



The human rights of the declared illegal migrants in the state of Assam: An analysis

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Abstract

The cross-border migration dispute between the Indian state of Assam and Bangladesh is one such dispute which has failed to find an equitable solution. While the issue is no more confined to the boundaries of Assam, the identification process has received severe criticism across the globe for not complying with the Universal Declaration of Human Rights and violating the human rights of the doubted citizens. The aftermath of the partition of India and the Bangladesh Liberation War has resulted in human migration between the countries. India supported Bangladesh throughout the war (1971) and also rolled out the policy to give refuge to the Bangladeshi migrants who took shelter in India. India is not a signatory to the Refugee Convention, of 1951. In the absence of any legislative framework to govern either the migrants or the refugees in India, it is governed by executive orders. The Assam Accord was enacted to determine the cutoff date to identify an illegal migrant as the indigenous people allege the continuous flow of migrants even after 1971 which is perceived as a threat to their security. There were a series of other policies which were in force before the controversial amendment of the Citizenship (Amendment) Act, of 2019. More than 100 foreign tribunals are in place to decide the status of the doubted citizens who are thereby detained. The present paper will look into the human rights of the declared illegal migrants highlighting the laws, policies and processes which are in force in Assam.

Keywords: Illegal migrants, cross-border, migrants

Introduction

One of the easternmost states of India, Assam with an area of 78,500 sq. km ^[1] has a tremendous increase in population of 3.12 crore from 2.67 crores in 2011 ^[2]. The geographical location of the State places it in a distinguished position from the other states in India as it is the gateway to the other sister states of Northeast India and connects to the Southeast Asian countries for commercial purpose. Apart from that, Assam shares its international and national borders, on the northwest by the kingdom of Bhutan; on the northeast, east, and southeast by the small mountain states of Arunachal Pradesh, Nagaland, Manipur, Mizoram, Tripura, and Meghalaya; and on the west by Bangladesh ^[3]. A narrow 40-mile corridor running through the foothills of the Himalayas in West Bengal connects Assam with the rest of the states of India. The physical feature of an Assamese can be said to have a admixture of races belonging to Aryan and the Mongoloids, also with the traces of the Dravidian and the Austric people as well ^[4]. A total of eight districts of Assam shares international borders with Bhutan and Bangladesh ^[5]. The natives of the state of Assam are known as "Asomiya" (Assamese), which is also the state language of Assam. Diverse tribes like Bodo, Kachari, Karbi, Miri, Mishimi, Rabha, etc co-exist in Assam, each unique in its tradition, culture, dress and the exotic way of life. A majority of the Assamese are Vaishnavas (a sect of Hinduism) ^[6].

In different periods of history, different ethnic groups have migrated to Assam and formed a composite population. One of the early migrants to arrive at Assam are the 'Tai Ahoms' a tribe from Thailand after crossing the Patkai mountains ^[7]. It is believed that the formation and growth of Assamese as a unified composite community was made during the glorious Ahom period. There are several opinions narrated with respect to the origin of the name 'Assam'. One view describes the mention of the name 'Pragjyothisha' and

'Kamrupa' referring to the ancient Assam in the great epic of Mahabharata, Ramayana and Puranas, while another view observes the name 'Aham' or 'Ahom' was probably given by the Ahoms ^[8]. The practice adopted by the Ahoms to accept the culture, language and religion of the natives of Assam helped them in assimilating and gain confidence of the people ^[9]. It helped them to rule Assam for more than six hundred years till they were invaded by the Burmese army. The Ahom's kingdom was dismantled by the Britishers, who intervened in the dispute between Burma and Assam. The intervening of the Britishers to protect Assam from the clutches of the Burmese Army gave them a smooth entry to conquer Assam as a reward soon after the event ^[10].

Human migration started to pace in the early 19th century, during the British rule in Assam, from different parts of India as well as from the neighbouring country of Nepal. The expansion of the British Empire and the discovery of an abundance of natural resources in Assam, required a strong labour force to work for their commercial interests which they failed to find it amongst the locals who were hesitant to work as labourers as they were owners of the land. This led to many labour migrants coming to Assam from Bengal, Uttar Pradesh, Madhya Pradesh, Bihar, Rajasthan and other states including the bordering country of Nepal ^[11]. This could be considered as one of the first groups of migrants in the colonial period coming and settling in the state of Assam.

