

MISERY, MELANCHOLY, AND MISFORTUNE: A MIGRANT CASE STUDY

JAYANTH K. KRISHNAN*

ABSTRACT

There is an ongoing crisis of despair involving migrants from abroad who are seeking refuge in one of the world's longest-standing, post-World War II democracies—India. There are roughly 4.9 million noncitizen migrants in India, with most coming from Bangladesh, Myanmar, Nepal, Pakistan, and Sri Lanka. Because these migrants often live in the shadows, they are frequently deprived of fundamental human rights.

On the one hand, it may seem surprising that this population remains so vulnerable. After all, India's Supreme Court has been a leading institutional light in safeguarding the rights of many marginalized groups. Supreme courts in other countries point to judgments from the Indian Supreme Court as a model for how to ensure that communities on the periphery are treated with dignity and due process. Furthermore, the Indian judiciary has been assisted in its progressive rights jurisprudence by a robust constitution and a vibrant civil society.

Yet when it comes to noncitizen migrants, there has been a dearth of sustained judicial support. Additionally, while there is certain, important, bottom-up activism on behalf of these noncitizens, it has frankly not been enough to meet the cascade of needs that exist.

This project focuses on how institutional inadequacies, at both the governmental and societal levels, have left noncitizen migrants among some of the most isolated individuals within India. Namely, the absence of specialized and independent immigration courts, an outdated immigration statute, a lack of a strong immigration legal profession, insufficient legal education on immigration law, and little research on immigration doctrine are key reasons why migrants face such dire

* Milt and Judi Stewart Professor of Law and Director of the Stewart Center on the Global Legal Profession, Indiana University-Bloomington Maurer School of Law. For their kind help and feedback at different junctures, the author thanks Rebecca Bertoloni-Meli, Vitor Dias, Lara Gose, Sital Kalantry, Chandra Mallampalli, Addison Mummert, Christiana Ochoa, Vikram Raghavan, Viplav Sharma, Zenas Shi, Dayaar Singla, and Tung Yin.

circumstances today. Otherwise put, India’s weak immigration infrastructure has sadly contributed to the difficulties noncitizen migrants face in accessing lawyers, the legal process, and, ultimately, justice within Indian society.

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INTRODUCTION

In the spring of 2020, as the onset of the COVID-19 pandemic was taking hold, the prime minister of India, Narendra Modi, issued an executive order locking down the entire country.¹ More than 1.4 billion

¹ See Press Information Bureau, Government of India, Prime Minister’s Office, PM Calls for Complete Lockdown of Entire Nation for 21 Days: PM Addresses the Nation on COVID-19 (Mar. 24, 2020), <https://pib.gov.in/newsite/PrintRelease.aspx?relid=200658> [perma.cc/9YAW-J87Z]; see also Jeffrey Gettleman & Kai Schultz, *Modi Orders 3-Week Total Lockdown for All 1.3 Billion*

people were ordered to adhere to restrictive travel measures and remain in their homes.² As a result, businesses were shuttered and hundreds of millions of manual laborers were left unemployed.³ At the time, the International Labor Organization (ILO) forecasted that these workers would “fall into deeper poverty while forcing many of them to return to their places of origin in the rural areas.”⁴ And, although the economy today looks to have recovered in some sectors,⁵ for much of the poorer, working population, life remains painstakingly hard.⁶

The disproportionate impact of the lockdown affected a particularly vulnerable population: migrant workers. The prime minister acknowledged and apologized for his decisions, which he recognized had “caused difficulties . . . especially [for] the poor.”⁷ The data from India’s last official census indicate that there are 139 million migrant workers in India.⁸ Following the prime minister’s order, over two-thirds of this population was left unemployed.⁹

Indians, N.Y. TIMES (Mar. 24, 2020), <https://www.nytimes.com/2020/03/24/world/asia/india-coronavirus-lockdown.html> [<https://perma.cc/8A8U-Z5EN>].

² See Gettleman & Schultz *supra* note 1.

³ See Shabarinath Nair & Divya Verma, *A Policy Framework for India’s COVID-19 Migration*, NDTV (May 19, 2020), <https://www.bqprime.com/coronavirus-outbreak/a-policy-framework-for-indias-covid-19-migration> [perma.cc/CA3L-QN8T].

⁴ *Id.*

⁵ See Mujib Mashal & Suhasini Raj, *From the U.S. to China, Major Economies Stalled. But Not India*, N.Y. TIMES (Sept. 7, 2022), <https://www.nytimes.com/2022/09/07/business/india-economy.html> [<https://perma.cc/D78U-GFPR>].

⁶ See Shefali Anand & Vibhuti Agarwal, *India’s Economy Hinges on the Return of Workers Who Fled to Their Villages*, WALL ST. J. (Feb. 13, 2022), <https://www.wsj.com/articles/indias-economy-hinges-on-the-return-of-workers-who-fled-to-their-villages-11644777177> [<https://perma.cc/7XNF-84XA>].

⁷ See Emily Schmall & Aljaz Hussain, *Modi Apologizes to Indians for 21-Day Lockdown Hardships*, APNEWS (Mar. 29, 2020), <https://apnews.com/article/005ee5b72ae40ceb9f8fccabe526927e> [<https://perma.cc/693T-EFP8>].

⁸ See Krishnavatar Sharma, *India Has 139 Million Internal Migrants. They Must Not Be Forgotten*, WORLD ECONOMIC FORUM (Oct. 1, 2017), <https://www.weforum.org/agenda/2017/10/india-has-139-million-internal-migrants-we-must-not-forget-them/> [<https://perma.cc/M326-FV87>] (drawing on the 2011 Census. Note, India is supposed to conduct a census every ten years, but the Prime Minister delayed the 2021 census citing COVID as the reason); see Tirtho Banerjee, *India’s Population Census Postponed Again. What Does the Delay Mean?*, INDIA TODAY (Jan. 10, 2023), <https://www.indiatoday.in/news-analysis/story/india-population-census-postponed-again-what-does-the-delay-mean-2319535-2023-01-10> [perma.cc/CCF9-4F5H].

⁹ See Radheshyam Jadhav, *Five States Account for 67% Migrant Workers Who Returned Home During Lockdown*, THE HINDU BUS. LINE (Feb. 11, 2021), <https://www.thehindubusinessline.com/data-stories/data-focus/five-states-account-for-67-migrant-workers-who-returned-home-during-the-lockdown/article33813158.ece> [perma.cc/9E9H-C5NE].

Unsurprisingly, efforts to reintegrate many of these workers into the labor force have been challenging.¹⁰ As a result, many laborers and their families have lost their homes and property, gone hungry, incurred major health-related calamities, and seen a spike in deaths by—among other causes—suicide.¹¹

When it comes to migrant laborers in India, the word “migrant” itself has multiple meanings. In India, the term “migrant workers” most commonly refers to people who travel domestically between states.¹² Most migrant workers in India come from the state of Uttar Pradesh, followed by the states of Bihar, Rajasthan, and Madhya Pradesh.¹³ Over the years, five states alone have “housed 50 percent of the country’s intra-country migrants.”¹⁴

To be sure, there is abundant literature on the dire state of affairs of these Indian migrants.¹⁵ As the findings from these studies suggest, the political, legal, and socioeconomic conditions for this population have long been bleak and will almost certainly remain so for the foreseeable future.¹⁶

¹⁰ See Anand & Agarwal, *supra* note 6.

¹¹ See Devender Singh & Debasish Chowdhury, *What India Should Have Done for Migrant Workers - But Conveniently Didn't*, THE WIRE (Feb. 17, 2023), <https://thewire.in/labour/migrant-workers-daily-wage-covid> [perma.cc/AVQ9-25PS].

¹² See *id.*

¹³ See Abhishek Jha & Vijdan Mohammad Kawoosa, *What the 2011 Census Data on Migration Tells Us*, HINDUSTAN TIMES (July 26, 2019), <https://www.hindustantimes.com/delhi-news/migration-from-up-bihar-disproportionately-high/story-K3WAio8TrrvBhd22VbAPLN.html> [perma.cc/GB2Z-NFJD] (noting that these “four states . . . accounted for 50% of India’s total inter-state migrants”); For an empirical discussion of Bihari migration, in particular, see Amrita Datta, *Circular Migration and Precarity: Perspectives from Rural Bihar*, 63 INDIAN J. LAB. ECONS. 1143, 1146 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7659404/> [perma.cc/R39Y-XT9G].

¹⁴ See Jha & Kawoosa, *supra* note 13 (noting that these states are “Maharashtra, Delhi, Gujarat, Uttar Pradesh and Haryana.” Explaining that Uttar Pradesh is notable here because it is both a *migrant-out* state as well as a *migrant-in* state).

¹⁵ See RITAJYOTI BANDYOPADHYAY, PAULA BANERJEE, & RANABIR SAMADDAR, *INDIA’S MIGRANT WORKERS AND THE PANDEMIC* (Routledge 2022) (sample of these works, in addition to the ones cited previously); BHARAT BHUSHAN, *MEDIA, MIGRANTS AND THE PANDEMIC IN INDIA* (Routledge 2022); Pooja Misra & Jaya Gupta, *Impact of COVID-19 on Indian Migrant Workers: Decoding Twitter Data by Text Mining*, 64 INDIAN J. LAB. ECONS. 731 (2021); Chetna Duggal, Sukanya Ray, Rajani Konantambigi & Arushi Kothari, *The Nowhere People: Lived Experiences of Migrant Workers during COVID-19 in India*, 41 CURRENT PSYCH. 8214 (2022); Awani T.D. & Shivashankar Bhat, *Review of Literature Related to Labour Migration: Types, Causes, and Impacts*, 7 INT’L J. MGMT., TECH. SOC. SCIENCES 191 (2022).

¹⁶ See BANDYOPADHYAY et al., *supra* note 15; BHUSHAN, *supra* note 15; Misra & Gupta, *supra* note 15; Duggal et al., *supra* note 15; T.D. & Bhat, *supra* note 15.

In addition to domestic migrants, there is a group that is perhaps even more desperate but has not been examined as extensively. These migrants who hail from *outside* of India are the focus of this Study. At present, there are roughly 4.9 million international, noncitizen migrants in the country.¹⁷ The vast majority come from India's neighbors: "Bangladesh (3.2 million), Pakistan (1.1 million), Nepal (540,000), and Sri Lanka (160,000)."¹⁸ But, because these migrants often live in the shadows and lack proper documentation, they are all too frequently deprived of fundamental human rights.

On the one hand, it may seem surprising that India has so disregarded this vulnerable population's needs. After all, India's Supreme Court has been a leading institutional light in safeguarding the rights of many marginalized groups.¹⁹ Supreme courts in other countries have pointed to judgments from the Indian Supreme Court as a model for how

¹⁷ Ruchi Singh, *Origin of World's Largest Migrant Population, India, Seeks to Leverage Immigration*, MIGRATION POL'Y INST. (Mar. 9, 2022), <https://www.migrationpolicy.org/article/india-migration-country-profile#:~:text=Immigration%20to%20India,of%20its%201.4%20billion%20people> [https://perma.cc/RSD3-T6S8].

¹⁸ See Phillip Connor, *India is a Top Source and Destination for the World's Migrants*, PEW RSCH. (Mar. 3, 2017), <https://www.pewresearch.org/short-reads/2017/03/03/india-is-a-top-source-and-destination-for-worlds-migrants/> [https://perma.cc/YCA2-MZ4X]; IOM MIGRATION, WORLD MIGRATION REPORT 202 (2022), <https://publications.iom.int/books/world-migration-report-2022> [https://perma.cc/MWJ9-4VMT] (for data from 2020). For a recent article that discusses how India offers some of the "fewest protections in its national laws" for noncitizen migrants, see Justin Gest, *Which Countries Walk the Walk on Migrant Rights?* FOREIGN POL'Y (Sept. 27, 2023), https://foreignpolicy.com/2023/09/27/migrant-rights-immigration-data-accountability-law-implementation-policy/#cookie_message_anchor [perma.cc/J2TJ-FWVJ] (noting that other countries also perform poorly on this front, including Australia and Saudi Arabia, "followed by Ireland (41 percent); Bangladesh (45 percent); Singapore, Indonesia, and India (48 percent); and the United Arab Emirates and Chile (52 percent).") The percentages here indicate what "percent of migrant rights [are] covered in national law." Further, "France leads the world with 85 percent of migrant rights covered in national law, followed by Brazil and Argentina (83 percent); Italy, Spain, and Greece (81 percent); Ethiopia (79 percent); and Mexico and the Netherlands (77 percent)." For the database on this project, see *Countries, MIGRANT RTS INITIATIVE*, <https://www.migrantrightsinitiative.org/en/countries> [perma.cc/VB6B-PC9M].

¹⁹ See e.g., CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (U. of Chi. Press, 1998); Jayanth K. Krishnan, *Lawyering for a Cause and Experiences from Abroad*, 94 CALIF. L. REV. 575 (2006); Marc Galanter & Jayanth K. Krishnan, *Bread for the Poor: Access to Justice and the Rights of the Needy in India*, 55 HASTINGS L. J. 789 (2004); Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 1985 THIRD WORLD LEGAL STUD. 107 (1985). For an important paper that looks at the everyday types of cases that the Court hears (from a dataset that involves the examination of cases between 2010 and 2015), see Aparna Chandra, William H.J. Hubbard, & Sital Kalantry, *The Supreme Court of India: An Institutional Overview in A QUALIFIED HOME: THE INDIAN SUPREME COURT AND PROGRESSIVE SOCIAL CHANGE* (Gerald N. Rosenberg, Sudhir Krishnaswamy, & Shishir Basil eds., 2019).

to ensure that communities on the periphery are treated with dignity and due process.²⁰ Furthermore, a robust constitution and a vibrant, active civil society assist the Indian judiciary in its perceived progressive rights jurisprudence.²¹

Yet, when it comes to noncitizen migrants, there has been a dearth of sustained judicial support. Additionally, while there is certain, important civil society attention paid towards these noncitizens, it has frankly not been far reaching enough to meet the cascade of needs that exist. This project focuses on how institutional inadequacies, at both the governmental and societal levels, have left noncitizen migrants among some of the most isolated individuals within India. Namely, the absence of specialized and independent immigration courts, an outdated immigration statute, a lack of a strong immigration legal profession, insufficient legal education on immigration law, and little research on immigration doctrine are key reasons why migrants face such dire circumstances today. Otherwise put, India's weak immigration infrastructure has sadly contributed to noncitizen migrants' difficulty accessing lawyers, the legal process, and, ultimately, justice within Indian society.

