

REFUGEE WATCH

A South Asian Journal on Forced Migration

Fallacy of Protection

56

Mahanirban Calcutta Research Group
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The Politics of Humanitarianism: Some Considerations

By

Shibashis Chatterjee*

Humanitarianism and its political derivative, humanitarian intervention, exploded on to the scene a decade back.¹The concept of humanitarian intervention was justified as a manifest improvement over the Agenda for Peace approach to global peacekeeping to a more muscular way that sought to protect people from violence across the world and thereby advance the idea of human rights as an ethical imperative or a moral trump over several other competing ideas predicated on claims of juridical sovereignty. This study makes several claims concerning this rather unprecedented dilation of humanitarianism in international politics. First, I show that the idea has evolved from being based on religious piety and charity to crisis mitigation and expedient to one of neoliberal governmentality, a right to save immortal souls more than the perishable bodies. It is at the same time a politics of life and victimhood, which discriminates care as much by ascription and expedient as by the concerns of the well-being and health of the host. Secondly, and as a logical corollary to the first, this requires us to understand humanitarianism as a variant of Foucault's ideas of biopower and biopolitics, understood as a politics of life, and Derrida's ideas of hospitality, gift, and forgiveness to understand the challenges of the politics of protection. It explains how the idea of protection is central to humanitarianism and its derivative governmentality in the form of modern population politics. We invoke Foucault's idea of the technologies of self-care as a condition of freedom and Derrida's ideas of care as duty and not choice to explain this transition. Foucault's work is particularly important in tracing how the internal technologies of care and protection evolved through the 18th and 19th centuries, producing the familiar argument of rescuing and protecting the human being in distress. Derrida's views make us understand that any politics

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of humanitarianism as the ideas of aid and protecting outsiders seem to be conceptually incapable of overcoming their limits. Thirdly, the paper argues that the modern form of humanitarianism is a product of modern neo-liberal capitalism rather than a form of altruism or love for humanity. Fourthly, I argue that idea of humanitarianism is global in scope, and international humanitarian law as a regulatory basis of global humanitarian governance and the governance practices in the domains of food and health bear a clear testimony to this fact. My central argument is that humanitarian protection is a form of biopolitical governmentality, and, therefore, all contexts of humanitarian protection would show limits and prioritisation of lives. This study argues that the innate diversity of conflicting ethical considerations makes it impossible to arrive at a sanitised version of humanitarianism that can be justified in abstract philosophical terms. Rather, humanitarianism must be understood politically, and considerations of interests, both economic and strategic, are central to the concept.

I. Protection and Humanitarianism

The idea of humanitarianism is a widely reflected and analysed phenomenon, though the bulk of the literature in international relations has approached the concept either through the prism of human rights or problems of security. However, this has often tended to obfuscate issues and prevented researchers from asking more fundamental questions. Instead of looking at humanitarianism through rights or security concerns, it is necessary to position how the idea of protection or hospitality has emerged as a key component of humanitarianism or humanitarian government. In simplest of terms, it is important to locate humanitarian practices as a part of population politics. The notions of humanitarian protection and care are inextricably intertwined with both the techniques of governance and the imperatives of the neoliberal political economy. In this section, we will trace how the idea of protection came to configure the modern practices of humanitarianism. While Foucault's path-breaking work on population politics and governmentality is pivotal to this analysis, engaging with Derrida's idea of hospitality is also necessary to understand the inescapable dilemmas that afflict us.

The idea of protection is central to humanitarianism. The historical roots of the idea go back into the past, with both Christianity and Islam calling for charity and care of the distressed. In the words of Christ, "I was hungry and you gave me food, I was thirsty and you gave me something to drink. I was a stranger and you welcomed me. I was naked and you gave me clothing, I was sick and you took care of me. I was in prison and you visited me."²² The idea of pastoral care is central to Christianity and the pastor becomes the agent who cares for the weak, the troubled, the alienated and all those in need for personal welfare. The idea of pastoral care is also likened to that of shepherding the needy and the distressed, which incidentally, went into Foucault's analysis of power, biopolitics, and governmentality. In fact, the missionary activities of the Christian churches were undoubtedly the most important careers and protagonists of early humanitarianism. Similarly, Islam

also stressed the role of charity as a central aspect of its faith. Islamic teaching distinguished between *zakat* (obligatory charity) and *sadaqa* (voluntary contribution), and instructed believers to help their brethren in need as a form of duty. The Koran and the Hadith mention different forms of charity related to helping the needy, protection from calamity, and debt relief. Organised Islamic churches have engaged in aid and relief throughout medieval and modern histories. Other religious traditions also make similar pledges. Religion, in brief, constituted the first moment of humanitarian protection. However, organised religion and religious bodies could not become the chief vectors of humanitarianism for many reasons that may not detain us here. The gradual secularisation of political authority in the West, the increasing salience of the state as the primary institution of collective life, and a gradual emergence of a rights-based discourse to humanitarianism put paid to the efforts of the religious bodies all over the world.

Another significant source of modern humanitarianism is laws of war. While rudimentary regulations to combats are as old as human civilization itself, there were rapid moves to the codification of principles from the 18th century onward. Gradually, domains such as protections of civilians and prisoners of war, conduct of hostilities, naval combat, enemy property, military necessity, and care for the wounded among others came under the purview of international legal regulations and many rules were made to make the conduct of warfare more humane. The Hague Convention of 1907 and the four Geneva Conventions of 1949 created the framework for the emergence of modern humanitarian law. The limited efficacy of these instrumentalities notwithstanding, the customary laws and statutes have powerfully driven home the idea that wars needed to be fought within acceptable codes of conduct as agreed upon by the states.³

The existing literature on the history of humanitarianism has mostly indicated three periods or moments that espouse different structures of feelings. Barnett and Weiss's widely cited work mentioned 'an imperial humanitarianism, from the early nineteenth century through World War II; a neo-humanitarianism from World War II through the end of the Cold War; and a liberal humanitarianism, from the end of the Cold War to the present'.⁴ Walker and Maxwell (2009) likewise describe the rather urgent moments of the two World Wars, the Cold War period of 'mercy and manipulation', and the 1990s yielding an epoch of 'globalization of humanitarianism'. Randolph Kent draws attention to the pivotal time of the Second World War when the vast scale of mass atrocities, devastation, and unprecedented casualties due to massive developments in war fighting technologies forced states to recognise interventionist humanitarian action as an unavoidable responsibility.⁵ The period was certainly not one of altruism and universal brotherhood. Rather, states were motivated to act out of drastic alterations in the material basis for warfare whereby distances and information time collapsed as never before. Both the scale of human fatality and the quick dissemination of these figures and narratives tied the hands of governments that feared mass disaffection of troops and alienation of public support from war efforts unless credible efforts were undertaken to ameliorate victims of war in a principled way. The

science of death has paradoxically generated the science of care for the nation-state.

Humanitarianism, moreover, became a rallying point for a large number of civil societal action that stemmed from advances in military medicine, advocacy practices and evidence-based action, and philanthropic associations of various kinds. Two broad patterns emerged out of this. Many of these bodies were local and their activities were limited within their borders. They were also often motivated by the racial cause of their respective nation-states. In contrast, the activities of organisations like the International Committee of the Red Cross (ICRC) were distinctly internationalist in orientation. It based itself on standing international legal agreements as constitutive of the framework of action that would not differentiate between citizens of nations, as all were deserving of care, protection, resuscitation, and recovery.

Advocacy has also been a pivotal form of humanitarian action, and Florence Nightingale's manifold contributions strengthened the case to look beyond all contingencies in cases of health emergencies. While she did not directly take part in advocacy, her practices and actions largely contributed to the success of advocacy as a model of care, nursing, and humanitarian action for the diseased. In the words of Selanders and Cranes, "Nightingale was a singular force in advocating for as opposed to with individuals, groups, and the nursing profession."⁶She described humanitarianism not as act of charity but as a matter of our inalienable right. And regardless of the nature of the political order and social systems, she not only articulated an unconditional case for nursing support for the ill and the wounded all over the world, but began to draw attention to the gendered practices around the then prevalent norms of humanitarian action that privileged the rights of men and devalued that of the female nurses and caregivers.⁷

This narrative, though persuasive and empirically reliable, tends to make humanitarianism an exogenous phenomenon, which seemed to have a life of its own, and was driven primarily by calamities both human and natural. In contrast, it may be argued that humanitarianism is as much a part of the technologies of power of the modern state as are all other general forms of public amenities and services. There are two contrasting interpretations here to boot. The first sees humanitarian governance as a technology needed to make sense of the state's categorisation of the various groups of people who were deserving of protection, who could be trusted in protecting and who could be not, whose life mattered more or less, and what justificatory discourses may be offered towards this end. The emphasis here is on the politics of race and nationalism, the modes of other is action that would separate citizens from outsiders, or make a group of citizens worthier than others, to deny the right to have rights to outsiders and groups that are perceived as hostile to the national well-being, and provide the state the justificatory grounds to manage humanitarian tasks in a fiscally responsible way. The second reading adds that humanitarian governance is not initiated only to keep others at bay or limit the right to protection to the acceptable groups but also to care for the emotional health of the domestic population

who require guarantees of sanity in their compulsive practice of limits. However, both these ideas are based on conceptual resources drawn from Foucault and Derrida to which we now turn to in the next section.

II. Biopower, Governmentality, Hospitality, and Forgiveness

Foucault saw modern power as a mechanism to administer life along two distinctive axes. One targeted to work on and disciplining the human body: ‘the body as a machine: its disciplining, the optimisation of its capabilities, and the extortion of its forces’.⁸ Foucault termed it the ‘anatomopolitics of the human body’. The second axis consisted of the collective or the population at large, which he called biopolitics. According to Foucault, “By this I mean a number of phenomena that seem to me to be quite significant, namely, the set of mechanisms through which the basic biological features of the human species became the object of a political strategy, of a general strategy of power, or, in other words, how, starting from the eighteenth century, modern western societies took on board the fundamental biological fact that human beings are a species. This is roughly what I have called biopower.”⁹ Foucault elaborated that biopower emerged later and “focused on the species body, the body imbued with the mechanics of life and serving as the basis of the biological processes: propagation, births and mortality, the level of health, life expectancy and longevity, with all the conditions that can cause these to vary. Their supervision was effected through an entire series of interventions and regulatory controls: a biopolitics of the population.” (Italics in original).¹⁰ He described it as a political problem as well as science problem, for a problem of biology was also a political problem and power’s problem.¹¹

While biopolitics is quintessentially modern, it is anticipated only by the Church that kept records of life and death and was the chief dispenser of care for the needy and the distressed. The state administers biopower as a politics of life, for regulating and improving the health of the population, to bring welfare benefits to the poor, and create an infrastructure of territorial security for a named population. Biopolitics, therefore, is not the traditional coercive force of the government. Rather, it arises out of an active interest in the life of the people whose welfare requires disciplining, monitoring, classification, surveillance, and the whole paraphernalia of institutions and scientific practices needed for the care of the body and the soul of the demographics. Like Gramsci and Althusser, Foucault also grants the existence of the sovereign power at the margins or limits of biopower.¹² When regulation fails and disciplining falters, coercion is needed, and the state must use violence as its sovereign signature. However, this is not how the modern state rules. Power is no longer a matter of negative sanction; it is about positively creating a disciplined and regulated body. If sovereign power is about the politics of death, biopolitics is about the politics of life. The manifest tension between the two forms of power and politics requires the ‘biopolitical border’ between lives to be cared for and those who can be left uncared for, and between the politics of care and the politics of indifference. It is not expressed by the territorial borders separating states, but in the

peculiar construct of the ‘state racism’ that separates the lives that matter and those that can be subjected to the threats of death.

If biopolitics produces ‘population’, a statistically generated social collective, governmentality, another concept that Foucault uses to explain the configurations and workings of modern power, is about the production of capillary power at various social sites, like in classrooms, prisons, institutions of mental health, that produce disciplined bodies. Foucault, in fact, provides a categorical understanding of the concept, which is worth recounting.

By this word “governmentality” I mean three things. First, by “governmentality” I understand the ensemble formed by institutions, procedures, analyses and reflections, calculations, and tactics that allow the exercise of this very specific, albeit very complex, power that has the population as its target, political economy as its major form of knowledge, and apparatuses of security as its essential technical instrument. Second, by “governmentality” I understand the tendency, the line of force, that for a long time, and throughout the West, has constantly led towards the pre-eminence over all other types of power – sovereignty, discipline, and so on – of the type of power that we can call “government” and which has led to the development of a series of specific governmental apparatuses (appareils) on the one hand, [and, on the other]† to the development of a series of knowledge’s (savoirs). Finally, by “governmentality” I think we should understand the process, or rather, the result of the process by which the state of justice of the Middle Ages became the administrative state in the fifteenth and sixteenth centuries and was gradually “governmentalized.”¹³

While there is an overlap of the ideas of biopower, biopolitics, and governmentality, Foucault makes it clear that governmentality is about the making of political rationalities that are not limited to the state. Conceived as a technology of discipline, Foucault argues that governmentality in its most recent phase has taken a new form, which he calls ‘neo-liberalism’, and distinguishes it from the political liberalism of the 18th century. This neo-liberalism is not about the state keeping the market free and competitive but the market taking over and controlling the state. Moreover, its basis for governance is not the regulation for the protection of individual freedom required by the economic or rational man. Rather, under neo-liberalism, the basis of regulation shifts to what Lemke described as “in the entrepreneurial and competitive behaviour of economic-rational individuals.”¹⁴

My argument here is that humanitarianism is a discourse of protection of life and death that invariably carries the imprimatur of the Foucauldian ideas of biopower and governmentality. I would develop this theme in the next section. However, the idea of protection requires more reflection at this stage because, although Foucault explains why the physical and mental health of a given population becomes central to the state’s politics of care and its attendant limits, one still requires an understanding of why our commitment to protect is always paradoxical in effect. This paradox can be explained in a myriad of ways. But, in a pithy form, the central idea is that our capacity to give and protect seems limited as is our powers of forgiveness

without which care is always conditional. It is the conditionality of care that is also the limits of humanitarianism. Derrida's reflections on hospitality and forgiveness help us understand both the nature and the causes of these limits.

Derrida makes it clear that there are palpable limits of hospitality, since the host can hardly be unconditionally caring and providing towards the guest. First, hospitality requires a power to offer aid, a certain capacity for action, ownership of resources, and a power of decidability over deciding. Hospitality also means that the host exercises a degree of control over the guests, since the hosted may have unconditional urges and may make demands that go both against the material capacity of the host and compromise the host's sense of identity and ownership. Hence, hospitality is never unconditional. Therefore, hospitality seems controlled at best, where the line of distinction between the host and the hosted remains in place all the time, and exclusions may be required on grounds of languages, national identity, race, and ethnicity. Essentially, the host can exercise control in the act of caring for the other—be they refugees, political exiles, victims of natural disasters, conflicts, or guest workers seeking refuge and support.

Derrida's account of hospitality builds on his understanding of gift and forgiveness. Derrida complicates gift giving as conventionally understood to be misleading as he finds in the act of gifting utilitarian considerations of expectation, reciprocity, and a desire for recognition of generosity. The grant of the gift, therefore, is ethically circumspect since generosity is conditional. In the words of Clive Barnett, "In reiterative readings of the theme of hospitality in literature, policy, and theology, Derrida finds that hospitality is ordinarily represented as a gift in the conventional sense, offered in exchange for something (for example, for good conduct, or respect for the law). Hospitality is therefore offered conditionally, out of a secure sense of self-possession. Just as with the deconstruction of the gift, Derrida's reading of what he calls the 'laws of hospitality' finds them to be premised on a logic of un-relinquished mastery over one's own space."¹⁵ In his text *On Cosmopolitanism and Forgiveness*, mirroring his take on gifts, Derrida argues that true forgiving is only possible if it amounts to forgiving of an 'unforgivable' misdemeanour or indiscretion. Conditional forgiving tantamount to amnesty, reconciliation, arbitration, or compromise, and is, therefore, not a genuine act of kindness. In the words of Simon Critchley and Richard Kearney, "Derrida argues that true forgiveness consists in forgiving the unforgivable: a contradiction all the more acute in this century of war crimes (from the Holocaust, to Algeria, to Kosovo) and reconciliation tribunals, such as the Truth and Reconciliation Commission in South Africa. If forgiveness forgave only the forgivable, then, Derrida claims, the very idea of forgiveness would disappear. It has to consist in the attempt to forgive the unforgivable: whether the murderousness of Apartheid or the Shoah."¹⁶

This lays the ground for Derrida's contrast of conditional and unconditional hospitality, the latter being an impossible act of ethical conduct while the former though pragmatic is never enough as an ethical standard. Derrida thus sets up a paradox of the possible impossibility, or vice versa, thereby problematising the very ethical basis of the idea of protection

underlying humanitarianism. For Derrida, the unwelcome guest is a challenge for the host as the visitor questions the self-identity and subjectivity of the provider. True, the paradox of the ethically short-changed possible tolerance (conditional hospitality) and the impossibility of the unconditional hospitality is paralyzing as an ethical stance. It also reflects on the superficiality of the prevailing models of protection by exposing their putative ethical basis as either indicative of our limits of generosity to outsiders or pure tactical compromises to habilitate alterity in life. This is the reason why Derrida both sanctions an ideal cosmopolitanism that would admit everyone unconditionally and simultaneously denies it as a possibility as limitations on rights of residence become mandatory in all the cases. Hosting, gifting, and forgiving are never settled and their possibilities remain open-ended as the philosophy of deconstruction demands.

The idea of protection that has come to embody the contemporary politics of humanitarianism is, therefore, a conditional idea at best and a result of practices deciding what it takes to be a living being and how lives worth protecting are to be regulated. In the following section, I discuss the motivations behind and the meanings of such regimes of protection that marks the topography of modern humanitarianism.

III. Humanitarianism, Capitalism, and Politics

Humanitarianism is both biopolitics and a politics of caring for life. As the path-breaking work of Didier Fassin (2011) has shown, it involves all the institutional paraphernalia of biopolitics, such as setting up camps and dwelling centres, identifying and registering the people to be hosted, deciding on the nature of care to be disbursed, allocating money and resources, setting up surveillance so that the state knows who are cared for, what their credentials are, how safe they are for the localities, to what extent their movement must be checked and their interactions with the citizens allowed, the processes of application that must be meticulously followed, the exceptions to be tolerated, and to guarantee a certain measure of health and well-being of the protected so that they become evidence of generosity rather than a cause for shame. Yet, it is also a politics of life since it makes the vital choice of which lives to be saved, the reasons for such prioritisation, the careful representation of causes that qualify to legitimise the grant of protection, and the conscious articulation of the discourses of victimhood without which even conditional hospitality would be impossible.

In every site of humanitarian action there is a delicate balance between lives to be saved and the lives to be risked. This is indeed a complex ethical conundrum. When a crisis is within a state where the lives of a large number of people are threatened, the state has a dual responsibility to perform, one towards the suffering victims of a tragedy and the other towards the people who must risk their lives to save, care for, and protect them. When it comes to refugees and guest workers under distress and in need for care, the choice is less stark as the distinction in the quality of the two lives can be racially resolved through an exclusionary drawing of a biopolitical boundary.

As Fassin explains, “Physically, there is no difference between them; philosophically, they are worlds apart. They illustrate the dualism that Giorgio Agamben derives from Aristotle’s *Politics*, between the bare life that is to be assisted and the political life that is freely risked, between the *zōē* of ‘populations’ who can only passively await the bombs and the aid workers and the *bios* of the ‘citizens of the world,’ the humanitarians who come to render them assistance.”¹⁷

The conventional literature on humanitarianism contrasts the cruelty of the realist politics of death that causes mass displacement, death, and indignity to the politics of life engendered by the humanitarian actors whose perspective see the problem from the vantage point of the victim.¹⁸ Though the political motivation behind this politics of life may either source in the rights of the displaced or more restrictive generosity, the ethical imperative is configured in the language of victimhood that recognises the sacrifices of the humanitarian actors and the moral motivation of protection, despite the distinction it necessarily makes between the bare and the political lives.

However, such a reading tends to create the impression that the politics of life only acts at the level of the population as a whole and is concerned about the health of an undifferentiated collective. Yet, Foucault’s analysis of biopower shows us that the caring of and for the self and the well-being of the population are inseparably intertwined. The idea of pastoral power, where the shepherd cares for the horde of sheep, is also about looking closely at the quality of the individual sheep so that it does not compromise the health of the whole lot or challenges the codes of the discipline that are prescribed for them. The sacrifice of an errant sheep is the duty of the shepherd, justified in the interests of the health of the population as a whole. In other words, the distinction—on which life to save and which life to risk or sacrifice—cannot be understood by only looking at biopolitics and ignoring the technologies that work on individual lives. In the context of humanitarian crises, this distinction is vital. The conventional accounts by scholars like Fassin (2011) play out this contrast by the common strategy that hosts adopt to separate the vulnerable lives that deserve protection from those that do not qualify – the lives of children separated from parents, women raped by the perpetrators, the old deserted by the able bodies, and men who are crippled, injured, and pulverised against the able-bodied who would risk everything for safe passage and a quest for a better life. The conventional account renders the able-bodied as risk-taking and desperate, whose motives are uncertain and allegiance untrustworthy, which becomes a source of danger for the host. The host may not control and subjugate these men or women and, therefore, it is better to keep them at a harm’s way, even if this seriously compromises their chances of survival. Harshness and exclusivity are justified so that these people may act reasonably and not risk lives that need not be risked in the first place.

This politics of deterrence by dividing victims on the basis of a differential ethic of protection, which often takes a racialised form since the language of trust is coded in religious and ethnic terms, draws attention to the host’s concern for the ‘health’ of the uninvited guests seeking care in standard

humanitarian crises scenarios. Mavelli (2017), however, argues that the motivation portrayed in these accounts is misplaced for the real concern is not about the life of the incomers to be saved but the emotional health of the hosts. For Mavelli, crucial for the development of these arguments has been a 'differentialist' understanding of biopolitical racism. Highlighted from that perspective, the boundary that separates 'superior' and 'inferior races' is a tool of the biopolitical governmentality targeting the population rather than what delimitates its space of action. This means that the "boundary between 'superior' and 'inferior races' – that is, the boundary between the population under power's control and external 'others' – can be redrawn beyond traditional forms of racism (based on nationality, ethnicity, religion, colour, and gender) if members of the 'inferior races' are deemed instrumental to enhance the material and emotional life of the population."¹⁹ Hence, he argues, "humanitarian government should be understood not just as the government and care of disenfranchised collectivities such as refugees, but also, and possibly more importantly, as the biopolitical governmentality and care of host populations through the humanitarian government of refugees."²⁰ What emerges from such a reading is that the justifications of exclusion and conditionalities are not limited to the character of the people seeking refuge, care, and protection. As part of biopolitical governmentality, the moral and emotional health of the host is perhaps a stronger motivation in fashioning an appropriate response to a humanitarian crisis and in the attendant characterisation of victimhood without which the politics of life, its priorities, and limits notwithstanding, will not be possible in the first instance.

While the arguments of the health of the host society as a possible explanation of the limits of humanitarianism are indeed crucial, I argue that the limits of protection conceived as a form of biopolitical governmentality is the result of two factors that require independent probing. The first of these relate to the linkages between contemporary capitalism and humanitarian interventionism, and the second involves the idea of nationalism. I shall not pursue the second argument here since it demands a detailed and granular analysis as the ingredients vary from one society to another and it does not help generalising across board.

There is a rich body of historical work that has shown how the anti-slavery movement in Europe and the anti-abolitionist movement in the United States were triggered by the generic requirements of capitalism. It simultaneously involved policies that on the one hand normalised the market risks and its attendant fallouts bordering on naturalised irresponsibility while investing in a notion of contractual responsibility on the other. At the level of discourse, humanitarianism did involve a feeling of compassion and guilt for the suffering other as it was increasingly possible to show that the death and sufferings of the poor were the result of wilful inaction of the rich or the able, and the increasing technological feasibility of delivering assistance and its efficacy in making the desired transformation in the quality of life of the sufferers exposed the wilful negligence of the rich as never before. As Thomas Haskell argued, "It is not merely coincidental that humanitarianism burst into bloom in the late eighteenth century just as the norm of promise keeping was

being elevated to a supreme moral and legal imperative. At the most obvious level, the new stress on promise keeping contributed to the emergence of the humanitarian sensibility by encouraging new levels of scrupulosity in the fulfilment of ethical maxims.”²¹

However, it was the economic transformations of capitalism that required a more humane system of governance as the state increasingly became a factor of analysis. The braiding of the state and the market in virtually all spheres of life meant that governance became critical to the working of the market economy itself so that new modes of tolerable disciplining could be used to extract value and the working classes made to believe that capitalism was not a morally degenerate order that did nothing for the poor and the sick. The health of the population became the precondition of the health of the economy and the discourses of protection were fine tuned to serve the needs of an increasingly globalised production process. If Weber thought that Protestant values were responsible for the flourishing of capitalism in the West, capitalism, in fact, was more efficient in creating the kind of lives necessary for its success. It is also clear that the humanitarianism induced by capitalism could not be absolute. The boundary of moral culpability coincided with an alleged capacity for intervention that was almost always decided by the arc of possibility marked out by the capitalist mode of production.

In more recent times, the enormous dilation in humanitarianism similarly shows a close connection with the class interests and market needs of neoliberal capitalism.²² All forms of modern humanitarianism like advocacy-based humanitarian action, the work done by many non-governmental organisations, the instrumentalities and ties specified by most humanitarian aid by donors, and celebrity humanitarianism show a clear link with market considerations and a welter of literature already exists that empirically documents these linkages. Not only is there a manifest continuity in the nature of the past and the contemporary forms of what I would describe as ‘market humanitarianism’, the underlying ethical motivations and the careful delineation of the limits of care are also comparable. Modern humanitarianism requires a similar ethic of victimhood, the need to distinguish between who is deserving of protection and who can be dispensed with, the hierarchies of both the politics of life and death, the tendency to settle for the bare minimums, the summoning of geopolitical and national interest driven justifications for the insufficiency of care, and the refusal, on balance, to see the problem of humanitarianism as a structural one. Without fundamental changes in the global political economy of production and distribution, the protection regimes of contemporary humanitarianism as a form of biopolitical governmentality will continue to betray its functionalist and limited character, though it will save lives and provide a modicum of benefits to millions under stipulated conditions of hierarchy at the same time.

Global Humanitarianism Governance

The evolution of international humanitarian law suggests that protection regimes are meaningless unless they operate universally. The two major sources of humanitarian law, namely, the Hague Convention (1907), that codified restrictions on the methods and ways of warfare, and the four Geneva Conventions, which protected wounded and sick soldiers, prisoners of war, and vulnerable civilians in both international and non-international armed conflicts, clearly indicated that no persons could be arbitrarily excluded from the security of legal protection under any pretext that did not find explicit mention in these documents. These were further bolstered by the two Additional Protocols to the Geneva Conventions on the protection of civilians (1977). While the four Geneva Conventions were universally ratified, the 1977 additional Protocols have been resisted by a number of states. The details of these provisions and their efficacy should not concern us here. We draw attention to the adoption of Article 3, which, for the first time extended to situations of non-international armed conflicts and do not allow any derogation. Fundamentally, it requires humane treatment of all persons in adverse conditions and places legal obligations on enemy states to recognise the innate humanity of all persons without any prejudicial distinction. The fact that all states accepted it indicates the articulation of a global protection regime through treaty law despite occasional violations of its provisions in concrete situations. This has paved the way to the evolution of a major approach to human security, which, in the words of Oberleitner, “understands human security as a tool for deepening and strengthening efforts to tackle issues such as war crimes or genocide and finally preparing the ground for humanitarian intervention”.²³

Do international humanitarian laws protect the refugees and the internally displaced people? Read together, many provisions of the existing international humanitarian law afford well-meaning protection to such hapless persons who often fall through the distinction between international and non-international armed conflicts. Thus, Article 3 provides that “Persons taking no active part in the hostilities [...] shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.” Furthermore Article 17, of Additional Protocol II specifically prohibits the forced displacement of the civilian population:

“1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.

2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.”

Hence, a legally compelling case exists to provide all civilians with the necessary protections as agreed upon in these instruments in situations of

both international and non-international conflicts. This is further reinforced by the fact that such protection exists not only in international humanitarian law but also in the various relevant sections of international human rights law, refugee law, and domestic law.²⁴ While the legal protection of the refugees, internally displaced, and stateless persons would not translate into the materiality of safety and well-being, compared to what existed in the past, there has been a considerable strengthening of the laws of global humanitarian protection and a concomitant restraining of the absolute powers of states. The practical or ground realities may indeed suggest many limitations of this regime of global care; yet, the idea of humanitarian protection as a global collective good owes much to the early work of the international lawyers and statesmen who laid the foundation of international humanitarian law through The Hague and the four Geneva Conventions. The architecture of global governance and its underlying principles demonstrate the vicissitudes of a universal principle mired in both normative and practical difficulties. Humanitarianism is undoubtedly the basis of international legal principles that have grown up over more than 150 years to regulate war and conflict on the one hand and to create a new consciousness of the worth of every human life on the other. The problems in realising this goal were many and rather predictable. One, great powers were loath to self-regulate themselves and submit to moral or legal principles that tended to put obstacles in their ways to build power and project might at will. The first challenge to humanitarianism was therefore the very nature of world politics that exalted the role of power over morality and security of human lives. The dominance of the idea of national interest has severely limited the efficacy and acceptability of humanitarianism as an idea. As Allan Rosas and Pär Stenbäck put it, “Modern restraints date back to the emergence of centralized states with standing armies. In the international legal order which developed since then, the law of war (the *ius in bello*) has occupied a prominent place. This traditional law of war, and international law in general, was certainly inspired by humanitarian considerations (e.g., the protection of prisoners of war and of aliens). But such considerations found expression through a predominant filter: the state interest.”²⁵

The second problem concerned the very acceptance of the idea of humanitarianism. While international law had been in the making for centuries, it was almost entirely predicated in the legal personality of the nation-state that claimed a monopoly of legitimate violence as the very condition of its being. Humanitarianism could not logically become an element of statehood. It had to be an alienable attribute of humanity at large and human beings, across space and independent of their differences, ascriptive or class-based. From the 18th to the 20th century, many forms of prejudices and discrimination based on race, nationality, culture, gender, and class, among others, questioned the idea of human equality and by extension the basis for the universalisation of the norms of humanitarianism. Our discussions on humanitarianism as a form of liberal governmentality would largely bear this out. While the progress of international humanitarian law has blunted many obscurantist norms and replaced them with progressive ones,

prejudice still remains in the implementation of these rules since privileged and dominant interests who have benefited historically from such inequities have found ingenious ways to sustain their strangleholds. Yet, the development of international humanitarian law as a new branch of international jurisprudence has been a steady one and many non-state actors like the International Committee of the Red Cross have played an important role in its development. While this has certainly underscored the need for a more humane regulation of all forms of warfare and complicated the traditional distinction between inter-state and intra-state violence, the ascension of international humanitarian law has not translated into any consensus on the ubiquity of the laws and norms of human rights. This issue is important since international humanitarian laws invariably call into question various rights and their mutual trade-offs. However, human rights law has proved to be a political incendiary, and indirectly at least, pushed down the idea of humanitarianism to the protection of bare lives. As Michael Barnett argues,²⁶ "The humanitarian community operates with narrow and broad definitions of humanitarianism. The more restrictive definition is the impartial, neutral, and independent provision of relief to victims of conflict and natural disasters. Humanitarianism, in this view, is defined by its principles, by the attempt to save lives at risk, by the treatment of symptoms and not causes of suffering, and by standing clear of politics and states... The more generous definition includes any activity that is intended to relieve suffering, stop preventable harm, save lives at risk, and improve the welfare of vulnerable populations."²⁶ Therefore, on the one hand, humanitarianism is contested by a perspective that has always wished to lift it over and beyond politics so that the considerations of power and national interest would not bedevil its prospects. On the other hand, in contrast, there is a commitment to transcend the symptomatic approach for a much wider and deeper commitment to resolve the deeper issues, not to be obsessed by fixing the malfunctioning but to remake the structure root and branch.²⁷ At the very basis of this lies the old debate on the proper meaning of life itself. To define life as a form of biological existence that requires safety against all forms of physical violence and trepidations is very different from defining it more inclusively by admitting the many life-enhancing roles. Humanitarian law and governance is undoubtedly global; but, being global does not ipso facto resolve the question of the meaning of humanity and species life.

