rulings, the short notices (24 to 48 hours[785]), FT distance from their home, even causing death at times,[786] beg the question of High Courts ignoring the SC judgment recommending physical accessibility to Courts.[787]

Deaths frequently due to roads accident, described in the book "No Land's People"[788] highlight the consequences of violation of access to justice, and shed to light on another type of violence: structural and normative. Though little data is available on the precise number of deaths, oral evidence is abundant.[789]

Disregard of SC rulings allows the High Court to consider FT as fair tribunals, and ignore their politicisation. Accessing justice implies in concrete access to the judiciary by individuals. In *Das v. Union of India* (2021), petitioner No.1 could not appear before the FT due to ill health, and consequently petitioner Nos. 3 to 5 as minors could also not appear. The Tribunal declared them all foreigners in an *ex-parte* ruling.[790] While the Gauhati High Court indicated that *ex-parte* orders "cannot be interfered in a routine manner" it is important to consider the implications for citizenship.[791] Besides noting the health issue, FT judges should have considered its cascading effect on other family members.

This cascading effect reinforced the Gauhati High Court's 2017 ruling on the extension of the illegal migrant status from an individual to another family member. In *Aktara Khatun* (2017), the Court gave the FT room to direct the Border Police's investigation into family members' citizenship status, when one individual was declared a foreigner by the FT.[792] However, this practice does not work in reverse: if one individual is declared an Indian citizen, other family members will not be given citizenship by extension.

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[785] Faizan Mustafa, 'Kangaroo Tribunals: Foreigners' Tribunals Almost Another Arm of BJP Government in Assam' *The Indian Express* (8 October 2019).

[786] Abhishek Saha, 'Four Dead as Thousands Rush across Assam for Fresh NRC Hearings' *The Indian Express* (8 August 2019).

[787] *Anita Kushwaha v Pushap Sudan* [2016] SC of India AIR 2016 SC 3506.

[788] Saha, *No Land's People* (n 16).

[789] Interview with Choudhury (n 416); Interview with Azad (n 427).

[790] [2018] Cachar Foreigners Tribunal Case No. 327.2017; [2018] Cachar Foreigners Tribunal Misc Case No. 07/2018.

[791] *Shri Rajendra Das v The Union of India* [2021] Gauhati High Court WP (C) No. 8295/2019 [9].

[792] *Aktara Khatun @Aktara Begum v Union of India* [2017] Gauhati High Court WP (C) 260 of 2017.

The risk of mass statelessness becomes a stark reality in this precise case as it extends the danger of deprivation of nationality to the rest of the family. Moreover, this practice is a violation of State Parties membership of the CRC and ICCPR.[793] The historian Mira Siegelberg argues that mass statelessness calls for the territorial state to become the core source of protection of individual rights.[794]

3.4. Dependence and partiality of judges

Just as FT functioning raises concerns about tribunals independence and impartiality, their composition is also problematic. Both undermine the working of a competent, independent and impartial tribunal, considered a core element of the rule of law and fair trials. This right is absolute and non-derogable.[795]

Selection process – Judges are selected through an evaluation of their performance based on the number of foreigners they have declared.[796] The higher the declaration of foreigners, the more the chances for the "judge" to have a seat in the Tribunal. This selection process may explain the following data gathered in four FT in the Kamrup Rural district. Here, nine cases out of ten were against Muslims, and 90% of these Muslims were declared illegal immigrants, compared to 40% Hindus.[797] While FT practices differ in each court, a generally unfavourable approach towards the Muslim minority can be detected, particularly when these are marginalised (poor, women, illiterate).

Politicisation of these tribunals through a selection of judges seems to be taking place. In 2019, Gauhati High Court advertised for a FT judge asking for a "fair knowledge of official language of Assam and its (Assam) historical background giving rise to foreigner issues".[798] This was

[793] Article 7 CRC; Article 24 ICCPR.

[794] Mira L Siegelberg, *Statelessness: A Modern History* (Harvard University Press 2020).

[795] The HRC argued that this right is firstly an element of the right to a fair trial, and secondly is an absolute right that cannot be subject to any exception. 'General Comment No. 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial)' (n 738) para 18.

[796] 'Assam Decides Tribunal Member's Term on Rate of Declaring Foreigners: Amnesty' *The Hindu* (12 March 2020).

[797] Rohini Mohan, '"Worse than a Death Sentence": Inside Assam's Sham Trials That Could Strip Millions of Citizenship' (n 414).

[798] 'The Gauhati High Court at Guwahati - Advertisement - No. HC.XXXVII-22/2019/442/R.Cell'.

interpreted in three ways: first, the degradation of eligibility criteria due to an absence of knowledge of citizenship or immigration laws; second, as grounds favourable for future discrimination against Bengali speaking Muslims in the state;[799] and finally, as ensuring conformity with political agendas.[800]

Prior to 2015, FT members were retired district court judges,[801] or additional district judges in the 36 Tribunals. With the increase of FT, the lack of judiciary officers led to a change of criteria, and the position was opened to advocates with more than ten years' experience.[802] The NRC publication in 2019 brought about further changes. Retired civil servants and advocates with seven years practice can now be appointed judges.[803] Next, the age limit was reduced from 45 to 35 years.[804] In practice, mostly individuals with no judicial background are selected. In 2015, out of 63 selected members, two were judicial officers.[805] This practice goes against SC rulings, notably *R K Jain v. Union of India* (1993). This upheld that a person appointed must have legal expertise, training, and judicial experience.[806] The term 'judicial experience' used in Section 2§2 of the FTO, is open to interpretation, but it also led the Central Government and the Gauhati High Court to distinguish between 'judicial experience' and 'having held judicial office'.[807] The SC in *Assam Sanmilita Mahasangha v. Union of India* (2014) agreed that judicial experience is equal to holding a judicial office, irrespective of the position occupied.[808] This, despite a 1959 Rajasthan High Court ruling, referring to judicial experience: "*a person must possess judicial experience in a substantial measure. Nominal judicial experience for a short*

[799] Talha Abdul Rahman, 'Identifying the Outsider: An Assessment of Foreigner Tribunals in the Indian State of Assam' (2020) 2 Statelessness and citizenship review 112, 128.

[800] 'Designed to Exclude: How India's Court Are Allowing Foreigners Tribunals to Render People Stateless in Assam' (n 655) 5.

[801] Interview with Advocate Wadud (n 679).

[802] Chakravarty, 'Declaring Foreigners: How Assam's Border Police and Tribunals Form a Secretive System of Justice' (n 686).

[803] 'The Gauhati High Court at Guwahati - Advertisement - No. HC.XXXVII-22/2019/442/R.Cell' (n 801).

[804] Purohit, 'Foreigners' Tribunals' (n 671); 'The Gauhati High Court at Guwahati - Advertisement - No. HC.XXXVII-13/2017/2687/R.Cell'; 'The Gauhati High Court at Guwahati - Advertisement - No. HC.XXXVII-22/2019/442/R.Cell' (n 801).

[805] Purohit, 'Foreigners' Tribunals' (n 671).

[806] *R K Jain v Union of India* [1993] SC of India 1993 AIR 1769.

[807] Rahman, , 'Identifying the Outsider: An Assessment of Foreigner Tribunals in the Indian State of Assam' (n 809) 126.

[808] *Assam Sanmilita Mahasangha v Union of India* (n 410) para 46.II.

period would not qualify a person to be appointed as Chairman".[809] Furthermore, according to the Basic Principles of the Independence of the Judiciary (Principle 10) judges must be qualified in law or trained. Under IHLR, no minimal educational or training requirement for judges is required. States practices and legislation thus vary.[810]

Future judges receive only one or two days orientation before heading the FT, leading to mistakes in the verification of evidence.[811] This process is not only inconsistent with national rulings, but constitutes a violation of the right to a fair trial. Based on Article 14 of the ICCPR, the right to a fair trial includes the right to a competent tribunal.[812] However, FT situation seems to deviate from core principles and produces surprising practices, including unfair termination of employment.[813]

In September 2019, 221 judges were appointed without any written test or a transparent selection procedure.[814] Judges are selected by the Gauhati High Court and appointed through the Home and Political Department of the Assam government.[815] Significantly, under the FTO, the power to appoint judges lies with the Central Government, which has delegated this power to state governments. Consequently, it is the Gauhati High Court and the Assam government which finalise judges selection.

End of contract – In 2017, 19 FT members sued the Assamese government in the Gauhati High Court[816] for terminating their contracts on grounds of unsatisfactory performance.[817] In

[809] *Badridass Kanhaiyalal v Appellate Tribunal of State Transport Authority Rajasthan* [1959] Rajasthan High Court [1959] AIR 1960 Raj 105 [58].

[810] Clooney and Webb (n 758) 75; *Gallo v Argentina* [2015] IACtHR Case 12.632 [122]; *Reveron Trujillo v Venezuela* [2009] IACtHR Series C, No. 197 [72]; 'Concluding Observations of the HRC: Bolivia' (HRC 1997) CCPR/C/79/Add.73 para 34.

[811] Rohini Mohan, '"Worse than a Death Sentence": Inside Assam's Sham Trials That Could Strip Millions of Citizenship' (n 414).

[812] See: Clooney and Webb (n 758).

[813] Fatima Khan, 'Job in Assam Foreigners Tribunal Depends on Conviction Rate, Says Civil Rights Group Report' *ThePrint* (19 September 2020).

[814] Bhushan and D'souza (n 703).

[815] ibid.

[816] *Mrs Mamoni Rajkumari v The State of Assam* (n 7§&).

[817] Arunabh Saikia, 'Assam's Foreigners Tribunals Are Competing to Declare People Foreigners' *Bar and Bench* (23 June 2019).

fact, the Monitoring Committee and the Gauhati High Court required the Government of Assam to "monitor and assess the performance" of judges.[818] This explained the intervention of the Government of Assam, Home and Political Department, in the extension of contracts. Indeed, the Assam government's creation of a Monitoring Committee to oversee the performances of the FT violates the 2014 SC judgement.[819]

An annex list in the petition showed that judges declaring 10% of their cases as foreigners were marked "not satisfactory. May be terminated".[820] In contrast, judges who ruled 59% of the defendants to be foreigners were offered an extension of their contract (Table 5). [821] However, these complaints were dismissed by the Assam Home Ministry.[822]

Table 5: Judges selection at the end of two years in 2017

[818] *Mrs Mamoni Rajkumari v The State of Assam* (n 761) paras 8–9.

[819] *Assam Sanmilita Mahasangha v Union of India* (n 410).

[820] 'Designed to Exclude: How India's Court Are Allowing Foreigners Tribunals to Render People Stateless in Assam' (n 655) 29; 'Fact Finding Report: Doubtful Citizenship, Distorted Rights in Assam' (United Against Hate 2017); Rohini Mohan, '"Worse than a Death Sentence": Inside Assam's Sham Trials That Could Strip Millions of Citizenship' (n 414). See Annex – 3.

[821] 'Designed to Exclude: How India's Court Are Allowing Foreigners Tribunals to Render People Stateless in Assam' (n 655) 29; 'Fact Finding Report: Doubtful Citizenship, Distorted Rights in Assam' (n 830); Rohini Mohan, '"Worse than a Death Sentence": Inside Assam's Sham Trials That Could Strip Millions of Citizenship' (n 414).

[822] Rohini Mohan, '"Worse than a Death Sentence": Inside Assam's Sham Trials That Could Strip Millions of Citizenship' (n 414).

Total of cases disposed since the beginning	Total numbers of foreigners declared	Percentage of foreigners declared	General views of the Government upon the Members	Whether may be considered for further retention or may be terminated
380	5	1,32	Not satisfactory	May be terminated
460	159	34,57	Good	May be retained
443	173	39,05	Good	May be retained
574	88	41,67	Need to improve	May be retained with warning
321	240	74,77	Good	May be retained
345	142	41,16	Good	May be retained
300	76	25,33	Good	May be retained
249	67	26,91	Need to improve	May be retained with warning
626	98	15,65	Good	May be retained
239	150	49,38	Good	May be retained
468	48	10,26	Need to improve	May be retained with warming
485	21	4,33	Not satisfactory	May be terminated
494	12	2,43	Not satisfactory	May be terminated
326	25	7,67	Not satisfactory	May be terminated
691	404	58,47	Good	May be retained
548	8	1,46	Not satisfactory	May be terminated
472	5	1,06	Not satisfactory	May be terminated
485	4	0,82	Not satisfactory	May be terminated
528	61	11,55	Need to improve	May be retained with warning
263	6	2,28	Not satisfactory	May be terminated
238	78	32,77	Need to improve	May be retained with warning

Source: Designed to Exclude: How India's Court are allowing foreigners tribunals to render people stateless in Assam (Amnesty International India 2019) 29 •

The BJP government's response to the allegations of lawyers working in the FT maintained:

> all foreigners tribunals enjoy complete independence from the government and the appointments are supervised by the High Court[823]

While the BJP argues that the executive is not interfering with the judiciary in this precise case, pressure faced by FT judges is an open secret in Assam's judicial landscape. Pressure comes from the state government and High Court judges.[824] An evolution is apparent according to the Assamese advocate Wadud. Under the Congress, judges did not face pressure, but with the BJP in power, pressure has increased and prejudice against individuals is more flagrant (Table 6).[825]

Table 6: State governments of Assam

[823] Kumar Sanjay Krishna, Additional Chief Secretary, Home and Political Department of Assam, in Khan (n 816).

[824] ibid.

[825] Interview with Advocate Wadud (n 679).

Period of office	State's government of Assam	Chief Minister
1946-1952	Indian National Congress	Gopinath Bordoloi / Bishnu Ram Medhi
1952-1957	Indian National Congress	Bishnu Ram Medhi
1957-1962	Indian National Congress	Bishnu Ram Medhi / Bimala Prasad Chaliha
1962-1967	Indian National Congress	Brimala Prasad Chaliha
1967-1972	Indian National Congress	Brimala Prasad Chaliha / Mohendra Mohan Choudhury
1972-1978	Indian National Congress	Sarat Chandra Sinha
1978-1979	Janata Party / Communist Party of India / Plains Tribals Council of Assam	Golap Borbora / Jogendra Nath Hazarika
1979-1980	Government of India	President Rule
1980-1981	Indian National Congress / Communist Party of India / Independents	Anowara Taimur
1981-1982	Government of India	President Rule
1982	Indian National Congress / Communist Party of India / Independents	Kesab Chandra Gogoi
1982-1983	Government of India	President Rule
1983-1985	Indian National Congress	Hiteswar Saikia
1985-1990	Asom Gana Parishad	Prafulla Kumar Mahanta
1990-1991	Government of India	President Rule
1991-1996	Indian National Congress	Hiteswar Saikia / Bhumidhar Barman
1996-2001	Asom Gana Parishad / Communist Party of India / United Minorities Front	Prafulla Kumar Mahanta
2001-2006	Indian National Congress	Tarun Gogoi
2006-2011	Indian National Congress / Bodoland People's Front	Tarun Gogoi
2011-2016	Indian National Congress / Bodoland People's Front	Tarun Gogoi
2016-2021	Bharatiya Janata Party / Asom Gana Parishad / Bodoland People's Front	Sarbananda Sonowal
2022-	Bharatiya Janata Party / National Democratic Alliance	Himanta Biswa Sarma

Assam's FT do not exhibit independence. Over the years they have voiced executive policies and its ideologies.[826] For instance, during Covid-19, FT members letter to the State Health and Finance Minister declared that their contribution to Assam Arogya Nidhi, a fund created to help families in need of access to healthcare, could not be given to the Tablighi Jamaat (an

[826] Saikia, 'Assam's Foreigners Tribunals Are Competing to Declare People Foreigners' (n 827).

organisation of Islamic missionaries) whose members had been labelled as 'Jihadi'.[827] One of the signatories was the same judge who had declared Mohammad Sanaulla (retired army serviceman) an illegal immigrant. The incident revealed a clear pattern of discrimination on the part of this particular judge towards Muslims. The letter was reportedly not sent. Nevertheless, the fact that it had been signed by FT judges in their official capacity is significant. Judges have an obligation to apply the law without discrimination. This letter brings an additional element to the ties between the judiciary and government ideology. Consequently, while indicating the existence of shared prejudices concerning Muslims, it once again questions the neutrality of FT judges. Furthermore, in terms of neutrality, judges not only administer "the law" but are also prosecutors and public advocates rapidly becoming State representatives.[828]

Likewise, it is interesting to note the high number of FT judges who had been members of the AASU.[829] Between 1979 and 1983 the party strongly opposed foreigners and favoured the NRC. While it is difficult to prove a direct link between a political opinion and judges' rulings in the FT due to the pressure of the Assamese government, it cannot be denied that membership of the AASU movement can impact the decision. The association with this political movement imperils the right to an impartial tribunal,[830] which is an absolute right that cannot be subject to any exception.[831] This signifies that judges should not be influenced by personal bias or prejudice,[832] nor promote the interest of one party. In the current context of the FT, this subjective aspect[833] is questioned. AASU, the state and the Centre government are all promoting "us vs them" programs, which concretely result in FTs increasingly declaring 'illegal

[827] Abhishek Saha, 'Our COVID Aid Not for Tablighis, Jihadis, Write Assam Foreigners' Tribunals' Members' (*The Indian Express*, 12 April 2020).

[828] Interview with Anonymous (n 728).

[829] For the AASU members, a need to strengthen the mechanism for detection and deportation of foreigners is needed, in addition to strengthening the border police force. 'Assam Govt, AASU Voice for Re-Verification of NRC' *The Northeast Today* (18 November 2021).

[830] This right is guaranteed in the following international human rights treaties signed by India: Article 14§1 ICCPR; Article 10 UDHR.

[831] 'General Comment No. 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial' (n 738) para 19.

[832] *Shyam Singh v State of Rajasthan* [1972] Rajasthan High Court 1973 CriLJ 441; *Zahira Habibullah Sheikh v State of Gujarat* [2006] SC of India Appeal (Crl.) 446-449 of 2004.

[833] For the HRC, impartiality resides in two requirements, a subjective and an objective element. 'General Comment No. 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial' (n 738) para 21.

migrants'. Furthermore, the letter cited above by FT judges to the State Health and Finance Minister reveals the lack of subjective impartiality of these judges.

It is important to recall that impartiality is closely tied to the independence of tribunals. International bodies often consider them twin elements[834] though these two concepts have different legal meanings.[835]

The relationship, either personal, or due to pressure from the Assam Government resulting from political affiliations reflects on the independence tribunals. Despite the SC pronouncements[836] and Constitutional principles,[837] judicial independence and the rule of law are core elements even if they are not stated as provisions. This principle is put aside in the case of the FTs. Judges must be independent,[838] and more importantly, their independence from the branches of the government must be guaranteed[839] to enforce individuals core right's.[840]

By accepting interference from the Government of Assam in the selection and termination of judges' contracts, the State endangers the judges independence by exposing them to political pressure, whether direct or indirect. It was precisely to prevent this that the HRC affirmed the need for States to protect "judges from any form of political influence in their decision-making".[841]

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[834] *Incal v Turkey* [1988] ECtHR 22678/93 [65].

[835] *Apitz Barbera (First Court of Administrative Disputes) v Venezuela* [2008] IACtHR Series C, No. 182 [55–56].

[836] "'Impartiality' is the soul of Judiciary, `Independence' is the life blood of Judiciary. Without independence, impartiality cannot thrive. Independence is not the freedom for Judges to do what they like. It is the independence of judicial thought. It is the freedom from interference and pressures which provides the judicial atmosphere where he can work with absolute commitment to the cause of justice and constitutional values.", *Union of India v R Gandhi* [2010] Preliminary Objections, Merits, Reparations and Costs Civil Appeal No. 3067 of 2004 [15].

[837] The right to an independent tribunal has to be established in the Constitution or national legislation. Principle 1 Basic principles on the Independence of the Judiciary 1985.

[838] *SP Gupta v Union of India* [1981] Preliminary Objections, Merits, Reparations and Costs 1982 (2) SCC 831; *Lopez Lone v Honduras* [2015] IACtHR Series C, No. 302 [194]; *McKay v United Kingdom* [2006] ECtHR 543/03.

[839] *Crociani v Italy* [1980] ECtHR 8603/79 & Others [212].

[840] *The Honourable Chief Justice of Trinidad and Tobago Mr Justice Ivor Archie ORTT v The Law Association of Trinidad and Tobago* [2018] Judicial Committee of the Privy Council [2018] UKPC 23.

[841] 'General Comment No. 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial' (n 738) para 19.

Fair investigations – Article 21 of the Constitution declares that fair investigation is a core right of aliens or Indians, and consequently, the individual must have an equal opportunity to demonstrate that he is not a foreigner during the investigation. Fair investigations remain one of the main checks to the deprivation of nationality. On the ground, however, they are difficult to implement, despite guidelines laid down in the *Moslem* case[842] by the High Court for Border Police investigation on individuals' citizenship.

4. Phase two: detention camps as a new legal norm

The case of Assam is once again quite specific compared to countries like as Italy, Spain or Greece.[843] In Europe for instance, illegal migrants are often detained upon arrival. However, in Assam, individuals are arrested in their homes or villages.

Notification No. 1/7/61-F.III (1961) gave the state authority to declare individuals foreigners under the Foreigners Act, 1946. This was later extended to Police and Deputy Commissioners under the government of Assam.[844] However, this notification did not include the power to issue orders for detention. In *Sree Latha v. Public Department* (2007), the Madras High Court ruled on that. The state government could keep foreigners in detention camps under section 3(2)(e) of the Foreigners Act, 1946.[845]

In this context, detention becomes a key mechanism to further alienate Muslims and Hindus. Strategies of building a nation on ethnic foundations have mobilised and legitimised legal mechanisms and instruments to enforce discriminatory policies in violation of IHRL.

On 17 August 2021, in an official notification, the Home and Political Department of Assam renamed Detention Centres as Transit camps.[846] The change seeks to present a more

[842] *State of Assam v Moslem Mondal* (n 690).

[843] For more information on the detention of migrants in these countries see: Céline Cantat, 'Locked up and Excluded: Informal and Illegal Detention in Spain, Greece, Italy and Germany' (migreurop 2020) 4.

[844] Notification No. 1/7/61–F.III 1961 para 2.

[845] *Sree Latha v The Secretary to Government* [2007] Madras High Court No. 1138 of 2006.

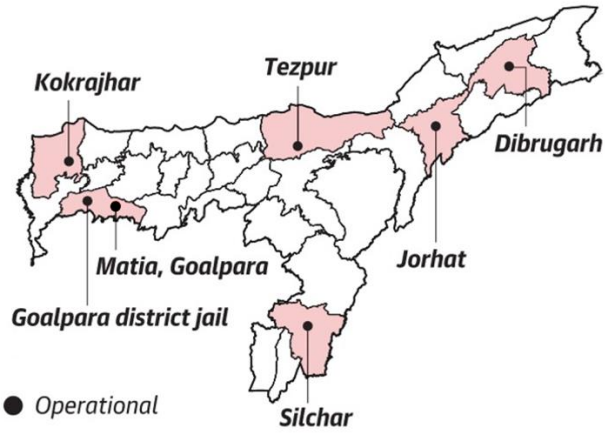
[846] In this chapter, I will use "transit" and "detention" interchangeably, as there is *de facto* no difference between the two concepts in Assam. Notification No. PLB.121/2015/Vol-I/509, Government of Assam 2021.

"humanised" image of these centres,[847] in order to make them more acceptable by national and international human rights standards. While ground reality presents another picture, the change signals the government's concern with its international image, and shows the importance of international legal standards and norms. However, scholars and activists, still use the term detention centre. For Angushman Choudhury, "there are no transit camps in Assam today, as deportation does not happen".[848]

4.1. Background

Detention centres are a new development in India. They came up in Assam in the early 2000's. In some areas former prisons were converted for detention of anyone identified as an illegal immigrant.[849] Currently, there are seven detention centres, holding predominantly Bengali-speaking people (map 2).

Map 2: Transit camps in Assam in 2020



Source: Naresh Singaravelu, Data | Where are detention centres in India?, The Hindu (1 January 2020)

[847] Tora Argarwala, 'Assam Govt Renames "Foreigner" Detention Centres to "Transit Camps"' *The Indian Express* (19 August 2021).

[848] Interview with Choudhury (n 416).

[849] Gringlas, 'India Passes Controversial Citizenship Bill That Would Exclude Muslims' (n 476); Uddipana Goswami, 'India's New Citizenship Law Reopens Wounds for Indigenous Populations' (*The Globe Post*, 13 January 2020).

The security angle was used to justify these detention centres. It acquired further importance after the sectarian violence against Bengali Muslims viewed as illegal immigrants from Bangladesh, and serial bomb blasts in Gauhati in October 2008, and in January 2009.

In fact, a large number of detainees in Assam are to date considered Bangladeshis or Burmese (table 7). Data published in *The Hindu*, a national daily newspaper, is unreliable, as far as figures for Bangladesh are concerned, especially in view of the earlier demonstration related to discrimination and links between FT judges and government institutions, and political ideology.

Table 7: Nationality in detention in Assam in 2020 - in percentage

Transit camp	Bangladesh	Myanmar
Goalpara	99,1	0,9
Kokrajhar	100	0
Silchar	91,9	8,8
Dibrugarh	100	0
Jorhat	100	0
Tezpur	97,1	3
Total	98,3	1,8

Source: Summant Sen and Naresh Singaravelu, Where are the Detention Centres in India?, The Hindu (1 January 2020) •

The first of these centres came up in 2008-2009. Following the 2008 Gauhati High Court's judgment on illegal immigrants, Justice B.K. Sarmat ordered the deportation of more than 50 Bangladeshi nationals, registered voters in Assam, found guilty of acquiring Indian citizenship "fraudulently".[850]

In July 2009, Bhumidhar Barman, Assam revenue Minister, informed the state assembly of the creation of two detention camps to hold illegal immigrants in Mancachar and Mahisashan. By mid-2010, three detention centres were active in Goalpara, Silchar and Kokrajhar. Until 2011,

[850] Prabhash K Dutta, 'NRC and Story of How Assam Got Detention Centres for Foreigners' *India Today* (27 December 2019).

362 foreigners-illegal migrants were sent to these camps. Later, detention centres were created at Tezpur, Jorhat, and Dibrugarh.

In 2014, the Central government directed all state governments to set up detention centres. In 2018 it approved the building of one in Goalpara district, expected to be completed by December 2019. It started operated in January 2023. In 2021, Gauhati High Court gave 45 days to the Assam Government to finish the construction of the transition centre.[851] Government pressure after the Covid-19 lockdown to complete this reflects a will to increase the number of arrested "foreigners". In practice, it would multiply FT discriminatory rulings.

In 2017, the state government sanctioned 20 bighas of land (5 hectares) for the construction of this detention centre.[852] Located 126 km from the state capital Dispur, the centre is spread over 2.8 hectares and can detain between 2,000 and 3,000 people.[853] Besides a hospital, it has a dining area, school, recreational centre, and two separate accommodations – 13 blocks for men and 2 blocks for women – divided by a six feet red wall.[854] As a security measure, it contains six watchtowers for round-the-clock monitoring, aided by a 100-metre high-beam light. It is considered the largest detention centre in India,[855] and cost approximately $7 million.[856] On 28 January 2023, 68 people shifted in the camp: 45 men, 21 women and 2 children.[857] In February 2023, the camp was used to detained man accused of child marriage.[858]

[851] Nupur Thapliyal, 'Foreigners' Detention Centre: Gauhati High Court Grants 45 Days To Assam Govt For Completing Construction, Shifting Detenues' *Livelaw.in* (20 August 2021).

[852] Dutta, 'NRC and Story of How Assam Got Detention Centres for Foreigners' (n 860).

[853] Tawqeer Hussain, '"How Is It Human?": India's Largest Detention Centre Almost Ready' *AlJazeera* (2 January 2020); Argarwala (n 857).

[854] Hussain, '"How Is It Human?"' (n 863).

[855] Anjana Dutta and Tripdip K Mandal, 'India Builds Largest Detention Centre For Those Excluded from NRC' *TheQuint* (3 September 2019).

[856] Interview with Choudhury (n 416).

[857] '68 Illegal Foreigners Shifted to the Newly Constructed Matia Transit Camp in Assam' (*OpIndia*, 28 January 2023).

[858] 'Assam Detention Centres for Foreigners Used to Jail Child Marriage Accused' *Hindustan Times* (8 February 2023).

The whole subject of detention camps is problematic. While women have more difficulties to obtain documents, interestingly they do not compose most of detainees (table 8).

In March 2020, the numbers had increased significantly: Goalpara has 370 inmates, Kokrajhar, a woman's detention centre, has 140, Silchar 479, Dibrugarh 680, Jorhat 670, and Tezpur 797 inmates, or a total of 3136, showing an increase of 223%. In less than 3 months detention centres in Assam had nearly reached maximum capacity, according to the Union Minister of State for Home Affairs G. Kishan Reddy, who proclaimed that nearly 3,331 people were lodged in Assam's detention centres.[859] According to Nityanand Rai, minister of State for the Ministry of Home Affairs, around 800 people were being kept in detention centres in Assam on 6 March 2020.[860] These sets of contradictory data underline the difficulty of establishing reliable statistical evidence.

Table 8: Number of detainees by gender in the Assamese detention centres in January 2020

Transit camp	Male	Female	Total
Goalpara	186	15	201
Kokrajhar	9	131	140
Silchar	57	14	71
Dibrugarh	38	2	40
Jorhat	132	64	196
Tezpur	224	98	322
Total	646	324	970

Source: Summant Sen and Naresh Singaravelu, Where are the Detention Centres in India?, The Hindu (1 January 2020) •

[859] 'Six Detention Centres in Assam with Capacity of 3,331 Persons: Home Ministry Tells Lok Sabha' *The New Indian Express* (17 March 2020).

[860] 'Around 800 People Kept In Detention Centres In Assam: Ministry Of Home Affairs' *Livelaw.in* (11 March 2020).

4.2. Dehumanising the minority through arbitrary detention

The FT declaration of an illegal immigrant implies their loss of all rights as Indians and immediate arrest by the police under Section 4 of the Foreigners Act, 1946. Consequently, on the day of the FT verdict, some lawyers advise their clients to stay away from the tribunal.[861] Individuals when arrested are sent to detention centre till their deportation. Interestingly, individuals are mostly sent to detention centres because of the D voter mechanism and reference cases rather than the NRC.[862]

FT discriminatory and arbitrary process invites analysis of detention centres as motors of deprivation of liberty by violation of individual rights particularly the right to a fair trial. In *Liu Xiabo v. China* (2011), the Working Group on Arbitrary Detention held that the lack of time to defend his case was a breach of fairness, and therefore his arrest was an arbitrary deprivation of his liberty because of the violation of the right to a fair trial.[863]

Whilst detention centres have been built across the country and the state, individuals have often been detained with 'criminals'. In *Santhanu Borthakur* (2020), the Gauhati High Court noted that illegal migrants should be held in detention centres outside prisons.[864] The Central Government did specify the need to separate jails and detention centres. However, it does not declare detention centres within prisons as illegal. Mixing 'illegal' migrants with convicts and undertrials has led overcrowded prisons to discrimination by jail officials, shortage of rations, with impacts on physical and mental health.[865] The first major problem resides in the non-separation of the detention centres and jails, and of detainees from ordinary inmates. Further, no clear legal regime for the rights and entitlements of detainees has been established. Jail

[861] Rohini Mohan, '"Worse than a Death Sentence": Inside Assam's Sham Trials That Could Strip Millions of Citizenship' (n 414).

[862] Siddique, 'Inside Assam's Detention Camps: How the Current Citizenship Crisis Disenfranchises Indians' (n 705) 3.

[863] *Liu Xiaobo v China* [2012] Working Group on Arbitrary Detention A/HRC/WGAD/2011/15 [23].

[864] *Santanu Borthakur v Union of India* [2020] Gauhati High Court WP (Crl) 2/2020.

[865] 'Mapping Developments: A Follow-up to the Detention Chapter from the Securing Citizenship Report' (*Parichay - The Blog*, 25 January 2021).

authorities follow the Assam Jail Manual, but without applying benefits such as salaried work or parole.[866]

These centres are used as a tool of repression,[867] and conditions are problematic: big halls have 15 to 20 detainees often with a personal space of 4 by 5 feet,[868] families are separated, and individuals held indefinitely without proper food, medical attention or care, no access to medicines, not privacy, no visitors, and the likelihood of facing collective punishment.[869] Most detainees are affected by these conditions, and suffer either mentally or physically (e.g. loss of eyesight).[870] Such treatment is opposed by HRC as outlined in *Mukong v. Cameroon* (1994) and considered as minimum standard.[871] Furthermore, the ECtHR jurisprudence upheld that the cumulative effect of prisons conditions induced inhuman and degrading treatment, and violated Article 3 of the European Convention of Human Rights (ECHR).[872]

Since 2008, nearly 100 deaths have been registered in detention centres including suicides.[873] 67-year-old, Ajbahar, was released on bail after three and a half years in the Goalpara detention centre following his arrest at the FT, where he learnt that he had been declared an illegal immigrant by another FT. His arrest was upheld by the Gauhati High Court. Depression provoked by his arrest led to his wife's suicide. Today, Ajbahar is mentally unstable.[874] While, the impact on individuals' mental health is disregarded as too the impact on family health, some social projects today seek to help former detainees with psychological aid.[875]

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[866] 'Report on NHRC Mission to Assam's Detention Centres from 22 to 24 January 2018' (National Human Rights Commission 2018) 2; 4.

[867] Interview with Anonymous (n 728).

[868] The ECtHR argues that personal space between 3-4 square meters constitutes a core factor in the consideration of detentions conditions. Siofra O'Leary, 'Conditions of Detention in the Case-Law of the Two European Courts: Responses to Prison Overcrowding' (Council of Europe, Strasbourg, 23 April 2019) 4.

[869] Soumya Shankar, 'How India's Changing Citizenship Law and a National Registry Could Target Muslims' (*The Intercept*, 30 January 2020); 'Statelessness in India in the Global Pandemic' (29 July 2021); Interview with Begum (n 684); Interview with Choudhury (n 416).

[870] Interview with Begum (n 684).

[871] *Mukong v Cameroon* [1994] HRC CCPR/C/51/D/458/199 [9.3].

[872] *Modarca v Moldova* [2007] ECtHR 14437/05; *Vasilescu v Belgium* [2014] ECtHR 64682/12.

[873] Hussain, '"How Is It Human?"' (n 863).

[874] Anjuman Ara Begum, 'Voices from the Field on Citizenship Rights in Assam' (Exploring the right to nationality in the context of India, 6 February 2021).

[875] Interview with Begum (n 684).