For this Study, Part I will provide a brief background on the present status of noncitizen migrants in India. Part II will outline the specific hurdles—case law-wise—these migrants have faced as a result of adverse Supreme Court rulings over the years. Part III will offer a new framework, which will be referred to as PRIM—Proposed Reforms for India's (Noncitizen) Migrants. This PRIM model will be both descriptive and prescriptive in nature, and, in particular, will call for improving the conditions that currently hinder the rights of India's noncitizen migrants. Part IV, the conclusion, will discuss the implications of this Study as well

²⁰ *But see Sharp Fall in Citation of Supreme Court Judgments by Foreign Courts After 2014, Study Finds*, THE WIRE (Nov. 24, 2020), <https://thewire.in/law/supreme-court-foreign-citations-study> [perma.cc/6UYD-TX7D] (summarizing a study by Mitali Gupta, which found that while rulings by the Indian Supreme Court have been cited by some 43 different courts around the world, since 2014 there has been a decline in the number of overall citations); Adam Liptak, *U.S. Supreme Court Now Guiding Fewer Nations*, N.Y. TIMES (Sept. 17, 2008), <https://www.nytimes.com/2008/09/18/us/18legal.html> [https://perma.cc/MXL3-ABXQ] (quoting Justice Michael Kirby of Australia as saying that “[n]ow we will take information from the Supreme Court of India, or the Court of Appeal of New Zealand, or the Constitutional Court of South Africa”).

²¹ *See, e.g.*, Galanter & Krishnan, *supra* note 19; EPP, *supra* note 19, at 23, 69; Baxi, *supra* note 19.

as how best to aid this community, in a sustained manner, as they seek to access justice.

I. A MACRO-PICTURE OF INDIA'S NONCITIZEN MIGRANTS

A. A BRIEF OVERVIEW OF THE DATA

While this Study focuses on noncitizen migrants, it is perhaps useful to state upfront how the term “migrant” is frequently deployed in literature. According to the United Nations International Organization for Migration (IOM), the word migrant is “an umbrella term, not defined under international law, reflecting the common lay understanding of a person who moves away from his or her [or their] place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons.”²²

The IOM hastens to note that while its definition is meaningful to how the organization carries out its duties, it is by no means one that is “universally accepted.”²³ In fact, the IOM goes on to say that its classification is not intended “to imply or create any new legal category.”²⁴ At the same time, because of its inclusiveness, the IOM’s definition allows for the study of migration to be plural, which is important, since many people who migrate do so for a diverse set of reasons.

At present, the IOM estimates that there are over 280 million migrants residing outside the countries in which they were born. This figure is “128 million more than in 1990, and over three times the estimated number in 1970.”²⁵ Furthermore, the IOM is sensitive to how, in countries such as India, migration can often be the result of domestic laborers traveling for employment or “internal displacement . . . [where people are] uprooted by conflict, violence, and disasters.”²⁶ The IOM projects that, around the globe, more than fifty-nine million people fall

²² *About Migration*, INT’L ORG. FOR MIGRATION, <https://www.iom.int/about-migration> [perma.cc/R3Q6-FHAK] (Feb. 20, 2024) (noting also that “[t]he term includes a number of well-defined legal categories of people, such as migrant workers; persons whose particular types of movements are legally defined, such as smuggled migrants; as well as those whose status or means of movement are not specifically defined under international law, such as international students.”).

²³ *Id.*

²⁴ *Id.*

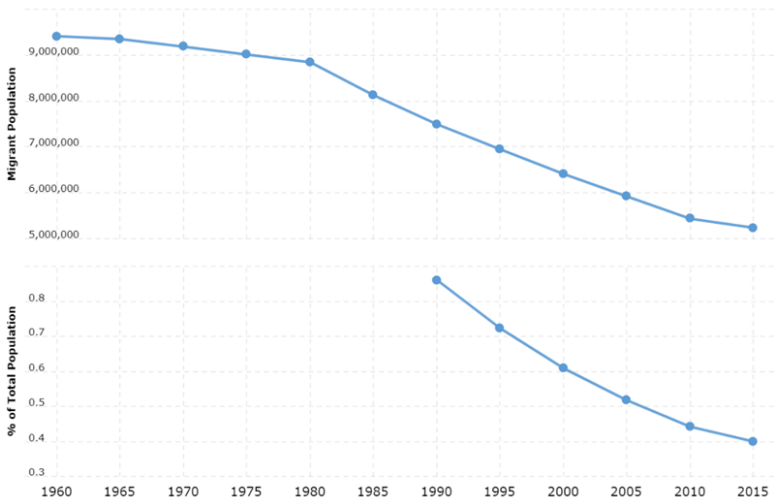
²⁵ *Id.*

²⁶ *Id.*

into this latter category,²⁷ and within India specifically, “nearly four million”²⁸ people were internally displaced as of 2020.

As it relates to international migration into India, according to the World Bank, there has been a decline dating back to the 1960s. Figure 1 highlights this development.

Figure 1:
Data on International Migration from the World Bank²⁹



As the chart shows, in 1960, there were over nine million noncitizen migrants in India.³⁰ By 1995, that number was approximately seven million.³¹ And by 2015, the number slipped again to just over five million.³² The IOM’s most recent data show that in 2020, India continued

²⁷ *Id.*

²⁸ INT’L ORG. FOR MIGRATION, *supra* note 18, at 79–80.

²⁹ *India Immigration Statistics 1960-2024*, MACROTRENDS, (Feb. 20, 2024), <https://www.macrotrends.net/countries/IND/india/immigration-statistics> [https://perma.cc/X46J-XDVV].

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

to see a downward trend of noncitizen migrants, with 4.48 million present that year.³³ (Other sources cite the figure at closer to five million.)³⁴

One cited reason why India has experienced this declining trend is that the country lacks a “comprehensive immigration policy.”³⁵ There are also low levels of migrant integration into Indian society.³⁶ One study even notes that “India ranked the lowest among 52 countries assessed for key indices of migrant inclusivity.”³⁷

Along several other benchmarks—the ability to sponsor immediate family members, access to education and healthcare, political participation, and the difficulties of obtaining permanent residence or citizenship—India’s aggregate performance has long been deemed unfavorable to migrants as well.³⁸ Furthermore, India has been criticized for failing to provide sufficient protection for noncitizen migrants facing discrimination.³⁹ Additionally, during the pandemic, India all but closed its borders—thus impeding many migrants from returning home. Those from Nepal, for example, were particularly affected, as many “were left stranded at different points of the 1,700 km border with India after [the] complete lockdown was imposed.”⁴⁰

All these factors have affected noncitizen migrants in a deeply adverse manner. Two other major developments require mentioning as well. We turn to these next.

³³ INT’L ORG. FOR MIGRATION, *supra* note 22, at 203 (noting that “[w]ith the exception of the Russian Federation, Kazakhstan, India, Jordan and Ukraine,” the top 20 destination countries in the world for noncitizen migrants saw an increase in this population between 1995 and 2020).

³⁴ See, e.g., Singh, *supra* note 17.

³⁵ Priyansha Singh & Rohini Mishra, *Millions of Indians Seek Better Lives Abroad, But India Treats Immigrants Poorly, New Study Shows*, INDIA SPEND (Jan. 7, 2021), <https://www.indiaspend.com/governance/millions-of-indians-seek-better-lives-abroad-but-india-treats-immigrants-poorly-study-711347> [perma.cc/K5J3-BAE3] (quoting Meera Sethi who is a “migration policy expert . . . formerly of the UN-IOM”).

³⁶ *Id.*

³⁷ *Id.*

³⁸ See Singh, *supra* note 17.

³⁹ *Id.*; see Fr. Martin Puthussery, *Accompany Distressed Migrant Workers in India*, THE FUTURE OF WORK: LAB. MIGRANTS IN THE 21ST CENTURY, <https://icmc.net/future-of-work/report/10-india/> [perma.cc/PYT2-ZH57], for a study that focuses on how many of these same factors (as well as additional ones) also play a significant role in the harsh conditions faced by domestic migrants.

⁴⁰ IOM MIGRATION, *supra* note 18, at 164.

B. THE NRC AND CAA

The first development involves the National Registry of Citizens (NRC). As Professors Sital Kalantry and Agnidipto Tarafder and their colleagues explained, the federal Citizenship Act was amended in 2003.⁴¹ The original statute was passed in 1955.⁴² The 2003 amendment required that the central government create a list of individuals who were legally in the country and who could prove their citizenship.⁴³ Those who could not do so were deemed “illegal immigrants”⁴⁴ and were given deportation orders. The government, however, did not embark on widespread implementation regarding the NRC for a decade, until the Supreme Court of India issued a judgment in 2013 stating that the registry needed to be updated forthwith.⁴⁵

Subsequently, the northeast state of Assam decided to aggressively follow the court’s order.⁴⁶ It took over fifty thousand civil servants and several years to create a statewide list of citizens, which cost the government a staggering \$200-plus million.⁴⁷ Proponents of the order argued that, for decades, Assam had been overrun with immigrants from Bangladesh who had been unlawfully entering the country.⁴⁸ One

⁴¹ See SITAL KALANTRY & AGNIDIPTO TARAFDER, DEATH BY PAPERWORK: DETERMINATION OF CITIZENSHIP AND DETENTION OF ALLEGED FOREIGNERS IN ASSAM, 7 (2021).

⁴² The Citizenship Act, 1955 (India).

⁴³ See KALANTRY & TARAFDER, *supra* note 41, at 4; Vatsal Raj, *The National Register of Citizens and India’s Commitment Deficit to International Law*, LONDON SCH. OF ECON. (Aug. 10, 2020), <https://blogs.lse.ac.uk/humanrights/2020/08/10/the-national-register-of-citizens-and-indias-commitment-deficit-to-international-law/> [perma.cc/JAY5-WRV6].

⁴⁴ See Raj, *supra* note 43; see, e.g., Amrita Hari & Sugandha Nagpal, *The National Register of Citizens (NRC) in India and the Potential for Statelessness in situ: A Cautionary Tale from Assam*, 30 CONTEMP. S. ASIA 194 (2022); Abu Sufian, *Geopolitical of the NRC-CAA in Assam: Impact on Bangladesh-India Relations*, 23 ASIAN ETHNICITY 556 (2022); Chetna Sharma, *National Register of Citizens, Assam, India: The Tangled Logic of Documentary Evidence*, 22 J. IMMIGR. & REFUGEE STUD. 225 (2022); Salah Punathil, *Precarious Citizenship: Detection, Detention, and ‘Deportability’ in India*, 26 CITIZENSHIP STUD. 55 (2022).

⁴⁵ See KALANTRY & TARAFDER, *supra* note 41, at 9; Billy Perrigo, *4 Million Indian Citizens Could Be Made Stateless Tomorrow. Here’s What to Know*, TIME (Aug. 30, 2019), <https://time.com/5665262/india-national-register-of-citizens-stateless-assam/> [https://perma.cc/996K-B57W].

⁴⁶ See Hari & Nagpal, *supra* note 44; Sufian *supra* note 44.

⁴⁷ See Hari Sreenivasan, *India’s Immigration Crackdown Leaves Nearly 2 Million in Limbo*, PBS NEWSHOUR (Feb. 22, 2020, 5:19 PM), <https://www.pbs.org/newshour/show/indias-immigrant-crackdown-leaves-nearly-2-million-stateless> [https://perma.cc/WP5Z-HERW].

⁴⁸ See Sreenivasan, *supra* note 47; see also Angshuman Choudhury, *Nellie Massacre: 40 Years Later, a Cautionary Tale for Today’s India*, THE WIRE (Feb. 23, 2023),

prominent supporter of the NRC is Abhijit Sarma, the leader of “a nonprofit called Assam Public Works, which advocates against illegal immigration.”⁴⁹ He and his allies have pushed for the detention and deportation of anyone who cannot prove Indian citizenship.⁵⁰

For advocates like Sarma, that the state could record and certify 31.1 million people as legitimate citizens was a major success.⁵¹ The problem, however, was that there were approximately 1.9 million people who claimed they had been unjustly left off the register—many through no fault of their own.⁵² For some, it was a matter of their documentation inexplicably being rejected, even though others with similar paperwork had been registered accordingly.⁵³ Then, there were people whose lineal ancestors had been recorded as citizens, but because the descendants had been too destitute to retain, possess, or produce evidence of their heritage, they were placed into the same category as immigrants found to be unlawfully within the country.⁵⁴

In 2022, the central government’s Comptroller and Auditor General’s office found that there were systematic errors and “haphazard”⁵⁵ administration of the NRC collection in Assam. The office thereafter ordered a review of the entire process to ensure that Indian citizens were not being wrongly detained.⁵⁶ As of this writing, Assam is reviewing its protocol on how best to correct these various irregularities.⁵⁷

<https://thewire.in/communalism/nellie-massacre-40-years-later-a-cautionary-tale-for-todays-india> [perma.cc/RJP4-QUZQ].

⁴⁹ See Sreenivasan, *supra* note 47.

⁵⁰ *Id.* See also KALANTRY & TARAFDER, *supra* note 41, at 9, for further discussion of the Assam Public Works.

⁵¹ See KALANTRY & TARAFDER, *supra* note 41, at 9; Sheikh Saaliq, *Citizenship List in Indian State Leaves Out Almost 2 Million*, PBS NEWS WEEKEND (Aug. 31, 2020), <https://www.pbs.org/newshour/world/citizenship-list-in-indian-state-leaves-out-almost-2-million> [perma.cc/G9TN-GB3X].

⁵² See KALANTRY & TARAFDER, *supra* note 41, at 4; Saaliq, *supra* note 51.

⁵³ See KALANTRY & TARAFDER, *supra* note 41, at 9; Saaliq, *supra* note 51.

⁵⁴ See KALANTRY & TARAFDER, *supra* note 41, at 9, 19–22; Saaliq, *supra* note 51; see also ABHISHEK SAHA, NO LAND’S PEOPLE: THE UNTOLD STORY OF ASSAM’S NRC CRISIS (2021); see generally HARSH MANDER & NAVSHARAN SINGH, THIS LAND IS MINE, I AM NOT OF THIS LAND: CAA-NRC AND MANUFACTURE OF STATELESSNESS (2021).

⁵⁵ See PTL, *CAG Report Flags Risk of Data Tampering in Assam’s NRC Updation Process*, OUTLOOK INDIA (Dec. 25, 2022, 3:15PM), <https://www.outlookindia.com/national/cag-report-flags-risk-of-data-tampering-in-assam-s-nrc-updation-process-news-248105> [perma.cc/Q7MA-52M8].

⁵⁶ *Id.*

⁵⁷ *Id.*

In addition to the NRC, in December of 2019, India separately passed a similarly titled Citizenship Amendment Act (CAA).⁵⁸ The government touted the CAA as providing a fast-tracked way “to make illegal migrants who are Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan, eligible for citizenship.”⁵⁹ Persecution of these religious groups in these countries, the government contended, was a major international human rights violation, and India was now going to work to alleviate these migrants’ plight.⁶⁰

Defenders of the CAA vigorously refuted the charge that the 2019 law intentionally excluded Muslim migrants from protection in India.⁶¹ Supporters stated that Muslims could still apply for citizenship through the regular immigration process.⁶² And, moreover, these supporters contended that there was no need to include Muslims in the bill because the three above-mentioned countries were predominantly Muslim, either by population, by national identity (through constitutional language), or by their attempts to convert non-Muslims to their faith.⁶³

Critics, however, have argued that the law’s failure to mention one religious community (i.e., Muslims), while explicitly offering aid, benefits, and protections to others effectively demarcates individuals

⁵⁸ See *The Citizenship (Amendment) Bill 2019*, PRS, <https://prsindia.org/billtrack/the-citizenship-amendment-bill-2019> [perma.cc/EDD4-JNRF]. For a broader discussion of the citizenship issue see e.g., KALANTRY & TARAFDER *supra* note 41 at 7–14; Abhinav Chandrachud, Paper Presentation for New Zealand India Research Institute at the University of Wellington (2020), <https://www.wgtn.ac.nz/nziri/events/past-events/2020-events> [https://perma.cc/VX57-XD5Y].