Third, the idea of the absolute sanctity of life was hardly an attractive principle. It battled with many forms of sacrificial notions articulated through the ideas like nation, ethnicity, identity, and class. As a result, the legal architecture that took shape in order to create and sustain humanitarianism was both instrumental and minimalist in nature. Its foremost objective was to save lives either in conditions of warfare and large-scale human violence or during natural calamities that were beyond the capacity of redress by states directly affected by such catastrophic events. Further, humanitarianism also suffered because of an inbuilt tension between its two constitutive principles—one advancing the individual right to dignity and respect and the other aiming at the alleviation of human losses or sufferings. There has not

been any consistent prioritisation of these two principles whose ethical and operative requirements tug in different directions. While moral philosophers have indicated that the right not to kill prisoners take priority over the overall limitations of sufferings, the history of international law often shows a different trajectory. Killing of enemies have often prevailed over the norm of sacrosanctity of all lives on the argument that it reduces the overall human sufferings in complex conflict theatres.²⁸

This brings us back to the genesis of humanitarianism and its global governance forms. In continuation, it is clear that humanity has many meanings and is rivalled by a number of ethical claims and counter-claims. Human life is both biological and social. It gathers meaning through social constructions. This clearly refers to the religious underpinnings and roots of early humanitarian action. Humanity could not be rescued through modernity and science. In fact, according to many sociologists like Durkheim, modernity was part of the problem since it emptied the idea of human progress of an ethical content. Henry Dunant, who established the ICRC, also clearly indicated that humanity could only be saved if religion, the Christian idea of compassion to be more precise, could be rescued.²⁹ The social construction of humanity also means that it requires ideas to acquire meaning, whether these come in the form of religious other-worldliness or secular action. The considerations of pragmatism have pushed humanitarianism towards a common denominator understanding which is based on the sanctity of physical existence as an unconditional right. However, irreducible to any higher considerations, such a bare humanity has also been critiqued as empty and irresponsible. The surge of humanitarianism in contemporary times has invited various explanations based on the attractions of liberalism as the dominant ideology for the last few decades since the end of the Cold War and before the very recent rise of ultra-nationalist and parochial political forces across many parts of the world, or as the effects of Western human rights oriented neo-imperial triumphalism, or the effects of a burgeoning market economy with a plethora of private and civil actors.³⁰

Yet, as humanitarianism has emerged as a dominant global ideology, the basic argument has been to highlight the need to focus on human sufferings irrespective of frontiers and save lives, at least in the more biological sense of the term, and in the face of resistance stemming from the traditional prioritisation of sovereign-national-territorial point of view. Whatever may be the source of our call to duty, be it compassion, or a sense of filiation driven by the market, humanitarianism certainly draws attention to look beyond our immediacy and local frontiers of action. In brief, humanitarian governance is global since many of our problems that were long thought through the prisms of the nation-state have tended to go out of control. The dominant thinking in the various organisations of the United Nations (UN) has come to recognise this globality of both problems and opportunities, risks and their mitigation, and the long and short of human development. The increasing intertwining of the Millennial Development Goals (MDG) and the Sustainable Development Goals (SDG) is also a recognition of the global turn to humanitarian governance.³¹

Both in the fields of food and health, the debate has been to move away from state-oriented solutions to more global approaches. Increasing recognition of climate issues and challenges has complicated the food architecture through the conventional developmental approaches based on poverty alleviation and economic self-sufficiency. The increasing role of the neoliberal trading system has also worked to undermine national mechanisms and drawn attention to global contracts. While issues of equity and justice bedevil global food security by wedging a rift between the North and the South, the realisation that effective food supply chains cannot be maintained through exclusive reliance on the national economy but requires strengthening global protocols of food procurement, storage, and supply, has automatically underlined the significance of thinking about humanitarianism in global terms.³² This does not mean that a paradigm shift has occurred over food. It only means that the terms of the debate have shifted and there are powerful arguments that pitch for global food security as a necessary condition for the Sustainable Development Goals.

Similarly, over health, the battle between national priorities and universal commitments may be read in the language of the meaning of humanity and its social construction. The emergent medical nationalism in the wake of the COVID-19 pandemic has not meant, contrary to the opinion of many observers that states are not cooperating over health issues. While the reliance on the protective and health-ensuring role of the state is on the rise, the role of the World Health Organization has actually increased in its advisory capacity and the call for a vaccine for the whole of mankind has united many states in their search to find a miraculous antidote to the virus through sustained collaborations in many domains of research. Again, the question is not whether a global-based health order is in the making; it is certainly not the case despite the global nature of health hazards that is inextricably intertwined with neoliberalism's unregulated exploitation of nature. A right to health oriented approach under global health governance is crippled by inequities across states that manifest over unequal rights to access life-saving medicines and healthcare systems between the richer and the poorer states.³³ However, mirroring trends in food governance, there is an unmistakable shift in the terms of the debate and increasingly global perspectives are now visible that harp on the need to craft humanity's most important rights, food and health, in global terms.

To sum up, there have been many changes over the years to the forms of humanitarian protection. From an avowedly non-political and neutral positioning that sought to care and protect everyone in need to the human rights' centric interventionism of recent years, humanitarianism, in essence, shows the fundamental ambiguities that are built into the idea, which is analogous with notions like forgiveness, hospitality, and tolerance. How much of a change have we actually witnessed in the models of protection? According to David Chandler, "The Red Cross established that humanity, impartiality, neutrality and universality were the underlying principles of any humanitarian intervention. The principle of humanity was based on the desire to assist the wounded and suffering without discrimination, recognising a

common humanity and that 'our enemies are men'. The principle of impartiality derived from the desire to assist without discrimination except on the basis of needs, giving priority to the most urgent cases of distress."³⁴A similar framework was adopted by the specialised agencies of the UN and other private-funded NGOs.

It seemed that in the politically banal period of the Cold War years, where humanitarian action was hostage to geopolitical considerations of the super powers, the charity activities of the agencies like the ICRC, the United Nations High Commissioner for Refugees (UNHCR) or Oxfam, among many others, were seen to be saving lives and protecting millions of displaced people across the world due to their commitment to political neutrality. While this reading is not entirely unacceptable, the ICRC, for instance, was divided on the question of which lives to protect and sensitive to concerns like what security cover was available to their volunteers and the assessment of risks involved in protecting lives. By the 1970s, the paradigm of political neutrality was increasingly criticised as silence and complicity with some of the worst contexts of massacres of human life, either deliberately by the warring groups and the state or by unpardonable neglect by the authorities and able-bodied citizens of their duties to avert such crises by available means. In contrast to the ICRC, the Médecines sans Frontières (MSF) adopted a far more political approach, preferring to speak out against atrocities and inaction and claiming powers of intervention to protect lives despite the constraints of sovereignty. In the changed political dynamics of the post-Cold War years, the new humanitarianism ramped this up many times more, advocating security of lives and livelihood of the victims. Solidarity with and development of the victims came to replace the earlier commitment to political neutrality. Humanitarian protection was no longer an unqualified dispensation of aid to all those who needed protection irrespective of their roles. Humanitarianism began to seek out political responsibility on the part of the recipients so that values like human rights, democracy, responsive governance, rule of law, and freedom for civil society organisations could be built up concomitantly. The doctrine of the responsibility to protect, the climactic point of this new humanitarianism, was the natural fallout of this transformation.

It must, however, be underlined that this new humanitarianism is a biopolitical construct, a form of governmentality which is necessary for the practices of neoliberal capitalism and its ethical sensibilities, that must care, protect, and discipline lives within the realm of possibilities. It must also deploy a sanitised discourse of the victim, understood as a differentiated category, who must be protected and uncared for at the same time, and be kept apart of the political lives of citizens. However, this biological existence of the bare life is not only a politics of death but also a politics of life. For, the protected must live in the moral interest of the caregivers and the excision of the undeserving is the precondition of the protection of the deserving.

Mark Duffield finds global governance requiring the construction of a common species kind that can be parcelled and divided into many categories like refugees, internally displaced persons, immigrant or guest workers, as local embodiments of a common genetic material.³⁵ Yet, the ethics of this global

biopolitics is not necessarily what Foucault has claimed it to be. The welfare state certainly promotes life but it also holds in its vice-like grip an unshakeable power of death. The dialectics of life and death, the inevitable intermeshing of the necessity for sacrificing some lives to save the more valuable ones, is integral to biopolitics at all levels. Global humanitarian governance, therefore, is not unconditionally premised on the sanctity of all lives, its rhetoric and justificatory discourses notwithstanding. It has evolved a complex assortment of institutions and practices for protection and care by distinguishing between what is permissible and what is not. It is ultimately a political stratagem that creates a space for its own operation by licensing the taking of lives so that the life worthy of living can proceed uninterruptedly. In this fundamental sense, therefore, its logic is hardly different from the national biopolitical orders that are more ruthless, efficient, and blatant in discriminating lives that matter from those that do not.

Notes

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²Matthew 25 ESV, p 35-36.

³ According to a study, "Laws of war or limits on the acceptable conduct of war were adopted in ancient Greece and Rome; articulated in *The Art of War* ascribed to Sun Tzu in Warring States China; promoted by Saladin in the Middle East in the 1100s; taught to Swedish soldiers by Gustavus Adolphus in the 1600s;" Eleanor Davey, John Borton, and Matthew Foley, *A history of the humanitarian system: Western origins and foundations*, Overseas Development Institute Humanitarian Policy Group, 2013, 6

⁴Michael N Barnett, *Empire of Humanity: A History of Humanitarianism*, New York: Cornell University Press, 2011, 29.

⁵Randolph Kent, *The Anatomy of Disaster Relief: The International Network in Action*, UK: Pinter Publication, 1987, 3.

⁶Louise. C. Selander and Patrick C. Crane, "The Voice of Florence Nightingale on Advocacy," *OJIN: The Online Journal of Issues in Nursing* 17, no. 1 (2012): 3.

⁷ In Nightingale's frustration, she wrote the lengthy essay *Cassandra* (1859/1979), named after the tragic Greek mythological figure, whose powers of clairvoyance did not win her dignity, a sense of power or trust among men. Nightingale wrote, "Now, why is it more ridiculous for a man than a woman to do worsted work and drive out every day in a carriage? ...Is man's time more valuable than woman's? or is it the difference between man and woman this, that woman has confessedly nothing to do?" Nightingale, 1859a/1979, p. 32. Quoted in L McDonald, ed., *Florence Nightingale's Suggestions for Thought: Collected Works of Florence Nightingale*, Vol. 11, Wilfrid Laurier University Press, 2008, 557.

⁸Michel Foucault, *Society Must be Defended*, London: Penguin Books, 2003, 245.

⁹Michel Foucault *Security, Territory, Population: Lectures at the Collège de France, 1977-78* ed. by Michel Senellart, Trans. by Graham Burchell, London: Palgrave Macmillan, 2007, 16.

¹⁰Michel Foucault, *The History of Sexuality: 1: The Will to Knowledge*, UK: Penguin Books, 2019, 139.

¹¹Michel Foucault, *Society Must be Defended*, London: Penguin Books, 2003, 24.

¹² In “Society Must Be Defended” Foucault says quite explicitly that “juridical systems, no matter whether they were theories or codes, allowed the democratisation of sovereignty, and the establishment of a public right articulated with collective sovereignty, at the very time when [in the nineteenth century], to the extent that, and because the democratisation of sovereignty was heavily ballasted by the mechanisms of disciplinary coercion.” Quoted in Partha Chatterjee, *I Am the People: Reflections on Popular Sovereignty Today*, (Ruth Benedict Book Series). Columbia University Press. Kindle Edition, 2019, 37.

¹³ Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977-78* ed. by Michel Senellart, Trans. by Graham Burchell, London: Palgrave Macmillan, 2007, 144.

¹⁴ Thomas Lemke, “The Birth of Bio-politics’: Michel Foucault’s Lecture at the Collège de France on Neo-liberal Governmentality,” *Economy and Society* 30, no. 2, (2001): 200.

¹⁵ Clive Barnett, “Ways of Relating: Hospitality and the Acknowledgement of Otherness,” *Progress in Human Geography* 29, no. 1(2005): 5–21.

¹⁶ As Derrida puts it in *On Cosmopolitanism and Forgiveness*, “It is important to analyse at its base the tension at the heart of a heritage between, on the one side, the idea which is also a demand for the unconditional, gracious, infinite, an economic forgiveness granted to the guilty as guilty, without counterpart, even to those who do not repent or ask forgiveness, and on the other side, as a great number of texts testify through many semantic refinements and difficulties, a conditional forgiveness proportionate to the recognition of the fault, to repentance, to the transformation of the sinner who then explicitly asks for forgiveness.” Jacques Derrida, *On Cosmopolitanism and Forgiveness*, trans. by Mark Dooley and Michael Hughes with a preface by Simon Critchley and Richard Kearney, London: Routledge, 2001, vii–viii, xi.

¹⁷ Didier Fassin, *Humanitarian Reason: A Moral History of the Present*, trans. Rachel Gomme, Berkeley: University of California Press, 2011, 507.

¹⁸ Didier Fassin, *Humanitarian Reason: A Moral History of the Present*, trans. Rachel Gomme, Berkeley: University of California Press, 2011.

¹⁹ Luca Mavelli, “Governing Populations through Humanitarian Government of the Refugees: Biopolitical Care and Racism in the European Refugee Crisis,” *Review of International Studies* 43, no. 5 (2017): 818.

²⁰ Luca Mavelli, “Governing Populations through Humanitarian Government of the Refugees: Biopolitical Care and Racism in the European Refugee Crisis,” *Review of International Studies* 43, no. 5 (2017): 831.

²¹ Thomas L Haskell, “Capitalism and the origins of the humanitarian sensibility, Part 2,” *The American Historical Review* 90, no. 3 (1985): 555.

²² For an excellent analysis, see A De Lauri, *The Politics of Humanitarianism, Power, Ideology and Aid*, London and New York: IB Tauris, 2016. Also relevant, though somewhat controversial, is I Kapoor, *Celebrity Humanitarianism: The ideology of Global Charity*, London: Routledge, 2013.

²³ Gerd Oberleitner, “Human Security: A Challenge to International law?,” *Global Governance: A Review of Multilateralism and International Organizations* 11, no. 2 (2005): 188.

²⁴ F. Bugnion, “Humanitarian Law and the Protection of Refugees,” *Refugee Survey Quarterly* 24, no 4 (2005): 36–42.

²⁵ Allan Rosas and Pär Stenbäck, “The Frontiers of International Humanitarian Law,” *Journal of Peace Research*, Special Issue on Humanitarian Law of Armed Conflict 24, no 3 (1987): 219.

²⁶ Michael N Barnett, “Humanitarian Governance,” *Annual Review of Political Science* 16, no. 1 (2013): 382–383.

²⁷Michael N Barnett, "Humanitarian Governance," *Annual Review of Political Science* 16, no. 1 (2013): 383.

²⁸ For details, see Anthony E. Hartle, "Humanitarianism and the Laws of War," *Philosophy* 61, no. 235 (1986): 109-115.

²⁹Michael N Barnett, "Humanitarian Governance," *Annual Review of Political Science* 16, no. 1 (2013): 385.

³⁰Michael N Barnett, "Humanitarian Governance," *Annual Review of Political Science* 16, no. 1 (2013): 386.

³¹ On MDGs and SDGs, see S Feeny, 'Transitioning from the MDGs to the SDGs: Lessons Learnt?,' in *Moving from the Millennium to the Sustainable Development Goals*, edited by Sefa Awaworyi Churchill, Singapore: Palgrave Macmillan, 2020, 343-351.

³² According to Hans Page, "It is evident that issues related to global and individual food security can no longer be resolved through action limited to the national or local level, but that there is need for cooperation and coordinated multi-stakeholder action at the global level and with a global perspective. The interdependency of national food-related production systems and markets, due to their vertical and horizontal integration, and their dependence on the global financial and energy markets, means that national policies alone cannot fully buffer against risks like inefficiencies and volatility." Hans Page, "Global Governance and Food Security as Global Public Good," Center on International Cooperation, 2013, 22, https://cic.nyu.edu/sites/default/files/page_global_governance_public_good.pdf.

³³ For a very comprehensive analysis of these issues, see Van de Pas, Remco, et al. "Global Health Governance in the Sustainable Development Goals: Is it Grounded in the Right to Health?," *Global Challenges* 1.1 (2017): 47-60.

³⁴David C Chandler, "The Road to Military Humanitarianism: How the Human Rights NGOs Shaped a New Humanitarian Agenda," *Human Rights Quarterly* 23, no 3 (2001): 678-700.

³⁵Mark Duffield, "Carry on Killing: Global Governance, Humanitarianism and Terror," *DIIS Working Paper*, 2004, https://www.files.ethz.ch/isn/18761/carry_on_killing.pdf

Questions of Ethics, Pandemic and the Migrant Worker

By

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On 24 March 2020, the Indian Prime Minister Narendra Modi announced a 21-day lockdown in the wake of the spread of the novel coronavirus SARS-CoV-2, better known by its acronym Covid-19. The announcement was both destabilising and unexpected. The country was totally unprepared for such a lockdown. The pandemic and the sudden lockdown were disastrous for most of the 400 million workers of India but proved particularly catastrophic for its 139 million migrant workers. Within days, migrant workers crowded bus stations to catch a bus to go back home or go someplace where they might live a life of dignity. News reached readers via the morning newspapers about how: “Carrying their children and bags, migrant workers, including women, were standing in a long queue of about 3 km... in the hope to catch any bus to return to their distant villages located in UP’s different parts. Several migrants were also from states like Madhya Pradesh and Bihar.”¹ News proliferated about how the police were beating back desperate migrants trying to leave town by the end of March 2020.² But the real desperation of migrants began when the first phase of lockdown ended and the next phase started. Very few people asked how ethical was it to begin a lockdown without any plans of sustaining the entire working class, let alone migrant workers, and driving them to desperate measures.

When the next phase of lockdown started the migrants were in such desperate conditions that they decided to brave all odds to go back home. Now it was not just a question of livelihood but of life itself. On 14 April, desperate migrant workers started gathering in bus stations again. This time the flash point was Mumbai. Soon news started appearing about how: “Migrant workers in large numbers gathered at a bus stand in Mumbai on Tuesday afternoon demanding transport arrangements to go back to their

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native places, hours after Prime Minister Narendra Modi announced the nation-wide lockdown to contain the spread of coronavirus has been extended till May 3.²³ Failing to get any help from the government, the migrants started acquiring private vehicles and those who could not do so began the long trek home, thereby embracing death for life. One news feed reported: “After facing difficulties to meet basic ends without work, these migrants, in the absence of any means of transport, found no choice but to walk back home. Unfortunately, not all of them reached their respective destinations.”²⁴ In May, news such as: “Three migrant workers who were on their way to Uttar Pradesh from

Maharashtra, mostly walking, died in Barwani district of Madhya Pradesh on Saturday,” was becoming commonplace.²⁵ In the peak of summer, migrant workers walking back home were dehydrated, fatigued and starving, and were dying on their trek towards their destination. No one asked why it was so important for the migrants to get away. There were media agencies that started tabulating the deaths that happened en route. One media house reported that between 24 March and 18 May, more than 159 migrant workers died in road accidents.²⁶ When the date was extended up to 30 May, the reported numbers of death rose to 198. One newspaper reported that: “There were at least 1,461 accidents over the course of the nationwide lockdown - from March 25 to May 31 - in which at least 750 people were killed, including 198 migrant workers. There were 1,390 who got injured, according to the data.”²⁷ Amidst these events, the government began to confront uncomfortable questions from the media. A news channel asked: “While the economic disruption caused by the pandemic and the lockdown remained a cause of concern, the failure to provide authoritative solutions for the unprecedented migrant crisis, even after more than 50 days of the lockdown, has raised questions over the planning of the country’s Covid-19 response.”²⁸ Faced with mounting criticisms of the sheer number of migrant deaths on the road to their destinations and then a direct order from the Supreme Court, the governments of both the centre and the states started running special buses and trains to take the migrants back to their homes. The trains were called Shramik Specials. It was reported that “within 15 days 4,277 Shramik Specials have been operated by railways to transport approximately 60 lakh people to their home states.”²⁹ But even these trains did not protect the lives of the migrant workers. It was reported that there were more than “80 deaths on board the Shramik Special trains (for stranded migrant workers) between May 9 and May 27, according to data from the Railway Protection Force...”³⁰

By the time the migrants reached home, India had reoriented itself to the term “social distancing”. After all, that was exactly what the upper-class Hindus had done to their lower- caste “essential workers” for centuries. When the erstwhile socially distanced became the essential workers, those who went to the cities or migrants who were once considered essential for the rural economy for their ability to send remittances to their family and villages had now become the new socially distanced. The migrants rushing home against all odds discovered that they were no longer welcome and they were

treated as if they “put everyone in the village in harms’ way”.¹¹ The migrants said that upon returning, “they and their families have been singled out, sneered at, and harassed by villagers. In some villages, they face ostracisation even after completing the mandatory 14-day quarantine period.”¹² However, the more important question that the migrants faced was could they get the dignity that they were looking for in their perilous journey?

Ram Achal Prasad, a factory worker in Mumbai, returned to his village promising never to come back. Upon returning, he was confronted with a situation that was most unexpected. Quoting his own words: “I left for my village in April and braved many setbacks. We almost lost our lives while going home... However, I could not find any work that suited my skill-set in Bagraich district, and I could not keep sitting at home waiting for things to get back to normal. I had no money left and had to decide to return to Mumbai. But with the news of COVID-19 cases rising every day, I decided to leave my wife and two daughters behind.”¹³ Meanwhile, the states were busy eroding whatever rights the migrant workers had by allowing businesses to hire and fire their workers without intervention either from the government’s labour inspectors or from trade unions. Some were arbitrarily trying to increase the working hours of workers, so much so, that the ILO expressed deep concerns.¹⁴ However, what concerns us in this paper is that apparently, the dignity that the migrants were striving for proved ephemeral both in their return as well as re-turn. The pandemic and the long march of the migrant workers brought back with a vehemence like never before the question of ethics in migration studies.

To begin with, migration studies was largely policy-oriented towards and subsumed within the area of law. There were those who looked at migration from the standpoint of how it could be regulated. Other than that, anthropologists and sociologists tried to look at the dynamics and patterns of migration from a micro level. Those who worked on ethics were seldom interested in questions of migration. Ethical theorists did not take migration on as they were wary of the empirical complexity of the field and their general favour towards scholarship about more abstract matters of moral concern to humanity also deterred them for a while. However, with increasing popularity of critical forced migration studies, ethics became an essential prism of analysis.

Over the last two decades, scholars from Asia, Africa and Latin America entered the field of forced migration studies. Most of them understood that the major narrative of forced migration that was being popularised needed to be critiqued. Instead of obsessing over questions of relief and rehabilitation, these scholars started questioning the politics behind the emergence of forced migration as a discipline in the global North. With it came the understanding that many crucial questions were not being addressed, such as what were the roots causes for such large-scale displacements that country of the global South were facing. While these new questions were being asked, new fields of study with different prisms were emerging, one of them being migration and forced migration studies through the lens of ethics. In the last decade, with advancement in technology, the

plight of migrants became more and more visible. Scholars were discovering a clear connection and/or disconnect between ethics and migration. How did ethics segue into migration and forced migration studies? The novel coronavirus showed the clear relationship of one with the other.

Probably, the fault-line as far as ethics in migration studies is concerned lies between questions about an 'ethics of care' and an 'ethics of justice'.¹⁵ Carol Gilligan's concept of the ethics of care—although she herself was not intending to argue anything beyond the point that the moral domain must be extended to include care—has been transformed by a cultural phenomenon into the concept of a female morality.¹⁶ Drawing from Gilligan's statement that the focus on care as a part of ethics had characteristically been a female phenomenon in the populations that she had studied, as the interpretation and reception of the theory has had to be, the ethics of care is an essentially female morality. This places value on concepts and qualities like sympathy, compassion, concern for others and friendship. In 1984, Nel Noddings published *Caring*, in which she developed the idea of care as a feminine ethic. She believed that caring was intrinsic to human existence. In it there are two parties, one caring and the other receiving care. Distinct from the ethics of care is the ethics of justice, which is the cornerstone for most Western theories of justice for the last several centuries and is centred on issues of equity.

Care ethics suggests that there is a certain moral significance in the very fundamental elements which make up the building blocks of relationships, particularly insofar as they relate to dependencies that concern human life. An ethics of care seeks to normalise and, further, to embed within a network of social relations the well-being of givers of care and receivers of care. It's usually viewed more in the line of a practice or a virtue than a theory per se. Care here has the implication of maintaining the world of, as well as meeting the needs of, both our own self as well as of others. In its advocacy of caring and emotion, it seeks to build upon the very motivation to care for those who are dependent and those who are vulnerable. In Gilligan's own words: "Listening to women's voices clarified the ethic of care, not because care is essentially associated with women or part of women's nature, but because women for a combination of psychological and political reasons voiced relational realities that were otherwise unspoken or dismissed as inconsequential."¹⁷ The ethics of justice follows a familiar but different track. "The principle behind most Western theories of justice appears to be that of equity (a characteristic of Hofstede's masculinity dimension) which, in turn, is driven by merit, not by care or nurturance. The exception is the pure egalitarian theory which is driven by people's needs, usually economic needs. The pure egalitarian theory as well as the communitarian approach to justice, which stresses societal virtues, are more akin to an ethics of care than to a distributive ethics of justice."¹⁸ Both these ethical queries are necessary for understanding migration and forced migration studies.

The Genre, its Traditional Subjects and Ethics

The genre of critical migration studies was already recognised as a vibrant theme for ethical analysis much before the pandemic and its impact on migrant workers. In this decade itself, ethics has reverberated through the study of refugees, especially in the context of Syrian refugees escaping to Europe and the Rohingyas perishing in boats, trying to escape to a safer life. The study of refugees more than any other phenomena raised ethical issues within the genre of critical migration studies. Speaking of the ethics of justice within the overarching context of migration studies itself, there are several ethical factors to be considered. It should not be too difficult to understand that ‘displacement’ as a very concept in the world surely has a spontaneous charge of questions about the ethical within it. To look specifically at an instance, it is not always clear what the border is between a migrant and a forced migrant. Individuals who may possess the privilege of being able to well afford to travel of their own free will and then further being able to well afford the context of settling down in the space that they have travelled to, perhaps because they liked the weather, are not forced migrants. But the lines of what precisely constitutes the persecution, which is a required factor before one can speak of a forced migrant, are not clear-cut. In the face of the fact that the 1951 United Nations Refugee Convention’s definition actually is at once indefinite, arbitrary and narrow, there is a problem. It is a question whether the norms imbibed by migration scholars from different origins and different points of view from different countries may not favour, perhaps, this or that particular kind of hard-luck narrative before they can conceive of a ‘forced migrant’. Again, if one considers, migration scholars use the term ‘forced migration’ to refer to individuals fleeing persecution from a certain country, but they do not consider the term applicable for someone suspected of being a criminal being forcibly extradited to face trial in another country or a non-citizen of a country who is being forcibly disgorge from it for failing immigration laws. Evidently, there is a moral judgment implicit and inherent in the very scholarship here, a moral judgement which is making an evaluation about the legitimacy of the concerned movement, the movement that is in question. This is certainly an ethical issue.

Perhaps simply the most fundamental question in migration studies with regard to ethics has been the question in scholarship of whether certain specific forced migrants have an implicit right to cross international borders in search of asylum or protection. The focus of this question most specifically has to do with which individuals should be able to make a claim of asylum and what responsibilities a nation-state has to protect thereafter those figures whom they have recognised and admitted as refugees.

Probably, the very concern with asylum is a refinement of the broader question in migration studies of whether immigration controls are ethical. One side in migration studies holds the view that immigration controls are ethically unacceptable and argues that in the ideal world, all individuals irrespective of their particular status should be free to move from one region to another. The other side argues that immigration controls are acceptable,

for example, because they are aids to the continuance of the way of life or the particular public culture of a specific community. However, the question that immediately comes in is what is to happen to those individuals who are being forced to move. The section of migration studies scholarship who defends the line of immigration control nevertheless mostly broadly agree that nation-states have some kind of an ethical duty to provide some form of asylum, which limits the ethical right of the nation-state to choose who to permit and who to exclude. What is disagreed on in the ethics in the scholarship is the question of who is a refugee, and who should be granted protection.

Andrew Shacknove has argued in 1985-86 that refugees are “persons whose basic needs are unprotected by their country of origin, who have no remaining recourse other than to seek international restitution of their needs.”¹⁹ Shacknove’s scholarship is perhaps influential because it emphasizes the point that the figure of the refugee is the result of the breakage of a certain type of bond, what in classical politico-ethical liberal theory would be termed as the social contract, between the person and the state; thus it is an ethical question in being a marker of a breakage of ethical rule. But here, what is left undefined are the reasons how, or rather, persecution on what specific grounds is having the effect that the basic needs of the individuals are being left unprotected by their country. It is up to the migration studies scholar’s own sense of ethics whether they consider life-threatening poverty a definite failure of the social contract or whether they insist that persecution must be of a direct nature by the state before they can conceive of the figure of a migrant as a ‘refugee’.

Shacknove’s definition is seen as set against the arbitrariness of the definition proposed by the United Nations Convention on Refugees. However, there are many scholars who hold that the requirement of persecution on certain definite grounds by the Convention before a person can be conceived of as a refugee is not arbitrary but rather a way of conceptualising who are the most deserving among many deserving migrants. Yet, this ethical standpoint in itself leads to issues. It hardly seems practical in the case of individuals who are threatened and while not persecuted are yet in grave imminent danger, such as those facing indiscriminate sporadic bombing.

Ethics in migration studies matters because on this depends the fine line between the duties that a scholar may advocate states have towards refugees in the real world or the legitimate expectations or rights of citizens of the states that states may feel exist, again citing the evidence of another set of scholars. If the definition of refugee is too broad, in the practical context in the actual world, states would be deemed not to have any ethical right to control their borders, which again in our real, non-ideal world would mean an influx that would be an extraordinarily onerous set of responsibilities upon a state. It will overturn all previous resource calculations.