As no agreement exists between India and Bangladesh, individuals considered foreigners by the FT are condemned to detention centres for an indefinite time. In fact, detention centres facilitate long-term custody.[876] While the *Moslem Mandal* case placed a two-month limit for the detention of foreigners, in reality the situation is quite different (table 9).[877] In *Madani v. Algeria* (2007), the HRC argued that in order to avoid arbitrariness, detention cannot continue "beyond the period for which the State party can provide appropriate justification".[878]

Currently, the issue of illegal movement between India and Bangladesh is being addressed within the framework of human trafficking, but irregular migration remains unmentioned between the two countries during official discussions.[879]

Table 9: Number of detainees in detention centres in Assam in January 2018

Detention centre	Since 2009	Since 2010	Since 2011	Since 2012	Since 2013	Since 2014	Since 2015	Since 2016	Since 2017	Since 2018
Kokrajhar	0	8	3	3	2	5	50	42	38	3
Tezpur	0	5	1	0	4	28	43	63	115	6
Goalpara	1	3	4	3	4	16	60	74	82	5
Johrat	0	1	1	1	4	0	18	41	44	1
Silchar	0	1	0	7	2	10	6	15	42	2
Diburgarh	0	0	1	0	1	1	5	8	12	2
Total	1	18	10	14	17	60	182	243	333	19

Source: Designed to Exclude: How India's Court are allowing foreigners tribunals to render people stateless in Assam (Amnesty International India) 14 •

In January 2018, 302 (33,6%) of the 897 detainees had been in detention for more than 2 years.[880] Whilst statistics on individuals declared illegal migrants by each FT can be found, it

[876] Interview with Choudhury (n 416).

[877] *State of Assam v Moslem Mondal* (n 690) para 134 (viii).

[878] *Madani v Algeria* [2007] HRC CCPR/C/89/D/1172/2003 [8.4].

[879] 'National Register of Citizens in Assam: A Spectre of Mass Statelessness in India' (Development And Justice Initiative 2018) 7–8.

[880] *Between Hatred And Fear: Surviving Detention In Assam* (n 756).

is not known whether the individual declared illegal as sent to the detention camp. Supposedly all those judged illegal migrants are not arrested, mainly as the fear of detention may drive individuals into hiding.[881]

A petition to the SC by social activist Harsh Mander challenged the inhuman treatment of individuals in detention centre and their indefinite detention.[882] On 10 May 2019 the Court ordered the release of individuals who had completed three years in detention on condition of payment of one lakh rupees and weekly reporting to the local police station.[883] These conditions are viewed as unreasonable and "harsh" by the Assamese lawyer Aman Wadud.[884] Despite the SC order, only nine 'foreigners' were released between May and September 2019, although 355 were still in detention since more than three years in June 2019.[885]

During Covid-19, a new petition was filed by the Assamese lawyer Aman Wadud, and in April 2020 the SC order reduced the period in the detention camps to two years, and lowered the personal bond to Rs 5,000. Conditions were therefore somewhat relaxed.[886] For the USCIRF Commissioner, Anurima Bhargava, this testifies to the SC's recognition of individuals vulnerability in detention centres.[887]

On 13 April 2021, 300 people in detention for more than 2 years were released.[888] The release however is not absolute, and individuals risk fresh detention. After the pandemic, a residential address is now required along with a personal bond, and weekly presentation at the police station. The reduction of public transport during the pandemic did not lead to the cancellation of police appointments creating a problem.[889] As people's geographical location is known to police, the threat of deportation and imprisonment still hangs heavily.

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[881] *'Would Hide If a Police Van Passed': Assam Woman's Horrors of Citizenship Battle* (Directed by The Quint).

[882] *Harsh Mander v Union of India* [2019] SC of India WP(C) 1045/2018.

[883] *Supreme Court Legal Services v Union of India* [2019] SC of India WP(C) 1045/2018.

[884] Wadud (n 661).

[885] Bhushan and D'souza (n 703).

[886] Interview with Hemadri (n 420).

[887] 'USCIRF Welcomes Indian Supreme Court Decision on Assam Detention Centers as a First Step' (14 April 2020).

[888] 'Statelessness in India in the Global Pandemic' (n 879).

[889] Interview with Begum (n 684).

In sum, detention, whether long or short, psychologically affects detainees, disturbing mental well-being, and physical condition. High levels of depression among detainees were observed in Assam detention centres.[890] Rules of international law see indefinite detention as heightening the risk of torture, because of the long-term psychological repercussions of indefinite custody.[891] Deteriorating psychological conditions may also lead to a high number of suicide attempts. 30 deaths by suicide, all of Bengali speakers, were reported in these centres, but the government attributed these to illness.[892]

Men, women and boys less than six years old are separated from their families in the prison. Children below six years old stay are expected to stay within the detention centre with the mother. Children over six are declared Indian and sent outside the detention centre if they are male. Girls are allowed to stay with their mothers inside the centres.[893] Yet, the State does not take responsibility for the child, leaving it to family members or the community. This situation may increase the danger of child abuse.[894] Indefinite detention of children with their parents is contradictory to IHRL, and State Parties obligation under Article 24§1 of the ICCPR and especially Article 37(b) of the CRC declares that:

> No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

The SC has at times pointed out the inhuman conditions and violation of core rights by the Assamese state in the detention centres. On 31 October 2018, during a petition hearing, the

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[890] 'Report on NHRC Mission to Assam's Detention Centres from 22 to 24 January 2018' (n 876).

[891] Alfred de Zaya, 'Human Rights and Indefinite Detention' (2005) 87 Int. Rev. Red Cross 15, 19.

[892] Rahul Karmakar, '30 "Foreigners" Dead in Assam's Detention Centres' *The Hindu* (12 April 2020); '28 Deaths in Assam Detention Centres, But None Due to Lack of Medicines: Govt' *The Wire* (28 November 2019).

[893] *Between Hatred And Fear: Surviving Detention In Assam* (n 756).

[894] According to the National Crime Records Bureau cases of rape and murder of children increase every year. In India, 53% of children face sexual abuse. In child-care institutions, children are at higher risks of abuse and torture. In 2017, in Assam – second state with the highest number of cases – 1127 children had suffered torture in 483 cases according to the National Crime Records Bureau. Rokibuz Zaman, 'Child Abuse Worry in Assam' *The Telegraph online* (Guwahati, 19 November 2019). 'Child Abuse in India' (*Helpline Law: Legal Solutions Worldwide*).

SC highlighted the problem with indefinite detention: "*You (Assam state government) cannot put a person in a detention centre and say you will decide later what's to be done about them. It must be planned out in advance.*"[895] Furthermore, the SC put an end to the absence of difference between "illegal migrants" and detainees in detention centres by asking the Assam government to establish a detention manual within two months, and guarantee that families are not separated.[896] In contrast, the Indian government's response to Harsh Mander's petition was quite different. It refused to acknowledge the violation of the right to hygiene, right to water, right to safety, right to dignity, or right to food.

4.3. From a regional to a national scale

Assam is not the only state to see the growth of detention centres (table 10). Since 2009, the central government, through the Ministry of Home Affairs, has instructed state governments to establish detention centres according to a Model Detention Centre Manual prepared by the government. The core objective is to limit movements of illegal migrants before repatriation.[897] Since 2006, a detention centre run by the Foreigners Regional Registration Office is even operational in New Delhi.[898] On 22 December 2019, the southern state of Karnataka opened a centre for undocumented migrants in Nelamangala, forty kilometres from Bengaluru.[899] On 29 May 2019 the western state of Goa opened a detention centre. In Rajasthan, the detention centre is inside a federal jail. In May 2020, another detention centre was expected to be completed in the state of Punjab. Other states under BJP governments have demarcated land to build new detention centres. However, states under non-BJP governments like West Bengal, Maharashtra and Kerala have declared they will not implement the central government order relating to detention camps.

Table 10: Detention centres in India in 2020

[895] 'SC Slams Assam Govt for Keeping Foreign Nationals in Detention Centres without Plan' *The Financial Express* (31 October 2018).

[896] *Re-Inhuman conditions in 1832 Prisons v State of Assam* [2018] SC of India WP (C) No. 406/2013.

[897] Vijaita Singh, 'Since 2009, States Asked by MHA to Set up Detention Centres' *The Hindu* (23 December 2019).

[898] Hussain, '"How Is It Human?"' (n 863).

[899] ibid.

Detention centre	State	Status
Goalpara district jail	Assam	Operational
Kokrajhar	Assam	Operational
Silchar	Assam	Operational
Dibrugarh	Assam	Operational
Jorhat	Assam	Operational
Tezpur	Assam	Operational
Lampur	Delhi	Operational
Mapusa	Goa	Operational
Alwar Central jail	Rajasthan	Operational
Amritsar Central jail	Punjab	Operational
Matia (Goalpara)	Assam	Under construction
Tarn Taran	Punjab	Under construction
Bengaluru	Karnataka	Under construction
Nerul	Maharashtra	Location identified
New Town	West Bengal	Location identified
Bongaon	West Bengal	Location identified

Table: Summant Sen and Naresh Singaravelu, Where are detention centres in India?, The Hindu (1 January 2020) •

Detention seems to have become a political tool used for electoral purposes, or for national security, with little respect for human rights' considerations or equitable treatment of refuges or immigrants. The State is thus held to be proactively participating in producing illegality. A strong body of scholarship has exposed the practices of detention camps as tied to the process of nation-building, through the control of borders, control of migration and creation of a sense of security. These elements centred around the idea of legality vs. illegality consolidate the concept of belonging to the nation, and thus, citizenship and nationality in legal terms, as a form of *contrat social*.[900] These forms of detention reflect the normalization and

[900] Bridget Anderson and Vanessa Hughes (eds), *Citizenship and Its Others* (Palgrave Macmillan UK 2015) 2; Leanne Weber and Benjamin Bowling, 'Valiant Beggars and Global Vagabonds: Select, Eject, Immobilize' (2008) 12 Theoretical Criminology 355.

routinization of a "carceral migration policy",[901] in which confinement is the punitive culminating point for immigrants.

5. Conclusion

The case of India is not a unique example of a country targeting minorities through the process of arbitrary deprivation of nationality or citizenship. The particularity of the Assamese case and India is linked firstly to the gradual delegation of the Central government's power to state governments to determine who is an Indian national. Secondly, because of multiple different legislations – Passport Act, Foreigners Act, FTO, Registration of Foreigners Act and the Citizenship Act – citizenship regulations have led to the inter-dependence of legislations and to its current complex regime.

The lack of consideration by FT to missing documents is striking in a country where uniform documentation was, and remains a challenge even today. It highlights the voluntary separation between this jurisdiction and the ground reality in the state. More importantly, it indicates that despite the judiciary's obligation to ensure the protection of individuals rights and improve State's policy through its rulings,[902] the Indian judiciary systems fails to do so. For Amnesty International India,[903] the SC and the High Court, in this case the Gauhati High Court, have not only weakened the separation of powers, but more dangerously, they have accelerated the politicisation of the judiciary. For instance, in the *Sonowal* case, which violated national and IHRL, the use of a Government of Assam's political report of to the President of India in 1998 and its acceptance by the Court, led the same Court in 2014 to legitimise the updated NRC.[904] Likewise, it has held individuals accountable for human rights abuses and increased the impunity of government bodies.

[901] Jenna M Loyd, 'Carceral Citizenship in an Age of Global Apartheid' (2015) 8 Occasion 1, 11.

[902] Fahed Abdul-Ethem, 'The Role of the Judiciary in the Protection of Human Rights and Development: A Middle Eastern Perspective' (2002) 26 Fordham Int. Law J. 761, 761.

[903] *Between Hatred And Fear: Surviving Detention In Assam* (n 756).

[904] 'Interview with Ravi Hemadri' (*Parichay - The Blog*, 5 January 2021).

The entire process of FT, from the judge's selection, the absence of impartiality, to discriminatory practices are all accentuated by the near impossibility to access FT rulings, making the procedure opaque, unaccountable and inaccessible. It recalls the importance of citizenship in today's world but more importantly, the link between citizenship and the respect of legal rights conferred by the Constitution.

The application of citizenship has been, as observed, a particularly sensitive matter in Assam. Defining "Assamese people" remained a contentious subject for decades, as local and national parties battled for different cut-off dates (1951 or 1971) to define who was Assamese. The exclusion of 1.9 million people from the final register deprived them of the right to have rights. The procedural aspect of establishing citizenship also raises questions about the State's respect of human rights. The institution of FT and detention camps has revealed arbitrary and biased decision-making, paucity of legal safeguards, and a disturbing interference by the executive in the appointment of judges.

At the international level, concern with deprivation of nationality that excludes groups, particularly minorities, is not new. Social activist Ravi Hemadri maintains that individuals need to understand the core link between citizenship and rights.[905]

The exclusion of individuals from the NRC and their categorisation as foreigners by FT not only creates statelessness but leads to their exclusion from other rights and services within the country. During Covid-19, individuals declared foreigners saw their ration cards cancelled and based on their appearance, individuals have also seen their food rations refused.

Marginalisation, and then exclusion of Assamese Muslims is not only due to structural discrimination, but more importantly, furthered by a political agenda promoted by the BJP in the region. Political interreference through FT has challenged the judiciary's independence not only in Assam but more largely at a national level. For a decade arbitrariness and discrimination have become disturbingly associated with the Indian judicial system.

[905] 'Assam Govt, AASU Voice for Re-Verification of NRC' (n 839).

Conclusion

India's perception as a country respectful of IHRL and more importantly of rule of law is challenged by its current approaches to the right to citizenship, the right to non-discrimination and minority rights. The country's historical position, and official commitment to democracy makes this deviation more problematic, particularly as it is one of the few South Asian States that has avoided military interference and coup-d'états so far. At the international level, it still qualifies as a democracy, despite its treatment of minorities like Sikhs, or Muslims.

At the judicial level, the SC has been acknowledged as modern and innovative. Such a presentation makes it more difficult to understand a gradual politicisation of the judiciary, demonstrated in the above chapters. This politicisation is specifically apparent in relation to certain categories of individuals (migrants, Muslims) and certain types of rights (right of representation or citizenship). Some cases of the SC do pinpoint this issue such as the 2011 case, *Arumugan Servai v. State of Tamil Nadu*.[906] In this jurisprudence, the SC drew attention to two points: firstly, the State governments' obligation to punish human rights violation; secondly, the role of government officials and politicians in the increasing violence towards marginalised communities, vulnerable individuals and minorities, which can impact the legal system.[907] While it does not clearly point out the institutionalised discriminatory mentality in Indian society, it recognises the role of identities in hate crime and institutions' difficulties in addressing these forms of violence.[908] Consequently, the SC mandated that a copy of the ruling should be sent to all Honorable Judges of High Court, thus emphasising the critical role of lower Courts in protecting individuals core rights.[909]

Whilst it can be argued that the intervention of political ideologies within the judicial system would bring about positive change, and promote respect of individuals human rights in States, in the case of India, the development of ethnic nationalism works to the contrary. In fact, the US Commission on International Religious Freedom back in 2016 noted that India was

[906] *Arumugam Servai v State of Tamil Nadu* [2011] SC of India 6 SCC 405.

[907] See also: *Tehseen S Poonawalla v Union of India* [2018] SC of India 9 SCC 501 [40-c–ii].

[908] M Mohsin Alam Bhat, 'Mob, Murder, Motivation: The Emergence of Hate Crime Discourse in India' (2020) 16 SLR 1, 26–31.

[909] *Arumugam Servai* (n 916) para 17.

witnessing a deterioration of religious tolerance.[910] According to the 2016 Report, religious-motivated violence is often linked to Hindu nationalist groups who act with the tacit support and incitement of members of the ruling BJP. Furthermore, these actions occur in a pervasive climate of impunity.[911] This atmosphere of impunity, violence towards minorities, and the transgression of rule of law in India have increased with the adoption of laws considered as discriminatory towards minorities.

Minorities have been an important issue in Indian society since the colonial period and remain so today. Even if constitutional guarantees of positive discrimination have been established in order to redress historical, social and economic disadvantages of specific groups, they have resulted in institutionalising social discrimination. This remains a core aspect of daily, administrative and judicial life. Whilst the debates promoted by the ICA, tried to defend what we understand today as human rights principles at the legal level, notably through the institution of political safeguards towards minorities, a regression can be observed today. This is mainly due to a political triumph and appeal of Hindutva ideology. The specific case of love-jihad is one illustration of the social impact of this political intervention.[912] More recently, the debate

[910] 'Annual Report of the U.S. Commission on International Religious Freedom - Tier 2 - India' (US Commission on International Religious Freedom 2016) 159.

[911] "These issues, combined with longstanding problems of police bias and judicial inadequacies, have created a pervasive climate of impunity, where religious minority communities feel increasingly insecure, with no recourse when religiously-motivated crimes occur", ibid.

[912] Behind these new laws and changes in judicial rulings on religions conversion lie two deeper issues: (i) the possibility of establishing unconstitutional measures; (ii), the executive's capacity to openly attack religion, and target gender. In short, they are held to reflect a disturbing use and abuse of power to influence these dimensions. Whereas the constitutional language and terminology are gender-neutral, rulings show that women are subjected to more severe punishment in cases of religious conversion. In addition, the Indian patriarchal system and the intervention of families in women's lives increase women's vulnerability. In fact, out of 14 cases concerning women converting to another religion to marry, 12 were registered by families. Such a trend reflects a deviation from a gender-neutral approach that is considered a benchmark of legal neutrality. It sets a disturbing precedent of abiding by patriarchal social norms, weakening women's empowerment by reducing their scope to make life decisions based on their own choices. Yet the judicial system, and thus judges, have the obligation to put an end to inequalities and discriminatory practices through their rulings. *Smt Noor Jahan Begum @ Anjali Mishra & Anr v State of UP* [2014] Allahabad High Court WP (C) No. 57068 of 2014 [8–ii]; *Priyanshi @ Km Shamreen And Another v State of UP and 3 Ors* [2020] Allahabad High Court WRIT- C No. - 14288 of 2020; *Salamat Ansari & 3 Ors v State of UP & 3 Ors* [2020] Allahabad High Court Crl. Mis. WP No. 11367 of 2020 [5]; '□□□□□□□□□□ □□□□□□□□ □□ □□□□: □□□□ □□ □□□□□□□□ □□ □□□□ □□□□ □□ □□□□□□ □□□□ □□□?' □□□□ □□.*in* (3 January 2021).

around the right of Muslim women to wear hijab in colleges, indicates the dangers of such political movements, and more significantly, the need for a neutral judicial system.[913]

This political and judicial environment reinforces the conclusions reached in the previous chapters concerning the troubling consequences of the CAA and the NRC. This legislation along with the National Register, favours religious belonging rather than the original criteria of *jus soli, jus domicilii* and *jus sanguinis,* advanced during the CAD. In practice, this has resulted in daily discriminations, producing statelessness. Though judges have a duty to protect the rule of law whilst respecting the application of national legislations, and indirectly IHRL incorporated therein, it has been observed that marginalised groups (ethnic and religious minorities, women or children) are easy targets of discrimination. The SC is the final arbiter. Yet, in this case, lower courts (High Courts) or even FT serve as the first contact for these individuals with the machinery of law. Even if the SC remains an independent and neutral body, as it should be in principle, the problems that arise with lower courts can create a widespread impression that the judiciary in India is not independent. FT abuses analysed above testify to international human rights violations and more specifically, of minority groups. Judges mostly comply with political ideologies and expectations. The Gauhati High Court's difficulty in positioning itself as a defender of minority rights seems to reflect its inability to function independently. Jurisprudential changes make it problematic to openly affirm the politicisation of the Court. Finally, the SC's slowness in treating CAA WP invites the conclusion that this apex body is not as independent, innovative or progressive as some legal academic circles or body treaty organs may declare.

Hannah Arendt's well-known affirmation on nationality as the right to have rights still resonates strongly today. Citizenship regulation in a context overly sensitive to national security, as well as external factors that lead to ethnic tensions, challenge the effectiveness of both international law and the rule of law through the instrument of the judiciary and courts to prevent statelessness. The Assamese case, interrogates India's attitude towards its obligation to respect IHRL, mainly its obligation to investigate human rights violations,[914] *ex officio* by

[913] *Aishat Shifa v The State Of Karnataka* [2022] SC of India Civil Appeal No. 7095 of 2022.

[914] *Zambrano Vêlez y otros v Ecuador* [2007] IACtHR Merits, Reparations and Costs, Series C, No. 165 [88].

informed authorities,[915] as it forms an integral part of the procedural dimension of substantive human rights. The current Indian government has understood that depriving individuals of their nationality makes them invisible in the eyes of the administration. Judges have accentuated this invisibility by putting aside core rights such as the right to a fair trial. The violation of this right in addition to discrimination sheds light on the difficulties face by minorities in defending themselves in a corrupt system.

The following chapters will examine the relation between India and human rights regional systems, and how each systems analyse cases of discrimination cases towards minority groups.

[915] *Miembros de la Aldea Chichupac y Comunidades vecinas del Municipio de Rabinal v Guatemala* [2016] IACtHR Excepciones preliminares, fondo, reparaciones y costas, Series C, No. 328.

Part 3. Protecting minority groups within regional institutions

Introduction

The Assamese case demonstrates the complexity of ensuring judges' independence on questions related to political programs. It illustrates how the intersectionality of factors like religion, gender, class, social category, or geographical localisation, accentuates not only discrimination of minority groups, but more importantly, their vulnerability under the "matrix of domination".[916]

Specific categories of people apart from minorities, such as women or children, are considered as vulnerable. This concept, which can be traced to the 1979 Belmont report related to ethics and health care research, describes individuals "considered to be worthy of protection".[917] For the scientist Florencia Luna, women are not *per se* vulnerable, but rather, are rendered vulnerable.[918] This perception can be transposed to minority groups as it is the situations that make them vulnerable, and thus call for specific and adequate safeguards. Two consequences of the use of the label "vulnerable" appear: firstly, it may, paradoxically, increase social and institutional discrimination; and secondly, States have a stronger responsibility towards these categories.

The State's responsibility is not absolute, yet it can be held accountable if it fails in its duty of due diligence. In 1927, the Institute de Droit International argued that the State is liable when damage results from its failure to take measures which should be taken to prevent or repress acts.[919] Furthermore, it is responsible for individual harmful actions only when it has not been diligent or taken necessary measures to prevent them or to react against them.[920]

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[916] This concept used by Collins in her book Black Feminist, looks at the oppression of women through the angle of race, class, and gender. Patricia Hills Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (Hyman 1990).

[917] Florencia Luna, 'Elucidating the Concept of Vulnerability: Layers Not Labels' (2009) 2 IJFAB 121, 123.

[918] ibid.

[919] Article 3 of the Resolution of 1 September 1927 'Annuaire, Tome 33, III' (Institut de Droit International 1927) 331.

[920] 'Annuaire, Tome 33, I+II' (Institut de Droit International 1927) 466.

Due diligence can, consequently, be understood as a way of conduct.[921] States have a positive obligation towards individuals living on their territory[922] through an obligation of a duty of care and a duty not to harm.[923] Hence, States must adopt measures to protect individuals under their jurisdiction from harm. The application of due diligence occurs when the State has elements to reasonably foresee the violations of core rights, and it has the capacity to interfere.[924]

Due diligence varies according to the individual protected and the foreseeability of damages.[925] Thus, in the case of minority groups, it limits analysis of this concept of due diligence, and regional courts, to see whether they adequately identify, and address the source of discriminatory practices and legislation faced by minority groups.

This analysis is conducted across three chapters. Chapter 7 starts with the legal approach of India towards IHRL. Chapter 8 then goes on to analyse how intersectionality and due diligence are used in the ECtHR. Chapter 9 highlights discriminatory practices and legislation under the IACtHR.

[921] Samantha Besson, *La Due Diligence En Droit International*, vol 46 (Brill Nijhoff 2021).

[922] *Velasquez Rodriguez v Honduras* (n 204) para 172; *Opuz v Turkey* [2009] ECtHR 33401/02 [129–130]; *Talpis v Italy* [2017] ECtHR 41237/14 [98–99; 129]. To see more on State obligations see Part 1 – Chapter 2.

[923] Samantha Besson, 'Due Diligence and Extraterritorial Human Rights Obligations - Mind the Gap!' (2020) 9 ESIL Reflections 1, 4.

[924] ibid 5.

[925] Currently, due diligence is used in the field of business and human rights law thanks to the triangular constitution of this concept that involves the State, the individual, and a third party as the cause of the harm (often firms).

Chapter 6. India and regional systems

Today, several States like the U.S. or Canada are not part of a human rights regional system either by choice, or due to the absence of regional institutions. India is one of them.

Asia has two organisations: (i) the Association of Southeast Asian Nations (ASEAN); and (ii) the South Asian Association for Regional Cooperation (SAARC). On one hand, the ASEAN, created in 1967, demonstrates a lower level of commitment towards human rights. The association is known for the "ASEAN Way", a cooperation emphasising on non-interference in State affairs and the promotion of Asian values.[926] With this approach, member States have argued the occidental concept of human rights, the importance of human rights to respect cultural differences and the equal importance of civil and political rights, and the economy. In fact, just like the Arab's League, the concept of humans rights was not found in official declarations until 2003, and the ASEAN Charter adoption was strongly critised for its non-consistent with international standards.[927] In 2007 the elaboration of the ASEAN Charter, a legally binding document, refers explicitly to the promotion and protection of human rights, and previously two declarations related to the protection of women and children, and on the elimination against violence towards women. Despite the establishment of legal documents related to human rights and the ASEAN Intergovernmental Commission on Human Rights (AICHR), the Association sees human rights as a field of dialogue between States rather than implementing itself as a regional mechanism just like the ECtHR, the IACtHR and the African system. The AICHR does not constitute a veritable regional mechanism it misses strong instruments to identify and punish human rights violations, yet it remains the only existing regional organ of human rights protection in Asia.[928] On the other hand, SAARC, established in 1985, primarily emphasized non-controversial elements in its Charter. It upheld the principle of non-interference and deliberately excluded contentious matters. Consequently, this approach

[926] Shaun Narine, 'Asia, ASEAN and the Question of Sovereignty: The Persistence of Non-Intervention in the Asia-Pacific' in Mark Beeson and Richard Stubbs (eds), *Routledge Handbook of Asian Regionalism* (Routledge 2011).

[927] 'UN Official Welcomes ASEAN Commitment to Human Rights, but Concerned over Declaration Wording | UN News' (*UN News*, 19 November 2012); Tanja A Börzel and Vera van Hüllen (eds), *Governance Transfer by Regional Organizations: Patching Together a Global Script* (2015th edn, Palgrave Macmillan 2015) 109.

[928] Anja Jetschke, 'L'ASEAN, Les Réfugiés Birmans et Les Droits de l'homme' (2017) Été Politique étrangère 67.

hinders any significant involvement in civil and political rights and precludes its role as a human rights arbiter.[929] Nevertheless, SAARC has demonstrated a commitment to increase regional awareness regarding poverty, child rights and healthcare through initiatives such as the Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (2002), the Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia (2002).

India is not one of the ten ASEAN State Members while SAARC (1985), despite its human rights concerns from the angle of dignity, is not equipped with a human rights regional system. Hence, with no higher judicial institutions, the Indian SC is the last resort for Indians citizens to receive justice. The country has not accepted the different Option Protocols of the UN Conventions, thus preventing Indians from approaching the treaty bodies.

However, in a world where regional systems influence each other, where UN treaty bodies refer to national jurisdiction and regional systems, States outside any regional systems are still influenced by the evolution of IHRL. Despite India's current position towards minority groups, the country is nevertheless affected by current IHRL approaches to the question.

The influence of international human rights rulings and intellectuals to the subject help to understand the Indian situation. Both factors colour its relationship with human rights. In particular, the effect of international conventions and the specific role of regional systems in the SC rulings, need attention.

1. Public Interest Litigation

Two core systems exist today despite application challenges: constitutional law and IHRL. The correlation between these two leading structures relies on the integration of human rights principles within the Constitution. In India, although human rights violation, and the

[929] 'Regional Human Rights Mechanisms in South Asia: Past Efforts and Ways Forward' (FORUM-ASIA 2021) 27.

judiciary's role towards minority groups discrimination, are an issue, the country remains strongly linked to IHRL. Over the years it has developed an indigenous jurisprudence and a human rights tradition. Indian sensitivity to contemporary international development is striking. The Constitution not only establishes human rights goals in its Preamble,[930] but in form and content, holds a strong similarity to an international convention: the UDHR.[931] For instance, in Article 2 of the UDHR the expression "other status" identical to the twin Covenant, refers to a non-exhaustive list of protected characteristics. This non-exhaustive approach can be found in the Indian Constitution. Justice Khanna argued in his non-validated dissent, in the case *ADM Jabalpur v. Shivakant Shukla* (1976),[932] that the Constitution does not contain an exhaustive list of human rights.

Throughout its jurisprudence, the SC has played an active role in the integration of human rights in India's domestic legal structure, but also within the jurisprudence of its neighbouring countries. Pakistan, Sri Lanka, Bangladesh and Nepal quote SC's ruling in their public interest litigation (PIL) jurisprudence.[933] Known for its judicial activism, the SC was also a key actor in respecting international human rights norms.[934] Three periods can be distinguished: (i) the 1970s-1980s under Justice Bhagwati and Krishna Iyer; (ii) 1990s onwards; and (iii) 21st century.

India's pro-active approach to human rights started mainly after the emergency period (1975-1977). Lawyers often argue that with a strong government, the judiciary is weak, whereas, with a weak government, the judiciary can be strong again.[935] During the emergency,

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[930] Leela Simon and Chiranjivi J Nirmal, 'Fundamental Rights: The Constitutional Context of Human Rights' in Chiranjivi J Nirmal (ed), *Human Rights in India: Historical, Social and political perspective* (OUP 2000) 43.

[931] Chandra Khare Subhas, *Human Rights and United Nations* (Metropolitan Book Company 1977) 195–197.

[932] *ADM Jabalpur v Shivakant Shukla* [1976] SC of India (1976) 2 SCC 521.

[933] Jona Razzaque, 'Linking Human Rights, Development, and Environment: Experiences from Litigation in South Asia' (2007) 18 Fordham Envtl. L. Rev. 587.

[934] SV Adithya Vidyasagar and Siddharth Tatiya, 'The European Court of Human Rights and India: A Study Contrasting Their Retrospective Approaches Towards Human Rights Issues' (2010) 11 Asia-Pac. J. Hum. Rights Law 31, 50.

[935] Interview with Advocate Hedge (n 433); Interview with Advocate Avi Singh (12 October 2022), New Delhi (India), criminal lawyer.

the Indian judiciary was seen as largely complicit with the government. In the infamous case, *ADM Jabalpur* (1976),[936] the SC held that the right to life was a gift of the Constitution, its suspension from the Constitution, implied it did not exist. This case undermined the SC's credibility, and the Court was accused of collaborating with the Union Government to destroy civil liberties. Strong criticism of the Indian judiciary, led Justice Bhagwati, who was part of the bench in *ADM Jabalpur*, to introduce PIL. The SC tried to redress the absence of government policies towards social justice through PIL, positioned itself as a sort of referee on controversial questions which divided society, like reservations of seats for backwards classes in educational institutions, and democratised access to the judiciary. PIL thus, restored legitimacy to the judiciary.

In the first phase (1970s-80s), PIL, focused only on constitutional litigation, under which human rights violations fall, gained importance with increasing judicial activism within the SC and High Courts. PIL along with activism, drew attention to the SC as a significant actor in India and around the globe.[937] Indeed, in the 1980s, the Indian judiciary rethought judicial interpretation by considering constitutional rights and social justice, mainly through the affirmation and expansion of fundamental rights.[938] During this phase, cases related mostly to disadvantaged groups rights[939] like child labour, prisoners or women. In addition, the SC interpreted fundamental human rights such as the right to life more expansively. In *Frances Mulin* (1981), the Court argued that at its heart lay the right to live with human dignity,[940] and in the *Morcha* case (1983) it highlighted the constitutional element underpinning this right.[941]

[936] *Additional District Magistrate, Jabalpur v Shivkant Shukla* [1976] SC of India AIR 1976 SC 1207.

[937] Upendra Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' (1985) 4 Third World Legal Studies 107, 115.

[938] Jeremy Cooper, 'Poverty and Constitutional Justice: The Indian Experience' (1993) 44 Mercer Law Review 611, 616.

[939] Surya Deva, 'Constitutional Courts as "Positive Legislators": The Indian Experience' [2010] The Indian Experience.

[940] *Frances Mullin v Union Territory of Delhi* [1981] SC of India 1981 AIR 746.

[941] *Bandhua Mukti Morcha v Union of India* [1983] SC of India 1984 AIR 802.

In the second phase (1990s onwards), not only did petitioners target the executive and legislative branch[942] privately and individually, but the SC went even further in what was considered a bolder posture.[943] It pointed out legislative gaps,[944] and extended the protection of fundamental rights to non-state actors. PIL cases related to the right to education,[945] sexual harassment at workplace,[946] rule of law, and corruption within administration.[947] The judiciary was reminding the government of its constitutional obligations and its duty to initiate legislative reforms.[948] It is during this second period that international human rights norms made their presence felt.

During the PIL's third phase, more individuals were able to file them. Through PIL access to justice became easier, henceforth disadvantaged groups could approach the system. This was perceived as positive in the 1970s. Yet, PIL rapidly became a tool to advocate specific causes, rather than register cases. Any individual could file a PIL, even based on a newspaper report. No direct link was necessary. This led to a backlash against PIL with judges taking a conservative stance. The judiciary manifested restraint by making measured use of PIL, and simply referring questions to the government.[949] However, the number of PILs did not decrease, even if more PILs were dismissed and active judicial involvement decreased.[950] Indeed, PILs can be perceived as a failure of the judicial system, failure to accept evidence, but more importantly, a failure of Courts.[951]

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[942] *Delhi Science Forum v Union of India* [1996] SC of India 2 SCC 405 (related to the constitutional validity of economic policies).

[943] Surya Deva, 'Public Interest Litigation in India: A Critical Review' (2009) 28 19, 28.

[944] *Vishaka v State of Rajasthan* [1997] SC of India AIR 1997 SC 3011; *Basu v State of West Bengal* [1996] SC of India AIR 1997 SC 610.

[945] *Unni Krishnan v State of Andhra Pradesh* [1993] SC of India 1993 AIR 2178; *Miss Mohini Jain v State of Karnataka* [1992] SC of India 1992 AIR 1858.

[946] *Vishaka v State of Rajasthan* (n 954).

[947] Vidyasagar and Tatiya (n 944) 44.

[948] Deva, 'Constitutional Courts as "Positive Legislators": The Indian Experience' (n 949) 32.

[949] Prashant Bhushan, 'Supreme Court and PIL: Changing Perspectives under Liberalisation' (2004) 39 EPW 1770, 1774.

[950] Interview with Advocate Hedge (n 433).

[951] Interview with Advocate Singh (n 944).

2. Let good thoughts come to us from all sides

Reference to IHRL can be found in SC jurisprudence. These jurisprudences are not binding but according to advocate Hedge, are used in a persuasive way.[952]

During the 1990s, the SC began referring to international conventions in its jurisprudence.

