

THE MEANING OF ‘LIFE’ UNDER THE INDIAN CONSTITUTION AND THE OBLIGATION NOT TO RENDER PERSONS STATELESS: WITH REFERENCE TO THE NRC IN ASSAM

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A person who has lost or who has been deprived of their nationality due to state action loses membership in the polity and is forced to live without human dignity. The right to nationality or the right to have rights obligates states to not render persons stateless and protects persons from a life without dignity. On the other hand, ‘life’ under art 21 of the Constitution of India is understood as dignified life and has been interpreted by the Indian courts as the right to rights. In this article, I examine how ‘life’ or the right to rights under art 21 of the Indian Constitution should include the right to have rights or the international obligation on the state not to render persons stateless. I apply these conclusions to examine India’s controversial exercise of updating the National Register of Citizens.

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I INTRODUCTION

What is the meaning of 'life'? The author puts forth this question in the context of art 21 of the *Constitution of India* ('*Constitution*') obliging the state to not deprive persons of their 'life'.¹ What this article examines is how this obligation of the Indian state under art 21 should include an obligation not to render persons stateless. This examination is then applied to the exercise of updating the *National Register of Indian Citizens* ('*NRC*') being undertaken by the Indian Government in the state of Assam in India.²

The *NRC* is a register of Indian citizens that was created after the census in 1951³ and not updated until 2015 when the Supreme Court of India ordered it to be updated for Assam.⁴ This exercise was undertaken to identify illegal migrants from Bangladesh within Assam.⁵ In order to have their names included in the *NRC* and avoid being designated as foreigners, the residents of Assam were required to submit documents issued to them before 24 March 1971, the eve of the Bangladeshi war.⁶ After updating, the final list of the *NRC* left out about 1.9 million people.⁷ The status of those not part of the list will now be determined by the Foreigners Tribunals ('*FTs*') set up across Assam to assess if they should have been included within the *NRC* as Indian citizens.⁸ Those who are unable to establish their Indian citizenship⁹ for inclusion within the *NRC* may be considered as foreigners.¹⁰ In this way, the *NRC* could act as a citizenship deprivation process and render citizens stateless.

When a state renders citizens stateless in this manner, it is the human right to nationality that is affected. A stateless person is one who is not considered as a national by any state under the operation of its law.¹¹ The right to nationality is a basic human right in the *Universal Declaration of Human Rights* ('*UDHR*')¹² and

1 *Constitution of India 1950*, Pt III art 21 (India) ('*Constitution*').

2 'NRC: In A Nutshell', *Government of Assam* (Web Page, 31 March 2019) <<http://nrcassam.nic.in/nrc-nutshell.html>>. There is a proposal to extend the *NRC* updating exercise to the whole of India.

3 'What is *NRC*?', *Government of Assam* (Web Page, 2014) <<http://nrcassam.nic.in/what-nrc.html>>.

4 *Assam Sanmilita Mahasangha v Union of India* (2014) WP(C) Nos 562 of 2012 and 274 of 2009 (Supreme Court of India) [48] (Narriman J) ('*Assam Sanmilita Mahasangha*').

5 *ibid* [42].

6 'Who Are Eligible for Inclusion?', *Government of Assam* (Web Page, 2014) <nrcassam.nic.in/eligibility-criteria.html>.

7 'India Excludes Nearly 2 million People from Assam Citizen List', *Al Jazeera* (online, 31 August 2019) <<https://web.archive.org/web/20210518154042/https://www.aljazeera.com/news/2019/08/31/india-excludes-nearly-2-million-people-from-assam-citizen-list/>>.

8 'Statement by MEA on National Register of Citizens in Assam', *Ministry of External Affairs, Government of India* (Web Page, 2 September 2019) <<https://www.mea.gov.in/Speeches-Statements.htm?dtl/31782/Statement+by+MEA+on+National+Register+of+Citizens+in+Assam>>.

9 In this article, 'national' and 'citizen' and 'nationality' and 'citizenship' are used interchangeably.

10 'Assam *NRC* Final List Out: What Will Happen to the 19 Lakh Excluded People?', *Business Today* (online, 31 August 2019) <<https://www.businesstoday.in/current/economy-politics/assam-nrc-final-list-out-what-will-happen-to-the-19-lakh-excluded-people/story/376476.html>>.

11 *Convention Relating to the Status of Stateless Persons*, adopted 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) ('*1954 Convention*') art 1.

12 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948).

is considered as the right to have rights.¹³ While all persons are entitled to human rights, nationality is vital for the enjoyment of human rights.¹⁴ On the other hand, the right to life under art 21 of the *Constitution* encompasses several other basic human rights making ‘life’ the right to rights.

This article draws an inference between the right to have rights (the right to nationality that is required to enjoy other human rights) and the right that encompasses other rights (the right to life). However, this article does not address the bigger political questions surrounding citizenship and the *NRC*. Instead, this article focusses on the international obligation of states not to render persons stateless and deduces how it is applicable in India as a constitutional obligation. First, this article explores the meaning of the formulation of the right to nationality as the right to have rights and shows how membership in a state is essential for the enjoyment of human rights and to live a dignified life. Second, it chalks out a link between the obligation not to render persons stateless and the right to life under international law. Third, it examines how the meaning of ‘life’ under art 21 of the *Constitution* includes the international obligation not to render persons stateless. Finally, the conclusions are applied to the exercise of updating the *NRC* in Assam to show that this state action offends art 21 of the *Constitution*.

II THE MEANING OF THE RIGHT TO HAVE RIGHTS AND THE OBLIGATION TO NOT RENDER PERSONS STATELESS UNDER INTERNATIONAL LAW

The obligation not to render persons stateless is part of the right to nationality and the prohibition on the arbitrary deprivation of nationality in art 15 of the *UDHR*. In fact, India and UK jointly proposed what became art 15(2) of the *UDHR*.¹⁵ The right to nationality and the prohibition on the arbitrary deprivation of nationality

¹³ Hannah Arendt, *The Origins of Totalitarianism* (Houghton Mifflin Harcourt 1973) 296–97.

¹⁴ Lindsey N Kingston, ‘Worthy of Rights: Statelessness as a Cause and Symptom of Marginalisation’ in Tendayi Bloom, Katherine Tonkiss and Phillip Cole (eds), *Understanding Statelessness* (Taylor & Francis 2017) 17, 26.

¹⁵ William A Schabas, *The Universal Declaration of Human Rights: The Travaux Préparatoires* (Cambridge University Press 2013) 1618–24.

are part of international and regional instruments¹⁶ and recognised by regional courts¹⁷ and by UN treaty bodies.¹⁸ This has led to acceptance of this obligation and the obligation to avoid statelessness in international law.¹⁹

The right to nationality is unlike other human rights and was described by Hannah Arendt as the right to have rights.²⁰ This means that while human rights in general are available to every person, in effect, they are unavailable or

¹⁶ 1954 Convention (n 11); *Convention on the Reduction of Statelessness*, adopted 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975) ('1961 Convention'); *International Covenant on Civil and Political Rights*, adopted 6 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 24 ('ICCPR'). Article 41 of the ICCPR was later entered into force 28 March 1979 for the provisions of art 41); *International Convention on the Elimination of All Forms of Racial Discrimination*, adopted 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) art 5 ('ICERD'); *Convention on the Rights of the Child*, adopted 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 7 ('CRC'); *Convention on the Elimination of All Forms of Discrimination Against Women*, adopted 18 December 1979 1249 UNTS 13 (entered into force 3 September 1981) art 9 ('CEDAW'); *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, adopted 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003) art 29; *Convention on the Rights of Persons with Disabilities*, adopted 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) art 18; *American Convention on Human Rights 'Pact of San José, Costa Rica'*, adopted 22 November 1969) 1144 UNTS 123 (entered into force 18 July 1978) art 20; *European Convention on Nationality* adopted 6 November 1997, ETS No 166 (entered into force 1 March 2000) art 4; *African Charter on the Rights and Welfare of the Child*, adopted 11 July 1990, OAU Doc CAB/LEG/24.9/49 (entered into force 29 November 1999) art 6; United Nations Human Rights Council, *Human Rights and Arbitrary Deprivation of Nationality*, UN Doc A/HRC/RES/32/5 (15 July 2016) ('UN Doc A/HRC/RES/32/5'). See also United Nations Human Rights Council, *Human Rights and Arbitrary Deprivation of Nationality*, UN Doc A/HRC/RES/7/10 (27 March 2008) ('UN Doc A/HRC/RES/7/10'); United Nations Human Rights Council, *Human Rights and Arbitrary Deprivation of Nationality*, UN Doc A/HRC/RES/10/13 (26 March 2009) ('UN Doc A/HRC/RES/10/13'); United Nations Human Rights Council, *Human Rights and Arbitrary Deprivation of Nationality*, UN Doc A/HRC/RES/13/2 (14 April 2010) ('UN Doc A/HRC/RES/13/2'); UNHRC, *The Right to a Nationality: Women and Children*, UN Doc A/HRC/RES/20/4 (16 July 2012) ('UN Doc A/HRC/RES/20/4'); *Human Rights and Arbitrary Deprivation of Nationality*, UN Doc A/HRC/RES/20/5 (16 July 2012) ('UN Doc A/HRC/RES/20/5'); *Human Rights and Arbitrary Deprivation of Nationality*, UN Doc A/HRC/RES/26/14 (11 July 2014) ('UN Doc A/HRC/RES/26/14').