Scholars of migration studies, according to their ethical positions, could have two divergent viewpoints on how exactly duties towards refugees are incurred and what these might involve. Some might follow the

fundamental ethical principle known as ‘non-refoulement’ which is a cornerstone of international law in migration studies. According to such scholars, non-refoulement states that a state has a fundamental ethical duty to a refugee who has arrived at or in its territory.²⁰ As per Michael Walzer, states have this ethical duty because first, in a situation similar to the one with the person who is in possession of a property automatically having a certain advantage in law in a possession dispute, such individuals already have made their escape. Secondly, to send them back now would be inflicting a cruel and unusual punishment on individuals who are desperate and helpless, which is ethically not acceptable. As can be seen, this ethical standpoint devolves entirely upon the question of location.²¹

Such an emphasis in an ethical standpoint towards location, in this issue, tends to have a couple of problems. First, it is a question whether it does not, in effect, privilege those who have the resources and the ability to move in search of asylum, like young men, and leave large numbers of people who simply don’t have the ability and the resources to move, trapped back home in their countries of origin and not recognised as legitimately worthy of need (Singer and Singer, 1988). These are the ‘internally displaced persons’. This is a group about whom increasingly ethical questions are now being raised in migration studies.

Moreover, depending upon the subject position of the particular migration studies scholar, some of them undoubtedly ought to recognise that applying the principle of location leads to unjust distributions in the burden of refugees across states. It should be recognised that countries in the global South tend to be the ones usually geographically near states emitting forth refugees, and consequently being easiest to access. These nation-states have extraordinarily large populations of refugees. This inequitable distribution tends to render hollow the rather favourite claim of scholars operating from a Western position that to take in and care for refugees is a common responsibility of the entire international society of states. Scholars whose subject position is from the global South might well argue that a truly just conception of fair migration needs to be sensitive in its thought to the integrative abilities of specific states, taking into consideration such factors as their gross domestic product, size and political stability and factoring in what is a proper measure beyond which, in Yeats’s words, things are bound to fall apart and the centre not hold.

There are grave ethical questions tied to this. To return to the ethics of care, to be shifting around the refugees in order to achieve an equitable balance as per law and justice between countries would be totally taking away the refugees’ own rights and choices. Alternatively, it could be said that states could distribute resources instead of the refugees themselves. First World states could financially help out Third World states with a very high refugee burden. To an extent, though, that makes it possible for the First World states to buy their way out of the problem. But the ethics of justice too has serious fundamental questions about what particular responsibilities individual states might have towards refugees. One supposes it is generally pretty accepted that states have a duty towards refugees rendered so by wars

or developmental crises initiated by war. In that sense, asylum could be conceived of as repayment given to refugees by states for crimes by third-party countries of military aggression against the refugees or the violation of their human rights. Ethically, in this sense, countries which have supplied arms to these nations owe a duty too.

Ethics and Research on Migration

Questions of ethics become important even in the pedagogy on migration, particularly when one is looking at things like sex work being the fastest-growing employment sector for migrating women from the global South. Here there really is a shocking crisis of care gap between the global North and the global South. If one is to deal effectively with questions of human security, an ethics of care is essential.²² As a researcher, one must understand their subjects as agential participating individuals, all carrying certain definite knowledge and their own interpretative perception with which they construct life-worlds. There may be instances where a researcher has to be conscious that in sourcing certain information, one has by virtue of that very fact transformed into a secret bearer, an individual who has information which could potentially be lethal for the respondent participants, and this can happen without the researcher being fully conscious of the process. As a result, the researcher must be self-reflexively aware at all times. Another way in which they must be self-reflexively aware is to consider what is their own subject position and to what extent they bring to bear influences in their mind which might affect the narratives of the research subjects. Moreover, when speaking of information collected, they should also consider under what means the original source of the information was prevailed upon to part with it. If, for example, one is encountering government records where duress and intimidation was used to compel individuals to part with information, it might be a more ethical decision to not use the information. However, there may be a situation where the benefit of this information to the outside world would outstrip all costs. This assessment of benefits versus costs must be done by the researcher.

An ethics of care closely concerns itself with trust. It is imperative for a relation of trust to be built up between an interviewer and a narrator. When one has, for example, had to flee from a dangerous situation in the home state or migrated irregularly and is occupied in an employment sector like sex work, without trust, respondents will view an interviewer with suspicious eyes. This is the more so since they regularly have to deal with other people who often ask about the same sort of information, such as border officials or smugglers. It is therefore important to build personal contact with respondents. The researcher should ideally be going out of themselves and considering what it would be like to be in the place of the interviewee. Ideally, researchers should select spaces for interviews which are open, informal sites where residents feel comfortable and therefore can speak freely about their situations and circumstances and experiences.

Researchers should not be urging interviewees to speak on any topic they do not want to talk about.

Public Health, Migration and Ethics

Few incidents bring into view questions of public health and ethics as a pandemic such as the novel coronavirus. The basic question here is in the words of John Krebs: “Whose responsibility is health? Is it purely a matter of individual choice or do governments have a role to play? What about others, such as businesses, employers and health professionals: do they also have responsibilities? Discussions of these issues in the media reveal a whole spectrum of views. These vary from considering any curbing of our freedom to do as we please as infringements by the pernicious ‘nanny state’ to crying ‘someone should do something’ to tackle public-health.”²³ Historically, public health became an issue of concern during epidemics. However, if one looks at the history of Black Death, medicine was an important albeit subordinate branch of the management of plague. As a medical response, the city councilors put certain administrative orders in place: “Physicians were forbidden to leave some cities and their hinterlands. They were offered high fees and prizes to visit patients in the lazeretti or... plague hospitals. Many city’s civic officials offered contracts to physicians to care for patients with plague. Most often, civic leaders tactfully delegated to local colleges of physicians the task of selecting members to serve in the hospitals.”²⁴ So health management was part of the larger management of urban centres.

In present times, by stressing the notion of individual choice, the states have often abrogated their responsibility as a result of which structural injustice happens when social processes, which is to say social norms, economic structures, institutional roles, incentive structures, sanctions, or decision-making processes, put large categories of persons under a sustained systematic threat of domination or deprivation of their means to develop and further exercise their capabilities, even as these same processes enable others to dominate or have a wide variety of opportunities for developing and exercising their capabilities. Structural injustices constrain and enable, working in a systematic manner to expand opportunities for the privileged while contracting opportunities for those who are less well off. Also, there are scholars who argue that by valourising individual choice states traditionally retreat from taking care of their marginalized populations. It has been argued that “entrenched focus on the individual in medical ethics is deeply implicated in the ongoing reproduction of poor health for marginalized minorities.”²⁵ Therefore, states step in only when there is a crisis but only for their citizens.

Therefore, it can be said with some certainty that public health becomes an issue in times of crisis and crisis is the *modus operandi* for states to become active. When it comes to migrants, the situation gets worse especially if that migrant happens to be a non-citizen. The ambiguity that is inherent in migrants’ existence makes their situation even worse. As a result, their entitlements to public health care provisions are severely affected, and

as they lack entitlement to legal protection or recourse too, they cannot try to protect the former entitlement. This can lead to extended periods of total destitution for multiple families. The national asylum support policy of a country, difficult working relations with border agencies, higher thresholds for eligibility, or the budgets of local care authorities getting slashed might all take effect as factors acting as barriers to the health support needs of forced migrants who are sick or disabled as well as their family care givers.²⁶ There is a moral judgment implicit and inherent which is making an evaluation about the legitimacy of the movement that has been made by the migrant. Nations often exploit this vagueness and ambiguity in their status as a loophole.

When the pandemic happened, states such as India resorted to the historically known ways of dealing with it through lockdowns and closing of borders. Since internal borders were closed, migrant labour came to be treated as refugees as they had arrived from across the state borders and they became nowhere people. The states did not feel the responsibility to take care of their health or any other issues. They became the bare bodies. The pandemic therefore once again brought to the forefront that where migrants are concerned, both ethics of care and ethics of justice are suspended. Only biopolitics remains the *modus operandi*.

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Pandemic, Protection and Politics of Mobility

By

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Introduction

Human mobility has been an organic phenomenon prevalent through various phases of history, from the ancient ages to the modern times. The discourse on migration underscores this significance of mobility across all population, at all ages. Irrespective of whether migration is forced or voluntary, mobility is the primary facilitating factor that enables the migration of individuals. But the recent COVID-19 pandemic has brought about a new politics of human mobility that has adversely impacted the dynamics of migration across the globe. As mobility and physical proximity are the key drivers in the spread of corona virus and thereby the pandemic itself, various governments throughout the globe have instituted restrictive policies such as complete or partial lock-downs, border closures, travel bans etc. These constraints on freedom of movement have precipitated an asymmetric impact on migrants, both in terms of livelihood and life. Many countries such as Malaysia, Thailand and India have unleashed crackdowns on migrants under the pretext of containing the spread of COVID. This is in clear violation of the 13th objective of Global Compact for Safe, Orderly and Regular Migration (GCM) that claims to “prioritize non-custodial alternatives to detention.” The ramification of such restrictive measures is even worse for refugees and stateless individuals whose protection is conditioned by their mobility. The paper makes the observation that by curtailing or enabling mobility of different segments of people without giving due regard to their specific vulnerabilities, the state is undertaking a performative act of providing protection to its population. Governance during the pandemic thus showcases the state performativity of protection

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that transmutes to the politics of mobility/immobility. This consequently reasserts the dichotomies of inclusion and exclusion- i.e. who can access protection and who is denied protection. It creates a hierarchy of inequality where migrants and refugees transmute to potentially disposable bodies while the citizen becomes the indispensable entity of body politic who is worth the protection that state has to offer. In the given context, this paper tries to examine the ways in which the pandemic has conjured a new politics of mobility/immobility that impacts migrants and refugees adversely. The paper also looks at how India in particular has implemented its domestic policies and laws during COVID, so as to curtail the protection of citizens, migrants and refugees.

State and Performative Protection

The very existence of state is rationalised primarily by the duty of the state to protect its citizens. The “nasty, short and brutish” state of nature portrayed in Hobbes’s *Leviathan* indicates the anarchy and chaos prevalent due to the absence of a state government that would protect and guard its population. Even in the current world order, the most important aspect that distinguishes a ‘failed state’ from others is its inability to protect its citizens through the preservation of law and order. The duty of the state to protect its people entails protection from both internal and external threats. While every other state tries to fortify its borders, implement stringent border surveillance measures, augment its military capacity by spending billions under the justification of protecting its population from war and other external threats, the protection within the country is largely reduced to the notion of effective governance and implementation of rule of law. A threat like COVID pandemic necessitates effective measures including dissemination of information on the disease, access to effective testing and diagnosis techniques along with affordable treatment that ensures timely recovery from the perspective of prioritizing public health. But it also entails the state ensuring the non-discriminatory protection of all its citizens without covertly differentiating them as citizens who are worthy of protection and citizens who are rather disposable in terms of comparatively inferior protection they receive. The paper attempts to make the observation that by curtailing or enabling the mobility of different segments of people without giving due regard to their specific vulnerabilities, the state is merely doing a performative act of providing protection to its population. The implementation of such performative protection precipitates a ‘politics of mobility’ that in turn creates an inherent hierarchy of people that reaffirms the state dichotomy of inclusion and exclusion.

The hyphenation between state and the notion of protection in Western political theory can be seen in “the common law tradition and natural rights theory” cherished in British constitutionalism.¹ According to Sir Edward Coke, the reciprocal obligation between the sovereign and the subject is conditioned by the responsibility of the sovereign to “govern and protect his subjects” and the duty of the subject to owe his allegiance or

obedience to the sovereign.² This conceptualisation is central to the constitutional theory in English legal tradition. In the Anglo-American constitutional tradition, the notion of protection can be traced backed to social contract theory. Both Locke and Rousseau approved of the idea that the primary cause for individuals coming together to form societies and bearing with the authority of the government was to ensure their safety and “preservation of their property”.³ According to Coke’s earlier postulation, the reciprocity between sovereign and subject was based on the organic pledge of allegiance between the two, but Locke postulates the foundation of such reciprocity on the consent of people rather than the allegiance.⁴ The constitution of modern states, such as the Indian constitution itself embodies this notion of protection through various fundamental rights. Inspired by the American constitution, the Indian constitution has included the more specific equal protection of laws clause that can be understood as state’s liability to give similar protection to all without discriminating between the citizens. Though per se it does not translate to a formal right to protection, it implies the need to maintain impartial equality in the event of state choosing to provide protection to its citizens. The dilemma in the COVID pandemic is not that the state denies protection to its citizens, rather that state tries to perform the responsibility to protect, there by leading to the discrimination between citizens.

The concept of performativity was coined by J.L Austin (1975) in his work *How To Do Things With Words*. In his attempt to differentiate what constitutes constative and performative utterances, Austin considers constative utterances as statements that state facts or methodical philosophy either correct or wrong whereas performative utterances as those which by themselves do not explain or testify anything, but merely enacts what it intends to describe.⁵ Performative acts though do not specifically mean much in itself when compared to what it tries to enact, it can have varied outcomes. Judith Butler has built on this notion of performativity for explaining gender as a performative construct in “constituting the identity it is purported to be”.⁶ This notion of performativity being an enactment of a preexisting normative idea can be appropriated in the case of state behavior as done by scholars like David Campbell and Cynthia Weber. In *Performative States*, Weber counters the notion of sovereignty as an ontological reality and instead postulates the state conjures legitimacy through the performativity of sovereignty. Taking this notion of state identity being shaped by the constitutive action it performs, the paper suggests that performativity of state can be seen in the way it enacts the responsibility to protect its population. State legitimizes the reciprocal obligation between the sovereign and subject by performing the responsibility to protect its citizen in return for their allegiance towards the state. This enactment of responsibility to protect is implemented as unequal measures adopted by the state towards various groups in its attempt to contain the pandemic. While the emigrant community from Middle East who were crucial to the inward remittance received by the southern states of India like Kerala were brought back to their native places through chartered flights and ‘Vande Bharat Mission’, the

same politics of mobility denied even the permission for migrant labourers to move back to their states of origin. This differential treatment to the two groups of migrants is indicative of prevalent inequalities and power asymmetries. The later section of this paper elaborates on the state's various crisis response measures to contain the spread of pandemic and protect citizens by regulating their mobility. This state performativity of protection adopted through gradational practices towards various groups, constitutes a politics of mobility/immobility that showcases a pattern of protection that is distorted along the various fault lines of the society. Before engaging with politics of mobility during the pandemic, the next section analyses the significance of mobility for migrants.

Mobility, Migration and Refugee Protection

People undertake migration for diverse reasons including “economic, social or political factors or a combination of all of these”.⁷ The term ‘migration’ often advances an understanding of a phenomenon that involves regular or rather voluntary movement of people across the borders in pursuit of better living conditions and/or financial prospects. In comparison, forced migration entails the involuntary movement of people who flee their places of origin in response to adverse situation of war, conflict, violence, poverty or even persecution. Hence while economic factors figure as prominent determinants of voluntary migration, the forced migration of individuals is marked by the predominance of socio-political factors that can in turn precipitate the economic factors. Regardless of the type of migration involved, the mobility becomes the single most important element that underpins the notion of migration. Increased mobility of individuals across borders is not just a phenomenon that can be reduced to its geographical understanding. Along with individuals, it simultaneously entails the mobilisation of discourses linked to comparatively static constructs such as states, territories and boundaries. The transnational mobility of individuals across borders complicated the linear understanding between people and the territories they occupy, thereby generating fear and insecurity among nation-states on the impact of such mobility. The drive to control migration has resulted in a gamut of measures adopted by the state which go beyond the traditional border control strategies and increased surveillance practices which Antoine Pecoud (2013) refers to as “disciplining of transnational human mobility.”⁸ Such attempts showcase the effort to align the patterns and practices of migration with the interests and goals pursued by the state. These objectives of the state include preserving the status-quo so as to not instigate obstructions to the autonomy and sovereignty of the state in control of its people. It also entails state's reassertion of its freedom and authority in determining who needs to be included and who should be excluded. This does not suggest that the state is the single actor in controlling the mobility of people through the administration of migration policies. Rather, various non-state actors and specialised international organisations like International Organisation of Migration or UNHCR work

independently or in collusion with the state to augment its capacity or ameliorate its burden in managing the people who crosses over to its borders for a variety of reasons. Scholarship on migration studies have widely acknowledged the formation of a “migration industry” where multiple stakeholders with varied agendas associate with the state often to pursue their own interests, inside the evolving “political economy of mobility management.”¹⁰

Interestingly, the discourse on human mobility is inextricably linked with the nation-state’s monopoly to regulate and control it. The Westphalian system, not only upheld the territorial sovereignty of nation-states, but also gave the states the authority to demarcate its citizens from the non-citizens based on the same territorial sovereignty.¹¹ This eventually resulted in states invoking an elaborative administrative system that institutionalized the inclusion of citizens and exclusion of non-citizens. Even those included citizens were subject to the state’s monopoly of regulating their ‘to and from’ movement across the national borders through a well lubricated surveillance mechanism enabled through documentary perquisites like visas and passports. This also emboldened the linear hyphenation of an individual’s national identity with a single country. Mobility being a pervasive phenomenon that aided the socio-cultural evolution of human being, there was a continued movement of people between states causing the state to develop the narrative of non-citizen being the “outsider.”¹² Hence transnational mobility of individuals that enabled their inter-state migration posed a threat to the construct of homogeneous nation-hood based on uniform ethnicity/culture/religion. The citizens were full-fledged members of the body-politic, whereas the migrants were cast to the zone of being denizens¹³ or partial citizens who were precluded from accessing the rights offered by the state. More than often, the welfare of the migrant in the host state was juxtaposed with the safeguarding of rights and privileges of the citizen. In Foucauldian terms this instituted a “governmentality” that involved the bio-political control of migrant bodies so as to secure the wellbeing of citizens. Hence the restrictive migration policies brought about by the state to curtail the influx of foreigners should be seen as the exclusionary policies directed at the non- citizens.¹⁴ Geiger (2013) postulates that the state’s “organized control and regulation over access, stay, employment and return” of migrants that constitutes the “government of migration” can be reduced to what Jurgen Mackert (1999) refers as the “struggle over membership” in the nation-state. It is to this context that the onset of COVID pandemic cause additional complexities. The measures of lockdown and border closures although *prima facie* is an attempt to regulate human mobility (regardless of the underlying causes that necessitate the mobility- economic or humanitarian) so as to contain the spread of virus, eventually divulges the state’s rationality of protecting those individuals that it deems worthy. In its performativity of providing protection, state attempts to maneuver human mobility as the primary response to the pandemic. This reflects Antoine Pecoud’s (2013) observation that controlling mobility is an attempt to preserve the “national order of things”¹⁵ where state reasserts its

sovereignty in not just determining who can enter and who cannot, but also in mandating who qualifies for protection of the state by the same logic.¹⁶

Controlling the mobility has similar adverse impact on the refugees as well. The agency of mobility that the refugees exerted in fleeing their country of origin due to threat of persecution is one of the important aspects in securing their protection. For those in protracted exile in the host country, the mobility becomes important aspect in securing livelihood as well. Refugees even otherwise live in a condition of partial lock down in host country, mostly restricted to their camps. Their freedom of movement is conditional on the authorization provided by camp administrators. These restrictions cause an impediment to the sustainable protection of refugees in terms of reconstituting their lives, securing livelihood and being self-reliant. The pandemic has constrained their access to protection in two ways. The decision to close the borders of the country of asylum prevents their attempt to flee persecution in their country of origin and precludes any chances to obtain protection. For those a few of them who are already entered the host country, miserable living conditions makes them more vulnerable to the pandemic. But the perception of being the ‘outsider’ and the reality of being a non-citizen in the host country, limits their access to any effective health care. This is also in violation to the ideals of international human rights law and international refugee law. The next section looks at the ways in which state performativity of protection constitutes the politics of mobility that impacts these vulnerable sections of domestic migrants and refugees differently than the rest.

Pandemic and the Politics of Mobility

Cresswell considers politics on anything to entail the social relations enmeshed in the “production and distribution of power” and as an extension, the politics of mobility comprises of the “ways in which mobilities are both the products of such social relations and are produced by them”.¹⁷ Cresswell also explains that mobility is one of the principal resources of 21st century so much so that it’s differential and discriminatory allocation and distribution is instrumental in the production and perpetuation of some of the harshest disparities that we see around us. A similar opinion is postulated by Bauman (1998) in opining that mobility has emerged as the “most coveted stratifying factor”.¹⁸ As much as mobility is about the individual’s capacity to be mobile, it also involves the constrictions that can potentially manoeuvre an individual’s mobility in a different tangent so as to create patterns of immobility. As a person’s mobility is what enables him in accessing his livelihood or sustaining his societal and personal relations, it is inextricably linked to the constitution and reconstitution of power relations within the society.¹⁹ The statutory and non-statutory provisions intended to enable or curtail the mobility and thereby the partaking of individuals across various aspects of life ensures the disproportionate endowment of mobility along the pre-existing fault lines of class, religion, ethnicity or even gender. As opined by Cook & Butz both

mobility and immobility are interconnected as it can exist concurrently amid different social groups “creating complex and uneven mobility landscapes”.²⁰ *How has the state invoked a politics of mobility during the pandemic so as to make these uneven landscapes of mobility assert itself along the pre-existing disparities in the society?*

The irony in the COVID situation is that the Corona virus spreads from people to people without discriminating with respect to borders and territories, whereas the response measures adopted by every state is territorial in nature. The state brings in a gamut of provisions which mainly emphasizes on restricting the movement of people, so as to prevent the spread of pandemic. Curtailing the mobility of people has been central to the response measures adopted by the state often implemented as complete or partial lockdown and border closures. Within the countries, idea was mooted on the basis of developing a spatial conception in understanding the spread of pandemic by demarcating spaces to corona free zones and corona containment zones and limiting the interaction of people between these two types of spaces. Various statutory restrictions were enacted to confine each individual to the zone he was occupying at the moment, not because that would guarantee his protection but more so that he doesn't become a potential threat as a carrier of virus to others. In essence, these measures is also an effort by the state to showcase its attempt to provide selective protection to its citizens. But the differential measures adopted by state towards different segments of its population institutes a gradational pattern of protection, dependent on the pre-existing hierarchies of class, caste and even religion.

The domestic migrant labour working in urban areas of India was the first ones to bear the brunt of measures such as lock down that was promulgated internally within the country. Afore mentioned fault lines of society is explicit in the absence of dignified life for the migrant labour in the country, despite of being a rightful citizen. Rights of these labour are denied from time to time both by the state and capital establishments that employ them for informal labour.²¹ The profits that enable the luxurious lifestyles of most elites are accrued by letting these labourers hang on the verge of subsistence, pushing them to the margins of society. The pandemic has elevated their situation to that of hyper incarceration. The loss of livelihood due to lockdown translated to lack of accommodation and even access to food, pushing them to dire poverty. Their precarity was compounded by the restriction of mobility imposed through lock down that effectively curtailed any remaining means for them to reach back to their native villages. The curtailment of mobility of individuals were being improvised even before the declaration of the Janata Curfew of March 20 as trains were cancelled from March 18 and completely stopped functioning from March 21, along with the cessation of air travel from march 22. Many of the labourers undertook perilous journeys on barefoot from their areas of domicile to their native places. Out of those, many succumbed to death either due to accidents, run over by train or even due to the exhaustion or hunger. The measures then adopted by the national government to address the violations

of restrictions imposed on mobility were to enforce more stringent closures of state and district borders, prosecution for violating the disaster management act and forcefully constraining them to make shift shelters and quarantines.²² Newspapers and social media were sprawling with reports on usage of tear gas and lathi charge against those travelling home defying the state dictums. The assistance in cash and kind announced for alleviating the conditions of the migrant labour, most remained on paper with only a few percentages able to access the benefit of same. Central government released a standard operating procedure (SOP) for facilitating the transportation of “stranded migrants” which was supposed to enable the deployment of those migrants in various shelter homes and facilities for work in the same state in which they were sheltered.²³ They were also prevented from moving out of the states in which the shelter was provided.²⁴ On a later date of 29 April, Central government released another statement that permitted the “stranded migrants” to go back home using only bus as the means of transport, and by adhering to mandated protocols.²⁵ Center delegated the moral, material and financial responsibility of coordinating and implementing the modalities of such transport to the respective states involved in the process. According to Ravi Srivastava (2020), such measures were aimed at curtailing the extensive movement of migrants from Southern and Western states to Eastern states, simultaneously employing their labour in the states where they were stuck. Later on 1 May, incidentally the labour day, Central government declared the permission for migrants to move from one state to another and authorised the Ministry of Railways with clear instructions on the running of ‘Shramik trains’ for the purpose. The government’s response was on the lines of firefighting a situation that according to them, had emerged due to spread of misinformation and rumors amongst the migrants rather than addressing their compounded vulnerability from pandemic and the larger systemic exclusion that had pushed the migrants to the margins. Certain states like Uttar Pradesh and Madhya Pradesh, also used the context of Pandemic and the uncertainty caused as an opportunity to roll out the ‘Temporary Exception from Certain Labour Laws ordinance, 2020’ after cancelling 35 existing labour laws relevant to factories and manufacturing establishments. The labour ministries of Gujarat, Himachal Pradesh and Madhya Pradesh have similarly invoked section 5 of Factories Act so as to prolong the work hours in factory to 12 hours a day. Through these changes does not meddle with minimum wage criteria, employers would be relieved from the social security obligations towards their employees as they are not mandated to pay anything more than the minimum wage.²⁶ Employers can hire and fire workers with much elasticity but without recompensing them or engage the contract labour on a need basis. This ordinance is supposed to balance the monetary damage caused by the broader macro-economic scenario during pandemic, but it does so at the expense of pushing the labour force to a situation of hyper precarity instead of protecting them. A substantive protection measure would have considered the safety and amenities of work environment, health checkup provisions, redressal mechanisms or any such

measures of security for the informal migrant labour during these testing times.

The government's consent for the mobility of these migrants were later followed up by an explanatory circular from Home secretary to Chief secretaries of all states, explicitly stating that the earlier order of 1 May was intended for enabling the mobility of not all stranded people, but only those distressed individuals who had moved from their native/work places "just before lockdown period", and unable to return to their work/indigenous places due to restrictions imposed as a part of lock down.²⁷ It effectively stated that the "stranded persons" did not include those people who were residing "normally" in places other than their place of origin for work functions and those who "wish" to go back to their native places in the "normal course".²⁸ Srivastava opines that this clarification on those who reaches their workplace/ native place just before the lock down as constituting the stranded migrant labour overlooks the larger gamut of migrant labour community involving the circular migrants of India. The Indian government's census report categorises an individual as a migrant, only if they are counted in documented in a region which is different from their place of origin. In order to qualify for listing in census in a place different from place of origin, the individual has to be residing in that place for a minimum of six months. Hence such categorisations seem to discount the larger number of temporary/ seasonal/ circular migrants²⁹ in the country that occupy the lion's share of informal work force in the urban and semi urban areas of the country. Even though the census data may be symptomatic of the data on permanent migrants effectually and semi-permanent migrants partially, it is not indicative of the data on temporary migrants. This category of temporary migrants which include short term seasonal migrants and circular migrants are a heterogeneous group including low caste and tribal populace who often migrate from their native hamlets to the urban spaces in search for informal works in the construction sites, brick kilns along with agricultural sector like sugar cane fields etc., often constituting the lowest rungs in the hierarchy of labour.³⁰ The usually precarious nature of their work elevates to a degree of "hyper precarity" during the pandemic for migrant workers.³¹ While global north perceives this hyper precarious of migrant labour's situation as one that is emanating from the interaction between "neo-liberal labour markets and highly restrictive immigration regimes."³²

When compared to the Indian situation, the global scenario of mobile bodies like migrants are habitually instituted and positioned along a continuum by the border regimes of nation-states. One end of this continuum is occupied by legal immigrants who are perceived to be accepted by host society where as the other end is occupied by the illegal immigrants who comprise the undesirable lot.³³ Often the latter end of the spectrum coincides with the "security continuum"³⁴ where threats emanating from activities like terrorism and criminal activities are predominantly showcased. This has caused the countries of global north to adopt a "managerialist approach to migration", so as to curtail the potential risks associated with

the undesirable immigrants.³⁵ Even within the countries of global south like India where intra state migration is predominant, the mobility of the migrant labour puts him in a position analogous to the above-mentioned spectrum. The migrant labour in India is not homogeneous category. The fault lines of caste, class and gender and the diversity of their inherent skill set have placed them in hierarchies of labour. Those who belong to the lowermost levels of this hierarchy overlaps with the latter end of spectrum where undesirable migrants are seen as a liability for the state. While government makes a distinction on the vulnerability of migrant labour during pandemic by differentiating them and addressing them as “stranded” due to the lockdown provisions, it simultaneously implies the existence of a category of migrants who are not equally “stranded”. Such haphazard categorisations that do not acknowledge the diverse nature of migrant labour is manifestation of politics of mobility that determines the extent of exclusive/inclusive protection during pandemic.

Like human mobility that is prevalent from ancient times, the mobility of pathogens such as viruses that causes epidemics and pandemics are equally antique. Instances of diseases like small pox, Spanish flu or even HIV/AIDS that were present on a global scale and the response mechanisms adopted has also been important in the way state allocates protection to its populations. Extra- territorial nature of pandemics has figured it in the list of biosecurity threats that the state has to handle along with other conventional problems like war, terrorism or even illegal immigration. Tangibly, even though pandemics are a matter of medical concern, the handling of the same gets entwined with the political response of the state. Nation-state being the central variable in the political configuration of society, the state mediated protection of society against such public health concerns would be channelised through political channels and institutions that would be in turn essential in devising and imposing legally binding response mechanisms.³⁶ In India, the protective measures adopted for the well-being of population is fortified with statutory backing through bringing its implementation under the legal ambit of Disaster Management Act of 2005. Apart from the citizens within the territory, gradation of individuals to bodies in which some deserve protection more than others has also impacted vulnerable individuals those who seek to enter the borders of the state seeking asylum. Effectively the pandemic has imposed severe restrictions on the ability of people to avail the protection of the state in both ways -that is for citizens in terms of limiting protection through restricted access to the rights, privileges and services provided by the state within its territory and for vulnerable non- citizens like refugees and stateless individuals this manifests as restrictions on the humanitarian protection that they seek to attain on crossing the borders and entering the territory of the state. In the context of a pandemic where to each individual, every other individual would be seen as bearing the possibility of being a potential carrier of the virus, the migrant labour and refugees were clearly being cast as ‘outsider’ or ‘other’. The sovereign authority of the state to shut and secure its borders so as to enable only regulated and restricted entry of

individuals during a pandemic is seen as a justifiable means to ensure the health and well-being of its population.³⁷ But such regulations ought to be in alignment with the principles of global framework of refugee protection and international rule of law as otherwise the challenges posed by the exclusionary nature of such regulations may persist even after the subdual of the pandemic.³⁸ The closure of borders during the extraordinary situation of a pandemic that jeopardises the very existence of the population of a nation can be justified in accordance with the clause of “public emergency” of Article 4 of the International Covenant on Civil and Political Rights and “exceptional circumstances” under Article 9 of 1951 Refugee convention. But such regulations are not supposed to implement a “blanket ban” on every individual who crosses over the borders from another territory without giving due regard for his/her specific vulnerability as most states have the capacity to adopt and improvise measures required to protect their own population without pushing back the vulnerable forced migrants to persecution in their countries of origin.³⁹ Even for countries like India, which are not party to the 1951 refugee convention such a blanket ban on the entry of refugees and stateless can amount to a violation of the principle of ‘non-refoulement’. The humanitarian protection offered by the states to these refugees are often done in collaboration with international humanitarian organisations or done independently by agencies like UNHCR by virtue of their unique mandate,⁴⁰ for which access of these organisations to these vulnerable populace is instrumental.⁴¹ The limitations imposed on the mobility of the various humanitarian agencies and organisations will also be in contradiction to the norms of international rule of law⁴² and also to the provisions of the recently adopted Global Compact of Refugees.⁴³ Those a few refugees, who are already within the host-state should have the access to health care and information on the “symptoms, prevention, control of spread, treatment and social relief” associated with the pandemic.⁴⁴ But living conditions of the most of the refugee camps within the countries of South Asia make it difficult for refugees to practice adequate social distancing, let alone availing the health and sanitation services. Without necessary water and sanitation facilities, the COVID precautionary dictum of frequent hand wash becomes a nearly impossible scenario for these refugees sheltered in camps.