⁵⁹ See *The Citizenship (Amendment) Bill, 2019*, *supra* note 58.

⁶⁰ See *Citizenship Amendment Bill*, BBC NEWS (Dec. 11, 2019), <https://www.bbc.com/news/world-asia-india-50670393> [perma.cc/GS3B-V76P] (For that reason, the advocates of the act argued that it rightly “amend[ed] provision . . . [within the original law stating that] a person must have lived in India or worked for the federal government for at least 11 years before they can apply for citizenship. [As they noted,] there will be an exception for members of six religious minority communities - Hindu, Sikh, Buddhist, Jain, Parsi and Christian - if they can prove that they are from Pakistan, Afghanistan or Bangladesh.”).

⁶¹ *Id.*

⁶² *Id.*

⁶³ See *id.*; see also *Citizenship (Amendment) Bill: Amit Shah Says Indian Muslims Have Nothing to Fear*, ECON. TIMES (Dec. 11, 2019), <https://economictimes.indiatimes.com/news/politics-and-nation/citizenship-amendment-bill-amit-shah-says-indian-muslims-have-nothing-to-fear/articleshow/72481306.cms?from=mdr> [perma.cc/WGM7-JWTW] (arguing that Indian Muslims who were citizens of India had no reason to be afraid of the 2019 amendment. Among the leaders who favored the law was Home Minister Amit Shah) (“No provision in [the] citizenship bill touches citizenship of Muslims. Indian Muslims are citizens of the country and will remain so. [The] Citizenship bill is not to snatch anyone’s Indian citizenship. Muslims have no need to fear or worry.”).

along religious lines, which has long been an anathema to the Indian Constitution's historically secular principles.⁶⁴ Following the CAA's enactment, there were widespread protests across the country—particularly from university students.⁶⁵ At the heart of this outcry was an empirical point: namely, Muslims from other neighboring majority-Muslim countries *were* facing persecution and looking to India for protection, including Shi'a and Ahmadi Muslims.⁶⁶

For these opponents, the CAA was just another indicator of the overall tenor of the government's hostility towards Muslims, including those who were Indian citizens.⁶⁷ That there was explicit, aggressively anti-Muslim rhetoric by the government and its allies was also especially troubling.⁶⁸ It was this worry that eventually prompted the amendment's opponents to submit over two hundred petitions to the Indian Supreme Court asking for the new law to be declared unconstitutional.⁶⁹

⁶⁴ See Madhav Khosla, *India's Founding Values Are Threatened by Sinister New Forms of Oppression*, THE GUARDIAN (Dec. 28, 2019), <https://www.theguardian.com/commentisfree/2019/dec/28/indias-founding-values-are-threatened-by-sinister-new-forms-of-oppression> [perma.cc/7SPA-CCFW] (noting specifically how “the government amended the citizenship law to speed up applications for refugees from surrounding countries who are Hindu, Christian, Parsi, Jain or Buddhist – but not Muslim”). See generally MADHAV KHOSLA, *INDIA'S FOUNDING MOMENT: THE CONSTITUTION OF A MOST SURPRISING DEMOCRACY* (2020); ARUN K. THIRUVENGADAM, *THE CONSTITUTION OF INDIA: A CONTEXTUAL ANALYSIS* (2016); SUNIL KHILNANI ET AL., *COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA* (2016).

⁶⁵ See, e.g., Archana Chaudhary & Iain Marlow, *Why India's Students Are Angry and Its Muslims Are Worried*, WASH. POST (Dec. 19, 2019), <https://indianexpress.com/article/opinion/columns/caa-protests-citizenship-law-jamia-amu-6183346/> [https://perma.cc/B4MQ-MPKW]; see also Harsh Mander, *CAA Protests Mark Collective Rejection of Toxic Politics and Policies that Dominate Public Life*, THE INDIAN EXPRESS (Dec. 25, 2019), <https://indianexpress.com/article/opinion/columns/caa-protests-citizenship-law-jamia-amu-6183346/> [perma.cc/SUR3-TH8F].

⁶⁶ See Harrison Akins, *The Citizenship (Amendment) Act in India*, U.S. COMM'N INT'L RELIGIOUS FREEDOM (Feb. 2020), https://www.uscirf.gov/sites/default/files/2020%20Legislation%20Factsheet%20-%20India_0_0.pdf [perma.cc/YD9-MAY5].

⁶⁷ See Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India*, 14 L. & ETHICS OF HUM. RTS. 49 (2020) (focusing more generally on the tenor of the government's actions over the years).

⁶⁸ See Akins, *supra* note 66.

⁶⁹ See R. Balaji, *CAA Hearing in Supreme Court Put Off Again*, THE TELEGRAPH ONLINE (Dec. 7, 2022), <https://www.telegraphindia.com/india/caa-hearing-in-supreme-court-put-off-again/cid/1902389> [https://perma.cc/GQ49-YYM9]; see also Akins, *supra* note 66 (noting that “a number of chief ministers, including in Kerala, Punjab, and West Bengal, announced that they would refuse to implement the law in their states with the Kerala government also challenging the law in the Supreme Court”).

As this Study went to publication, the government stated that it needed more time to respond to these lawsuits. It has also held off on the actual implementation of the CAA.⁷⁰ All the while, millions of noncitizen migrants continue to live in perpetual uncertainty.⁷¹ Sadly, due to the inadequate immigration infrastructure that exists within the country, the situation will likely not improve any time soon.

II. PRECEDENTIAL HURDLES NONCITIZEN MIGRANTS FACE IN INDIA

A. THE ROHINGYAS AND THE *SALIMULLAH* JUDGMENT

In 2021, the Supreme Court of India handed down an important judgment in *Salimullah v. Government of India*, which addressed the status of a discrete group of noncitizens: the Rohingya Muslims from Myanmar.⁷² Four years earlier, Myanmar's military government engaged in an even more severe form of autocratic rule than it had in previous periods, which forced some seven hundred thousand Rohingyas to leave the country.⁷³ The vast majority settled in camps within Bangladesh, but over twenty thousand migrated to India.⁷⁴ In *Salimullah*, the Indian Supreme Court refused to stay the deportation order of a group of Rohingyas who had been held in the northern Indian region of Jammu.⁷⁵

⁷⁰ See *Union Home Ministry Seeks Another Six Months to Frame CAA Rules*, THE WIRE (Jan. 8, 2023), <https://thewire.in/government/union-home-ministry-seeks-another-six-months-to-frame-caa-rules> [perma.cc/V5YX-NMQW] (This is now the seventh time the law has been delayed from coming into existence.); Balaji, *supra* note 69.

⁷¹ See Singh, *supra* note 17 (detailing the many migrants who live in desperation).

⁷² See Writ Petition Order, Mohammad Salimullah v. Union of India, AIR 2021 SC 1789 (2021).

⁷³ *Rohingya Refugee Crisis Explained*, USA FOR UNHCR: THE UN REFUGEE AGENCY (July 13, 2022), <https://www.unrefugees.org/news/rohingya-refugee-crisis-explained/> [perma.cc/6C5K-3HKQ].

⁷⁴ *Id.*

⁷⁵ See Writ Petition Order, Mohammad Salimullah v. Union of India, AIR 2021 SC 1789 ¶ 15 (2021) (noting, though, that due process had to be followed, or as the Court put it, the noncitizens “shall not be deported unless the procedure prescribed for such deportation is followed”). For a thoughtful article on this case, see generally Atul Alexander, *Critical Analysis of Mohammad Salimullah v. Union of India: Has the Supreme Court of India Acted as Executive*, 3 CMR U. J. CONTEMP. LEGAL AFF. 113 (2021), <https://www.cmr.edu.in/school-of-legal-studies/journal/wp-content/uploads/2022/02/06-Critical-Analysis-of-Mohammad-Salimullah-v-Union-of-India-Has-the-Supreme-Court-of-India-acted-as-Executive.pdf> [perma.cc/4C4N-C9RG]; see also Shriansh Jaiswal & Ananya Kumar, *India's Response to Rohingyas: A Gross Misuse of Defense of National Security and Turning Away from Its International and*

It is important to note that the Rohingyas who have recently migrated to India are categorized as refugees. According to Amnesty International, “A refugee is a person who has fled their own country because they are at risk of serious human rights violations and persecution there.”⁷⁶

The United Nations has labeled the Rohingyas as one of the most persecuted communities in the world.⁷⁷ Dating back to the 1970s, Rohingya Muslims fled Myanmar in search of safer places to live and work.⁷⁸ Historically, Bangladesh has also been the main recipient of these refugees,⁷⁹ with India serving as an alternative destination site.⁸⁰ Including the twenty thousand from the recent wave, today it is estimated that there are more than forty thousand Rohingya Muslims in India.⁸¹ Yet, even in Myanmar, the Rohingya people are effectively stateless. This is because the Myanmar government refuses to recognize them as citizens despite their presence over countless generations.⁸²

Unfortunately, rather than seeing this displaced population as deserving protection, various politicians and anti-immigration activists in

Constitutional Obligations, JURIST (July 2, 2021),

<https://www.jurist.org/commentary/2021/07/https-www-jurist-org-commentary-2021-07-jaiswal-kumar-rohingya-muslims-national-security-india/> [perma.cc/VSD2-7YT3].

⁷⁶ *Refugees, Asylum Seekers, and Migrants*, AMNESTY INT’L, <https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/#:~:text=The%20terms%20%E2%80%9Crefugee%E2%80%9D%2C%20%E2%80%9C,there%20is%20a%20legal%20difference> [perma.cc/F4XU-XGFX] (noting that “risks to their safety and life were so great that they felt they had no choice but to leave and seek safety outside their country because their own government cannot or will not protect them from those dangers. Refugees have a right to international protection”).

⁷⁷ See *Rohingya Refugee Crisis Explained*, *supra* note 73.

⁷⁸ *Burma’s Path to Genocide*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://exhibitions.ushmm.org/burmas-path-to-genocide/timeline> [perma.cc/JD3A-54KW].

⁷⁹ See *Rohingya Refugees Demand Citizenship and Security on First Return to Myanmar*, CNN (May 7, 2023) (first published by Reuters) (noting that today approximately “a million Rohingya Muslims live in squalid camps in the Bangladesh border district of Cox’s Bazaar”) <https://www.cnn.com/2023/05/07/asia/rohingya-myanmar-repatriation-visit-intl-hnk/index.html> [perma.cc/DHQ7-FR57].

⁸⁰ See *Rohingya and the CAA: What is India’s Refugee Policy?*, BBC NEWS (Aug. 19, 2022) <https://www.bbc.com/news/world-asia-india-62573446> [perma.cc/6HUI-EDNH].

⁸¹ *Id.*

⁸² *Id.*; see *Rohingya Refugees Demand Citizenship and Security on First Return to Myanmar*, *supra* note 79. For an edited volume on the plight of this community, see generally NASREEN CHOWHORY & BISWAJIT MOHANTY, *CITIZENSHIP, NATIONALISM, AND REFUGEEHOOD OF ROYINGHYAS OF SOUTH ASIA* (2020). For an important resource on statelessness in India, see *Citizenship and Statelessness in India*, MELBOURNE L. SCH., <https://law.unimelb.edu.au/centres/statelessness/research/research-projects/citizenship-and-statelessness-in-india> [perma.cc/4SLS-MHNP].

India have argued this group is mainly comprised of “illegal migrants.”⁸³ This rhetorical move has allowed for the Rohingyas to be discursively framed as threatening both India’s national security and its economy (in terms of supplanting Indian citizens from jobs). And, particularly regarding the former, the Supreme Court in *Salimullah* had no interest in challenging the government’s position.⁸⁴

Specifically, the court showed great deference to intelligence officials who “raised serious concerns about the threat to the internal security of the country”⁸⁵ posed by the Rohingyas. Through what American scholars might call the plenary power approach, the Indian Supreme Court restrained itself from entering the national security space, and in the process, clearly gestured that it believed the prime minister and Parliament ought to have virtually sole control over this field.⁸⁶

The court’s interpretation is problematic in that it leaves no room for an alternative analysis. As different observers have argued, India indeed has international human rights obligations that call for protecting petitioners like the Rohingyas in this case.⁸⁷ It is true that India is not a party to the 1951 Refugee Convention or its corresponding 1967 protocol, but the court’s judgment disregarded the fact that India has historically adhered to customary international law, which includes respecting the doctrine of nonrefoulement—which means not “returning individuals to a country where there is a real risk of being subjected to persecution, torture, inhuman, or degrading treatment or any other human rights violation.”⁸⁸

⁸³ See *Rohingya Refugees in Arbitrary Detention, Denied Exit Permissions by India: Report*, THE HINDU (May 19, 2023), <https://www.thehindu.com/news/national/rohingya-refugees-in-arbitrary-detention-denied-exit-permissions-by-india-report/article66867255.ece> [perma.cc/FPE4-6L3R]; see also Douglas McDonald-Norman, *Deprived of Life: Rohingya Asylum Seekers and the Limits of Constitutional Protections in India*, 6 INDIAN L. REV. 243 (2022); Farrah Ahmed & Balu G. Nair, *Administering Indian Citizenship*, 7 INDIAN L. REV. 51 (2023); see generally ROMILA THAPUR, N. RAM, GAUTAM BHATIA, & GAUTAM PATEL, ON CITIZENSHIP (2021).

⁸⁴ See Writ Petition Order, *Mohammad Salimullah v. Union of India*, AIR 2021 SC 1789 ¶ 10 (2021).

⁸⁵ *Id.* ¶¶ 10–11.

⁸⁶ *Id.* (noting that this type of approach to adjudication is hardly *sui generis* in that it involves “(i) the threat to internal security of the country; (ii) the agents and touts providing safe passage into India for illegal immigrants due to the porous nature of the landed borders. Moreover, this court has already dismissed [a petition] filed for similar relief, in respect of those detained in Assam.”).

⁸⁷ See Alexander, *supra* note 75, at 121; Jaiswal & Kumar, *supra* note 75.

⁸⁸ See *Non-refoulement*, MIGRATION AND HOME AFFAIRS OF EUROPEAN COMM’N, https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/nonrefoulement_en#:~:text=In%20the%20global%20context%2C%20a,any%20other%20human%20rights%20violation [perma.cc/S5QY-82BJ]. This point is also raised by

The question is what effect the *Salimullah* decision might have on other noncitizens who may also (incorrectly) be categorized as “illegal migrants.”⁸⁹ Two authors, Malcolm Katrak and Shardool Kulkarni, have suggested that the Indian Supreme Court and different state high “courts have incorporated and internalized several norms of international law.”⁹⁰ Thus, the reach of *Salimullah* may be limited. However, those who are less sanguine point to the court’s rulings in two earlier, but relevant, cases, decided in 2005 and 2007, respectively.