¹⁷ See, *Janko Rottmann v Freistaat Bayern* (C-135/08) [2010] ECR-SC I-1467, [53]; *Genovese v Malta* (2011) Eur Court HR 1590 ('Genovese'); *Case of the Girls Yean and Bosico v Dominican Republic (Judgment)* (Inter-American Court of Human Rights, Series C No 130, 8 September 2005) [138]–[139], [142] ('Case of the Girls Yean and Bosico'); *The Matter of Anudo Ochieng Anudo v United Republic of Tanzania (Judgment)* (African Court on Human and Peoples' Rights, App No 012/2015, 22 March 2018) [76]–[78].

¹⁸ *General Comment No 17: Art 24 (Rights of the Child)*, CCPR/C/GC/17 (7 April 1989) ('CCPR GC 17'); *General Recommendation No 30 on Discrimination against Non-Citizens*, CERD/C/GR/30 (1 October 2002) ('CERD GR 30'); *General Recommendation No 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women*, CEDAW/C/GC/32 (5 November 2014); *General Comment No 1: Art 12: Equal Recognition before the Law*, CPRD/C/GC/1 (19 May 2014); *Joint General Comment No 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 23 of the Committee on the Rights of the Child on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return*, CMW/C/GC/4 and CRC/C/GC/23 (16 November 2017).

¹⁹ *Explanatory Report to the European Convention on Nationality* (Report ETS No 166, Council of Europe 6 November 1997); *Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Bedri Hoti v Croatia (Application No.63311/14)* (Submission, UNHCR 3 July 2015); Michelle Foster and Hélène Lambert, *International Refugee Law and the Protection of Stateless Persons* (1st ed, Oxford University Press 2019) 73; William Thomas Worster, 'The Obligation to Grant Nationality to Stateless Children under International Law' (2019) 27(3) *Michigan State International Law Review* 441, 468.

²⁰ Arendt (n 13) 296–97.

inaccessible when such a person is not qualified as a ‘national’ of some state.²¹ This section first explores how the right to nationality has been understood as the right to have rights and then draws out the meaning of the obligation not to render persons stateless under international law.

A *The Right to Nationality as the Right to Have Rights*

Arendt calls nationality the ‘right to have rights and a right to belong to some kind of organised community’ and calls the loss of polity an ‘expulsion from humanity’.²² Arendt points out that stateless persons without the right to have rights become rightless and lose their right to have a place in the world, lose their political status and the consequent protection of a government.²³ Furthermore, according to Arendt, with the loss of a community and a polity, a person loses human dignity and is expelled from humanity.²⁴ Accordingly, based on Arendt’s conception of nationality as the right to have rights, a person without nationality is without membership in a political community and without dignity.

This means that firstly, the right to have rights is a right to membership in a political community. So, the enjoyment of other rights depends on membership within the state even if such rights were human rights that accord to people on account of their human nature. Alison Kesby expands on Arendt’s conception of the right to have rights and explains how it is the national that can enter and reside in a state and in this sense has a ‘place in the world’.²⁵ She notes that nationality is ‘a necessary legal status for the exercise of ... the full range of human rights’.²⁶ Carol Batchelor describes it as ‘a necessary precursor to the exercise of other rights’.²⁷ Kristin Henrard echoes Arendt’s idea when she notes that citizenship is ‘membership of a polity, of a political community, and thus revolves around questions of inclusion and — as the other side of the coin — exclusion’.²⁸ Such membership ‘makes the person possessing [citizenship] deserving of the rights, and entitlements contingent on membership’.²⁹ While the very idea of human rights is to accord human beings basic rights on account of their humanity rather than a state’s will, despite being human stateless persons fall through the cracks and end up without rights.³⁰ This is why Arendt argues that the deprivation of the right to live happens after the right to have rights is taken away.³¹

In fact, United Nations human rights treaty bodies note the obstacles persons without nationality face in enjoying human rights, thus confirming the right to

²¹ Kingston (n 14) 26.

²² Arendt (n 13) 296–97.

²³ *ibid* 293–94.

²⁴ *ibid* 297.

²⁵ Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012) 16.

²⁶ *ibid* 52.

²⁷ Carol A Batchelor, ‘Statelessness and the Problem of Resolving Nationality Status’ (1998) 10(1) *International Journal of Refugee Law* 156, 159.

²⁸ Kristin Henrard, ‘The Shifting Parameters of Nationality’ (2018) 65(3) *Netherlands International Law Review* 269, 271.

²⁹ *ibid* 276.

³⁰ See Amy Lind and Marianne H Marchand, *Feminist (Im)Mobilities in Fortress(ing) North America: Rights, Citizenships, and Identities in Transnational Perspective* (Routledge 2016) 67–68.

³¹ Arendt (n 13) 295–96.

nationality as the right to have rights.³² Similarly, the Inter-American Court of Human Rights ('IACHR') holds the view that nationality 'allows the individual to acquire and exercise rights and obligations inherent in membership in a political community' and that it is required to exercise specific rights.³³

Secondly, the Arendtian conception of the right to have rights indicates that a person without nationality is without human dignity. Christoph Menke articulates that what Arendt means is a loss of dignity apart from the loss of all human rights, the membership in a polity and the right to have rights.³⁴ John Douglas Macready notes that the right to have rights confers human dignity.³⁵ So, the deprivation of nationality, considered 'more primitive than torture,' affects human dignity.³⁶ The IACHR has recognised nationality as a 'prerequisite for recognition of juridical personality' and noted that non-recognition of juridical personality affects dignity.³⁷ Similarly, the African Commission on Human and People's Rights recognised the link between the right to nationality and dignity when it noted that a claim to nationality status is protected under art 5 of the *African Charter on Human and People's Rights*, which guarantees the right to the respect of human dignity and recognition of legal status.³⁸

From the above, the right to have rights or the right to nationality can be understood as the right to membership in a polity and as ensuring the human dignity of a person. Somehow, nationality gives context to a human being and ensures the recognition of the human rights that should be accorded to a person. This is not to deny a state's responsibility to accord human rights to everyone within its territory and subject to its jurisdiction.³⁹ Rather, this describes the nature of the right to nationality as a fundamental right under international law, the removal or denial of which is to remove a right that is core to a person's existence.⁴⁰ Accordingly, states have an international obligation not to render persons stateless and without such membership and dignity.

³² See UN Doc A/HRC/RES/32/5 (n 16). See also UN Doc A/HRC/RES/7/10 (n 16); UN Doc A/HRC/RES/10/13 (n 16); UN Doc A/HRC/RES/13/2 (n 16); UN Doc A/HRC/RES/20/4 (n 16); UN Doc A/HRC/RES/20/5 (n 16); UN Doc A/HRC/RES/26/14 (n 16); CERD GR 30 (n 18) [3]; CCPR GC 17 (n 18) [8].

³³ *Case of the Girls Yean and Bosico* (n 17) [137]. See also *Case of Expelled Dominicans and Haitians v Dominican Republic* (Judgment) (Inter-American Court of Human Rights, Series C No 282, 28 August 2014) [264].

³⁴ Christoph Menke, 'Dignity as the Right to Have Rights: Human Dignity in Hannah Arendt' in Marcus Düwell et al (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014) 338.

³⁵ John Douglas Macready, *Hannah Arendt and the Fragility of Human Dignity* (Lexington Books 2017) 94.

³⁶ See Sangita Jaghai and Laura van Waas, 'Stripped of Citizenship, Stripped of Dignity? A Critical Exploration of Nationality Deprivation as a Counter-Terrorism Measure' in Christophe Paulussen and Martin Scheinin (eds), *Human Dignity and Human Security in Times of Terrorism* (Springer Nature 2019) 153, 163, citing *Trop v Dulles*, 356 US 86, 101 (United States Supreme Court, 1958).

³⁷ *Case of the Girls Yean and Bosico* (n 17) [178]–[179].

³⁸ *The Nubian Community in Kenya v The Republic of Kenya* (Communication) (The African Commission on Human and Peoples' Rights, Communication 317/2006 19–28 February 2015) [136]–[140].