In the landmark case on sexual harassment in the workplace, *Vishaka v. State of Rajasthan*, it applied the Convention on the Elimination of All Forms of Discrimination against Women (ICEDAW) guidelines and norms.[953] In 1997, there was no national law against sexual harassment and abuses, or for protection of gender equality. The lack of protection by domestic laws led the judiciary to consider international human rights norms. This usage highlighted the purpose of IHRL, which is to provide guidelines and directions to States and therefore the judiciary, not only imposing its obligations but influencing them to address then legal shortcomings. In fact, in cases related to discrimination against women, the SC often refers to the ICEDAW. In *Githa Hariharan* (1999), the Court recalled the necessity for the judiciary to consider international conventions and norms when interpreting national laws when there is no incoherence between the two.[954] Earlier, in *Madhu Kishwar* (1996), the Court had highlighted State's obligation to enforce ICEDAW provisions, affirming that discrimination against women violates the principles of equal rights and human dignity.[955] In other cases, like *Anuj Garg* (2007), the SC referred to previous rulings that mentioned international conventions like the ICEDAW,[956] the ICCPR,[957] the UDHR,[958] or the International Labour Organization Preamble, in order to highlight women's rights. Judges also used these conventions to interpret the Constitution. In *P.G Gupta* (1995), Articles 19§1-e and 21 of the Constitution are read in

[952] Interview with Advocate Hegde (n 728).

[953] *Vishaka v State of Rajasthan* (n 954).

[954] *Ms Githa Hariharan v Reserve Bank of India* [1999] SC of India [1999] 236 ITR 380.

[955] *Madhu Kishwar v State of Bihar* [1996] SC of India 1996 AIR 1864 [23].

[956] *Anuj Garg v Hotel Association of India* [2007] SC of India (2008) 3 SCC 1 [10].

[957] ibid 7.

[958] ibid 12.

conjunction with the ICESCR.[959] The three judges argue that it is the State's duty to build houses at reasonable cost and make them accessible to individuals with low income.

While the SC readily refers to international conventions, it mentions UN treaties jurisprudence less frequently. For instance, in *Aparna* (2021) [960] the SC quotes the CEDAW, *V.K v. Bulgaria* (2008)[961] and *Karen Tayah Vertido v. The Philippines* (2010)[962] cases. However, two possible explanations are: (i) treaty bodies are perceived as operating on another level, they are not seen as adjudicatory, but more as statecraft;[963] (ii) the absence of judges and lawyers in the UN treaty committee.[964] The SC seems to prefer indicating regional systems approach and jurisprudence. In cases related to discrimination, SC practice is not regular, yet it exists. Therefore, the approach to SC cases, will take up a broad range of cases.

The SC uses regional and national jurisprudence, and sometimes observations by UN treaty bodies to highlight practices in other systems. In the *Anuj* case (2007), it uses ECtHR rulings to underline how gender equality is recognised in other systems,[965] and it tries to understand the ECtHR approach on the doctrine of proportionality and incompatibility to see its utility for Indian judges.[966] In *Anuj*, the Court mentions the U.S SC with *Frontiero v. Richardson*,[967] *United States v. Virginia*,[968] and dissident opinions of judges with Justice Marshall in the *Dothard* case,[969] and the South African Constitutional Court with the *Bhe* case (2004).[970] The *Anuj* case is not unique. In *Munichikkanna* (2007) on adversarial possession, the SC referred to the ECHR's interpretation of Article 1 of Protocol 1. In the landmark case *Nitisha v. Union of*

[959] *Shri P G Gupta v State of Gujrat* [1994] SC of India (1995) 2 SCC 182.

[960] *Aparna Bhat v The State Of Madhya Pradesh* [2021] SC of India 2021 SCC OnLine SC 230.

[961] ibid 36; *VK v Bulgaria* [2008] CEDAW CEDAW/C/49/D/20/2008.

[962] *Aparna Bhat v The State Of Madhya Pradesh* (n 970) para 37; *Karen Tayah Vertido v The Philippines* [2010] CEDAW CEDAW/C/46/D/18/2008.

[963] Interview with Advocate Hegde (n 728).

[964] Interview with Advocate Grover (n 785).

[965] *Abdulaziz, Cabales and Balkandali v United Kingdom* [1985] ECtHR 9214/80; 9473/81; 9474/81; *Van Raalte* (n 162); *Schuler-Zgraggen v Switzerland* [1993] ECtHR 14518/89; *Petrovic v Austria* [1998] ECtHR 20458/92.

[966] *Anuj Garg v Hotel Association of India* (n 966) para 47.

[967] *Frontiero v Richardson* [1973] SC of the US 411 U.S.677.

[968] *United States v Virginia* [1996] SC of the US 518 U.S. 515.

[969] *Dothard v Rawlinson* [1977] SC of the US 433 U.S. 321.

[970] *Bhe v The Magistrate, Khayelisha* [2004] South African Constitutional Court (2004) 18 BHRC 52.

India (2021), which for the first time recognised indirect and systemic discrimination, reference is made to the *Oršuš* case related to discrimination of Roma children.[971] The SC does not restrain itself to the European regional system, but refers equally to the Inter-American Commission on Human Rights (IACmHR). In *Aparna* (2021), whilst trying to understand the concept of judicial stereotyping, the SC mentions the definition used by the Commission.[972] Previously, in *Justice K.S. Puttaswamy* (2017), the SC refers to the IACtHR case of *Artavia Murillo* (2012) to understand the right to private life. [973]

References to IHRL are not confined to the SC, but made by all High Courts.[974] In a recent Uttaranchal High Court case, the Court mentioned the European and Inter-American human rights system (IAHRS), most specifically individuals' complaints mechanisms, not jurisprudence.[975] However, at know points does the Indian legal system mention the African human rights system composed of the African Commission and African Court. Yet, this system could influence positively the Indian legal system. In comparison to the jurisprudence of other regional system, the particularity of the African system is rooted in the initial provisions of the African Charter on Human and Peoples' Rights and this particularity has become more pronounced from 2013 onwards with some bold and in-depth analyses.[976]

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[971] *Nitisha v Union of India* [2021] SC of India WP (C) No 1109/2020 [68]; Vandita Khanna, 'Indirect Discrimination and Substantive Equality in Nitisha: Easier Said than Done under Indian Constitutional Jurisprudence' (2022) 22 Int. J. Discrim. Law. 74; Dhruva Gandhi, 'Nitisha v. Union of India: Furthering A Discussion on Discriminatory Intent' (2021) 14 NUJS Law Review 1; *Oršuš v Croatia* (n 177).

[972] *Aparna Bhat v The State Of Madhya Pradesh* (n 970) para 34.

[973] *Justice KS Puttaswamy (Retd) v Union of India* [2017] SC of India WP(C) No. 494 OF 2012; *Artavia Murillo et al (In Vitro Fertilization) v Costa Rica* [2012] IACtHR Preliminary Objections, Merits, Reparations, and Costs, Series C, No. 257.

[974] Interview with Advocate Grover (n 785).

[975] *Dr Vijay Verma v Union of India* [2018] Uttaranchal High Court WP (PIL) No. 17 of 2018.

[976]Article 7 of the *Protocole de Ouagadougou* confirms that the African Court shall apply the provisions of the Charter and any other relevant human rights instrument ratified by the State concerned. The African system is thus an open system, which considers the existence of previous practice of normativity in international law, in which the African system is called upon to take into account in interpreting and applying the Charter. Alexander B Makulilo, 'Tanganyika Law Society and the Legal and Human Rights Centre V. Tanzania and Rev. Christopher R. Mtikila V. Tanzania (Afr. CT. H.R.)' (2013) 52 International Legal Materials 1327; Abdou-Khadre Diop, 'L'influence de La Jurisprudence Européenne Sur Le Système Africain de Protection Des Droits de l'homme' (2020) 1 RQDI 593, 596–597.

3. Conclusion

In India, fundamental rights have been integrated in the Constitution since its adoption. The same document established an independent judiciary. Judges are not limited to interpreting national laws or the Constitution, but have a duty to give meaning to legislations.[977] In its landmark cases on fundamental rights, the SC has shown the scope of positive judicial activism through PIL.

Over the years, the judiciary has incorporated IHRL, and jurisprudence related to these rights, whether from national courts or regional systems. Whilst criticism has been voiced regarding the SC's silence on specific topics such as the CAA, its evocation of international law has remained consistent since 2015. International human rights jurisprudence retains relevance in the Indian judiciary whether at the SC level or High Courts. Legal scholars, whether Indian or not, are regularly quoted on specific subjects like discrimination**.** In fact, India's record in PIL cases and its relation to international jurisprudence, highlights the fluidity in the field of jurisprudence, where national and regional boundaries are not limits to judicial reasoning and decision. This element is accentuated by constant reference to works of legal scholars like Littleton (sexual equality),[978] Tarunabh Khaitan (discrimination against LGBTQ)[979] or Sandra Fredman (accountability in the Constitution).[980]

Although India has ratified the core human rights conventions, in its own jurisprudence it shows preference for ECtHR or IAHRS jurisprudence, rather than the UN treaty body. This practice confirms Koh's explanation that internalization of international law takes place through the "three I's": interaction, interpretation and internalization.[981] This approach invites analysis of regional systems' understanding of discrimination faced by minority groups.

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[977] Sanjay S Bang, 'Judicial Review of Legislative Actions: A Tool to Balance the Supremacy of the Constitution' in Lancy Lobo and Jayesh Shah (eds), *Democracy in India: Current debates and emerging challenges* (Replika Press Pvt Ltd 2017) 121.

[978] *Anuj Garg v Hotel Association of India* (n 966) para 46.

[979] *Navtej Singh Johar v Union of India* (n 551) para 107.

[980] *In Re: Distribution Of Essential v Unknown* [2021] SC of India WP (Civil) No.3 of 2021 [3]; *Farhan v State* [2022] Delhi High Court WP (C) 284/2015 (sexual violence).

[981] Naiade el-Khoury, *Transnational Legal Process: Theory and the Effectiveness of International Human Rights Treaties* (Brill Nijhoff 2020) 191.

Chapter 7. The European Court of Human Rights and the prism of intersectional discrimination

At the European level, two systems exist: the EU, a political organ, and the Council of Europe that defends human rights in Europe. The Council of Europe level, has two bodies to protect human rights: (i) the ECtHR (1959) whose mission is to promote and protect democracy through human rights; and (ii) the Advisory Committee to the Framework Convention for the Protection of National Minorities (Framework Convention) adopted in 1994, which protects minorities through the establishment of States obligations rather than individual rights.[982] These two institutions produce a fragmentation of human rights within the Council.[983] The creation of the Framework Convention stressed the necessity for the regional human rights system to respect general international conventions, and protect specific individuals and groups considered vulnerable and requiring stronger protection.[984] Even though it is the first legal binding instrument at the international and regional level to protect national minorities, it's effectiveness is limited as Article 14 does not define the concept of "national minority".[985]

The birth of the Framework Convention signalled the ECHR's (1953) inability to fully protect minority rights. Unlike Article 27 of the ICCPR it does not contain provisions relating to minority rights. The only reference is found in Article 14 on the right to non-discrimination, where it establishes grounds of possible discrimination such as sex and race in "association with a national minority".[986]

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[982] M Magdalena Sepúlveda Carmona and others, *Human Rights Reference Handbook* (University for Peace 2004) 142.

[983] Stephanie E Berry, 'Democracy and the Preservation of Minority Identity: Fragmentation within the European Human Rights Framework' (2017) 24 Int. J. Minor 205, 205.

[984] Ludovic Hennebel and Helene Tigroudja, *Traité* (n 149) 96.

[985] 'Framework Convention For The Protection Of National Minorities And Explanatory Report' (Council of Europe 1995) para 12. "It should also be pointed out that the Framework Convention contains no definition of the notion of 'national minority'. It was decided to adopt a pragmatic approach, based on the recognition that at this stage, it is impossible to arrive at a definition capable of mustering the general support of all Council of Europe member States."

[986] Contrary to Articles 2§1 of the ICCPR, Article 1 of the ACHR or Article 2 of the African Charter on Human and Peoples' Rights this article covers nationality minority. Article 3 of the African Charter uses the term "ethnic group", thus limiting the scope of minority to a certain group.

Analysing the ECHR's approach to minority groups under Article 14 invites two specific interrogations. The first examines how the Court protects minority groups against discrimination. The second probes how it tries to recognise discriminations they face in society through the concept of marginality and vulnerability, and the links with States responsibility.

1. Article 14 of the European Convention of Human Rights: the prohibition of discrimination

The ECHR and the ECtHR protect individuals' rights within member States by establishing a corpus of international human rights. Despite its fundamental importance within the European region, the ECHR does not contain minority rights provisions. Their absence prompted the ECtHR to fill this legal black hole. In *Denizci* (2001), member States were enjoined to enforce "international standards in the field of protection of human and minority rights".[987] Despite this clarification by the Court, the absence of clear rights for minorities seems to have prevented minority groups from claiming a violation of minority rights directly before the Court.

1.1. The role of "Cinderella" in protecting minority groups

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[988]

[987] *Denizci v Cyprus* [2001] ECtHR 25316/94; 25317/94; 25318/94; 25319/94; 25320/94; 25321/94; 27207/95 [410].

[988] Article 14 European Convention on Human Rights 1950.

1.1.1. A general perspective

Discrimination and social exclusion faced by Roma populations triggered policies of protection of minority groups through the angle of non-discrimination enshrined in Article 14 of the ECHR.[989] This approach to the concept of minority may be explained by the well-established theory of non-discrimination within international law.

Scholars have argued that there is a striking absence of definition on the concept of minority. More significantly, restricted limitations of categories such as ethnic, religious, or linguistic groups have led to perverse results.[990] Yet, it is important to underline that in cases of discrimination towards minority groups at the level of the ECtHR, such classification seems at first sight to increase States' obligation towards these groups. The lack of a clear definition of minority groups, or provisions within the Convention does not prevent minorities from qualifying as victims of ECHR's obligation violations.

Article 14 of the ECHR clearly provides that no individual should suffer from discrimination. Consequently, it enforces a duty on States to not discriminate. Contrary to Article 26 of the ICCPR, Article 14 can only be used before the Court, in association with another article of the Convention. Hence, it is often perceived as a parasite,[991] the "Cinderella article", since it works only in relation to the rights and freedoms safeguarded by the ECHR. This signifies that under the aforementioned article, discrimination not connected to any article of the Convention falls outside the competence of the Court. However, the entry into force of Protocol 12 removed the necessity to prove a link between discrimination and the violation of another right included in the Convention.

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[989] Guido Schwellnus, 'Anti-Discrimination Legislation' in Bernd Rechel (ed), *Minority rights in Central and Eastern Europe* (Routledge 2009) 32.

[990] John Packer, 'On the Definition of Minorities' in John Packer and Kristian Myntti (eds), *The Protection of Ethnic and Linguistic Minorities in Europe* (Institute for Human Rights, Åbo Akademi University 1993) 57; Geoff Gilbert, 'The Council of Europe and Minority Rights' (1996) 18 HRQ 160, 168.

[991] *Sommerfeld v Germany* [2003] ECtHR [GC] 31871/96; Niklas Bruun, 'Prohibition of Discrimination under Art. 14 of the European Convention on Human Rights' in Filip Dorssemont, Klaus Lörcher and Isabelle Schömann (eds), *The European Convention on Human Rights and the Employment Relation* (Hart Publishing 2013) 371.

Despite this limitation of the right to non-discrimination in the rights accorded by the Convention, Article 1§1 of Protocol 12 not only provides that it is a separate right from other substantive articles, but also that it applies to rights established by the law, and thus to national laws.[992] The only difference between Article 14 and 1§1 of the Protocol is the scope of its application.[993] In *Pilal v. Bosnia* (2016), the Court confirmed the importance of interpreting both articles in the same way.[994] Once again, put together, these two articles are similar to Articles 2§1 and 26 of the ICCPR.

1.1.2. The range of Article 14

Significantly, because of the stated purpose of Article 14, drafted as a tool to prohibit discrimination, the list of rights developed within the article is shorter than the UDHR, and does not include social or economic rights. This absence led to the development of rights related to property, education and free election within Protocol 1 and to the expansion of other rights throughout the Court jurisprudence. For instance, in *Lucza v. Poland* (2007), the Court argued that discrimination can be based on nationality.[995] In this case, a French national of Polish origin had moved to Poland, where he was excluded from the social security system for farmers, on the grounds of his French nationality.

As clearly indicated in Article 14, discrimination is prohibited on grounds of sex, race, colour, language, religion, political, national or social origin, or in association with a national minority, property and birth.

The expression "other status", broadly defined by the Court, has been understood as an open expression, indicating that the article is not limited to a certain list of discriminations.[996] In the *Novruk* case (2016), the ECtHR argued that it can be understood as "differences based on an identifiable, objective, or personal characteristics, or 'status', by which individuals or groups

[992] Article 1 Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms 2000.

[993] *Sejdic Finci v Bosnia-Herzegovina* [2009] ECtHR 27996/06.

[994] *Pilav v Bosnia and Herzegovina* [2016] ECtHR 41939/07 [40]; *Andejeva v Latvia* [2009] ECtHR 55707/00.

[995] *Luczak v Poland* [2007] ECtHR 77782/01; *Savickis v Latvia* [2022] ECtHR 49270/11.

[996] Oddný Mjöll Arnardóttir, 'Non-Discrimination under Art. 14 ECHR: The Burden of Proof' [2007] Sc.St.L. 13, 14.

are distinguishable from one another".[997] In *Biao* (2016), the Court completed the definition by including the innate or inherent characteristics of individuals.[998] The evolution of jurisprudence has integrated new categories under the label of "other status", such as sexual orientation, age and disability which have been developed under EU law through directives,[999] but also fatherhood or motherhood,[1000] marital status,[1001] place of residence,[1002] military rank,[1003] parenthood of a child born out of marriage,[1004] affiliation to an organisation,[1005] medical circumstances,[1006] detainees pending trial,[1007] etc.

This expansion of rights through Court jurisprudence increases protection of specific individuals and situations.

1.1.3. The extension of protection against direct and indirect discrimination

Whilst the Article outlines clear categories of groups, it does not develop the different types of discrimination, whether indirect or direct, systemic, social or even the substantive conception of discrimination, consequently weakening the understanding of discrimination.

In fact, throughout its jurisprudence the Court developed, or, in certain cases, refused, to highlight these types of discrimination. In *Anguelova v. Bulgaria* (2000) the Court emphasised the importance of systemic discrimination, despite its absence from Article 14 but failed to promote and develop the substantive conception of non-discrimination. Under this concept,

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[997] *Novruk and others v Russia* [2016] ECtHR 31039/11, 48511/11, 76810/12, 14618/13, 13817/14 [90].

[998] *Biao v Denmark* (n 154) para 89.

[999] 'Handbook on European Non-Discrimination Law' (European Union Agency for Fundamental Rights, Council of Europe 2018) 224; *Šaltinytė v Lithuania* [2022] ECtHR 32934/19.

[1000] *Weller v Hungary* [2009] ECtHR 44399/05; *Paparrigopolous v Greece* [2022] ECtHR 61657/16; *Tapeya v Russia* [2022] ECtHR 24757/18.

[1001] *Petrov v Bulgaria* [2008] ECtHR 15197/02, *Şerife Yiğit v Turkey* [2010] ECtHR 3976/05.

[1002] *Carson v the United Kingdom* [2010] ECtHR [GC] 42184/05, *Baralika v Bosnia and Herzegovina* [2019] ECtHR 30100/18 .

[1003] *Engel v the Netherlands* [1976] ECtHR 5100/71; 5101/71; 5102/71; 5354/72; 5370/72.

[1004] *Sommerfeld v Germany* [2003] ECtHR [GC] 31871/96; *Christine Goodwin v the United Kingdom* [2002] ECtHR [GC] 28957/95; *Mazurek v France* [2000] ECtHR 34406/97.

[1005] *Danilenkov v Russia* [2009] ECtHR 67336/01; *Grande Oriente D'italia Di Palazzo Giustiniani v Italy (n° 2)* [2007] ECtHR 26740/02.

[1006] *Novruk v Russia* (n 1007).

[1007] *Varnas v Lithuania* [2013] ECtHR 42615/06.

individuals, because of their association with specific groups, face discrimination systematically. Despite recognising "systemic racism and hostility" in the use of the term "the Gypsy" by police officers, which signals discrimination within institutional bodies in Bulgaria,[1008] the Court missed the chance of expanding the substantive concept of non-discrimination. In its dissent opinion, Judge Bonello focused on the intriguing attitude of the Court in not, for instance, considering colour, nationality or place of origin as the core element to human rights violation.[1009]

Direct discrimination is more easily considered by the Court, whereas indirect discrimination is not generally recognised. The equal application of national legislation to everyone within the country's jurisdiction, but which has disproportionate impact on specific groups seems not to have been initially considered by the Court.

In Turkey, for example, legislation permits detention for a period of four days, which can be extended to fifteen days in case of a trial before the State Security Courts. However, in *Sanli and Erol v. Turkey* (2001), the Court argued that the thirteen days of detention was not a violation of the general policy but was respecting Law no. 3842, under which people committing terrorist offences would be treated less favourably regarding pre-trial detention.[1010] Thus, for the Court, the difference of treatment between the four-day detention and the thirteen-day period was not due to political membership. In this case, the ECtHR concluded a non-violation of the right to non-discrimination. This highlights the Court's failure to consider the political context, mainly the oppression by the Turkish army and government since the 1980s.

Another relevant case concerning political ideologies is that of the Kurd minority in Turkey. In *Mutlu and Yildiz* (2001),[1011] and *Kalin, Gezer and Tebay* (2004)[1012] versus Turkey, the applicants, suspected members of the Kurdistan Workers' Party, were detained as terrorists, hence for a period of fifteen days instead of the usual four days. Again, the Court held that national legislation justified the difference of treatment. More significantly, no ethnic criteria

[1008] *Anguelova v Bulgaria* [2000] ECtHR 38361/97 [5].

[1009] *Anguelova v Bulgaria* [2002] ECtHR 38361/97 [13].

[1010] *Sanli and Erol v Turkey* [2001] ECtHR 36760/97 [2].

[1011] *Mutlu and Yildiz v Turkey* [2001] ECtHR 30495/96.

[1012] *Kalin v Turkey* [2004] ECtHR 31236/96.

were involved. Here, the ECtHR did not consider the political oppression of the Kurd minority. Nor did it consider the disproportionate arrest of Kurds under terrorist legislation.[1013] Whilst in theory the Turkish legislation seemed neutral, in practice its application by Turkish institutions to minority groups violated the right to non-discrimination. However, disregard of indirect discrimination led the ECtHR to set aside Article 14 in cases related to Turkey.

In contrast, in cases connected to the United Kingdom's violation of Article 14 in Northern Ireland, the ECtHR did accept arguments based on *de facto* indirect discrimination.[1014] For legal scholar Geoff Gilbert, the difference of approach between the Turkish jurisprudence and the United Kingdom cases may be linked to the dissimilarities in arguments. For Gilbert, if Turkish applicants had advanced more robust arguments based mainly on the percentage of arrested Kurds under the anti-terrorist legislation, the Court may have considered indirect discrimination.[1015] As a counter argument to this view, it could be said that the Court as a regional human rights organ, could not base its ruling solely on parties' data. It is important for any regional court to bear in mind the difficulties parties face in accessing data, and the political, geographical, social context of minority groups. In fact, at the EU level, the discrimination faced by Kurds within Turkey was already a well-known information in the years before 2000.[1016]

Despite specific cases where the Court did not consider indirect discrimination, it is often argued that since the *Thlimmenos* case (2000)[1017] and its rulings on separate education of Roma children in Eastern European states,[1018] the concept of indirect discrimination was finally integrated within its jurisprudence.

[1013] Geoff Gilbert, 'The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights' (2002) 24 HRQ 736, 748.

[1014] *Shanaghan v the United Kingdom* [2001] ECtHR 37715/97; *Hugh Jordan v the United Kingdom* [2001] ECtHR 24746/94; *Mckerr v the United Kingdom* [2001] ECtHR 28883/95; *Kelly v the United Kingdom* [2001] ECtHR 30054/96.

[1015] Gilbert, 'The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights' (n 1023) 749.

[1016] 'Turkey: The Problems Experienced by Kurds during 2000-2001; Those Most at Risk within the Kurdish Population; the Risks Experienced by Kurds Who Are Not Politically Active; the Regions Where Kurds Are Most at Risk' (Canada: Immigration and Refugee Board of Canada 2001) TUR37720.E.

[1017] *Thlimmenos v Greece* (n 200).

[1018] Rory O'Connell, 'Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR' (2009) 29 Legal Studies 211.

1.1.4. Difference of treatment and impact on available data

Court jurisprudence proves that effective protection against discrimination is closely linked to the existing levels of scrutiny in countries. In cases of high-level scrutiny, the Court will be more exacting about justification in case of discrimination. The degree of suspicion – based on gender, skin colour, race or ethnicity, religion – on grounds of discrimination will be higher in countries where there is already a high level of scrutiny.

Reports on discrimination by EU bodies are quoted in the ECtHR jurisprudence.[1019] Difference of treatment between countries thus affect availability of data. In fact, a parallel can be made between the EU's political pressure and the ECtHR's approach to discrimination. During the integration of Eastern European countries, depending on the size of the Roma ethnic group within each State, the EU's political pressure varied. The case of Eastern Europe drew attention to human rights effectiveness, especially for minority groups. It revealed the States difficulties in integrating, and establishing clear legislation in favour of minority groups through the right to non-discrimination. More significantly, it highlighted the differences of treatment between

[1019] See: *Nachova v Bulgaria* (n 202) paras 51–53.

countries. For instance, in Bulgaria,[1020] Czech Republic[1021], Hungary,[1022] Romania[1023] and Slovakia,[1024] measures against discrimination towards Roma were clearly recognised in the

[1020] While in the Constitution, the principle of non-discrimination is already established, in order to align with the European anti-discrimination *acquis*, in January 2004, Bulgaria had an anti-discrimination law entered into force, prohibiting direct and indirect discrimination. The new law takes into account discrimination based on sexual orientation. '2004 Regular Report on Bulgaria's Progress towards Accession' (European Commission 2004) SEC(2004) 1199 20.

[1021] Existing legislation, Employment Act and the labour code, did not satisfy EU requirements on the right to non-discrimination, and it was only in 2003 and 2004 that amendments were adopted with the insertion of a definition on discrimination. Despite these efforts, the country is the last EU State to adopt anti-discrimination law. The Anti-Discrimination Act passed on 17 June 2009 guarantees the right to equal treatment and ends discrimination on specific grounds such as sex, age, race, or ethnic origin, and it prohibits direct (section 2§3) and indirect discrimination (sections 1§3 and 2§2). This law meets the minimum requirement of the EU directives. In comparison to the other European countries, Czech Republic has the minimum criteria protected by national laws against discrimination. For instance, Belgium has 21 criteria while Czech Republic has only nine (race, colour, ethnic origin, nationality, sex, sexual orientation, age, disability, religion or belief). Czech Republic does not consider birth or gender identity or even political opinion as grounds of discrimination. Isabelle Chopin and Catharina Germaine, 'A Comparative Analysis of Non-Discrimination Law in Europe, 2017' (European Commission 2017) 12; Pavla Boučková, 'Report on Measures to Combat Discrimination – Directives 2000/43/EC and 2000/78/EC: Country Report 2012, Czech Republic' (European Network of Legal Experts in the Non-discrimination Field 2013).

[1022] Between 2001 and 2003, the European Commission had pointed out the absence and fragmentation of a unified anti-discrimination legislation. It also clearly pointed out the need to "improve the situation of the Roma minority". Debates over the constitutionality of such a law emerged in the country, the Constitutional Court on 4 December 2020 argued that a unified law was not unconstitutional. '2002 Regular Report on Hungary's Progress towards Accession' (European Commission 2002) SEC(2002) 1404 27; 'Comprehensive Monitoring Report on Hungary's Preparations for Membership,' (European Commission 2003) SEC(2003) 1205 36; 'Minority Protection in the EU Accession Process. Monitoring the EU Accession Process: Minority Rights' (Open Society Institute 2001) 223–224; 'Hungarian Constitutional Court Rules on Anti-Discrimination Legislation' (*European Roma Rights Centre*, 10 April 2001).

[1023] The 2002 Romanian text, Ordinance on the Prevention and Punishment of All Forms of Discrimination pushed the country to have one of the most complete anti-discrimination legislation within EU candidates. 'Minority Protection in the EU Accession Process. Monitoring the EU Accession Process: Minority Rights' (n 1012) 393.

[1024]Contrary to Hungary, the Slovakian Constitutional Court argued in October 2005 that positive actions on grounds of racial and ethnic origins within the anti-discrimination legislation passed in May 2004 was anti-constitutional. The Court pointed out firstly the vagueness of these provisions and secondly the unconstitutionality of measures based on grounds of race and ethnicity. While the legislation still passed without the positive measures and complies with the EU non-discrimination directives, the Christian Democrats Party's clear opposition to anti-discriminatory measures still occurs today. Antoaneta Dimitrova and Mark Rhinard, 'The Power of Norms in the Transposition of EU Directives' (2005) 9 European Integration online Papers 1, 14; Zuzana Dlugosova, 'Executive Summary Slovakia Country Report on Measures to Combat Discrimination' (European network of legal experts in the non-discrimination field); Miroslava German Sirotnikova, 'Anti-Roma Rhetoric Under Scrutiny Before Slovak Election' (*Balkan Insight*, 3 January 2020); Gilles Mastalski, 'Les Slovaques restent les Slovaques' (2004) 7 Outre-Terre 243; 'Discriminating Roma Children at School: Slovakia' (*European Commission*, 19 April 2023).

annual progress reports.[1025] On the contrary, in countries like Estonia,[1026] Latvia,[1027] Lithuania,[1028] Poland[1029] and Slovenia,[1030] this element was barely mentioned.

Level of scrutiny not only impacts data on discrimination, but also the level of MOA.[1031] High level of scrutiny leads to a narrower MOA.

[1025] Guido Schwellnus, 'Anti-Discrimination Legislation' in Bernd Rechel (n 999) 35

[1026] Despite its accession to the EU in 2004, Estonia did not have a non-discrimination legislation. Interestingly, on 25 June 2009, the European Commission sent Estonia in front of the CJEU for the non-transposition in national law of EU Directive 2004/113/EC on gender discrimination. The Commission did withdraw its appeal as Estonia complied with its obligation. 'Commission Refers Estonia to European Court of Justice on Gender Equality Legislation' (*European Commission*, 25 June 2009); *Commission européenne c République d'Estonie* [2010] CJEU C-328/09.

[1027] The Constitution of Latvia does prohibit discrimination (article 91), yet no list is established. It thus seems that the promotion of anti-discrimination legislation is an EU process in the country. In 2001, a new labour code was adopted and amended in 2004. But it was only in 2006 that sexual orientation discrimination was ban from employment. While information and data can be found on other European countries, Latvia remains quite discrete towards the situation of vulnerable groups (mainly Roma) especially their employment. 'Development of Anti-Discrimination Legislation and Practice in Latvia: EU Accession and Remaining Challenges' (*European Commission*, 30 September 2008); 'Latvia Finally Bans Sexual Orientation Discrimination in Employment' (*ILGA Europe*, 22 September 2006); Aleksejs Dimitrovs, 'Equality Law in Latvia: Current Trends and Challenges' (2012) 9 ERR 11.

[1028] In January 2005, the Law on Equal Treatment covered the prohibition of all grounds and took into account two European directives (200/78/EC and 2000/43/EC). Edita Ziobiene, 'Report on Measures to Combat Discrimination – Directives 2000/43/ EC and 2000/78/EC, Country Report: Lithuania' (European Network of Legal Experts in the Non-discrimination Field 2007) 3.

[1029] Despite the amendment on the labour code in 2003 for discrimination at the workplace, Poland still faced procedures in front of the CJEU in 2011 due to the non-integration of the EU equality legislation at the national level. However, the case was dropped as Poland adopted a new anti-discrimination law. 'Equality: Commission Drops Three Cases against Poland Following New Anti-Discrimination Law' (*European Commission*, 14 March 2011).

[1030] Slovenia implemented the EU directives in April 2004, the year of its entering in the EU, with the Implementation of the Principle of Equal Treatment Act. This Act considers the different groups of discrimination established by the EU directives. However, it is important to note that the Slovenian Constitution at article 14§1 contains a wider protection towards the violation of the right to non-discrimination than what is required by the European directives. Neža Kogovšek Šalamon, 'Report on Measures to Combat Discrimination – Directives 2000/43/ EC and 2000/78/EC: Country Report 2013 Slovenia' (European Network of Legal Experts in the Non-discrimination Field 2014) 13.

[1031] Kristin Henrard, 'The European Court of Human Rights, Ethnic and Religious Minorities and the Two Dimensions of the Right to Equal Treatment: Jurisprudence at Different Speeds?' (2016) 34 Nord. J. Hum. Rights 157, 160.

1.2. Room for manoeuvre: the margin of appreciation doctrine

The ECtHR's role, recalled in *Karner v. Austria* (2003), is to determine issues "on public-policy grounds in the common interest" within European States, and promote a "general standard" of human rights.[1032] This approach echoes French sociologist Durkheim's understanding of law as a visible symbol, which ensures stability and precision within society.[1033] Durkheim also considered law as a framework to understand and consider social morality.[1034] This sociological approach resonates in the MOA doctrine. The constant recognition by the Court of States' discretion rights is mainly based on this idea of an European moral dimension.[1035]

Under this doctrine, which is a judicial creation as there is no article in the Convention which proclaims it, the ECtHR grants authority to States to fulfill their obligations under the Convention.[1036] In doing so, the Court strikes a balance between a State's sovereignty and their obligations under the ECHR. Furthermore, it allows the ECtHR to consider States' different interpretations arising from a divergence in legal, cultural and historical traditions. This doctrine goes back to the 1958 case *Greece v. United Kingdom* of the European Commission of Human Rights, under which the Commission maintained the right to MOA.[1037] It was then re-used in the *Handyside* case (1976). The Court expanded the scope of the doctrine through a case-by-case approach. From a general perspective, the MOA allows circumvention of strong confrontations between the Strasbourg Court and States.[1038]

The application of the MOA doctrine enables differential treatment between States. Depending on the State, and the existence or absence of common ground between national laws and the Convention, the Court will apply a narrower or broader margin based on circumstances,

[1032] *Karner v Austria* [2003] ECtHR 40016/98 [26].

[1033] Emile Durkheim, *The Division of Labour in Society* (1893rd edn, The Free Press 1933) 64–65.

[1034] Paul Johnson, 'Sociology and the European Court of Human Rights' (2014) 62 Sociol Rev 547, 550.

[1035] *Handyside v the United Kingdom* [1976] ECtHR 5493/72 [48]; *Capital Bank AD v Bulgaria* [2005] ECtHR 49429/99 [78–79].

[1036] Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, vol 17 (Human rights files No 17 Council of Europe Publishing 2000) 5.

[1037] *Greece v United Kingdom* [1956] European Commission of Human Rights 176/1956.