B. THE SONOWAL CASES OF 2005 AND 2007

The above discussion on the NRC offered context to the recent developments in Assam involving noncitizen migrants. Some years prior, the Indian Supreme Court handed down two decisions, referred to as *Sonowal-I* and *Sonowal-II*, which were the foundation and impetus for the later, more aggressive actions the Assam government took on immigration.

There are three historical pieces of law that form the “executive underpinning”⁹¹ of India’s immigration system today. First, a year before India achieved independence, the Foreigners Act of 1946 was enacted.⁹² Originally divided into seventeen separate sections, the law authorized the government to determine who could enter the country, who could remain, and who was subject to deportation.⁹³ Second, in 1955, the Indian

Alexander, *supra* note 75, at 121; Jaiswal & Kumar, *supra* note 75; see also Malcolm Katrak & Shardool Kulkarni, *Refouling Rohingyas: The Supreme Court of India’s Uneasy Engagement with International Law*, 7 J. LIBERTY & INT’L. L. 116 (2021) (noting that India is also not a party to the 1967 Refugee Protocol); *id.* at 119.

⁸⁹ For another critique of how this community has been so derisively labelled, see Somya Lakhani, *Rohingyas as Refugees, Not Illegal Migrants: SC Advocate Colin Gonsalves*, THE QUINT (Aug. 19, 2022), <https://www.thequint.com/news/india/rohingyas-are-refugees-not-illegal-migrants-says-supreme-court-advocate-colin-gonsalves#read-more> [perma.cc/F2QA-NY9F].

⁹⁰ See Katrak & Kulkarni, *supra* note 88, at 118 (citing Lavanya Rajamani, *International Law and the Constitutional Schema*, in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 145 (Sujit Choudhry, Madhav Khosla, & Pratap Bhanu Mehta eds., 2016) (discussing two key Indian Supreme Court cases along these lines: *Gramophone Company of India Ltd. v. Birendra Bahadur Pandey* (1984) 2 SCC 534 (India) and *Vishaka v. State of Rajasthan* (1997) 6 SCC 241 (India)).

⁹¹ See Atreyo Banerjee, *Suspicion as Evidence: The Supreme Court’s Sarbananda Sonowal Judgments, and the Chimera of Legitimacy of Foreigner Tribunals*, THE LEAFLET (Sept. 27, 2021), <https://theleaflet.in/suspicion-as-evidence-the-supreme-courts-sarbananda-sonowal-judgments-and-the-chimera-of-legitimacy-of-foreigner-tribunals/> [https://perma.cc/W9WW-BZ7E].

⁹² The Foreigners Act, 1946; KALANTRY & TARAFDER *supra* note 41, at 7.

⁹³ The Foreigners Act, 1946, Preamble.

Parliament passed its first postindependence Citizenship Act.⁹⁴ This law helped define who could qualify as an Indian citizen, and it has been amended five times, including in 2019, when the changes described in Part I.B of this Study were made.⁹⁵ Third, in 1964, the central government issued the Foreigners Tribunal Order,⁹⁶ which operationalized the 1946 act through the creation of adjudicative forums.⁹⁷ Essentially, where the central or a state government sought to determine whether an individual was to be deemed a “foreigner” under the statute, it needed to “refer the question . . . to a Tribunal to be constituted for the purpose”⁹⁸ of this request.

However, these tribunals—which were supposed to serve as quasi-immigration courts—never really came to fruition in any meaningful way.⁹⁹ In the early 1970s, as Pakistan faced its civil war, there was a mass exodus of people living in what was then East Pakistan (now Bangladesh) fleeing into northeast India.¹⁰⁰ Estimates are that some ten

⁹⁴ KALANTRY & TARAFDER *supra* note 41, at 7.

⁹⁵ The Citizenship Act, 1955, §§ 3–7 (noting how citizenship could be acquired through “birth,” “descent,” “registration,” “naturalization,” and for those who are part of territories (rather than states) and who live in Assam). The Act was amended in 1986, 2003, 2005, 2015, and the 2019 CAA. *Citizenship Act, 1955*, UNACADEMY, <https://unacademy.com/content/clat/study-material/legal-reasoning/citizenship-act-1955/> [<https://perma.cc/T2X9-6RTS>]. Additionally, there is an interplay between this statute and the Constitution of India. See India Const. art. 5–11. For an important treatment of this subject, see Niraja G. Jayal, *Citizenship*, in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION (Sujit Choudhry, Madhav Khosla, & Pratap Bhanu Mehta eds., 2016) (discussing a number of cases where the Supreme Court adjudicated on issues relating to how residency and intentions of residency can and cannot be tied to claims of citizenship). Professor Gopal Jayal is a leading authority on citizenship in India. For other work that she has authored on this subject, see, e.g., NIRAJA G. JAYAL, *CITIZENSHIP IMPERILED: INDIA’S FRAGILE DEMOCRACY* (2021); see generally, NIRAJA G. JAYAL, *CITIZENSHIP AND ITS DISCONTENTS* (2013).

⁹⁶ The Foreigners (Tribunals) Order, 1964 (Sep. 23, 1964). For a thoughtful discussion of this order, see KALANTRY & TARAFDER., *supra* note 41, at 10–14; see also, Talha A. Rahman, *Identifying the ‘Outsider’: An Assessment of Foreigner Tribunals in the Indian State of Assam*, 2 STATELESSNESS & CITIZENSHIP REV. 112 (2020).

⁹⁷ The Foreigners (Tribunals) Order, 1964, § 2(1) (Sep. 23, 1964); KALANTRY & TARAFDER, *supra* note 41, at 10–14.

⁹⁸ The Foreigners (Tribunals) Order, 1964, § 2(1) (Sep. 23, 1964) (noting how such a referral could be made by “the Union territory administration or the District Collector or the District Magistrate”). For a discussion of this framework, see Banerjee, *supra* note 91.

⁹⁹ See KALANTRY & TARAFDER, *supra* note 41, at 8–14; see Marc Galanter & Jayanth K. Krishnan, “*Bread for the Poor*”: Access to Justice and the Rights of the Needy in India, 55 HASTINGS L. J. 789 (2004) (discussing the historic problems facing specialized tribunals in India more broadly).

¹⁰⁰ For a study on this point, see ABHIJAT DASGUPTA, *DISPLACEMENT AND EXILE: THE STATE-REFUGEE RELATIONS IN INDIA* (2016); see also Moosa Izzat, *The Chakmas’ Struggle for Citizenship: Breaking Down India’s Citizenship Acquisition Regime*, 15 NUJS L. REV. 346

million people “crossed over to the Indian states of West Bengal, Tripura, Meghalaya, and Assam between March-end and mid-December 1971.”¹⁰¹ Subsequent census data show that between 1981 and 2001, over three million more Bangladeshis arrived in India,¹⁰² with those states housing most of the migrants.¹⁰³

Yet, for those noncitizens whom the Indian government believed were in the country unlawfully, there was not—and still has not been—a fully structured, nationwide adjudicative process to handle such immigration cases.¹⁰⁴ The only foreigners tribunals that have emerged have been in the state of Assam, and, even with that, their presence has been ad hoc and hastily administered.¹⁰⁵ One organization that has attempted to track these forums, the Centre for Justice and Peace, found that respondents are often not personally notified of their summons but rather are informed via “notices . . . posted on electricity poles . . . [which] is a clear violation of set law and procedure.”¹⁰⁶ Similarly, another group, Clearias, found that judicial delays within the Assamese proceedings were dreadfully long. “Between 1985 to October 2019, there were 468,905 cases referred to [the approximately three hundred] Foreigners Tribunals,” with some taking over six years to resolve.¹⁰⁷

(2022) (a study on the Chakma refugees who were from Bangladesh (then East Pakistan in the 1960s), and sought safe haven in the state of Arunachal Pradesh, India).

¹⁰¹ See Subhradipta Sarkar, *Treatment of the 1971 East Bengali Refugees: A Forgotten Experience*, TIMES OF INDIA (Dec. 19, 2021), <https://timesofindia.indiatimes.com/blogs/sarkarthoughts/treatment-of-the-1971-east-bengali-refugees-a-forgotten-experience/> [https://perma.cc/PKP9-756N]; see also KALANTRY & TARAFDER, *supra* note 41, at 4; Izzat, *supra* note 100, at 347.

¹⁰² See Aswini Kumar Nanda, *Immigration from Bangladesh to India Based on Census Data*, 14 ASIAN & PAC. MIGRATION J. 487, 487 (2004).

¹⁰³ *Id.* (noting that these states have ninety-seven percent of the migrants). At the present time, there is a dispute as to how many migrants from Bangladesh are actually in the country. See Rudabeh Shahid, *India's Bangladeshi Bogyman*, E. ASIA F. (July 8, 2022), <https://eastasiaforum.org/2022/07/08/indias-bangladeshi-bogyman/> [https://perma.cc/7EGS-3BBA] (skeptically observing that “anti-Bangladeshi rhetoric continues to dominate Indian domestic politics, with the political establishment claiming there are 20 million undocumented Bangladeshi migrants living in India”).

¹⁰⁴ See KALANTRY & TARAFDER, *supra* note 41, at 8–15, 25–28; CJP Team, *Foreigners' Tribunals: Why Were They Established and How Do They Operate?*, COMBINED JEWISH PHILANTHROPIES (Apr. 15, 2021), <https://cjp.org.in/all-you-ever-wanted-to-know-about-foreigners-tribunals/> [https://perma.cc/GMW8-JVZ9].

¹⁰⁵ See KALANTRY & TARAFDER, *supra* note 41, at 8–15, 25–28; CJP Team, *supra* note 104.

¹⁰⁶ See CJP Team, *supra* note 104.

¹⁰⁷ See Clearias Team, *Foreign Tribunals*, CLEARIAS, <https://www.clearias.com/foreigners-tribunal> [https://perma.cc/9DST-2GVP] (Dec. 27, 2023). Cases often will go from the tribunal to the Guwahati High Court on appeal, which is why cases may take six-plus years to resolve a dispute comes. The Clearias report indicates that there are cases that can take over a decade to resolve

All this background is important to understand how the two *Sonowal* cases arose. During the 1970s and 1980s, Assam witnessed great turmoil as Bangladeshi immigrants faced backlash from local residents.¹⁰⁸ An anti-immigrant campaign known as the Assam Movement emerged, with the agitation against these noncitizens most intensely manifesting between 1979 and 1985.¹⁰⁹ In fact, in February of 1983, horrific violence occurred when “a huge mob of Tiwa, Koch, caste Hindu Assamese and members of other local communities brutally slaughtered more than 2,000 Bengal-origin Muslims in and around Nellie, a town in the central Assam district of Morigaon (back then, Nagaon district).”¹¹⁰

In response, and as a means of protecting this religiously minoritized community, Parliament adopted the Illegal Migrants Detention Tribunal Act (IMDT) of 1983.¹¹¹ The goal was to enact procedural safeguards, including specialized immigration courts where, in contrast to Section 9 of the Foreigner’s Act, the government would now have the burden of establishing that individuals were unlawfully in the country.¹¹² Moreover, the IMDT pertained only to the state of Assam.¹¹³

Petitioner Sarbananda Sonowal objected to this statute in his lawsuit against the Indian government.¹¹⁴ Currently, Sonowal is a cabinet head in the ruling Bharatiya Janata Party government.¹¹⁵ Prior to the lawsuit he filed in the early 2000s, he was the “former president of the All Assam Students Union, the largest non-political students’ organisation in

just within the tribunal itself. *Id.*; CJP Team, *supra* note 104 (noting there are 300 tribunals in the state of Assam).

¹⁰⁸ See V. Venkatesan, *The NRC Case: The Supreme Court’s Role*, FRONTLINE (Sept. 25, 2019), <https://frontline.thehindu.com/coverstory/article29498707.ece/amp/> [<https://perma.cc/LN8L-BTG7>].

¹⁰⁹ See Choudhury, *supra* note 48.

¹¹⁰ *Id.*; see also KALANTRY & TARAFDER, *supra* note 41 at 8.

¹¹¹ See KALANTRY & TARAFDER, *supra* note 41, at 8; The Illegal Migrants Detention Act, 1983 <https://www.indiacode.nic.in/bitstream/123456789/1766/3/a1983-39.pdf> [<https://perma.cc/F8WE-RAH3>].

¹¹² See KALANTRY & TARAFDER, *supra* note 41 at 8; The Illegal Migrants Detention Act, *supra* note 111 at ch. II; See also The Foreigners Act, 1946, §9.

¹¹³ See The Illegal Migrants Detention Act, 1983, § 1; KALANTRY & TARAFDER, *supra* note 41 at 9.

¹¹⁴ See Sarbananda Sonowal v. Union of India & Anr, A.I.R. 2005 S.C. 2920; KALANTRY & TARAFDER, *supra* note 41 at 9.

¹¹⁵ See Sarbananda Sonowal, *L. Murugan Take Oath as Rajya Sabha Members*, NDTV (Oct. 21, 2021), <https://www.ndtv.com/india-news/sarbananda-sonowal-l-murugan-take-oath-as-rajya-sabha-members-2560451> [<https://perma.cc/Y3B6-EGNX>].

the State, which was responsible for leading the student movement in Assam on the issue of immigrants in the late 1970s and early 1980s.”¹¹⁶

In its 2005 ruling, the Supreme Court sided with Sonowal.¹¹⁷ It held that the central government had a duty to ensure Assam’s security under Article 355 of the Indian Constitution, and that the IMDT interfered with this obligation.¹¹⁸ The court further held that the law unfairly targeted Assam—it was the only state in the country that had the burden of proving noncitizenship of those it wanted to deport, while no other subnational government was under the same obligation.¹¹⁹ For that reason, the court vitiated the IMDT and reinstated the Foreigners Act as the primary statute governing deportation matters.¹²⁰

In 2007, the court further restricted the central government’s efforts to provide protections to noncitizens by invalidating an administrative amendment to the Foreigners Tribunal Order in *Sonowal II*.¹²¹ The amendment “required the Foreigners Tribunal to first consider whether there were sufficient grounds for proceeding against a person suspected of being an illegal migrant and only on the Tribunal being satisfied that the basic facts were *prima facie* established could a notice be issued to the person concerned.”¹²² In other words, the statute provided that noncitizens were entitled to enhanced due process rights under the principle of “natural justice.”¹²³

¹¹⁶ See Venkatesan, *supra* note 108.

¹¹⁷ See Sarbananda Sonowal v. Union of India & Anr, A.I.R. 2005 S.C. 2920, ¶ 58.

¹¹⁸ See *id.*

¹¹⁹ *Id.* The Court noted that this situation violated Article 14 of the Constitution, which mandates that “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.” India Const. art. 14; For a further discussion, see KALANTRY & TARAFTER, *supra* note 41 at 9.