³⁹ UN Doc A/HRC/RES/32/5 (n 16).

⁴⁰ *ibid.*

B *The Meaning of the Obligation Not to Render Persons Stateless under International Law*

As explained above, the right to nationality is the right to have rights and assures persons of membership in a society so that they have access to the full range of human rights and also enjoy human dignity. This means that the obligation not to render persons stateless under international law prevents states from taking away a core right to a human being's existence as a member within society and the right to access and enjoy other rights.

Furthermore, art 15(2) of the *UDHR* on the prohibition of the arbitrary deprivation of nationality can provide guidance as to the meaning of the obligation not to render persons stateless.⁴¹ Some argue that any deprivation of nationality that results in statelessness is arbitrary.⁴² While this is contentious, what is clear is that the prohibition of arbitrary deprivation of nationality obliges states to prevent statelessness unless the circumstance is one that falls under certain exceptions.⁴³ Even these exceptions ought to be read restrictively keeping in mind the principle of proportionality.⁴⁴

International law recognises that a state can deprive persons of their nationality on limited grounds including if the nationality has been acquired by fraud or if persons have acted in a manner prejudicial to the vital interests of the state.⁴⁵ Furthermore, all deprivations of nationality that result in statelessness will be arbitrary unless such deprivations serve a legitimate purpose under international law and are in conformity with the principle of proportionality,⁴⁶ which necessitates that the proposed state action of rendering a person stateless is to be proportionate to the state interest to be protected.⁴⁷ States cannot, even by legislation, render persons stateless if such legislation arbitrarily deprives persons of their nationality.⁴⁸ Given these limitations, it is difficult to actually justify a loss or deprivation of nationality resulting in statelessness.⁴⁹ Accordingly, mass denationalisation measures that result in statelessness have to be considered as arbitrary deprivation of nationality.⁵⁰ Therefore, the international law obligation

41 'Right to a Nationality and Statelessness', *UN Human Rights Office of the High Commissioner* (Web Page, 2020) <<https://www.ohchr.org/EN/Issues/Pages/Nationality.aspx>>.

42 See Mirna Adjami and Julia Harrington, 'The Scope and Content of Art 15 of the Universal Declaration of Human Rights' (2008) 27(3) *Refugee Survey Quarterly* 93, 103.

43 See Jorunn Brandvoll, 'Deprivation of Nationality: Limitations on Rendering Persons Stateless under International Law', in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 194, 215.

44 See Foster and Lambert (n 19) 75; *Human Rights and Arbitrary Deprivation of Nationality — Report of the Secretary-General*, UN Doc A/HRC/25/28 (19 December 2013) [39] ('UN Doc A/HRC/25/28').

45 *1961 Convention* (n 16). See also Brandvoll (n 43) 194–216.

46 United Nations Human Rights Council, *Arbitrary Deprivation of Nationality: Report of the Secretary-General*, UN Doc A/HRC/10/34 (26 January 2009).

47 See *Expert Meeting — Interpreting the 1961 Statelessness Convention and Avoiding Statelessness Resulting from Loss and Deprivation of Nationality Summary Conclusions* (Report, UNHCR March 2014) <<https://www.refworld.org/docid/533a754b4.html>>. See also Michelle Foster and Hélène Lambert, 'Statelessness as a Human Rights Issue: A Concept Whose Time Has Come' (2016) 28(4) *International Journal of Refugee Law* 564, 579.

48 See Brandvoll (n 43) 195.

49 UN Doc A/HRC/25/28 (n 44) [4].

50 See Laura van Waas, 'Nationality Matters: Statelessness under International Law', *Institute Statelessness and Inclusion* (Web Page, 2008) <https://files.institutesi.org/Nationality_Matters.pdf>.

not to render persons stateless means that states are to ensure as a general rule that no state action leaves persons stateless unless such state action is in line with the above exceptions, passes the test of proportionality and is for a legitimate purpose.

III THE RIGHT TO LIFE AND THE OBLIGATION NOT TO RENDER PERSONS

STATELESS UNDER INTERNATIONAL LAW

As explained in the previous section, states have an international obligation not to render persons stateless, leaving them in a situation where they have lost their membership in the state, do not have access to human rights and are forced to live without human dignity. Given that this obligation arises from international law, this section explores if international law provides a basis for examining this obligation through the lens of 'life'.

The right to life in art 6 of the *International Covenant on Civil and Political Rights* ('ICCPR') includes the right against 'unnatural or premature death' and the right to live with dignity.⁵¹ The Human Rights Committee, expanding on the dignity aspect of the right to life under art 6 of the *ICCPR*, explains that states have to take steps to address conditions in society that may threaten life including life-threatening diseases, extreme poverty and homelessness, and notes that states should take measures to address access to essential goods and health care.⁵² Regional and national courts have also interpreted the dignity aspect of the right to life to ensure socio-economic rights.⁵³

Although this link between the right to life and dignity has not been indicated in the context of statelessness, some of the measures that states are required to take pursuant to the right of persons to live with dignity are the rights that are denied or are inaccessible to persons without a nationality.⁵⁴ This indicates that there could be a connection drawn between enjoyment of human rights and the right to life. Since the enjoyment of the former requires the right to nationality, a connection can be teased out between the right to life and the right to nationality.

In another sense, these measures relate to the protection of life on the basis of human dignity. The right to have rights is to ensure human dignity to the rightless. On the basis of this human dignity, the right to life could include the obligation not to render persons stateless. If not for this obligation, persons could be rendered stateless, kept from a dignified life without access to human rights and membership in a polity and this can affect the right to life. This shows that international law provides a basis for arguing that the right to life should include the obligation not to render persons stateless.

Similar reasoning was made by the European Court of Human Rights when it drew inferences between the right to social life of individuals under art 8 of the *European Convention on Human Rights*, social identity and the right to nationality. The Court acknowledged the impact the denial of citizenship could

⁵¹ *General Comment No 36, Art 6 (Right to Life)*, CCPR/C/GC/36 (3 September 2019) [3].

⁵² *ibid* [26].

⁵³ Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', (2008) 19(4) *European Journal of International Law* 655, 693; Elizabeth Wicks, 'The Meaning of "Life": Dignity and the Right to Life in International Human Rights Treaties' (2012) 12(2) *Human Rights Law Review* 199, 219.

⁵⁴ Refer to Part 4(A).

have on a person's social identity, thus ruling that such denial of citizenship could be in contravention of art 8.⁵⁵

Furthermore, two recent developments in international legal scholarship can support the argument in this article linking right to life and the obligation not to render persons stateless. Firstly, Michelle Foster and H el ene Lambert argue that denial and withdrawal of nationality on one of the grounds on which refugee status is granted should give rise to a legitimate claim for refugee status.⁵⁶ They also detail jurisprudence where violations of civil and political rights in connection with such denial or withdrawal amounts to persecution.⁵⁷ Furthermore, they identify that in few cases, even denial of socio-economic rights of stateless persons could amount to persecution.⁵⁸ Secondly, C oman Kenny argues that state-sanctioned statelessness caused by mass arbitrary deprivation of nationality could amount to crimes against humanity and genocide, depending on the circumstances.⁵⁹ These developments reveal that the right to have rights is so important that their deprivation or denial or the consequent denial of human rights can amount to persecution under international refugee law or to international crimes under international criminal law. Since human dignity and the right to life are values on which both refugee protection and international criminal justice are premised, these developments support drawing a link between the obligation not to render persons stateless which is premised on human dignity and the right to life.⁶⁰

IV THE MEANING OF 'LIFE' UNDER ART 21 OF THE *CONSTITUTION* AND THE INTERNATIONAL OBLIGATION NOT TO RENDER PERSONS STATELESS

Having established in the previous section that under international law, an inference can be drawn between the right to life and the obligation not to render persons stateless, this section shows how life is affected in a situation of statelessness in India. Thereafter, it examines the meaning of 'life' under art 21 and analyses the obligation not to render persons stateless through the lens of 'life' under art 21.

A 'Life' in a Situation of Statelessness in India

India with China, Indonesia and Nigeria accounts for about 42% of the world's stateless population.⁶¹ However, due to issues with reporting, there is no concrete

⁵⁵ *Genovese* (n 17) [33]. See also *Hoti v Croatia* (European Court of Human Rights, First Section, Application No 63311/14, 26 April 2018) [119]–[123].

⁵⁶ See Foster and Lambert (n 19) 157.

⁵⁷ *ibid* 173.

⁵⁸ *ibid* 142.

⁵⁹ C oman Kenny, 'Legislated Out of Existence: Mass Arbitrary Deprivation of Nationality Resulting in Statelessness as an International Crime' (2020) 20(6) *International Criminal Law Review* 1, 34.