[1038] Helen Fenwick, *Civil Liberties and Human Rights* (Cavendish Publishing Limited 2005) 34–37.

subject-matter, and background.[1039] In cases where practices differ significantly between States, the margin will be wider.[1040] On the contrary, in the event of a common European background, the margin will be narrower.[1041]

Member States are thus allowed a MOA. However, in terms of minority groups, the MOA may weaken the principle of non-discrimination.[1042] The ECtHR developed this notion because of its absence from the Convention. It aims at reconciling a common standard upheld by the Convention whilst safeguarding legal pluralism. The Court considers that national authorities are often in a better position to appreciate the full extent of a problem and to provide the most appropriate solutions. Therefore, the Court leaves it to States to choose the measures they consider most appropriate to fulfil their obligations.[1043] However, recognition of an MOA does not signify that the State is exempt from European control.

Regarding minority groups, the value of this approach by the ECtHR calls for more rigour. Firstly, the use of the MOA in favour of States may be perceived as a risky move for marginalised and minority groups. In fact, in the case of Turkey, the Court's use of the MOA in *Refah* (2001) and *Sahin* (2005) led to the loss of legitimacy of Turkish minorities.[1044] Secondly, on Article 14 and minority groups, the MOA based itself on three factors: (i) the State must prove that the practice is reasonable and rational;[1045] (ii) the disproportionate effects of the treatment;[1046] (iii) a comparison between democratic States' use of this practice.[1047] The MOA doctrine was frequently used at the level of the ECtHR in cases related to sexual orientation. In the early 1980s the doctrine was invoked in cases over differences concerning

[1039] *Rasmussen v Denmark* [1984] ECtHR 8777/79 [40].

[1040] *Frette v France* [2002] ECtHR 36515/97.

[1041] Pieter van Dijk, Godefridus JH Hoof and GJH Van Hoof, *Theory and Practice of the European Convention on Human Rights* (Martinus Nijhoff Publishers 1998) 87.

[1042] O'Connell, 'Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR' (n 1028).

[1043] Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Brill Nijhoff 2021) 13.

[1044] *Refah Partisi (the Welfare Party) v Turkey* [2001] ECtHR 41340/98, 41342/98, 41343/98, 41344/98; *Leyla Şahin v Turkey* [2005] ECtHR [GC] 44774/98.

[1045] *Abdulaziz, Cabales and Balkandali v the United Kingdom* [1985] ECtHR 9214/80, 9473/81, 9474/81 [74–83].

[1046] *Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' (merits)* (n 179).

[1047] J Schokkenbroek, 'The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation' (1998) 19 Hum. Rights Law J. 20, 21.

the age limit for sexual activity between gay men (18 years old) and heterosexuals (16 years old). In *Sutherland v. United Kingdom* (1996), this discrimination based on sexuality was not only considered to be in violation of the Convention, but the applicants found the MOA doctrine narrow in cases concerning obligation to refrain from interpretation.[1048] In *Frette v. France* (2004), the Court argued that in relation to adoption policy for a single person that not only was the refusal illustrative of discrimination based on sexual orientation, but more importantly, the absence of a general policy within Europe on adoption by single persons set aside the MOA doctrine.[1049]

Thus, the application of the MOA doctrine varies according to the context, as distinction between different treatment and discrimination needs to be considered in light of social policies.[1050]

Regarding social policy, in certain cases related to discrimination based on sex,[1051] religion[1052] or nationality,[1053] the ECtHR has argued *prima facie* discrimination in terms of differential treatment on the grounds that they are expressly or implicitly contrary to European social policy.[1054]

The *prima facie* discrimination cases attest to the Court's evolution on discrimination of minority groups. In fact, the Court was strongly criticised over the burden of proof imposed on the applicant, perceived as unreasonable.[1055] There are undoubtfully difficulties in presenting evidence of discrimination. This has triggered an evolution in IHRL in discrimination cases with the ECtHR having the claimant prove the *prima facie*, so that the burden of proof falls on

[1048] *Sutherland v the United Kingdom* [1996] ECtHR 25186/94.

[1049] *Frette v France* (n 1050).

[1050] *Rasmussen v Denmark* (n 1049) para 40.

[1051] *Abdulaziz, Cabales and Balkandali v the United Kingdom* [1985] ECtHR 9214/80, 9473/81, 9474/81 [78]; *Schuler-Zgraggen v Switzerland* [1993] ECtHR 14518/89 [67]; *Burghartz v Switzerland* [1994] ECtHR 16213/90 [27]; *Karlheinz Schmidt v Germany* [1994] ECtHR 13580/88 [24].

[1052] *Canea Catholic Church v Greece* [1997] ECtHR 25528/94 [47].

[1053] *Gaygusuz v Austria* [1996] ECtHR 17371/90 [42].

[1054] Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (n 1046) 11.

[1055] Henrard, 'The European Court of Human Rights, Ethnic and Religious Minorities and the Two Dimensions of the Right to Equal Treatment: Jurisprudence at Different Speeds?' (n 1041) 162.

the State.[1056] The Court started incorporating the prohibition of indirect discrimination in its reasoning, whilst the new approach of the burden of proof evolved.[1057]

The Court seemingly advanced in terms of burden of proof but, more importantly, with the consideration of indirect discrimination, it took a step backwards with discriminatory violence. In this case, the Court appears reticent in adopting its own approach to the burden of proof.[1058] In the *Nachova* (2004) case over the killing of two fugitive Roma men by Bulgarian policemen, the Court refused to allocate the burden of proof on the State as it would be too demanding.[1059] Despite Bulgaria being one of the countries where measures against discrimination were clearly demanded by the EU during the country's integration process, in view of the high visibility of social and institutional discrimination against the Roma minority, the Grand Chamber in 2004 did not consider the link between flawed police investigation and a case of *prima facie* racial discrimination. Similarly, in the accepted approach to indirect discrimination since 2014, the Court increased its level of protection towards discriminatory violence by expanding its level of scrutiny mainly on grounds of ethnicity, and more prominently, on this ground the Court accepts identified cases of *prima facie* for direct discrimination.[1060] Yet, despite specific cases,[1061] the Court is still reluctant to consider institutional discrimination within the police and its impact on investigation.[1062]

2. Addressing marginality

To understand the concept of minority groups protection at the ECtHR level, it is important to analyse not only the protection granted by Article 14 but also the Court's approach

[1056] Monika Ambrus, *Enforcement Mechanisms of the Racial Equality Directive and Minority Protection: Theory and Four Case Studies* (Eleven 2010) 27–30.

[1057] Samantha Besson, 'Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?' (2008) 8 Hum. Rights Law Rev. 647, 670–671; 679; O'Connell, 'Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR' (n 1028) 222–223.

[1058] Kristin Henrard, 'The Council of Europe and the Rescue of Roma as a Paradigmatic Case of Failed Integration?' in European Centre for Minority Issues and The European Academy Bozen/Bolzano (eds), *European Yearbook of Minority Issues,* vol 10 (Brill Nijhoff 2011) 281–283.

[1059] *Nachova v Bulgaria* (n 202) para 157.

[1060] Henrard, 'The Council of Europe and the Rescue of Roma as a Paradigmatic Case of Failed Integration?' (n 1068) 164.

[1061] *Lingurar v Romania* [2019] ECtHR 48474/14.

[1062] *Sakir v Greece* [2016] ECtHR 48475/09; *MC and AC v Romania* [2016] ECtHR 12060/12.

to different types of discrimination. In light of the Court's jurisprudence, it is difficult to argue that the ECtHR analyses the general context of minority groups situation in specific countries. The approach to consider Article 14 violation does not seem linked to the understanding of the systemic and general discrimination faced by minority groups.

The concept of marginalisation though seemingly straightforward, and offering possibilities of a deeper protection of minority groups, remains hampered by narrow understanding. Integrating this concept, may force the Court to examine minority groups' social, economic and political position to grasp both the overall picture of the violation, and more significantly, the importance and impact of such a violation on minority groups' right to non-discrimination.

2.1. The culture of discrimination

Marginalisation, like discrimination, is a compilation of different factors when it impacts minority groups. The difficulty of this concept, in addition to its intersectionality, lies in the socio-legal approach. Marginality is often defined as the description and analysis of "socio-cultural, political and economic spheres, where disadvantaged people struggle to gain access […] to resources […] In other words, marginalised people might be socially, economically, politically and legally ignored, excluded or neglected".[1063]

Understanding marginality is different from recognising it in terms of human rights. From a legal perspective, marginalisation translates mostly as a difficulty to access justice. As highlighted in the Assamese case, the judiciary tends to reflect imbalances within society and reinforce them. These obstacles can be divided in two categories: (i) institutional, involving consideration of social discrimination in institutions, poor accountability mechanisms, problematic use of legal procedure, and poor interpretation and implementation of the law; (ii) social, which includes the lack of financial resources, stereotypes and cultural attitudes, and the absence of awareness of individuals legal rights and procedure. For both categories, judges can translate these realities in legal terms specific to human rights, such as access to justice, the right to non-discrimination, or right to fair trial. Therefore, a Court may be persuaded to not

[1063] Tom Brind, Caroline Harper and Karen Moore, 'Introduction and an Overview of the Marginalisation of Groups in Europe' (Open Society Foundations 2008) 2; Ghana S Gurung and Michael Kollomair, 'Marginality: Concepts and Their Limitations' (NCCR North South 2005) 10.

only follow a legal approach to human rights violation but equally, to bear in mind the sociological mechanisms of the society which minority groups inhabit.

'Margin' originates from the Latin word *marginem* or *margo,* translated into English as the edge. Marginalisation can be the result of different factors. These range from the unequal geographical impact of globalisation[1064] on economic development,[1065] government policy on dislocation of individuals such as asylum seekers,[1066] and detention of migrants in detention centres, highlighted by Covid-19.[1067] These elements correspond to spatial marginalisation. But it can also occur when citizenship rights are defined by legalisation of territorial arrangements within States.[1068] But by far the most visible element leading to marginalisation is linked to social prejudices and beliefs.[1069] This societal framework of marginalisation concentrates on aspects determined by humans, such as religion, culture or social structure. It is reflected in living conditions marked by lack of resources and opportunities.[1070] The Court's use of this concept indicates not only the marginalisation of an individual but takes account of the broader historical, political, social context that creates this phenomenon. In India, the use of marginalisation by the SC reflects this idea. For instance, in the recent case *Janhit Abhiyan* (2022) related to reservation on economic criteria, the concept of marginalisation is used throughout the ruling to underline the disparities between social groups.[1071] This case highlights the difficulties of this concept. Not only is there a constant intersection between elements of marginalisation, but with particular socio-economic and geo-political environments.

[1064]'Overview of the Impact of Coronavirus Measures on the Marginalised Roma Communities in the EU' (Council of Europe).

[1065] Sergio Puig, *At the Margins of Globalization: Indigenous Peoples and International Economic Law* (Cambridge University Press 2021).

[1066] Andrew Burridge and Nick Gill, 'Conveyor-Belt Justice: Precarity, Access to Justice, and Uneven Geographies of Legal Aid in UK Asylum Appeals' (2017) 49 Antipode 23.

[1067] Joint Committee on Human Rights, 'The Government's Response to COVID-19: Human Rights Implications. Seventh Report of Session 2019–21' (House of Commons 2020) HC265.

[1068] Nadia Ben-Youssef and Sandra Samaan Tamari, 'Enshrining Discrimination: Israel's Nation-State Law' (2018) 48 JPS 73.

[1069] Gurnham, 'Introduction: Marginalisation in Law, Policy and Society' (n 105) 6.

[1070] Paul Brodwin, 'Marginality and Cultural Intimacy in a Transnational Haitian Community' [2001] Occasional Paper No.91.

[1071] *Janhit Abhiyan v Union of India* [2022] SC of India WP(C) No(S). 55 OF 2019. In this case, references to the ECHR can be found though the United Kingdom's case: *R(Carson) v Secretary of state of work and pensions* [2005] Appellate Committee of the House of Lords UKHL 17, 2006, 1 AC 173 [3].

Undoubtedly, while it may be difficult for the societal framework to change rapidly, the intervention of political parties and legal reforms within national legislation may promote a positive change. However, it is more likely that despite legal reforms, social behaviour and beliefs still reproduce a state of marginalisation for certain communities, thus weakening the right to non-discrimination. In countries where integration into the EU was linked to introducing anti-discrimination legislation, its application remains a challenge, both for State authorities and for victims. This can be connected either to individual unawareness of their rights or authorities' failure to prosecute cases for violation of the right to non-discrimination.[1072]

The failure to prosecute can be traced to structural discrimination, which is embedded in traditional social hierarchical structures, and manifests itself in norms, routines, behavioural pattern and attitudes that impede equality of opportunity and real equality. Discrimination, like marginalisation often flows from to social prejudice against minorities, which fundamentally affects access to justice when these are institutionalised. This is evident in many recorded complaints. In Central and Eastern European countries, except for Hungary and Romania, other countries had low complaints for ethnic discrimination, despite the establishment of complaints procedure. In its 2007 report the EU Agency for Fundamental Rights explained this by the absence of both sanctions of established procedures and moral pressure to end discrimination.[1073]

Marginalisation like discrimination, often consist of different elements. In cases of systemic and structural discrimination, this hinders understanding of the set of mechanisms that lead to the discrimination of minority groups. Marginalisation affects categories of people according to their age, ethnicity, nationality, sexuality or even disability,[1074] factors decisive to define minority groups. These categories can intersect and increase marginalisation and discrimination.

[1072] Guido Schwellnus, 'Anti-Discrimination Legislation' in Bernd Rechel (n 999) 40.

[1073] 'Report on Racism and Xenophobia in the Member States of the EU' (European Union Agency for Fundamental Rights 2007) FRA 2007 8.

[1074] Jørgen Elm Larsen, 'Who Cares about and for Marginal People?', *Coping with Social Polarization in the Urban Landscape: Reflections upon the Empowerment* (Aalborg Universitetsforlag 2002).

Understanding a minority group's marginalisation is beneficial for victims of discrimination as it provides an overview of the use of discriminatory practices, and thus establish a benchmark for evaluating the violation of this right. Yet, identifying marginalisation requires both information about life experiences of minority groups,[1075] and acceptance of the intersectional nature of discrimination within the ruling.

Consequently, marginalisation and discrimination of minority groups often go hand-in-hand, one leading to another. Yet, the result is the same: inequality, stigmatisation, exclusion and victimisation. In *Oršuš* (2010), the Court quotes a passage of the Parliamentary Assembly Recommendation No. 1557 (2002) on the legal situation of Roma in Europe. It indicates the relation between discrimination and marginalisation: "*today Roma are still subject to discrimination, marginalisation*…".[1076] It then connects marginalisation to economic and social segregation, leading to ethnic discrimination. Thus, from a legal perspective marginalisation can be defined as a complex set of individual disadvantages which culminates in the violation of human rights. Yet, marginalisation of groups invites interrogation whether human rights violations are related to identification (race, age, etc.), living conditions (economic inequality, geographical localisation, etc.), or on the contrary to an intersectional reality. This intersectionality underlines a complex causality of elements conducive to human rights violations.[1077] Indivisibility of human rights implies that: rights are not perceived as part of specific packets (e.g. life, education, housing) but as a whole.[1078]

By crossing a range of variables, marginality and therefore intersectionality provides a cognitive framework for judges to analyse and understand national structures.[1079]

[1075] Gurnham, 'Introduction: Marginalisation in Law, Policy and Society' (n 105) 5.

[1076] *Oršuš v Croatia* (n 177) para 83.

[1077] Shreya Atrey, 'The Humans of Human Rights: From Universality to Intersectionality' (22 February 2020) 23.

[1078] Lisa A Crooms, 'Indivisible Rights and Intersectional Identities or, "What Do Women's Human Rights Have to Do with the Race Convention?"' (1996) 40 How. L. J. 619, 625–632.

[1079] Atrey, 'The Humans of Human Rights: From Universality to Intersectionality' (n 1087) 25.

2.2. From marginality to intersectionality

The ECtHR refers to the concept of marginalisation within its jurisprudence. Concepts of social exclusion and marginalisation appear to be interchangeable,[1080] and at the level of the Court, both concepts are found and used as synonyms within jurisprudence related to minority groups and cases of discrimination. Social exclusion can be understood as a situation under which groups "lack effective participation in key activities or benefits of the society in which they live".[1081] Marginalisation is understood as an exclusion or neglect from a social, economic and political perspective.[1082]

A distinction occurs between marginalised groups. Those identified formally by government policy as marginalised, and those who are marginalised because of their non-conformity to cultural or social norms.[1083] The ECtHR proved that marginalisation could occur through poverty,[1084] exclusion through race and ethnicity,[1085] sexual orientation,[1086] disability or ill-health,[1087] and affecting children of migrants and refugees. All these factors increase discrimination faced by minority groups.

In 2022, on the HUDOC platform related to the ECtHR rulings, the word "marginalisation" was used by the Court only in 18 cases on discrimination faced by minority groups.[1088] If not all cases of discrimination of minority groups are associated with

[1080] Joan G Mowat, 'Towards a New Conceptualisation of Marginalisation' (2015) 14 Eur. J. Educ. Res. 454, 456.

[1081] Michal Razer, Victor J Friedman and Boaz Warshofsky, 'Schools as Agents of Social Exclusion and Inclusion' (2013) 17 Int. J. Incl. Educ. 1152, 1152.

[1082] Brind, Harper and Moore, 'Introduction and an Overview of the Marginalisation of Groups in Europe' (n 1073) 2; Gurung and Kollomair, 'Marginality: Concepts and Their Limitations' (n 1073) 10.

[1083] Dorothy Bottrell, 'Resistance, Resilience and Social Identities: Reframing "Problem Youth" and the Problem of Schooling' (2007) 10 J. Youth Stud. 597.

[1084] *Garib v The Netherlands* [2017] ECtHR 43493/09.

[1085] *Sejdić and Finci v Bosnia and Herzegovina* [2009] ECtHR [GC] 27996/06, 34836/06 [37].

[1086] *Vallianatos v Greece* [2013] ECtHR [GC] 29381/09, 32684/09 [43]; *Oliari v Italy* [2015] ECtHR 18766/11, 36030/11 [190].

[1087] In the *Horváth* case, the Court highlights how social marginality in Hungary is treated as a handicap. *Horváth and Kiss v Hungary* [2013] ECtHR 11146/11 [74].

[1088] The following words were put on HUDOC: "minority, marginalization". Focus was put on Article 14 and the Courts ruling.

marginalisation, significantly spatial or social marginalisation at the level of the ECtHR appears only in 18 cases.

Principally, the Court refers to marginalisation by quoting external reports (UN[1089] or the US Commission[1090]) in which marginalisation integrates the sociological reality of minority groups discrimination. Only twice, in *G.L* (2020) and in *Oršuš* does the Court directly use the concept of marginalisation to support its argument without reference to an international organisation report.[1091] Judges Yudkivskc[1092] and Wojtyczek[1093] in their dissident opinion refer to the concept.

The ECtHR's insufficient and irregular consideration of this concept remains problematic, as over the years the Court has played a major role in the protection of human rights within European countries.[1094] Recognising marginalisation of minority groups guarantees their visibility in democratic countries.[1095]

Despite a positive evolution in its approach to discrimination, the absence of concern and simultaneous development of marginalisation in its jurisprudence sheds light on the Court's failure to provide visibility to discrimination faced by minority groups. Still, the Court has expanded the ECHR civil and political rights to address issues faced by marginalised groups.[1096]

The Court's difficulty in referring and relying on "marginalisation" seems connected to the concept of intersectionality. In 2022 on the HUDOC platform, the word "intersectionality" appears only once, in relation to minority and Article 14: *Cinta v. Romania* (2020).[1097] Like

[1089] *Guberina v Croatia* [2016] ECtHR 23682/13 [37].

[1090] *MYH v Sweden* [2013] ECtHR 50859/10 [28].

[1091] *Oršuš v Croatia* (n 177); *GL v Italy* [2020] ECtHR 59751/15 [69]

[1092] Judge Yudkivskc argue that the effect of marginalisation would have been less important if the parents had gone in another country. *GL v Italy.* (n 1101).

[1093] Judge Wojtyczek argues simply about the risk of marginalisation. *Oršuš v Croatia* (n 177).

[1094] Stephen Livingstone and Colin Harvey, 'Protecting the Marginalised: The Role of the European Convention on Human Rights' (2019) 70 NILQ 51, 446.

[1095] Colin Harvey, 'Protecting the Marginalized?', *Judges, Transition, and Human Rights* (OUP 2007) 534.

[1096] Dia Anagnostou and Susan Millns, 'Individuals from Minority and Marginalized Groups before the Strasbourg Court: Legal Norms and State Responses from a Comparative Perspective' (2010) 16 Eur. Public Law 393, 396.

[1097] *Cînța v Romania* [2020] ECtHR 3891/19.

marginalisation, "intersectionality" is used in an external source: the General Comment No. 6 (2018) on equality and non-discrimination of the UN Committee on the Rights of Persons with Disabilities.[1098]

Marginalisation results from several factors leading to discrimination. But marginalisation is already based on intersectionality, and thus linked to discrimination. In his dissident opinion in the *Garib* case, Judge Pinto de Albuquerque, with Judge Vehabović, denounced the Court's failure to consider intersectional discrimination.[1099] Defending the validity of the concept, Judge Pinto de Albuquerque quoted reports of legitimate human rights bodies such as the CESCR,[1100] the Committee on Elimination of All Forms of Discrimination against Women, [1101] the Special Rapporteur on violence against women,[1102] and further referred to the IACtHR with the *Gonzales Lluy v. Ecuador* case. [1103]

In the famous case *V.C. v. Slovakia* (2011)[1104] on the forced sterilisation of Romani women in Slovakia, the ECtHR missed an opportunity to acknowledge the multiple layers of discrimination faced by the community, not only in Slovakia, but more notably in Eastern European countries, and the invisibility of distinctive yet converging structures of oppression. Invisibility of sterilisation practices was accentuated by two factors: (i) discrimination based on gendered and ethnic factors in addition to class-based stereotypes; (ii) institutional and social marginalisation.

Primarily, the Court did not regard the historical sterilisation process and discrimination, in addition to its impact on Romani women. During the Third Reich, coercive sterilisation of Romani Women was already a political policy.[1105] Later (1970-1990s), in Czechoslovakia,

[1098] *ibid 32.*

[1099] *Garib v The Netherlands* (n 1094).

[1100] *ibid 36.*

[1101] *ibid.*

[1102] *ibid 35.*

[1103] *Garib v The Netherlands* (n 1094) [38]; *Gonzales Lluy et al v Ecuador* [2015] IACtHR Preliminary Objections, Merits, Reparations, and Costs, Series C, No. 298.

[1104] *VC v Slovakia* [2011] ECtHR 18968/07.

[1105] Jan Brustad, 'Forced Sterilisation in Auschwitz-Birkenau' (*The Norwegian Center for Holocaust and Minority Studies*, 26 February 2016); Henriette Asséo, 'Le Sort Des Tsiganes En Europe Sous Le Régime Nazi' (1999) 167 Revue d'Histoire de la Shoah 8.

sterilisation was officially promoted for birth control, yet it disproportionately affected Romani women who were the main targets of social workers using financial arguments or threats to cut social benefits.[1106] Furthermore, the legal advocacy organisation Centre for Reproductive Rights 2003 report, documented patterns of health care providers failure to gain informed consent on sterilisation, and systematic racial discrimination.[1107]

Secondarily, European recommendations and reports[1108] revealed the lack of national protection for Roma minority, especially during the process of Eastern countries integration into the EU. Yet, none of the reports used by the ECtHR mention social marginalisation, or Romani women's difficulties to "untangle the complex social, political and economic issues"[1109]. By, ignoring institutional interaction, the Court put aside not only gender perspective, but reduced the "case to the individual level".[1110]

The *V.C.* case (2011) was major and fundamental. For the first-time the Court recognised coerced sterilisation as a human right violation at the ECtHR.[1111] However, it was not only reluctant to highlight violation of Article 14 but did not even regard it as a violation. It linked forced sterilisation to prohibition of torture (Article 3), and the right to respect for private and family life (Article 8). Furthermore, it considered neither the marginalisation of Romani women, nor their discrimination, let alone the intersectionality of factors. Human rights courts cannot isolate forced sterilisation, ethnicity, patriarchy or social oppression. A refusal to consider these elements as relevant to forced sterilisation, and citing lack of objective evidence, to prove an organised policy or racially motivated intention of hospital staff[1112] legitimised discrimination by ignoring Article 14. It further rendered an oppressive society invisible, and aggravated the marginalisation of communities. Moreover, at the political level, this decision ignored the political climate of discrimination towards Romani women. In 1995, Lubomir Javorsky, the Slovakian health minister declared: "the government will do everything to ensure

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[1106] Siobhan Curran, 'Intersectionality and Human Rights Law: An Examination of the Coercive Sterilisations of Romani Women' (2016) 16 ERR 132, 139.

[1107] 'Body and Soul: Forced Sterilization and Other Assaults on Roma Reproductive Freedom in Slovakia' (Center for Reproductive Rights and Poradna pre obcianske a l'udské práva, in consultation with Ina Zoon 2003) 15.

[1108] *VC v Slovakia* (n 1114) para 80.

[1109] Angela Kocze and Maria Popa Raluca, *Missing Intersectionality: Race/Ethnicity, Gender, and Class in Current Research and Policies on Romani Women in Europe* (CEU University Press 2009) 9.

[1110] Dissenting opinion of Judge Mijovic, *VC v Slovakia* (n 1114).

[1111] *ibid.*

[1112] ibid 177.

that more white children are born than Romani children".[1113] Despite several rulings of the ECtHR, it was only in 2021 that the Slovakian government recognised the forced sterilisation of Romani women.

Human rights' elaboration and development can counter society's abuses. Ignoring different factors of oppression, or the angle of intersectionality, limits the judicial interpretation. An unidimensional approach to discrimination and thus marginalisation overlooks the social divisions at work in specific situation. Intersectionality helps understand social and institutional discrimination and underline crucial patterns of human rights violation. The lack of attention to this concept has often been highlighted in cases related to Roma,[1114] or in the Islamic headscarf jurisprudence.[1115]

2.3. Accentuating invisibility: the case of segregated schools

Examining and highlighting marginalisation in Courts not only accentuates the set of factors and their impact on discrimination but renders visible historical, spatial and institutional marginalisation. More importantly, it legally acknowledges the influence of social ideologies and cultural practices on situations affecting minority groups. Recognition of marginalisation shifts legal approaches and methodologies of judges in the ECtHR. It promotes analysis of intersectional forms of exclusion that cover low access to education, employment or healthcare. The difficulty in integrating marginalisation at the level of the judiciary lies at the heart of the problem. Not only is its intersectional nature complex, but more importantly, it is a process and an experience. It includes oppression but also ensues from it.[1116]

The case of Roma children's segregation in schools illustrates how the ECtHR accentuates invisibility and their marginalisation. Since 2007, a certain number of cases related to segregation of Roma children in school have come before the ECtHR. Segregation within

[1113] Lindsay Hoyle, 'V.C. v. Slovakia: A Reproductive Rights Victory Misses the Mark' (2014) 36 Boston College int. comp. law rev. 17, 19.

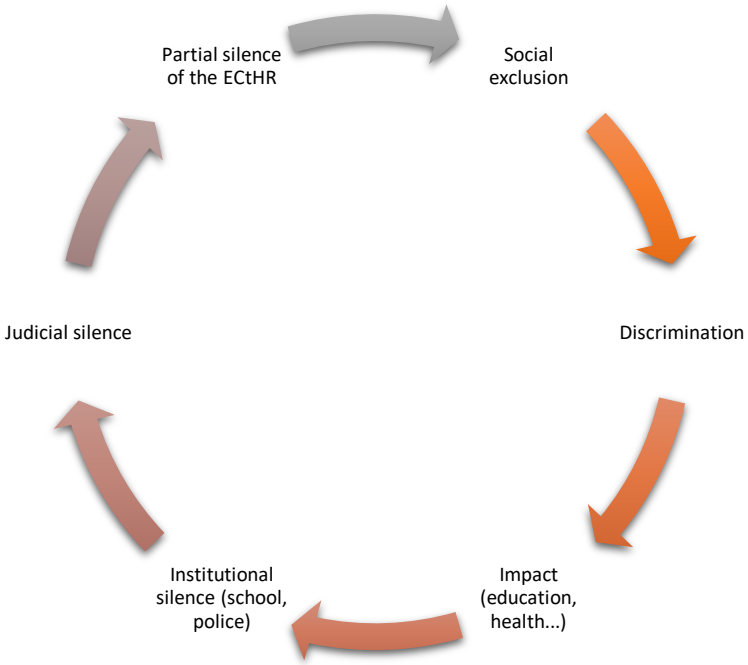
[1114] Ruth Rubio-Marín and Mathia Möschel, 'Anti-Discrimination Exceptionalism: Racist Violence before the ECtHR and the Holocaust Prism' (2015) 26 Eur. J. Int. Law 881.

[1115] Ivana Radacic, 'Gender Equality Jurisprudence of the European Court of Human Rights' (2008) 19 Eur. J. Int. Law 841; *SAS v France* [2014] ECtHR 43835/11.

[1116] JM Hall, 'Marginalization Revisited: Critical, Postmodern, and Liberation Perspectives' (1999) 22 ANS. Advances in nursing science 88; Tracey Mcintosh, 'Theorising Marginality and the Processes of Marginalisation' (2006) 2 AlterNative: An International Journal of Indigenous Peoples 44, 46.

education has reinforced oppressive power relations, social exclusion, educational disadvantage, and created a circle of marginalisation (figure 1). Despite Court rulings, progress in this field has been limited at the national level.

Figure 1: Circle of marginalisation



Children's segregation often echoes colonial practices or apartheid (South Africa or the U.S). In the U.S, segregation was legalised until the *Brown* ruling (1954) when the SC declared segregation in public schools as unconstitutional.[1117] However, legalisation of segregated education is not a constant pattern amongst countries practising it. In Eastern and Central Europe, the complexity of marginalisation and discrimination faced by the Roma community often result from neutral government policies or, more precisely, because of their inaction in respecting IHRL. For Roma children, segregation is consequently a result of multiple factors – educational and informal discriminatory policies or residential segregation[1118] – which have been documented by international organisations and NGOs.[1119]

[1117] *Brown v Board of Education of Topeka County* [1954] SC of the US 347 US 483.

[1118] Jack Greenberg, 'Report on Roma Education Today: From Slavery to Segregation and Beyond' (2010) 110 Colum. L. Rev 919, 919; 935.

[1119] 'Stigmata: Segregated Schooling of Roma in Central and Eastern Europe' (European Roma Rights Centre 2004).

Discrimination and segregation, thus work hand in glove. Despite the integration of the political protection of minority rights at the EU level through the Copenhagen criteria (respect for and protection of minorities),[1120] and the implementation of the EU Directive 2000/43/EC (Race and Equality Directive), which resulted in a ministerial order legally prohibiting segregation in schools in Bulgaria,[1121] Hungary,[1122] Slovakia,[1123] and in Romania,[1124] discriminatory practices continued. Difficulties arose in Eastern European countries concerning the implementation of mechanisms related to discriminatory practices.

At the level of the ECtHR, cases related to Roma children's segregation, discrimination and consequently marginalisation, underline two elements: (i) in practice, the idea that segregation translates into one school for each ethnic group does not work entirely for Roma children; and (ii) in theory the Court should highlight the failure of national measures to end segregation, indicate the role played by national institutions, and formulate clear obligations for State authorities.

Under the violation of the right to education (Article 2 of Protocol 1), in relation to Article 14, three principal of segregation cases can be found.

One consists of special schools for children with disabilities. In *DH v. Czech Republic* (2007), data presented to the Court proved that in Ostrava city, 56% of Roma children were in special schools, whilst overall they represented 2.26% of the city's primary school students. On the contrary, only 1.8% of non-Roma children were in special schools. Applicants argued that Roma children were 27 times more likely to be sent to a special school.[1125] In addition, placement in these schools was based on tests measuring the "child's intellectual capacity".[1126]

[1120] 'Accession Criteria' (*European Commission*).

[1121] Protection Against Discrimination Act, 2003.

[1122] CXXV Act 2003 on the Promotion of Equal Treatment and Equal Opportunities.

[1123] Schools Act, 2008.

[1124] Ministerial Order 1540/2007.

[1125] *DH v the Czech Republic* (n 147) para 18.

[1126] *ibid 16.*

The Court referred to the Council of Europe's doubts concerning these tests,[1127] as well as the U.S SC ruling, *Griggs v. Duke Power*, which pointed to the discriminatory effect of such tests.[1128] In this case the Court underlined indirect discrimination. In *Horváth and Kiss* (2013), it went further and held that diagnosing two complainants as disabled and sending them to a school for the mentally disabled, was discriminatory towards Roma children.[1129] This judgment was unique as the Court explicitly mentioned the State's positive obligations to address and undo a history of racial segregation in special schools.[1130]

The second group separates classes within schools. In 2008, in the *Sampanis* case, the Court, basing itself on the same article as in the *DH* case (right to an education, and prohibition of discrimination) and Article 13 (right to an effective remedy) argued that putting children in an annex building of the school following protests from non-Roma parents was a violation of the Convention.[1131] Segregation was here based on ethnic origins and racism.[1132] Despite the Court ruling in 2008, in 2012 the Court once more issued a decision related to distinctive class, which was defended as a means of avoiding social, cultural and educational problems.[1133] The ECtHR recommended enrolment in another State school, and enrolment in second chance school for those above 18 years old.[1134] Separation of classes was also a core element in the *Oršuš* case where children who lacked knowledge of the Croatian language were put in different classes. However, it was only Roma children who were sent to these classes. Moreover, Roma children were not offered classes to learn Croatian, and their program had 30 % less content compared to non-Roma curriculum classes. Qualitative differences in the curriculum were also found in the *DH* case, which also had unqualified teachers.[1135] The *Oršuš* case revealed divisions on the absence of Article 14 violation along with Article 2 of Protocol 1. For Judges Jungwiert, Vajić, Kovler, Gyulumyan, Jaeger, Myjer, Berro-Lefèvre and Vučinić, this separation did not prevent

[1127] *DH v the Czech Republic* (n 147).

[1128] *Griggs v Duke Power Co* [1971] SC of the US 401 US 424.

[1129] *Horváth and Kiss v Hungary* (n 1097)

[1130] ibid 127.

[1131] *Sampanis v Greece* [2008] ECtHR 32526/05.

[1132] *ibid 63.*

[1133] *Sampanis v Greece* [2012] ECtHR 59608/09.

[1134] *ibid.*

[1135] G Hobcraft, 'Roma Children and Education in the Czech Republic: DH v Czech Republic: Opening the Door to Indirect Discrimination Findings in Strasbourg'' (2008) 2 Eur. Hum. Rights Law Rev 245, 246.