¹²⁰ See Sarbananda Sonowal v. Union of India & Anr, A.I.R. 2005 S.C. 2920, ¶ 57; KALANTRY & TARAFTER, *supra* note 41 at 9. For an argument that the outcome of the decision was correct, while the reasoning was not, see Parag Satya, *Sarbananda Sonowal v. Union of India, A.I.R. 2005 S.C. 2920*, 18 STUDENT BAR REV. 95 (2006) (noting that a better analysis “could have been done by (a) avoiding the use of Article 355; (b) using Article 14 in a more nuanced and conceptually sound manner; (c) asserting that the right to culture and language of the Assamese people as guaranteed under Articles 21 and 29(1) has been violated; and (d) clearly showing that the right to life of the immigrants is not violated by the application of the Foreigners Act, 19.”); *id.* at 102.

¹²¹ This case was known as *Sonowal II*, as it involved the same petitioner bring a follow-up claim against the government. See Sarbananda Sonowal v. Union of India, 2007 (1) SCC 174, ¶ 45.

¹²² See Venkatesan, *supra* note 108.

¹²³ See Sarbananda Sonowal v. Union of India, 2007 (1) SCC 174, ¶ 35. For a discussion of this point regarding natural justice, as it related to additional Indian Supreme Court jurisprudence, see KALANTRY & TARAFTER, *supra* note 41, at 27–28.

The court found the administrative amendment and these extra safeguards unnecessary.¹²⁴ It then emphasized that the government needed to have the ability to deport people they suspected of being in the country unlawfully in an expedited and efficient manner.¹²⁵ According to the court, the influx of noncitizens was a serious problem, and it was a justifiable policy goal to reign in the “uncontrolled immigration [that] . . . posed a threat to the integrity of the nation.”¹²⁶

This discussion of key Supreme Court precedent highlights two salient points. First, when the central government has sought to enhance protection for migrants, the court has not hesitated to rule against such measures.¹²⁷ Second, where the central government has argued for the deportation of noncitizens using national security as the underlying basis, we have seen the court act with great deference towards the prime minister and Parliament.

Both outcomes offer little comfort for noncitizen migrants in India. Furthermore, there have not been many other cases noncitizens can lean on for support. Emphasizing this point, in *Sonowal-I*, the court looked to long-standing legal principles used in the “UK and some other western nations,”¹²⁸ presumably illustrating the relatively thin amount of immigration precedent on the books in India.

Thus, at least from a jurisprudential perspective, the outlook of imminent change does not appear promising. That said, the next section proposes a framework for imagining what could be done to improve the conditions for this vulnerable community in the longer term.

¹²⁴ See *Sarbananda Sonowal v. Union of India*, 2007 (1) SCC 174, ¶ 44.

¹²⁵ *Id.* ¶ 45.

¹²⁶ *Id.* ¶ 64; see Venkatesan, *supra* note 108 (noting also how “the court reasoned that all the facts required to prove one’s citizenship, namely, date of birth, place of birth, name of parents and grandparents, and their place of birth and citizenship, would necessarily be within the personal knowledge of the person concerned and not of the authorities of the state”).

¹²⁷ See *Sarbananda Sonowal v. Union of India & Anr.*, A.I.R. 2005 S.C. 2920; see *Sarbananda Sonowal v. Union of India*, 2007 (1) SCC 174.

¹²⁸ See *Sonowal v. Union of India & Anr.*, A.I.R. 2005 S.C. 2920, ¶ 19.

III. PRIM—PROPOSED REFORMS FOR INDIA’S (NONCITIZEN) MIGRANTS

A. THE NEED FOR IMPROVED ADJUDICATIVE FORUMS

As we have seen, there is an absence of a dedicated, nationwide immigration court system in India. Despite an administrative order on the books for the past six decades authorizing the creation of such specialized forums, noncitizens facing deportation have been shunted into a regular court system that suffers from delays, inefficiencies, and a scarcity of lawyers willing or able to serve marginalized communities.¹²⁹ Indeed, empirical research has shown that, regardless of whether the matters are civil or criminal in nature, litigants in the regular courts encounter a host of problems that too often deprive them of due process and access to justice in a timely fashion.¹³⁰

The reasons for the dismal state of India’s lower court system are well documented.¹³¹ There has historically been a woeful lack of resources for the courts and for court personnel.¹³² For example, there are simply not enough judges to staff the lower courts. Thus, judges are overworked, underpaid, and routinely transferred, which leads to numerous docket delays.¹³³

The prevalence and abuse of interlocutory appeals by lawyers—which is a practice that dates back to British times—also contributes to extensive delays.¹³⁴ Additionally, basic essentials taken for granted in wealthier countries—reliable electricity, clean water, and other infrastructural support (e.g., modernized staff offices, judicial chambers, and hygienic common areas)—are often missing in the lower courts throughout India.¹³⁵ Lower court staff also rightly bemoan the inadequate

¹²⁹ For research on the lower courts, see Jayanth Krishnan et al., *Grappling at the Grassroots: Access to Justice in India’s Lower Tier*, 27 HARV. HUM. RTS. J. 151 (2014).

¹³⁰ See *id.*; Galanter & Krishnan, *supra* note 19; see generally Jayanth K. Krishnan & C. Raj Kumar, *Delay in Process, Denial of Justice: The Jurisprudence and Empirics of Speedy Trials in Comparative Perspective*, 42 GEO. J. INT’L L. 747 (2011).

¹³¹ See Krishnan et al., *supra* note 129; Galanter & Krishnan, *supra* note 19; see generally Krishnan & Kumar, *supra* note 130; Jayanth K. Krishnan & Patrick W. Thomas, *Surveying Key Aspects of Socio-Legal Scholarship on India: An Overview*, 11 ANN. REV. L. & SOC. SCI. 337 (2015).

¹³² See Krishnan et al., *supra* note 129.

¹³³ *Id.*; see generally Galanter & Krishnan, *supra* note 19.

¹³⁴ See Krishnan et al., *supra* note 129; see generally Galanter & Krishnan, *supra* note 19.

¹³⁵ See Krishnan et al., *supra* note 129.

ways that case files are stored and cataloged, and they complain of insufficient availability of computers and unstable internet access.¹³⁶

Interestingly, in a three-state ethnographic study of lower courts in Himachal Pradesh, Gujarat, and Maharashtra, judges were viewed with great esteem and as incorruptible by a range of respondents.¹³⁷ However, there was disillusionment and dismay that unscrupulous behavior was part of a built-in culture perpetuated by other actors working in and around the courthouses.¹³⁸

This background provides an overview of what the environment is like for those who engage with the Indian lower courts. It is worth noting that the litigants in this system are overwhelmingly everyday Indian citizens—many of whom struggle socioeconomically and must confront the numerous hurdles when navigating this difficult process.

Now, the hardships faced by noncitizens are among the most dire. Having to be part of this same environment makes it almost impossible to expect the lower courts to address cases involving immigration with deliberation, timeliness, and the attention to detail that they deserve. Therefore, the question becomes whether establishing a national set of immigration courts would effectively protect both noncitizen rights and the Indian state. In reflecting upon this inquiry, it may be helpful to consider three factors: (1) the research on specialized forums, (2) the research on national security courts, and (3) comparative immigration court models.

1. *The Research on Specialized Forums*

First, dating back decades, a string of works has examined how specialized forums serving as alternatives to regular courts have functioned in India.¹³⁹ For example, following independence in 1947, the

¹³⁶ *Id.*

¹³⁷ *See id.* (noting that judges were held in high regard by government and defense lawyers, litigants, court personnel, and adjacent staff workers).

¹³⁸ *Id.*

¹³⁹ For a good summary of these works, see Galanter & Krishnan, *supra* note 19, at 791; Marc Galanter, *The Aborted Restoration of 'Indigenous' Law in India*, in *LAW AND SOCIETY IN MODERN INDIA* (Rajeer Dhavan ed., 1989); Upendra Baxi & Marc Galanter, *Panchayat Justice: An Indian Experiment in Legal Access*, in *ACCESS TO JUSTICE: EMERGING ISSUES AND PERSPECTIVES* (Mauro Cappelletti & Bryant Garth eds., 1978); ROBERT HAYDEN, *DISPUTES AND ARGUMENTS AMONGST NOMADS: A CASTE COUNCIL OF INDIA* 83–109 (1999); Catherine S. Meschievitz & Marc Galanter, *In Search of Nyaya Panchayats: The Politics of a Moribund*

government sought to establish a set of local bodies known as *nyaya panchayats* (justice councils) that were intended to deliver results to litigating parties in a timely manner.¹⁴⁰ These forums were not sustained on a widespread level for several reasons, including that they lacked: (1) resources, (2) personnel who were sensitive to the needs of historically marginalized communities, and (3) an understanding of how democratic constitutionalism needed to be a privileged ideal over what were often highly biased local norms.¹⁴¹

By the 1970s, *nyaya panchayats* had become effectively “moribund.”¹⁴² Following the Emergency Rule period (1975–1977), the Indian Supreme Court made an affirmative decision to bring greater access to the legal process for people at the local levels.¹⁴³ Specifically, the court implemented a “relaxation of requirements of standing, [an] appointment of investigative commissions, [an] appointment of lawyers as representatives of client groups, and a so called ‘epistolary jurisdiction’ in which judges took the initiative to respond proactively to grievances brought to their attention by third parties, letters, or newspaper accounts.”¹⁴⁴ It also welcomed public interest litigation whereby petitions against the state for infringements of constitutional rights could be argued directly in the Supreme Court without having to appeal.¹⁴⁵

Institution, in 2 THE POLITICS OF INFORMAL JUSTICE: COMPARATIVE STUDIES 47–77 (Richard L. Abel ed., 1982).

¹⁴⁰ See Baxi & Galanter, *supra* note 139; Meschievitz & Galanter, *supra* note 139.

¹⁴¹ See Galanter & Krishnan, *supra* note 19, at 793; Meschievitz & Galanter, *supra* note 139.

¹⁴² See Galanter & Krishnan, *supra* note 19, at 793; Meschievitz & Galanter, *supra* note 139 (it is important to note that even though these institutions faded, their idea remained). For works that highlight this point, see Department of Legal Affairs, Report of the Expert Committee on Legal Aid—Processual Justice to the People, Government of India, Ministry of Law, Justice & Company Affairs (issued May 1973); D.A. Desai, *Alternative Dispute Resolution Mechanism: Role of Legal Profession, Dispute Commissions and Family Courts and Nyaya Panchayats—Participatory Justice*, in ROLE OF LAW AND JUDICIARY IN TRANSFORMATION OF SOCIETY: INDIA-GDR EXPERIMENTS 77, 80 (D.A. Desai ed., 1984); Upendra Baxi, *From Takrar to Karar: The Lok Adalat at Rangpur—A Preliminary Study*, 10 J. CONST. & PARLIAMENTARY STUD. 52, 60 (1976).

¹⁴³ See Galanter & Krishnan, *supra* note 19 at 794; see generally Meschievitz & Galanter, *supra* note 139.

¹⁴⁴ See Galanter & Krishnan, *supra* note 19, at 795.

¹⁴⁵ See *id.* at 795–96; Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 THIRD WORLD LEGAL STUD. 107, 121–22 (1985); Carl Baar, *Social Action Litigation in India: The Operation and Limitations of the World’s Most Active Judiciary*, 19 POL’Y STUD. J. 140, 142, 147 (1990); Rajeev Dhavan, *Law as Struggle: Public Interest Law in India*, 36 J. INDIAN L. INST. 302, 306–08 (1994); see generally UPENDRA BAXI, COURAGE CRAFT AND CONTENTION: THE INDIAN SUPREME COURT IN THE EIGHTIES (1985); EPP, *supra* note 19, at 71–110; Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM. J. COMP. L. 495, 497–98 (1989); Clark D. Cunningham,

However, even with all of these laudable efforts, which certainly brought about improvements for some communities, obtaining justice was still elusive for many.¹⁴⁶ During the 1980s, the government started to contemplate ways of establishing new specialized forums that would provide faster judicial relief.¹⁴⁷ One such initiative was utilization of the *lok adalat* (people's court), which were forums that sought to unburden the regular civil courts of their heavy caseloads.¹⁴⁸ These *lok adalats* were codified through federal law, and they have proliferated over the last three decades.¹⁴⁹ Additionally, the government has created other specialized tribunals covering an array of legal areas, including tax matters, environmental law, business disputes, consumer complaints, and bankruptcy.¹⁵⁰

Given the number of specialized courts in India, it might seem reasonable—and desirable—to have a nationwide system of immigration courts. However, we must take a cautious approach. For one thing, many of the problems associated with the lower courts have been found in specialized forums as well.¹⁵¹ Consider the issue of delay. Continuances—or what are referred to in India as adjournments—are routine in the regular courts.¹⁵² A prime motivation behind the creation of specialized forums has been to reduce the number of such adjournments to deliver more timely results.¹⁵³ Yet the research has shown that this practice, which can

Public Interest Litigation in the Indian Supreme Court: A Study in the Light of American Experience, 29 J. INDIAN L. INST. 494 (1987); Susan D. Susman, *Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation*, 13 WIS. INT'L L.J. 57 (1994); N. R. Madhava Menon, *Justice Sans Lawyers: Some Indian Experiments*, 12 INDIAN BAR REV. 446 (1985); G.L. Peiris, *Public Interest Litigation in the Indian Subcontinent: Current Dimensions*, 40 INT'L & COMP L.Q. 66 (1991); P.N. Bhagwati, *Judicial Activism and Public Interest Litigation*, 23 COLUM. J. TRANSNAT'L L. 561 (1985).

¹⁴⁶ See Galanter & Krishnan, *supra* note 19, at 796–97; see also Krishnan et al., *supra* note 129; Robert S. Moog, *Conflict and Compromise: The Politics of Lok Adalats in Varanasi District*, 25 L. & SOC'Y REV. 545 (1991).

¹⁴⁷ See Galanter & Krishnan, *supra* note 19, at 797–835.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ See Nalini Sharma, *Centre Notifies New Rules for Appointment to 14 Tribunals*, INDIA TODAY (Sept. 16, 2021, 8:34 PM), <https://www.indiatoday.in/india/story/sc-centre-new-rules-appointment-tribunals-1853657-2021-09-16> [<https://perma.cc/UR98-9AKX>].

¹⁵¹ See Krishnan et al., *supra* note 129.

¹⁵² *Id.* at 171–72; see also NATHAN REHN ET AL., JUSTICE WITHOUT DELAY: RECOMMENDATIONS FOR LEGAL AND INSTITUTIONAL REFORMS IN THE INDIAN COURTS (2010).

¹⁵³ See Krishnan et al., *supra* note 129.

be judge initiated or litigant initiated, has only replicated itself in these other bodies.¹⁵⁴

Another problem is that, just as there are not enough judges to staff the regular courts, we also see difficulty in filling vacancies in the specialized forums.¹⁵⁵ Lawyers also cause delays, which can range from filing multiple (often frivolous) motions requesting additional hearings to sometimes even failing to appear.¹⁵⁶ And the infrastructural support necessary for specialized forums to run efficiently has been lacking as well.¹⁵⁷

To be sure, the literature to-date on India's specialized forums has been sobering. The negative practices that have contributed to the shortcomings of the regular lower courts have frequently migrated to these other bodies.¹⁵⁸ These issues are extremely relevant when contemplating how best to craft a system of immigration courts that avoid repeating such patterns and, at the same time, protect both government interests and noncitizen rights.