⁶⁰ Clara Laverty, 'What Lies Beneath? The Turn to Values in International Criminal Legal Discourse', *EJIL Talk!* (Blog Post, 23 April 2018) available at <<https://www.ejiltalk.org/what-lies-beneath-the-turn-to-values-in-international-criminal-legal-discourse/>>; Christian Walter, 'Hospitality and Integration of Migrants and Refugees' in Andrea Gattini, Rosana Garciandia and Philippa Webb (eds), *Human Dignity and International Law* (Brill 2020) 182.

⁶¹ Lily Chen, Petra Nahmias and Sebastian Steinmueller, *UNHCR Statistical Reporting on Statelessness* (Statistics Technical Series Report 2019/1, UNHCR October 2019) 1.

figure on the number of stateless persons in India.⁶² Some of the stateless populations in India are the Chakmas and Hajongs, Hindus from Pakistan, inhabitants of the Indian enclaves in Bangladesh, Rohingyas, persons of Chinese origin in Kolkata, Nepalis, Bihari Muslims from Bangladesh and the Sri Lankan Estate Tamils.⁶³ This Part will elaborate some of the problems these populations face in India on account of their statelessness to illustrate how 'life' is affected in a situation of statelessness.

There are an estimated 40,000 Rohingyas in India.⁶⁴ Reports indicate that they face surveillance and harassment from the police as well as from the locals, that they live in makeshift structures in jhuggis and engage in rag-picking as a livelihood.⁶⁵ They do not possess identification documents as they are not recognised as nationals by Myanmar and do not receive documents in India, which limits access to health and education.⁶⁶ They face arrest, detention and a risk of deportation.⁶⁷ These are related to their statelessness as they are considered foreigners in India while Myanmar does not recognise them as citizens.

The Chakmas and Hajongs are from the Chittagong Hill Tract who fled to India from East Pakistan (Bangladesh) in 1964–65. This was because of persecution as they were non-Muslim, non-Bengali speakers and because they lost their land due to the construction of a dam.⁶⁸ The Supreme Court of India noted some of the problems faced by the Chakmas in *National Human Rights Commission (NHRC) v State of Arunachal Pradesh*, a case where a writ petition was filed by the National Human Rights Commission on account of the persecution faced by the Chakmas from the locals, another consequence of statelessness. The All Arunachal Pradesh Students Union ('AAPSU') had issued notices to the Chakmas to leave the state failing which force would be used against them. The Court noted that AAPSU had prevented the supply of essential facilities to the camps of the Chakmas which led to deaths and the spread of diseases. The Court recognised there was a threat to life and liberty of the Chakmas under art 21 of the *Constitution* and that without citizenship, they had been subjected to threats of expulsion and had been unable to access basic necessities. The Supreme Court ordered the state to ensure the protection of the life and liberty of the Chakmas and to consider their citizenship applications.⁶⁹

The Estate Tamils of Sri Lanka moved to India after Sri Lanka's independence as their citizenship was not recognised in Sri Lanka. In India, a number of them

⁶² *ibid.*

⁶³ *The World's Stateless* (Report, Institute on Statelessness and Inclusion December 2014) <<https://files.institutesi.org/worldsstateless.pdf>>.

⁶⁴ Snehal Dote, *Rohingyas in India: State of Rohingya Muslims in India in Absence of Refugee Law* (Report, The London Story 2020). <<https://www.ohchr.org/Documents/Issues/Religion/Islamophobia-AntiMuslim/Civil%20Society%20or%20Individuals/RitumbraM1.pdf>>.

⁶⁵ Ashley Starr Kinseth, 'India's Rohingya Shame', *Al Jazeera* (online, 29 January 2019) <<https://www.aljazeera.com/opinions/2019/1/29/indias-rohingya-shame>>.

⁶⁶ Yermi Brenner, *Rohingya Migration to India: Patterns, Drivers and Experiences* (Report, Mixed Migration Centre April 2019) <https://mixedmigration.org/wp-content/uploads/2019/04/063_briefing-paper_Rohingya_India.pdf>.

⁶⁷ *ibid.*

⁶⁸ 'Who Are Chakmas?', *The Hindu* (online, 14 September 2017) <<https://www.thehindu.com/news/national/who-are-chakmas/article19682129.ece>>.

⁶⁹ *National Human Rights Commission v State of Arunachal Pradesh and Others* MANU/SC/1047/1996 (Supreme Court of India) ('NHRC').

remain in refugee camps, unable to obtain citizenship.⁷⁰ *P Ulaganathan v The Government of India* (*'P Ulaganathan'*) before the Madras High Court demonstrates the problems arising from their statelessness. The Court noted how the Tamils did not have any ties with Sri Lanka, how they had made applications for citizenship several times, that they had been living in camps in hellish conditions and considered how they had suffered in statelessness. It recognised the link between citizenship and enjoyment of human rights and noted that art 21 of the *Constitution* was violated since the Tamils had lived in statelessness for 35 years in these camps. One of the impediments for the citizenship applications to be considered was s 5 of the *Citizenship Act, 1955* (*'1955 Act'*) which defines an illegal migrant as a foreigner who entered India without valid travel documents. The Court noted that the Government, as the sovereign authority, has an implied power to grant relaxation under the *1955 Act*.⁷¹

The above cases show how the lack of citizenship and the situation of statelessness of the Chakmas and the Estate Tamils led to inhumane treatment and threats to their life and liberty. Even the courts have recognised how these populations have been subjected to human rights violations due to their situation of statelessness. In general, the United Nations High Commissioner for Refugees' (*'UNHCR'*) description of a stateless person's life illustrates how a stateless person's rights and dignity, without membership in a polity through citizenship, is affected: without nationality, a stateless person cannot

go to school or university; get a job; get medical care; own property, travel; register the birth of [their] children; marry and found a family; enjoy legal protection; have a sense of identity and belonging; participate fully in developments in a world composed of states, in which nationality is a key to membership.⁷²

Not only this but without nationality, severe human rights violations have been inflicted on stateless persons including prolonged detention, trafficking and discrimination.⁷³ UNHCR also records some of the problems faced by stateless persons across the world including perpetuation of statelessness across generations, insecurity, shaming and threats, property issues, issues in relation to custody of the children of stateless persons, the risk of arrest and detention, lack of education and employment opportunities, lack of access to health services, being unable to engage in political participation, and expulsion.⁷⁴ All of these illustrate that in a situation of statelessness, without the right to have rights, persons are unable to enjoy human rights in dignity.

⁷⁰ 'Forgotten People: Upcountry Tamils from Sri Lanka Living in Refugee Camps in India', *Reliefweb* (online, 15 September 2004) available at <[⁷¹ *P Ulaganathan v The Government of India* \(2019\) WP\(MD\) No 5253 of 2009 \(Madras High Court\) \(Swaminathan J\) \(*'P Ulaganathan'*\).](https://reliefweb.int/report/sri-lanka/forgotten-people-upcountry-tamils-sri-lanka-living-refugee-camps-india#:~:text=This%20bill%20grants%20citizenship%20to%20approximately%20168%2C141%20stateless%20estate%20Tamils.&text=The%20Upcountry%20Tamils%20in%20the,w ho%20were%20born%20in%20India.>.</p>
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⁷² *What Would Life Be Like If You Had No Nationality*, (Report, March 1999) <<https://www.unhcr.org/3b8f92124.pdf>>; Waas (n 51) 12.

⁷³ See van Waas (n 50) 12.

⁷⁴ Special Report — Ending Statelessness Within 10 Years', *UNHCR* (Web Page, 4 November 2014) <<https://www.unhcr.org/en-in/protection/statelessness/546217229/special-report-ending-statelessness-10-years.html>>.

B *'Life' as Encompassing the Obligation Not to Render Persons Stateless*

In light of the above description of the situation of statelessness, this section examines the meaning of life under art 21 of the *Constitution* vis-à-vis the obligation not to render persons stateless. Article 21 states: 'No person shall be deprived of his life or personal liberty except according to procedure established by law'.⁷⁵ Indian courts have adopted a liberal construction of this right and have included within the meaning of 'life', several civil, political and social rights contained in human rights treaties and conventions.⁷⁶ These rights have been included as part of 'life', as the Supreme Court of India has interpreted 'life' to mean a dignified life.⁷⁷ The Court recognised that the right to life 'includes the right to live with human dignity ... the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self'.⁷⁸ The Court considers that 'without the right to life with dignity other fundamental rights may not realise their complete meaning'.⁷⁹ So, 'life' interpreted as dignified life includes all rights that are required to live as a human being. The Supreme Court has recognised that the protection of such dignified life of non-citizens as the State's obligation.⁸⁰

What does this dignified life mean? As elaborated by the Supreme Court, the right to life includes human dignity,⁸¹ the right to livelihood,⁸² the right to health,⁸³ the right to medical care,⁸⁴ the right to speedy trial,⁸⁵ the right to be recognised as a person before law,⁸⁶ the right against torture,⁸⁷ the right against solitary confinement,⁸⁸ right to culture,⁸⁹ the right to social justice,⁹⁰ the right to

⁷⁵ *Constitution* (n 1) art 21.