Roma children from accessing education or reaping its benefits.[1136] They argued that the case led to another judgement on the question of the Roma minority and not on the right to education itself.[1137]

Finally, geographical criteria played a role. Residential segregation led non-Roma parents to remove their children from specific schools precisely because of their high percentage of Roma children.[1138] The difficulty in the *Lavida* case (2013) related to "white flight" practices, displayed in the absence of Greece's intention to discriminate Roma children.[1139] However, the Court argued that the State's refusal or inability to establish anti-segregation measures led to the violation of Article 14 and of the right to education.

Segregationist policies in education build marginalisation and systemic discriminatory practices and policies. They affect the right to education and the right to dignity both protected by IHRL. At the collective level, such practices and policies accentuate stigmatisation already faced by Roma, deprive them of educational and employment opportunities, reinforce marginalisation, diminish their presence at the social and political levels, and more importantly, weaken their ability to protect themselves from the violation of their other rights.[1140]

Significant contributions were made in the field of direct and indirect discrimination, through these cases or by developing positive obligations. However, despite landmark decisions related to segregation faced by Roma children in schools, the Court did not mention the impact of violating the right to education through practices that trivialise marginalisation such as school dropouts and low employment opportunities.

Ending school segregation favours the right to education, and is a significant step towards ending the circle of marginalisation. The Court can restore the right to education through these landmark cases, but it does not recognise, nor mention marginalisation of these communities

[1136] *Oršuš v Croatia* (n 177) para 11.

[1137] ibid 15.

[1138] Kalina Arabadjieva, 'Challenging the School Segregation of Roma Children in Central and Eastern Europe' (2016) 20 Int. J. Hum. Rights 33, 34; *Szolcsán v Hungary* [2023] ECtHR 24408/16.

[1139] *Lavida v Greece* [2013] ECtHR 7973/10.

[1140] Iulius Rostas and Anita Danka, 'Setting the Roma Policy Agenda: The Role of International Organizations in Combating School Segregation', *Ten Years After: A History of Roma School Desegregation in Central and Eastern Europe* (Central European University Press 2012) 53.

that is at the heart of segregation, and thus neglects the overall picture comprising a complexity intersection of factors. Showing the significance of age and ethnicity as determining marginality or ignoring social categories of exclusion, the Court fails to recognise that children are affected more strongly by such practices.[1141]

The absence of a definition of segregation does not help.[1142] Nor does the failure to recognise difference between discrimination in the lower quality of education, though inferior curriculums, or segregation as a human right issue. In sum, the Court does not distinguish between physical segregation of Roma from non-Roma children.

To date the lack of progress in the recognition of marginalisation remains problematic at the level of the European human rights system. Despite the integration of external reports, or *Amicus Curiae* underlying marginalisation issues,[1143] the Court has still to integrate this concept in its reasoning. The dissident opinion of Judges in the *Oršuš* case, underlines the importance of considering marginalisation. For them, segregation was justified with the argument of a stable environment encouraging Roma children to develop the necessary linguistic skills.[1144] However, the *Oršuš* case highlights how the Court uses other concepts to underline the necessity of paying special attention to minority "needs and their different lifestyle" through the concept of vulnerability.[1145]

3. The concept of vulnerability and its application to minority groups

Lately, the use of vulnerability has increased in human rights. The concept is used in the 2011 Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights

[1141] Noam Peleg, 'Marginalisation by the Court: The Case of Roma Children and the European Court of Human Rights' (2018) 18 Hum. Rights Law Rev. 111, 17.

[1142] *DH v the Czech Republic* [2007] ECtHR [GC] 57325/00 [54–80; 103–104].

[1143] *Oršuš v Croatia* (n 177) para II-B-3

[1144] Joint partly dissenting opinion of Judges Jungwiert, Vajić, Kovler, Gyulumyan, Jaeger, Myjer, Berro-Lefèvre and Vučinić, *Oršuš v Croatia* (n 177).

[1145] ibid 148.

in the African Charter on Human and Peoples' Rights. However, no explicit references can be found in other regional human rights conventions, hence legal practice forms the main subject of study. Scholars evoke the law of "vulnerabilisation" or even a quiet revolution of vulnerability.[1146] But this shift cannot be applied to the ECtHR, even though the concept has been used over the years.

3.1. Building the notion

3.1.1. A multidisciplinary concept

The concept of vulnerability has a long and complicated background. Research around it has taken a multidisciplinary approach.[1147] Medical and health sciences stress the measurement of risk of suffering harm,[1148] while sociology and psychology follow the medical approach to indicate the susceptibility of specific individuals to harm.[1149] In humanities,[1150] and from a geographical perspective, the notion permits us to understand and to recognise attitudes that characterise the relationship between societies and their environments.[1151] For sociologists, vulnerability is a result of the weakness of social systems and is systematically constructed, along with external factors.[1152] This approach sees vulnerability through the eyes of society,

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[1146] Alexandra Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights' in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: reflections on a new ethical foundation for law and politics* (Routledge 2013) 147; M O'Boyle, 'The Notion of "Vulnerable Groups" in the Case Law of the European Court of Human Rights' (Conference on the Constitutional Protection of Vulnerable Groups: A judicial dialogue, Santiago, Chile, 4 December 2015).

[1147] Carlos Paula, Ana Silva and Cléria Maria Bittar, 'Legislative Vulnerability of Minority Groups' (2017) 22 Ciência & Saúde Coletiva 3841, 3842.

[1148] Robert L Kane and David M Radosevich, *Conducting Health Outcomes Research* (1st edition, Jones & Bartlett Learning 2010).

[1149] Lena Dominelli, *Greening Social Work* (Polity Press 2012); B Wisner and I Kelman, 'Community Resilience to Disasters' in J Wright (ed), *International encyclopeadia of social and behavioural sciences*, vol 4 (Elsevier 2015); R Dunlap, 'Environmental Sociology' in G Ritzer and JM Ryan (eds), *The concise encyclopedia of sociology* (Wiley-Blackwell 189AD).

[1150] Ben Wisner, JC Gaillard and Ilan Keman (eds), *Handbook of Hazards and Disaster Risk Reduction* (Routledge 2012).

[1151] Kenneth Hewitt (ed), *Interpretations of Calamity: From the Viewpoint of Human Ecology* (Allen & Unwin INC 1983).

[1152] EL Quarantelli, 'A Social Science Research Agenda for the Disasters of the 21st Century: Theoretical, Methodological and Empirical Issues and Their Professional Implementation' in RW Perry and EL Quarantelli (eds), *What is a disaster: New answers to old questions* (International Research Committee on Disasters 2005) 345.

while integrating factors such as socio-economic status, race, geographical location, beliefs or historical background.[1153]

Such an interdisciplinary use of the concept has expanded its understanding. Initially perceived as undergoing physical harm, it came to include psychological and moral suffering.[1154] In concrete terms, therefore, vulnerability refers to the way specific individuals are exposed to human rights' threats.

3.1.2. A multiplicity of layers

Often, concepts such as marginality or vulnerability, are rendered complex due to the constant evolution of individuals' experiences over time, and their shifting exposure to everyday risks such as violence, sickness, or large scale events (civil war or climate change).[1155] Due to the interactions between these two different scales (the everyday and the macro) it becomes necessary to understand "vulnerable individuals" through their situations, rather than their position in a specific category. The generalisation that vulnerable individuals are part of specific groups may reside in the very concept of vulnerability. Much like discrimination, vulnerability is often composed of different layers. Therefore, its analysis call for a broader understanding, of its occurrence in several spheres.

Viewed in the light of these considerations, four characteristics of vulnerability emerge: firstly, it is a *potential* concept, as it refers to a possibility; secondly, it is objective as the threat is established objectively; thirdly it is subjective, as its evaluation depends on individual vulnerability; finally, it is a relational concept, since two entities are required for it to manifest.[1156]

[1153] David Mechanic and Jennifer Tanner, 'Vulnerable People, Groups, And Populations: Societal View' (2007) 26 Health Aff. 1220.

[1154] BS Turner, 'Vulnerability' in W A; Darity (ed), *International encyclopedia of the social sciences*, vol 8 (Macmillan Reference USA 2008).

[1155] Benjamin Wisner, 'Vulnerability as Concept, Model, Metric, and Tool' [2016] Oxford Research Encyclopedia of Natural Hazard Science.

[1156] Samantha Besson, 'La Vulnérabilité et La Structure Des Droits de l'homme : L'exemple de La Jurisprudence de La Cour Européenne Des Droits de l'homme', *La vulnérabilité saisie par les juges en Europe* (Pedone 2014) 60.

Understanding or analysing vulnerability from a legal point view is central to comprehending patterns of discrimination. However, at the international level no definite categories of vulnerable groups seem to exist.[1157] The establishment of specific international conventions in relation to particular groups may indicate the will of States and international human rights legal experts to protect and accord special attention to the risk of vulnerability they may face. Consequently, vulnerability categories can include: age, sex or gender, ethnicity, health status, liberty status, and other statuses, which correspond to asylum seekers, deportees or refugees.[1158] In the Indian case, the Rajasthan High Court pointed out the vulnerability of women in society irrespective of their social position, and therefore the need for special provisions.[1159] Under the sphere of IHRL, vulnerability and the term vulnerable are used to refer to and describe parts of the population who should be beneficiaries of extra care and attention.[1160] Often, social and systemic discrimination render individuals vulnerable, thus calling for affirmative action. The evolution of the ECtHR ruling on prohibition of non-discrimination, also includes affirmative action. It took the Court longer, in comparison to the Court of Justice of the EU (CJEU), to allow positive action in this field.[1161] For instance the ECtHR uses Article 3 of the ECHR in relation to migrants' vulnerability and extends the scope of positive obligations to the socioeconomic sphere.[1162]

"Human vulnerability" is the result of a combined physical and social vulnerability of individuals in a precise social, economic and political system.[1163] This often leads to establish a relation between vulnerability, poverty and inequality. Vulnerability is understood as the lack of access to resources and power to recover or face risks or the impact of disasters.[1164] On the

[1157] Alexander HE Morawa, '"Vulnerability" as a Concept in International Human Rights Law' (2003) 10 J. Int. Relat. Dev. 139, 139.

[1158] ibid 141.

[1159] *Priyanka Sharma v State (Panchayati Raj Dep)* [2013] Rajasthan High Court WP(C) [514].

[1160] Hennebel and Tigroudja, *Traité* (n 149) para 10.

[1161] Samantha Besson, 'Evolutions in Non-Discrimination Law within the ECHR and the ESC Systems: "It Takes Two to Tango in the Council of Europe"' (2012) 60 Am J Comp Law 147, 174.

[1162] Timmer and others, 'The Potential and Pitfalls of the Vulnerability Concept for Human Rights' (n 110) 194.

[1163] M Pelling, *The Vulnerability of Cities: Natural Disasters and Social Resilience* (Earthscan 2003) 5.

[1164] Helen Forbes-Mewett and Kien Nguyen-Trung, 'Defining Vulnerability' [2019] Vulnerability in a Mobile World 5, 17.

one hand poverty is perceived as a temporary factor, on the other, vulnerability is a permanent state of individuals' as they are vulnerable to external threats.[1165]

3.1.3. Marginalisation and vulnerability

Marginality often goes hand in hand with the concept of vulnerability as it increases the possibility of victimisation of minority groups. In fact, vulnerability is often more visible when it overlaps with spatial and societal marginality resulting from historical background, minority status or ethno-cultural characteristics that make already marginal minority groups even more vulnerable.

The link between these two concepts rests on defining vulnerability principally as a lack of access to resources.[1166] Four factors have been identified to understand the different reasons creating vulnerability: (i) poverty, marginality and poor access to resources; (ii) dependency on resources; (iii) inequality and marginalisation; (iv) inadequacy of institutional structures to build up resilience.[1167] These elements accentuate the role of society and social systems in creating vulnerability. Vulnerability, even though it interacts with different concepts, is thus a clear outcome of social construction.

3.2. Protecting vulnerable groups

Despite the increasing use of vulnerability in research fields and in contemporary practices of IHRL, the ECtHR rulings does not at first glance, seem to clearly promote its use[1168]. Concepts of vulnerability, marginality and even discrimination are phenomena linked to individuals and social systems, and are strongly connected to politics and law. In short,

[1165] ibid.

[1166] WN Adger and PM Kelly, 'Social Vulnerability and Resilience' in WN Adger, PM Kelly and NH Ninh (eds), *Living with Environmental Change: social vulnerability, adaptation and resilience in Vietnam* (Routledge 2001) 22.

[1167] Forbes-Mewett and Nguyen-Trung, 'Defining Vulnerability' (n 1174) 22.

[1168] Besson, 'La Vulnérabilité et La Structure Des Droits de l'homme : L'exemple de La Jurisprudence de La Cour Européenne Des Droits de l'homme' (n 1166) 61.

vulnerability poses the question of individuals relations with the environment and thus with the society they inhabit.

The difficulty in considering vulnerability may reside in the analytical structure of human rights, composed of three principal elements: (i) essential objective interest; (ii) the threat made in a certain way, leading to individual mandatory protection;[1169] (iii) protection of individuals through rights and State obligation imposes a reasonable burden.[1170]

As developed above, vulnerability flows from the usage of threats. Due to the specific vulnerability of particular groups, "special" rights have been developed to protect individuals from these threats.

3.2.1. The uses by the European Court of Human Rights

This concept appears neither in the ECHR nor in its Protocols. However, the ECtHR does refer to it in its jurisprudence, and the *Chapman* case (2001) is perceived as the landmark case.[1171] In 2022, the word vulnerability appeared in 63 cases, in relation to Article 14 and minority cases, on the HUDOC platform.[1172] Thus, in statistics, the Court refers more frequently to vulnerability than marginalisation. Though the notion surfaced in 1981, it has been used constantly since 2001,[1173] and more specifically since the *DH* jurisprudence (2007). The word appears in cases concerning women,[1174] pregnant women, adolescents,[1175] children,[1176] physical

[1169] In *Bachpan Bachao Andalon*, the SC underlines the necessity to identify children who are vulnerable and need protection. *Bachpan Bachao Andolan v Union of India* [2011] SC of India WP(C) No.51 OF 2006 [58].

[1170] Besson, 'La Vulnérabilité et La Structure Des Droits de l'homme : L'exemple de La Jurisprudence de La Cour Européenne Des Droits de l'homme' (n 1166) 63.

[1171] *Chapman v the United Kingdom* (n 200).

[1172] The research on HUDOC was based on the Grand Chamber and Chamber rulings, in relation to Article 14. The words used in the search were: "minority vulnerability".

[1173] Besson, 'La Vulnérabilité et La Structure Des Droits de l'homme : L'exemple de La Jurisprudence de La Cour Européenne Des Droits de l'homme' (n 1166) 65.

[1174] *BS v Spain* [2012] ECtHR 47159/08.

[1175] *RR v Poland* [2011] ECtHR 27617/04 [159]; *P and S v Poland* [2012] ECtHR 57375/08 [162].

[1176] *Stubbings v the United Kingdom* [1996] ECtHR 22083/93, 22095/93.

and psychologically sick individuals,[1177] transexuals,[1178] homosexuals,[1179] detainees,[1180] refugees,[1181] stateless,[1182] Roma minority,[1183] individuals with mental disabilities,[1184] with HIV,[1185] or asylum seekers.[1186] Apparently, vulnerability is understood as individuals' situation[1187] or status.[1188]

Still, vulnerability is not defined within the ECHR and the ECtHR rulings, even if the Court has identified it in its rulings on categories of vulnerable persons, thus granting them special protection. Markers are based on social disadvantages, historical prejudice stigmatisation by social exclusion and stereotypes.[1189] These criteria seem to follow a social structure, which counters the Court's general approach to marginalisation or intersectional discrimination. In the *Kiyutin* case (2011), the Court identified specific categories like gender, ethnic origin, sexual orientation and disability as elements of vulnerability.[1190] This approach was used in the chamber judgment of *Novruk* (2016),[1191] and *Guberina* (2016).[1192] But, it was never employed by the Grand Chamber, which uses vulnerability as an argumentative tool.[1193]

[1177] *Renolde v France* [2008] ECtHR 5608/05.

[1178] *Christine Goodwin v the United Kingdom* (n 1014).

[1179] *Dudgeon v the United Kingdom* [1981] ECtHR 7525/76.

[1180] *Aydin v Turkey* [1997] ECtHR [GC] 23178/94.

[1181] *Hirsi Jamaa v Italy* [2012] ECtHR [GC] 27765/09.

[1182] *Kurić v Slovenia* [2012] ECtHR [GC] 26828/06.

[1183] *Oršuš v Croatia* (n 177) para 147; *Chapman v the United Kingdom* (200) para 96; *DH v the Czech Republic* (n 147); *Yordanova v Bulgaria* [2012] ECtHR 25446/06; *Horváth and Kiss* (n 1097).

[1184] *Alajos Kiss v Hungary* [2010] ECtHR 38832/06 [42].

[1185] *Kiyutin v Russia* [2011] ECtHR 2700/10 [64].

[1186] *MSS v Belgium and Greece* [2011] ECtHR [GC] 30696/09 [251].

[1187] *Renolde v France* (n 1187) para 83 (case related to detainees' vulnerability).

[1188] *MSS v Belgium and Greece* (n 1196) para 251 (case related to asylum seekers); *Mugenzi c France* [2014] ECtHR 52701/09 (case related to refugee status). .

[1189] Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11 Int. J. Const. Law 1056, 1070; *Kiyutin v Russia* (n 1195) para 48.

[1190] *Kiyutin v Russia* (n 1195) para 48.

[1191] *Novruk v Russia* (n 1007).

[1192] *Guberina v Croatia* (n 1079).

[1193] Oddný Mjöll Arnardóttir, 'Vulnerability under Article 14 of the European Convention on Human Rights' (2017) 4 Oslo Law Rev. 150, 164.

Thus, the Court retains natural or intrinsic causes. Pregnancy, age or gender, external or circumstantial factors, outcome of migration or detention, are conducive to vulnerability.[1194] Of course, several causes can combine and lead to an aggravation of individuals' vulnerability. This was highlighted by the Court in the *Mubilanzila Mayeka* (2006)[1195] and *Muskhadzhiyeva* case (2010)[1196] where a child was detained in a detention centre for migrants. In both cases, the Court signaled children's vulnerability in the same detention centre. Despite the different circumstances, in *Mayeka* the child was detained with his family, and in *Muskhadzhiyeva* the child was detained alone, the Court still maintained the children's vulnerability. It was also underlined in the *Claes* case (2013) in relation to the inferiority and powerlessness of mentally ill prisoners in psychiatric hospitals.[1197]

Interestingly, with respect to gender/sex discrimination, vulnerability is only seen in the context of gender-based violence. Whenever, observed outside this prism, the Court prefers referring to stereotypes.[1198] Hence, in the *Khamtokhu* judgement (2017), a life imprisonment sentence could not be given to a woman under 18 or above 65, the Court argued that stereotypes could not justify a difference of treatment.[1199] Different treatment in this case between men and women's imprisonment showed up as protection against gender-based violence, abuse and sexual harassment. Despite both parties' agreeing on women's vulnerability in prison environment, the ECtHR did not mention the concept. Despite clear categories of individuals or groups considered as vulnerable, there seems to be no clear format when the concept can or should be used.

3.2.2. Applying the concept to minority groups

Vulnerability is used for individuals and groups who can be considered minorities. Notwithstanding clarity about who experiences vulnerability, the Court refers indistinguishably

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[1194] Besson, 'La Vulnérabilité et La Structure Des Droits de l'homme : L'exemple de La Jurisprudence de La Cour Européenne Des Droits de l'homme' (n 1166) 70.

[1195] *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* [2006] ECtHR 13178/03 [103].

[1196] *Muskhadzhiyeva v Belgium* [2010] ECtHR 41442/07 [56].

[1197] *Claes v Belgium* [2013] ECtHR 43418/09 [101].

[1198] Mjöll Arnardóttir, 'Vulnerability under Article 14 of the European Convention on Human Rights' (n 1203) 160.

[1199] *Khamtokhu and Aksenchik v Russia* [2017] ECtHR [GC] 60367/08; 961/11.

to the concept for individuals and groups. Consequently, no difference is made between individual or collective vulnerability. This may seem anodyne at first glance, but a deeper look confirms a real legal problem. Legal acknowledgment and recognition of groups is based on specific characteristics like gender, religion, beliefs, or language, and these elements can interact, culminating in multiple and intersectional discrimination, as well as stigmatisation. Thus, the qualification of groups' vulnerability often calls for an analysis of social structure. Though NGOs or international organisations (European or the UN)[1200] often examine social attitudes towards specific groups, over time the Court has automatically come to recognise the vulnerability of minority groups like the Roma. This is principally a result of European recommendations[1201] and their own history, and their evident social disadvantage as a vulnerable minority.[1202] So far, the Court has only considered Roma as vulnerable within the category of individuals facing ethnic discrimination. In the *Makhashevy* case (2012),[1203] the ethnic origin of the Chechen party beaten up by the police raised two questions: first, the violation of negative obligation not to discriminate; second, the violation of States' procedural obligation through lack of investigation, questioning the State's positive obligation of due diligence. The Court considered this a violation of Article 14 and Article 3. Although the Court held that individuals in custody were in a "vulnerable position" it did not recognize their ethnic origin as a factor of vulnerability.[1204]

Moreover, Court jurisprudence has granted the qualification of vulnerable groups to asylum seekers because of their traumatic migratory experience,[1205] and to mentally disabled persons having suffered serious discrimination.[1206] Asylum seekers situation in *M.S.S.*, illustrates the Court's intention to give special protection to particularly vulnerable populations and declare Article 3 violation. This case also highlights the Court's practice to weigh the situation's general structure.

[1200] *Salah Sheekh v the Netherlands* [2007] ECtHR 1948/04 [140].

[1201] Recommandation 1203 relative aux Tsiganes en Europe 1993; Recommandation 1557 relative à la situation juridique des Roms en Europe 2002.

[1202] *Oršuš v Croatia* (n 177) para 147.

[1203] *Makhashevy v Russia* [2012] ECtHR 20546/07.

[1204] *ibid 151.*

[1205] *MSS v Belgium and Greece* (n 1196) para 232; *N.S.K. v the United Kingdom* [2022] ECtHR 28774/2 [39].

[1206] *Alajos Kiss v Hungary* (n 1194) para 42.

This approach to minority groups highlights the Court's inconsistency. On the one hand it continues the historical tradition of viewing the Roma as mentally challenged individuals, on the other it, deals with specific situations of asylum seekers or displaced persons, produced by current circumstances. The ECtHR's approach of indirect discrimination reflects its use of vulnerability to identify categories of individuals and then recategorize them.[1207]

3.2.3. Identification of special vulnerabilities

First and foremost, the Court protects the *special vulnerability* of individuals or groups,[1208] by identifying special obligations. It uses the concept of vulnerability to recall State's special positive obligation. It allows the ECtHR to underline the gravity of the violation of States obligations. Yet, it also refers to *general vulnerability*, which leads to a paradoxical conclusion. In *L v. Lithuania* (2007), the ECtHR deduced from this concept a violation of Article 3 (prohibition of torture), and thus created a kind of right to non-vulnerability.[1209]

Recognizing vulnerability from a legal point view and establishing States' obligation to specific individuals and groups marks a positive advance for the Court. Yet, the ECtHR jurisprudence has proved the limits of the Court's reflection on discrimination faced by minority groups. Discrimination often continues historical tradition and social practices that create and perpetuate specific disadvantaged groups. But the Court does not break the circle of discrimination and vulnerability, as it does not always consider the multiplicity and intersectionality of elements caused by the combination of natural elements and external factors. The ECtHR does not reflect on the economic situations, nor on social or cultural origins which also create vulnerability.[1210] Though not all factors can intersect, and though the Court combines natural and external factors, it does not always take the risk of integrating social attitudes and social discrimination to judge vulnerability. In fact, its reasoning for vulnerability is not applied uniformly for all groups. For instance, the legal reasoning behind Roma vulnerability is not extended to the Chechen ethnic group in Russia. Thus far, the ECtHR has also clearly not considered identity markers. On the contrary, it has focused on the impact of

[1207] *DH v the Czech Republic* (n 147).

[1208] *MSS v Belgium and Greece* (n 1196) para 251.

[1209] *L v Lituania* [2007] ECtHR 27527/03 [46].

[1210] Dimitris Xenos, 'The Human Rights of the Vulnerable' (2009) 13 Int. J. Hum. Rights 591, 593–594.

association with this identity marker. Certainly, individuals' experiences within the legal group differs.

In addition, the Grand Chamber seems to avoid employing the vulnerability concept, except in specific cases and for groups like Roma children, and their segregation in school. In the *Khamtokhu and Aksenchik* ruling (2017), the Court based itself on classic approaches of discrimination and did not consider vulnerability.[1211] It uses this concept to expand the scope of application of specific rights, like Article 14 or Protocol 12. But the Court also mobilizes vulnerability to develop new types of obligations and enlarge its competence. In the context of the prohibition of discrimination, the Court has developed three basic features. With vulnerability, the Court multiplied the categories of possible groups facing discrimination. It added the category of people with handicap in the *Glor* case (2009). In this case, the Court clearly stated the need to "prevent discrimination against people with disabilities and foster their full participation and integration in society".[1212] It implicitly recognized Switzerland's practice of excluding a group of individuals. In this particular instance, whilst the Court extended the qualification of vulnerability, it remained far from acknowledging their vulnerability. In cases related to individuals with disabilities, the Court limits the States' MOA thus increasing its cognitive power.[1213] In the *Kiyutin* case (2011) on the expulsion of a non-Russian citizen because of his HIV status, the Court argued that in cases where there is a historical discriminatory attitude towards particular vulnerable groups, the States' MOA is immediately narrower and limited.[1214] Here, the Court uses this concept to deal with indirect discrimination. This enables the Court to identify disadvantaged minority groups, particularly in its jurisprudence on the Roma community.[1215] Finally, the Court followed the European Committee of Social Rights traditional practice,[1216] going further with the establishment of

[1211] *Khamtokhu and Aksenchik v Russia* (n 1209).

[1212] *Glor v Switzerland* [2009] ECtHR 13444/04 [84].

[1213] Besson, 'La Vulnérabilité et La Structure Des Droits de l'homme : L'exemple de La Jurisprudence de La Cour Européenne Des Droits de l'homme' (n 1166) 74.

[1214] *Kiyutin v Russia* (n 1195).

[1215] Mathias Moschel, 'Is the European Court of Human Rights' Case Law on Anti-Roma Violence' Beyond Reasonable Doubt'?' (2012) 12 Hum. Rights Law Rev. 479.

[1216] Besson, 'Evolutions in Non-Discrimination Law within the ECHR and the ESC Systems: "It Takes Two to Tango in the Council of Europe"' (n 1171).

special positive obligations of preventions. This attitude is reflected in its jurisprudence related to Roma children minority, and their integration within the education system.[1217]

Despite several references to vulnerability, the ECtHR remains discrete on the notion and its precise criteria**.** It mentions vulnerability without developing the concept and perceives it rather as a factual element to observe. However, the purpose of vulnerability is to underline the complex and deep-rooted situations of discrimination in social contexts.

The Court's approach is unsatisfactory for the concept imposes specific obligations on States. Vulnerability linked to discrimination allows the Court to consider indirect discrimination, and positive obligations of due diligence. Consequently, not only does it increase State 'duty' towards specific groups, but the burden of proof shifts to the State.[1218] However, categorizing specific groups with identity markers may be a move towards a clear-cut division between groups, and prevent a more general approach to the violation of Article 14.

3.3. The State's quandary: between vulnerability and due diligence

Vulnerability is today a key concept in IHRL. It appears in ECtHR rulings and has become a necessary bedrock for judgments.[1219] The purpose of vulnerability seems to be to tighten the link between human rights law, its theory and individuals' experiences.[1220] From a judicial perspective, it allows a human-centred approach. It interrogates States obligations and questions prevailing social attitudes. At the same time, for vulnerable individuals, the label of vulnerability seems to reinforce stigmatisation, marginalisation and human rights abuses.

[1217] *Oršuš v Croatia (n 177)* para 157; *Horváth and Kiss* (n 1097) para 102.

[1218] *Horváth and Kiss* (n 1097) para 108; *JD and A v the United Kingdom* [2019] ECtHR 32949/17; 34614/17 [89].

[1219] Timmer and others, 'The Potential and Pitfalls of the Vulnerability Concept for Human Rights' (110) 191.

[1220] Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11 International Journal of Constitutional Law 1056, 1056–1085.

3.3.1. The concept of due diligence

On several occasions, the ECtHR mentions State's positive obligation of due diligence.[1221] Under this principle, States are held responsible for violations committed by non-State actors. States are also considered accountable for acts of private actors if they fail to act with due diligence. States must prevent human rights violation, prosecute and punish perpetrators, and in addition, protect and provide justice for victims.[1222]

At the level of regional courts, this concept was first developed at the IACtHR with the *Velasquez Rodriguez* case (1988) or enforced disappearances in Honduras. Here, the Court argued for State responsibility in the abduction and disappearance of Angel Manfredo Velasquez Rodriguez, a graduate student. For the Court, the State should ensure the guarantee of rights when these are established, and consequently, the State has an obligation to exercise due diligence to ensure fulfilment of these rights. The Court's legal framework led to the foundation of due diligence standard, which arrived in the ECtHR with the *Bevacqua*[1223] and *Opuz*[1224] cases over domestic violence. In these two cases, the Court recognised and applied the due diligence standard.

Due diligence depends on the legal recognition of State responsibility for private acts. Although in *Osman v. United Kingdom* (1998), the ECtHR did not formally use the concept of due diligence, it did outline it.[1225] This case seemed to be the first step towards an official recognition of State responsibility. It followed the IACtHR and the CEDAW approaches to the question and argued that State can be complicit of human rights abuses by non-State actors. The establishment of State responsibility advanced a precedent that could be used in subsequent cases like in *M.C.* (2003). In the situation of a woman's rape State positive obligation could be recalled.[1226]

[1221] See: *Makhashevy v Russia* (n 1213).

[1222] Julie Goldsheid and Debra J Liebowitz, 'Due Diligence and Gender Violence: Parsing Its Power and Its Perils' (2015) 48 Cornell Int. Law J. 301, 302.

[1223] *Bevacqua and S v Bulgaria* [2008] ECtHR 71127/01.

[1224] *Opuz v Turkey* (n 932). See also: *Tkhelidze v Georgia* [2021] ECtHR 33056/17

[1225] *Osman v the United Kingdom* [1998] ECtHR [GC] 23452/94.

[1226] *M.C. v. Bulgaria* (n 171).

3.3.2. From the Inter-American Court of Human Rights to Europe

Due diligence within the ECtHR appears on the recognition of State responsibility regarding violence against women. In 2002, the Committee of Ministers of the Council of Europe adopted "Recommendation Rec (2002) 5" on the protection of women against violence. Here it clearly articulated the principle of due diligence. It argued that member States should recognise their obligation to exercise due diligence to "prevent, investigate and punish acts of violence", whether perpetrated by the State or private actors.[1227]

It is in this context that the ruling in two cases *Bevacqua* and *Opuz* became turning points for the ECtHR. In both cases of gender-violence, the Court underlined women's vulnerability and did not rely on stereotypes as seen above.

In *Bevacqua*, the applicant argued that she had been physically abused by her ex-husband, and faced indifference and delayed action from local law enforcement agencies and the Bulgarian Home Ministry. Before the ECtHR, the application affirmed violations of Articles 3, 8, 13 and 14 by State authorities because of failure to intervene and assist her. In addition to reviewing Bulgarian law, the Court noted the particular vulnerability of victims of domestic violence.[1228] An analysis of the ECtHR jurisprudence reveals its reactivity to the evolution of IHRL. Indeed, in this case, the Court referred to discussions and acknowledgment surrounding the due diligence principle, such as the 2006 Special Rapporteur Ertürk report on due diligence as a tool for the elimination of violence against women.[1229] The Special Rapporteur highlighted the multiplied of forms of violence towards women, and the intersection of different types of discrimination.[1230] This led to a consideration of due diligence as different from States' obligation, to a focus on the State's role in transforming social values and institutional approaches to gender inequality, and an examination of "shared responsibilities" of the State

[1227] Recommendation Rec (2002) 5 on the protection of women against violence 2002 para 2.

[1228] *Bevacqua and S v Bulgaria* (n 1233) para 25.

[1229] Yakin Ertük, 'Integration of the Human Rights of Women and the Gender Perspective: Violence against Women - the Due Diligence Standard as a Tool for the Elimination of Violence against Women' (Commission on Human Rights 2006) E/CN.4/2006/61.

[1230] ibid 2.

and private actors.[1231] Despite the Court's taking account here of women's vulnerability in a situation of gender-based violence, it did not see this as a discriminatory practice. Even though the Bulgarian criminal code distinguishes between prosecution in an attack on a woman in the street and at home, the latter is being seen a private matter. In terms of protection of women, the Court considered their vulnerable position as a result of discriminatory practices and attitudes. Judicial and institutional institutions like the ECtHR despite advancing the concept of vulnerability, failed to protect gender-based violence and discrimination faced by women under Article 14.

In *Opuz*, the ECtHR recognised State failure to exercise due diligence in gender-based discrimination practices,[1232] or to provide effective protection measures or prosecution. The lack of legally enforced protection from gender-based violence inflicted on a woman by her husband led to the applicant's mother's death. The applicant argued for the violation of Article 2 (right to life), Article 3 (prohibition of torture) and Article 14 due to inadequate response of law enforcement resulting from a gender-based discrimination. The Court followed the same approach as in *Bevacqua*. It reviewed the relevant Turkish legislation, referred once more to Special Rapporteur Ertürk's report, and its conclusion concerning the customary international aspect of due diligence.[1233] Contrary to *Bevacqua* case arguments, in *Opuz*, the Court recognised that the violation of the State's positive obligation of due diligence led to the violation of Article 14 through the angle of gender-based discrimination. *Opuz* remains a landmark case, not only because of the application of due diligence, but more significantly, because the Court recognized the high risk of domestic violence women face. Since Turkey did not provide protection against victims of domestic violence, the State failed to exercise due diligence, and consequently violated Article 14.

Subsequently, in both cases, the Court did make a significant progress with the establishment and articulation of the due diligence principle for cases of gender-based violence and discrimination. It gave binding legal authority to the principle of due diligence within the jurisdiction of the Court, and settled references for this principle and vulnerability.[1234]

[1231] ibid 6.

[1232] *Opuz v Turkey* (n 932) para 149.

[1233] ibid 79.

[1234] Lee Hasselbacher, 'State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, And International Legal Minimums of Protection' (2010) 8 JHR 190, 215.

3.3.3. A key to the concept of vulnerability

Recognising vulnerability is a key challenge for individual protection. Clearly identifying vulnerable groups or individuals through Court jurisprudence is a first step towards greater protection, and perhaps also a move to address stereotypes within society that lead to discriminatory practices and legislation. Fixing such categories of individuals calls for greater State obligation towards their protection. The Court and human rights advocates have consequently increased the use of due diligence standard as a tool to address discriminatory practices towards minority groups. This approach emphasizes the importance for States to re-organise their national structure through legislation, policies and practices to prevent abuses of minority groups, and more specifically of vulnerable individuals. For the ECtHR, this translates human rights treaties from pure theory to practice.[1235]

Due diligence was clearly constructed as a tool for the Court to recall States' duty to protect vulnerable individuals. Yet, a difficulty resides in this standard as it was not "created" to address specific structural discriminatory practices. In recalling States obligation or pointing out wrongful legislation or institutional behaviours, due diligence standard does have a positive impact. However, it remains limited because of Court attitudes towards discrimination as an *ensemble*.