2. *The Research on National Security Courts*

The above discussion details the many problems that have persisted in India's specialized courts for decades. Also relevant is analysis regarding India's national security courts. These forums have a long history, and the government has often focused (albeit not exclusively) on noncitizens.¹⁵⁹ A recent iteration of these courts manifested following the horrific November 26, 2008, terrorist attacks in Mumbai, when the government passed the National Investigation Agency Act (NIAA).¹⁶⁰ This statute created NIAA courts that allowed the government to try suspected terrorists in an expedited fashion.¹⁶¹

¹⁵⁴ *Id.*; see also Galanter & Krishnan, *supra* note 19.

¹⁵⁵ See Krishnan et al., *supra* note 129.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 165–66; see also Nick Robinson, *Judicial Architecture and Capacity*, in THE OXFORD HANDBOOK OF INDIAN CONSTITUTIONAL LAW 330–348 (Sujit Choudhry, Madhav Khosla, & Pratap Banu Mehta eds., 2016).

¹⁵⁸ See generally Galanter & Krishnan, *supra* note 19, at 797–835.

¹⁵⁹ See Jayanth K. Krishnan, *India's "Patriot Act": POTA and the Impact on Civil Liberties in the World's Largest Democracy*, 22 L. & INEQ. 265 (2004); see also Menaka Guruswamy, Comment, *Countering Terror or Terrorizing the Law?*, SEMINAR 2-5 (July 2009).

¹⁶⁰ See The National Investigation Agency Act, 2008; see also Guruswamy, *supra* note 159.

¹⁶¹ The National Investigation Agency Act, 2008, ch. IV.

The preceding statutes to the NIAA trace back to British colonization.¹⁶² The Crown was aggressive in enacting a series of laws that placed suspected terrorists in swift judicial proceedings.¹⁶³ In the post-1947 independence era, the Indian government continued this practice.¹⁶⁴ In 1967, for instance, Parliament passed UAPA—the Unlawful Activities Prevention Act.¹⁶⁵ After Prime Minister Indira Gandhi was assassinated in 1984, the Terrorism and Disruptive Activities (TADA) Act was authorized into law, which greatly enhanced the state’s coercive powers over terrorism suspects.¹⁶⁶ Then, in 2002, India adopted the Prevention of Terrorism Act (POTA).¹⁶⁷ And, in 2008, it amended the 1967 UAPA to include a complementary set of provisions to the NIAA.¹⁶⁸

The aforementioned statutes provided dedicated and expedited processes for adjudicating national security cases.¹⁶⁹ And noncitizens have certainly not been the only defendants charged with crimes under these statutes.¹⁷⁰ However, over the years, the rhetoric against the “foreign threat”¹⁷¹ has been prevalent within the discourse involving national security adjudication.¹⁷² Perhaps unsurprisingly, noncitizens have been parties to some of the most prominent cases involving these laws.¹⁷³

Unfortunately, these specialized courts have oftentimes failed to comply with the Indian Constitution’s guarantees of due process. It is not

¹⁶² See Jayanth K. Krishnan & Viplav Sharma, *Exceptional or Not? An Examination of India’s Special Courts in the National Security Context*, in *GUANTANAMO AND BEYOND: EXCEPTIONAL COURTS AND MILITARY COMMISSIONS IN COMPARATIVE PERSPECTIVE* (Fionnuala Ni Aolain & Orin Gross eds., 2013).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 285–86.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 286–89.

¹⁶⁷ *Id.* at 287–89; Krishnan, *supra* note 159.

¹⁶⁸ See Krishnan & Sharma, *supra* note 162, at 290–93.

¹⁶⁹ *Id.* at 285–93.

¹⁷⁰ See *India: POTA Repeal a Step Forward for Human Rights*, HUM. RTS WATCH (Sept. 22, 2004), <https://www.hrw.org/news/2004/09/22/india-pota-repeal-step-forward-human-rights> [<https://perma.cc/384R-EZDG>] (“[e]very country has the responsibility of protecting its citizens, but in India, anti-terrorism laws have become a tool for attacking the government’s critics”).

¹⁷¹ See Ali Khan Mahmudabad, *Indian Muslims and the Anti-CAA Protests: From Marginalization Towards Exclusion*, 24/25 S. ASIA MULTIDISCIPLINARY ACAD. J. 30, 38 (2020).

¹⁷² See Krishnan, *supra* note 159, at 271.

¹⁷³ See Krishnan & Sharma, *supra* note 162, at 295–97; *Mumbai Celebrates Kasab’s Death Sentence*, ONE INDIA NEW (May 6, 2010), <https://www.oneindia.com/2010/05/06/mumbaicelebrates-kasabs-deathsentence.html> [<https://perma.cc/V2XU-SMX9>]; Krishnan, *supra* note 159.

unusual, for example, for hearings to be held *in camera* without any accountability or transparency to the public.¹⁷⁴ The courts are also deemed *ad hoc* in nature, meaning that they can be established at the whim of government officials.¹⁷⁵ Furthermore, the central government has historically handpicked both prosecutors and judges.¹⁷⁶ Additionally, there is virtually no discovery process, and defendants have a limited ability to appeal decisions.¹⁷⁷

Further, when national security courts are formed, their function tends to resemble that of the regular courts.¹⁷⁸ Namely, there are delays and adjournments. Also, the infrastructural and technological maladies that plague the regular courts frequently exist within these specialized courts as well.¹⁷⁹

Finally, the jurisdictional lines between national security courts and regular courts are problematically blurred.¹⁸⁰ Several crimes listed within the various antiterrorism statutes mirror those that are found within the traditional Indian Penal Code, where defendants are tried in the regular criminal courts.¹⁸¹ As one study found, there appears to be no systematic process for determining when a defendant will be placed in a specialized national security court or a regular criminal court.¹⁸² Of course, these issues all matter for our immigration discussion. The group of people most at risk of being abused in these situations are those who lack: (1) legal representation, (2) a basic understanding of the plight in which they find themselves, and (3) citizenship.

3. *Comparative Immigration Court Models*

If India were to create a specialized immigration court system, one country that some might assert is a natural point of reference is the United States. Currently, the US immigration courts of first resort, and the body to which cases from these forums are appealed (the Board of Immigration

¹⁷⁴ Krishnan & Sharma, *supra* note 162, at 287–88, 292–93.

¹⁷⁵ *See, e.g.*, National Investigation Agency Act, 2008; Krishnan & Sharma, *supra* note 162, at 291, 300.

¹⁷⁶ *See, e.g.*, National Investigation Agency Act, 2008; *see also*, Krishnan & Sharma, *supra* note 162, at 289, 292.

¹⁷⁷ Krishnan & Sharma, *supra* note 162, at 292; *see* Krishnan, *supra* note 159, at 269–73; 280.

¹⁷⁸ *See* Krishnan & Sharma, *supra* note 162, at 300–01.

¹⁷⁹ *See id.* at 301.

¹⁸⁰ *Id.* at 293.

¹⁸¹ *Id.* at 293–301.

¹⁸² *Id.* at 299.

Appeals (BIA)), are located within the US Department of Justice (DOJ), which falls under the Executive Branch.¹⁸³ The president of the United States is the chief officer of this branch, and it is the president who appoints the head of the DOJ—the attorney general—who in turn oversees the immigration courts.¹⁸⁴

To say that politics plays a role in how immigration policy is implemented within the DOJ is a major understatement. Immigration judges, for instance, do not have tenure and can be dismissed at will.¹⁸⁵ The attorney general can overturn the BIA's judicial decisions.¹⁸⁶ There is also no right to government appointed counsel within US immigration courts, which results in many unrepresented noncitizens receiving removal orders at extremely high rates.¹⁸⁷

The deck is thus stacked against the US noncitizen. With the US immigration court backlog running over 1.3 million cases, and with cases taking over four years to resolve,¹⁸⁸ the American system may not be the model for India. Indeed, there have been calls from various observers within the United States to overhaul these courts and make them more independent.¹⁸⁹ The question then becomes whether there are other countries to which India may want to look.

¹⁸³ See Jayanth K. Krishnan, *Judicial Power—Immigration Style*, 73 ADMIN. L. REV. 317, 326–30 (2021).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*; see also AILA National, *It's Time for Immigration Court Reform*, YOUTUBE (Jan. 31, 2020), https://www.youtube.com/watch?v=8fkt-g4XG_A [<https://perma.cc/S2G5-EA69>]; see also ABA signs joint letter to Congress on establishing an independent immigration court system, ABA (July 9, 2019), <https://www.americanbar.org/news/abanews/aba-news-archives/2019/07/aba-signs-joint-letter-to-congress-on-establishing-an-independen/> [<https://perma.cc/GU3L-3QKG>].

¹⁸⁶ See Krishnan, *supra* note 183; Rebecca Baibak, *Creating an Article I Immigration Court*, 86 UNIV. CIN. L. REV. 997, 1004–05 (2018); Amit Jain, *Bureaucrats in Robes: Immigration “Judges” and the Trappings of “Courts,”* 33 GEO. IMMIGR. L.J. 261, 314–15 (2019).

¹⁸⁷ See Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 4–5, 14 (2015); Matthew S. Mulqueen, *Access to Counsel in Immigration Proceedings*, 44 LITIG. NEWS 1, 2; see also Kevin R. Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394, 2399 (2013).

¹⁸⁸ See Marisol Hernandez, *Immigration Backlogs and Congressional Funding*, BIPARTISAN POL'Y CTR. (Oct. 6, 2022), <https://bipartisanpolicy.org/explainer/immigration-backlogs/> [<https://perma.cc/PY2R-7ANE>]; Anagilmara Vilchez, *Immigration Backlog Has a U.S. Asylum-Seeker Feeling Like He's 'imprisoned in a country,'* NBC NEWS (June 2, 2023, 2:23 PM), <https://www.nbcnews.com/news/latino/asylum-seekers-are-limbo-years-immigration-backlog-rcna87228> [<https://perma.cc/7JY5-R5FL>].

¹⁸⁹ See AILA National, *supra* note 185; ABA, *supra* note 185 (arguing primarily that the immigration courts should be placed under Congress's Article I jurisdiction rather than remaining within the Executive Branch).

Given its colonial history, the British system might be another for India to consider. In 2007, the British Parliament enacted the Tribunals, Courts, and Enforcement Act.¹⁹⁰ This new law restructured how a range of legal cases—including those involving immigration—would be heard.¹⁹¹ Immigrants seeking to stave off deportation or challenge adverse rulings made by the Home Minister’s office must now take their cases to the First-Tier Tribunal (FTT).¹⁹² From the FTT, appellants can bring their cases to the Upper Tribunal (UT), and, subsequently, the Court of Appeal, and, finally, the UK Supreme Court.¹⁹³

While the 2007 law was a significant overhaul, in 2023, the British government enacted an especially controversial statute entitled the Illegal Migration Act, which severely curtailed the rights of noncitizens to be able to proceed with their legal claims at all.¹⁹⁴ As the UN’s Office of the High Commissioner for Human Rights noted, one of the law’s most ignominious provisions is that it prohibits noncitizens “from presenting refugee protection or other human rights claims, no matter how compelling their circumstances.”¹⁹⁵ Further, Prime Minister Rishi Sunak’s government has unabashedly proclaimed that these restrictions are necessary to “speed up the removal of those with no right to be here.”¹⁹⁶ Although, curiously, this statement assumes a conclusion without allowing for a hearing to determine whether such an outcome is actually warranted.

¹⁹⁰ See *Tribunals, Courts and Enforcement Act 2007*, c. 15 (UK), <https://www.legislation.gov.uk/ukpga/2007/15/contents> [<https://perma.cc/9A3Z-3A9D>].

¹⁹¹ *Id.*; see also *Tribunals, Courts and Enforcement Act 2007*, c. 15, Explanatory Notes ¶ 7 (UK), <https://www.legislation.gov.uk/ukpga/2007/15/notes> [<https://perma.cc/MP5W-J2N3>].

¹⁹² See *First-tier Tribunal*, CTS. AND TRIBUNAL JUDICIARY (2024), <https://www.judiciary.uk/courts-and-tribunals/tribunals/first-tier-tribunal/> [<https://perma.cc/FF5V-S7UE>] (noting that the FTT currently has a total of 89 judges on it who tend to sit in benches of one).

¹⁹³ See *Upper Tribunal*, CTS. AND TRIBUNAL JUDICIARY (2024), <https://www.judiciary.uk/courts-and-tribunals/tribunals/upper-tribunal/> [<https://perma.cc/4CYC-4JUU>]; see also *The Right to Remain Toolkit*, RIGHT TO REMAIN, <https://righttoremain.org.uk/toolkit/ut/> [<https://perma.cc/4YVW-TBNK>].

¹⁹⁴ See *Illegal Migration Act 2023*, c. 37 (UK), <https://www.legislation.gov.uk/ukpga/2023/37/enacted> [<https://perma.cc/BUX4-SEQK>].

¹⁹⁵ *UK Illegal Migration Bill: UN Refugee Agency and UN Human Rights Office warn of profound impact on human rights and international refugee protection system*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R (July 18, 2023), <https://www.ohchr.org/en/press-releases/2023/07/uk-illegal-migration-bill-un-refugee-agency-and-un-human-rights-office-warn> [<https://perma.cc/LE48-9EDA>] (noting that “it requires their removal to another country, with no guarantee that they will necessarily be able to access protection there . . . [and] creates sweeping new detention powers, with limited judicial oversight”).

¹⁹⁶ *Illegal Migration Act 2023*, GOV.UK (Mar. 8, 2023), <https://www.gov.uk/government/collections/illegal-migration-bill> [<https://perma.cc/62SQ-29LH>].

These changes have left noncitizens in a precarious position in today's Britain. Similar criticisms of US immigration courts have been lobbed against British immigration tribunals as well. Specifically, the latter are backlogged, susceptible populations are detained in brutal conditions, and the process can leave noncitizens languishing for years before they have a final answer on their cases.¹⁹⁷

Clearly, then, neither US nor British immigration courts appear to be ideal models for India to adopt. While there may be other countries that serve as more laudable examples to emulate,¹⁹⁸ any new immigration court infrastructure that India adopts would need to cater to its own laws and societal culture. Ultimately, India must do something urgently, because the way it currently handles its immigration cases—through its bottlenecked lower courts and its ad hoc, nontransparent specialized forums—leaves noncitizen migrants in a direly vulnerable position.