The exclusionary nature of performative protection provided to the migrants basically flouts the principles of non-discrimination and human rights enshrined in the Global Compact of Migration, even though the compact itself is anchored on the principles of state-sovereignty.⁴⁵ In India, migrant labour were arrested for not adhering to the restrictions of mobility and undertaking journeys on foot for home villages. On an international level, such arrests and arbitrary detentions are in violation of the 13th principle of Global Compact of Migration (GCM) which mandates the states to seek “non-custodial alternatives to detention” and thereby explicitly indicating the aversion for usage of detention on migrants. But the unilateral measures adopted by various nations showcase the affirmation of a nation-state determined world order and the re-assertion of each of its inherent

socio- economic fault lines in the wake of a pandemic. The politics of mobility and protection during pandemic has displayed the otherwise covert strand of “ultra-nationalism” that has caused a stringent “state control through surveillance, repressive laws and radical populism.”⁴⁶ Dobusch and Kreissl (2020) has opined that the nature in which states handle the response measures for COVID can be likened to the way in which the crisis management transmutes as a “im-/mobility governance”. For a pandemic crisis where mobility induced proximity of individuals is the primary causative factor, the curtailment of the very same mobility emerging as the principal response mechanism of the state was perceived to be fairly just. According to Dobusch and Kreissl (2020), the politics of mobility/immobility during pandemic thus entails maneuvering a subtle poise amongst “public health, maintaining the infrastructure of basic supplies and the demands of a capitalist economy”.⁴⁷ But the implementation of such response mechanisms exhibits the inequalities and asymmetric power relations of each society.

Conclusion

The moral responsibility of the state to provide protection to its citizens during pandemic has resulted in the state performativity of protection. While enacting this responsibility to protect its population, states have used the curtailment of mobility as the primary response mechanism. As mobility and physical proximity between people aggravated the chances of spread of COVID, such spatially aligned response mechanism was deemed appropriate to ensure the protection of people. These restrictions on mobility like lock downs and border closures does not effectively protect the vulnerable migrants or refugees from the wrath of the disease, rather it only ensures that they do not become potential carriers who threatens the health of others. Normatively, protection framework from a public health perspective during the pandemic would have ideally comprised of dissemination of timely information on the disease, adequate testing mechanisms for timely diagnosis and access to affordable treatment that ensures apt recovery. Instead by opting for a blanket measure of curtailing the mobility of all sections of people without due regard to their specific vulnerabilities, state verifies that it is merely performing its responsibility to protect. This state performativity of protection has precipitated a politics of mobility/immobility showcases the differential gradation of its citizen into two categories- those citizens who are worthy of protection at the expense of others and those who are not. This reinstates a hierarchy of inequality where migrants and refugees become the perpetual outsiders who are rather disposable at the outset of a pandemic. As rightly opined by Carolin Emcke⁴⁸ COVID response mechanisms have conjured a “contrast medium” that amplifies and reveals the “ills that affect our society”.

Notes

¹ Steven J Heyman, "First Duty of Government: Protection, Liberty and the Fourteenth Amendment, The," *Duke Lj* 41 (1991): 507.

² According to Edward Coke, Institute of the laws of England -The subject's right to protection entails "the safety of his person, servants and goods, lands and tenements, whereof he is lawfully possessed, from violence, unlawful molestation or wrong." -As cited in Heyman 1991.

³ John Locke, "The Second Treatise of Government 54," edited by Thomas P Peardon, The Liberal Arts Press 1952, 17.

⁴ James H Kettner, *The Development of American Citizenship, 1608-1870*, UNC Press Books, 1978.

⁵ John Langshaw Austin, *How to Do Things with Words*, Oxford University Press, 1975, 10.

⁶ In *Gender Trouble*, Butler elaborates that the normative heterosexuality that we subscribe to is the procreation of established behavioural patterns and perceptions that are confirmed by conventions and social institutions. Gender then is constituted through the continued enactment of socially constructed behaviour that fabricates differential identity traits to both man and woman. Gender thus is a performative construct. Judith Butler, *Gender Trouble: Feminism and The Subversion of Identity*, Routledge, 2011.

⁷ Subrata Ghatak and Anne Sassoon, eds. *Migration and Mobility: the European Context*, Springer, 2001

⁸ Martin Geiger and Antonio Pecoud, *Disciplining the Transnational Mobility of People*, Springer, 2013.

⁹ Alexander Betts, *Survival Migration: Failed Governance and The Crisis of Displacement*, Cornell University Press, 2013

¹⁰ Martin Geiger, "The Transformation of Migration Politics," In *Disciplining the Transnational Mobility of People*, edited by Martin Geiger and Antoine Pécoud, pp. 15-40, London: Palgrave Macmillan, 2013, 15.

¹¹ James F Hollifield, "The Emerging Migration State 1," *International Migration Review* 38, no. 3 (2004): 888

¹² Martin Geiger, "The Transformation of Migration Politics," In *Disciplining the Transnational Mobility of People*, edited by Martin Geiger and Antoine Pécoud, pp. 15-40, London: Palgrave Macmillan, 2013.

¹³ Hammar, 1990.

¹⁴ William Rogers Brubaker, *Immigration and The Politics of Citizenship in Europe and North America*, University Press of America, 1989.

¹⁵ Liisa H Malkki, "Refugees and Exile: From "Refugee Studies" To the National Order of Things," *Annual Review of Anthropology* 24, no. 1 (1995): 495-523.

¹⁶ Martin Geiger and Antonio Pecoud, *Disciplining the Transnational Mobility of People*, Springer, 2013

¹⁷ Tim Cresswell, "Towards a Politics of Mobility," *Environment and Planning D: Society and Space* 28, no. 1 (2010): 21.

¹⁸ As cited in Lucie Macková and Lubor Kysučan, "The History and Politics of Human Mobility," *Development, Environment and Foresight* 2, no. 1 (2016): 23-34.

¹⁹ Tim Cresswell, "Towards a Politics of Mobility," *Environment and Planning D: Society and Space* 28, no. 1 (2010); Nancy Cook, and David Butz, eds. *Mobilities, Mobility Justice and Social Justice*, Routledge, 2018.

²⁰ Nancy Cook, and David Butz, eds. *Mobilities, Mobility Justice and Social Justice*, Routledge, 2018

²¹ Arun Kumar, "The Pandemic is changing the face of Indian labour," 2020, *The Wire* <https://thewire.in/economy/covid-19-pandemic-indian-labour>

²² Ravi Srivastava, "Understanding Circular Migration in India: Its Nature and Dimensions, the Crisis Under Lockdown and the Response of the State," *Institute for Human Development, Centre for Employment Studies Working Paper Series-WP 4*, 2020.

²³ Ministry of Home Affairs, Government of India, 2020, <https://www.mha.gov.in/sites/default/files/MHA%20Order%20Dt.%2019.4.2020%20with%20SOP%20for%20movement%20of%20stranded%20labour%20within%20the%20State%20and%20UT.pdf>

²⁴ Ibid.

²⁵ https://www.mhagov.in/sites/default/files/MHAOrdernew_20042020.PF

²⁶ Read the detailed analysis of labour ordinance 2020 in <https://thewire.in/labour/labour-laws-changes-turning-clock-back>

²⁷ Letter to Chief Secretaries, Government of India, 2020, <https://dgrpg.punjab.gov.in/wp-content/uploads/2020/05/MHA-letter-to-Chief-Secretaries-and-Administrators-clarifying-movement-of-distrressed-stranded-persons-03.05.2020.pdf>

²⁸ Ibid.

²⁹ Srivastava and Sasikumar makes a distinction between various types of migrants such as permanent and semi-permanent migrants. While the former category included those migrants who have settled in the areas to which they migrated and do not maintain a strong association with the areas or places of their origin, the latter includes those migrants who maintain strong bonds and associations to the place from which they migrated. Ravi Srivastava and S. K. Sasikumar, "Migration and The Poor in India: An Overview of Recent Trends, Issues and Policies," *Migration and Development: Pro-Poor Policy Choices* (2005): 157-216.

³⁰ Alpa Shah and Jens Lerche, "Migration and The Invisible Economies of Care: Production, Social Reproduction and Seasonal Migrant Labour in India," *Transactions of the Institute of British Geographers* 45, no. 4 (2020): 719-734.

³¹ Lewis et al., 2015.

³² Ibid.

³³ Sandro Mezzadra and Brett Neilson, *Border as Method, or, the Multiplication of Labor*, Duke University Press, 2013; Engin F Isin, *Citizens Without Frontiers*, Bloomsbury Publishing USA, 2012.

³⁴ Didier Bigo, "The European Internal Security Field: Stakes and Rivalries in A Newly Developing Area of Police Intervention," in *Policing Across National Boundaries*, edited by Malcolm Anderson and Monica Den Boer *London: Pinter*, 1994, 164.

³⁵ Eleonore Kofman, "Citizenship, Migration and The Reassertion of National Identity," *Citizenship Studies* 9, no. 5 (2005): 453-467.

³⁶ Luhmann, 1974, 26; Palma, 2016.

³⁷ This discretion of states is acknowledged by the international humanitarian organisations like United Nations Human Rights Committee and UNHCR as evident in 'UN Human Rights Committee in Aumeeruddy-Cziffra and nineteen other Mauritian women v Mauritius' (Communication No. 35/1978, UN Doc. CCPR/C/12/D/35/1978, 9 April 1981, para. 9.2b(2)(ii)3); 'The Committee Against Torture in Agiza v Sweden' (Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003, 24 May 2005, para. 13.1)- Cross cited from Gilbert, "Forced Displacement in a Time of a Global Pandemic," In *Covid-19, Law and Human Rights: Essex Dialogues*, edited by Carla Ferstman and Andrew Fagan, University of Essex School of Law and Human Rights Centre, 2020.

³⁸ Geoff Gilbert, “Forced Displacement in a Time of a Global Pandemic,” In *Covid-19, Law and Human Rights: Essex Dialogues*, edited by Carla Ferstman and Andrew Fagan, University of Essex School of Law and Human Rights Centre, 2020, 167 - 175.

³⁹ Lucas Guttentag, “Corona Virus Border Expulsions: CDC’s Assault on Asylum Seekers and Unaccompanied Minors,” *Just Security*, 2020, <https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/>

⁴⁰ Refer to the provisions outlined by the ‘Global protection cluster’ led by UNHCR so as to achieve “well co-ordinated, effective and principled protection preparedness and responses” that is central to all humanitarian actions as seen in <https://www.globalprotectioncluster.org/about-us/who-we-are/>

⁴¹ Turk, Volker and Elizabeth Eyster, "Strengthening accountability in UNHCR," *International Journal of Refugee Law* 22, no. 2 (2010): 159-172.

⁴² Geoff Gilbert and Anna Magdalena Rusch (2018), has cited that the United Nations General Assembly had acknowledged that all states and international organisations need to adhere to the rule of law and “predictability and legitimacy” of the activities of the state should be determined by the “respect and promotion of rule of law and justice”-from the ‘*Declaration of the High-level meeting of the General Assembly on the Rule of law at National and International levels*’.

⁴³ The Global Compact of Refugees (GCR) considers humanitarian access indispensable to achieve the outlined goals of operationalising the “principles of burden and responsibility sharing to better protect and assist refugees and support host countries and communities” based on the notions of “humanity and international solidarity” – Refer Global Compact on Refugees (GCR), UNGA Res 73/151, December 2018, para. 5.

⁴⁴ Principle 6 in ‘*Human Mobility and Human Rights in COVID-19 Pandemic: Principles of Protection for Migrants, Refugees and other Displaced Persons*’, Columbia, Cornell, Zolberg Institute - <https://zolberginstitute.org/covid-19/> cross cited from Gilbert, “Forced Displacement in a Time of a Global Pandemic,” In *Covid-19, Law and Human Rights: Essex Dialogues*, edited by Carla Ferstman and Andrew Fagan, University of Essex School of Law and Human Rights Centre, 2020.

⁴⁵ Pascale Allotey, Zhie X Chan, Fatima Ghani, Emma Rhule, *Mobility Migrants and COVID- 19: An Enhanced Challenge to Health and Human Rights*, June 2020 as seen in <https://iigh.unu.edu/publications/articles/epic-tracker-blog-mobility-migrants-and-covid-19-an-enhanced-challenge-to-health-and-human-rights.html>

⁴⁶ Kanak Mani Dixit, “Pandemics without borders, South Asia’s Evolution,” *The Hindu*, 04 May 2020, <https://www.thehindu.com/opinion/lead/pandemics-without-borders-south-asias-evolution/article31495761.ece>

⁴⁷ L Dobusch and K Kreissl, “Privilege and Burden of Im-/Mobility Governance: On the Reinforcement of Inequalities During a Pandemic Lockdown,” *Gender Work Organ*, 2020.

⁴⁸ Based on interview “The pandemic is an authoritarian temptation that invites repression” given to web24.news <https://www.web24.news/u/2020/04/the-pandemic-is-an-authoritarian-temptation-that-invites-repression.html> cross cited from Dobusch and Kreissl, “Privilege and Burden of Im-/Mobility Governance: On The Reinforcement Of Inequalities During a Pandemic Lockdown,” *Gender Work Organ*, 2020.

Wounded Identities: Untold Stories of the Wasteland

By

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Introduction

“Where do the migrants from Assam, who work as waste collectors, live?”

A Respondent (not from the focus group): *“Oh those Bangladeshi’s? Go straight, you shall reach the Chandan Basti. There are so many of them.”*

Chandan Basti is known to be one of the largest migrant settlements in the city of Lucknow, Uttar Pradesh. On entering the Chandan Basti, what first meets the sight are dumps of rejected waste, crumpled bottles and squealed broken refuses from households. But what is distinct about Chandan Basti is that it is not just a desolated waste slum, it is also a ghetto of many untold stories; stories of violence and injustice, of fear and flight. These slums have been populated by migrants from Barpeta, Assam. All of them share a common religious identity of being Muslims. The interesting part of the study is that the study group in discussion belongs to one specific district, Barpeta in Assam and has been migrating to Lucknow since more than the last two decades. They are engaged in one specific activity, which is door to door collection and segregation of waste on private basis. On the surface, what appears to be out migration, due to economic inopportunity, has layers of nuance, the explanations to which were found, in our attempts to trace back their history and polity. We were introduced to these layers of the stories when, on one of our filed visits to Chandan Basti¹ there was a fire ignited by a short circuit. One of the migrant dwellers’, jumped into the fire to save their voter card. On being asked about the reason behind such a risk, they said, *“we are nothing without these papers, if we don’t have them, we shall be sent to Bangladesh.”*

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On Further enquiry, we were introduced to what can be called the ‘story of wounded identities’, which shall be systematically discussed, in this paper. Starting from the point of origin, Assam, one of the north-eastern states of India, has often been referred to as the “problem state” of the country. Lack of means of livelihood, poverty, unemployment and persistent floods are the economic side of the problems in Assam that come into play with social problems of historical agitation, hybridity, ethnic-lingual-cultural conflicts, to create a section of society that is ‘vulnerable in both worlds’. Topographically there are many riverine islands in the river Brahmaputra which are home to Bengali Muslims (of East Bengali origin) population who are known as *Mia* Muslims in Assam. This section of the population is usually illiterate, poor and is culturally similar in terms of its attire, language, food habits, religion to the population across the international border (Bangladesh). Due to this similarity, post partition, a common perception about them has been that these are illegal immigrants who have illicitly crossed the Bangladesh border and have entered Assam. Therefore, many of these poor and illiterate people prefer to either get confined to their own or nearby villages or move out of the state to the farthest possible distance, adopting a migratory route to escape harassment so that they find a secure place where they no more face ethnic and linguistic tensions.² These conditions of the state, castes its shadow on the identity of its inhabitants not only when they are in the state, but more so, when they move out of the state, to different parts of the country. And in the case of our focus group, these shadows are even more dense by virtue of their culture, language and religion.

Therefore, in this paper, we shall study the social and political features relevant to the plight of Bengali Muslim Migrants settled in the Chandan Basti of Lucknow, and how they impact their identity and well-being. This paper is a qualitative expedition into the lives of these migrants. In depth interviews carried to extract information have been used to get an insight into their psychology. Extracts of interviews from both Barpeta and Assam have been utilised to illustrate the struggle of Assamese migrants with identity, at home and host society. The paper is organised in the following manner. In the first section we have explained the triad of identity, hybridity and hospitality to understand how this interplay affects migration. In the second section Assam movement, National Register for Citizens and the controversial Citizenship Amendment Act of 2019 are briefly taken up to understand the process of identity formation in Assam. In the third section, the paper elaborately discusses the field observations related to the problems faced by the migrants in Lucknow when it comes to their identity and acceptance in the host society. The paper concludes with some suggestions which may be taken into consideration by the state so as to resolve the issue of identity and migration in Assam and outside Assam.

The Triad of Identity, Hybridity and Hospitality

To study the wounds on the identities of our focus group, we shall first analyse what identities are. The term Identity in Psychology has its roots partly

in Erik Erikson's theory, according to which this represents the capacity to keep continuity and an inner coherence. A stable and continuing evolution of identity is primal for the hominid development of an individual and goes a long way in deciding their ability of negotiations over social norms. Identity is dynamic, individualistic and at the same times a social concept. With the course of life, with experiences, and interactions, identity of an individual takes a new shape. But when the origin of one's existence is under question, identity is in crisis and when the crisis proves to be difficult, some kind of identity pathology sets in. Across the globe there are many deprived populations who are still struggling with their primary needs and requirements. Also, there are sections of population, whose emergence and existence are under controversy owing to political and social factors. Actions of the state are the backbone of lives of citizens in the nation but when amidst political turmoil, the state fails to cater to the sentiments of a particular section of the society, indifference trickle down at the social level and then at an individual level. Identity in such setting not only becomes intricate, it may even undergo a crisis. The formation of identity of such troubled sections of global population and manifestation of chaos in their identity, has been garnering attention lately. The spectacular rise of the 'identity discourse' can tell us more about the present-day state of human society than its conceptual and analytical results have told us.

"Identity has now become a prism through which other topical aspects of contemporary life are spotted, grasped and examined. Established issues of social analysis are being rehashed and refurbished to fit the discourse now rotating around the 'identity' axis. For instance, the discussion of justice and equality tends to be conducted in terms of 'recognition', culture is debated in terms of individual, group or categorical difference, creolization and hybridity, while the political process is ever more often theorized around the issues of human rights (that is, the right to a separate identity) and of 'life polities' (that is, identity construction, negotiation and assertion)."³

Contemporary Literature shows how identity is not a private affair. In the Pre-Modern period identity was defined in context with the place of birth and nascent position of parents. By virtue of this definition, identity was considered to be a matter of destiny, and something a person had little control over. However, in the Post-Modern era, the definition of identity has expanded and become more inclusive. This paradigm shift can be attributed to factors such as globalisation and paroxysm of migration causing an addition of social, political and psychological dimensions in the definition of identity. Bauman (2001), calls this period as 'Liquid Modernity'. Works of White and Wyn (2004),⁴ and William and McIntyre (2004)⁵, show how identity is shaped by an individual, throughout the course of life. Struggles of life in the pre and post-modern periods, are significantly different. With development, the concern has shifted from survival, to the quality of life. This has presented us, with a paradox, where people are faced with the 'burden' and 'freedom' of defining their own identity.

Scholars like Tuan, have examined the concept of identity with linkages to place and mobility. In his concept of the Hearth and Cosmos,

Tuan, highlight how the body desires proximity and nearness, is Hearth but the mind is a wanderer which he calls the cosmos. Humans are both 'mind' and 'body'. So, while a body is here, the minds wanders and reaches home.⁶ Furthermore, according to Erikson, 'Identity is a process between the identity of the individual and the identity of the communal culture.' He coined the phrase 'Identity Crisis' in 1940s which referred to a person who had lost a sense of personal consistency. Amartya Sen in his book *Identity and Violence* (2007) insists on the recognition that identities are multiple. Any single individual carries several identities within her, denying one for the sake of a more relevant alternative in a given situation, and switching them around according to immediate need and convenience.⁷

The next relevant concept, to further the discussion is Hybridity. Hybridity is a construct that defines identity construction processes at people that brighten up in the same time of more cultural reference systems, such as migrants. The word 'hybrid' was originally used to describe people of mixed race, but has been adopted by these theorists to talk about "the notion of 'in-betweenness' as a position, being between positions".⁸ The term of 'hybridity' constitutes together with the term of 'diversity' a central category of social reorganisation with an appropriate behaviour towards heterogeneity. Leaving the origin country, the migrant suffers the loss of a part of his identity, especially regarding the cultural identity. The experience of uprooting is accompanied by a surprise in the host-country: the migrant acts 'normally' but the environment behaves differently, so the expected reaction from the outside is missing. The disadvantage of this strategy is the partial loyalty, especially when the individual reaches a conflict situation between these cultures. Hence a hybrid identity is something which is not static and adamant, rather it is fluid and positional. 'Hybridity' happens when a person is caught between two different things, often two different cultures, which leads him/her to a 'double vision' or 'double consciousness' and finally a merged or even a lost identity. As Homi Bhabha said, feeling of 'home' is a stabilising identity, as such, feeling 'unhomeliness' can be a major reason for lost identity. As Bhabha mentions, "to be unhomed is not to be homeless, nor can 'unhomely' be easily accommodated in that familiar division of social life into private and public spheres."⁹ People of different cultures, are distinct representatives of their 'tribe', with heterogeneous traditions, costumes, customs and language. Eisenbruch has defined cultural bereavement as plight of a deracinated person.¹⁰ After relocation, the feeling of nostalgia, loss and identity crisis come their way. Traumatic images from the past flash and foster a plethora of feelings- guilt, longing and 'homelessness'.¹¹ Behavioural and psychological changes take place in an immigrant with assimilation. An individual and cultural identity may be lost during the assimilation process as he or she moves within the host society. The stresses of the migration process itself combined with a lack of social support, a discrepancy between achievement and expectations, economic hardships, racial discrimination and harassment, and a lack of access to proper housing, medical care, and religious practice can lead to poor self-esteem, an inability to adjust, and poor physical and mental health. This could manifest in the form of mental illness, post-

traumatic stress disorder of simply, an identity crisis. Hospitality is not merely a matter of laws and policies that define the arrival or reception of migrants, rather. It is a conception with its roots deep in the transit of time, born and taken form as a result of internalised and historicised fears, perceptions, practices, attitudes and believes. In the words of Derrida-

“I open my home and that I give not only to the foreigner... but to the absolute, unknown, anonymous other, and that I give place to them, that I let them come, that I let them arrive, and take place in the place I offer, without asking of them either reciprocity (entering into a pact) or even their names.”¹²

Formal Citizenship laws define the political acceptance of a country towards immigration, however, in the global south, there is a wide gulf between the political promise, delivery and social reality when it comes to the experience of immigrants.¹³ However, hospitality is not just open and accepting policies of the government. Hospitality, at the very crux of it, is a socio-political concept. It also includes the attitude of micro actors of the society, and their acceptability of having a ‘different one’ amongst them. However, filters of ethnicity, language, cultural differentials and nationality, act as gate keepers of the host society.

Brief History of Assam, NRC and CAA

In the words of Banerjee and Samaddar “If we are to understand why human migration becomes a matter of contentious politics and therefore has to be governed by law, administrative practices, customs, and failing all other things, by brutal violence, we have to study the historical conditions of the emergence of migration as a matter of nationalized security, marked all over by collective violence and collective politics.”¹⁴ In the context of Assam, at one level, the identification of migration as the single most important issue in the identity crisis is clearly the outcome of the history of lingual and cultural existentialism that Assam had witnessed. It is the simplest step one can take in analysis. But at the same time, it is also the one issue that has complex ramifications. Assamese intellectual Hiren Gohain wrote an article in 1979 entitled, ‘*Marxabad aru Jatisamasya*’ (‘Marxism and the Problem of the Nation’), where he suggested that in Assam the problem of identity /people/nation/race had taken two forms: first, illegal migration into Assam; and second, the use of minority languages in the schools of Assam. The vexing question about who is a citizen, along with deteriorating socio-economic situation and a demographic change in the state finally culminated in the student uprising led by AASU, the Assam movement and the infamous Nellie Massacre. The Assam movement (1979-1985) ended eventually with the signing of the Assam Accord by the Congress government in the Centre with AASU leaders so as to end the insider-outsider debate. A compromise was struck between the AASU leaders and government wherein the National Register for Citizens (NRC) would be updated to grant citizenship to refugees who entered India

before March 1971. This also exhibits the strength of social movement for identity protection and explaining the famous idea of 'Sons of Soil'. However, the update of NRC could not be carried out since 1951 due to several political compulsions. Later on, it was under the aegis of the Honourable Supreme Court of India that the process was set in motion along with the issuance of directives to the appropriate authorities to accelerate its progress. Thereby, the Government of Assam along with the approval of the Union Government formulated the updating process to assert the eligibility of any name to be a part of the NRC. It may be mentioned that more than 19 lakh people in Assam were excluded from the final list of the NRC that was released by the government on August 31, while over three 3.11 crore persons were included.¹⁵ Though they were not declared illegal foreigners yet, still they were at a risk of becoming stateless. Besides, this updation process shall also give rise to the deportation challenge of the non-citizens in the light of the uncertain stand of Bangladesh regarding this issue. The Assamese are unlikely to accept non-deportation of the post-1971 illegal aliens. Yet deportation will be no easy task. The official position of the Bangladeshi government is that none of their citizens have illegally crossed the border into India.

Furthermore, the newly introduced Citizenship Amendment Act (CAA) of 2019 aims to grant citizenship to immigrants of Christian, Hindu, Sikh, Parsi, Jain and Buddhist communities who had migrated to India before 2014 from Pakistan, Bangladesh and Afghanistan. This act has been receiving huge criticism on the grounds of being discriminatory in the sense that it talks about giving citizenship status to only non-Muslim immigrants excluding Muslim immigrants from the said countries. The most problematic issue about the Act for the state of Assam is its combination with the NRC. The distinct implication of this duet is the large number of illegal Muslim migrants in Assam who shall face the fear of statelessness in absence of any deportation agreement. But with CAA in force, only the Muslims population left out of the NRC, shall bear the brunt of this exercise. The cause of concern regarding the implementation of CAA in Assam is the distress that illegal Bengali Hindu migrants from Bangladesh, if granted citizenship under CAA, will threaten cultural and linguistic identities of the state. Also, the combination of CAA and NRC, will not only create high inflow of Bangladeshi Hindus, it will also create a miasma of fear, a sense of impending trepidation for the Hindi speaking Bengali inhabitants of Assam. The Act that has been introduced as a benevolent law to protect vulnerable population in neighbouring countries from persecution, is a paradox in itself, by virtue of subtraction of Muslims from the list of welcomed immigrants. In addition to the social consequences, implementation of CAA, is bound to have mammoth economic repercussions. Being rich in population and humble in resources, the influx of migrants, and their claim to being citizens of the country, is bound to disturb and pressurize the economy of the nation.

However the reasons for agitation in Assam, against the CAA, just after the final update of the NRC, are different from those across India. The opposers of the CAA, in Assam, can be divided into three categories. The first, who feel that the CAA must accommodate Muslims migrant from

neighbouring countries. The second, who are averse to any sort of immigration irrespective of language, ethnicity or nationality. The third category, see the CAA implementation in context to the lingual-cultural history of Assam. The linguistic data of the Census 2011 revealed that the percentage of people speaking Assamese decreased from 58 per cent in 1991 to 48 per cent in 2011, while Bengali speakers in the state went up from 22 per cent to 30 per cent in the same period.¹⁶ The long-standing lingual conflict of Assam has been rubbed again, with the introduction of the CAA, resulting in what can be called, a war for majority. On one side of this Lingual-Majority struggle is the awakened consciousness of Bengali Mia-Muslims, to popularise their language, by writing poetries on their struggle of living under suspicion, and campaigns run by activists and academics, appealing to the Bangla speaking population to report Bengali as their mother tongue while on the other side is constant struggle to maintain dominance of Assamese.¹⁷ So, they were sometimes Assamese, sometimes, Bengalis. This is one of the prominent reasons of agitation against the CAA in Assam since December 2019 till the lockdown in India was initiated. Ignoring the emotions and sentiments of citizens, in a welfare state, to such an extent and at such a large scale, clearly indicates moral failure and high headed approach of governance.

Evidences from the Field

After the exercise of NRC update in Assam, we visited the field in Lucknow in January 2020, and asked the migrants if their names feature in the final NRC list, will they still go back to vote? The common response was that even if their name is in the list, they would still travel back to cast vote. Furthermore, they asked us that *'Is it now not necessary to cast vote? For us featuring our names does not make any difference as far as the citizenship question is concerned.'* Many of these families told us how they borrow money to finance their travel back to Assam, during elections. This also indicates voting, an exercise that might seem obvious to a large population, has been a testimony of identity, a proof of citizenship, yet an expression of fear, for the migrant population from Assam. One more instance from the field sufficient enough to testify to this crisis, is when during a fire sparked by short circuit in the *Waste Slum*, one of our respondents told us, how she had to jump in the fire to save her documents. She said *'It is important to save our documents even if I get burnt as these are the only proofs to prove our citizenship. If we lose this, then we shall be called Bangladeshi.'*

A miasma of fear and uncertainty can be well tested by the fact that most of these migrants are multi-dimensionally poor, yet they migrate back every election, accrue the expenses of travelling back so far, just to 'preserve their identity' as a citizen of India.

In the backdrop of these episodes from the contorted socio-political history of Assam, this paper further moves on to present the ordeal of inhabitants and the out migrants from Assam in the form of an ongoing quest of discovering, defining, redefining their identity. We started with open ended interviews of Bengali Muslims (of East Bengali origin) from Barpeta, Lower

Assam, whose crisis of identity is both lingual and communal. In our field visits in Barpeta, Assam, one of our respondents, Malik, narrated to us, the social trials they undergo:

'For us, the word, Bangladeshi, is like death. Bengali Muslims are tagged Bangladeshi. They never think that we have feelings and we feel bad. Even if we are hired, in case of shortage of labour, we will be treated differently. That is the reason many sons are forced to separate from their mothers, and go to a foreign land to earn.' (Malik, age 38).

'What we want is employment, two square meals, peace and no violence. What we get is, people calling us Bangladeshi, refusing us jobs. Our people have endured everything. From physical violence to social barring.' (Asif, age 39)

In context of Assam, cross border immigration, linguistic conflict, hospitality goes a long way in defining the chaos in the state. In Assam, the influx of illegal immigrants and outstanding lingual conflict has led to the formation of 'evil presence' and 'influence of aliens' attitude towards migrants. Another aspect of hospitality, is the out migration of people from Assam. Bengali Muslims that migrate from Assam, are often met with the same 'hostility Instead of 'hospitality', termed as 'Bangladeshi' and looked at with suspicion.