Still, regarding cases of minority groups, except for gender-based violence towards women, due diligence is rarely used in the jurisprudence. For example, this standard is not employed in Roma children's segregation in school and the jurisprudence quoted earlier. In theory, due diligence standard coupled with concepts like vulnerability or discrimination, is a decisive tool to change national structures and practices. It reminds States of their duty and obligation. Yet, in practice, the use of this standard is light, no doubt because of the possible implications for the State.

[1235] Paulo de Tarso Lugon Arantes, 'The Due Diligence Standard and the Prevention of Racism and Discrimination' (2021) 68 NILR 407, 412.

4. Conclusion

The Indian case highlighted the danger of integrating political programs within the judiciary, the ECtHR's analysis proves how historical and social contexts are key factors to understanding human rights violation within national frameworks. Yet, these elements are not used as a justification for Article 14 violation. They do however serve to recognise the limits of practices or institutional silence, and indicate their passage into legal terminology. They further bring out the legal awareness and use of intersectional factors. In fact, through this approach to minority groups, the ECtHR application of international law reinforce the idea that social movements are not considered to recall States of their obligations under the Convention.

Chapter 8. A comparison with the Inter-American Court of Human Rights

Created in 1948, the Organisation of American States (OAS) set up the IAHRS, to provide legal, institutional and political tools in the region as guarantees of human rights protection on the American continent. Composed of two main organs – the IACmHR and the IACtHR – the IAHRS played an important role in the period of dictatorship and civil wars in South and Central America. Its rulings recalled States' obligations under IHRL.[1236]

Human rights protection is organised within the OAS under several legal instruments such as the Charter of the OAS, which establishes the IACmHR through Article 51 of the Charter, the American Declaration on the Rights and Duties of Man or the American Convention on Human Rights (ACHR). The ACHR remains the principal human rights treaty in the OAS. Article 33 of the Convention empowers the Commission and the Court,[1237] and ensures State compliance with the rights outlined in the Convention. Like the ECHR, the Convention protects human rights such as the right to life, fair trial, personal liberty, prohibition of discrimination, etc.

Despite being inspired by the ECHR or the ICCPR,[1238] the ACHR founders did not replicate these conventions mainly due to the differences on human rights violations between these two regional systems.[1239] This prompted the IAHRS to take account of cultural and historical events and attitudes that shaped the specific legal backgrounds in the different States. Thus, they responded to regional challenges like dictatorship and minority group's struggles. This approach created a major difference between the IACtHR and the ECtHR on minority groups and discrimination. In time, this produced a difference in the qualitative structure of both systems. Understanding the IACtHR analysis of minority groups sheds light on three specific dimensions: (i) the Convention's approach to discrimination; (ii) the Court's views on

[1236] Par Engstrom, 'Introduction: Rethinking the Impact of the Inter-American Human Rights System' in Par Engstrom (ed), The Inter-American Human Rights System (Palgrave Macmillan 2019) 2.

[1237] The IACmHR has thus jurisdiction over all OAS States, whilst the Court does only towards ACHR parties.

[1238] The influence of UN Conventions is underlined in Article 1 of the ACHR, as most international conventions use Article 1 to establish general obligations and the right to non-discrimination.

[1239] Jo M Pasqualucci, The Practice and Procedure of the Inter-American Court of Human Rights (2nd edn, Cambridge University Press 2013) 4.

specific cultural and historical features of minority groups; and finally (iii) a reflection on the Court's role in promoting long-term protection of minority groups in States' judicial system.

1. Article 1 of the American Convention on Human Rights

> The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.[1240]

1.1. The relevance of Article 1.1 of the Convention

Article 1§1 of the ACHR, entitled "obligation to respect rights" establishes States general duty to respect the substantive rights listen in the Convention, and ensure them without any discrimination. This first article lays down the importance of enjoying and exercising the rights protected in the ACHR as not only universal but applicable to "all persons".

Further, it promotes the subsidiarity principle under which States are the primary authority responsible for protecting individuals' human rights in their national legal systems.[1241] States, and therefore domestic legal systems, are duty-bound to ensure respect, and guarantee rights recognised in the Convention. In case of State failure to protect individual rights, the ACHR and the IAHRS organs (IACmHR and IACtHR) complement national laws by redressing human rights violations.[1242] However, the Convention does not, either in Article 1§1 nor in other articles, indicate how the ACHR should be incorporated to the domestic legal system, nor

[1240] Article 1§1 ACHR.

[1241] *López Soto v Venezuela* [2018] IACtHR Fondo, Reparaciones y Costas, Series C, No. 362 [127].

[1242] *Acevedo-Jaramillo v Peru* [2006] IACtHR Preliminary Objections, Merits, Reparations and Costs, Series C, No. 157.

clarify its position within the constitutional order. It is the States' duty to determine its position in its own legal system.[1243]

The position of these rights highlights the approach to protect human rights on the American continent, and more specifically, elucidates the IAHRS' philosophical and legal approach.

To begin with, Article 1§1 importance was emphasised as crucial in the Court's first case, *Velasquez* (1988), under which the IACtHR indicated the very essence of this article in recognising human rights violation.[1244] Interestingly, any violation of the ACHR rights automatically implies violations of Article 1§1,[1245] and it cannot be breached in and of itself. It is a general rule which applies to all the provisions of the treaty and thus, a discriminatory practice is *per se* incompatible with the Convention.[1246] However, akin to Article 14 of the ECHR, Article 1§1 of the ACHR is conditional, and consequently is not an independent article.[1247] Article 1§1's violation leads to violation of Article 2, which relates to States' obligation to harmonise national norms with the Convention.[1248] Consequently, this article is the cornerstone of Member States' national duties and responsibilities.[1249]

Next, this significant position depends equally on the *pacta sunt sevanda* principle, which legally obliges States to respect the content of the Convention. Not only does it prevent arbitrary behaviour, but States must also fulfil the treaty's obligation in good faith.[1250] The establishment

[1243] Enforceability of the Right to Reply or Correction (Arts 14(1), 1(1) and 2 American Convention on Human Rights) [1986] IACtHR Advisory Opinion OC-7/85, Series A, No. 7 [33].

[1244] *Velasquez Rodriguez v Honduras* (n 204) para 164.

[1245] ibid 162.

[1246] *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica* (n 710) para 53; *San Miguel Sosa et al v Venezuela* [2018] IACtHR Merits, Reparations, and Costs, Series C, No. 348 [110]; *Guevara Díaz v Costa Rica,* [2022] IACtHR Fondo, Reparaciones y Costas, Series S, No. 453 [47].

[1247] Mwakagali, 'International Human Rights Law and Discrimination Protections: A Comparison of Regional and National Responses' (n 129) 54; *Apitz Barbera (First Court of Administrative Disputes) v Venezuela* (n 845) para 209.

[1248] Concurring opinion A.A, Cancado Trinidade Caballero-Delgado and Santana [1997] IACtHR Series C, No. 31.

[1249] Gonzalo Sánchez de Tagle, 'The Objective International Responsibility of States in the Inter-American Human Rights System' (2015) 7 Mex. Law Rev. 115.

[1250] II Lukashuk, 'The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law' (1989) 83 AJIL 513, 513.

of general obligations to respect and ensure human rights reflects this standard, and makes the Convention a legally binding instrument.[1251] Once more inclusion of the right to non-discrimination within this article is not anodyne, and underlines the connection between this right and each right of the Convention.

Then, from a structural perspective, Article 1§1 is divided into four parts: (i) establishment of positive ("ensure") and negative ("respect") obligations; (ii) individuals protected by the Convention ("all persons"); (iii) jurisdiction; and (iv) conditions of State responsibility. This structure echoes Article 2§1 of the ICCPR and the good faith principle.[1252] Furthermore, under this framework, States are considered responsible for human rights violation of non-State actors, and thus it also advances the principle of due diligence.[1253] In *The Last Temptation of Christ* case (2001), the Court recalled the engagement of State responsibility to acts committed by any "power or organ of the State".[1254] The State is thus considered responsible for failing to act in a manner consistent with its positive obligations, not only for non-State actors, but also for the executive, legislative and judicial branches, and more generally, for the acts of its agents abusing their official capacity to commit human rights violation.[1255]

1.2. Article 1.1 in comparison to the other articles of the Convention

The 1969 ACHR consolidates personal liberty and social justice within a democratic institutional structure. These rights are based not on the individual's nationality, but on "attributes of the human personality" ("los atributos de la persona humana").[1256]

[1251] 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (HRC 2004) CCPR/C/21/Rev.1/Add. 13 para 3.

[1252] Hennebel and Tigroudja, *A Commentary* (n 168) 21.

[1253] *Velasquez Rodriguez v Honduras* (n 204) para 172; *Suárez Peralta v Ecuador* [2013] IACtHR Preliminary Objections, Merits, Reparations, and Costs, Judgment, Series C, No. 261 [129].

[1254] "The Last Temptation of Christ" (Olmedo Bustos et al) v Chile [2001] IACtHR Merits, Reparations and Costs, No. 73 [72]; *Integrantes y Militantes de la Unión Patriótica v Colombia* [2022] IACtHR Excepciones Preliminares, Fondo, Reparaciones y Costas, Series C, No. 455 [256].

[1255] Garrido and Baigorria v Argentina [1996] IACtHR Merits, Series C, No. 26 [170]; Kawas-Fernández v Honduras [2009] IACtHR Merits, Reparations and Costs, No. 196 [85]; *Integrantes y Militantes de la Unión Patriótica v Colombia* (n 1264) para 262.

[1256] Preambule ACHR.

Divided in three parts – general obligations, civil and political rights, and economic, social and cultural rights – the ACHR, despite an absence of definition, advances the right to non-discrimination in Articles 1§1, 24 (right to equal protection) and 27.

The main difference between these articles is found in the general obligation contained in Article 1§1.[1257] This Article establishes what a general obligation is and the role of discrimination therein: if a State fails to comply with this article it will be held internationally responsible.[1258] Consequently, there is an "inseparable link" between Article 1§1 obligation and the principle of non-discrimination.[1259] On the contrary, Article 24, which is self-governing, prohibit discrimination not only in association with the rights found in the ACHH but also with laws passed by States and their enforcement.[1260] Despite key difference between these two articles, the Court and the ACHR understand that non-discrimination flows from equality,[1261] and the IACtHR uses the expression "principle of equality and non-discrimination". Both are considered central and fundamental axis for the IAHRS.[1262] However, non-discrimination in Article 24, as opposed to Article 1§1, is not developed in the sense that no grounds are established to understand how a difference of treatment becomes discriminatory. Thus, the Court mainly uses Article 1§1 and IHRL to clarify Article 24.[1263] Despite big differences, the Court developed a jurisprudence related to the right to non-discrimination through Articles 1§1 and 24 of the Convention.[1264] The San José judges used the theory of positive obligations, which through the indigenous question helped the Court to develop this approach in cases related to

[1257] *Flor Freire v Ecuador* [2016] IACtHR Preliminary Objection, Merits, Reparations, and Costs, Series C, No. 315 [112].

[1258] *Duque v Colombia* [2016] IACtHR Preliminary Objections, Merits, Reparations, and Costs, Series C, No. 310 [94]; *Gender identity, and equality and non-discrimination of same-sex couples* [2017] IACtHR Advisory Opinion OC-24/17, Series A, No. 24 [63].

[1259] *Gender identity, and equality and non-discrimination of same-sex couples, Advisory Opinion OC-24/17* (n 1268) para 63.

[1260] ibid 64; *Espinoza Gonzáles v Peru* [2015] IACtHR Preliminary objections, Merits, Reparations and Costs, Series C, No. 295 [217].

[1261] *Juridical Condition and rights of the undocumented migrants* (n 117) 83–84.

[1262] *Rocio San Miguel Sosa v Venezuela* [2015] [111].

[1263] Hennebel and Tigroudja, *A Commentary* (n 168) 720–721.

[1264] *Yatama* (n 183) paras 201; 225; Mario Melo, 'Recent Advances in the Justiciability of Indigenous Rights in the Inter-American System of Human Rights' [2006] SUR 31.

discrimination in general and to urge States to fix regulations supporting material rather than formal equality.[1265]

With Article 27§1 of the ACHR – covering suspension of guarantees in times of "war, public danger, or other emergency" – derogations are possible, but the measures must respect international law obligations and the right to non-discrimination.[1266]

1.3. Discrimination as a key target in Article 1.1

Under Article 1§1, States have the obligation to respect and ensure rights of individuals who fall under their jurisdiction, and who are therefore protected by the Convention. It rules out any discrimination on grounds of "race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition." Categories which do not expressly appear in these elements, due to the non-exhaustive list of grounds, have been interpreted by the Court as falling under the scope of Article 1§1 through the expression "otra condición social", and on certain occasions Article 24.[1267] Thus, the Court underlined discrimination based on sexual orientation,[1268] gender identity and expression,[1269] age,[1270] and illness and disability.[1271] The Court also used its jurisprudence to specify other categories like economic status, social condition, or political opinions, to tackle the structural and historical discrimination faced by poor and enslaved workers in Brazil for instance.[1272] In the *Hacienda* case (2016), for the first time the IACtHR ruled on slavery, human trafficking and structural discrimination on economic grounds. Furthermore, the Court ruled on State

[1265] Laurence Burgorgue-Larsen, 'Les Nouvelles Tendances Dans La Jurisprudence de La Cour Interaméricaine Des Droits de l'homme' [2009] Cursos de Derecho Internacional y Relaciones y Internacionales de Vitoria-Gasteiz 2008, Universidad del Pais Vasco 1, 14.

[1266] Article 27§1 ACHR.

[1267] Hennebel and Tigroudja, *A Commentary* (n 168) 721.

[1268] *Atala Riffo and Daughters v Chile* (n 156) para 85; *Pavez* (n 138).

[1269] *Azul Rojas Marín et al v Perú* [2020] IACtHR Preliminary Objections, Merits, Reparations, and Costs, Series C, No. 402 [86]; *Flor Freire v Ecuador* (n 1267) para 118; *Gender identity, and equality and non-discrimination of same-sex couples, Advisory Opinion OC-24/17* (n 1268) para 68.

[1270] *Paola Guzmán Albarracín et al v Ecuador* [2020] IACtHR Merits, Reparations, and Costs, Series C, No. 405 [141].

[1271] *Gonzales Lluy et al v Ecuador* (n 1113) para 242.

[1272] *Hacienda Brasil Verde Workers v Brazil* [2016] IACtHR Preliminary Objections, Merits, Reparations, and Costs, Series C, No. 318 [334].

responsibility for human rights violations committed by private actors. In the State of Pará (Brazil), 85 workers, including children, viewed as vulnerable, faced inhuman working conditions in the Hacienda Brasil Verde, a private owned estate. This case represented the systemic historical problem in the country's agriculture sector. More interestingly, the Court established that the victim's vulnerability – poor and of African descent – increased the chances of recruitment and abuses in this sector.

Furthermore, through this expression, "otra condición social", the Court considers the evolution of international law and interprets this discrimination in light of the victim's situation. It thus follows therefore a *pro persona* approach.[1273]

Indeed, the IACtHR has developed the principle of non-discrimination through its jurisprudence. In the *Granier* case (2015), and in an earlier advisory opinion (2003), it considered this principle as being a norm of *jus cogens*. This went on to become a foundation stone of international and national orders.[1274] Under this norm, defined in Article 53 of the Vienna Convention, certain principles of rights are considered to be universal and superior and form the basis of peremptory norms of general international law.

The qualification of discrimination under Article 1§1 of the ACHR is inspired by the ECtHR jurisprudence.[1275] Two elements are used by the Court: firstly, the difference of treatment, and second, State justification. Difference of treatment is either linked to direct or indirect discrimination,[1276] and such possible discrimination should in practice lead to special State protection of individuals, or discrimination by perception.[1277] More specifically, according to the Court, the State must abstain from carrying out any actions that lead to or

[1273] *Atala Riffo and Daughters v Chile* (n 156) para 85; *IV v Bolivia* [2016] IACtHR Preliminary Objections, Merits, Reparations, and Costs, Series C, No. 329 [240].

[1274] *Granier et al (Radio Caracas Television) v Venezuela* [2015] IACtHR Preliminary Objections, Merits, Reparations, and Costs, Series C, No. 293 [215]; *Juridical Condition and rights of the undocumented migrants* (n 117) para 101.

[1275] Hennebel and Tigroudja, *A Commentary* (n 168) 53.

[1276] *Nadege Dorzema et al v Dominican Republic* [2012] IACtHR Merits, reparations and costs, Series C, No. 251 [233-234.]. For more information see: Part I – Chapter 2.

[1277] Consists of discriminating a person based on its appearance (clothes for instance). *Flor Freire v Ecuador* (n 1267) para 120.

create *de jure* or *de facto* discrimination. It goes further, by arguing that States must take affirmative measures in response to discriminatory situations occurring in their society.[1278] In *Cotton Field* (2009), the Court delimited the conditions under which affirmative actions must be developed by national institutions.[1279] While the Convention does not promote affirmative action, the IACtHR declared that difference of treatment is not necessarily discriminatory. However, this distinction has to be based, firstly, on reasonable and objective criteria, and secondly, serve a legitimate state interest.[1280]

The impact of such direct or indirect discrimination, leads to discrimination by "*ricochet"* also known as discrimination by association. This discrimination indicates the impact of such policies or practices towards individuals linked to the victim. This concept seems to have appeared for the first time in the *Coleman* case of the CJEU (2008).[1281] At the level of the IACtHR, a focus was put on children affected by discrimination faced by their parents.[1282] With the establishment of the difference of treatment, States must justify this violation through solid and serious arguments based on Article 1§1.[1283]

While not specifically linked to Article 1§1 or to the obligations established in the Convention, the Court has gradually developed and used the concept of multiple and intersectional discrimination to highlight situations of structural vulnerability in cases of discrimination.[1284] For instance, in the *Artavia Murillo* case (2012) concerning in vitro fertilisation, the multiple discrimination was based on gender, economic situation and finally health status.[1285]

[1278] *Juridical Condition and rights of the undocumented migrants* (n 117) paras 101; 104; *Furlan and Family v Argentina* [2012] IACtHR Preliminary Objections, Merits, Reparations and Costs, Series C, No. 246 [132–134]; *Maya Kaqchikel Indigenous Peoples of Sumpango et al v Guatemala* [2021] IACtHR Merits, Reparations and Costs, Series C, No. 440 [116].

[1279] *González et al ("Cotton Field") v Mexico* [2009] IACtHR Preliminary Objection, Merits, Reparations and Costs, Series C, No. 205 (discrimination faced by women in a case of gender violence).

[1280] *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica* (n 710) para 56.

[1281] *S Coleman v Attridge Law and Steve Law* [2008] CJEU C-303/06.

[1282] *Atala Riffo and Daughters v Chile* (n 156) paras 150–155.

[1283] *Duque v Colombia* (n 1268) para 106.

[1284] *Paola Guzmán Albarracín et al v Ecuador* (n 1280) paras 141–142; *Manuela v El Salvador* [2021] IACtHR Excepciones preliminares, Fondo, Reparaciones y Costas, Series C, No. 441 [253].

[1285] *Artavia Murillo et al. (In Vitro Fertilization) v. Costa Rica* (n 983) para 285.

The use of intersectional discrimination by the Court emphasises the vulnerability of individuals and their increased discrimination. In *Gonzales* (2015), the Court argued that in the absence of any one of the factors – gender, HIV, disability, minority, or socio-economic status – discrimination would have been different.[1286] This case emphasised the complexity embedded in the concept of discrimination. Whilst in theory, the concept is quite clear, in practice, the multiplicity and intersectionality of discrimination leads to specific situations to which the Court must adapt. The constant evolution of the jurisprudence is thus mandatory at the regional level in order to grant greater protection to vulnerable populations.

2. Victims of subordination and exclusion: the case of indigenous groups

With the arrival of Spanish and Portuguese in the XVth century, indigenous groups in South America developed a common history. The difference of languages, traditions, art and religion, were put aside to focus on the general attitude of coloniser.[1287] Whilst differences between legal systems exist, the impact of colonisation forged a general heritage from a social and legal perspective. As in India, discriminatory practices often find its sources in the colonial period and groups violations must be understood through the prism of history and social perspective and that shows how national laws translated colonial domination over their societies. This approach is found within the IACtHR ruling. Currently, the Court is the first international jurisdiction to recognise the rights of indigenous groups as such.[1288]

2.1. General perspective

Today, discrimination in Latin America towards indigenous communities is not only an integral part of society but is equally a central issue at the regional level. Their exclusion and

[1286] *Gonzales Lluy et al v Ecuador* (n 1113) para 290.

[1287] Quintana Osuna Karla I and Citroni Gabriella, 'Reparations for Indigenous Peoples in the Case Law of the Inter-American Court of Human Rights' in Federico Lenzerini, *Reparations for Indigenous Peoples* (OUP 2008) 318.

[1288] Burgorgue-Larsen, Les Nouvelles Tendances Dans La Jurisprudence de La Cour Interaméricaine Des Droits de l'homme (n 1275) 13.

marginality, inequality and poverty compared to the rest of society heightens their vulnerability to discrimination.[1289]

2.1.1. A political and historical approach

From a political and historical perspective, attitudes towards these communities reflect former patterns of colonial domination under which indigenous groups were subordinated to white people who positioned themselves as superior.[1290] Discrimination and exclusion served as important tools to maintain not only a dominant position, but equally, endorsed an attitude of social and economic subjection. The end result was to reproduce inequity.[1291] In *Brevísima relación de la destrucción de las Indias* (1552), Fray Bartolomé de Las Casas, a Spanish Dominican friar, and an indigenous rights Defensor highlights this exclusion and domination policy: exploitation, forced evangelisation and dispossession of their lands. Territorial domination, appropriation of natural resources by the majority and integration of labour within imposed cash-crop agriculture, accentuated the process of invisibility through discrimination. Exploitation of natural resources on indigenous lands continued to be applied until the XXth century without regard of indigenous rights.[1292] It resulted in significant loss of land, territory, and natural resources for the indigenous people, accentuated by forced evictions.[1293]

In addition, policies of "denial of the other" reinforced discrimination of indigenous groups.[1294] This attitude, which dates to the first conquest and regimes of colonisation, took the form of cultural discrimination, developing into political and social exclusion. In practice, this mainly led to economic disparity.

[1289] Alvaro Bello and Marta Rangel, 'La Equidad y La Exclusión de Los Pueblos Indígenas y Afrodescendientes En América Latina y El Caribe' (2002) 76 Revista de la Cepal 39, 40.

[1290] Bónfil Batalla Guillenno, Pensar Nuestra Cultura (Alianza Editorial 1991).

[1291] Bello and Rangel, 'La Equidad y La Exclusión de Los Pueblos Indígenas y Afrodescendientes En América Latina y El Caribe' (n 1299) 40.

[1292] Ivonny Carolina Mora Burbano, 'Les Constitutions Sud-Américaines et Le Droit International' (These de doctorat, Bordeaux 2019) 171.

[1293] Martin Hopenhayn and Alvaro Bello, 'Discriminación Étnico-Racial y Xenofobia En América Latina y El Caribe' [2001] Serie políticas sociales 1.

[1294] G Fernando Calderón, Martín Hopenhayn and Ernesto Ottone, Esa esquiva modernidad: desarrollo, ciudadanía y cultura en América Latina y el Caribe (Ed Nueva Sociedad 1996).

2.1.2. The question of migration

Forced "migration" of indigenous populations towards cities, linked to the deterioration of communal land, general lack of resources and poverty, heightened their vulnerability to discrimination. It increased their precarity, marginalisation and discrimination, subjecting them to insecure and precarious employment. For instance, in Guatemala, Mexico or Peru, the difference between poverty levels of indigenous and non-indigenous can rise to 20 to 30 points.[1295]

The principle causes of such poverty lie in the XIXth century liberal reforms throughout the region. Their introduction of the concept of private land property led indigenous groups to lose their lands, and created a massive exodus.[1296] Furthermore, civil war, as in Salvador, Nicaragua or Colombia, also led to migration of indigenous populations.

2.1.3. The integration process

The process of symbolic integration replaced the European practice of forced evangelisation of colonies. States were constructed on the "acculturation-culturation" process. In practice, this translated into the privation of their identity and culture, along with the destruction of their social practices often linked to the land, culminating in their "acculturation". On the other hand, assimilation into the dominant culture led to the process of "culturation". States created a national identity without considering indigenous groups' who also failed to present an alternative coherent economic and political system, and norms of moral conduct.[1297] This is mainly due to the conception of indigenous populations by the ruling elites and intellectuals, who built the ideology surrounding the new State.[1298]

[1295] Harry Anthony Patrinos and George Psacharopoulos, 'Pueblos indígenas y pobreza en América Latina: un análisis empírico' (ECLAC 1994) LC/DEM/G.146.

[1296] Roger Plant, 'Pobreza y Desarrollo Indígena: Algunas Reflexiones' (Banco Interamericano de Desarrollo, Washington, DC 1998).

[1297] Hopenhayn and Bello, 'Discriminación Étnico-Racial y Xenofobia En América Latina y El Caribe' (n 1303) 10.

[1298] Intellectual elites were often divided in two groups, traditional and conversative, identifying mainly with a Spanish and Catholic heritage, rejecting traditional and backward practices, and desirous of incorporating ideas of

This attitude resonates today in the social and cultural system, with their exclusion from education, resulting in high levels of illiteracy,[1299] poor access to justice or low political participation in comparison to "white" people, and precarious employment.

2.2. Constitutional evolution and indigenous particularisms at the national level

In South America, the State, along with private actors, is the main perpetuator of human rights violation of indigenous groups. This is mainly due to the adoption of rules that have perpetuated discriminatory practices and domination over indigenous populations within national contexts.[1300]

At the national level, States have considered indigenous particularism through Constitutional provisions for their protection. Legally, this puts an end to, or at least offers a remedy to political, cultural, social and judicial abuses. In the early 1980s, several constitutional reforms in the sub-continent considered specificities of indigenous culture and language, and even specific rights. While these rights did not clearly establish the right to non-discrimination, in theory they put an end to social and legal exclusion of indigenous groups, which aggravated their discrimination.

In most South American countries, constitutionalism occupies a central place. Following the XIXth century French constitutional tradition, the Constitution often known as the *bloc de constitutionalité* was perceived as the principal source in the legal system. Consequently, States use the Constitution, perceived as a political charter, to promote new political ideologies.[1301] In Latin America, in 18 countries, 388 constitutional reforms were made between 1978 and 2012,

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the French enlightenment. Rodolfo Stavenhagen, Derecho Indígena y Derechos Humanos (IIDH-Colegio de México 1988) 24.

[1299] Stefano Varese, 'La Cultura Como Recurso: El Desafío de La Educación Indígena En El Marco Del Desarrollo Nacional Autónomo' in Madeleine Zúñiga, Juann Ansion and Luis Cuevas (eds), Educación en poblaciones indígenas. Políticas y estrategias en (Santiago de Chile, 1987); Jorge E Horbath and Ma Amalia Gracia, 'Estudiantes Indígenas Migrantes Frente a La Discriminación En Escuelas Urbanas de Las Ciudades Del Sureste Mexicano' (2018) 13 Península 151.

[1300] Sílvio Coelho Dos Santos, O Indio Perante o Direito: Ensaios (Editora da UFSC 1982).

[1301] Françoise Martinat, 'Droits Indigènes et Logique d'État', La reconnaissance des peuples indigènes entre droit et politique (Presses universitaires du Septentrion 2017).

and 16 new constitutions were established.[1302] States like Brazil, Colombia, Mexico, Chili, Costa Rica, Honduras and Peru frequently changed their constitution through reforms.[1303] The direct impact of this attitude is the blurring between the political system and constitutional values.[1304] In Brazil for instance, difference can be found in the constitutional norms between *polity* (refers to the fundamental rights and basic rules of politics) and *policies* (norms which surrounds public policies).[1305] In a context of dictatorship and weak democracy, States sought to legitimize their actions through constitutional changes. Law is then no longer a tool to counter violence. Instead, it serves as a legitimate tool of communication between States and individuals.

For the Colombian jurist Mauricio Garcia Villegas, law does not correspond to legal norms but serves as political strategy.[1306] This approach has determined the constitutional protection granted to indigenous groups in that country. Law is used to lend a strong validity to State actions. Countries like Colombia and Venezuela highlight this point with a strong legal system as compared to their fragile political systems.[1307] Consequently, law is a tool employed by these States to activate strong symbols such as unity and even multiculturalism. The protection of indigenous rights in the Constitution must be understood as a strategy in this context. Under this scheme, the respect of indigenous rights depends on specific political programs, and despite recognition in the Constitution, it is no guarantee of the respect of their rights.

Another way to end discrimination consists of integrating concepts such as multicultural or pluri-ethnicity in State values. By integrating and recognising indigenous people as part of

[1302] Detlef Nolte, 'Réformes Constitutionnelles En Amérique Latine', Le constitutionnalisme latino-américain aujourd'hui : entre renouveau juridique et essor démocratique ? (Éditions Kimé 2015).

[1303] ibid.

[1304] Martinat, 'Droits Indigènes et Logique d'État', La reconnaissance des peuples indigènes entre droit et politique (n 1311).

[1305] C Gonçalves Couto and R Bastos Arantes, '¿Constitución o Políticas Públicas ? Una Evaluación de Los Años FHC', Política brasileña contemporánea : de Collor a Lula en años de transformación (Siglo XXI Editores 2003); G Sartori, Comparative Constitutional Engineering (Houndmills, Macmillan 1994) 202.

[1306] Mauricio Garcia-Villegas, 'Law as Hope: Constitution and Social Change in Latin America Essay' (2001) 20 WILJ 353.

[1307] Martinat, 'Droits Indigènes et Logique d'État', La reconnaissance des peuples indigènes entre droit et politique (n 1311).

the nation in their legal system, States use their system to reduce tensions between political attitudes and social reality on the surface.

However, in reality these concepts are misused and create space for institutional abuses. In Venezuela for instance, in order to legally take ownership of the land belonging to the Kali'na community, the city of Maturin deprived it of their indigenous qualification through an administrative decree. Consequently, they no longer needed to respect and apply indigenous rights legally. By detaching the ethnic factor from indigenous groups, the State could dispossess them from their land and expropriate them it. Finally, in October 1998, the judiciary re-established their rights and recognised them as indigenous once more.[1308] Even so, the Kali'na community did not recover ownership of its lost land. The case demonstrates the misuse of law by political and institutional organs; but more dangerously, the discrimination of indigenous groups through laws.

The entry into force of the International Labour Organization (ILO) Convention – Indigenous and Tribal Peoples Convention, 1989 (No. 169), recognises their rights to a free prior consultation and information about government measures that can directly undermine their rights. It promotes indigenous groups rights to participate in institutions, but more importantly permits their incorporation in society while retaining their own characteristics.[1309] Consequently, it puts an end to the idea of "acculturation-culturation". This has led States to incorporate this right within their Constitution[1310]: Article 120 of the Venezuelan Constitution and Article 57 of the Ecuadorian Constitution is one example.

Constitutional ambiguity on this principle has led national judges, and more specifically constitutional judges, to interpret the Constitution and this right differently. In Colombia, the 1991 Constitution integrated the prior consultation right and the Constitutional Court extended it to indigenous and black communities within its jurisprudence. Since 1997 and the SU-039/97 ruling (related to oil extraction in the U'wa habitat area), the Court recalled the importance of

[1308] ibid.

[1309] Mora Burbano, 'Les Constitutions Sud-Américaines et Le Droit International' (n 1302) 171.

[1310] The obligation to consult is also protected by the IACtHR directly linked to the State's obligation to guarantee the free and full exercise of the rights recognised in Article 1(1) of the Convention. César Rodríguez Garavito and Carlos Andrés Baquero Díaz, 'The Right to Free, Prior, and Informed Consultation in Colombia: Advances and Setbacks' 3; *Comunidad Garífuna Triunfo De La Cruz Y Sus Miembros v Honduras* [2015] IACtHR Fondo, Reparaciones y Costas, Series C, No. 305 [159].

prior consultation in more than 77 judgements.[1311] In 2003 for example, the Court underlined the correlation between the protection of the prior consultation and the preservation of indigenous ethnic, social, economic and cultural identity that is central to their survival as a social group.[1312] In Bolivia, in 2012, the Court underlined the presence of protection of indigenous rights' in the bloc of constitutionality (Article 410 of the Constitution) and consequently the State's duty to respect their right to prior consultation.[1313] However, the Court has also played a critical role in the regression of this right. In the C-253 judgment of 2013, it held that prior consultation can only apply for legislative measures (post January 2008).[1314] Despite some positive interpretations, indigenous groups and their rights often stand in contradiction to State ideologies of unity.[1315] States use concepts of unity, diversity and nation to their advantage to encroach on indigenous groups rights. This is not specific to South America. As noted earlier, decolonised countries like India too accord significant political importance to unity and national security, which can override the judiciary's respect of rights to non-discrimination.

The 1993 case in Colombia highlights this. The Media Amazonas community (Huitoto, Muinane, Andoque, Nonuya and Yucuna) invoked the right of indigenous communities to equality and dignity, cultural, social and economic integrity, to their autonomy, and traditional and communal territories before the Constitutional Court.[1316] In this case, Colombian and American military troops had settled on their territory to control narcotics traffickers, and even built an US airbase without any prior consultation. The Court used the argument of State unity, national security and general interest to reject their legal argument.[1317] The case emphasizes the secondary importance accorded to indigenous rights in practice and the fact that these are not absolute.[1318] Strikingly, this case similar to Indian examples, demonstrates the malleability of

[1311] 'Right to Free, Prior, and Informed Consultation and Consent in Latin America: Progress and Challenges in Bolivia, Brazil, Chile, Colombia, Guatemala, and Peru' (Due Process of Law Foundation 2015) 11.

[1312] Acción de tutela instaurada por la Organización de los pueblos indígenas de la Amazonia colombiana OPIAC contra la Presidencia de la Republica y otros [2003] Corte Constitucional de Colombia SU-383/03.

[1313] *Sentencia 0300/2012* (Tribunal constitucional plurinacional de Bolivia).

[1314] *Sentencia C-253/13* (Corte Constitucional de Colombia).

[1315] Françoise Martinat, 'Droits Indigènes et Logique d'État', La reconnaissance des peuples indigènes entre droit et politique (Presses universitaires du Septentrion 2017) 49.

[1316] Comunidades Indígenas del Medio Amazonas contra el Ministerio de Defensa Nacional y la Misión Aérea de los Estados Unidos [1993] Corte Constitucional de Colombia T-405/93 [I].