Due to the geographical location it was easily accessible to the migrants from Bengal. Thus, during the colonial rule a significant growth of migrants from Bengal, both in the administrative and labour migrants was observed. This was also resisted later by certain Assamese groups who believed that the migration was encouraged, mostly the labour migrants, who were Muslims to make Assam a Muslim-

majority state with the ultimate motive to merge it with Pakistan^[12]. It was at the time when the seeds of religious partition has already been sown. However, Assam remained intact with India. The resistance of the natives of Assam towards the migration of people from East Bengal and their settlement resulted in the introduction of the 'Line System' to restrict their right to settlement in the state of Assam^[13].

With the end of the World War I, history has witnessed the peak of migration of people from one place to the other and its significance which initially the League of Nations had to deal with the issues associated with it. When the United Nations replaced the League, it inherited the global problem of combating migration. To find solutions to the issues associated with migration, the UN established the United Nations High Commissioner for Refugees. Two years after the formation of the UN, India became a sovereign republic. Even before the formal announcement of India becoming an independent nation on 15 August 1947, the seeds of migration started to grow in India. As a concept of the two-nation theory, Muslims from India were migrating to the newly created Islamic state of Pakistan. Likewise, the Hindus from Pakistan (modern day Pakistan and Bangladesh) migrated to India^[14]. Later on, during the liberation of Bangladesh (1971), some 1,00,00,000 people migrated from Bangladesh to India^[15]. In addition to this, India currently hosts migrants from Afghanistan, Syria, Myanmar, Tibet, Nepal, Sri Lanka. Thus, the territories of India, Pakistan and Bangladesh which were once united had their territories drawn and re-drawn many times in history causing inconvenience to the people in terms of citizenship and identity.

The migration began to be a cause of concern for the Assamese people when it was observed that the population of Assam has tremendously increased especially in the border districts with Bangladesh. It is believed that even though Bangladesh formed as a separate country in 1971, still there has been continuous migration of people to the state of Assam, due to the proximity of the borders. Although, there was no official data to prove the fact, the people of Assam started to allege them as undocumented and perceived them as the encroachers to their culture, language and ultimately to the security of the state.

Even though India has always been committed to unity through diversity, practising secularism, and belonging to widely different ethnic groupings since its independence from Britain in 1947, cultural differences, communal separatism, and ethnic conflicts nonetheless have resulted in bitter and violent struggles^[16]. The launch of the Assam movement and the series of ethnic conflicts by the Bodos towards the Muslim Bengalis is evidence of their resentment^[17]. As Islam is the religion which is followed by the majority in Bangladesh, hence Muslim Bengalis are often doubted as undocumented migrants from Bangladesh. The refugee migrants who have settled through proper channels are also looked at with suspicion as undocumented migrants in this process unless proven otherwise with the help of documents. Thus, the migrants from Bangladesh to India can be categorised as labour migrants whose stay is temporary and as per the allowed terms of stay; the partition migrants who chose to settle in India during the India-Pakistan partition; the refugee migrants who have decided to settle in India during the conflict between West Pakistan and East Pakistan. Although migration, as a problem in Assam, is looked at only from 1971, we cannot ignore the historical

events and the facts which have culminated in migration 'to and fro' of people from the three countries, that is India, Pakistan and Bangladesh. Thus, this paper looks at the legal framework adopted in the state of Assam to identify undocumented migrants considering the national and international standards in practice.

Who are Undocumented Migrants?