'We have been called Bangladeshi because they think we have no roots. We are not sons of this soil. Bodo's are considered Indian, kasiyas are considered Indian. But we are never considered Indian. They think we will never be able to prove that we are sons of this soil, that is why they trouble us, question us, mistreat us, and call us names.' (Amal, age 45)

A very poignant incident was narrated to us by Ali who felt absolutely bad when he was questioned in this manner.

'I was out of the city for some time, when I came back my neighbour who is a Hindu, asked me if I had been to Bangladesh' (Ali, age 40).

High degree of dissatisfaction and anger towards the government for years was also detected:

'This government is degenerate. They are not concerned about us at all. We were born here, our forefathers were born here, still we are troubled every single day and the government almost does nothing to make things better for us. They have turned a deaf ear and blinded their eyes against our perils, violence and bloodshed.' (Firoz, age 40)

'Not just this government Madam, all governments. All of them have just used us for voot (vote). Since years we have been bearing the brunt of being a Bengali Muslim. That's all there is to this problem.' (Kamaal, age 42)

Angst was evident in the interview with Sarfaraaz, a law student from Barpeta, as he said:

'In the census, our people reported their language as Assamese even though they did not normally converse in Assamese. They thought it would give them acceptance by the

community. But no! We cut our tongues to gain acceptance and we still continue to be discarded. All this when we are the children of this very land! (Sarfaraz, Age 33).

After colonisation, Assam was placed under Bengali administration. Bengali was introduced as a medium of instruction, in official and educational institutions, a direct implication of which was exclusion of Assamese speaking population from these domains. An influx of Bengali speaking people in schools and offices of Assam, side-lined Assamese speaking population and became the cause of rising resentment. After the state reorganisation Act 1956, the demand for Assamese as an official language gained as a new momentum. The milestone in this string of events was, when on 22 April 1959, ADCC passed a resolution supporting the resolution of Assam Sahitya Sabha, which sparked organisation of protests and strikes in the state. Within the background of linguistic reorganisation of states, having a standardised language spoken by the majority of the people in the states became a prerequisite for statehood. However, in the census of 1951 all the Muslims of East Bengali origins who were Bengali speakers recorded their mother tongue as Assamese so that they may be accepted by the Assamese community. They boosted the number of Assamese speakers and it paved the way for making Assamese the state language.¹⁸ Hence this cultural assimilation would accentuate their acceptance in the state and they will no longer be viewed as outsiders. "Their acceptance of Asamiya represents their fundamental desire for survival in a society which did not accept them."¹⁹

Another chapter that added to the identity crisis of these people was they feature as Doubtful voter (introduced in 1997 in Assam) which is a unique feature in the electoral list only in the state of Assam and not in any other state of India. 'D' is marked against the names of the voters, who's citizenship is doubtful or under dispute. This was in response to the various complaints regarding the presence of a large number of foreigners from various civil and social bodies. Consequently, these D category voters had to prove their citizenship through the valid documents. The scars left by this process are still fresh in the minds of the people of Assam. One of respondents whose daughter has been marked a D voter told us:

'According to the government, I am an Indian, my wife is an Indian, my sons are Indians, but my youngest daughter is a Bangladeshi? What kind of a joke is this?' (Saif, age 43)
'Madam, life gets really tough when you are required to prove yourself to everyone, give testimony for something which is obvious. Not just to the government but to everyone. To our neighbours, our employers. Our friends, the social group we are a part of. Life is difficult when everyone questions you, looks at you with suspicion. We feel bad and defeated.' (Momin, age 39).

Rashid, another law student told us, the story of one of his friends who was marked a D voter:

'My friend Alam was marked a D voter. He was such an intelligent person. But since there was a D in front of his name, he was denied admission to most prestigious institutions. He has been through a lot since then.' (Rashid, age 20)

These extracts of the interviews are testimonials of grief. The identity of a person receives a blow, when he is set in such circumstances where he feels helpless. For the Bengali Muslims (of East Bengali origin) residing in Assam, this state of helplessness has been so prolonged that they seemed to have accepted it as a part of their reality and derive their identity on this basis. This can be seen in line with Amartya Sen's Capability Approach, that shows how people subjected to prolonged prejudices, tend to internalise or imbibe those prejudices as a part of themselves. The irony here is that an endeavour of the state, due to its faulty crafting and implementation is responsible for an identity crisis of its citizens. Other than the D voter issue, the process of updating the NRC has also been quite perilous. Long standing exposure to the state where they have questioned 'who are you?' while they have tried to prove 'who I am', has led to a situation where they are left wondering 'who do you want me to be?', being what would give them emancipation from life under suspicion, what can they possibly do to disperse this miasma of fear. In an article for *The Wire*, on the issue of NRC, and the need for suspected citizens to prove their citizenship through an Indian Legacy, Ranabir Samaddar wrote, "This then is a procedure to arrest the power of the family through the construction of a legal myth called legacy, which modifies the biological with the legal, and along with that, modifies the power of the individual to claim citizenship as a *person*".²⁰ In our field interviews in Barpeta we spoke to our respondents on their take on the NRC, to which one of our respondents said:

'NRC is good for us. We are Muslims of India. Whatever our language is, that doesn't matter. There are so many languages spoken in India. The NRC should filter the illegal immigrants. Because for us, it is a situation like how when the buffaloes fight, the crops get crushed. (a local proverb that shows they get punished without their fault). So, NRC should have done that. It should have helped us. But it did not. So many errors, so much pain all of us have gone through. Especially Muslims. Because even people at the realm of administrative duties, dismiss us by calling us Bangladeshis.' (Asif, age 50)

Difficulty in getting employment, being called out for their religion, language and culture, being religiously prosecuted in their own country, has led to the emergence of a fear psychosis. And how can a person's identity be, if all he has seen in his life is violence, rejection and hatred? These events and processes in the political history of Assam, have given birth to a, confused and indistinct identity by these Bengali Muslims (of East Bengali origin).

Moving further, we shall now look into the state of migrants in Lucknow, post migration. The concept of hybridity and hospitality and its association with identity is relevant to this part of the discussion. The cause of migration from Barpeta, Assam, is mostly in search of better employment facilities as Barpeta remains submerged in the floods and agricultural productivity is low.²¹ But what is interesting to observe is that even as they migrate to Lucknow, they carry traces of chaotic Assamese history and violence with them. During our field interactions, more open ended interviews were carried out in the Chandan Basti, to understand the identity

crisis of the Bengali Muslims, who migrate to Lucknow in search of a better life.

'I earn, here there is no dearth of work. Even my wife can work. I send my children to school. But even for people of Lucknow, we are Bangladeshis. We are bidesi (foreigner).' (Akeram, age 36)

Rubina, a household help told us, 'once I had to hide my identity to get work. It was a Brahmin family. They did not want a Muslim migrant woman working and cooking at their place. So, I told them that my name was Shanti (a Hindu name) in order to get that job. But then, it was Eid. And out of excitement, by mistake I said to my employer that I need a holiday for Eid. That's when I was caught. They dismissed my services immediately and did not pay me. They said if I could change my name for a job, I could even change it for some terrorist activity.' (Rubeena, age 32)

One, who is a brother, a son of the same soil, shall be welcomed in all guises. However, filters of ethnicity, language, cultural differentials and nationality, act as gate keepers of the host society. The kind of hospitality received by a migrant in the host society depends on the inhabitants in the host society, who are primary units of socialisation. Their attitudes, perceptions go a long way in defining the experience of warmth and welcome the migrant is going to face. These migrants face exclusion on both administrative and social levels. Most of them work as waste pickers. Even on administrative levels, they have been let down and failed.

'The police harass us, abuses us, calls us Bangladeshis. Where ever they see us, they ask us the same question... what have you come to steal? You, Bangladeshi thief.' (Zebrul. Age 34)

Sen argues that violence is done when multiplicity is denied or forcibly erased for the sake of a single identity. When identities are defined on one axis in a unidimensional fashion, pluralist forces in a society can antagonise one another. Such conflicts between communities could, no doubt, be spontaneous outbursts for protecting a community's identity or protesting against its violation.²²

Another illustration of severe identity crisis was how these Migrants travel back to Assam, during the election period to cast their votes. On being asked they report that if they do not vote, their name might be struck out of the voter list and that this is the only claim to Indian citizenship they have.²³ This claim might seem quotidian on surface, but deep down it reveals how a drowning man catches at a straw. The miasma and scepticism around their identity and nationality is such that it forces them to bear expenses and travel back every election period, to cast their votes, a right, most of the 'normal' Indian citizens take for granted. This extract from an interview with Rashid, a waste picker, is an example of suspicion on their identity:

'I had gone back to Barpeta to vote in the panchayati election. When I came back, my employer (a local resident) asked me, where I had been. I said I had gone home to vote.'

And he said, is it election season in Bangladesh? He had assumed I am a Bangladeshi.'
(Shiraaf, age 37)

An elderly from the community, Rashid said

'Only the one who has been in it, feels the pain, Madam. I am a citizen of India, and if someone doubts it, it is against my dignity. But what can people like you and me do. I don't even blame the people who treat us differently. I blame the government. For keeping us hanging, like this, for putting our identity in question like this and for so long. Our people have died proving that they are Indians. What effect has all this had on our children, on us? Has the government ever bothered to fathom that? No. Why I ask? Do they have a precise answer to my question? Why have we been facing this?' (Rashid, 65).

Conclusion

When most of us mince at the wrong pronunciation of our names, this group of people has been struggling to justify their very existence. While theories of identity tell us how identities are individual, fluid and dynamic, these Bengali Muslims (of East Bengali origin), residing in Assam or migrating out of the state, are struggling to get their natural identity legitimised. Still it is believed that large number of this section of population is entering Assam from Bangladesh through porous borders. Keeping in mind cross-border international trade and labour markets, borders should not be looked upon as solely demarcating lines with a security centric model.²⁴ Crisis is the only apropos word to define this phenomenon. A humanitarian crisis that has been birthed by a chaotic history and indolent state action. Action, justice, remedy all three have been denied to this population as a result of which, they have been living a life of fear, dilemma and incongruity, wrapped in acute poverty. Rights of migrants in India have been a very neglected subject. Episodes of violence against internal migrants from different states are quotidian. While the social fabric is such, efforts on part of the government is also severely lacking. Political actions such as the recent Bodo Peace Agreement signed between the union government, ABSU and NDFB, in February 2020, are a welcome step to restore peace and start a journey towards development. But actions must also be taken to fix the damage that has already been done, not just at administrative levels, but also at basic levels such as health, education and rights of the migrants.

Also considering the latest NRC-CAA implementation, it may be mentioned that there is absolutely no dialogue between the Indian and the Bangladesh governments regarding the problem of migration. This puts the lives of the so-called illegal immigrants in a limbo. While Muslim population in Assam continues to face oppression, live under suspicion, and under the combined instruments of the NRC and the CAA, shall face the fear of being stateless, their migrant kins in Lucknow, continue to live a life of exclusion. Hence, respecting the dignity of a human being and realistically finding solutions to their social, cultural and economic problems should be the way out as identity ensures stability. It is safe to conclude that chaotic history has

wounded the identities of this migrant population. To fix them, ensuring basic rights of risk-free employment or generating rural employment avenues in their native state and proper physical and mental health facilities shall be small steps in the right direction.

Note: All the names of the respondents have been changed to maintain anonymity.

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Notes

¹ The field visit was for a project entitled “An Exploratory Investigation of Migration from Agricultural Land in Lower Assam to Waste Slum in Lucknow”, undertaken for ICSSR, New Delhi, which looked into the economic struggles and reasons of migration of these migrants.

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²³ Roli Misra and Parvin Sultana, "Birth of a Nation and Lost Identities," *Journal of Identity and Migration* 9, no. 2 (2015): 18-30; Roli Misra, "Citizenship in Dispute: The Case of Outmigrants from Barpeta, Assam," *Economic and Political Weekly* LIII, no. 43 (2018).

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Undocumented Immigrants in Assam: Understanding the Jurisprudence in Past, Present and Future

By

Anjuman Ara Begum *

‘Undocumented immigration’ in Assam is a perennial socio-political issue since colonial times resulting in a lot of legislations and executive policies for the detection and deportation of undocumented immigrants. Legal architecture and standards developed from time to time is reminiscent of the colonial norms and a colonial understanding of ‘foreigners’. Laws related to citizenship and land rights reflect dominant racial, cultural and linguistic prejudices and claims of civilisational superiority. Any non-conforming person is regarded as an ‘outsider’ (Bohiragoto in Assamese) and is subjected to persecution, censorship, social stigma, prolonged incarceration and virtual statelessness.

The legislation dealing with the foreigners in India didn’t shed its colonial roots even after national independence in 1947. The principle of equality before law and fair trial before a competent authority was not adhered to during the determination of citizenship for certain ‘other’ minority communities by the Government of India. The Foreigners Act is a primary legislation which controls entry, stay and exit of foreigners. It was enacted in 1864 and underwent several amendments in 1939, 1940 and 1946. The Foreign Tribunal Order, a set of rules to implement the Foreigners Act came into force in 1964. The Passport Act was enacted in 1920 and continues to be in force.

Foreigner’s Tribunal (FT), a quasi-judicial body is the main institution for determining the status of ‘suspected foreigner’ as per the definition of the Foreigner’s Act 1946. This is an exceptional measure for Assam in the legal standards dealing with the foreigners. Established under the Foreigner’s

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Tribunal Order 1964, these tribunals have investigated the status of thousands of 'suspected' foreigners and declared 1,17,164 persons residing in Assam as foreigners. A total of 1043 persons are detained in detention camps waiting for years to be deported. Tribunals are under the central Government and its expenses are totally reimbursed to the state. About 64 thousand that is 70 percent of the orders of the FTs are ex-parte, raising the question of its efficiency and fairness. These Tribunals over the years have played a controversial role arbitrarily depriving people of their right to nationality and exposed them to the risk of 'statelessness'. Several studies and reports¹ proved beyond doubt that the FTs act arbitrarily from a political perspective rather than a judicial or human rights perspective. FTs have definitely created fear for a particular class of people who are categorised as 'Bohiragoto', 'illegal immigrant' 'Bangladeshi' 'Foreigner' and further increased their vulnerability through legal machinery, social control and an institutionalised culture of impunity.

This paper will discuss functioning of the FTs and the Judiciary, the merits of their judgments and their impact through empirical data and personal narratives on the process of 'determination' of irregular migrants in Assam. This paper is divided into three parts. Part I will discuss the historical background behind resorting to a quasi judicial body for determination of an important right like that of right to nationality along with the legal landscape created over the years to deal with the 'suspected foreigners' in Assam. Part II will focus on the judiciary, election commission, detention camps, NRC process, with a focus on the recent judgments. Part III of the paper will present summarised versions of personal narratives highlighting life and longings of those 'suspected' foreigners. The paper will end with a brief conclusion.

PART I

Historical Background and the Foreigner's Tribunals

The development of legal regime and jurisprudence on irregular or undocumented immigration in Assam can be divided into three different time period: Pre IMDT period [1947 to 1983], IMDT Period [1983 to 2005] and Post IMDT period [2005 onward]. In the first period, setting of legal norms for citizenship was carried out via the Citizenship Act of 1955. This period also changed the definition of citizenship and divided people under three categories of citizenship: a) citizenship by birth [*jus soli*] till 1 June, 1987, b) citizenship through descent after 1 June, 1987 [*jus sanguinis*] and c) naturalisation of persons. Section 6A was inserted in the Citizenship Act to implement Assam Accord and is applicable only in Assam. It aims to give special protection. It divided immigrants from East Pakistan [now Bangladesh] into three categories: a. those who came to the state before 1966 are considered citizens, b. those who entered from 1966 to 1977 can stay on in Assam but will lose voting rights for the time being and will be

regularised after ten years, c. those who entered Assam after 24 March, 1971 are non-citizens and will be deported. This arrangement has been challenged as unconstitutional, violating article 14 of the Indian constitution and is awaiting final judgment.

Assam agitation from 1979 to 1983, Nellie massacre of 1983 and the subsequent signing of the Assam Accord in 1985 expedited the implementation of the Illegal Migrants Determination Tribunal [IMDT] Act passed in 1983. Major demands of the Assam Accord were to secure the border with Bangladesh with barbed wire fencing, updating the NRC of 1951 and expulsion of all irregular immigrants from Assam who entered Assam after March 21, 1971. Under the IMDT Act, 16 tribunals were formed. However only a few remained functional till 2005. Currently there are 100 active tribunals and another 200 will be operational soon.

In the post IMDT period starting from 2005 onwards, the Supreme Court struck down the IMDT Act. Since then, gradually the judiciary has turned authoritarian. It often assumed executive roles and compromised neutrality. Orders of the FTs are often upheld by the judiciary despite the presence of glaring unfairness in the orders. Judiciary also was the main authority supervising the process of NRC in Assam. Since this paper deals mostly with the functioning of the FTs, post IMDT period will be the main focus.

Standard process validated seemingly unfair legal norms for 'suspected foreigners' in Assam. Several laws were enacted since independence to define Indian citizenship as well as to determine illegal immigrants or foreigners in Indian soil. However, the preliminary responsibility of detecting an illegal foreigner in Assam is based on administrative law and not on constitutional law. Foreigner's Tribunal is an administrative process under the state executive, the Home Department of the Government of Assam. During the Constituent Assembly debates, representatives from Assam demanded special protection in the Constitution. However, it didn't gain much support. Instead, Immigrants (expulsion from Assam) Act was passed in 1950 in addition to the continuation of the legal mechanisms of the colonial era to determine who is a foreigner. The Foreigner's Act, 1946² along with Foreigner's Tribunal Order 1964 are the primary source of legal standards to be followed for the determination and identification of foreigners in India. The Foreigners Act has a colonial legacy as an earlier version was promulgated in 1864 to control entry and exit for British Burma. To counter the impact of the World War II, Foreigners Ordinance 1939 was promulgated in British India. This was replaced by the Foreigners Act 1940. It was amended in 1946. The Foreigners Act 1946 remains in force even today. FTs are so far a unique feature in Assam. It was only in 2019, that an amendment enabled all other Indian states to form their own FTs.³

In 1960s, as a response to the international criticism of expulsion of foreigners without due process,⁴ the Foreigner's Tribunals Order was issued in 1964 to establish Foreigner's Tribunals. However, these bodies were non-

functional for a long time till the cutoff date for the entry of the 'foreigners' was agreed through Assam Accord of 1985.

Additionally, in 1962, the Assam Police was empowered to establish a Special Border Organisation under the PIP Scheme (Prevention of Infiltration from Pakistan). Currently the Assam Police Border Organisation (APBO) is armed with more than 4000 personnel. APBO conducts surveys in the so-called 'infiltration' prone districts, identifies the suspected foreigners and registers cases called 'Reference Cases' and reports the same to the Foreigners' Tribunals.⁵

No uniformity of procedures of detecting and deporting of foreigners was maintained between Assam and other Indian states. The process of detection and deportation of foreigners in other states of India is different from that of Assam.⁶ Such differential processes lack a reasonable explanation.

A separate procedure for deportation of illegal Bangladeshi migrants was set out in September 1997 to be followed all over India. This process includes verification with the Bangladesh High commission, confirmation of the nationality of the person and then repatriation to the original country with the help of the state government and Border Security Forces. Till their deportation, foreigners are to be lodged in detention facilities.

A departure from this process is in force in Assam. In case of Assam, the accused or suspected foreigner has to go through a process of long trial before the FTs. This process starts once the Border Police deployed all over the state 'detect' presence of 'suspected foreigners' and refer them to the FTs. The FTs also act on reference from the Election Commission. Once the FT declares its final order after investigation, appeals can be made to the high judiciary bodies. This process excludes the involvement of the Bangladesh High Commissioner. Detailed guidelines are also issued for suspected Bangladeshi national claiming Indian citizenship and the process has to be completed in 30 day's time period. Once confirmed, the foreigner will be deported with the help of the Border Security Forces (BSF).

The members of the Foreigners' Tribunals recruited by the government doesn't require to be trained lawyers or persons with a judicial background. Even former bureaucrats are eligible to be employed. They are recruited by the Home Department and are trained by the Guwahati High Court. The primary duty of the FT members is to review the cases referred by the border police and issue summons and after completing the process, declare if a person is a citizen or not. Once a person is confirmed a 'foreigner', there may be punishment ranging from three months to eight years of imprisonment. After completion of the sentence, the person is to be deported to their country of origin and they will be lodged to a detention centre till the country accepts them.

The FTs have determined the status of 1,17,164 persons till 31 March 2019. A majority of the cases [about 60%] are ex-parte decisions, passed in the non-appearance of the persons without any hearing. A total of 63,959 people⁸ have been declared as foreigners through ex-parte proceedings by the FTs in

Assam from 1985 to February 28, 2019. Case studies indicate that an inefficient and faulty system of delivering notices and summons is the common cause for ex-parte decisions. Procurement of documents by the accused is expensive and time consuming. Hence many accused persons fail to meet the demands of the FTs in time and hence are declared foreigners. The process is not only unfair but also often violates the principle of double jeopardy. Until recently, tribunals could declare individuals as foreigners even if their Indian citizenship are confirmed by another tribunal.⁹ Another major defect of the FTs is that it has no appeal process and hence it fails to qualify as fair trial. The only recourse to challenge the order of the FT is to file a writ petition before the High Court or the Supreme Court.

Accountability of FT Members

There is no process for accountability of the members of the FTs. Over the years it has created additional avenues for further persecution and prosecution of suspected foreigners.¹⁰ Though their training, performance evaluation and overall functioning is monitored by the Guwahati High Court. In a response to a parliamentary question, the Home Ministry too revealed that there is no process to hold the FT members accountable.

Lack of accountability is also reflected in a research by Amnesty International India. In one of their report published in 2019, it is stated that with the reversal of burden of proof, the investigations have become shoddy and lackadaisical.¹¹ The Guwahati High Court has recognised these lax investigations. Both citizens and non-citizens are entitled to fair trial as per article 21 of the Indian constitution. However political and social pressure compels the FT members to dispose of cases as fast as possible to avoid dismissal from their service. In June 2017, 19 members of FTs were fired for 'poor performance'. Less number of 'foreigners' declared by the FT member amounts to 'poor performance'. In last few years, there's a growing tendency to declare more and more people as foreigners. In 2017, within eleven months, 13343 people were declared foreigners, whereas average declaration was 2586 in previous years, as per the Amnesty report. This clearly reflects the pressure on the FT members. Media reports and activists working on the ground also reported similar pressure on the Border Police.

The researcher didn't come across any case or information of fixing accountability of any FT member for abuse of power by wrongly declaring citizens as foreigners. It was only in May 2020, that for the first time a FT member has reportedly faced accountability for his irresponsible behaviour. A FT member who had donated to the State COVID-19 fund with a rider that his contribution should not be spent on Tablighi Jamaat attendees who tested positive after returning to the State was removed.¹²

An examination of Assam's Foreigners Tribunals raises grave questions about their functioning and independence—the processes are clearly unfair towards suspected illegal immigrants.¹³ Both the executive and judiciary seem to encourage the tendency of Foreigners Tribunals' members to

declare suspected immigrants as foreigners—sometimes even when there is evidence to the contrary¹⁴.

Part II: Post IMDT Period and the Rise of the Judiciary

Fairness and Burden of Proof

The concept of burden of proof played a significant part in the legal architecture of irregular immigration and this concept proved to be a game changer. Burden of proof is a legal terminology, originating during the second world war. It indicates the obligation of a party in a litigation. As per Indian Evidence Act, the burden of proof lies with the state. Under Foreigner's Act the accused person has to prove that their entry, stay and exit is not violative of the existing laws.

The IMDT Act made a departure from this norm. It shifted the burden of proof to the state or the vigilant citizens. The IMDT Act didn't contain provision similar to section 9 of the Foreigners Act. This reportedly slowed down the rate of detection of 'foreigners' in Assam. From 1983-1998, 489046 persons were detected as foreigners in Assam, whereas only 1494 persons were detected and allegedly deported till 30th June 2001. Out of 87222 cases only 12180 persons were declared foreigners in Assam till 31 March 2004. The constitutionality of the IMDT was challenged in the Supreme Court on the ground that it is applicable only in Assam and the law has proved ineffective in containing irregular migration. The petition heavily dependent on a 1998 report prepared by SK Sinha, the then Governor of Assam. The report quoted information from intelligence sources as primary data and also quoted that 6000 people are entering Assam everyday, a figure quoted without any empirical data or research. The report referred to an observation by SC Mulan, the Census Superintendent of 1931 Census, under the heading "Illegal Migration" and expressed fear of a demographic change in Assam. The Supreme Court accepted the report that deemed migration in 1931 as illegal. Sarbananda Sanowal empowered the judiciary to be authoritarian and facilitated the judiciary later on to down play international standards on non-refoulment, statelessness and natural justice. "External aggression" and "internal disturbance" became a dominant narrative and emphasised the need for being harsh to the accused in order to 'protect' Assam. This precedent influenced all subsequent proceedings under the FTs and Guwahati High Court and increased the scope of arbitrariness and bias. Over a period of time the judiciary rendered invalid a set of acceptable documents as a proof of citizenship. The Guwahati High Court in a civil writ petition filed later, held the Gaon Panchayat Secretary certificate as "private document" and thereby invalidated around 46 lakh Gaon Panchayat Secretary certificate issued to women as documents for establishing linkage with parents. In another case, a woman was declared foreigner despite submitting 15 documents to prove her legacy with parents. Sarbananda Sanowal also narrowed down the principle of separation of power, a basic structure of the

Indian constitution. The Supreme Court's direct supervision of the NRC without maintaining neutrality is the outcome of this.

Following the Sarbananda Sanowal I judgment, the Central government amended the Foreigners Tribunal Order 1964. This amendment too was challenged before the Supreme Court by Sarbananda Sanowal, the current chief minister of Assam. Supreme Court again struck it down on the ground that it's unconstitutional. The Foreigners (Tribunals) Order 1964 stated that the accused in question should be given an opportunity to defend his case before the tribunal, while the Foreigners (Tribunals for Assam) Order 2006 vested tribunals with special powers to decide if there were sufficient grounds to proceed against a suspected foreigner. The Supreme Court also observed, "uncontrolled immigration into the northeastern states posed a threat to the integrity of the nation" and ordered to establish more FTs in Assam within four months. As per the Supreme Court's order, all cases pending before the IMDT tribunals were transferred to the FTs to be decided in the procedure prescribed under the Order of 1964. A total of 25 tribunals were established in 2005. 4 came up in 2009 and another 64 came up in 2014 making it a total of 100. Another 100 FTs were established in 2019 making it a total of 200.

Doubtful Voters

For proving citizenship, entry in the voter list has been given extra importance despite the fact that it was not mandatory. Entry in the voter list of 1966 and 1977 are considered conclusive proof of citizenship. However, it is observed that typos, wrong entries, minor anomalies in age, surname etc. are upheld by the judiciary as valid points to cancel the citizenship of a person. In 1997, the Election Commission (EC) 'identified' several hundred thousand people as D voters, most of them Muslims along with Bengali speaking Hindus, Koch Rajbangshis, Nepalis and others. The process of identifying D voters came into action after a huge political mobilisation led by the All Assam Students Union (AASU) and other ultra-nationalist organisations, with the government being asked to carry out an intensive revision of the voters lists across Assam. Government figures suggest that over 2.4 lakh people have been declared as 'D-Voters' in the state since 1997, and over 1.1 lakh cases are still pending in tribunals.¹⁵ An overwhelming 60% of the D-voters are married women. Lists of D-voters are sent to the FTs to initiate trial to investigate the D-voters. Entry in D-voters list renders a person virtually stateless and immediately deprived of social benefits and other rights as citizen. D-voter's list is prepared based on suspicion and not after an inquiry.

The Rise of Authoritarian Judiciary

The post IMDT period also reflects an overwhelming institutional effort in creating fear and trauma through social exclusion, bureaucratic hurdles and humiliation. Minor 'technical lapses' like typos, spellings and age discrepancies, absence of linkage documents are the main reasons cited by the

Judiciary for stripping people of Indian citizenship. The Guwahati High Court in various judgments took note of the callous nature of authorities in recording minute details or timely actions, prolonged delay in FTs, difficulties in procuring documents and most importantly difficulties in deportation. Despite these observations, the Court said that delay in FTs is of the average '10/15/20'. It gives scope to the accused to file writ petitions and offers opportunity to register their children as Indian citizens. The Court then asked the Central government to allow summary trial and disposal of the cases by spot inquiry.¹⁶ It further cautioned that any amount of delay in deciding the cases always leads to serious consequences with effects on integrity, sovereignty and security of the State.

In a study of 787 cases¹⁷ of appeals before the Guwahati High Court on the decisions of FTs, it was found that in 99% of the appeals from ex-parte orders of the Foreigners Tribunals, the High Court agreed with the findings of the Tribunals. All the persons who appealed to the High Court had some form of documentation. Around 61% of them produced electoral rolls and 39% of them produced permanent residence certificates/certificates from the Panchayat. In 66% of the cases, the Foreigners Tribunals found the documentation unsatisfactory. In 38% of the cases, documentation was rejected because spellings did not match and in 71% of them, the secondary evidence was deemed inadmissible.

There has been a change of trend in the role of judiciary on the issue of irregular migration. Since 2005, while striking down the IMDT Act, the judiciary's action has shown a paradigm shift. It is assuming a more proactive executive role rather than remaining limited to judicial delivery. The Guwahati High Court ordered construction of detention camps while the Supreme Court undertook the role of supervising enrollment of citizens through the NRC process. A quick note of the cases decided by the Guwahati High Court will provide much clarity.

- **Ajjur Ali vs. State of Assam¹⁸**

The person was declared foreigner based on clerical discrepancies like the spelling of his parents' names in the voter lists of 1966 and 1977. The accused person's name was spelled as Ajibur while his father's name Hajarat Ali was spelled as Harzat Ali. There was discrepancy in the records of the age of his parents. Their age recorded both in the voter lists of 1966 and 1977 were the same. Another reason to deprive nationality to the accused was that he claimed to be educated till class VIII. However, in one of the documents submitted to the court, he has put his thumb impression. These raised serious doubts in the mind of the judiciary. The judiciary found it enough to declare the person as a 'foreigner'. Police authority was to act swiftly and detain him. It took ten years to complete the process starting from the FT. The Guwahati High Court also noted that the delay in determining and deporting Bangladeshis has created danger for the indigenous population and called for summary disposal by the FTs based on spot visit.

- **Anowara Khatun vs. State of Assam and Others¹⁹**

Anowara Khatun was declared a foreigner *ex parte* by an FT in 2009. She challenged the decision before the Guwahati High Court and claimed to be an Indian by birth. Her name appeared in the voter lists twice in 1994 and 1997. There is discrepancy in the spelling of her names and age. Anowara sought time before the FT to prepare her written submission when a notice was served to her in August 2008. She claimed that due to strikes called by a social organisation followed by a silent protest meet by the lawyers, she was not able to attend the hearings. The High Court noted that her citizenship became doubtful when the electoral roll for the year 1997 was under preparation and a reference was made to the FT and all procedures were followed. The Guwahati High Court observed that the act of absence from hearing has become 'convenient' for the irregular Bangladeshi migrants and Anowara's absence from hearing was deliberate. The court was satisfied with the discrepancies in the voter lists and upheld the decision of the FT. The Court also observed that since Anowara is 60 years old, her name should have appeared in the voter lists before 1994 and she couldn't prove 'linkages' of her existence in Assam before the cutoff date. This raises suspicion over her claim of being an Indian by birth. The court ordered her to be deported. Anowara Khatun was soon found missing from the locality. The Court also held that given the prevalence of the problem [illegal immigration], act of leniency would mean impede the whole purpose. The accused is duty bound to prove his/her citizenship as per section 9 of the FT Act 1946.