[1317] ibid II–1.

[1318] ibid II–2.

the concept of national security, or general interest in the hands of the judges. In 1992, in a dispute over the construction of a road between the indigenous community of Cristianía and Colombian populations living in the West, the Constitutional Court had already pronounced that core human rights contain "an absolute value, which cannot be negotiated or underestimated."[1319] Hence, the concept of general interest could not be used to violate human rights. Yet in 1993, the Constitutional Court over-ruled its jurisprudence, by considering State values more 'important' than the constitutional bloc in the sensitive context of land acquisition of indigenous groups. Through this case does not directly mention the right to non-discrimination, it does perpetuate traditional approach to these communities who have been dispossessed of their land and marginalised. In the case of other communities, it would have been perceived as a violation of law but because the case concerns minority groups protected by special constitutional provisions, the discriminatory element is flagrant. Compared to other groups, indigenous groups face a higher risk of discrimination despite the formal application of constitutional rights.[1320]

Discrimination clearly functions at different levels, from the overt to the more subtle. The above example perfectly illustrates that discrimination can be embedded in general treatment of groups, and is not simply confined to issues such as employment or access to education. The existence of constitutional law in this instance did not protect the violation of indigenous groups. Their vulnerability, and exposure to forced assimilation was the product of long historical traditions, this persists and needs to be consistently considered by judges, especially constitutional judges.

2.3. Cultural diversity and the *pro homine* principle

On the protection of minority groups, the IACtHR and the ECtHR differ drastically. Hence, an analysis of both regional systems cannot be based on the same concepts. From a European perspective, discrimination is generally examined through marginality and vulnerability, without a strong consideration of the sociological or historical context. As highlighted in the analysis of Roma minority cases, marginality and vulnerability heightens

[1319] *Amado De Jesus Carupia Yagari* [1992] Corte Constitucional de Colombia T-428/92 [D-1].

[1320] Martinat, 'Droits Indigènes et Logique d'État', La reconnaissance des peuples indigènes entre droit et politique (n 1311).

increases their discrimination. The ECtHR's disregard these concepts and perpetuates discriminatory practices by institutions and national jurisdiction, and furthers the invisibility of not only Roma minority groups, but more broadly other minority groups. Surprisingly, despite the centrality of these concepts, the Strasbourg judges often do not mobilise them to demonstrate abusive differences of treatment rooted in historical, sociological and mostly structural discrimination. On the contrary, the IACtHR approach relies first on historical considerations and then secondly on the specific violation of human rights, such as the right to land. The IACtHR has a section labelled "Facts" ("Hechos") that not only describes the context of the case, but goes into deeper details about the situation of indigenous groups,[1321] integrating historical references, geographical location, or population census. Furthermore, it also considers intersectionality in its ruling,[1322] though its analysis is not founded uniquely on this concept. The IACtHR's jurisprudence underlines the importance of understanding individuals in larger historical, political, social frames.

Discrimination against indigenous groups in Latin America took shape around cultural identity, resulting in their exclusion from society, the nation State, and dispossession of their land. Few cases in front of the Court mention discrimination, yet the State's abusive practices clearly produced in discrimination, continuing the historical exclusion of indigenous groups from society.[1323] The term *structural racism* sums up this phenomenon.[1324] Tellingly, the Court chose the angle of culture alongside the concept of vulnerability of indigenous groups to tackle the problem. Whilst cases of assimilation policy result in deprivation of indigenous lands,[1325] many cases related to land expropriation have not been analysed directly through the angle of discrimination. However, the San José judges promote an approach that recognises historical

[1321] *Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v Panama* [2014] IACtHR Preliminary Objections, Merits, Reparations, and Costs, Series C, No. 284 [60–61]; *Pueblo Indígena Xucuru y sus miembros v Brasil* [2017] IACtHR Preliminary Objections, Merits, Reparations and Costs, Serie C, No. 346 [60–61]; *Indígenas Miembros de la Asociación Lhaka Honhat (nuestra tierra) v Argentina* [2020] IACtHR Fondo, Reparaciones y Costas, Series C, No. 420 [57–50].

[1322] *Maya Kaqchikel Indigenous Peoples of Sumpango et al v Guatemala* (n 1288).

[1323] Inclusion of indigenous groups for the purpose of exploitation by society, mostly as cheap laborer's can still lead to their social exclusion.

[1324] Rodolfo Stavenhagen, 'Cultural Diversity in the Development of the Americas: Indigenous Peoples and States in Spanish America' [2002] Culture Studies series, OAS 1, para 79.

[1325] *Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v Panama* (n 1331) paras 199–200.

discrimination against individuals, which has led to land expropriation in the past. They adopt the angle of cultural protection to make States recognize the cultural particularism of indigenous groups in land ownership cases.[1326] This approach accommodates central elements of indigenous histories, and allows their visibility.

The *Awas Tingni* case (2001), was the first IACtHR ruling on property rights of indigenous groups which centred on the concept of indigenous cosmovision.[1327] Here, the Court examined land acquisition by the Nicaraguan State for a corporate firm. This case became a legal precedent for collective land battles of indigenous groups. However, discrimination was not linked by the Court to land appropriation but to other rights such as a healthy environment, adequate food, water and cultural life. In its separate opinion, Judge Poisot, after rapidly underlining the link between the right to conservation of their land without discrimination (Article XIX of the 2016 American Declaration on the Rights of Indigenous Peoples), recalled the importance of the cultural dimension, and spiritual connection with the territory.[1328] Judges Trindade, Gomez and Burelli underlined the cultural dimension in the right to communal property, and considered that the deprivation of land would deprive groups from practicing, conserving and revitalising their culture.[1329] The Judges went further and argued that cultural aspects cannot be invoked against universal human rights, thus creating a tension between the values of diversity and uniformity in human rights.[1330] They also argued that cultural diversity must be respected, while cultural relativism must be put aside.[1331] Their approach, attempted to blend universality with diversity. The Court argued that universality does not entail the end of difference, but on the contrary, consists of accepting and promoting difference. It followed the philosophical approach of the French jurist René-Jean Depuy, who had argued that the UDHR

[1326] *Mayagna (Sumo) Awas Tingni Community v Nicaragua* [2001] IACtHR Merits, Reparations and Costs, Series C, No. 79; *Comunidad Garífuna de Punta Piedra y sus miembros v Honduras* [2015] IACtHR Excepciones Preliminares, Fondo, Reparaciones y Costas, Series C, No. 304 ; *Pueblo Indígena Xucuru y sus miembros v Brasil* [2018] IACtHR Excepciones Preliminares, Fondo, Reparaciones y Costas, Series C, No. 346. On issues related to land rights and the protection of religious and cultural practice, the case of the African Court related to the Ogiek community in Kenya resonates with the approach of the IACtHR. See: *African commission on human and peoples' rights v Republic of Kenya* [2017] African Court on Human and Peoples' rights 006/2012.

[1327] ibid.

[1328] Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, ibid 20.

[1329] Separate Opinion of Judges Antônio Augusto Cançado Trindade, Máximo Pacheco Gómez, and Alirio Abreu Burelli, ibid 6; 8.

[1330] ibid 14.

[1331] ibid.

is not related to one unique person, but to all individuals who are different yet equal.[1332] Intriguingly, cultural diversity is today still perceived in opposition to universality, which according to the former Special Rapporteur in the field of cultural rights, Karima Bennoune, leads Governments to excuse human rights violation through wrong interpretation.[1333]

Along with linking universality and cultural diversity, this approach leads to another legal reflection. Individuals are at the heart of cases for the IACtHR, not only as members of a community, but also as part of broader contexts. Contrary to the ECtHR which does not considers this, the IACtHR through its jurisprudence developed the *pro homine* principle which requires that situations be interpreted in the most beneficial way for individuals.[1334] Concretely, this implies that the Convention must be interpreted through the angle of individual protection, the preservation of their human dignity, and the need to ensure and advance fundamental rights.[1335] In sum it is understood that firstly, legal rules or principles must be interpreted in the most extensive way when recognising protected rights,[1336] secondly that under this *modus operandi* the Convention's rights are the basis to protect human right dignity. The IACtHR further considers that legal systems must recognise the individual from a pluralistic perspective.[1337] Thus, the Court subscribes to an expanded interpretation of human rights through the *pro homine* principle and goes beyond the Convention.[1338] The use of this principle has promoted indigenous groups protection.

Equally, through the *pro homine* principle, the San José judges recognised the importance of a *pro individual* framework that combines natural law and legal positivism.[1339] This enabled the Court to view individuals as part of a pluralistic environment, and acknowledge this diversity

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[1332] René-Jean Depuy, *La Communauté Internationale Entre Le Mythe et l'histoire* (UNESCO 1986).

[1333] 'Universality, Cultural Diversity and Cultural Rights: Report of the Special Rapporteur in the Field of Cultural Rights' (General Assembly 2018) A/73/227 para 7.

[1334] Concurring Opinion of Judge Sergio García Ramírez, *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (n 1336).

[1335] Sergio Garcia Ramirez, 'Concurring Opinion of Judge Sergio García Ramírez in the Judgment on The Merits and Reparations in the "Mayagna (Sumo) Awas Tingni Community Case' (2002) 19 Ariz. j. int. comp. law 443, para 2.

[1336] Mónica Pinto, 'El principio pro homine: Criterios de hermenéutica y pautas para la regulación de los derechos humanos' (Editores del Puerto 1997) 163.

[1337] Valerio De Oliveira Mazzuoli and Dilton Ribeiro, 'Indigenous Rights Before the Inter-American Court of Human Rights: A Call for a Pro Individual Interpretation' (2015) 61 Revisita IIDH 133, 149.

[1338] ibid 150.

[1339] ibid 151.

as a central purpose and element of IHRL. In the *Mayagna* case (2001), the IACtHR based its ruling on this philosophical approach by arguing that indigenous customary law must be considered. Hence, the Court concluded that under these customary principles, possession of land is sufficient to consider their ownership from an administrative perspective.[1340] The link between land and indigenous spiritual life, economic survival and culture prompted the Court to consider their customary law and values.[1341] In *Yakye Indigenous Community* (2005), also about land ownership, the Court applied a *pro individual* approach to extend the Convention's scope by using of Article 31 of the Vienna Convention of the Law of Treaties and Article 14(3) of the ILO Convention No. 169. With these two articles, the Court changed the understanding of the right to property, to include communal property of ancestral lands for indigenous groups.[1342] Moreover, the Court once more recalled the importance of considering human rights treaties as living tools, and therefore evolutive and urge their application while considering individuals' conditions.[1343] In 2015, the Court recalled how land ownership is not centred around individuals but around groups and the indigenous community. By doing so, it highlighted that the right to property must be understood through culture, customs and beliefs of individuals. Indeed, not following this approach would lead to an illusory protection of these communities.[1344]

The Court's approach argued for a recognition of individual in society from a historical, religious and cultural perspective. In this view, individuals are substantively equal, but institutions must acknowledge their differences.[1345] By upholding this approach within its jurisprudence, the IACtHR crystalises the idea that individual protection under IHRL must be considered, in a multicultural frame. In accordance with the concept of multiculturalism, States must understand human rights not as a unique concept of rights, but one that must be adapted and consider diversity. The interpretation of treaties, in this case the ACHR, should be in

[1340] *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (n 1336) para 151.

[1341] Mazzuoli and Ribeiro, 'Indigenous Rights Before the Inter-American Court of Human Rights: A Call for a Pro Individual Interpretation' (n 1347) 153.

[1342] *Yakye Axa Indigenous Community v Paraguay* [2005] IACtHR Merits, Reparations and Cost, Series C, No. 125 [124].

[1343] *ibid 125.*

[1344] *Kaliña and Lokono Peoples v Suriname* [2015] IACtHR Merits, Reparations and Costs, Series C, No. 309 [129]; *Sawhoyamxa Indigenous Community v Paraguay* [2006] IACtHR Merits, Reparations and Costs, Series C, No. 146.

[1345] Mazzuoli and Ribeiro, 'Indigenous Rights Before the Inter-American Court of Human Rights: A Call for a Pro Individual Interpretation' (n 1347) 167.

accordance with the fundamental element of diversity as part of the individual's legal personality. The cultural specificity of indigenous groups, leading to their constant discrimination, requires proper effective protection from States, which should consider "their specificities, their economic and social characteristics, as well as their situation of special vulnerability, their customary law, values, and customs".[1346] Following the *pro homine* principle, the Court acknowledges the multicultural approach to individual human rights violation and the role of culture, holding States responsible for such violations. Despite its absence in the jurisprudence, the Court recognises this.

3. Extending responsibility: from States to judges

In the ECtHR analyses, jurisprudence underlined the importance of linking discrimination with historical and sociological processes. However, this qualitative approach differs from the IACtHR's. In the European continent, the EU influenced the integration of anti-discriminatory legislations, as seen with abuses in the Central and Eastern countries. In South America, the IACtHR had to consider two elements: (i) State construction is closely linked to indigenous groups; (ii) the monistic tradition of colonisation and dictatorship.[1347] This monistic approach, pushes the IACtHR to identify an approach that would make it a determining actor in national legal systems. The Court created what Helfer and Slaughter call a "community of law".[1348] For the ECtHR this results in a sphere where legal actors "interact based on common interests and values". For the IACtHR, it implies the integration of jurisprudence and interpretation within the region. This hands all judges, irrespective of their national legal structures, the necessary tools to protect indigenous rights.

[1346] *Yakye Axa Indigenous Community v Paraguay* (n 1352) para 63.

[1347] Méryl Thiel, 'Le Droit Constitutionnel Chilien Face Au Système Interaméricain Des Droits de l'homme : Le Droit Des Peuples Indigènes En Question - Le Cas Mapuche' (2017) 111 Revue française de droit constitutionnel 691.

[1348] Laurence Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 Y.L.J 273, 277.

3.1. The control of conventionality and constitutionality

The second strategy of the Court, which creates an important precedence for cases of indigenous groups, is to consider that human rights are no longer at the mercy of States' political programme but lie in the hands of the judiciary. The theory of the control of conventionality occurred in several cases, notably as structural discrimination towards indigenous land delimitation,[1349] the rape of young indigenous women,[1350] or even the right to not be discriminated because of sexual orientation.[1351] At the national level, several cases related to discrimination faced by indigenous groups underline the use of this theory.[1352] The establishment of this theory, within South America, seems to prove the increased importance accorded to the IACtHR approach.[1353]

With this innovation, responsibility in cases of human rights violation changes making judiciary a central actor of the IAHRS. While the State is the primary responsible actor for neglecting human rights, and violating them, the San José judges in their jurisprudence highlighted the national judges' role, perceived as conventional judges of common law.[1354]

The conventionality control doctrine is developed as a mechanism to bring coherence to the application of law and protect the primacy of IHRL at the national level.[1355] This doctrine seems successful as a tool to respect and guarantee the Convention's rights. It seeks to confirm the ACHR as the supreme rule within the national legal order. Furthermore, it is a key instrument in implementing an *ius commune* within the IAHRS, in terms of developing individuals and constitutional rights,[1356] and providing for a consolidation and harmonisation

[1349] *Xákmok Kásek Indigenous Community v Paraguay* (n 156) para 311.

[1350] *Fernández Ortega v Mexico* [2011] IACtHR Interpretation of Judgment of Preliminary Objection, Merits, Reparations and Costs, Series C, No. 224.

[1351] *Duque v Colombia* (n 1268) **;** *Atala Riffo and Daughters v Chile* (n 156).

[1352] See: *El Caso Takana El Turi Manupare II* [2014] Tribunal Constitucional Plurinacional de Bolivia 0572/2014.

[1353] Laurence Burgorgue-Larsen, 'Chronique d'une Théorie En Vogue En Amérique Latine Décryptage Du Discours Doctrinal Sur Le Contrôle de Conventionalité' (2014) 100 Revue française de droit constitutionnel 831, 848.

[1354] Burgorgue-Larsen, Les Nouvelles Tendances Dans La Jurisprudence de La Cour Interaméricaine Des Droits de l'homme (n 1275) 20.

[1355] Néstor Pedro Sagüés, 'Obligaciones Internacionales y Control de Convencionalidad' 8 Estudios Constitucionales 117, 134.

[1356] ibid 118.

of a regional legal system. Finally, it transforms national judges into the guardians of the ACHR.[1357]

In the 2006 cases, *Almonacid Arellano*[1358] and *La Cantuta*,[1359] the IACtHR for the first time asserted the role to be played by national judges in its jurisprudence. National judges are expected to defend the ACHR and invalidate any legal norms that violate the Convention or the Court's jurisprudence. The legal foundation of the national judges' conventionality control was advanced in the *Almonacid* case. Here, the San José judges named conventionality control as the obligation for judges to control the compatibility of national legislation with the Convention.[1360] The elaboration of this doctrine is therefore linked to a jurisprudential evolution and is not distinctly recognised by the ACHR. It is the result of a development of the IACtHR interpretation under Article 1§1 of the Convention and Articles 25 and 27 of the Vienna Convention on the Law of Treaties.[1361]

The Court argued that domestic judges, are firstly State officials, and secondly must ensure that domestic laws do not contradict conventional norms. Under this control of adequacy, judges not only have an obligation to apply national laws including the Convention, but must also resolve legal issues within these norms, while protecting the supremacy of the ACHR.[1362] Notably, this approach of the Court resembles the U.S SC arguments on protecting judicial review in the *Marbury* case (1803).[1363] The doctrine was later developed and clarified in the

[1357] Yota Negishi, 'The Pro Homine Principle's Role in Regulating the Relationship between Conventionality Control and Constitutionality Control' (2017) 28 Eur. J. Int. Law 457.

[1358] *Almonacid-Arellano et al v Chile* [2006] IACtHR Preliminary Objections, Merits, Reparations and Costs, Series C, No. 154.

[1359] *La Cantuta v Perú* [2006] IACtHR Merits, Reparations and Costs, Series C, No. 162.

[1360] Humberto Nogueira Alcali, 'Los Desafios Del Control de Convencionalidad Del Corpus Juris Interamericano Para Los Tribunales Nacionales, En Especial, Para Los Tribunales Constitucionales' [2011] Humberto Nogueira Alcala 331, 340.

[1361] Pablo González-Domínguez (ed), 'Jurisprudential Development of the Doctrine of Conventionality Control', The Doctrine of Conventionality Control: Between Uniformity and Legal Pluralism in the Inter-American Human Rights System, vol 11 (Intersentia 2018) 13.

[1362] Claudina Orunesu, 'Conventionality Control and International Judicial Supremacy' [2020] Revus. Journal for Constitutional Theory and Philosophy of Law 45, para 5.

[1363] *Marbury v Madison* [1803] SC of the US 5 U.S. 137.

Heliodora Portugal case (2008), where the Court linked Article 2 of the ACHR to the control of conventionality.[1364]

From a legal perspective and under French inspiration of the *bloc de constitutionalité*, judges are guardians of the Conventions and must therefore follow the conventionality control. In *Almonacid Arellano* (2006), the San José judges highlight national judges' responsibility for following ratified international treaties like the ACHR. According to the Court, the judiciary must respect national legal provisions, the ACHR and the interpretation of the IACtHR.[1365] Consequently, national judges must exercise a conventionality control between national legal norms and the ACHR. The Court goes further by pointing out the importance for the Judiciary to consider the evolution of the IACtHR jurisprudence. In practice, this implies that judges must verify the existence of a jurisprudence on the legal issue. Additionally, they should look upon the doctrine arising from the IACtHR case and examine whether or not this *ratio* is applicable to the case in question. Finally, they are called upon to analyse the jurisprudence in light of internal legal reasoning. In case of a contradiction within the IACtHR jurisprudence, judges should either follow the Court's rulings or the national legal approach, and in any case justify their approach.[1366] Following the Attorney General Office of Argentina's attitude, the IACtHR jurisprudence becomes a guide for the interpretation for the ACHR. Consequently, the jurisprudence is binding but not mandatory, as the judiciary must consider it. However, it may not apply because of the specificity of national cases.[1367]

This first approach to the conventionality control appeared for the first time in a separate opinion emanating from Judge Garcia Ramirez in the *Myrna Mak Chang* case (2003).[1368] Surprisingly, a difference occurred between the Spanish version of the case which used the expression "control de convencionalidad" and the English translation with the expression "treaty control".[1369] This difference in translation also appeared in other cases such as *Cabrera*

[1364] Heliodoro Portugal v Panama [2008] IACtHR Preliminary objections, Merits, Reparations and Costs, Series C, No. 186 [179–180].

[1365] *Almonacid-Arellano et al v Chile* (n 1368) para 124.

[1366] Orunesu, 'Conventionality Control and International Judicial Supremacy' (n 1372).

[1367] *Gelman v Uruguay* [2013] IACtHR Monitoring Compliance with Judgment.

[1368] *Myrna Mack Chang v Guatemala* (n 199).

[1369] ibid 27.

Garcia and Montiel Flores (2010) in which the Spanish version argued that it is the judges and the bodies involved in the administration of justice, whereas the English version claimed "the judiciary at all levels" must exercise a control of conventionality in *ex officio*.[1370] The English translation simplified the importance granted by the IACtHR judges to integrate different types of judges. These were later corrected for future cases.[1371] In the *Gelman* case (2011), the Court's judges increased the exercise of the conventionality control to any type of public authority and not uniquely to organs related to judicial administration.[1372]

In the *Dismissed Congressional Employees* case (2006), the Court uncovered new elements concerning the role of judges. It held that the judiciary must not only exercise a control of constitutionality but also one of *ex officio* conventionality between national norms and the ACHR.[1373] Significantly, this control must be performed in respect of the competences and procedural rules. Under this principle, the judiciary not only becomes an important ally of the IACtHR as it can question the conventionality of national legal norms, but judges have to respect the characteristic of their legal order such as the place of internationality treaties in the *bloc de constitutionalité*.[1374] The idea of a control of conventionality by national judges was consolidated through the Court's jurisprudence.[1375]

Judges have applied this theory in various ways. Some have accepted it while others refused it on legal grounds that consider the place of IHRL within national Constitutions, or for

[1370] *Cabrera García and Montiel Flores v Mexico* [2010] IACtHR Preliminary Objection, Merits, Reparations, and Costs, Series C, No. 220 [225].

[1371] Burgorgue-Larsen, 'Chronique d'une Théorie En Vogue En Amérique Latine Décryptage Du Discours Doctrinal Sur Le Contrôle de Conventionalité' (n 1363) 839.

[1372] *Gelman v Uruguay* [2011] IACtHR Merits and Reparations, Series C, No. 221 [239].

[1373] *Dismissed Congressional Employees (Aguado Alfaro et al) v Peru* [2006] IACtHR Preliminary Objections, Merits, Reparations and Costs, Series C, No. 158 [128].

[1374] La Aplicación de Los Tratados Sobre Derechos Humanos Por Los Tribunales Locales (CELS 1997).

[1375] *Boyce et al v Barbados* [2007] IACtHR Preliminary Objection, Merits, Reparations and Costs, Series C, No. 169 [78] (the Court points out the absence of conventionality control by the national judges); *Cabrera García and Montiel Flores v Mexico* (n 1380) para 225;233; *Gelman v Uruguay (2011)* (n 1382) para 193;239; *López Mendoza v Venezuela* [2011] IACtHR Merits, Reparations, and Costs, Series C, No. 233 [228] (example of control of conventionality by national judges); *Fontevecchia and D`Amico v Argentina* [2011] IACtHR Merits, Reparations and Costs, Series C, No. 238 [93]; *Atala Riffo and Daughters v Chile* (n 156) paras 282–283; *Furlan and Family v Argentina* (n 1288) para 303 (examples of the use of control of conventionality by SC judges); *Gudiel Álvarez et al ('Diario Militar') v Guatemala* [2012] IACtHR Merits, Reparations and Costs, Series C, No. 253 [330] (expands the interamerican juris corpus and adds within the judiciary organs the public prosecutor); *Ríos Avalos v Paraguay* [2021] IACtHR Fondo, Reparaciones y Costas, Series C, No. 429.

more political reasons, as the nomination of judges, and States' systematic rejection of the IAHRS in Peru under Fujimori or in Venezuela under Chavez.[1376]

The control of conventionality does not claim to be an automatic process of justiciability for indigenous groups, but is developed as a strategic tool.[1377] Generally, the IACtHR employs it without considering the specificity of cases and uses it a general doctrine.[1378]

3.2. From regional to national jurisdiction

National and IACtHR judges enjoy a certain equality, as both are guardians of the ACHR. In terms of discrimination faced by indigenous groups, this implies that the Courts' understanding of situation must be followed by all national judges in South America.

Judge Cançado Trindade, in a separate opinion (*Dismissed Congressional Employees*), argues the importance for national judges to understand not only constitutional law but also IHRL.[1379] Judge García Ramírez, in another separate opinion, argued that consistency between international and national implementations of the ACHR is essential to protect individual human rights.[1380] He claimed that national courts should adopt the IACtHR interpretation and implement it at the domestic level.[1381] This creates a deeper relation between the regional system and the national system, and more importantly, makes for a consistency in the

[1376] Eduardo Góngora Mera, 'Interracciones y Convergencias Entre La Corte Interamericana de Derechos Humanos y Los Tribunales Constitucionales: Un Enfoque Coevolutivo' in Armin Von Bogdandy, Flavia Piovesan and Mariela Morales Antonazzi (eds), Estudios Avançados de Direitos Humanos (Elsevier, Campus jurídico 2013).

[1377] Fernando Casado and Francesco Maniglio, 'Los Derechos Indígenas y El Control de Convencionalidad OIT. Algunas Consideraciones Sobre Los Casos de Ecuador, Venezuela y Bolivia' [2022] Rev. Latinoam. de Derecho Soc. 243, 248.

[1378] Ariel E Dulitzky, 'An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights' (2015) 50 TILJ 45, 51.

[1379] Separate Opinion of Judge A.A. Cançado Trindade, *Dismissed Congressional Employees (Aguado Alfaro et al) v Peru* (n 1383) paras 2–3.

[1380] Separate Opinion of Judge García Ramírez, ibid 2.

[1381] ibid 6–7.

application of IHRL.[1382] In this way, the San José judges advanced an important aspect of the rulings: universality and efficiency. For the former President of the IACtHR, Judge García Ramírez, this system allows the use of a clear interpretation and application by member States and furthers uniformity within the different legal systems for human rights violation.[1383]

In practice, this approach strengthens the relationship between IACtHR and national judges. During the opening of the 150th regular session in Brazil, Judge Pérez in his presentation underlined the importance of the training course to strengthen jurisprudential dialogue between Brazil and the IACtHR.[1384] Secondly it consolidated the place of international treaties within the *bloc de constitutionalité.*

With the application of conventionality control, judges play a dual role: they are judges for their national laws but also, inter-American judges at the national level.[1385] This develops a decentralised system, creating a strong jurisprudence around the ACHR. However, it can also lead to cases where national judges are either partially consistent, or in open contradiction with the current interpretation and rulings of the IACtHR.[1386] Whilst the doctrine of conventionality control intended to promote a more stable human rights law, it could in fact, lead to the contrary. Yet, the will to see an emergence of Inter-American judges at the national level could in fact further a more rigorous universalism of human rights, under which courts can converge laws with current national political and cultural practices. Besides, the IACtHR built its ruling and its theory of integration and conventionality control on already existing national practices,[1387] despite some inconsistency. Consequently, unsurprisingly, the control doctrine was both

[1382] ibid 5–7.

[1383] ibid 8.

[1384] IACtHR, '150th Regular Session in Brazil'.

[1385] Humberto Nogueira Alcalá, 'Los Desafíos Del Control de Convencionalidad Del Corpus Iuris Interamericano Para Los Tribunales Nacionales' [2012] Revista de Derecho Público 393, 404.

[1386] Dulitzky, 'An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights' (n 1388) para 72.

[1387] *Miguel Angel Ekmekdjian v Gerardo Sofovich, recurso extraordinario* [1992] SC of Argentina E000000064 (the Convention interpretation must follow the IACtHR jurisprudence); *Libertad De Expresion En Opinion Consultiva De La Corte Interamericana De Derechos Humanos* [2000] Corte Constitucional de Colombia C-010/00 (the IACtHR interpretation is relevant for the Colombian Constitution interpretation due to the status of the ACHR in the Colombian legal order).

embraced and rejected by national judges.[1388] Using Court jurisprudence not only strengthens national courts' ruling,[1389] but it becomes a legitimate tool of authority for IACtHR decisions and future rulings.

The internationalisation of South American State Constitutions not only enhances relations between international human rights system and national legal systems,[1390] but discourages violence practiced by dictatorships. IHRL within Constitutions appear to embody democratic values. In Colombia, Article 93§2 of the Constitution advances, albeit in ambiguous terms, the prevalence of international treaties related to human rights protection ratified by the State in the internal system. The ambiguity lies in the position given to international treaties, as it can be analysed through the angle of supra-legislative or constitutional rank. Despite this haziness, the constitutional court argued the primacy of the IACtHR jurisprudence when interpreting the Constitution.[1391] Consequently, explicit reference to the Court's jurisprudence became significant in national cases.[1392] According to the former President of the constitutional court, Judge Córdoba Triviño, judges know the importance of the IACtHR jurisprudence, and its impact on the sustainability of judicial rulings.[1393] Furthermore, within any country, judges will not react the same way towards the IACtHR. For instance, in Chile, the SC seems quite in favor of the IACtHR jurisprudence, contrary to the constitutional tribunal.[1394] Despite having established a principle related to national judges' role in protecting human rights violations in theory, in practice, judges often put aside legal norms.

[1388] *Sentencia* [2012] Corte Constitucional de Guatemala 3334-2011; [2008] Venezuela Supreme Tribunal of Justice 08-1572; *ML, JFF0, denuncia, excepcion de inconstituionlidad arts 1, 2, y 3 de la Ley no 18831* [2013] Uruguay SC IUE 2-109971/2011.

[1389] Alec Stone Sweet, 'On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court' (2009) 80 Revue trimestrielle des droits de l'homme 1.

[1390] Mariela Morales Antoniazzi, 'La Doble Estatalidad Abierta: Interamericani- Zación y Mercuruzación de Las Constituciones Suramericanas' [2013] Estudios Avanzados de Direitos Humanos 178.

[1391] *Sentencia C-010/00* (Corte Constitucional de Colombia).

[1392] Jaime Córdoba Triviño, 'Aplicación de La Jurisprudencia de La Corte Interamericana de Derechos Humanos al Derecho Constitucional Colombiano' [2007] Anuario de Derecho Constitucional Latinoamericano 667.

[1393] ibid 669.

[1394] Burgorgue-Larsen, 'Chronique d'une Théorie En Vogue En Amérique Latine Décryptage Du Discours Doctrinal Sur Le Contrôle de Conventionalité' (n 1363)846–847; Gonzalo Aguilar Cavallo, 'El Control de Convencionalidad En La Era Del Constitucionalismo de Los Derechos. Comentario a La Sentencia de La Corte Suprema de Chile En El Caso Denominado Episodio Rudy Cárcamo Ruiz de Fecha 24 Mayo de 2012' (2012) 10 Estudios constitucionales 717.

3.3. Judges' role v. States responsibilities

With the theory of control of conventionality, the IACtHR places a strong responsibility on national judges. Undoubtedly, the ECtHR mentions the State's responsibility. Yet, it lays aside the role of national jurisdiction in increasing and accentuating discrimination towards minority groups. In Eastern and Central Europe, the cases of Roma minority groups brought before the ECtHR highlight how national judges often base their rulings on strong community stereotypes and increase their invisibility before national institutions.

The doctrine of control of conventionality does not ignore State responsibility. However, it recalls the judiciary's role and gives it a central role to ensure the effectiveness of the ACHR. The integration principle, which consists of incorporating the Convention in national legal systems, prompts national judges to recognise the IAHRS. For the Court, this approach is essential to protect and promote human rights.[1395] Whereas States are frequently perceived as the principal actors, responsible for the respect of human rights due to their obligations under international law, judges and the judiciary are key actors for enforcing the Convention. Contrary to the ECtHR that develops the concept of due diligence to remind States of their obligation, the IAHRS elaborated a process laying down judges' responsibility. This approach is grounded on the idea that States are not the only actors in international law. Whilst the judiciary could be perceived as State agents and therefore enact State responsibility, it is important to recall that the judiciary is partly responsible.

Under this doctrine, State authorities must apply the Convention, but so must judges in all their rulings. The Convention thus becomes an important part of the domestic legal system. Curiously therefore, the ACHR turns out to be superior in hierarchy to the national legal system including the Constitution.[1396]

With the integration process, the ACHR becomes a unit of stable legal rules. Indeed, the governments use of the Constitution as a political charter suggests that human rights, especially minority rights, can be easily jeopardized. Although each legal principle or doctrine is in theory based on a functioning democracy, especially in independent and effective judicial systems, doctrines protecting human rights violation still need to be developed. For the IACtHR, human

[1395] *Santo Domingo Massacre v Colombia* [2012] IACtHR Preliminary Objections, Merits and Reparations, Series C, No. 259 [142–43].

[1396] Dulitzky, 'An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights' (n 1388) 54.

rights violations are aggravated by the failure of national courts to use effective remedies,[1397] which could be explained by the absence of ACHR references and its use in national courts.[1398]

Under the doctrine of conventionality control, the subsidiarity principle predominates. Two approaches can be identified between Europe and America: (i) the IACtHR uses the subsidiarity principle; and (ii) the ECtHR proceeds with the MOA. For the San José Court, mobilizing the subsidiary principal and the control of conventionality, the IACtHR permitted States to appropriate the Convention.

With the direct applicability of the Convention, the San José court imposed its own interpretation and implementation of the Convention.[1399] In comparison, the ECtHR allows European States to interpret the ECHR and integrate it in their national legislation.[1400] With the MOA, the Strasbourg judges allow important discretionary power to the judiciary. Under this approach, the ECtHR allows States to apply the Convention whilst respecting of their own political, institutional structures and cultural values.[1401] To a certain degree, the MOA permits the recognition of State sovereignty from a regional human rights perspective. But, at the level of the ECtHR, this creates distinctions between States. In contrast, the subsidiary approach with the control of conventionality establishes a more universal human rights protection as it ignores cultural specificities, and consequently brings uniformity to the protection of individuals. It focuses on the uniformity of international human rights and their application, contrary to the MOA. More generally, the ECtHR's approach relies principally on the goodwill of States and the national judiciary. The clear impact of this approach is seen in the restriction of the scope

[1397] Richard J Wilson, 'Supporting or Thwarting the Revolution - The Inter-American Human Rights System and Criminal Procedure Reform in Latin America Symposium: Abandoning the Inquisitor: Latin America's Criminal Procedure Revolution' (2007) 14 Southwestern Journal of Law and Trade in the Americas 287, 312.

[1398] Claudio Nash Rojas, 'Control de Convencionalidad. Precisiones Conceptuales y Desafíos a La Luz de La Jurisprudencia de La Corte Interamericana de Derechos Humanos' (2013) 1 Anuario de Derecho Constitucional Latinoamericano 489, 491.