⁷⁶ See M P Jain, *Indian Constitutional Law* (8th ed, Lexis Nexis 2018) 2249–50. See also *Navtej Singh Johar v Union of India* (2018) WP(C) 76 of 2016 (Supreme Court of India) [420]–[430] (Dr DY Chandrachud J) ('*Navtej Singh*').

⁷⁷ See *Bandhua Mukti Morcha v Union of India* (1984) 3 SCC 161 (Supreme Court of India) [10]. See also *In Re: Noise Pollution (V)* (2005) 5 SCC 733 (Supreme Court of India) [10].

⁷⁸ *Francis Coralie Mullin v Administrator, Union Territory of Delhi* (1981) SCR (2) 516 (Supreme Court of India) [8] (Bhagwati J) ('*Francis Coralie*').

⁷⁹ *Navtej Singh* (n 76) [127].

⁸⁰ *Chairman, Railway Board v Chandrima Das* (2000) 2 SCC 465 (Supreme Court of India) [32] ('*Chandrima Das*').

⁸¹ *Maneka Gandhi v Union of India* (1978) 1 SCC 248 (Supreme Court of India) [85] ('*Maneka Gandhi*').

⁸² *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545 (Supreme Court of India) [32].

⁸³ *Calcutta Electricity Supply Corporation (India) Ltd v Subhash Chandra Bose* (1992) 1 SCC 441 (Supreme Court of India) [30] ('*Calcutta Electricity Supply Corporation*').

⁸⁴ *Paschim Bangal Khet Mazdoor Samity v State of West Bengal* (1996) 4 SCC 37 (Supreme Court of India) [9].

⁸⁵ *Hussainara v Home Secretary, State of Bihar, Patna* (1980) 1 SCC 98 (Supreme Court of India) [10].

⁸⁶ *National Legal Services Authority (NALSA) v Union of India* (2014) 5 SCC 438 (Supreme Court of India) [75]–[80] ('*NALSA*').

⁸⁷ *Francis Coralie* (n 78) [8].

⁸⁸ *Sunil Batra v Delhi Administration* (1978) 4 SCC 494 (Supreme Court of India) [192]–[193].

⁸⁹ *Ramsharan Autyanuprasi v Union of India* (1989) Supp (1) SCC 251 (Supreme Court of India) [13].

⁹⁰ *Calcutta Electricity Supply Corporation* (n 83) [30].

education,⁹¹ the right to food,⁹² the right against custodial violence⁹³ and the right to shelter.⁹⁴ These rights are the most basic of rights that any human being is presumed to possess on account of their humanity and human dignity,⁹⁵ the ‘bare necessities of life’ and an arbitrary deprivation of any of these rights would result in a deprivation of the right to life.⁹⁶

From the above, two aspects are clear about the meaning of ‘life’ under art 21 — the first being that the right to life includes several rights that make up a dignified life and the second is that such dignified life is core to a human being’s ‘life’. Given the consequences of statelessness, that is loss of membership in the state and human dignity, it is difficult to imagine how a person’s ‘life’ in a situation of statelessness could be a dignified life as mandated by art 21 of the *Constitution*. The previous part described what ‘life’ is like in a situation of statelessness. A comparison of ‘life’ in such a context with ‘life’ as mandated under art 21 reveals that in a situation of statelessness, a person is exposed to human rights violations and is unable to enjoy basic human rights and live a dignified life under art 21.

The *NRC* updating exercise itself illustrates the importance of a state for an individual to enjoy human rights. If a person is rendered stateless through the *NRC* exercise and if they do not have another nationality, they may be considered a foreigner and detained under the *Foreigners Act, 1946* (‘*FA 1946*’).⁹⁷ Without diplomatic protection from any state, such detainees cannot be deported since they do not have a state and are vulnerable to human rights violations including indefinite detention which infringes art 21 of the *Constitution*.

Having established that when ‘life’ under art 21 of the *Constitution* is contrasted with the reality of a person in a situation of statelessness, a stateless person does not experience a dignified life, this article now turns to whether ‘life’ under art 21 should include an obligation not to render persons stateless. If this is the case, then a state action that renders persons stateless would be in violation of art 21.

At the outset, it is noted that the international obligation not to render persons stateless is applicable to India especially through the right to nationality, which is part of treaties that India is a party to, namely the *ICCPR*, the *Convention on the Rights of the Child*, the *Convention on the Elimination of All Forms of Discrimination Against Women*, and the *International Convention on the Elimination of All Forms of Racial Discrimination*.⁹⁸ Article 15 of the *UDHR*, as well as the different UN resolutions containing the obligation of states not to render persons stateless, apply to India.⁹⁹ Moreover, the obligation not to render persons stateless, as an emerging customary international law norm and as a general principle of law, is applicable to India. In any case, Indian courts have

⁹¹ *Unni Krishnan, JP v State of Andhra Pradesh* (1993) 1 SCC 645 (Supreme Court of India) [166].

⁹² *Shantistar Builders v Narayan Khimalal Totame* (1990) 1 SCC 520 (Supreme Court of India) [9].

⁹³ *DK Basu v State of West Bengal* (1997) 1 SCC 416 (Supreme Court of India) [22].

⁹⁴ *UP Avas Evam Vikas Parishad v Friends Coop. Housing Society Ltd* (1995) Supp (3) SCC 456 (Supreme Court of India) [8].

⁹⁵ *Francis Coralie* (n 78) [8].

⁹⁶ *ibid* [7]–[8].

⁹⁷ *Foreigners Act, 1946*, Act No 31 of 1946 (India) ss 2(a), 3.

⁹⁸ *ICERD* (n 16) art 5; *CRC* (n 16) art 7; *CEDAW* (n 16) art 9.

⁹⁹ Indian courts have often drawn obligations arising out of United Nations resolutions. See *People’s Union for Civil Liberties v Union of India* (1996) Supp 10 SCR 321 (Supreme Court of India) [10] (Rajendra Babu J).

applied the international norm of avoidance of statelessness where persons were at risk of being rendered stateless through governmental action.¹⁰⁰

1 *Nationality as a Necessity for Enjoyment of a Dignified 'Life'*

As noted previously, the obligation not to render persons stateless is applicable to India. A person without nationality does not enjoy the right to nationality and so does not possess membership in a state or enjoy a dignified life. A loss, deprivation or denial of nationality would mean the denial of a core right that enables a human being to exist and not to just possess but claim all human rights. Under art 21 of the *Constitution*, no person can be deprived of their right to a quality, dignified life. If there was a right that acted as a necessary component in the enjoyment and not just the entitlement to the right to life guaranteed under art 21, the former right has to be assured so the latter right can be enjoyed. The right to nationality is that 'precursor' right to enjoy a dignified life.¹⁰¹ In this sense, if art 21 mandates the state to guarantee the right to life of all persons, it means that the state cannot render someone stateless, cutting off such persons from the rights under art 21.

Human rights constitute minimum protections and the practices to realise such protections.¹⁰² So, a person can be considered to have human rights in not just possessing rights but in being able to enjoy those rights. A person may be entitled to all or some human rights but in rendering them stateless, the state exposes them to a situation where they may not be able to enjoy these rights. It follows that for the enjoyment of all rights constituting 'life', a person must be assured that they are not rendered stateless. Where state action renders a person stateless, such a person finds themselves in a place where they are, in effect, not entitled to the right to a dignified life under art 21.

Accordingly, a person must be guaranteed the right to have rights to enjoy the right to life, which constitutes the right to several other human rights. The loss or deprivation of the right to have rights would result in the violation of the right to other human rights or the right to life. A similar logic was followed by the Madras High Court in *P Ulaganathan*, where the Court considered the problems faced by those who were left in a situation of statelessness for 35 years and called this a violation of the right to life itself.¹⁰³ Therefore, given the importance of nationality for the enjoyment of the right to life, the right to nationality and the consequent obligation not to render persons stateless are necessary for the enjoyment of 'life' under art 21.