With the exponential population growth of Assam with the revision of electoral rolls in the year 1976, the people of Assam believed that it was due to migration from the neighbouring state of Bangladesh. The allegation soon took a serious route when a mass movement was organised demanding the identification of the 'illegal' or 'undocumented migrants'. It seems that the Assam Accord, which is considered one of the important documents with respect to the regulating of the migrants in Assam was signed without much deliberations with respect to how the 'undocumented migrants' are to be identified, rather it determined a specific timeline, that is 24th March 1971 beyond which a person shall be considered as 'illegal migrant' and hence deported^[18]. Thus, one criterion to identify an undocumented migrant would be failing to produce the relevant documents to prove one's existence in the country prior to the mentioned date.

It is important to ponder that, in India even though it is hit by cross-border migration tremendously, there is no comprehensive legislation which regulates nor defines a migrant, in fact it is placed under the definition of a 'foreigner' under the Foreigners Act, of 1946. It defines a 'foreigner', as, 'a person who is not a citizen of India'^[19]. The rules of citizenship seems to take a diversion for the state of Assam as compared to rest of India, as it says that, a person will fail to be a citizen of India if he/she fails to produce through documents one's existence prior to 24th March, 1971, which apparently is the date of independence of the state of Bangladesh, as it was alleged by the people of Assam that even after Bangladesh was formed as a separate state, the migration still continued. To incorporate the same Section 6A was inserted into the Citizenship Act, of 1955 by an amendment in the year 1985^[20]. The said section enumerated specific dates which shall be considered in concluding the fact whether a person shall be a citizen or a foreigner. To summarize the section if any migrant is proven to enter Assam prior to 24th March 1971 but after 1st January 1966 they are to be considered as citizens of India, however voting rights were to be suspended for a period of ten years, which shall be revived after the said period. The migrants who have entered after 24th March, 1971 shall be considered as a foreigner, which is not explicit in the section, however, this is adopted in line with the Assam Accord. Assam is the single state in India to have an different cut-off date to prove one's citizenship. For the rest of India, the cut-off date is July 19, 1949^[21]. Although, the petitions are pending before the Supreme Court of India to consider the provision unconstitutional, which is argued to violate the principle of equality as envisaged under the Constitution of India, the provision is still enforced in Assam^[22].

India is also not a party to the Refugee Convention 1951, thus the executive orders play an important role in determining who shall be considered lawful to settle in India. The Indira-Mujib Pact^[23] allowed the 'refugees' to settle in India. However, there was no specific timeline

which was determined to allow their settlement. With the incorporation of Section 6A, it seems that the refugees are not permitted to settle beyond the said cut-off date and if they have migrated to India they will be declared as 'illegal' or 'undocumented migrants'.

In addition to that the National Register of Citizens (NRC), has been updated only in the state of Assam since 1951. The NRC demands the production of legacy documents to prove one's existence in the state of Assam prior to 24th March 1971. [24] The final draft of the NRC has declared 19 lakh people as 'undocumented' [25]. However, not all the 19 lakh people will be declared as 'undocumented', as there has been an amendment to the citizenship laws of the country in 2019, which offered citizenship to a certain group of people. The clause has been produced below:

The Citizenship Amendment Act, 2019 (CAA) has inserted a proviso in section 2(1)(b) as

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

The clause provides the minority communities from Bangladesh, Pakistan and Afghanistan to acquire citizenship in India who came to India before 31st December 2014. However, in 2015 a notification was issued to offer citizenship to the 'religiously persecuted' minorities from the said countries. Thus, the 2015 order and the 2019 amendment make a huge difference, as in the latter even the declared undocumented migrants by the Foreigners Tribunals will also be able to apply for Indian citizenship. The reason for extending help to the minorities does not seem to pass the test under Article 14 [26] and Article 25 [27] as the minority groups of Sri Lankan Tamils, the Ahmadiyya Muslims of Pakistan and Rohingya Muslims of Myanmar [28] are excluded.

The said amendment has completely diluted the identification process and the purpose of enacting the Assam Accord. Firstly, the base year has now been extended till 31st December 2014. Secondly, the declared undocumented migrants will be able to apply for citizenship. It is indeed a progressive idea to offer citizenship to the people who are struggling to be included under a particular 'nation', however the same should not be denied to some on the basis of religion, India being a secular country. Thus, the above criteria will determine, if a person is a 'documented' or an 'undocumented' migrant. Now, let us look into the machinery and the process that will determine a person to be a non-citizen of India.