- **Moinal Mullah vs. Union of India and Other²⁰**

Moinal Mullah's case also affirms the corruption and inefficient adjudication of justice. The FT in Barpeta on 16 February, 2010 declared Moinal Mullah as a foreigner. The decision was *ex parte*. The FT based its judgment on the testimony of the local verification officer who pointed out that in an earlier occasion Moinal was asked to submit his citizenship credentials and he failed to submit it and hence he is a foreigner. Moinal was detained on 5 September 2013. Moinal's parents were also marked as D-voters in 1997. They required to prove their citizenship before the erstwhile IMDT Act for the removal of D-voter status. In 2003 Moinal's father Ashan Mullah and mother Monowara Begum were cleared of the doubt and they were restored their Indian citizenship. His lawyer advised that since his parents are proved Indians, he doesn't need to attend the hearing before the FT. Once he was declared a foreigner, he was taken into a detention camp in Goalpara. A petition was filed before the Guwahati High Court against the decision of the FT. However, the petition was rejected. A social organisation supported Moinal to appeal before the Supreme Court. The Supreme Court directed the FT to restart the case and Moinal was asked appear before the FT on 29 August 2016. FT cleared Moinal Mullah and he was declared an Indian soon after.

- **Jabeda Begum@Jabeda Khatun vs. Union of India** ²¹

Jabeda Begum was declared a foreigner by FT in Baksa District in May 2019. She has submitted 14 documents to claim that she was an Indian citizen by birth.²² She challenged the order in Guwahati High Court. Guwahati High Court dismissed her plea and upheld the order of the FT. She had also produced documents like land revenue payment receipts, her bank passbook, PAN card and a ration card. She also added a certificate from the Gaon Burah, village headman to link her legacy with her parents. First certificate said her father Javed Ali was a permanent resident of the village while second certificate one said Begum was Javed Ali's daughter and married to Rejak Ali. The High Court ruled that PAN card, bank document and land revenue documents are not proof of citizenship. Certificates issued by a village Gaon Bura is also not to be considered as proof of citizenship of a person. Goan Burah certificate can only be used by a married woman to prove her post marriage relocation in her husband's village [Rupjan Begum Vs. Union of India, reported in (2018) 1 SCC 579].

The Court in the case of Md. Babul Islam Vs. Union of India [WP(C)/3547/2016], held that PAN Card and Bank documents are not proofs of citizenship. So, in the absence of any linkage certificate Jabeda was declared a foreigner. The court held that 'the certificate issued by the G.P. Secretary merely acknowledges the shifting of residence of a married woman from one village to another. The said certificate by itself and by no means establishes any claim of citizenship of the holder of the certificate'²³.

In Anima Das vs. state of Assam and other, two certificates dated 30.08.1993 and 03.04.2018 are issued by the Headmaster of her school. The certificates were not accepted by the Foreigners Tribunal, Baksa because the Headmaster of the school who had issued the two certificates was not examined.²⁴

- **Sanaullah vs. State of Assam and Others**²⁵

The accused Sanaullah, a retired army officer was declared a foreigner *ex parte* by the FT based on discrepancy in the age of birth in May 2019. The inquiry report by the Border Police doesn't include any visit to his house. He was quoted as a labourer and illiterate in that report. The case created a public outrage since Sanaullah was a veteran army officer and educated person. Decision of the FT was challenged in the Guwahati High Court and well-known lawyer Indira Jaising appeared on behalf of Sanaullah. It was subsequently revealed during the litigation before the Guwahati High Court that the Inquiry Officer who reportedly conducted inquiry twice was found to be misleading. He forged papers and put thumb impression on confession papers saying that Sanaullah accepted that he has come from Bangladesh. Sanaullah was arrested and was put in a detention centre in Goalpara for ten days based on this report. Later he was granted bail by the Guwahati High Court and the matter is pending for final solution.

Declared Foreigners Face Endless Captivity in the Process of Deportation

In a study on Immigration Detention Centre in Australia, Michelle Peterie argued that ‘the camp, in this context, is a “state of exception” – a place in which “the rule of law [is] suspended” and the individual is reduced to a state of “bare life.”’²⁶ He quoted examples of concentration camps of 20th century fascist regimes, detention at Guantanamo Bay, detention of immigrants at a football field in Bari, Italy etc. as kinds of ‘states of exception’ where certain kind of people live and the state creates an environment of mass support for this treatment where basic rights of human beings are suspended or denied.

Detention camps in Assam are not free from this unfairness. The detention centres, a transit facility for the declared or suspected foreigners is the result of the verdict of the judiciary. The Guwahati High Court in 2008, ordered the establishment of these facilities. Detention centres came up in Assam in 2010, 2012, 2014 and 2018. This facility in practice resulted in prolonged captivity, delayed justice and financial harassment of the victims along with enormous psychological trauma. Construction of detention camps/centres was ordered in 2009 and it was expedited when the Guwahati High Court said that the ‘Bangladeshis are becoming Kingmakers’ [in Assam]. The government immediately formed three camps, curved out of central jails in Goalpara, Silchar and Kokrajhar. A total of 362 inmates were taken into it by the end of 2011.

Till date, these camps have no rules and procedures and have no operating manuals. Inmates are not entitled to any facilities similar to those available in jails.²⁷ They are treated like prisoners and still deprived of the rights of a prisoner like parole, wages against work, family visits and are confined within the camp area. Interactions with former inmates revealed that the quality of food or sleeping spaces were too small, causing lack of nutrition and psychological illness. A manual similar to that of jail manual is currently under consideration as per the instruction of the Supreme Court.

Detention camps are also a unique feature in the whole discourse on expulsion of irregular immigrants. No other Indian state has detention camps. Assam has been sanctioned additional fund from the central government to construct a detention centre at Matia, Goalpara district of Assam that may house 3000 people, possibly the largest detention centre in the world. The researcher visited this detention centre under construction. About six hundred construction workers are working there and many of them do not have their names in the NRC list. ‘We are working here for a living but I could be the one living here as an illegal immigrant’, one of them informed.

Michelle Peterie further pointed out that ‘psychological and psychiatric studies have consistently demonstrated that asylum-seekers who are subject to detention experience high levels of anxiety, depression, and Post Traumatic Stress Disorder (PTSD), with self-harm and suicidal ideation widely reported.’²⁸ The negative impacts of detention on detainees are well established in Assam. Every detainee interviewed by this researcher indicated mental illness along with physical weakness and financial loss. Detention

camps had about 1300 inmates. Compared to the population of 2.6 million in Assam, this number looks miniscule. However, it is enough to inflict a collective trauma to the targeted communities. Those excluded from the NRC list also shared similar state of anxiety and sleeplessness.

A total of 29 inmates have died inside the detention camps [as of March 2020]. A public interest litigation was filed by social activist Harsh Mander in 2017 asking for better living condition at the detention centres. The Supreme Court initially acted harshly for filing the petition and removed Harash Mander from the litigation. Later it ruled that the detainees in these centres are eligible for bail after completing three years and have to present themselves before the police every week after the grant of bail. Biometric data and security of 1 lakh rupees along with two Indian nationals as a guarantee has to be furnished. Few hundred inmates were released. In April 2020, another PIL was filed for the release of all the declared foreigners on bail in absence of any deportation mechanism. The prevailing COVID situation probably have influenced the Supreme Court which ordered that inmates completing one year in detention should be released after furnishing two Indian witnesses and a security money of 10 thousand rupees. Goalpara has 201 inmates, Kokrajhar has 140, Silchar 71, Dibrugarh 41, Jorhat 196 and Tezpur holds 322 inmates currently. A sum of 4.74 crores rupees has been spent at the detention centres so far for its maintenance.

Deportation

Deportation is an important part of the process of expelling a foreigner without proper documents. However, in case of Assam, there is not settled practice or norm for the deportation of a person once declared a foreigner. The government has admitted of 'push back' in various cases filed before the Guwahati High Court. Home Ministry has informed the parliament that till date, 39 persons have been sent back to Bangladesh and a few thousand has been pushed back with the help of BSF. In a significant number of cases, the accused persons and their families went missing once the Guwahati High Court upheld the decisions of FT and declared them as foreigners.²⁹ In most of the cases, the jurisdictional Superintendent of Police has submitted reports that the Bangladeshi nationals are not traceable and their whereabouts are not known.³⁰

Overall Impact and Collective Traumatization

Collective traumatization through violence could be traced in Assam since 1983. Nellie massacre of 1983 followed by several mass killings and ethnic conflicts in the state in Bodo inhabited areas in the last three decades have reinforced a collective trauma, demonisation and otherisation of the Bengali speaking Muslims in Assam. Transitional justice mechanism, one of the fast growing popular mechanisms started with Argentine 40 years ago is widely used to address the peace and reconciliation issues in post conflict situation.

In case of the Nellie massacre,³¹ an Inquiry commission was reportedly established to document of the circumstances leading to the massacre of nearly 2000 Bengali speaking Muslims in four hours. It remains untraceable in the office of the Assam Government.³² A compensation amount of five thousand rupees for those killed in the massacre was thought sufficient enough to rebuild life. The issue of criminal accountability was not even addressed. Instead, 312 charge sheeted cases were dropped to maintain peace and harmony. Many instances of mass killings of minorities in Assam took place and no accountability was established. It was only in 2013, that NIA court was ordered to investigate criminal culpability charges against rioters in Khagrabari massacre and a charge sheet was submitted.

The National Register of Citizens (NRC)

The NRC process is one of the most significant citizen identification processes so far aiming at detection of non-citizens. This is again very exceptional and has taken place only in Assam. The first NRC was carried out in 1951 and updating of the same was one of the main demands during the Assam agitation. The process started in 2015 and was enormously heavy on exchequer and has already put millions of people at the risk of being stateless. The National Register of Citizens (NRC) process has already affected millions of people from across communities in Assam. More than 33 million people of Assam had to collect their historical legacy document, a digitised form of pre 1971 archival document, fill their application, submit 'acceptable' current documents to prove linkage with the 'legacy person', establish a water-tight 'family tree', attend several rounds of verifications and hearings, including the hearings for disposal of frivolous 'objections' and so on.³³ Millions of people have spent their hard-earned money in the labyrinthine process, lost jobs and lost livelihood resources. Children had to drop out of schools, and many people lost their lives while waiting in the queue to acquire proof their citizenship.

On 31 August 2019, the NRC authority published the final list of Indian citizens living in Assam. The list included 31 million applicants and excluded 1.9 million people, mostly belonging to marginalised groups like religious and linguistic minorities, tribals, married women, children and sexual minorities creating an imminent risk of statelessness. They awaited the final legal battle before the judiciary to prove their historical legacy in Assam. NRC process is another traumatising process leading to many suicides and fear psychosis. This process further weakened the already economically marginalised population in Assam. The NRC process put stress on the legacy of the person rather than the person himself. The government has not formed any policy on those excluded from the NRC, except increasing the number of FTs to 200. Those excluded from the NRC will now be required to go through the final test in the foreigners' tribunal to defend their Indian citizenship. However, this process has been slowed down. In December 2019 the Bharatiya Janata Party-led government in Delhi amended India's Citizenship Act and offered to provide fast track citizenship to migrants from

religious minorities from three Muslim-majority countries i.e. Bangladesh, Pakistan and Afghanistan. This provision doesn't apply to Muslim migrants. Arguably, the non-Muslims who are excluded from the NRC will be provided citizenship through the new Citizenship Amendment Act (CAA) 2019.

The search for 'original inhabitants' in Assam and the NRC process has created social polarisation and has bolstered communal politics. About 12 lakh Bengali speaking Hindus are excluded from the final list of the NRC whereas the number of Muslims were around 6 lakh. This was against the expectations of the nationalist forces. No legal option is available to invalidate the NRC process since it was carried out under the supervision of the Supreme Court. Muslims supported the NRC process with a hope that it will free the community from the tag of 'illegal Bangladeshi', alter the dominant prejudiced narrative and ensure equality. The NRC was successful in this regard to some extent. Muslims youths started taking pride in being a 'Miyā', a term used to ridicule Bengali speaking Muslims. The Hindu community, specially the refugees from East Pakistan under the influence of the current ruling party on the other hand are reluctant to carry forward the NRC results as a majority of those excluded are Hindus. Assamese linguistic nationalists are now looking for new avenues in the Assam Accord to uphold their interests and to secure privilege and reservation in terms of entitlements.

However, an entry in the NRC list doesn't guarantee freedom from further ordeal. Rahima Begam of Nalbari, Assam was declared a foreigner on 8 November 2019 after the publication of final NRC on 31 August, 2019. The Guwahati High Court has asked the NRC Authority to file an affidavit to bring in record the 'undeserving' or 'not legally' entitled individuals to citizenship. Such order and terminology used could further enhance persecution of 'suspected foreigners.'

With the passing of the Citizenship Amendment Act in 2019 (CAA), the issue of detection and deportation of foreigners has reinforced inequality before the law and sanctioned discrimination based on religion. Illegal immigration of four religious groups has been decriminalised, exonerated. With this a new chapter has commenced in the citizenship jurisprudence with the potential of impacting the whole of South Asia. Illegal immigrants of four religious groups has become eligible for Indian citizenship under the CAA. About 59 petitions challenging its constitutional validity is pending before the Supreme Court.

PART III

Case Studies: Search for 'Original Inhabitant' and a Process of Inflicting Collective Trauma

The researcher visited 10 former inmates of detention camps, in the month of February 2020. Each of these cases depicts chilling accounts of cyclic vilification and traumatic experience of deliberate denial of due process and fairness in dealing with their citizenship. In a majority of the cases, the

inmates have to spend years in detention camps for their 'failure' to prove the legacy with their ancestors. DNA test, a scientific method to ascertain the legacy was silently thrown out of the list of 'verification'.³⁴

The ten cases physically documented by the researcher required travel to remote areas often completely disconnected by the governance system. Police station, fire stations and hospitals were not found in their vicinity. Over populated schools lacking basic infrastructure with acute shortage of teaching staff was often the only visible structure representing the presence of fragile state and marginalisation of its minorities. Internal displacement results into statelessness. Inmates in riverine areas (i.e Char areas) were found to be internally displaced people who often shifted their house 10-12 times due to flood and river erosion. This phenomenon of environment crisis often increased their vulnerability in protecting their legal documents and engaging with the foreigners detection/determination system. Every case studied for this paper reflects a deep level of trauma and exhaustion of all available financial resources. The experience of helplessness of the accused and their families spread trauma over the whole community and contributed to collective fear and agony. In all the cases, it was found that the families are living with very basic subsistence and were compelled to spend all their available resources in procuring historical documents to claim their citizenship. The researcher also didn't come across incidents where a person is provided compensation for wrongful trial and denial of right to nationality.

Case 1:³⁵ Respondent Ajbahar Ali is a 56-year-old small farmer from Kheluapara village in Jogighopa, Goalpara, Assam. He was declared a foreigner and was taken into custody in May 2016. Ajbahar belongs to Deshi Muslim community, an indigenous group of Assam. Despite struggles in life, Ajbahar was a happy man with four family members including three sons, one daughter and his wife. He supported his eldest son Moinul Hoque to open a mobile repairing shop. Sometime in 2014, a notice was received by the family saying that he has been declared a foreigner by the Foreigner's Tribunal, Barpeta. After receiving the notice, he took the help of a lawyer and filed a statement and necessary documents stating that he is an Indian citizen by birth. He regularly attended hearings and was expecting a positive order. Then one day in 2016, while waiting for the hearing of his case, some police personnel reached him and arrested him in the Tribunal premises saying that he has been already declared a foreigner as per proceedings and *ex parte* order of another case in Goalpara Foreigner's Tribunal. Ajbahar has no clue that he is facing double jeopardy and there is a second case against him. He was detained in the Detention camp in Goalpara for more than three years. The difficulty for Ajbahar was a mistake in the spelling of his father's name. This made him a foreigner in his own land. His son challenged the order in the Guwahati High Court. To meet the expenses of a prolonged litigation, the family sold their assets and paid the lawyer hoping for a positive outcome. However, the High Court upheld the Tribunal's decision. The only recourse for justice left for the family was to challenge the decision before the Supreme Court. Ajbahar's wife Balijan Bibi, was depressed over the prolonged

detention and the expensive litigation. Finding no way to meet the financial requirements, she died by suicide on the early morning of 24 September 2016. This incident added another layer of hardship for the family.

Ajbahar found that he was 'identified' by two Border Police personnel, who referred the cases to two different Foreigners Tribunals in two different districts. Ajbahar has been released on bail after a Supreme Court verdict in 2019 ordered to release inmates detained for more than three years. He is back to his home after a long time. However, he is now physically weak, mentally disturbed, forgetful and sits in a place for a long time without even moving. His family's financial situation is deteriorating day by day in the absence of income. Land properties have been sold and the family faces food shortages and often starves. Ajbahar is now out of the detention camp on bail. But the system that prescribed him a 'foreigner' remains intact and his future status as an Indian citizen remains uncertain.

Case 2:³⁶ Respondent Sahera khatun is a 40 years old woman with no formal education. She was born in remote riverine Takakata village of the Barpeta district. She was a victim of child marriage practice and was married off at the age of approximately 12. Since then, she has lived with her husband in a nearby village called Chinki gaon. She has three sons and seven daughters. She hardly understands the legal process and was shocked to learn that she has been declared a foreign national as per the order of a Foreigner's Tribunal in Barpeta. She has the knowledge that the order of the Tribunal has been challenged and litigation is ongoing for the last four years in the Guwahati High Court. She is informed by her lawyer that once she clears his 40 thousand balance fees [she has already paid one lakh], she will be declared an Indian again. She blames number of erosion and displacement she experienced in her life and her family. She said, 'the river Beki made my life hell. I had to shift my house 8 times due to floods and river erosion'. Her current house at Chikni reserve village is where she shifted about 12 years ago. This village was de-notified in 1962. Later settlement of the victims of river erosion was arranged in this village by the then government. This provided her an opportunity to settle in this village and she bought a small piece of land for residential purpose. She showed four small houses made entirely of tin sheets sharing a small courtyard and she lives in one of those houses. She has 8 children and five of them are enrolled in the NRC. But 3 of them born after 2003 couldn't make it to the NRC list. Sahera regrets that her sons are daily wagers and major part of their income is spent on her litigation. This has left the family with no savings and exposed them to multiple hardships.

Sahera's case depicts the fact that citizenship determination norms are gender discriminatory and creates enormous barriers in proving citizenship. In many cases, women fail to prove their linkage with their parents despite having documents where their husband's names are mentioned as guardians. Due to social discrimination and patriarchy their education is not prioritised in the family. They are married off early as the family itself faces survival challenges like multiple internal displacements and then the state comes asking

for proof with documents. Most of those excluded from the NRC are married women who used their husbands name as guardian after marriage. They have found it hard to prove their legacy. Since the Citizenship Amendment Act 2003, if one parent is declared a doubtful citizen then their children is not entitled to citizenship. India is a party to the Convention on Child Rights [CRC]. It prohibits denial of citizenship of a child born in a country. This international norm is totally violated.

Case 3:³⁷ Respondent Momiron Nessa of Takakata village, Barpeta district is approximately 40 years old. She is one of those who spent more than ten years in a detention camp. Momiron Nessa was the only daughter of her parents and grew up along with four sons. She is not formally educated. She was married off at the age of 12. After her marriage, Momiron enrolled her name as a voter during a door-to-door enrollment process. After five years since then she went to vote in 2010 and found that she has been marked as ‘D voter’ [Doubtful voter]. She couldn’t vote that day. Later her family enquired with the police. The police informed them that three notices by the Foreigner’s Tribunal have been served to them already and they never attend the hearings. Neither Momiron Nessa nor her family members ever received those notices. While the family was exploring means to seek remedy, Momiron was arrested and immediately detained in the detention camp in Kokrajhar. She was forcibly separated from her three year old lactating son. Momiron was reportedly pregnant and had an abortion during her detention. Momiron’s detention was one of the longest detentions in a detention camp in Assam. She was released on bail after ten years and six months in October 2019. Her release on bail was possible because of a Supreme Court order. Momiron said, ‘My father is 108 years old and is still alive. He has cleared his name in the NRC and has all the documents to prove his citizenship starting from the NRC of 1951. Then why am I suffering like this? I was the only daughter of my parents and lived like a queen and why are they [the state] behaving so cruelly with me?’

Meanwhile, while Momiron was counting her days to come out of the detention camp, her depressed husband died at the age of 42. Financial constraints and loneliness seem obvious reasons contributing this early death. Momiron was unaware of this for a long time. Her son was replaced as official visitor. Momiron was finally released on bail in 2019. During the ten years of detention, Momiron met her eldest son twice and her daughter only once due to financial constraints. She met her 3 year old lactating son only after her release. Momiron is suffering from low eyesight, sleeplessness, palpitation and trauma. She cannot afford litigation in future. Activists monitoring Momiron’s case is of the opinion that DNA testing could have solved the issues long ago and ten years of detention is nothing less than a punishment for a heinous crime.

Case 4: Respondent Roshiya Begum, 40 years, is currently living in Fekamari, Mankachar, Dhubri district. She was born in a village called Shilkata, Rajabala under Phulbari police station, Block Selsela, West Garo Hills, Meghalaya.

Roshiya was the eldest daughter out of 8 children. Her parent prioritised marriage than her education. She was married of at the age of 13 and she remembers going to primary school.

After her marriage, she applied for enrolling her name in the voter list of Assam. During census, officials visited her house and asked for 'documents' to prove her citizenship that could prove 'linkage' with her father. She couldn't produce any. Soon the police started an inquiry and visited her family several times in the village. She felt intimidated. Her husband moved her to her parent's house in Meghalaya where she went underground. But she couldn't remain in hiding due to police pressure on her family. As soon as she appeared for an interrogation before the police, she was immediately arrested. She was shifted to a few police stations in Meghalaya and Assam. Local people gathered at Hatsingimari police station and protested against her detention. Visiting a police station was traumatic for her. The thought of being separated from her family was so painful that she fainted and was hospitalised at Panbari Hospital where she was treated for nearly a month. Her medical treatment was financially taken care of by her family. Once recovered, she was taken into a detention camp in Kokrajhar, Assam and continued in detention for more than 3 years. After one and half months in the detention camp, the District Commissioner of West Garo Hills certified her as a bona fide citizen of Meghalaya. This was rejected by the authority in Assam and she was not released. Her family sold land properties to finance litigation in the Guwahati High Court at the cost of 1.5 lakh.

Roshiya informed the researcher that a heavy flood during 1988 completely submerged the schools for more than a week and destroyed all the documents in the schools. The researcher interacted with Roshiya at her home. Roshiya's detention had devastating consequences for her children. All three sons of Roshiya dropped out from school. The eldest son was married early in order to have a woman in the house to take care of the household chores. Fear and uncertainty about her future status as citizen of India is affecting the whole family. Her two sons are already in low wage manual work while she is trying hard to bring her third son back to school. She has to report to police station every week and it costs her about 400 rupees for transportation. It's a burden for the whole family and affecting them adversely. Roshiya feels good for the fact that her whole family has been included in the NRC list except her.

Case 5:³⁸ Respondent Jinu Koch is a widow. Her husband Naresh Koch died while in detention. She is surviving on donations in the village of Tinkuniapara, Goalpara, Assam. This village is away from modern connectivity and about 40 kms away from the main city of Goalpara where hospitals, police stations and government offices are situated. Naresh was a daily wager and most of the time worked as an agricultural labour. In 2017, he along with Jinu took up an employment as resident manual labour at a fishery farm at Mornoi, about 40 km away from his village. Naresh made a few

friends there and became a frequent visitor to a local bar. Naresh had no formal education and married Junu after the death of his first wife. One afternoon in the month of March 2018, he was having a drink at the same local bar. A vehicle full of police men reached there and informed that he had been declared a foreigner by the FT in June 2017 and a search was on to trace him. He was arrested and taken into custody immediately. Utterly shocked, Naresh had no means even to inform his family about his arrest. He was taken to Goalpara Detention camp. The whole incident left him traumatised and depressed for the rest of his life. Till his arrest his family had no information that he has been declared a D-voter, then a foreigner and that he had been served a notice to appear before the FT for four consecutive times. The process was completely *ex parte* and the family never received summons. Consequently, Naresh was in the Goalpara Detention camp for nearly two years.

Naresh's family was unaware of his detention for few days and once they came to know of it, they did not have the money to meet him. The local police donated Rs 100 to the family, so that they could visit him in the detention centre, about 40 km away. Naresh would fall sick often in the detention camp. After two years, the local police again visited his family in December 2019 and donated Rs 1000 to his wife Junu to visit him in a hospital in Guwahati, about 150 km away from her village. Jinu Koch visited him and found that Naresh had suffered a stroke and was not able to talk. Jinu met him after two years and wanted to hear his voice. She took care of him for 13 days in the hospital. On 5 January 2020 he died at the age of 56 years. His death marked the 29th custodial death in detention camp. Police asked the family to take his dead body for last rites. This created a public outcry. People protested, 'why is a foreigner's dead body delivered in India?', they asked. After few days of negotiation, the family agreed to receive the dead body and his last rites were performed. Naresh belonged to the Koch-Rajbongshi community, an indigenous community in Assam. His son Baruram Koch is included in the NRC as a citizen of India. As a token of compensation, the family has been given a subsidised house and a toilet under government scheme.

Case 6:³⁹ Respondent Nazrul Islam is 40 years old and is released on bail from Goalpara detention camp in 2019 after more than four years. In November 2015, he was arrested by the police from his home in Hatsingimari, Dhubri district, Assam and was immediately taken to the detention camp. Before that he received a notice from the Foreigner's Court, Goalpara and had appeared before the proceedings. He is not formally educated and panicked. During the proceedings, he submitted documents to prove his Indian citizenship and one of the documents was a birth certificate. He procured the birth certificate with the help of a 'dalal' [middle man]. Birth certificates issued after 90 days of birth is not an acceptable valid document in the FT. It was found that the birth certificate was forged and hence his claim of Indian citizenship was rejected. Nazrul is a married man with three children. He was earning about 12-13 thousand rupees a month by working as

a mason in Guwahati. With his arrest, the primary earning member of the family was gone. Consequently his wife and children went to her parental house and started living there. After spending four years and four months in the detention camp, Nazrul was released on bail after the Supreme Court's verdict in 2019. About 4 lakh rupees was spent by the family ever since he was detained. This amount was procured by selling their property and other resources. Currently Nazrul lives in his father-in-laws house along with his wife and children. None of his children are into school and his youngest child. His five year old daughter couldn't recognise him after his release and kept a distance from him. Nazrul lived along with 216 inmates in the detention camp and had to survive on poor quality of food and amidst crowded living condition. His health is fragile and it is extremely tiring for him to work as mason. His 17 years old son has become a migrant labour and supports the family financially. Nazrul is suffering from sleeplessness and anxiety. He is extremely worried of the future course of action on his citizenship.

Case 7:⁴⁰ Respondent Jyotish Sutradhar lost his father for not having 'legacy document' to prove his citizenship. Angadh Sutradhar, his father was an old man belonging to the indigenous Koch Rajbongshi community of Assam that the NRC Authority has categorised as 'original inhabitant' to provide special relaxation to include their names in the NRC even if they don't possess sufficient proof of citizenship. He was living in a remote village called Pakriguri in Baksa district of Assam. Angadh who was not formally educated and didn't had sufficient historical documents to prove his birth linkage with his ancestors, was under enormous stress to file the NRC application and the deadline to submit such application expired in July 2015. His son Jyotish Sutradhar made several efforts to find an arrangement with the help of the local NRC registration office but failed due to the absence of a 'legacy document'. Angad and his son couldn't find a way to process their application. Meanwhile they heard from the media and villagers that those excluded from the updated NRC will be either deported or detained in detention centres. Angadh Sutradhar and his family members again discussed on what they should do but couldn't find a way. They decided to try to meet the officers again and explain their situation. Soon after this discussion, Angad went to the bank of the small canal passing close to his home and was sitting there quietly. At around 10:30 pm when the family went there to call him for dinner, he was found hanging from a tree nearby. He had committed suicide.

Case 8:⁴¹ Respondent Sabiya Khatun is a 45 years old woman from Shimlabari village in Bongaigaon district of Assam. She was not formally educated and is a survivor of early child marriage. She was declared a foreigner by the Kokrajhar Foreigner's Tribunal and was detained in Kokrajhar detention centre for four years. She submitted a lot of documents from her father whose name figured in several legal documents that proves his Indian citizenship. Her father has 1951 NRC certificate, 1970 voter's list and even Sabiya was enrolled in the voter list of 1997 onwards. She submitted a

panchayat certificate to proof her linkage with her father. The Foreigner's Tribunal still declared her a foreigner because the panchayat secretary, who provided the linkage certificate didn't appear before the tribunal and testify that he has issued the certificate.

Absence of Sabiya in her family was devastating. Her sons dropped out of schools and became manual labourers. Her daughter dropped schooling to cook for the family and to look after Sabiya's three year old daughter. Her husband developed psychological trauma. A small amount of money was saved for the treatment of her husband. Meanwhile the Guwahati High Court rejected her petition claiming Indian citizenship and there was a need to file a review petition. The family spent the amount saved for this litigation and consequently Sabiya lost her husband while she continued in detention. No parole was issued to her to take part in his last rites. Sabiya is finally out of detention following the Supreme Court's order in 2019. However, uncertainties over her citizenship continue.

Case 9:⁴² Respondent Abiron Nessa is a 45-year-old widow from Jaklibilpathar village in Baksha district. She was married as a second wife to her husband Abdul Rahman at the age of 15. She survives on meager earning by selling fish, vegetables or working as a domestic help. Her two sons are daily wagers. Abiron was not mentioned as the wife in the legal documents of her husband. His first wife's name had remained there. Abiron did enroll as a voter. She didn't attend school in childhood. There is no document to prove her linkage with her father. Her father, both her sons and husband are all included in the final list of NRC. Her name was included in the ration card with her father. However, once she was married, her name was deleted from the card. They didn't save the older card. Abiron has been served a notice from the Foreigners Tribunal in the month of September, 2020 and was asked to submit her statement. With the help of a pro bono lawyer, she has submitted her statement. She doesn't have the financial or physical capacity to procure historical documents related to her legal identity. Days are passing by and increasing her stress. Since the day the notice was served, Abiron couldn't sleep properly, suffering from stress. She has developed chest and neck pain due to stress. Her sons were daily wagers who are now jobless since the lockdown. With uncertain future, Abiron developed a fear psychosis. She went on hiding for a whole night when she heard the sound of a vehicle. She feels the police will come in a vehicle and will put her in a detention camp. Abiron's case is pending before the FT.

Case 10:⁴³ Respondent Jaymona Khatun is 50 years old widow. She was married to Haresh Ali of Jaklibilpothar village in Baksha district of Assam. She works a domestic help and agricultural labourer. She was declared a D-voter in 1997. She received a notice from the Kokrajhar Foreigners Tribunal in the month of September 2020 during the pandemic that she has been suspected as a foreigner and needs to appear for hearing. Joymona's parents are not alive and she has five brothers and 3 sisters. She was married off as a child and didn't receive formal education. She was the second wife to her

husband and doesn't have linkage document to proof her relation with her father. She has visited various local offices to procure documents. No document was issued in her name. She was told that all the local officers have been asked not to issue any document to D-voters. Joymona is under extreme stress since the notice was served. She lost appetite, cannot sleep and mental tension caused her chest pain. She devotes her time in praying such that god saves her from this ordeal. All her three sons are also excluded from the NRC list and are currently working as daily wagers in constructions sites.