[1399] Dulitzky, 'An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights' (n 1388) 55.

[1400] Paolo Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 AJIL 38, 75.

[1401] ibid.

and extension of human rights protected by the ECHR.[1402] The IACtHR does use the MOA in specific cases mainly because of the control of conventionality.[1403] Still, it remains a marginal concept in the IACtHR jurisprudence. For the former president of the Court, Judge Cançado Trindade, the MOA does not have its place in the ACHR judicial system and is not being used by the Court.[1404] In making this statement, Trindade does not recognize the 1984 advisory opinion of the Costa Rican government. However, in his broad observation, Trindade points out the type of Court cases that are linked to non-derogable rights and hence, referring to the MOA is not conceivable, mainly due to the small number of democratic States.[1405] This approach relies on a strong normative premise, that is, in case of *jus cogens* human rights, States should not be given the chance to use the MOA doctrine.[1406] Judge Trindade's bold perspective is not a minority position. The traditional reluctance to apply the MOA, while based on different arguments, often relies on the fragility of South American States' democracies. However, in recent years, this disregard of MOA's is being highlighted by States like Argentina, Brazil, Chile, Colombia and Paraguay. In April 2019, they issued a Joint Declaration to the IACmHR, in which, while reaffirming their commitment to the ACHR, they recalled the importance for the IACtHR to respect the States "legitimate space of autonomy".[1407] Evoking this angle of autonomy, these five States highlight the need for the Court to accept the MOA doctrine.

Clearly, placing the ACHR at the heart of national judicial processes promotes the idea of a regional constitutional system.

[1402] Pablo Contreras, 'National Discretion and International Deference in the Restriction of Human Rights: A Comparison Between the Jurisprudence of the European and the Inter-American Court of Human Rights' (2012) 11 JHR 28, 37.

[1403] Proposed Amendments to the Naturalisation Provisions of the Political Constitution of Costa Rica [1984] IACtHR Advisory Opinion OC-4/84, Series A, No. 4 (related to proposed amendments on naturalisation in the Costa Rica Constitution); Herrera-Ulloa v Costa Rica [2004] IACtHR Preliminary Objections, Merits, Reparations and Costs, Series C, No. 107 (concerning free speech).

[1404] Antonio Cançado Trindade, 'Reflexiones Sobre El Futuro Del Sistema Interamericano de Protección de Los Derechos Humanos' in Juan E Méndez and Francisco Cox (eds), El futuro del sistema interamericano de proteccion a los derechos humanos (Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas 1998) 582.

[1405] ibid 243.

[1406] ibid 583.

[1407] Marisa Iglesias Vila, 'The Conventionality Control and the Fontevecchia Case: Is the Margin of Appreciation the Panacea?' [2022] Journal for Constitutional Theory and Philosophy of Law.

In comparison to European countries with their models of democracy and independent judiciaries, South American States historically presented a notable lack of democracy.[1408] The imbalance within States and systemic human rights abuses under dictatorship regimes, encouraged the IACtHR to expand influence of its jurisprudence and the universality embedded in the protection of human rights. From a general perspective, human rights should be seen as establishing universal obligations, and therefore neither relativism nor particularism should enter the equation. Even so, the IACtHR accommodated a regional distinctiveness whilst arguing for the construction of legal universalism.[1409]

A constant change of Constitution has politicised human rights within States. The ACHR in this context becomes a solid foundation of human rights, which contrary to national Constitutions, does not change. With the incorporation of the Convention in domestic legal systems, the Court encouraged the integration process. The Convention entered the constitutional bloc. with the doctrine of the control of conventionality and the integration process,

Curiously, the conventionality control and integration principles resemble the EU model, rather than the European human rights approach. For the EU, within the legal system, community law enjoys primacy over domestic law, and this procedure was recalled by the CJEU in 1964 and 1970.[1410] The ECHR, in contrast, does not have a constitutional rank. In fact, it is the Constitution which sets the relationship between the national legal order and the ECHR or the ECtHR rulings,[1411] as the Inter-American system. In reality, however, conventionality, subsidiarity and integration doctrines consolidate the ACHR's constitutional rank. The ECHR works as a supplement to national legislation protection.[1412] Yet, contrary to the IAHRS, the

[1408] See: Henry Steiner and Philip Alston, International Human Rights in Context: Law, Politics, Morals (Clarendon Press 1996).

[1409] Ludovic Hennebel, 'The Inter-American Court of Human Rights: The Ambassador of Universalism' (2011) 1 RQDI 57, 60.

[1410] Flaminio Costa v ENEL [1964] CJEU Case 6-64; Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] CJEU Case 11-70.

[1411] Stone Sweet (n 1379) 13.

[1412] ibid 8.

ECtHR did not establish a specific mode of incorporation. In France for instance, until 1980, the ECHR did not have a legal status in the national order.

With the two theories of conventionality control and integration, the IACtHR appears itself as an Inter-American Constitutional Court transforming the ACHR into an Inter-American Constitution.[1413] This change depends on the judges' role. They are responsible for the ACHR's effectiveness, and as such, become not only key actors in the promotion and protection of human rights, but also in the IAHRS.[1414] Constitutionalizing the regional system impelled the Court to use the constitutional language of judicial review whilst mentioning the conventionality control,[1415] and it adds constitutional law doctrines at the level of IHRL.[1416] In the *Barrios Alto* case (2001), the Court not only argued that Peru's amnesty legislation was incompatible with the ACHR, but more importantly, that it "lack(ed) legal effect".[1417] With this conclusion, the IACtHR clearly invalidated a national norm, in the manner of a constitutional court.

The Mexican Judge Garcia Ramirez, sees similarity between the IACtHR and a constitutional court.[1418] He argues that despite the absence of justice at the national level, the Court should not become the last resort in terms of jurisdiction.[1419] Concretely, this implies that the Court should only judge a limited number of cases, and rule only therefore on "*grandes temas*" (big questions), which will frequently expand to include new aspects and perspectives.[1420] Consequently, the Court should function more or less as a Constitutional Court.

[1413] Dulitzky, 'An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights' (n 1388) 64.

[1414] *Santo Domingo Massacre v Colombia* (n 1405) paras 142–143; *Dismissed Congressional Employees (Aguado Alfaro et al) v Peru* (n 1383) para 128.

[1415] Dulitzky, 'An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights' (n 1388) 65.

[1416] ibid; See: Charles Fried, 'Constitutional Doctrine' (1994) 107 Harv. Law Rev. 1140, 1140.

[1417] Barrios Altos v Peru [2001] IACtHR Merits, Series C, No. 75 [51–4].

[1418] *Dismissed Congressional Employees (Aguado Alfaro et al) v Peru* (n 1383) para 4.

[1419] ibid 11.

[1420] Sergio Ramírez García, 'El Control Judicial Interno de Convencionalidad' (2011) 5 REVISTA IUS 124, 131.

Compared to the European system, where the constitutionalisation of the ECtHR and ECHR opened a strong debate between those in favor and those against,[1421] the judicialisation and constitutionalisation already occurred at the level of the IAHRS with the *Barrios Altos* and *Almonacid* cases.

4. Conclusion

Regrettably discrimination of minority groups is a key feature of American societies. With strong historical and ideological traditions, indigenous groups find themselves second-class citizens in these States. State ratification of international conventions and constitutional reforms have ended neither ethnic nor racial discrimination or land appropriation. However, the IACtHR jurisprudence has affirmed the importance of considering diversity and cultural particularism within the frame of universality. It thus promotes the visibility of indigenous groups, who, weighed down by their historical pasts that continues in the form of cultural differences, are often being discriminated in society and by institutions.

In comparison to other regional systems, the IACtHR approach is clearly innovative. Not only does it consider individuals in broader frames, but it nudges towards the establishment of a global community in law. While this "cross-pollination" of judicial interpretation has advanced by the lawyer Slaughter is not new,[1422] the IACtHR has elaborated existing concepts with a new set of rules: conventionality control, integration, and subsidiarity. As observed the San José Court created a set of communal values based concretely on the ACHR. Furthermore, it encourages national judges to be central actors of its outreach, impelling respect. Under IHRL, States are often perceived as the first responsible actors of human rights violations. Yet, it is often the judiciary and its administration, which promotes discrimination towards minorities. Under the IACtHR, a movement towards national judges' responsibility has begun.

[1421] Stone Sweet (n 1379) 1; Jean-Françoise Flauss, 'La Cour Européenne Des Droits de l'homme Est-Elle Une Cour Constitutionnelle?' (1999) 36 Revue française de droit constitutionnel 711; Stepehn Greer, *The European Convention on Human Rights* (OUP 2006).

[1422] Anne-Marie Slaughter, 'A Global Community of Courts Focus: Emerging Fora for International Litigation' (2003) 44 Harv. Int. Law J. 191; D Hoadley and others, 'A Global Community of Courts? Modelling the Use of Persuasive Authority as a Complex Network' (2021) 9 Frontiers in Physics 1, 2.

Despite State difficulties in compiling with the IACtHR rulings, the effects of the IAHRS remain positive, specifically for vulnerable groups. The IAHRS is a significant and progressive human rights system on the continent, and IACtHR jurisprudence is regularly used in national courts.[1423] In comparison to Western Europe, where democracies with a functional judiciary prevail, to begin with the IAHRS appeared in an environment where these two elements were not present in every member State. However, the IACtHR evolved and elaborated concepts that made it impossible to ignore human rights systems.

[1423] Engstrom, 'Introduction: Rethinking the Impact of the Inter-American Human Rights System' (n 1246) 5.

Conclusion

In 2017 the Indian SC declared: "The narrative will then proceed to examine the decisions of the European Court of Human Rights, […] and the Inter-American Court of Human Rights. These decisions are indicative of the manner in which the right to privacy has been construed in diverse jurisdictions based on the histories of the societies they govern and the challenges before them."[1424] While this passage does not refer to the role of discrimination, it underlines the influence of regional system within the Indian judicial context and the development of a global law.

IHRL is broadly defined as laying down obligations for States. By becoming parties to international treaties States must respect, protect and fulfil human rights. Analyses focus in systematic ways on the angle of States as parties to specific convention: UN, ECHR, ACHR, etc. However, growing connections between legal systems call for setting aside this traditional approach to consider more broadly how Courts understand facts and translate them into legal settings. Naturally, differences between systems exists. For instance, while analysing the ECtHR, EU influences on national legislation are apparent. On the contrary, this parallelism does not occur in South America. On one side, the link between the ECtHR and other EU institutions, draws attention to the fact that the combination of different institutions increases protection towards minorities whilst the country's own approach can also lead to disparity of treatment. On the other side, the IACtHR establish itself as a central actor within South America States.

These analyses of the ECtHR and the IACtHR recalls the importance of regional human rights convention in the protection of individuals right to non-discrimination. Not only do they adopt regional perspectives – the ACHR for instance incorporates a collective approach – but they also integrate and recall international principles enshrined in the Charter, and the UDHR, on the right to non-discrimination. Furthermore, each regional monitoring body develops these rights through its own interpretation. However, both systems without any doubt argue that discrimination, when it targets minorities, is an important issue to be addressed. It can often be the outcome of accepted practices of social discrimination and thus lodged in the institutional

[1424] *Justice KS Puttaswamy (Retd) v Union of India* [2017] (n 983).

structural discrimination system itself.[1425] The IACtHR judged that such discrimination is not only a violation of IHRL but refers to a general culture of discrimination consisting of social stereotypes that limit opportunities of certain social groups.[1426] The value and relevance of this approach for other situations cannot be underestimated.

[1425] Dinesh Bhugra, 'Social Discrimination and Social Justice' (2016) 28 Int Rev Psychiatry 336, 336; 'General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (Art.2, Para. 2, of the ICESCR)' (n 136) para 40.

[1426] Hélène Tigroudja, 'Droits Des Femmes et Élimination Des Discriminations'; *González et al ("Cotton Field") v Mexico* (n 1289); *Gutiérrez Hernandez et al v Guatemala* [2017] IACtHR Exceptiones Preliminares, Fondo, Reparaciones y Costas.

General conclusion: Invisibility is a Human Rights violation

Universalism versus particularism, North versus South, member States versus non-member States, violators versus non-violators: these divisions are only a few examples of the systemic dichotomies that beset IHRL. Divisions which can either be defended or criticised, depending upon the approach used to highlight current problems or simply human rights violations. On one side, the complexity and multiplicity of these categories creates complications in the field, where individuals must define their work and intellectual approach within specific legal settings. On the other, minority groups are caught up in these sharp divisions, moving from one category to another, experiencing not only a constant violation of their human rights but more dangerously, making it difficult to grasp the concepts under which their violations can be treated: from a historical, social, political perspective, or from all these perspectives. As their discrimination remains constant, understanding its multiple causes can help to undermine its persistence.

The complexity of the situation invites the question whether national or regional judges are armed by IHRL with the necessary tools to render discrimination faced by minorities visible. The answer to this interrogation is positive. Despite distinct approaches due to the specificity of each systems, tools to protect minority groups against discrimination are provided in legal texts and judges have developed a strong jurisprudence. This results from two elements: (i) the establishment of a universal IHRL more or less based on conventions, *jus cogens* principles, and jurisprudence flowing either from UN treaty bodies or from regional organs; (ii) and the elaboration of a global law. The first element finds its limits in States such as India, Russia or China who are not part of a regional human rights system and where therefore the influence of IHRL is restricted not only to the ratification of international human rights conventions, but also to the States' relation with UN treaty bodies. The second argument related to the globalisation of law underlines the circulation of ideas such as judicial decisions and interpretation of norms throughout the world. The thesis studied the existence of an international *corpus juris*, which can be found on specific rights. Despite IHRL's fragmentation, there is a convergence on a substantial level and a construction of this "global law". Elaborating an international *corpus juris* is based on a constant dialogue between

mechanisms and processes, revealed through a more comparative analysis of solutions and interpretation of IHRL. These elements are the key to IHRL's effectiveness. Despite different rulings and approaches, this relationship between different judicial bodies enriches the field. While the thesis did not follow a comparative methodology, an analysis of three legal systems (India, ECtHR, IACtHR) underlined the similarity of discriminatory practices and their invisibility at the judiciary's level. These systems, India, ECtHR and the IACtHR, indicated that despite its different contexts, discrimination follows the same pattern from a legal perspective. This harmonisation, whether positive or negative, results from the universality of human rights.[1427] Yet, this universality which leads to a dialogue between systems is often only perceived at the level of regional systems and international mechanisms, and not from a national perspective, especially for countries outside a regional system.

To demonstrate this argument of the role of global law in protecting minority groups, the thesis focused on a country where no human rights regional system exits. It began with the hypothesis that due to the absence of a human rights regional system, individuals, and more specifically minority groups in cases of discrimination were more likely to see their human rights violated. This surmise was based on the idea that no judicial institutions filled the void of regional systems' jurisprudence and interpretation of norms, and therefore minorities faced a potentially reduced understanding of law as they could not use legal reasoning of other systems. This hypothesis can be summarised briefly as the absence of a regional system possibly increasing human rights violations and their invisibility. However, the methodical study of Indian citizenship laws application in Assam (Part 2) and the minority cases of the Roma community and indigenous groups (Part 3) led to question this hypothesis, and even introduced a change of hypotheses. These three cases testified that human rights abuses do not end with the mere existence of a regional human rights system. Undoubtedly, regional systems enrich IHRL, yet they do not announce the end of human rights abuses. India is not a member of a regional system, and this does not presuppose it to committing more human rights violations. Whilst the Indian SC remains partially silent on Assam, it displays a strong use of human rights norms and interestingly, integrates the regional system approaches. The country does not exclude legal evolution and jurisprudence of other systems is used. However, it does

[1427] Hélène Tigroudja, 'Les Systèmes Universels et Régionaux de Protection Des Droits de l'Homme: Harmonisation, Complémentarité Ou Fragmentation'.

not consider all the existing mechanism of human rights such as the African system for instance who does carry a unique approach to understand human rights violation and does contribute to the real of international human rights law. The absence of consideration of the African human right system by Indian judges pushed to include in the analysis only regional system which were quoted by the SC. Thus, the Arab League and the African human rights system, were despite their own set of particularities not develop. Indian judges may decide or fail to quote the work of regional courts, yet this influence is seen. This conclusion resulted not only from an analyses of jurisprudence, but also interviews with legal actors who were able to fill in the current voids in literature. In fact, while there is abundant current literature on the Indian SC's use of PIL at the SC level, academic work ignores the influence of regional system. This, despite it being quite common to integrate a comparative analysis between judicial systems in the IHRL field. Yet, for India the absence of a regional system called for a comparison only between States, despite the place of regional system jurisprudence within the Indian legal system. The hypothesis therefore changed. India does not have a regional system, yet actors of the Indian legal system are aware of the constant evolution of IHRL. Consequently, the new hypothesis was that if India was well inserted in the evolution of IHRL then judges' practices to render minority discrimination invisible should be found in other procedures. Furthermore, while India's colonial legal precedents and social realities led the country over the years to adopt a legal approach to individuals that accommodates backward social status, religion or community membership, or indeed geographical contexts, did other system also considered these elements? On the contrary to the first hypothesis which turned out to be wrong, the second one proved to be right. The answer to this hypothesis lies in the IACtHR's practice in relation to the judiciary and the role of judges. International law historically bases itself as a state-centric field, in which therefore the State is the main actor and solely responsible due to its legal obligations. However, the judiciary's independence must be integrated into legal reasoning. Discrimination towards minority groups reveals the impact of judicial rulings on practices, policies and legislations. With the will of a global perspective – starting from Assam and finishing at the regional levels – the analyses shows that law is not state-centric and is no more in the hands of international law's primary actors, States. The IACtHR normative approach has made it possible to recognise that the judiciary is primarily responsible for increasing discrimination towards minority groups. The judiciary's independence is thus a critical element in protecting individuals. States are responsible for protecting individuals, yet when the State is defective, the judiciary must be paradoxically, strong.

Political, sociological and cultural identities are singular to each country, and it depends on regional or national judges to incorporate them in their rulings. Ultimately, the key issue remains the refusal of judges to analyse these elements and consider them in the light of the society's complexity. As shown through the case of Assam, India has understood the importance of considering complex historical and sociological contexts. Today, India cannot, from a legal perspective, continue to question or reject Western norms as its SC jurisprudence clearly shows the influence of regional and national courts, like UK courts for instance. India has still to free itself from its colonial heritage in specific legislations. However, as far as discrimination towards minorities is concerned, it must face and handle its own traditions, legacies and present politics.

Unequal societies are held to be more 'advanced' in discriminatory practices than egalitarian societies.[1428] While discrimination may be embedded in traditional hierarchical structures, social customs, or practices, States and the judiciary are nonetheless required to protect individuals from the violation of their rights. Yet, despite this obligation established by international conventions, States which do not tend to identify with all its citizens, undermine the effectiveness of international conventions and laws.[1429] When backed by legislation, these States legitimise discrimination, and consequently condone widespread, unquestioning acceptance of informal abuses. Openly accepted and supported by States they are then backed by its judicial machinery. Certainly, IHRL doctrines and conventions do provide judges with the necessary tools to protect minority groups. Regional systems have made significant contribution through the development of doctrines. Their approach has gone further than their own member States. UN conventions are today not the only legal instruments which can be termed international: regional jurisprudence has shown that it can also be included in this "international" category, because of its application by national jurisdiction.

Through the objective to investigate whether judges had the necessary tools to protect human rights discrimination faced by minority groups, a hitherto less explored area and

[1428] Dinesh Bhugra, 'Social Discrimination and Social Justice' (2016) 28 Int Rev Psychiatry 336, 336.

[1429] Sammy Smooha, 'Ethnic Democracy: Israel as an Archetype' (1997) 2 Israel Studies 198, 199–200; Katharine Adeney, 'How Can We Model Ethnic Democracy? An Application to Contemporary India' (2021) 27 Nations Natl. 393.

question arose: does a large democratic State require a regional judicial system over and above the usual judicial structure? IHRL is usually examined through the medium of international rulings and how States violate their international obligations. Reflection on law and the ways in which legal systems operate are more often than not, conducted without deep consideration of how interconnections operate between international conventions, rulings and national agendas or concerns. This study has opted to consider the law not simply as state-centric, through its production, or an existing set of institutions or corpus of rulings. Instead, it has privileged a close to the ground approach by studying the issues where appropriations of international rulings or regional systems' judgements are taking place in the Indian law courts. In this way, it does not limit itself to the usual commentaries on India's constitutional openness, or debates on its judiciary's neutrality or autonomy from executive interference. Instead, by including a discussion of other regional systems outside India, it has chosen different field of inquiry. Whilst other legal national systems are considered during the creation of legislation, as analysed in the pages devoted to the CAD, scholars, though coming from different disciplines, do not dwell on the critical questions relating to discrimination, or how minorities are being handled and treated in other countries, or their relevance for the Indian context. This thesis has attempted to show that judicial legislation and practices elsewhere can have a ripple effect on the global scale. It becomes important then to tease out these effects and these unforeseen exchanges between other regional systems and the Indian situation.

Annex

1. Ambedkar proposition: Article 5 of the Constitution,

"5. At the date of commencement of this constitution, every person who has his domicile in the territory in citizenship at the date of commencement of this Constitution.

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 the date of such commencement,

shall be a citizen of India provided that he has not voluntarily acquired the citizenship of any foreign State.

Rights of citizenship of certain persons who have migrated to India from Pakistan.

5-A. Notwithstanding anything contained in article 5 of this Constitution, 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 date of 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 ordinarily resided within the territory of India since the date of his migration; and

(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 this behalf by the Government of the Dominion of India on an application made by him therefore to such officer before the date of commencement of this Constitution in the form prescribed for the purpose by that Government.

Provided that no such registration shall be made unless the person making the application has resided in the territory of India for at least six months before the date of his application.

Rights of citizenship of certain migrants to Pakistan.

5-AA. Notwithstanding anything contained in articles 5 and 5-A of this Constitution 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 5-A of this Constitution be deemed to have migrated to the territory of India after the nineteenth day of July 1948.

Right of citizenship of certain persons of India origin residing outside India.

5-B. Notwithstanding anything contained in article 5 and 5-A of this Constitution, any person who or either of whose parents or many of whose grandparents was born in India as defined in the Government of India Act, 1935 (as originally enacted) and who is ordinarily residing in any territory 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, prescribed for the purpose buy the Government of the Dominion of India or the Government of India.

Continuance of the rights of citizenship.

5-C. Every person who is 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.

Parliament to regulate the right of citizenship by law.

6. 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."[1430]

2. Miya poetry

2.1. A Charuwa's Proposition, Maulana Bande Ali (1939)

Some say Bengal is my birthplace
And gloat in this bitter accusation
Well, before they came,
My father and my mother and many others
Left their homes, became country-less
How many people belonged to countries then
Who now wear the crowns and masks of leaders?
They are trapped by greed, I know
I quietly observe the language greed speaks.
But I will not tear the plate that feeds me
My faith will not allow me.
This land that I live in
I will revel in this land's well-being.
The land which my Aai, Abbajan
Left for the heavens
This land is my own, my golden Assam
This land is my holy sanctuary.
The land I scrape to build my house
Is my own land
These are words from the Quran
And in it there is no falsehood
The people of this land are simple, pure
The Assamese are our own
We will share what we have in our shared home
And raise a golden family.

I am not a *charuwa*, not a *pamua*.
We have also become *Asomiya*
Of Assam's land and air, of Assam's language
We have become equal claimants.
If Assamese dies, so do we
But why will we let it happen?
For newer tribulations we will build new weapons

[1430] Constituent Assembly Debates, Volume IX, August 10, 1949, 9.115.154, 9.115.155.

With new tools we will build a new future.
Where will we find such love, such respect
Where will we find such a place?
Where the plough cuts through earth and reveals gold
Where will we find such a land of grace?
Mother Assam feeds us at her breast
We are her frolicking children
Let us sing in one tune- we are *Asomiya*
We shall not be Mymensinghia
We will need no 'borders'
We will be brothers
And when outsiders come to loot us,
We will bar them with our bare chests.

2.2. I beg to State That, Khabir Ahmed (1985)

I beg to state that
I am a settler, a hated Miyah
Whatever be the case, my name is
Ismail Sheikh, Ramzan Ali or Majid Miyah
Subject- I am an Assamese Asomiya

I have many things to say
Stories older than Assam's folktales
Stories older than the blood
Flowing through your veins

After forty years of independence
I have no space in the words of beloved writers
The brush of your scriptwriters doesn't dip in my picture
My name left unpronounced in assemblies and parliaments
On no martyr's memorial, on no news report is my name printed
Even in tiny letters.
Besides, you haven't yet decided what to call me-
Am I Miyah, Asomiya or Neo-Asomiya?

And yet you talk of the river
The river is Assam's mother, you say
You talk of trees
Assam is the land of blue hills, you say
My spine is tough, steadfast as the trees
The shade of the trees my address…

You talk of farmers, workers
Assam is the land of rice and labour, you say
I bow before paddy, I bow before sweat
For I am a farmer's boy…

I beg to state that I am a
Settler, a dirty Miyah
Whatever be the case, my name
Is Khabir Ahmed or Mijanur Miyah
Subject- I am an Assamese Asomiya.
Sometime in the last century I lost
My address in the storms of the Padma
A merchant's boat found me drifting and dropped me here
Since then I have held close to my heart this land, this earth
And began a new journey of discovery
From Sadiya to Dhubri…

Since that day
I have flattened the red hills
Chopped forests into cities, rolled earth into bricks
From bricks built monuments
Laid stones on the earth, burnt my body black with peat
Swam rivers, stood on the bank
And dammed floods
Irrigated crops with my blood and sweat
And with the plough of my fathers, etched on the earth
A…S…S….A…M

Even I waited for freedom
Built a nest in the river reeds
Sang songs in Bhatiyali
When the Father came visiting,
I listened to the music of the Luit
In the evening stood by the Kolong, the Kopili
And saw on their banks gold.

Suddenly a rough hand brushed my face
On a burning night in '83
My nation stood on the black hearths of Nellie and screamed
The clouds caught fire at Mukalmua and Rupohi, Juria,
Saya Daka, Pakhi Daka- homes of the Miyahs
Burnt like cemeteries
The floods of '84 carried my golden harvest
In '85 a gang of gamblers auctioned me

On the floor of the Assembly.

Whatever be the case, my name
Is Ismail Sheikh, Ramzan Ali or Mazid Miyah
Subject- I am an Assamese Asomiya.

2.3. My Mother, Rehna Sultana (1 May 2016)

I was dropped on your lap my mother
Just as my father, grandfather, great-grandfather
And yet you detest me, my mother,
For who I am.
Yes, I was dropped on your lap as
a cursed Miyah, my mother.

You can't trust me
Because I have somehow grown this
beard.
Somehow slipped into a *lungi*
I am tired, tired of introducing myself
To you.
I bear all your insults and still shout,
Mother! I am yours!
Sometimes I wonder
What did I gain by falling in your lap?
I have no identity, no language
I have lost myself, lost everything
That could define me
And yet I hold you close
I try to melt into you
I need nothing, my mother.
Just a spot at your feet.
Open your eyes once mother
Open your lips
Tell these sons of the earth
That we are all bothers.
And yet I tell you again
I am just another child
I am not a 'Miyah cunt'
Not a 'Bangladeshi'
Miyah I am,
A Miyah.

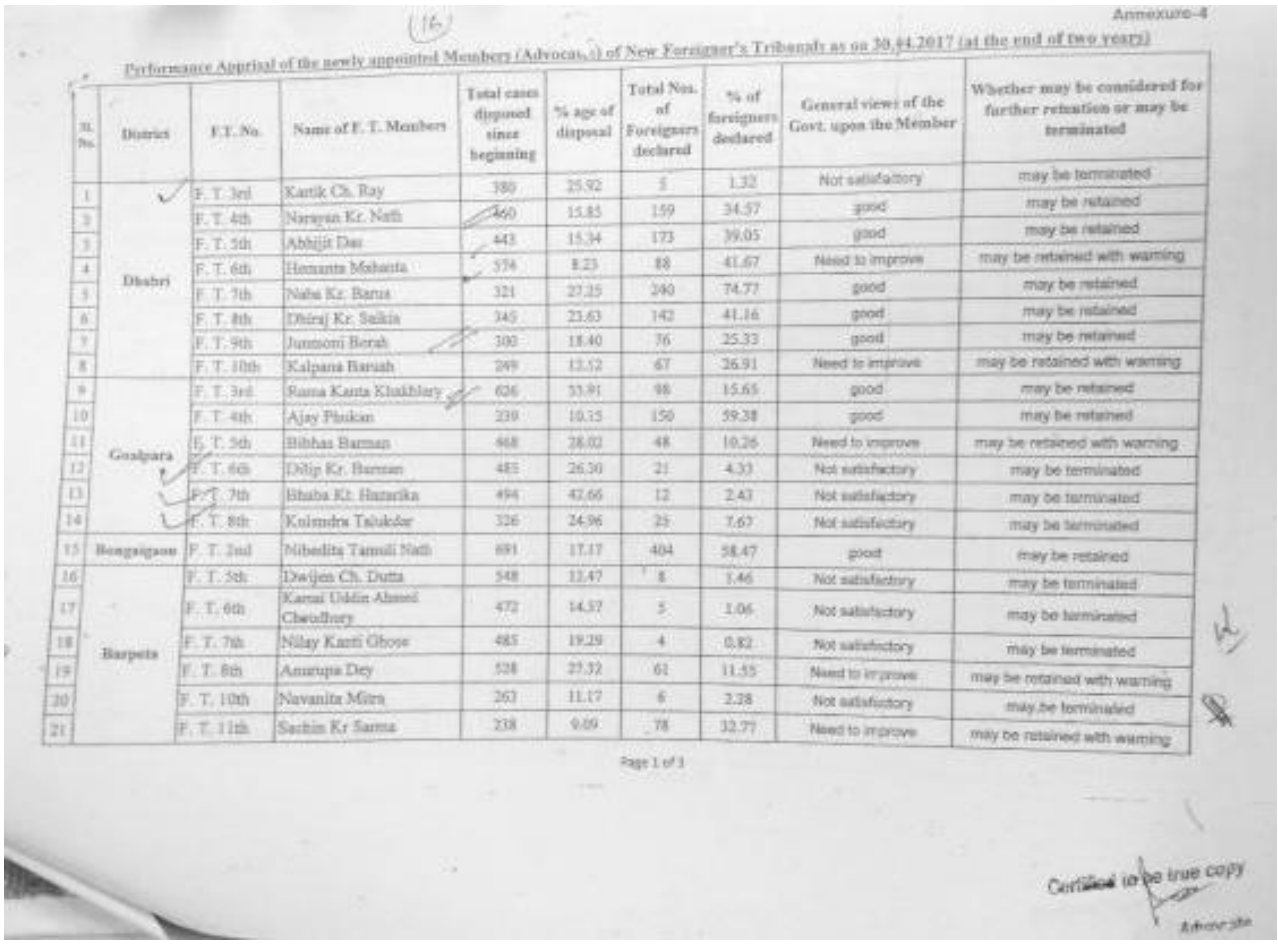
I can’t string words through poetry
Can’t sing my pain in verse
This prayer, this is all I have.

2.4. Write Down ‘I am Miya’”, Hafiz Ahmed

Write Down 'I am a Miyah'
Hafiz Ahmed
Write
Write Down
I am a Miya
My serial number in the NRC is 200543
I have two children
Another is coming
Next summer.
Will you hate him
As you hate me?
write
I am a Miya
I turn waste, marshy lands
To green paddy fields
To feed you.
I carry bricks
To build your buildings
Drive your car
For your comfort
Clean your drain
To keep you healthy.
I have always been
In your service
And yet
you are dissatisfied!
Write down
I am a Miya,
A citizen of a democratic, secular, Republic
Without any rights
My mother a D voter,
Though her parents are Indian.
If you wish kill me,
drive me from my village,
Snatch my green fields
hire bulldozers
To roll over me.

Your bullets
Can shatter my breast
for no crime.
Write
I am a Miya
Of the Brahamaputra
Your torture
Has burnt my body black
Reddened my eyes with fire.
Beware!
I have nothing but anger in stock.
Keep away!
Or
Turn to Ashes.

3. Performance of Foreigner's Tribunal members.



Annexure-4

Performance Apprisal of the newly appointed Members (Advocates) of New Foreigner's Tribunals as on 30.04.2017 (at the end of two years)

Sl. No.	District	F.T. No.	Name of F. T. Members	Total cases disposed since beginning	% age of disposal	Total Nos. of Foreigners declared	% of foreigners declared	General views of the Govt. upon the Member	Whether may be considered for further retention or may be terminated
1	Dhubri	F. T. 3rd	Kartik Ch. Ray	380	25.92	5	1.32	Not satisfactory	may be terminated
2		F. T. 4th	Narayan Kr. Nath	460	15.85	159	34.57	good	may be retained
3		F. T. 5th	Abhijit Das	443	15.34	173	39.05	good	may be retained
4		F. T. 6th	Hemanta Mohanta	374	8.23	88	41.67	Need to improve	may be retained with warning
5		F. T. 7th	Naba Kr. Barua	321	27.25	240	74.77	good	may be retained
6		F. T. 8th	Dhiraj Kr. Saikia	345	23.63	142	41.16	good	may be retained
7		F. T. 9th	Junmoni Borah	300	18.40	76	25.33	good	may be retained
8		F. T. 10th	Kalpana Baruah	249	13.52	67	26.91	Need to improve	may be retained with warning
9	Goalpara	F. T. 3rd	Rama Kanta Khakhlary	626	33.91	98	15.65	good	may be retained
10		F. T. 4th	Ajay Phukan	239	10.15	150	59.38	good	may be retained
11		F. T. 5th	Bibhas Barman	468	28.02	48	10.26	Need to improve	may be retained with warning
12		F. T. 6th	Dilip Kr. Barman	485	26.30	21	4.33	Not satisfactory	may be terminated
13		F. T. 7th	Bhaba Kt. Hazarika	494	42.66	12	2.43	Not satisfactory	may be terminated
14		F. T. 8th	Kolindra Talukdar	326	24.96	25	7.67	Not satisfactory	may be terminated
15	Bongaigaon	F. T. 2nd	Nibedita Tamuli Nath	691	17.17	404	58.47	good	may be retained
16	Barpeta	F. T. 5th	Dwijen Ch. Dutta	548	13.47	8	1.46	Not satisfactory	may be terminated
17		F. T. 6th	Kamal Uddin Ahmed Chowdhury	472	14.57	5	1.06	Not satisfactory	may be terminated
18		F. T. 7th	Nilay Kanti Ghose	485	19.29	4	0.82	Not satisfactory	may be terminated
19		F. T. 8th	Anurupa Dey	528	27.32	61	11.55	Need to improve	may be retained with warning
20		F. T. 10th	Navanita Mitra	263	11.17	6	2.28	Not satisfactory	may be terminated
21		F. T. 11th	Sachin Kr Sarma	238	9.09	78	32.77	Need to improve	may be retained with warning

Page 1 of 1

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