The Foreigners Tribunals in Assam: An Analysis

To identify the undocumented migrants, there are more than 100 Tribunals which are established, spread across all the 33 districts of Assam. The Tribunals are embedded with excessive and unfettered power to take up any case of a suspected person as brought before them by the registering authority and also to declare them as non-citizens even on

mere technical error [29]. They are empowered to decide cases on any of the below mentioned grounds:

- a. The doubted citizens referred by the Central Government.
- b. The doubted citizens referred by the Border Police.
- c. The 'D' voters as marked by the Election Commission of India.
- d. The excluded persons from the National Register of Citizens.

Thus, from any of the above-mentioned channels, Foreigners Tribunals (FTs) can take up the cases. The Central Government does have the power to refer a case to the FTs [30]. With respect to the Border Police, it is unique to the state of Assam, that all the police stations have a unit known as Border Police which is entrusted with the power to 'doubt' the citizen of any person [31]. If any person is doubted, a notice shall be provided and within the mentioned time, he/she shall produce before the FTs and produce the relevant documents to prove one's citizenship. In case a person fails to do so, the person shall be detained in the designated detention centres.

At this juncture, there are three major things which shall be discussed which tend to violate the rights of a person. Firstly, the unfettered power conferred on the Border Police to doubt any person without any laid down criteria will lead to harassment of genuine citizens. The questioning of one's citizenship is humiliating and violates the dignity of a human. Moreover, Assam has sheltered Bangladeshi 'refugees' and history has witnessed the settlement of Bengali Muslims during the colonial period. Often they will be the victim as they share similar linguistic and cultural attributes [32].

Secondly, the procedure adopted by the FTs in disposing of a case. The FTs are not established by an Act of Parliament but under the Foreigners Act, of 1946. There are many flaws which have been reported about the functioning of the FTs [33]. As there are no specific criteria which have been determined, the FTs are free to adopt their own procedure. Even a typographical error in the name of the person can conclude a person to be a 'foreigner'. There are cases reported where a member of a family is considered as a 'citizen of India' but another member is declared as a foreigner [34]. Thus, with the flawed FTs there is a possibility that genuine citizens are declared as a foreigner. The declared foreigners are on the verge of being 'stateless' [35] and in such a circumstance there shall not be any space of human error which can have a drastic impact on one's identity. The power of the FTs to decide a case 'ex-parte' shall not be permitted and opportunity must be given to all to present their case. Moreover, the objective of the FTs must not be for speedy disposal of the case, but to decide it meticulously free from error.

Thirdly, with respect to the detaining of the declared 'undocumented' migrants indefinitely in the absence of any specific policy. There is no prove to the fact that the declared 'undocumented' migrants are Bangladeshi nationals, neither there is any bi-lateral agreement between the two countries for safe deportation. In such a scenario, it seems to violate the customary international principle of 'non-refoulement' [36]. The Supreme Court of India have intervened from time to time in the entire process which is adopted in the state of Assam. With the outbreak of the Covid-19 pandemic, it ordered the release of the declared foreigners who have completed three years in the detention

centre, however, they must report to the designated police station every week^[37]. Although they were allowed to come out of the congested detention centres, yet their freedom is restricted by making it mandatory to report every week.

The Election Commission of India during the revision of the rolls in 1976 in the state of Assam, started with a unique practice of writing the letter 'D' against some of the electorates. The term 'D' signified doubtful voters and the voting rights were suspended until the final disposal of the case by the FTs. The cases of D voters are not fully disposed of yet. Neither any power was conferred on them nor any criteria formulated before adopting such a random practice where the rights of the persons were severely hampered.

Lastly, the declared foreigners by the NRC can approach the FTs to reconsider their case by producing the relevant documents. Although the High Court and Supreme Court will have jurisdiction to hear appeals from the FTs yet the question is how many of the declared foreigners can afford to hire lawyers in the High Court and Supreme Court as most of them are daily wage labourers.