¹⁰⁰ See, *Gangadhar Yashwant Bhandare v Erasmo Jesus De Sequiria* (1975) 1 SCC 544 (Supreme Court of India) [22]–[23]; *Prabhleen Kaur v Union of India* (Delhi High Court, Bakhru J, 3 October 2018) ('*Prabhleen Kaur*') [35]; *Ramesh Chennamaneni v Union of India* (Telengana High Court, Naveen Rao J, 10 July 2019) ('*Ramesh Chennamaneni*') [48]–[50]; *P Ulaganathan* (n 73) [14]; *Mangal Sain v Shanno Devi* AIR 1959 P&H 175 (Punjab-Haryana High Court) [17]; *Jasmeet Kaur v Navtej Singh* (Delhi High Court, Kohli and Sharma JJ, 19 September 2017) [29].

¹⁰¹ Batchelor (n 27) 159.

¹⁰² Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press 2003) 17.

¹⁰³ *P Ulaganathan* (n 71) [14].

2 Nationality as an Aspect of Dignified 'Life'

Drawing from the right to nationality in the *UDHR*, 'life' can be interpreted as the obligation not to render persons stateless, which is an aspect of the right to nationality. Neither the *1955 Act* nor the citizenship provisions in the *Constitution* deal with the issue of statelessness and therefore do not exclude the application of art 15 of the *UDHR*. On the other hand, given that there is a lacuna in Indian law dealing with the obligation not to render persons stateless and also given that Indian courts have striven to interpret domestic law harmoniously with international human rights law, art 15 of the *UDHR* should apply in the interpretation of 'life' under art 21 of the *Constitution*.

The list of rights that constitute the right to life under art 21 is not exhaustive and fundamental rights cannot be narrowly construed ignoring international and national developments and changes in circumstances.¹⁰⁴ The expansive interpretation of art 21 is based on the assumption that the right to life has unarticulated, inherent rights.¹⁰⁵ The Supreme Court has arrived at this expansive interpretation from the 'Directive Principles of State Policy' in Part IV of the *Constitution* as well as international law including the *UDHR* and *ICCPR*.¹⁰⁶ All of this means that 'life' should be interpreted by the international obligation not to render persons stateless. This is firstly due to the effects of statelessness, which necessitates the evolution of art 21. Secondly, because the human dignity aspect of 'life' under art 21 will be violated if statelessness is permitted. Thirdly, as courts should adopt a harmonious interpretation of the *Constitution* with international norms.

'Life' under art 21 is understood as dignified life. Citizenship accords human beings with the ability to have full and dignified lives. This means that unless art 21 includes an obligation on the state not to render persons stateless, state action can render persons stateless and keep them away from enjoying a dignified life. If 'life' under art 21 is not interpreted to include this obligation, a group of second-class human beings may be created who are not entitled to the dignified life that is assured to all persons. This means that 'life' under art 21 or dignified life includes the right to nationality to the extent that state action shall not render persons stateless. This means that any state action that causes statelessness is in violation of a constitutional obligation arising from a fundamental right.

Does this interpretation mean that all stateless persons within the Indian territory should be given Indian citizenship so as to guarantee them a dignified life? Such an implication does not deviate from existing Indian case law on the point. Where courts have found persons stateless within Indian territory, they have directed the government to consider their citizenship applications based on existing citizenship law.¹⁰⁷ In cases where statelessness is a possibility, courts have either recognised their citizenship so they do not become stateless or offered

¹⁰⁴ *Francis Coralie* (n 78) [6].

¹⁰⁵ Soli J Sorabjee, 'Expansion and Protection of Fundamental Rights by Judicial Interpretation and Intervention' (2014) 7(1) *NUJS Law Review* 1, 5.

¹⁰⁶ *ibid* 7–8. The 'Directive Principles of State Policy' of the *Constitution* are a set of non-judicial obligations of the state to be considered by the state when enacting laws or developing policies. See also *Chandrima Das* (n 80) [19], [24]; *NALSA* (n 86) [102]–[103]; *Shatrughan Chauhan v Union of India* (2014) 3 SCC 1 (Supreme Court of India) [48]; *Calcutta Electricity Supply Corporation* (n 83) [30].

¹⁰⁷ *NHRC* (n 69) [21]; *P Ulaganathan* (n 71) [18].

protection to such persons.¹⁰⁸ Given this trend, it is not an untenable implication that including the obligation not to render persons stateless under art 21 could give rise to an obligation on the state to grant citizenship to stateless persons with no links to any other country.

3 *Procedure Established by Law and Exceptions to the Obligation Not to Render Persons Stateless*

In this Part so far, it has been established that art 21 should include an obligation on the state not to render persons stateless. If 'life' includes the state obligation not to render persons stateless, then any exception to such an obligation has to be in accordance with procedure established by law, a limitation on the right to life provided by art 21.

'Procedure established by law' under art 21 has been interpreted by the Supreme Court of India to mean that the law itself should be fair, just and reasonable.¹⁰⁹ This posits the existence of a law as a first requirement.¹¹⁰ In relation to the obligation not to render persons stateless, there should first be a law in existence that specifically mentions how and when statelessness can be created. Harmoniously reading international law on the obligation on states to avoid statelessness with Indian law, this should, as a minimum, not go beyond what are accepted in international law as exceptions for creating statelessness.

The Supreme Court has established that to assess if a law is fair, just and reasonable, what is to be examined is the legitimate state aim and proportionality of the legislation.¹¹¹ If the legislation pursues a legitimate goal (legitimate goal stage), there is a suitable means of furthering the goal (suitability stage), there is an alternative measure which could achieve that purpose with a lesser degree of limitation (necessity stage) and it does not have a disproportionate effect on the right holder (balancing stage), a limited infringement of rights will be valid.¹¹² So, any state action that does not comply with the obligation not to render persons stateless, which should be part of art 21, has to be tested to see if the action is based on procedure established by a just, fair and reasonable law. In fact, these requirements echo the limitations on state action causing statelessness under international law namely that such state action is to be non-discriminatory, for a legitimate purpose that is in accordance with international law and that the action is to be proportional to the consequences that would befall the person rendered stateless and the interest of the state that is being protected by the state action.¹¹³

While the following Part will test the *NRC* against the above requirements, this article argues that the obligation not to render persons stateless should generally be part of art 21. To illustrate this, consider *Ramesh Chennamaneni v Union of India and Others*, where the Telengana High Court ruled that the deprivation of

¹⁰⁸ *Prabhleen Kaur* (n 100) [39]–[40]; *Sheikh Abdul Aziz v State NCT of Delhi (Order)* (2014) WP(Crl) 1426/2013 (Delhi High Court) (Bhasin and Waziri JJ); *Sheikh Abdul Aziz v State NCT of Delhi (Order)* (2014) WP(Crl) 1426/2013 (Delhi High Court) (Baht and Sanghi JJ).

¹⁰⁹ *Maneka Gandhi* (n 81) [48].

¹¹⁰ *Dr Subhash Kashinath Mahajan v The State of Maharashtra* (2018) SC 1498 (Supreme Court of India) [12].

¹¹¹ *Justice KS Puttaswamy v Union of India* (2017) WP(C) No 494 of 2012 (Supreme Court of India) [180] (Khehar CJI, Chelameswar, Bobde, Agrawal, Nariman, Sapre, Chandrachud, Kaul and Nazeer JJ) ('*Justice KS Puttaswamy*').

¹¹² *Justice KS Puttaswamy* (n 113) [125]–[126].

¹¹³ See Part 2(B).

the citizenship of the petitioner was unsustainable although the petitioner had obtained citizenship on the basis of fraud.¹¹⁴ Hypothetically, if the argument in this article that art 21 includes the obligation on the state not to make persons stateless applies to the facts of the case, state action depriving citizenship should be tested against procedure established by law. The petitioner was deprived of his citizenship under s 10 of the *1955 Act* because he had not revealed in his citizenship application that he had travelled out of the country in the 12 months before the application. Here, the law in place is s 10 of the *1955 Act*. The procedure established should be for a legitimate purpose and be proportional. Applying the above test, firstly, it can be inferred that the deprivation of citizenship was to prevent fraud and concealment of facts in obtaining citizenship. Secondly, it is doubtful if deprivation of citizenship is suitable for furthering the goal of prevention of fraud. However, this is not contested since in the case at hand, residence in the country for 12 months before submission of application is a condition for obtaining citizenship by registration under s 5 of the *1955 Act*. Thirdly, s 17 of the *1955 Act* provides that anyone making any false representation as to a material particular shall be punishable with imprisonment up to five years or with fine up to Rp50,000. Since this is a criminal law measure, it is stringent and may prevent applications made by fraud. However, since a state's citizenship is given to a person in good faith, it might still be considered a necessary measure. Finally, the question is if the result of statelessness on account of citizenship deprivation has a disproportionate effect on the petitioner. Here, the purpose is to prevent fraud in obtaining citizenship of the country. On the other hand, it is the petitioner's right to have rights that is in the balance. With a loss of nationality, a person does not have any 'place in the world' and does not enjoy a dignified life. They will be exposed to human rights violations and not have access to civil, political and socio-economic rights that are available to all citizens. Their status is unresolved and they remain expelled from humanity. This is a disproportionate effect compared to the purpose for which the measure is in place.