B. ESTABLISHING A BROADER-BASED IMMIGRATION BAR

Although precise data are difficult to ascertain, estimates are that India has between 1 and 1.5 million lawyers.¹⁹⁹ Even granting the latter number, in a country of over 1.4 billion people, this figure constitutes 0.001 percent of the population. And, in 2017, the regulatory body that oversees Indian lawyers—the Bar Council of India—made a “shocking

¹⁹⁷ See Diane Taylor, *Home Office Loses 75% of Its Appeals Against Immigration Rulings*, THE GUARDIAN (Sept. 3, 2018), <https://www.theguardian.com/uk-news/2018/sep/03/inhumane-three-quarters-of-home-office-asylum-appeals-fail> [<https://perma.cc/FN6G-2CC4>] (describing the terrible conditions immigrants face in the UK system, and how much of this treatment is unnecessary given that the immigration courts not infrequently rule against the government, which “raises concerns the Home Office is putting people through lengthy and expensive court processes when it has little chance of winning”); see also Rose Gordon-Orr, *Mononormativity and Related Normative Bias in the UK Immigration System: The Experience of LGBTQ+ Asylum Seekers*, FRONTIERS (July 23, 2021), <https://www.frontiersin.org/articles/10.3389/fhumd.2021.659003/full> [<https://perma.cc/GMJ6-GR6P>].

¹⁹⁸ *Most Friendly Countries for Immigrants Ranked 2022*, GLOBAL RCG (Jan. 11, 2022), <https://www.globalrcg.com/post/most-friendly-countries-for-immigrants> [<https://perma.cc/9U2W-ZYX3>].

¹⁹⁹ See Kian Ganz, *RTI Reveals: 1.3m Advocates; 1 in 300 Delhi-ites a Lawyer; Maharashtra Lawyers 'richest'; Jharkhand, Assam, J&K Fastest*, LEGALLY INDIA (Feb. 18, 2013), <https://www.legallyindia.com/the-bench-and-the-bar/rti-reveals-number-of-lawyers-india-20130218-3448> [<https://perma.cc/9QGK-D5BQ>] (noting how the number was 1.3 million 10 years ago).

revelation,”²⁰⁰ noting that some “30% of all lawyers in India are fake, holding fraudulent law degrees.”²⁰¹

For many observers of the Indian legal profession, Indian lawyers have long evoked conflicting emotions: dismay and cynicism—but also occasional hope. Past researchers have documented the significance of Indian lawyers at crucial moments in the nation’s history.²⁰² For example, Indian lawyers were leaders in the fight for independence and then afterwards during the Nehruvian period.²⁰³ Additionally, many lawyers strongly opposed the Emergency Rule of Indira Gandhi.²⁰⁴ Lawyers, working in conjunction with the Supreme Court, were also crucial in building the legacy of the public interest movement of the 1980s.²⁰⁵ And key segments of the Indian legal profession—particularly corporate lawyers—have facilitated India’s economic development as the country liberalized during the 1990s and 2000s.²⁰⁶

²⁰⁰ *Indian Bar Council Reveals That 30% of all Lawyers in the Country are Fake*, INDIAN NAT’L BAR ASSOC., <https://www.indianbarassociation.org/indian-bar-council-reveals-that-30-of-all-lawyers-in-the-country-are-fake/#:~:text=In%20a%20shocking%20revelation%2C%20Bar,fake%2C%20holding%20fraudulent%20law%20degrees> [https://perma.cc/KJS7-VMBJ].

²⁰¹ *Id.*; see also *Almost Half of Lawyers Roaming in Courts Across India are Fake, Says Bar Council of India*, OUTLOOK, <https://www.outlookindia.com/website/story/almost-half-of-lawyers-roaming-in-courts-across-india-are-fake-says-bar-council-297710> [https://perma.cc/S57J-SD3U] (Jan. 23, 2017, 11:15 AM).

²⁰² See ROHIT DE, *A PEOPLE’S CONSTITUTION: THE EVERYDAY LIFE OF LAW IN THE INDIAN REPUBLIC* (Jeremy Adelman et al. eds., 2018) (illustrating the role of lawyers in the constitutional-making process and how the constitution translated down to ordinary life in India).

²⁰³ See, e.g., James Jaffe, *Gandhi, Lawyers, and the Courts’ Boycott During the Non-Cooperation Movement*, 51 MOD. ASIAN STUD. 1340, 1340–41 (2017); Alexander Williams, *Imagining the Post-colonial Lawyer: Legal Elites and the Indian Nation-State, 1947–1967*, 15 ASIAN J. COMPAR. L. 156, 163–65 (2020).

²⁰⁴ See Sanjoy Ghose, *The Ones That Didn’t Make It to NYT: The Valiant Bar and Bench During Indira’s Emergency*, THE WIRE (June 25, 2020), <https://thewire.in/law/indira-gandhi-emergency-courts-justice> [https://perma.cc/7RGN-MWB6]; FALI S. NARIMAN, *BEFORE MEMORY FADES: AN AUTOBIOGRAPHY* 166–67 (2010); UPENDRA BAXI, *THE CRISIS OF THE INDIAN LEGAL SYSTEM* 20 (1982); William Borders, *India’s Courts Welcome Back ‘Rule of Law,’* N.Y. TIMES (June 14, 1977), <https://www.nytimes.com/1977/06/14/archives/indias-courts-welcome-back-rule-of-law.html> [https://perma.cc/HV3Q-ZFR3].

²⁰⁵ See ANUJ BHUWANIA, *COURTING THE PEOPLE: PUBLIC INTEREST LITIGATION IN POST-EMERGENCY INDIA* 16 (2017); Krishnan et al., *supra* note 129, at 155; Galanter & Krishnan, *supra* note 19, at 795.

²⁰⁶ It is important to note that the Indian bar itself has been quite restrictive in allowing lawyers from abroad to practice in this environment, contributing to the complicated nature of the corporate legal sector during this time. See Jayanth K. Krishnan & Patrick W. Thomas, *Being Your Own Boss: The Career Trajectories and Motivations of India’s Newest Corporate Lawyers*, in *THE INDIAN LEGAL PROFESSION IN THE AGE OF GLOBALIZATION* 217, 218 (David B. Wilkins et al. eds., 2017); Jayanth K. Krishnan, *Peel-Off Lawyers: Legal Professionals in India’s Corporate Law Firm Sector*, 9 SOCIO-LEGAL REV. 1, 6–7 (2013).

However, ongoing research confirms the observation made by a leading expert on the Indian legal profession, Professor Marc Galanter, who noted decades back that most Indian lawyers are solo-practicing, lower-court litigators who struggle to earn a livable income.²⁰⁷ There is also no shortage of reports documenting lawyers violating their professional responsibilities and providing clients with ineffective and even incompetent legal representation.²⁰⁸

The story of Indian lawyers is layered and far from one-dimensional. Even with these negative characterizations, as the preceding discussion illustrates, Indian lawyers have played a vital role in civil society activism and have pushed for social change. The victories on these fronts show that there is capacity and space for lawyers to make positive differences on behalf of the vulnerable. Yet this legal vibrancy has not manifested to help noncitizen migrants in a broad and systematic manner. It is true that nongovernmental organizations, small numbers of law school clinics, and individual lawyers have successfully assisted migrants in important instances.²⁰⁹ But widespread, large-scale, and coordinated representation has simply not been present.

One key reason is that there is no fully dedicated immigration bar where lawyers can collaborate in a substantive fashion to assist those in need.²¹⁰ Otherwise put, in India, there is no equivalent to the American Immigration Lawyers Association or the United Kingdom's Immigration Law Practitioners' Association.²¹¹ These organizations have been able to collectively organize and serve as important counterweights to the state.²¹²

²⁰⁷ See MARC GALANTER, LAW AND SOCIETY IN MODERN INDIA 283–84 (Rajeev Dhavan ed., 1989); Krishnan et al., *supra* note 129, at 179.

²⁰⁸ See Krishnan et al., *supra* note 129, at 179; Galanter & Krishnan, *supra* note 19, at 816.

²⁰⁹ One of the most well-known NGOs in India working on behalf of migrants is Jan Sahas. See JAN SAHAS, jansahas.org [https://perma.cc/6DS6-24Z6]. Some law schools have done work on behalf of migrants, including a report co-authored by law school faculty from the West Bengal National University of Juridical Sciences; see KALANTRY & TARAFDER, *supra* note 41, at 4. There have also been some efforts by individual lawyers. See *Meet the Top Lawyers Fighting for Rohingyas in Supreme Court: A Myanmar-born Padma Awardee, an IIT-Bombay Grad*, INDIA TODAY, https://www.indiatoday.in/india/story/meet-the-top-lawyers-fighting-for-rohingya-muslims-in-supreme-court-1049624-2017-09-21 [https://perma.cc/NP58-ZTKP] (Sept. 21, 2017).

²¹⁰ This observation is based on the author's experience in India, where he has spent over twenty years working in the country on this issue of legal education and the legal profession.

²¹¹ See *About ALLA*, AILA, https://www.aila.org/about [https://perma.cc/Q3GK-HTSZ] (for background on these organizations); *Objectives and History*, ILPA, https://ilpa.org.uk/about-us/about-ilpa/objectives-and-history/ [https://perma.cc/7CUU-4MH5].

²¹² See AILA, *supra* note 211.

But, unfortunately, India does not have such an analog.²¹³ The difficult immigration work is thus left to those few specialists who do exist or to generalist lawyers who work episodically and who lack expertise in this complicated area of law.

The absence of a strong immigration bar partly stems from the fact that immigration law is not offered as a standalone course in most Indian law schools.²¹⁴ Currently, there are 1,700-plus law schools in the country.²¹⁵ Some institutions offer legal education as only a post-undergraduate degree, others offer it as a combined five-year undergraduate and law degree program, and then there are those that offer both options.²¹⁶ However, immigration law is not a mainstay course in any of these tracks.

Previous research has shown the evolution of curricular legal education in the postcolonial era. Briefly, starting in the 1950s, Indian law schools sought to incorporate more engaged forms of pedagogy into the classroom by bringing in different forms of the Socratic method, seminar classes, and enhanced writing projects.²¹⁷ Influenced by primarily American but also some British academics, several Indian legal education reformers wanted to find ways to teach law to their students that moved beyond rote memorization of civil, criminal, and administrative codes.²¹⁸

In the 1970s and 1980s, there was a push to include clinics in the curriculum, and there was also an effort to ensure that legal education

²¹³ There is the Indian National Bar Association (INBA), which is “a non-profit, non-political, non-Governmental Association endeavoring to: [a]ct as a premier body representing the interest of [the] Indian legal community & to strive to provide several economic & social benefits that should accrue to them; [r]eform the Indian Legal Systems leading to effective & quick justice for everyone; [and] reform the Indian Governmental bureaucratic rules and regulations (red-tape) and the Legal Systems, leading to [the] nation’s economic and business growth.” *About us*, INDIAN NAT’L BAR ASS’N, <https://www.indianbarassociation.org/about-us/> [https://perma.cc/TBW2-LTMN] (but there is not a dedicated immigration-focused component to the INBA).

²¹⁴ This observation is based on the author’s experience in India, where he has spent over twenty years working in the country on this issue of legal education and the legal profession.

²¹⁵ *1,721 Law Schools in India; More Than Twice as Many Private Law Colleges Than Government Law Colleges: Law Minister, BAR & BENCH* (Mar. 29, 2022), <https://www.barandbench.com/news/lawschools/1721-law-schools-in-india-more-than-twice-as-many-private-law-colleges-than-govt-law-colleges-law-minister> [https://perma.cc/VG65-86J2].

²¹⁶ Most Indian law schools historically were public, although that trend has changed, where now there are more private law schools in existence. *See id.*

²¹⁷ *See* Jayanth K. Krishnan, *Professor Kingsfield Goes to Delhi: American Academics, the Ford Foundation, and the Development of Legal Education in India*, 46 AM. J. LEGAL HIST. 447, 457 (2004); *see also* Jayanth K. Krishnan, *From the ALI to the ILI: The Efforts to Export an American Legal Institution*, 38 VAND. J. TRANSNAT’L L. 1255, 1260–61 (2005).

²¹⁸ *See* sources cited in *supra* note 217.

comported with India's norms, culture, and society.²¹⁹ Since India liberalized its markets in the 1990s and 2000s, law students have had increased exposure to the globalization of law.²²⁰ Given its connection to international law, comparative law, transnational law, and issues that tie to human rights, asylum, and refugee status, a doctrinal course on immigration would seem to be a natural fit within a law school's curriculum. However, as stated, very few Indian law schools regularly offer this class to their students.

Immigration courses are often not offered because the vast majority of law schools struggle financially, infrastructurally, and technologically to provide even the basic course offerings mandated by the Bar Council of India.²²¹ Most law schools also have difficulty recruiting and retaining talented faculty.²²² And, even for those law schools that are deemed reputable, immigration law has not been an area that has received adequate attention by administrators; offering courses in other areas is simply seen as more relevant and valuable.²²³ Therefore, there is not an educational milieu when it comes to immigration. There are insufficient opportunities for students to learn the doctrine, have meaningful clinical training, and be inspired to take these experiences with them into a welcoming practice environment.²²⁴ This vacuum has resulted in an abundance of noncitizen-migrant needs going unmet.

C. DEVELOPING AN IMMIGRATION LITERATURE AND UPDATING THE LAW

There is a chicken-and-egg puzzle surrounding the lack of immigration as a focus in Indian law schools. The doctrinal scholarship on immigration law in India is limited. In addition, there is not a widely circulated doctrinal textbook upon which students and professors can

²¹⁹ See *id.*; see also Upendra Baxi, *Enculturing Law?: Some Unphilosophic Remarks*, in *ENCULTURING LAW?: NEW AGENDAS FOR LEGAL PEDAGOGY* 1, 19 (Mathew John & Sitharamam Kakarala eds., 2007) (describing the many ways that he (Baxi) helped promote "alternative imageries of the socially relevant legal education" within the country).

²²⁰ See Krishnan & Thomas, *supra* note 206; Krishnan, *supra* note 206.

²²¹ This observation is based on the author's experience in India, where he has spent over twenty years working in the country on this issue of legal education and the legal profession.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

rely.²²⁵ There are no dedicated law journals focused on immigration law in India either. These circumstances suggest that the reason many law schools do not offer immigration law is because there is not much pedagogical scholarship from which to draw. Yet, perhaps there is not much pedagogical scholarship because most law schools do not offer courses in this area, so potential writers thus see little incentive to produce this type of material.

Regardless, there is still strong interdisciplinary law-and-society research on the topics of citizenship, migration, human rights, asylum, and refugees.²²⁶ But even these writers and their readers surely yearn to see more. What also occasionally exist are practitioner-based books on the technical aspects of immigration law.²²⁷ Additionally, there are journalistic accounts of diverse immigration topics, and there is a voluminous literature on the Indian diaspora traveling out of India.