Cases Decided by the Indian Judiciary: A Human Rights Perspective

India is not a party to the Refugee Convention 1951, yet India has ratified a few conventions such as UDHR, ICCPR, ICESCR, CRC, and CEDAW. The principle of 'non-refoulement' and 'non-discrimination' are the two founding principles which has been enshrined in a number of International Conventions such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic Social and Cultural Rights (ICESCR) of 1966, the 1984 Convention against Torture and 1989 Convention on the Rights of the Child.

The protection of life and personal liberty except according to the due procedure established by law under Article 21 of the Constitution of India has been provided to foreigners in India as well with the decision of the Supreme Court of India in *Louis De Raeds v. Union of India*^[38] and *State of Arunachal Pradesh v. Khudiram Chakma*^[39]. The said Article has been given a wider scope and its ambit has been significantly expanded to protect not only the life of the person, also to but live with human dignity. The right has been extended to all human being including an alien which is the duty of the state to protect the life and liberty of the person^[40]. There are several cases where the Indian courts have protected the rights of the refugees to non-refoulement^[41] and have protected them where there are substantial grounds to believe that their life would be in danger by allowing them to be granted refugee status by the UNHCR^[42].

In *Zothansangpuri vs State of Manipur*^[43], the Imphal bench of the Gauhati High Court ruled that the refugees have the right not to be deported if their life was in danger. In *Dr Malvika Karlekar vs Union of India*^[44], the Supreme Court held that authorities should consider whether refugee status should be granted; and until this decision was made, the petitioner should not be deported.

In *Bogyi vs Union of India*^[45], the Gauhati High Court not only ordered the temporary release of a Burmese man from detention but also approved his stay for two months so that he could apply to UNHCR for refugee status. The Gauhati High Court issued a landmark ruling in the case of *U Myat Kayew and Nayzan vs State of Manipur*^[46], it involved eight Burmese, aged 12 to 58, who were detained in the

Manipur central jail in Imphal for illegal entry. Those people who are the pro-democratic activists in Burma voluntarily surrendered to the Indian authorities and were taken into custody. They were charged under section 14 of the Foreigners Act for illegal entry into India. They filed a petition for their release, however, to enable them to seek refugee status with UNHCR in New Delhi. The judiciary has also upheld a refugee's right to leave the country.

In *Nuang Maung Mye Nyant vs government of India*^[47] and *Shar Aung vs government of India*^[48], the courts ruled that even those refugees against whom cases were pending for illegal entry should be provided exit permits to enable them to leave the country for third country resettlement. However, the judiciary has put in their decision on the specific cases which have been brought before them, which in many circumstances may go unnoticed.

The Constitution of India provides certain fundamental rights to all persons and thus, they include refugees as well as declared foreigners as well. While the judiciary has played a humanitarian approach while protecting the rights of the refugees in India, comprehensive legislation governing their rights and obligations must be established for equal treatment to be provided to all the refugees in India. Needless to say, the same analogy must also be applied to the migrants in India. The undocumented migrants in India by declaring them as declared foreigners on failing to prove their nationality are living a life without any rights being guaranteed on time. Even though the judiciary has from time to time intervened to protect the rights of the foreigners by directing the FTs and the government of Assam to enforce and protect the rights of the alleged or declared foreigners, a specific statute declaring their rights and obligations is the need of the hour. In addition to the two important constitutional rights that is, Article 14 and 21 of the Constitution of India there are certain other rights which are available to both citizens and non-citizens such as protection in respect of conviction for offences^[49]; Right to elementary education^[50]; Protection against arrest and detention in certain cases^[51]; Prohibition of traffic in human beings and forced labour^[52]; Prohibition of employment of children in factories etc.^[53]; Freedom of conscience and free profession, practice and propagation of religion^[54]; Freedom to manage religious affairs^[55]; Freedom from payment of taxes for promotion of any religion^[56]; Freedom from attending religious instruction or worship in certain educational institutions^[57]. Thus, the rights shall be conferred on the declared foreigners and they shall be release from the detention centres. I would urge to supplement the concept of detention centres with that of well regulated 'work permit'.