In fact, the Court in *Ramesh Chennamaneni* also noted the serious consequences of statelessness in deciding that despite the fraud the petitioner should not be deprived of his citizenship. This is also why the UN Secretary-General notes that it is difficult to justify a deprivation of citizenship that results in statelessness on the ground of proportionality.¹¹⁵ This is because of the serious effects of statelessness discussed at the beginning of this section.

V 'LIFE', THE OBLIGATION NOT TO RENDER PERSONS STATELESS AND THE *NRC*

Having established that 'life' under art 21 of the *Constitution* should include an obligation on the Indian state not to render persons stateless, what is examined now is how the state should comply with this obligation in the exercise of updating the *NRC* that the Government of India has undertaken in Assam.

In 2015, the Supreme Court ordered the central and state governments to conduct the exercise of updating the *NRC* in Assam to determine who holds Indian

¹¹⁴ *Ramesh Chennamaneni* (n 100) [48]–[50].

¹¹⁵ *UN Doc A/HRC/25/28* (n 44).

citizenship and who are illegal immigrants.¹¹⁶ This exercise has raised concerns that about 1.9 million people from Assam could be at the risk of statelessness at the end of the exercise.¹¹⁷ The *NRC* process is examined below to see if it has the potential to create statelessness and if this process violates the obligation of the state not to render persons stateless, as part of the obligation not to deprive anyone of their 'life' under art 21 of the *Constitution*.

A *Does the NRC Updating Exercise in Assam Lead to a Threat or Risk of Statelessness?*

The *NRC* is a register containing details of Indian citizens.¹¹⁸ In Assam, the *NRC* is being updated on the basis of the *1955 Act* and the *Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003* ('*2003 Rules*').¹¹⁹ As per the *2003 Rules*, the Central Government can collect details from individuals and families in Assam including their citizenship status based on the *NRC* of 1951 and the electoral rolls until 24 March 1971.¹²⁰ Accordingly, applications were invited from the residents of Assam and after scrutiny of the applications, with data from the electoral rolls till 1971 and the *NRC* of 1951, a list was prepared and published.¹²¹ Anyone whose names do not appear in the *NRC* could make claims under the *2003 Rules*.¹²² After giving an opportunity to be heard to the applicants, the state prepared a final *NRC* for Assam.¹²³ Any person not satisfied with the outcome of the decisions as to the claims could appeal to the FTs established under the *Foreigners (Tribunals) Order, 1964* ('*1964 Order*').¹²⁴

The *2003 Rules*, while defining the district, local and national register of Indian citizens, defines them in terms of a register containing details of Indian citizens.¹²⁵ So anyone who is included within the registers are Indian citizens and anyone left out have not been considered as Indian citizens by the authorities dealing with the registers. If, through appeals before the FTs, a person remains excluded, the implication is that he is not an Indian citizen. As per the *FA 1946*, anyone who is not an Indian citizen is a foreigner.¹²⁶

The *NRC* in Assam is based on information contained in the 1951 *NRC* as well as the electoral rolls up to 1971. Paragraph 3(3) of the Schedule to the *2003 Rules* indicates a 'beyond reasonable doubt' standard to ascertain who the original

¹¹⁶ See C Chandramouli, *Order SO 3591 E* (Notification F. No. 95/2009–CRD, Ministry of Home Affairs 5 December 2013) <<http://nrcassam.nic.in/pdf/not11.pdf>>. See also *Assam Sanmilita Mahasangha* (n 4) [48].

¹¹⁷ 'Assam NRC: What Next for 1.9 Million "Stateless" Indians?', *BBC News* (online, 31 August 2019) <<https://www.bbc.com/news/world-asia-india-49520593>>.

¹¹⁸ *Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003*, Vide GSR No 937(E) (India) r 2(k) ('*2003 Rules*').

¹¹⁹ See 'Legal Provisions for Citizenship in Assam', *Government of Assam* (Web Page, 2014) <http://nrcassam.nic.in/rule_2003.html>.

¹²⁰ *2003 Rules* (n 118) r 4(a).

¹²¹ 'Complete Publication of Draft NRC', *Government of Assam* (Web Page, 2014) <<http://nrcassam.nic.in/complete-draft.html>>.

¹²² *2003 Rules* (n 122), Schedule, [6].

¹²³ 'Receipt and Disposal of Claims and Objections', *Government of Assam* (Web Page, 2014) <<http://nrcassam.nic.in/receipt-claims-objections.html>>.

¹²⁴ *2003 Rules* (n 118) Schedule, [8].

¹²⁵ *ibid* r 2(e), (g), (k).

¹²⁶ *Foreigners Act 1946* (n 97) s 2(a).

inhabitants of Assam are.¹²⁷ The website of the Assam Government lists all of the admissible documents for the *NRC* process, which would show links up to midnight of 24 March 1971.¹²⁸ This means that even if a person is a citizen, their inclusion in the *NRC* largely depends on their ability to show documentary linkages to India before 1971 and a high standard of proof is applicable. A number of residents have been unable to produce such documents even though they may be citizens. This is because a number of them are poor and marginalised, without documents or had lost their documents or had been unable to obtain the documents of the nature demanded by the authorities.¹²⁹ Some documents that have been submitted have been rejected on the basis of minor clerical errors including spelling errors and numerical errors.¹³⁰ In some cases, some members of a family have been added to the *NRC* while others have been excluded.¹³¹ The application of the *2003 Rules* have also been found to be discriminatory in practice.¹³² Without factoring in such issues, the *2003 Rules* place arbitrary and undue importance on documentation. The *2003 Rules* do not take into account the nature of the demographic or the feasibility of producing documents from decades before. It fails to consider that citizens may not possess documents, having never obtained them due to ignorance, pre-existing inequalities and discrimination, or disparity in terms of wealth. On the other hand, the *2003 Rules* automatically presume that those without such documents are non-citizens or illegal migrants.¹³³

Exclusion from the *NRC* can be overturned by a decision of the FTs. District Magistrates have to produce *NRC* records before the FTs.¹³⁴ So, the assessment before the FTs may still be premised on documentation because of what the *2003 Rules* state as the criteria for inclusion.¹³⁵ Furthermore, the functioning of the FTs themselves are not beyond reproach and they have been found to follow arbitrary procedure giving excessive power to the executive and operating through delegated legislation.¹³⁶

¹²⁷ *2003 Rules* (n 118) Schedule, 3.

¹²⁸ 'What Are the Admissible Documents?', *Government of Assam* (Web Page, 2014) <<http://nrcassam.nic.in/admin-documents.html>>.

¹²⁹ Amit Sengupta, 'Assam: The Many Problems of the NRC Exercise', *National Herald* (online, 3 August 2018) <<https://www.nationalheraldindia.com/india/assam-the-many-problems-of-the-nrc-exercise>>.

¹³⁰ 'Uncertain Destiny for Millions in Assam Post NRC', *Amnesty International* (Blog Post, 31 August 2019) <<https://www.amnesty.org.uk/press-releases/india-uncertain-destiny-millions-assam-post-nrc>>. See also 'In India's Citizenship Test, a Spelling Error Can Ruin a Family', *The Economic Times* (online, 17 August 2018) <<https://economictimes.indiatimes.com/news/politics-and-nation/in-indias-citizenship-test-a-spelling-error-can-ruin-a-family/articleshow/65434885.cms?from=mdr>>.

¹³¹ See Sengupta (n 129).

¹³² See Sadiq Naqvi and Dhruvo Jyoti, 'Trapped in the NRC Legalese', (*Hindustan Times*, 9 September 2019) <<https://www.hindustantimes.com/india-news/trapped-in-the-nrc-legalese/story-z0rBaerWHLw00AdWrh8tBJ.html>>.

¹³³ See Rukmini S, 'India's Poor Are Also Document-Poor', *Livemint* (online, 6 January 2020) <<https://www.livemint.com/news/india/india-s-poor-are-also-document-poor-11578300732736.html>>.

¹³⁴ *Foreigners (Tribunal) Order, 1964*, GSR 1401 [3A](5) (India), as amended by *Foreigners (Tribunals) Amendment Order, 2019*, GSR 623(E) (India).

¹³⁵ See *2003 Rules* (n 122) Schedule [1].

¹³⁶ See Talha Abdul Rahman, "'Identifying the 'Outsider': An Assessment of Foreigner Tribunals in the Indian State of Assam' (2020) 2(1) *Statelessness and Citizenship Review* 112, 113.