Conclusion

The above discussion clearly shows that there are no standard rules and procedures and the entire process of confirming an important right like citizenship is left on administrative discretion. Rohit De wrote in his book 'People's Constitution' that there is distinction between legality and rule of law. He wrote that 'unlike the West, administrative laws in India are shaped though legislative and bureaucratic action.'⁴⁴ The system in Assam is a reflection of this proposition where the executive through a quasi-judicial process take away the nationality of those recognised as citizens. It constitutes a denial of human rights and the Universal Declaration of Human Rights. Matters related to citizenship is delegated to the executive while the judiciary took an active part too and supported this excessive delegation of power. The current process of determining citizenship of a population is discriminatory towards the economically weaker sections of the society as well as towards women and children who don't have enough resources to defend themselves. Double jeopardy is prohibited by the constitution. However, the FTs didn't protect this right. There is no provision for compensation for anyone who is wrongfully declared a foreigner.

The Foreigner's Act was passed keeping in mind people from a different country entering India without a valid passport or visa and without legitimate claims to stay in India. However, in case of Assam the Act is applied on people who are living in the country for years and have acquired Indian citizenship. Citizenship once given cannot be arbitrarily forfeited except under certain circumstances as stipulated in the citizenship laws. Judicially speaking, the Foreigner's Act is not fit for someone who has already acquired Indian citizenship and have been living in Indian soil for ages. The Foreigners Act is probably the second such Act that heavily stressed on 'suspicion' similar to that of AFSPA. The FTs presumes a person as a foreigner and prosecution starts from there. This is in violation of criminal justice principles.

The situation in Assam and its institutional responses towards migration detention have remained more or less elusive from the attention of the national and international media for a long time. The Rohingya issue shocked South Asia in 2017 and raised concerns over similar situations in the region. Gradually the migration detention and the NRC process are gaining public notice in India and Assam has become a central point of discussion.

Lack of academic engagement with the minority's perspectives encouraged dominant narrative of 'illegal immigration'. It poses a threat to the indigenous communities in Assam. Marginalisation of the voices and perspectives of the minority community and culture of alienation of Bengali speaking Muslims created a vacuum resulting social conflict and paranoia. Denial of citizenship is applicable only in case of 'confirmed foreigners', not for people who live in Indian soil simply because they are not in possession of historical documents. Lack of organised resistance from the community contributed to the overall traumatised and suffering. Its only during the Bodo-Muslim ethnic violence in 2012 when nearly 50 thousand Muslims were displaced, that youths began to organise themselves and resorted to judiciary and other human rights mechanisms to enforce their entitlements and sought justice for massacres. As a result, Khabribari massacre of 40 people is under investigation by a central agency. International human rights organisations like the Amnesty International and the Human Rights Watch intervened late and published detailed research report on the NRC only in 2019 and 2020. In 2018, for the first time, four UN Special rapporteurs issued statements and expressed concern over the NRC process. The statement quoted that 'the experts also highlighted the lack of clarity in the link between the NRC process, electoral roll information and the separate judicial processes of citizenship determination before the Assam Foreigners' Tribunals. "This adds to the complexity of the whole process and opens the door to arbitrariness and bias."⁴⁵ Convention on Child Rights, an UN treaty ratified by the government of India prohibits denial of nationality to children. However, the NRC process has denied inclusion of lakhs children and they are at risk of being stateless. The Nellie massacre and lack of accountability created a precedent that permitted institutional negligence of the rights and entitlements of Bengali speaking Muslims. River erosion in western Assam displaced thousands. Land resources shrank and agriculture based economy was affected in the *char* areas where a majority of Bengali speaking Muslim population reside. They were forced to shift to the city areas where they could earn a livelihood as unskilled labourer and play a significant part in development of urban infrastructure. Reportedly river erosion has displaced 4 million of people. There is a need to study the trend of migration of those displaced as a result. Absence of a policy on refugees in India has adversely impacted the migrants in post partition South Asia. Indian law and practice provide distorted and incomplete protection to the refugees.⁴⁶ There is complete distortion of who is a 'foreigner' or 'illegal immigrant'. Judicial interventions didn't adopt international human rights norms, specially those dealing with statelessness and international obligation to prevent it. Right now, the uncertainty of the final NRC, mushrooming of detention camps and the political narratives are not suitable for a fair trial of 'suspected foreigners' and there is a possibility of the repeat of Rohingya like crisis in the future.

Notes

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- ²Government of India, *The Foreigners Act*, 1946, <http://legislative.gov.in/sites/default/files/A1946-31.pdf>; Ministry of Home Affairs, Government of India, *Foreigners (Tribunal) Order*, 1964, [https://upload.indiacode.nic.in/showfile?actid=AC_CEN_5_23_00048_194631_1523947455673&type=order&filename=Foreigners%20\(Tribunal\)%20Order,1964.pdf](https://upload.indiacode.nic.in/showfile?actid=AC_CEN_5_23_00048_194631_1523947455673&type=order&filename=Foreigners%20(Tribunal)%20Order,1964.pdf).
- ³Vijaita Singh, "All States Can Now Constitute Foreigners Tribunals," *The Hindu*, June 10, 2019, <https://www.thehindu.com/news/national/all-states-can-now-constitute-foreigners-tribunals/article27706366.ece>.
- ⁴Home and Political Department, Government of Assam, *White paper on Foreigners' Issue*, 2012, <https://cjp.org.in/wp-content/uploads/2018/10/White-Paper-On-Foreigners-Issue-20-10-2012.pdf>.
- ⁵Abdul Kalam Azad, "Human Cost of NRC in Assam," Unpublished Paper.
- ⁶*Rustom Ali vs. State of Assam and Others*, WP(C) 3226 of 2009, Guwahati High Court, 2011.
- ⁷Ministry of Home Affairs vide letter No. 14011/55/09-F.VI dated 23.11.2009.
- ⁸G Kishan Reddy, Minister of State for Home Affairs, informed the Parliament on July 2, 2019. Source: www.loksabha.in.
- ⁹"Case Closed: How Assam's Foreigners Tribunals, Aided by the High Court, Function Like Kangaroo Courts and Persecute Its Minorities," *The Caravan*, November 6, 2019, <https://caravanmagazine.in/law/assam-foreigners-tribunals-function-like-kangaroo-courts-persecute-minorities>.
- ¹⁰"Case Closed: How Assam's Foreigners Tribunals, Aided by the High Court, Function Like Kangaroo Courts and Persecute Its Minorities," *The Caravan*, November 6, 2019, <https://caravanmagazine.in/law/assam-foreigners-tribunals-function-like-kangaroo-courts-persecute-minorities>.
- ¹¹Amnesty International, *Designed to Exclude: How India's Courts are allowing Foreigners Tribunals to Render People Stateless in Assam*, 2019, <https://amnesty.org.in/wp-content/uploads/2019/11/Assam-Foreigners-Tribunals-Report-1.pdf>.
- ¹²"Assam Government Removes Foreigners' Tribunal Member," *The Hindu*, May 24, 2020, <https://www.thehindu.com/news/national/other-states/foreigners-tribunal-member-removed/article31666251.ece>.
- ¹³"Case Closed: How Assam's Foreigners Tribunals, aided by the high court, function like kangaroo courts and persecute its minorities," *The Caravan*, November 6, 2019, <https://caravanmagazine.in/law/assam-foreigners-tribunals-function-like-kangaroo-courts-persecute-minorities>.
- ¹⁴Ibid.

¹⁵ Anwar Tarique, "Foreigners Tribunals in Assam: Saga of Inherent Gender Bias, Presumption of Non-Citizenship," *News Click*, September 16, 2019, <https://www.newsclick.in/Foreign-Tribunals-Assam-Citizenship-NRC>.

¹⁶ *Md. Rustom Ali vs. State of Assam and Others*, WP(C) 3226 of 2009, Guwahati High Court, 2011, <http://ghconline.gov.in/Judgment/WPC32362009.pdf>.

¹⁷ Leah Verghese and Shrthi Naik, "Caught in a Bureaucratic Web," *The Hindu*, March 05, 2020, <https://www.thehindu.com/opinion/op-ed/caught-in-a-bureaucratic-web/article30983165.ece>.

¹⁸ *Ajjur Rahman vs. Union of India, State of Assam and Others*, WP(C) No. 2358/2011, Guwahati High Court, 2011, <http://ghconline.gov.in/Judgment/WPC23582011.pdf>.

¹⁹ *Ms Anowara Khatun Vs. Union of India*, WP(C) 643/2009, Guwahati High Court, 2009, <https://www.casemine.com/judgement/in/56b49555607dba348f012127>.

²⁰ *Moinal Mullah vs. Union of India, State of Assam and Others* <https://www.news18.com/news/india/my-name-is-moinal-mollah-i-am-an-indian-1274971.html>, https://images.news18.com/ibnlive/uploads/2016/07/Moinal_Mollah_1.jpg.

²¹ *Jabeda Begum vs. Union of India and Others*, Guwahati High Court, 2020, <https://indiankanoon.org/doc/161150352/>.

²² In support of her contention, the petitioner filed 14 (fourteen) documents. They are -NRC details of Javed Ali [Petitioner's brother], Voter Lists of 1966 parents, grandparents, Voter Lists of 1970; Land Revenue Paying Receipt; Voter Lists of 1997; Voter Lists of 2015; Land Revenue Paying Receipt; another Land Revenue Paying Receipt, another Land Revenue Paying Receipt; certificate of Gaon Bura certifying that Md. Javed Ali is a permanent resident of Village No. 2 Dongergaon; another certificate of Village Gaon Bura certifying that the petitioner was the daughter of Lt. Javed Ali and was married to Rejak Ali; a copy of Ration Card in the name of the petitioner; Bank Passbook; the PAN Card of the petitioner; another bank document of the petitioner.

²³ *Rupjan Begum vs. Union of India*, Supreme Court of India, 2017, <https://indiankanoon.org/doc/7961750/>.

²⁴ WP © 3056/2018 decided on 3-1-2019.

²⁵ Sangeeta Barooah Pisharoty, "Declared a Foreigner", Guwahati-Based Ex-Army Subedar Sent to Detention Centre," *The Wire*, May 29, 2019, <https://thewire.in/rights/declared-foreigner-former-army-subedar-assam-detention-centre>.

²⁶ Michelle Peterie, "Deprivation, Frustration, and Trauma: Immigration Detention Centres as Prisons," *Refugee Survey Quarterly* 37, no. 3 (2018): 279-306.

²⁷ Researcher received hand written notes from the inmates depicting over crowded and unhygienic conditions.

²⁸ Michelle Peterie, "Deprivation, Frustration, and Trauma: Immigration Detention Centres as Prisons," *Refugee Survey Quarterly* 37, no. 3 (2018): 279-306.

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India and Others, WP(C) 80/09, *Mameza Khatun Vs. Union of India and Others*, WP(C) No.1334/09, *Upendra Roy Vs. Union of India*, WP(C) 191/09, *Samsul Hoque Vs. State of Assam and Others*, WP(C) 1708/08, *Natbu Ram Biswas Vs. Union of India and Others*, WP(C) 5497/08, *Gopal Ch. Das Vs. Union of India and Others*, WP(C) 5545/08, *Tarabhanu Vs. Union of India and Others*, WP(C) 1166/09, *Mustt. Sabera Khatun Vs. Union of India and Others*, WP(C) 1045/09, *Mustt. Hazera Khatun Vs. Union of India and Others*, WP(C) 5542/2008 and *Md. Jalal Uddin Vs. Union of India and Others*, WP(C) 5560/2008.

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³⁵ Personal Interview, 24 February, 2020.

³⁶ Personal Interview, 23 February, 2020.

³⁷ Personal Interview, 13 February, 2020.

³⁸ Personal Interview, 24 February, 2020.

³⁹ Personal Interview, 13 February, 2020.

⁴⁰ Personal interview conducted by community worker Abdul Kalam Azad on behalf of the researcher due to COVID restrictions.

⁴¹ Personal interview conducted by community worker Abdul Kalam Azad on behalf of the researcher due to COVID restrictions.

⁴² Personal Interview, 11 October, 2020.

⁴³ Personal Interview, 11 October, 2020.

⁴⁴ Rohit De, *A People's Constitution: The Everyday Life of Law in the Indian Republic*, New Jersey: Princeton University Press, 2018, 118.

⁴⁵ United Nations Human Rights, Office of the High Commissioner, *Un Experts: Risk of Statelessness for Millions and Instability in Assam, India*, July 3, 2019, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24781&LangID=E>.

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Night Shelters for Homeless Population in Visakhapatnam, India: Understanding the Functions and Facilities

By

M Abraham* and S Narayana Swamy†

Introduction

The house is a basic need for every human being. It provides shelter, security, and status. It fulfils the social, economic, psychological, physical, and emotional needs of human beings. The Universal Declaration of Human Rights (UDHR) recognised the right to housing as part of the right to an adequate standard of living.¹ However, in reality, many families in India have no shelter/house. People living below the poverty line are not able to build their own houses and live in rented houses. Some of the families are not in a position to pay rent and stay on pavements in urban areas. The homeless are located mostly by the roadside, on pavements, in hume pipes, near hospitals, railway platforms, bus terminals, temples/mosques/ churches, and other religious structures, commercial/traffic junctions, parks, open spaces, etc.² After 70 years of independence, still many people in India are living without proper shelter.

1.1 Definition of Homelessness

Government of Andhra Pradesh (2013) defined “Homeless person” as an individual who lacks a fixed, regular, and adequate night-time residence or those who, on a specific purpose attend towns and cities and remain shelterless e.g., street children and street adults, destitute, a single unprotected child especially girls and rag-pickers. According to the Census

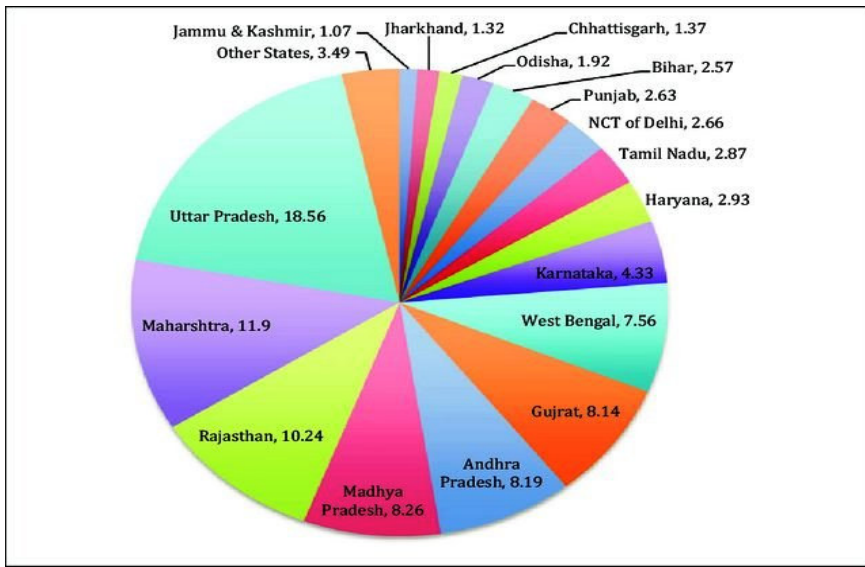
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Refugee Watch, 56, December 2020

of India of 2011, about 1.77 million people have no house. The below graph presents the statistics of homeless population in India.³

Figure No: 1 Homeless Population in India⁴



The data in the above graph reveals that the states viz. Uttar Pradesh, Maharashtra, Rajasthan, and Andhra Pradesh have a greater number of houseless people in comparison to other states of India.

1.2 Characteristics of the Homeless Population

The major characteristics of homeless people are that they live and sleep at pavements, parks, railway stations, bus stations, places of worship, outside shops and factories, at construction sites, under bridges, in hume pipes and other places under the open sky or places unfit for human habitations. Homeless people are faceless, voiceless, and invisible groups in a city's populace.⁵

1.3 Effects of Homelessness

Homelessness negatively affects physical health, mental health, relationships, substance abuse, and other dynamics that hinder individual functioning. They may not have their own place for rest. They are more vulnerable and face risk from anti-social elements.⁶ Homelessness leads to many social problems and has an impact on their health, education, and livelihoods.

1.4 Government Initiatives

The Government of India and Government of Andhra Pradesh have initiated many schemes through five-year plans and special schemes like Housing, Urban Development Corporation (HUDCO), Jawaharlal Nehru National Urban Renewal Mission (JNNURM), National Urban Livelihood Mission (NULM) etc which benefits the urban poor. However, these schemes do not reach all the people and many people stay on the roadsides of urban areas. In the legal case of the Peoples' Union for Civil Liberties (PUCL) (NGO) Vs Union of India and Others (2010), the Supreme Court of India gave the judgment to run night shelters in every city of India.⁷

1.5 Supreme Court's Directives on Shelter Homes are as Follows:

1. All cities covered under the Jawaharlal Nehru National Urban Renewal Mission (JNNURM) and with a population above 5 lakh to have one shelter home (functioning for 24 hours, 365 days), with a capacity of 100 persons for every one lakh population.
2. Basic amenities should include mattresses, bed-rolls, blankets, drinking water, functional latrines, first-aid, primary health facilities, de-addiction with recreation facilities, etc.
3. About 30 per cent of these are to be special shelters (for women, old and infirm, and recovery shelters).
4. The Supreme Court of India restated on January 9, 2012, that the right to dignified shelters/ night shelters was a necessary component of the Right to Life under Article 21 of the Constitution of India (Supreme Court Commissioners' Office, 2010).

1.6 Definition of Night Shelters

Night shelter may be defined as a place that provides accommodation to the poor, shelterless people in the night under a roof, either free of cost or upon the payment of a small fee. Night shelter is an organisation or a place that provides dormitory-style accommodation for homeless people at night.

1.7 Guidelines for Implementation of Night Shelters

According to the Government of India, all the assets created under the scheme will be constructed, maintained, monitored, and evaluated by the local municipal corporations or the committees formed by the government or the respective district collectors. The committees may handover the maintenance of night shelters to interested and reputed non-governmental organisations and voluntary agencies and regular follow up is necessary. Where it is run by the Municipal Corporation itself, competent and motivated staff should be engaged to ensure the quality of services and proper maintenance of the premises. The shelters and other facilities created under this scheme will generally function on a "pay-and use" basis.⁸

1.8 Types of Shelters in India

The shelter homes or night shelters may serve the most vulnerable groups within the homeless populations such as (a) single women and their minor children, (b) aged, (c) infirm, (d) disabled, (e) mentally challenged, etc. The types of shelter homes / night shelters in India are a) shelters for men, b) shelters for women, c) family shelters, and d) special shelters.

Night Shelters in Visakhapatnam

The Government of Andhra Pradesh initiated a program called ‘shelters for homeless’ in 2010-11. The Municipal Corporation of Visakhapatnam established 7 night shelters for men and 1 for women in different places in the city. These night shelters provide shelter to the shelterless population coming from Visakhapatnam district as well as other districts of Andhra Pradesh, and other states of India.

Review of Literature

Harsh Mander conducted a study titled ‘Living rough, surviving city streets: a study of homeless populations in Delhi, Chennai, Patna and Madurai’.⁹ The study revealed that the inmates have bondage with their family members. In Delhi, out of a sample of 86 people, 8 respondents told said that they send money home regularly and 12 send money on an irregular basis. The study suggested that at least 30 per cent of all new housing space for the poor should be reserved, and made compulsory by law.

Sanjoy Roy, Chandan Chaman conducted a study titled ‘Homelessness in Delhi: roots, rhetoric, and realities’.¹⁰ Homelessness is very high in Delhi. The major reasons are (i) this type of population continues to fluctuate; (ii) enumeration of homeless population is difficult, because they move very often and (iii) the homeless people also try to hide from getting counted. The major reasons for homelessness in Delhi are poverty, unemployment, family disputes, natural calamities and hunger, health problems, displacement, and crop failure. The study suggested that the night shelter should focus on safety planning, rescue work, advocacy, street mobilisation, and service deliveries.

Jagori and Nazariya conducted a study on ‘Shelter homes in Delhi’.¹¹ The study found that despite the high rates of violence against women in Delhi, the number of shelter homes for women in distress has not grown proportionally. The few certified shelter homes for women in Delhi have had stringent criteria for admission and they would not accept destitute or homeless women because they were designed for women in distress, even though the line between the two could be very thin, if at all. The study found that there are 263 “night shelters” for homeless persons in Delhi, only 21 offer shelters for homeless single women.

Methodology

3.1 Statement of the Problem

The night shelter is an organisation or a place that provides dormitory-style accommodation for homeless people at night in urban areas.¹² As per the directions of the Supreme Court, the Government of India has established night shelters for the urban homeless in all cities where the population is more than 5 lakhs. The Supreme Court of India directed that for every one lakh urban population, one night shelter should be established for a minimum of one hundred persons' occupancy. The Government of India has provided minimum funding to run the night shelters by the local governments and non-governmental organisations (NGOs). The majority of the night shelters are run by NGOs with the help of local municipal corporations and government funding. There are 8 (eight) night shelters available in Visakhapatnam city for the urban poor and homeless population. There are separate homes for men and women. A few studies have been conducted on this topic and those studies were also conducted in other states of India. Most of the studies were conducted in metropolitan cities like Delhi, Mumbai and Kolkata. In this connection, the present study was conducted to understand the functioning and facilities available in the night shelters at Visakhapatnam city.

3.2 Objectives of the Study

1. To study the functions and facilities available in night shelters of Visakhapatnam;
2. To provide appropriate suggestions for the better functioning of night shelters in Visakhapatnam

3.3 Study Area

Visakhapatnam is one of the smart cities of Andhra Pradesh and India. It was found that there were 8-night shelters in Visakhapatnam. Among them, 6-night shelters are meant for men, one night shelter caters to women, and one night shelter in Arilova provides shelter for both men and women. The shelters were located in Bheem Nagar, Allipuram, TSR Complex (2 shelters), near Collector's Office, Peda Waltair, Buchirajupalem, and Arilova. The available shelters can accommodate approximately 338 people. The present strength is 288 people which accounts for 85.2 per cent of occupancy. The number of men and women present in the shelters was 254 and 34, respectively. The men account for 75.1 per cent of the total occupants and women constitute 24.9 per cent. The Greater Visakhapatnam Municipal Corporation (GVMC) provided buildings to all night shelters in Visakhapatnam. All night shelters in Visakhapatnam are run by the Non-Governmental Organisations.

3.4 Research Design

A descriptive research design was formulated for the present study with a view to describe, compare, and analyse the perceptions of the staff working in the night shelters of Visakhapatnam.

3.5 Sample

Eight-night shelters were selected from Visakhapatnam city by adopting a purposive sampling method. The profile of the night shelters was prepared with the information provided by the staff of the night shelters and the observation of the researcher.

3.6 Data Collection

This study interacted with the staff of eight-night shelters and collected the facilities available in the night shelters through a structured schedule. The researcher also collected the major functions of the night shelters through a schedule. The observations of the researcher related to the functions and facilities available in the night shelters are also included in this study.

3.7 Data Collection and Analysis

The data were collected from eight-night shelters through a structured schedule and the data were analysed through Microsoft Excel 2007 version and SPSS 17th version.

Findings of the Study

4.1 Night Shelters in Visakhapatnam

The present study identified the available facilities in the night shelters of Visakhapatnam City. The following table presents information about the capacity and occupancy of night shelters in Visakhapatnam.

Table 1: Night Shelters in Visakhapatnam

| Sl. No | Name and Area of the Night Shelter | Meant for which Gender | Capacity | Occupancy | Occupancy by Women |
|--------|------------------------------------|------------------------|----------|-----------|--------------------|
| 1 | TSR Complex, Near Bus Stand | Male | 60 | 58 | - |
| 2 | TSR Complex, Near Bus Stand | Female | 30 | - | 25 |
| 3 | Nandan Kumar Road, Peda Waltair | Male | 20 | 17 | - |

| | | | | | |
|---|---------------------------------|-----------------|------------|------------|-----------|
| 4 | Government Hospital, Arilova | Male and Female | 40 | 19 | 9 |
| 5 | Bupesh Nagar, Railway Station | Male | 40 | 35 | - |
| 6 | Bheem Nagar, Allipuram | Male | 70 | 63 | - |
| 7 | Maharani Peta, Collector Office | Male | 50 | 39 | - |
| 8 | Buchirajupalem, N.S.T.L. Gate | Male | 28 | 23 | - |
| | Total | | 338 | 254 | 34 |

The data in the above table reveals that there are eight-night shelters available in Visakhapatnam city. Among them, six-night shelters are meant for men, one-night shelter caters to women, and one night shelter in Arilova provides shelter for both men and women. The total residents' capacity of the night shelters in Visakhapatnam city is 338 people. The present strength in the night shelters is 288 people which account for 85.2 per cent of occupancy rate. The number of men and women present in the shelters are 254 and 34 respectively. Men account for 75.1 per cent of the total occupants and women constitute 24.9 per cent.

The Greater Visakhapatnam Municipal Corporation (GVMC) provided buildings to all night shelters in Visakhapatnam. All the night shelters are run by the Non-Governmental Organisations.

4.2 Staff Members (Human Resource)

Staff members are the important resources to run any organisation like night shelters. They need more patience, counselling, and coordination skills to work with the residents of the night shelters. The following table presents information about the staff working in the night shelters.

Table 2: Night Shelters in Visakhapatnam

| # | Name and Area of the Night Shelter | Male Staff | Female Staff | Total |
|---|------------------------------------|------------|--------------|-----------|
| 1 | TSR Complex, Near Bus Stand | 03 | 03 | 06 |
| 2 | TSR Complex, Near Bus Stand | 03 | 03 | 06 |
| 3 | Nandan Kumar Road, Peda Waltair | 03 | -- | 03 |
| 4 | Government Hospital, Arilova | 02 | 02 | 04 |
| 5 | Bupesh Nagar, Railway Station | 03 | -- | 03 |
| 6 | Bheem Nagar, Allipuram | 04 | -- | 04 |
| 7 | Maharani Peta, Collector Office | 01 | 03 | 04 |
| 8 | Buchirajupalem, N.S.T.L. Gate | 01 | 02 | 03 |
| | Total | 20 | 13 | 33 |

The data in the above table reveals that there are 33 staff members working in the night shelters, out of which 20 are male and 13 are female, accounting 60 per cent and 40 per cent respectively. The majority of the staff working in the night shelters are caretakers, sweepers, and cleaners. The study found that the staffs working in the night shelters are not sufficient as per the guidelines formed by the Governments. It is also found that there are no counsellors and social workers in the night shelters.

4.3 Monitoring Committee

There is a committee for monitoring the activities of the night shelters in Visakhapatnam. The committee consists of a district collector and magistrate, local politicians, corporation staff, NGOs, social workers, and doctors. The committee comes to the night shelters occasionally and provides guidelines to the staff of the night shelters.

4.4 Procedure of Intake

There is a procedure to intake residents in the night shelters. According to orders of the Supreme Court of India, and the Government of India, the night shelters of Visakhapatnam have developed the following rules and guidelines for admitting homeless population in the night shelters.

- The person should be above 18 years of age
- The person should pay Rs.10/- for his admission
- The person should submit identity proof such as Aadhar card or Voter ID, driving license or any central government identification document etc.
- The person should handover two passport size photos to the night shelter
- The person should provide thumb impression (bio-metric system) at the night shelter
- Smoking, drinking alcohol, and drugs are not allowed in the night shelters. The staff may not allow anyone to drink alcohol in the night shelter
- Persons who have a mental illness should be admitted by the police
- Runaway people and missing people in railway stations and bus stands should be admitted with the help of police only

4.5 Type of Buildings

The study found that 7 night shelters are being run in pucca buildings and one night shelter is being run in an asbestos roofed house. The night shelter with an asbestos roof is in Arilova which is 15 kilometres away from the town.

4.6 Ventilation in Night Shelters

The study observed that the night shelters have proper ventilation. The study found that 4 night shelter are on the first floor of the buildings. Remaining 4 night shelters are in the ground floor. The ventilation is good for the first floor and ground floor buildings. Each shelter has sufficient number of windows. Each night shelter has 6 to 10 fans. All are in working condition. The study found that the system of ventilation in the night shelters is good.

4.7 Water (Potable drinking water and other needs) and Sanitation

Water is a basic need for every human being. Contaminated water leads to health problems. Water is used for drinking, preparing food, bathing, washing clothes and dishes, brushing teeth and watering gardens, etc. The study found that all the night shelters are have decent water facilities. GVMC is providing free water to all the night shelters.

4.8 Lighting and Electricity

About 100 per cent of the night shelters have electricity. Their electricity bills are paid by GVMC. There are sufficient number of tube lights in the night shelters.

4.9 Pest and Vector (mosquito) Control

Occasionally the GVMC undertakes pest control measures to kill mosquitoes. But it is very rare. They apply pest control treatments once in three months.

4.10 Regular Cleaning of Blankets, Mattresses, Sheets and Other Services

Cleaning of blankets and bed sheets are important because these may carry forward the infections, virus, and bacteria. The staff of the night shelters change the bed sheets once every three days. The residents of the shelters wash their clothes and bed sheets regularly inside the premises.

4.11 Telephone Facility

The night shelters need telephone facility. The people staying in the night shelters are poor. Many people in the night shelters may not have mobile phones. They depend on the common telephone available in the night shelters. The study found that 100 per cent of the night shelters have telephone connectivity. They display the telephone number on a wallboard. The residents who don't have a mobile phone, use the landline number to make and receive calls from their relatives and friends.

4.12 Newspaper and Magazines

The study found that none of the night shelters have library facility. But all the night shelters have newspapers. When the residents have free time they go and read the newspaper in the front room of the night shelter.

4.13 Personal Lockers

Personal lockers are important for the residents of the night shelters because they have no place to store their belongings and savings. The study found that all the night shelters provide personal lockers to the residents. They provide an aluminium cupboard and locker to each resident. They store all their belongings in that box and keep it near to their beds. All the night shelters provide personal boxes and locks to the residents.

4.14 Hygiene in Night Shelters

Maintenance of hygiene in the night shelters is important. The staff of the night shelters regularly educate the residents about the importance of hygiene. They also monitor the cleanliness of the bathrooms and the dormitories of the night shelters.

4.15 Serving Food in the Night Shelters

The people who live in the night shelters are deprived of food, because they are poor and homeless people. The study found that 100 per cent of the night shelters in Visakhapatnam are providing one-time food, i.e. dinner to the residents of the night shelters with support from the Akshaya Patra Foundation. It is a free service by the Akshaya Patra Foundation. The employees stated that the majority of the residents go to work during the day and come back in the evening. The Greater Visakhapatnam Municipal Corporation mobilised the Akshaya Patra Foundation to provide dinner free of cost. Sometimes, donors offer special food, which is an unexpected food provision for the residents of night shelters.

4.16 Documentation in the Night Shelters

Registers and documentation are important for the night shelters. The study found that 100 per cent of the night shelters are maintaining registers. The documentation is almost the same in all night shelters. There is a movement register in the reception with the in-out information of the residents. Some records like stock register, admission register, and financial register are also present in the night shelters. The NGOs are responsible for the documentation.

4.17 Biometric System in the Night Shelters

A biometric system is a technological system to identify a person's attendance. All the night shelters in Visakhapatnam take attendance through the biometric system. The residents use the biometric machine when they are going out and when they return back to the night shelters.