Conclusion

In terms of the legislative framework in India, refugees, migrants and a foreigner are all governed under the same legislation, that is the Foreigners Act, of 1946 as discussed in the paper. The rights of the said categories are not determined which has caused a hindrance to the refugees who have settled through the genuine course. Apart from foreigners who have migrated temporarily as a tourist or for work or other related matters, the others must be citizens of India. The rights of the 'refugees' who have or will take shelter in future are at par with citizenship. Their rights are not specified and are based on the orders which shall be passed from time to time on the case to case basis. Even for

the ones who have been declared to be 'undocumented foreigners', there is the absence of any specific guidelines. Even if we consider them on par with the convicted criminals, there seems to be unequal treatment being provided to the 'declared foreigners' or 'convicted foreigners' by failing to allow the rights available under the Indian criminal justice delivery system such as parole, release after completing of the specified terms of imprisonment. The indefinite detention and the principle of guilty until proven innocent do not even treat them at par with an accused under Indian laws.

While formulating the rules for identifying the undocumented migrants in Assam, two agreements must be referred to, one is the Nehru-Liaquat Pact and the Indira Mujib Pact. The former allowed the people to come to India and also claim their immovable property which they had to leave due to the communal riots. The pact allowed further migration of people to and fro both the countries. The latter was signed between the two countries in 1971 during the which the refugees have settled in India as a escape to the atrocities from Pakistan. In both the Acts the main objective is to protect the rights of those people who have suffered hostilities at different intervals. While the Nehru-Liaquat pact does give a defined time period beyond which the right cannot be claimed, the Indira-Mujib Pact do not speak anything about the cut-off date. The cut-off date as decided in the Assam Accord is chosen on the basis of the Independence of Bangladesh on 26th March, 1971. The number of refugees from Bangladesh to India has not been recorded till date rather it is only estimated that millions of refugees took shelter in India to escape the horrid situations in their country of origin. The allegation of undocumented migration in the state of Assam is a not a new phenomenon, however even after the passage of several decades, there is no cohesive policy to govern them. The declared foreigners being locked up in the jails of Assam without any specific period of their release is a clear violation of their life and liberty. The detention camps do not have any facility to provide a conducive environment to the declared foreigners. India is neither a signatory to the Convention Relating to Status of Refugee nor its protocol of 1967. However, India has ratified a number of major international human rights instrument which obligates to provide with the basic human rights. The Constitution of India also accords some basic rights to non-citizens. With no uniform practice it might sometimes become difficult to differentiate the various category of asylum seekers in the country, while some may be identified as a refugee while other may be doubted as illegal migrants, the current scenario in the state of Assam is an eye-opener to that fact.

The Constitution of India clearly states that the rights provided under Article 14 and Article 21 are available to both a citizen and non-citizen, even Article 32 and Article 226 of the right to constitutional remedy is available to non-citizens. However, the migrants who are declared as a foreigner may not even know the rights which they can avail of and in the fear that their relatives or friends might have to undergo the same treatment may chose not to sought for help and chose to suffer the same. The conferring of rights cannot be solely be based on the principle of citizens and non-citizens. India has not accorded its acceptance to the Refugee Convention, 1951 which sets out the guidelines and the rights which should be conferred on a refugee. Not being a signatory to the Convention, the executive orders and the

agreements through which India has nodded its acceptance to shelter the refugees have led to serious human rights violation of a certain section of people who are declared as foreigners and are alleged as illegal migrants from Bangladesh. The refugees have been demarcated on the basis of religion and are provided with an option to acquire Indian citizenship. By granting citizenship, India has shown humanity to provide citizenship rights to all those people who have entered India up to 31st December 2014, at the same time the policy seems to violate the discrimination principle by not taking into consideration the minorities of certain specified countries. The extension of the cut-off dates from time to time without any specific criteria to host the refugees will definitely produce two categories of people, one will be allowed to acquire citizenship, while the other will be considered stateless. The objective of the law is not to provide an opportunity to acquire citizenship but to govern the migrants through different streams on the basis of the Constitutional and International standards as laid down in varied Conventions.

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