So, the 2003 Rules, by solely relying on documentation, could deprive citizens of citizenship. If such persons have no other citizenship, the NRC updating exercise could potentially render them stateless.

B *Does the NRC Updating Exercise Violate the Right to 'Life' under art 21?*

It is clear from the above paragraphs that the NRC updating exercise poses a serious risk of statelessness. As discussed before, the state should be obliged under art 21 of the *Constitution* not to render persons stateless. So, does the NRC updating process violate art 21?

Any state action that threatens to violate art 21 rights should be tested against the criteria of procedure established by law. As mentioned in the previous section, the criteria are that there should be a law and this law should be proportional. If the NRC passes this test, there would not be an arbitrary violation of the right to life.

The state action in question is the updating of the NRC. The laws pertaining to this exercise are the 1955 Act, the 2003 Rules, the 1964 Order and the *Foreigners (Tribunals) Amendment Order 2019* ('2019 FTO'). Applying the test of proportionality, firstly, the objective of the NRC updating exercise is the identification of illegal migrants.¹³⁷ This is a legitimate goal to protect the interests of a state.

Secondly, it is doubtful if this state action can identify illegal migrants. There is no evidence to show that the Indian state has considered if the purpose to be achieved can be achieved through the strategy adopted despite the fact that statelessness could be a result of this approach.¹³⁸ At best, what the exercise can do is find out who does not possess necessary citizenship documents. This does not necessarily mean that everyone who is not in possession of a required document is an illegal immigrant. As stated previously in this Part, the NRC does not factor in other issues that influence whether a person may have documents to establish citizenship such as the inability to obtain documents and the ignorance about obtaining documents in the past. It arbitrarily creates a distinction between citizens with documents and citizens without documents and penalises those without documents by taking away their citizenship. This is not to say that the Indian state cannot require documentation to prove citizenship. However, a person being unable to establish his nationality for want of documents is different from a person not possessing the citizenship of that state.¹³⁹ As UNHCR provides, if documents have 'been lost or destroyed, this should not be conflated with loss of nationality.'¹⁴⁰ States have an international human rights obligation to ensure the right to nationality independent of documentation.¹⁴¹ In this sense, the NRC is not suitable to achieve the legitimate goal it purports to achieve.

Thirdly, there is nothing to say that the NRC updating exercise, which poses a threat of statelessness, is the only option available to the Government to control

¹³⁷ *Assam Sanmilita Mahasangha* (n 4) [46].

¹³⁸ See, Priyaranjan Jha, 'Identifying Illegal Migrants through NRC Process Will Be Cumbersome, Costs Dar Outweigh Benefits', *The Indian Express* (online, 3 January 2020) <<https://indianexpress.com/article/opinion/columns/nrcs-cost-benefit-analysis-caa-protests-6197030/>>. See also, Shivam Vij, 'Why India Doesn't Need NRC', *The Print* (online, 22 November 2019) <<https://theprint.in/opinion/why-india-doesnt-need-nrc/324771/>>.

¹³⁹ *UN Doc A/HRC/25/28* (n 44) [35].

¹⁴⁰ *ibid.*

¹⁴¹ *ibid* [37].

illegal migration or identify illegal migrants. To its credit, *Assam Sanmilita Mahasangha v Union of India* prescribes other measures for preventing illegal migration such as stricter border control.¹⁴² So, it cannot be said that the *NRC*, which has the potential to create statelessness on a massive scale, is the only option available to the Government.

Fourthly, the *NRC* has a disproportionate effect on rights holders who are inhabitants of Assam. The exercise applies to the whole of the State of Assam and questions the citizenship of everyone in the state, at the cost of creating mass statelessness through arbitrary criteria, while laying down a high standard of proof, without showing cause to doubt the citizenship of the whole population in the first place. The justification claimed for this is the protection of national security. Even if it were to be considered that the presence of illegal migrants leads to such concerns, given that there may be other measures to protect national security, this creates disproportionate effects on the inhabitants of Assam. Given that statelessness leads to deprivation of 'life' and curtails access to all other human rights, mass deprivation of people's citizenship through state action on the basis of documents is not proportional. Quantitatively, this means that the state without considering alternative ways of protecting national security has decided to expose about 1.9 million people to the risk of statelessness where they could end up with no 'place in the world' and expelled from humanity. Therefore, the *NRC* does not meet the criteria under art 21 of the *Constitution*.

At this juncture, it is important to consider the implications of *Sarbananda Sonowal v Union of India* where the Court recognised that the presence of illegal migrants in the state of Assam was a national security concern.¹⁴³ Firstly, even in the case of national security concerns, the above argument on proportionality under art 21 applies and the *NRC* updating exercise cannot be justified on this count. Secondly, under international law, a state could take an action that results in statelessness if a vital interest of the state is involved.¹⁴⁴ Vital interest of state is of a higher standard than national interest and includes acts that seriously prejudice its integrity or security.¹⁴⁵ Even if it were to be assumed that illegal migration seriously prejudices India's security, there is no link between creating statelessness through a procedure that sets a high bar of documentation which could denationalise citizens and the protection of the arguable vital interest namely, identification of illegal migrants.

On the other hand, an Indian citizen could be deprived of their nationality because they cannot show documentary linkages as required by the *2003 Rules* and the *2019 FTO*. Under the *1955 Act*, there are limited grounds under which a citizen can be deprived of their citizenship after following the due procedure mentioned in the Act.¹⁴⁶ These grounds do not cover deprivation of citizenship on the basis that a person cannot any longer prove their citizenship through documents. This means that the *2003 Rules* and the *2019 FTO* could deprive citizens of citizenship on a ground not recognised by the *1955 Act*, which is the

¹⁴² See *Assam Sanmilita Mahasangha* (n 4) [45].

¹⁴³ *Sarbananda Sonowal v Union of India* (2005) WP(C) 131 of 2000 (Supreme Court of India) [5] (Lahoti, Mathur and Balasubramanyan JJ).

¹⁴⁴ See Part 3(A).

¹⁴⁵ *Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Arts 5–9 of the 1961 Convention on the Reduction of Statelessness*, UN Doc HCR/GS/20/05 (May 2020) [62].

¹⁴⁶ *Citizenship Act 1955* (India) ss 10(2)–(3).

parent legislation to the 2003 Rules. In this sense, the NRC process is ultra vires the 1955 Act.

Therefore, the NRC updating exercise in Assam should not be considered a just, reasonable and fair procedure but one that is arbitrary and disproportional. This means that the NRC updating exercise has the potential to render persons stateless in violation of the India's international obligation and art 21 of the *Constitution*, which should include this international obligation not to render persons stateless within the meaning of 'life'. In conclusion, the NRC updating exercise poses a serious threat to the 'life' of persons within the meaning of the *Constitution*.

VI CONCLUSION

This article sought to determine the meaning of 'life' under art 21 of the *Constitution* vis-à-vis the obligation not to render persons stateless. It was concluded that the right to have rights or the right to nationality is essential for a dignified life in a polity and for the enjoyment of human rights. So, art 21 being a repository of human rights, cannot be enjoyed without a nationality. This means that the right to rights under art 21 includes the right to have rights or the right to nationality and there is an obligation on the state not to render persons stateless. This obligation is subject to procedure established by a just, reasonable and fair law, that is, such a law could render persons stateless.

In applying these conclusions to the NRC updating exercise, it was found that the exercise itself has the potential to make citizens stateless. The exercise does not pass the test of procedure established by law under art 21. Therefore, the NRC process is in violation of art 21 and is unconstitutional.

The NRC updating process has brought into sharp debate aspects of the citizenship laws in India that could be arbitrary and unconstitutional, not just in their application to Assam, but also to the rest of India. The exercise itself has been found to be discriminatory in its application. The ruling party of India's election manifesto in Assam, contains a promise to correct the NRC list so that genuine citizens will not lose their citizenship.¹⁴⁷ However, without amending the law and without factoring in issues of statelessness, it may be impossible to fulfil such a promise.

In dealing with litigation arising from the NRC updating exercise, it remains to be seen how the Supreme Court will address the issue of statelessness that is imminent, in light of past precedents on dignified life laid down by the Court and how the meaning of 'life' under art 21 should include an obligation not to render persons stateless. Furthermore, given the proposal of the Government to extend the NRC to the rest of the country, if statelessness is not factored in and if the obligation not to render persons stateless is not respected by the State, such a process could render millions stateless.

¹⁴⁷ 'Assam Assembly Elections — BJP Manifesto Promises to Release "Corrected" NRC', *The Hindu* (online, 23 March 2021) <<https://www.thehindu.com/elections/assam-assembly/assam-assembly-elections-bjp-promises-corrected-nrc-avoids-cao-in-poll-manifesto/article34139627.ece>>.