However, based on the author's years of fieldwork in India, he has seen how the scarce number of doctrinal materials on immigration law has had a definite—and detrimental—effect on the profession's development. Courts have also no doubt felt the impact of the dearth of literature in this area, especially in the upper judiciary where it is not unusual for judges on high courts and at the Supreme Court to look to academic writings as reference points when crafting opinions.²²⁸

There is also a more structural problem: immigration statutes and regulations are, frankly put, old and outdated.²²⁹ Recall that, in the post-

²²⁵ *Id.*

²²⁶ See, e.g., works by Gopal Jayal, *supra* note 95; MIGRANTS, MOBILITY AND CITIZENSHIP IN INDIA (Ashwani Kumar & R. B. Bhagat eds., 2022); JEEVAN R. SHARMA, CROSSING THE BORDER TO INDIA: YOUTH, MIGRATION, AND MASCULINITIES IN NEPAL (Craig Jeffrey & Jane Dyson eds., 2018); SHUVRO PROSUN SARKAR, REFUGEE LAW IN INDIA: THE ROAD FROM AMBIGUITY TO PROTECTION (2017); THE ROUTLEDGE HANDBOOK OF REFUGEES IN INDIA (S. Irudaya Rajan ed., 2022); RIA KAPOOR, MAKING REFUGEES IN INDIA (2022); Abishek Pandey, *Legal Rights of Migrant People in India*, SSRN (May 5, 2020), <https://ssrn.com/abstract=3572571> [<https://perma.cc/W3WW-9JTT>]; RIZWANA SHAMSHAD, BANGLADESHI MIGRANTS IN INDIA: FOREIGNERS, REFUGEES, OR INFILTRATORS? (2017); ANWESHA GHOSH, IDENTITY AND MARGINALITY IN INDIA: SETTLEMENT EXPERIENCE OF AFGHAN MIGRANTS (2019).

²²⁷ See Dhawal Srivastava, *Significance of immigration lawyers in India*, IPLEADERS (Jan. 12, 2021), <https://blog.ipleaders.in/significance-immigration-lawyers-india/> [<https://perma.cc/32VH-NPL5>] (for a discussion on the importance of the practice of immigration law in India); see, e.g., AMISH TANDON, INDIAN CITIZENSHIP AND IMMIGRATION LAW (2022).

²²⁸ See SCO Team, *Which foreign judgments does the SC cite?*, SCO (July 13, 2020), <https://www.scoobserver.in/journal/which-foreign-judgments-does-the-sc-cite/> [<https://perma.cc/X7GG-EW5G>]; K. G. Balakrishnan, *The Role of Foreign Precedents in a Country's Legal System*, 22 NAT'L L. SCH. INDIA REV. 1 (2010).

²²⁹ See discussion *infra* Part II.B, IV.A.2; see also Act No. 31 of 1946, Foreigners Act, 1946; The Citizenship Act, 1955; Foreigners (Tribunal) Order, 1964 (Sept. 23, 1964).

independence era, there have been several laws that govern areas such as citizenship and the rights of “foreigners” as well as which judicial bodies should be hearing which types of cases.²³⁰ And even though some of these laws have been amended over the years, they remain insufficient to adequately address the needs of those seeking redress.²³¹ Moreover, the dedicated courts that are supposed to resolve these cases have not been properly established, have not complied with the requirements set forth by the law, and have operated in an ad hoc manner.²³²

To that end, Parliament should pass a new, modern immigration law. Several key elements are required for this law to be effective. To begin, there would need to be clarity on who is a citizen and who can become a citizen. The legal roots of citizenship are “derived from the Constitution of India, 1950, and the Citizenship Act of 1955 . . . [whereby] citizenship was [and has since been] framed in the backdrop of the Partition”²³³ between India and Pakistan. Citizenship can be obtained through a number of different routes. Insofar as the important concept of birthright citizenship is concerned, this principle originally started under “a liberal jus soli framework but gradually [involved] imposing restrictions to transition to a jus sanguinis framework.”²³⁴ Today, there are even “differentiated citizenship”²³⁵ rights depending on a person’s lineage and birthplace. Clearly, then, a new and updated immigration statute is needed to ensure a fair and equitable pathway to citizenship, which might include a required period of lawful permanent residence before citizenship is an option.

There are other aspects to consider as well. Take, for instance, the category of lawful permanent residents. Since liberalizing its markets, India has seen certain high-skilled noncitizens seeking both permanent and nonpermanent residency in the country.²³⁶ While various temporary-stay visas are available, these laws do not sufficiently accommodate the ever-changing immigration demands by noncitizens (many of whom the

²³⁰ See also Act No. 31 of 1946, Foreigners Act, 1946 (Nov. 23, 1946); The Citizenship Act, 1955 (Dec. 30, 1955); Foreigners (Tribunal) Order, 1964 (Sept. 23, 1964).

²³¹ See discussion *infra* Part III.A.2.

²³² See discussion *infra* Part II.B, III.A.2.

²³³ See KALANTRY & TARAFDER, *supra* note 41, at 7.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ For a study that has discussed this point in detail, particularly as it relates to the legal profession and the desire of foreign lawyers wanting to enter the Indian market, see generally Jayanth K. Krishnan, *Globetrotting Law Firms*, 23 GEO. J. LEGAL ETHICS 57 (2010).

government wishes to welcome) that have been brought about by market liberalization.²³⁷ Relatedly, the existing laws continue to be bureaucratically difficult for those temporarily in the country who wish to adjust their status to become lawful permanent residents.²³⁸ These updates, therefore, would also be required as part of any new immigration reform.

Additionally, modernizing existing statutory and regulatory procedures with respect to admissibility into the country and deportation are necessary. Also, accounting for how “crimmigration” plays a role in today’s immigration system—specifically, updating how a noncitizen’s criminal conviction might relate to that person’s immigration status—is needed with any new set of laws.

There also must be greater thought given as to how noncitizens seeking relief from removal can bring such a cancellation of deportation petition. This opportunity is especially crucial when the consequence of deportation is that a noncitizen is returned to a dangerous home jurisdiction. Furthermore, India needs immigration court reform. A new immigration statute ought to include how such courts would operate, how judges would be selected and insulated from political pressure, the procedure for appeals, the extent to which judicial review by the regular courts would be permitted, and the availability for noncitizens to have legal representation. And, because India is a federal system, it would be important for the new laws to have provisions that indicate when state governments have the authority to engage in immigration enforcement, and under what conditions delegation to subcentral units is permitted.

Improvement of India’s immigration system is required on multiple fronts. Noncitizen migrants at the border and within the country are far too frequently denied their most fundamental rights. The concluding section discusses the overall implications of this Study, and then describes one final example highlighting this point, which involves how tens of thousands of Afghans seeking safety in India have been impeded from gaining full-scale protection.

²³⁷ *Id.*

²³⁸ *Id.*; see generally Krishnan & Thomas, *supra* note 206.

IV. CONCLUSION

This Study has sought to highlight the infirmities of India's immigration infrastructure. The current system is in dire straits, particularly for noncitizen migrants who face enormous hurdles—politically, legally, and socioeconomically. Under the proposed PRIM model, a number of reforms are necessary to raise the standard of care for this population.

For example, Indian legal education has devoted insufficient time, attention, and resources toward incorporating immigration law as part of its curriculum. As a result, very few students graduate from law school with the background or skills required to pursue immigration as a primary practice area. Correspondingly, there is not a scholarly milieu when it comes to doctrinal immigration law. Given that academic institutions in India do not cultivate a broad-based culture of pedagogical instruction and doctrinal research on immigration, perhaps it is unsurprising that the country lacks a large cohort of immigration lawyers to defend the rights of noncitizens and champion their cause in a systematic and coordinated manner. The PRIM model, therefore, calls for a series of changes to be made both within Indian legal education and within the Indian legal profession to encourage greater interest towards immigration law among students and those within the bar.

Additionally, the PRIM framework identifies two other important places where reforms are warranted. First, India's immigration laws and regulations are archaic and have not kept up with the diverse situations that noncitizens face in the modern era. Updates to statutes and administrative rules are essential—to safeguard both the noncitizen rights and the government interests (especially in terms of national security).

Second, there is a visible absence of specialized immigration courts that can fairly deliberate on cases where the government is attempting to deport noncitizens. The PRIM approach proposes establishing an adjudicative process where judges are independent and can copiously scrutinize the claims asserted by both the government and the noncitizen.

In considering these points together, there is a sobering conclusion that cannot be avoided: India's weak immigration infrastructure has contributed to noncitizens having difficulty accessing lawyers, the legal process, and, ultimately, justice.

A recent global event even more fully emphasizes this point. In 2020, then-President Trump began reducing US forces in Afghanistan.²³⁹ In August 2021, under the Biden administration, the United States officially ended its formal presence in the country, and the Taliban took control of the government.²⁴⁰ As a result, 3.6 million Afghans fled, and within just two months of the United States' departure, the Indian government "received close to 60,000 applications from Afghan nationals."²⁴¹

Today, the UNHCR reports that there are some twenty thousand Afghans living in India as refugees. In addition, there have been "nearly 13,000 Afghan students stuck in India since 2001."²⁴² The situation for the Afghan refugees in India is highly unstable. For one thing, the visas provided by the Indian government are valid for only six months.²⁴³ Moreover, the Afghans seeking Indian protection are often prohibited from working or studying in the country.²⁴⁴ Recall also the broader issue of India not accepting the 1951 Refugee Convention or the accompanying 1967 protocol that binds signatory countries to certain responsibilities when it comes to the treatment of refugees.²⁴⁵ As one writer has stated,

²³⁹ See Barbara Starr et al., *US Announces Further Drawdown of Troops in Afghanistan and Iraq Before Biden Takes Office*, CNN (Nov. 17, 2020, 4:14 PM), <https://www.cnn.com/2020/11/17/politics/afghanistan-iraq-withdrawal-pentagon/index.html> [<https://perma.cc/SRZ9-3WHQ>].

²⁴⁰ See Shannon K. Crawford, *2 Years on, Afghanistan Withdrawal Continues to Cast Pall on Biden Administration: Analysis*, ABC NEWS (Aug. 31, 2023, 7:20 PM), <https://abcnews.go.com/Politics/2-years-withdrawal-afghanistan-continues-cast-pall-biden/story?id=102837216> [<https://perma.cc/HMG5-4D3U>]; Madiha Afzal, Comment to *What the Biden administration's report on the Afghanistan withdrawal gets wrong*, BROOKINGS (May 5, 2023), <https://www.brookings.edu/articles/what-the-biden-administrations-report-on-the-afghanistan-withdrawal-gets-wrong/#:~:text=Biden%20and%20his%20team%20had,year%20American%20effort%20in%20Afghanistan> [<https://perma.cc/DQ42-DU59>].

²⁴¹ See Arunav Kaul, *Afghan Refugees in India Highlight the Need for Indian Domestic Refugee Law*, JUST SECURITY (Oct. 18, 2021), <https://www.justsecurity.org/78586/afghan-refugees-in-india-highlight-the-need-for-indian-domestic-refugee-law/> [<https://perma.cc/6YNQ-7J5U>].

²⁴² See Shivangi Seth & Stuti Bhatnagar, *Uncertain Haven: Afghan Refugees in India*, THE STRATEGIST (Mar. 23, 2023), <https://www.aspirategist.org.au/uncertain-haven-afghan-refugees-in-india/#:~:text=According%20to%20UNHCR%20data%2C%20there,in%20legal%20limbo%20n%20India> [<https://perma.cc/MD7E-5RK2>].

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ See Mahika Khosla, *The Geopolitics of India's Refugee Policy*, STIMSON (Sept. 22, 2022), <https://www.stimson.org/2022/the-geopolitics-of-indias-refugee-policy/#:~:text=India%20is%20not%20party%20to,to%20handle%20refugee%20crises%20unilaterally> [<https://perma.cc/J59E-Y5HR>]; Sital Kalantry, *India Should Also Accede to the UN*

“India does not [even] acknowledge the administrative role of the UNHCR within its territory and chooses to handle refugee crises unilaterally.”²⁴⁶

This refugee situation will likely not be a one-off. In 2022, for example, following a political and economic crisis that gave rise to massive public protests criticizing the government’s inept leadership, Sri Lanka’s prime minister, president, and over two dozen cabinet ministers resigned.²⁴⁷ Subsequently, many Sri Lankans fled to India, but this influx has been only the latest wave.²⁴⁸ Members of the Sri Lankan Tamil community sought refuge in India to avoid the civil war that lasted from 1983 to 2009.²⁴⁹ Today, nearly sixty thousand displaced Sri Lankans are “living in 106 camps in 29 districts across [the Indian state of] Tamil Nadu.”²⁵⁰ Furthermore, climate refugees from around the region are increasingly fleeing their home jurisdictions for India, which is seen as one of the few life-saving destinations within geographical reach.²⁵¹

In sum, this Study has shown that India’s immigration system, like many others across the globe, is in clear need of reform. But, perhaps more importantly, there must be a serious reimagining of how to improve the immigration infrastructure to respond to ongoing (and future) noncitizen

Refugee Convention, HINDUSTAN TIMES (Mar. 12, 2020, 3:59 PM),

<https://www.hindustantimes.com/analysis/india-should-also-accede-to-the-un-refugee-convention/story-6XP68ZzpFZGBXkTFMGD6EM.html> [<https://perma.cc/458E-MA88>].

²⁴⁶ See Khosla, *supra* note 245 (noting that “about 46,000 of [all] the 200,000 refugees in India have received formal protection from the UNHCR office in New Delhi, while others either receive state recognition or are entirely undocumented”).

²⁴⁷ Agence France-Presse, *Sri Lanka’s Cabinet Resigns as Protesters’ Anger Grows Over Economic Crisis*, THE GUARDIAN (Apr. 3, 2022), <https://www.theguardian.com/world/2022/apr/04/sri-lankas-cabinet-resigns-as-protesters-anger-grows-over-economic-crisis> [<https://perma.cc/X3NX-D7V3>].

²⁴⁸ Prarthana Sen, *Concern for Sri Lankans fleeing to India Amid Economic Crisis* (Sept. 18, 2022), <https://www.lowyinstitute.org/the-interpreter/concern-sri-lankans-fleeing-india-amid-economic-crisis> [<https://perma.cc/VQV7-L6HA>].

²⁴⁹ See Shahina K. K., *Refugee to Illegal Migrant: The Journey Of Sri Lankan Tamils to India*, OUTLOOK (July 25, 2023, 11:41 AM), <https://www.outlookindia.com/national/refugee-to-illegal-migrant-journey-of-sri-lankan-tamils-to-india-magazine-304250> [<https://perma.cc/F6BW-H2MN>].

²⁵⁰ *Id.*; see also Sen, *supra* note 248; Urvi Pathak, *Statelessness and the Citizenship Amendment Act, 2019: The Case of Sri Lankan Tamil Refugees*, 17 SOCIO-LEGAL REV. 156, 172 (2022).

²⁵¹ See Murali Krishnan, *India: Migration from Climate Change Getting Worse*, DW (Apr. 19, 2023), <https://www.dw.com/en/india-migration-from-climate-change-getting-worse/a-65369043#:~:text=According%20to%20the%20%22State%20of,their%20homes%20in%202020%2D2021> [<https://perma.cc/45FJ-SEL5>]; Kimberly Hidalgo Hernandez, *How the Maldives Struggles to Stay Afloat During Climate Change*, CATALYST (Dec. 9, 2022), <https://catalyst.cm/stories-new/2022/12/9/how-the-maldives-struggles-to-stay-a-float-due-to-climate-change> [<https://perma.cc/D9JR-Q46D>].

demands. These changes must be driven not only by those in government, but also by leaders within civil society. If such actions are not taken, the situation for noncitizens in India will worsen beyond what is already unacceptable. The bottom line is that for a country that prides itself on its democratic character, the status quo simply cannot remain—from a political, legal, and moral standpoint.