4.18 Sanitation

It is a primary duty of the night shelters to provide sufficient water and sanitation facilities to the residents of the night shelters. Toilet facility is available in all the night shelters. The study found that 50 per cent of the toilets in the night shelters are not in good condition. The night shelters have separate bathrooms for bathing and separate space for washing clothes. Each resident washes their own clothes. Overall, the water facility and sanitation in the night shelters are good. The majority of the respondents stated that cleaning operation is not regular in the night shelters. There is only one staff member for cleaning a night shelter. They clean the night shelters twice a week.

4.19 Connectivity of the Night Shelters

Connectivity to bus stands, hospitals, railway stations are necessary for the dwellers of the night shelters. The study found that the night shelters in the TSR complex and Bheem Nagar are very close to the railway station and bus stand. The night shelters run by the Indian Red Cross, Butta Summanna and Appalaswamy are very near to a government hospital at china Walter and King George Hospital (KGH). The night shelter in Arilova named Amma Nanna night shelter is far from Visakhapatnam. All the night shelters are very near to places of worship. Some of the residents visit places of worship for prayers.

4.20 Adequate Fire Protection Measures

The study observed that no night shelter is following fire protection measures. It is alarming. In a few night shelters, the access road is narrow. A fire engine may not be able to reach them.

4.21 First Aid Kit

A first aid kit has medical equipment that is used to give immediate medical treatment. It is found that no night shelter has a first aid kit. The residents should take care of their health and first aid. They go to the nearby medical stores and doctors for treatment.

4.22 Health Care Facility

The study found that no night shelter is providing health care facilities to the residents of night shelters. They go to the government hospitals when they have a health problem. They access free health care facilities in government hospitals.

4.23 Availability of Security Guards

A security guard is someone whose job is to protect a building and the residents from thieves and anti-social elements. There is a requirement of security guard for every night shelter. The study found that no night shelter has appointed any security guards.

4.24 Complaint Box in Night Shelters

A complaint box is a democratic tool to file a complaint. Every night shelter should keep a complaint box and these boxes should be opened once a week. The study found that none of the night shelters are not keeping complaint boxes.

4.25 Display of Emergency Phone Numbers

The Government of India suggests displaying emergency phone numbers like the numbers of hospitals, police stations, medical shops, and lawyers in the night shelters and public places. The study found that none of the night shelters display emergency phone numbers.

4.26 Common Kitchen, Cooking Space, Necessary Utensils for Cooking and Serving, Cooking Gas Connections

The night shelters in Visakhapatnam do not have kitchen equipments, utensils, because no night shelters provide cooked food to the residents. Akshaya Patra Foundation is providing dinner. They bring the food, serve the residents, and take back the remaining food and vessels to Akshaya Patra Foundation.

4.27 Field Work by the Staff of Night Shelters

The staff of the night shelters do field work once a week. The GVMC gave an operational area to each night shelter. The staff of the night shelters visit that place during night and identify people who don't have shelter and encourage them to access the services of the night shelters. If they agree, the staff informs the police, and through the police, the shelterless people are admitted into the night shelters. Sometimes the police also refer the homeless

population to shelter homes. It is a regular activity of the staff of the night shelters.

4.28 Distribution of IEC material

The staffs of the night shelters distribute pamphlets and brochures during field visits with information about the services of the night shelters.

4.29 Staying Period in Night Shelters

The study found that the maximum stay period in night shelters is 3 months only. After that, the residents need to vacate the night shelters. Sometimes the residents of the night shelters leave and re-join the same night shelter after a few days due to lack of shelter.

Suggestions

- Separate Toll-Free Numbers of the night shelters should be available and displayed at public places in Andhra Pradesh. It may help the shelterless people to reach the night shelters. It may reduce trafficking and other exploitations.
- Lists of the names and addresses of the night shelters should be put up at bus stations, railway stations, police stations, government hospitals, and other public places. It helps the needy people to access the services of a night shelter in a particular town.
- The night shelters should be accessible to ambulances, fire engines, and other vehicles. The night shelters should have at least 30 feet access roads.
- The night shelters should be equipped with 24x7 water supply, electricity, generator, and fire safety.
- The night shelters should be friendly to the elderly. Western commodes should be available in the night shelters. A majority of the residents of night shelters are aged people.
- Emergency contact numbers and addresses of hospitals, fire engines, and police stations should be displayed in the notice boards of the night shelters. It helps the residents to contact these services based on their requirements.
- The study suggests that more cleaning staff are required at the night shelters to maintain hygiene.
- Every night shelter should recruit a security guard for night time.
- Separate night shelters should be built for males and females. It is found that two-night shelters are running for both men and women in the same building, but the rooms are different. There should be separate buildings.

- Complaint boxes should be available on the premises of night shelters.
- Health check-ups should be done in the night shelters by medical practitioners and doctors who provide treatment voluntarily. The staff of the night shelters should encourage doctors to provide free services at the night shelters.
- First aid boxes should be available at the night shelters and capacity building on first aid treatment should be provided to the staff.

Conclusion

Night shelters provide support to the shelterless people in India. During Covid-19, the government rehabilitated many shelterless people to night shelters and provided care. This research found that the procedure of intake to the night shelters is the same in all the night shelters of Andhra Pradesh. They follow the rules and regulations of the Government of India. Overall, the functioning and facilities of the night shelters are good except fire safety and food. All the night shelters have fixed biometric machines to monitor the attendance of residents. There is a shortage of staff in the night shelters. If the government recruits adequate staff members, management of the night shelters will be more effective in Andhra Pradesh. The government should build more night shelters as per the Supreme Court order. Counsellors and social workers should be recruited to promote quality services to the residents of the night shelters.

Notes

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How Protected are the Refugees: A Comparative Study of the Contemporary States of Germany and India in Light of the Geneva Convention, 1951

By

Kusumika Ghosh*

The Beginning

The Realist School of thought in International Relations understands the world in terms of the nation-state being driven by its power-politics, alternatively known as its 'national interest'. Here, the state reigns supreme - and retains all power to articulate 'law' and 'rights'. This approach leaves one to wonder, what happens to people who do not belong to a state, or had to leave their nation-state? What law protects them, and what rights do they have? Human rights law emerges as one of the answers to these questions - where all human beings are entitled to some fundamental rights simply because they exist, without the necessity of having the membership of a nation state.

The world's experience with human rights and refugee rights found the most concrete articulation after World War II. Hitler's Germany was defeated by the Allied powers in 1945, ending a racist, genocidal regime that remains one of the darkest blotches on human history. Nazism was shunned by the world, but that did not solve the problem of millions of Jews and other persecuted communities who had to flee German-occupied Europe and seek shelter in other states. To tackle the problem of displaced Europeans, the Geneva Convention was conceived by the United Nations High Commission for Refugees (UNHCR) and has been the bedrock of refugee rights since its inception. The fundamental understanding of who is a refugee, however, came out of Nazi Germany to protect the people who fled the genocide in Hitler's regime in the 1930s and 40s. This left a curious gap for others who

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encountered similar situations in different places, under vastly different circumstances. This shortcoming of the Convention was addressed in its 1967 Protocol, which sought to amend the invisibilisation of the refugee crises that were triggered across erstwhile European colonies after 1945, when colonialism proved too expensive for war-ravaged economies in the continent. Decolonisation was not a blanket experience, but had specific implications for each region that liberated itself from European exploitation. South Asia, for example, recorded the largest number of displaced people in the world when India and Pakistan were partitioned before they could gain sovereignty from British rule. While human rights were meant to safeguard all, human rights law proved a tad too ambiguous to address the specific concerns of this group of people it identified as refugees.

Originally, the relationship between human rights law and refugee law has been approached as a causal link, the violations of human rights being acknowledged as the primary cause of refugee movements. Since then, the conceptualisation of their interrelationship has gradually shifted from a preventive approach to an interactive one. This new impetus has mainly focused on the specific linkages between human rights standards and the distinctive tenets of international refugee law, such as the definition of 'refugee' and the principle of *non-refoulement*. More recently, this interactive approach has finally paved the way for a more integrative one, which concentrates on the complementary protection to the refugee status under the 1951 UN Convention Relating to the Status of Refugees (Geneva Convention)¹

Vincent Chetail (2014) goes on to write that while this evolution largely echoes the practice and concerns of states, the abundant literature devoted to the interaction between human rights law and refugee law calls for two preliminary remarks. On the one hand, academic discussions remain very specific and refugee law-oriented, to the detriment of a more systemic analysis. On the other hand, they are grounded on the premise that the Geneva Convention is a 'specialist human rights treaty'.² This assertion is generally accompanied by a poignant celebration of the Refugee Convention as opposed to the alleged drawbacks of general human rights treaties. For the community of refugee lawyers, the 'other' human rights instruments would be based on 'inappropriate assumptions' and would 'not address many refugee-specific concerns.'

A discursive analysis of the relationship between human rights law and refugee law is beyond the scope of this paper, but the background is necessary for the argument it makes: that being a signatory to an integrative (of human rights law and refugee law) treaty like the Geneva Convention of 1951 and then seeking necessary amendments than operating on an ad hoc basis offers more protection to refugees against exploitation and torture.

A Polarised Globe

In the 1980s, the 'Brandt Line' was developed as a way of showing how the world was.

According to this model:

- Richer countries are almost all located in the Northern Hemisphere, with the exception of Australia and New Zealand.
- Poorer countries are mostly located in tropical regions and in the Southern Hemisphere.

This has its due limitations, given the world today is much more complex than the Brandt Line depicts. Many poorer countries have experienced significant economic and social development. However, inequality within countries has also been growing and some commentators now talk of a 'Global North' and a 'Global South' referring respectively to richer or poorer communities which are found both within and between countries. For example, whilst India is still home to the largest concentration of poor people in a single nation, it also has a very sizable middle class and a very rich elite.³

While acknowledging the intersectionalities, the countries of Germany and India check several boxes in the opposite direction on development indices. This comparative study bases itself in these two countries for the following reasons:

- Their respective membership of the Global South and the Global North; their experiences with partition of territories – Germany was split into East and West and later reunited; the Indian subcontinent was divided into India, Myanmar and Pakistan, later bifurcated to create Bangladesh.
- Germany's anti-Semitic history and India's experience with religious pogroms since the Partition of 1947.
- Finally, the differences of execution of the protection regime as experienced in a signatory of the Geneva Convention (Germany) and another that has not signed and ratified the Geneva Convention (India).
- Economically, India was projected as Germany's contender for the third position in the world economy in December 2019. It might be of interest to note that Germany has been a welfare state longer than India has been independent of colonisation. To disengage from the history of colonisation in a comparative study on two states on the opposite sides of the spectrum of colonialism is to erase the structural conditions that have shaped these economies. Thus, we acknowledge the different starting points, and are approaching our research questions from this vantage point.

History of Partition

In the mid-20th Century, following the conclusion of World War II, the non-European world began experiencing a process of rapid decolonisation. Colonialism proved too expensive to maintain for the war-ravaged European economies. In August 1947, the Indian subcontinent was granted sovereignty by the British colonists, but not before carving out two separate states, for the 'two nations'. In popular usage, the term 'Partition of India' does not cover the earlier separation of Burma and Ceylon from the subcontinent. It only refers to the creation of India and Pakistan. The heavily populated provinces of Punjab and Bengal were divided to create Pakistan in the north and its eastern extension, referred to as the erstwhile East Pakistan. The UNHCR estimated that almost 14 million people were displaced in an extremely violent manner as a result. The Indian subcontinent's Partition of 1947 violently displaced millions of people across newly imposed cartographic lines dividing the provinces of Bengal and Punjab. It is marked with an unprecedented mass migration and a massive human rights disaster that exploded in the form of the riots between Hindus and Muslims on either side of the new borders dividing India and Pakistan.

It may be estimated that about five and half million people travelled each way across the new India-Pakistan border in Punjab. In addition about 400,000 Hindus migrated from Sind and well over a million moved from East Pakistan to West Bengal. As a matter of fact the partition related displacement and migratory flow had started a year before the partition, i.e., on August 6, 1946 the 'Direct Action' day declared by the Muslim League. But on partition, the migration had to be managed by the state, as it was no more migration but evacuation. The state estimated that about 25 lakh Muslims and 20lakh Hindus had to be evacuated from the two countries.⁴

It might be useful to note from this introductory stage that while the Partition of 1947 of the Indian subcontinent was on the basis of religion, its implications were and continue to be extremely intersectional in nature. Among others, class and gender within class have played decisive roles in the nature of Partition-induced displacement and resettlement, as I have derived from a previous research.

The end of World War II implied not only decolonisation of several European colonies in Asia, Africa and Latin America, but also the start of the Cold War era. Prior to the conclusion of the War, the USA and the USSR had combined their forces under the Allied Powers. The Allies went on to defeat the Axis Powers, of who Hitler's Germany was a part. Germany's defeat in the War ended the Nazi grasp on its existence, but also got it divided into four portions of territorial control where France, Britain and United States occupied the western regions while the USSR took over the east. A divided Germany thus coincided with the world splitting into two blocs of power, one led by the erstwhile Soviet Union with communist politics/economics and another by the United States of America, championing free market economy

with neo-liberal politics. Thus, Germany's bifurcation signalled not only different territorial control, but also ideological affiliation. West Germany, or the Federal Republic of Germany, was officially established in May 1949 and East Germany, or the German Democratic Republic, was established in October 1949. Under their occupying governments, the two Germanys followed very different paths. "West Germany was allied with the USA, the UK and France and became a western capitalist country with a market economy. In contrast, East Germany was allied to the Soviet Union and fell under highly centralised communist rule."⁵

The partition of Germany was not the product of a unilateral policy by one power, still less of one clear-cut decision, but of a gradual historical process. The policies which led to it emerged from a series of pragmatic responses to changing circumstances, and the American role in this process was by no means confined to reacting to Soviet initiatives. Subsequent manifestations of Soviet assertiveness tend to obscure the extent to which, initially, the Soviet Union exhibited both caution and willingness to collaborate with the other victors in implementing the wartime decisions in Germany. In 1945-6, relations between American and Russian officials were in fact reasonably harmonious and co-operative. The real villains in American eyes during this period were not the Russians but the French, who obstructed the creation of a central administration in their determination to dismember Germany.⁶

India and Germany's experiences with hosting refugee populations thus go back to the history of their formation (and re-formation). This paper, however, limits itself to the two of the most destructive wars and the displacement induced as a result: the Syrian War and the systematic genocidal attack on the Rohingya people in Myanmar. Both triggered an enormous outflow of persecuted people from these countries since 2015, who scattered to different parts of the world for asylum. In this paper, the focus will remain on India and Germany as hosts to the Rohingya and the Syrian refugees, respectively, from 2015 – 2017.

The Geneva Convention of 1951

The need for a global contract to protect the people displaced by the aftermath of colonialism and World War II was felt by the United Nations. It culminated in the Refugee Convention of 1951, also known as the Geneva Convention. "The Geneva Convention on the Status of Refugees is central to scholarship on refugee and asylum issues. It is the primary basis upon which asylum seekers make their claims to the majority of host states today and, as a key text of the human rights framework, has come to be associated with the very idea of a universalised rights-bearing human being."⁷ It contains a number of rights and also highlights the obligations of refugees towards their host country. The cornerstone of the 1951 Convention is the principle of non-refoulement contained in Article 33. According to this principle, a refugee should not be returned to a country where he or she faces serious threats to

his or her life or freedom. This protection may not be claimed by refugees who are reasonably regarded as a danger to the security of the country or, having been convicted of a particularly serious crime, are considered a danger to the community. It also protects the refugees against persecution for illegal entry into contracted states and expulsion, and guarantees rights to education, work, housing, freedom and public assistance.

Some basic rights, including the right to be protected from refoulement, apply to all refugees. A refugee becomes entitled to other rights the longer they remain in the host country, which is based on the recognition that the longer they remain as refugees, the more rights they need. However, it concerns itself with persons who became refugees due to events occurring in Europe before 1 January 1951, and turns a blind eye to the nuances of gender, regional politics and intersectionalities.

The refugee regime, built on the 1951 Convention relating to the Status of Refugees, has long excluded women from the international right to protection from persecution. The gender-blind parameters of the Convention have been exacerbated by the same qualities in the international legal system of which it is a part; state practices toward asylum-seekers; and the dichotomous construction of the refugee regime as a whole, which has produced and reproduced victimizing identities of refugee women.⁸

These limits thus laid the foundation for exclusion, which could not be entirely undone even with its 1967 Protocol.

When ratifying (becoming a party to) the (1951) Convention, countries could choose to restrict its application even further so that it applied only to refugees displaced by events within Europe before 1 January 1951. After 1951, new refugee situations arose, and these new refugees did not fall within the scope of the Refugee Convention. This protection gap led governments to create the 1967 Protocol, because they considered it ‘desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention, irrespective of the dateline of 1 January 1951’ (Protocol Preamble).⁹

Mitigation with the 1967 Protocol

The 1967 Protocol removed the Refugee Convention’s temporal and geographical restrictions so that the Convention applied universally. Article 1 of the Protocol says that countries that ratify it agree to abide by the Refugee Convention as well, even if they are not a party to it. For instance, the United States has not ratified the Refugee Convention but it has ratified the 1967 Protocol. This means that it is bound to apply the Convention’s provisions, which commit it to treating refugees in accordance with internationally recognised legal and humanitarian standards. These include respecting the principle of non-refoulement – that is, not sending refugees to a place where they are at risk of persecution, or to a country which might send them to such a place; providing refugees with a legal status, including rights such as access

to employment, education and social security; and not punishing refugees for entering 'illegally' that is, without a passport or visa.

The effect of the Protocol means that the Refugee Convention now applies universally amongst those States which have adopted the Protocol. The only exceptions are in Turkey, which expressly maintains the geographical restriction; Madagascar, which maintains the geographical restriction and has not adopted the Protocol; and Saint Kitts and Nevis, which has not adopted the Protocol. Against the background of the aforementioned history, geography and politics, this paper will now explore the protection offered to Rohingya refugees in India and Syrian refugees in Germany, drawing on their experiences from 2015 to 2017.

India and the Refugee Convention of 1951

India hosts a number of different communities fleeing persecution from political and religious violence.

India is home to diverse groups of refugees, ranging from Buddhist Chakmas from the Chittagong Hill Tracts of Bangladesh, to Bhutanese from Nepal, Muslim Rohingyas from Myanmar and small populations from Somalia, Sudan and other sub Saharan African countries. According to the UNHCR, there were 204,600 refugees, asylum seekers and "others of concern" in India in 2011. They were made up of 13,200 people from Afghanistan, 16,300 from Myanmar, 2,100 from various other countries and the two older populations of around 100,000 Tibetans and 73,000 Sri Lankan Tamils. The UNHCR financially assisted 31,600 of them.¹⁰

However, it has no defined legal framework stating the entitlements of refugees seeking asylum in the country. The refugees are considered under the Foreigners Act of 1946 and the Passport Act of 1967, both of which define a person with a non-Indian nationality as a "foreigner, independent of his/her specific legal status." This refusal to acknowledge the category of 'refugee' in India's domestic law creates a vacuum that can have dangerous implications. In clubbing together the political categories of migrants and refugees under the umbrella term of 'foreigners', it glosses over the different degrees of protection and assistance required by the two. With no domestic law in place to ensure systematic and equal treatment to them, refugees, migrants and asylum seekers in India cannot seek the rights guaranteed by the 1951 Convention either, given India is not a signatory to it. Despite the absence of a legal framework, its history with refugees dates back to its decolonisation. The Partition of the subcontinent in 1947 witnessed one of the largest and brutal population exchanges in the world. It had violently displaced millions of people across the divided provinces of Bengal and Punjab, created communal abrasion that is still felt in the country, and paved the way to problematic equations between the indigenous and the immigrant, characterising the politics of Northeast India till date.

The United Nations' 1951 Refugee Convention, the only refugee instrument that existed at the time, had been created to accord protection to people displaced in the aftermath of World War II. The Convention's Euro-centric nature was clear in its limitations - it was applicable to the events occurring in "Europe or elsewhere before 1 January 1951" and gave refugee status to someone "who has lost the protection of their state of origin or nationality." This essentially meant that the 1951 Convention, in its original form, was only applicable to people who had fled a state-sponsored (or state-supported) persecution.¹¹

While the Partition was on the basis of religion, its implications were and continue to be extremely intersectional in nature. Among others, class and gender within class have played decisive roles in the nature of Partition-induced displacement and resettlement, as I have derived from my Master's dissertation research on women who were displaced by the Partition of 1947 on the Bengal border. What it could not be classified as, however, was 'state sponsored persecution'. South Asian experiences with decolonisation and state-making did not find space within the Refugee Convention of 1951. Thus, the Partition and the forced displacement it had induced in 1947, while within the Convention's timeline, did not fall into the category defined in it. People who had to leave their homeland, were forced to do so due to socio-religious, perhaps even socio-economic persecution instead of 'state-sponsored persecution' or 'war on the civilians by the state'. Most importantly, as Manuvie (2019) opines in her article, "the subsequent concerns of both India and Pakistan to attribute a more liberal meaning to the term 'refugee' in order to include internally displaced people or those displaced due to social rifts were rejected at the international level.¹² This created an overall scepticism towards the 1951 Refugee Convention." India under Jawaharlal Nehru did not sign the 1951 Convention and its 1967 Protocol for the fear of international interference in what it has considered its "internal affairs", as well as the fear of international criticism should it fail to provide the minimum living/housing conditions to refugees in its territory, as per the treaties. Thus, it continues to follow the ad hoc policy of administering issues around protection of refugees that it had adopted at its independence. This is a grave cause of concern, especially when considered with the newly passed Citizenship Amendment Act, 2019 that bases naturalisation of non-citizens on religious grounds. Interestingly, it does not concern itself with Myanmar and thereby bypasses any possibility of bringing the Rohingya refugees under its purview.

The Rohingya are an ethnic group, the majority of whom are Muslims. To escape persecution in Myanmar, hundreds of thousands of Rohingya have been fleeing to other countries for refuge since the 1970s. The largest migrations of this community took place in 2016 and 2017, when episodes of brutal suppression by the security forces of Myanmar caused more than 723,000 Rohingya to seek refuge in neighbouring countries. While the vast majority of the Rohingya that fled Myanmar are in Bangladesh, there are an estimated 18,000 Rohingya asylum seekers and refugees registered with

UNHCR in India. There are two main patterns of Rohingya migration to India: from Bangladesh westward to the state of West Bengal in India and northeast to the Indian states of Mizoram and Meghalaya. On both of these routes, the Rohingya are vulnerable to exploitation due to their lack of official identification documents, their inability to speak local languages and their lack of financial means.¹³

According to UNHCR's *Global Focus* Report on India, the "protection environment in India remained positive" in 2015 with 4,200 refugees having their stay regularized, following the issuance of long-term visas which provide access to employment opportunities. Refugees and asylum-seekers continued to enjoy access to Government services, including health and education. However, the detention of people of concern to UNHCR – mostly of Rohingya asylum-seekers in border areas – continued to be reported and it complained of inaccessibility of the detained people. The 2016 report contained the same clause of concern:

In 2016, India hosted over 33,800 refugees and asylum-seekers registered with UNHCR, with the vast majority coming from Afghanistan and Myanmar, as well as smaller numbers from the Middle East and Africa. The number of new arrivals reached 7,100, an increase by 9.5 per cent compared to 2015. Afghans constituted the largest group of new arrivals (3,859) followed by Myanmarese (2,178). 69 Afghans repatriated voluntarily in 2016, a similar number as compared to 2015 (UNHCR).

Interestingly, the same report notes the figure on voluntary repatriation of Sri Lankan refugees, which increased from 452 to 852 compared to 2015. However, the alarm is actually raised in its report of 2017.

The traditionally generous protection environment in India became constrained in 2017, impacting refugees' access to documentation and basic services, as well as the right to seek asylum. Increased incidents of harassment and evictions, particularly of Rohingya refugees, were reported. UNHCR initiated contingency plans to assist people of concern to relocate from areas of tension or risk, and to intervene immediately in the event of possible deportation or *refoulement* (UNHCR).

Non-Refoulement is a key principle enshrined in the Refugee Convention of 1951. Following from the right to seek and to enjoy in other countries asylum from persecution, as set forth in Article 14 of the Universal Declaration of Human Rights, this principle reflects the commitment of the international community to ensure to all persons the enjoyment of human rights, including the rights to life, to freedom from torture or cruel, inhuman or degrading treatment or punishment, and to liberty and security of person. These and other rights are threatened when a refugee is returned to persecution or danger. This is an important indicator of the lacuna created in the absence of a monitoring framework.¹⁴

Rohingya Refugees in India

The Rohingyas are a minority ethnic group inhabiting the Rakhine state in Myanmar who subscribe to Sufi-infused Sunni Islam. The Union Citizenship Act, 1948, which defines the ethnicities eligible for citizenship was passed shortly after Myanmar (then Burma) got independence from the British. Under this Act, Rohingyas who had settled in Myanmar for two generations or more were allowed to apply for identity cards. But after the military coup in 1962, all citizens were required to obtain national registration cards and the Rohingyas were only issued with foreign identity cards, which drastically limited their educational and jobs opportunities. The new citizenship law formulated in 1982 came as a big blow to the already discriminated Rohingyas as it rendered them completely stateless by denying them the recognition as being one of Myanmar's ethnic groups. Owing to the restrictions by the Myanmar government, many of them pursue fundamental Islamic studies in mosques and religious schools present in most villages. They are distinct to the other communities residing in Myanmar through their physical features and dialect. The Buddhists of Myanmar use the loaded term 'Bengali' to address the community, denying their roots in the country.

The Rohingya, described by the UN as the world's most persecuted people, have faced heightened fears of attack since dozens were killed in communal violence in 2012. According to Amnesty International, more than 750,000 Rohingya refugees, mostly women and children, fled Myanmar and crossed into Bangladesh after Myanmar forces launched a crackdown on the minority Muslim community in August 2017, pushing the number of persecuted people in Bangladesh above 1.2 million.

Al Jazeera has reportedly compared the Indian government's stance with that of Myanmar, which has brutalised the Rohingya people in the first place. In January 2019, 31 refugees – including 16 children and 6 women – were left stranded in the barren “no man's land” along the India-Bangladesh border for four days after Bangladesh denied them entry and the two nations failed to agree on what to do with them. Eventually, India arrested the group on January 22.¹⁵

Germany and the Refugee Convention of 1951

In comparison, Germany has displayed a relatively consistent attitude to refugees and asylum seekers after the Nazi dictatorship was uprooted and replaced with a democratic government. Its citizenship and asylum laws are based on the experiences of German emigrants, who, on the run from the Nazis, became dependent on a country that had taken them in as refugees. A new article (article 16) was added to the Federal Republic's Basic Law (*Grundgesetz*) in 1948–49 stating: "Politically persecuted persons have the right of asylum." With this, the Federal Republic of Germany is obliged to grant a right of residence to the politically persecuted. The second legal basis for the asylum policy of the Federal Republic of Germany is the Geneva Convention of 1951.

Article 16 of German Basic Law – its constitution – provides the right to asylum for those fleeing political persecution, and Article 116 provides the right to citizenship for people with German heritage from Eastern Europe suffering from persecution. Because these constitutional rights thereby limit the scope of electoral politics on this issue, a ‘liberal’ asylum policy remained mostly intact during occasional asylum crises. In the 1980s, for example, Germany devised ad hoc administrative solutions such as requiring entry visas for certain asylum seekers or prohibiting asylum applicants from working upon arrival. Only in the early 1990s, following reunification, did Germany modify its asylum law, when unprecedented numbers of ethnic Germans sought entry from Eastern Europe and refugees were fleeing the Balkan wars. Specifically, a constitutional amendment removed the right to asylum for those who entered from a ‘safe third country’ or a ‘non-persecuting’ state.¹⁶

In 2015, the migrant crisis in the world had peaked with the Syrian refugees becoming the most vulnerable group of asylum seekers. Under Chancellor Angela Merkel, Germany adopted an open door policy for the Syrians and displayed a welcoming stance for immigrants in general. Before 2015 ended, the country took in a massive one million applications for asylum, of whom Syrians constituted the majority.¹⁷ Syrians make up the largest group of arrivals, followed by Afghans, Iraqis, Iranians, Eritreans and Albanians. Chancellor Angela Merkel has been criticised for her decision to open Germany's border to refugees during the height of the crisis, as thousands drowned in treacherous boat crossings over the Mediterranean and Aegean seas.

“Merkel’s decision to welcome Syrian refugees had won her praise but also sparked a backlash, with some senior ministers openly questioning the approach and her usually-high poll ratings slipping several points.”¹⁸ The hostility is primarily justified on grounds of security, right-wing groups have blamed the welcoming policy for terror attacks carried out by migrants and refugees, including the massacre at a Christmas market in Berlin. It raised the alarm for a review of Germany’s national security and made the Chancellor promise a “national effort” to ensure that people who are not entitled to stay go home following revelations of attempts to deport ISIS supporter Anis Amri had failed months before he committed the Berlin attack.¹⁹

‘I understand that many of us are feeling insecure at the moment’, said German Interior Minister Thomas de Maiziere at a news conference in July 2016, before announcing his order of greater police presence across the country. The minister’s statement came after a series of deadly attacks in a week – three of them involving refugees as alleged perpetrators – heightened public anxiety. Anti-immigrant sentiments and scepticism over the government’s handling of the refugee crisis had already spiked since reports of mass sexual assaults and thefts during the 2015 New Year’s Eve celebrations in Cologne claimed perpetrators to be foreign nationals. While more and more people demanded stricter limits on migration politically

motivated crimes against asylum seekers increased sixteen times from 2013 to 2015 (Amnesty International, 2016). Tapping into these anxieties, a new anti-immigrant party, the Alternative für Deutschland (AfD) grew rapidly, gaining seats in 13 (out of 16) Länder since its founding in 2013.²⁰

The scepticism towards accepting migrants and refugees in Western Europe has manifested in deadly implications for the asylum seekers. The number of asylum seekers arriving in Germany plummeted by more than 600,000 in 2016, government figures show.

The number of refugees arriving in Europe dropped dramatically last year after the EU struck a controversial deal with Turkey aiming to prevent crossings over the Aegean Sea, by detaining anyone arriving on Greek islands under the threat of deportation. That had been the main route for the vast majority of migrants reaching Germany after journeying through Balkans countries to reach Western Europe. Border closures and security crackdowns along the route have since left thousands of people trapped in squalid camps, with at least three asylum seekers dying in sub-zero temperatures in recent days. Despite the fall in numbers, 2016 was the deadliest ever year for refugees, after the EU-Turkey deal made the main route revert to the far wider and more treacherous Central Mediterranean Sea. More than 5,000 asylum seekers died in sea crossings, either by drowning, fuel inhalation or suffocation in overcrowded and unseaworthy boats.²¹

Germany's relationship with the Refugee Convention of 1951 is therefore more established as a signatory, supported by a domestic legal framework of providing asylum. However, in a comparative study with India, its geo-political location has to be taken into account, considering Germany is central to European history and is therefore well placed in the context of the Convention.

To Sign or Not to Sign

Although not an exhaustive list, the experiences discussed above point to the fact that refugees, migrants and stateless people are more likely to face persecution in the absence of a universal framework of protection. The Geneva Convention, its 1967 Protocol and the newer instrument called the Global Compact are all efforts in that direction. When the asylum-provider installs an ad hoc mechanism, as demonstrated by India, instead of ratifying an international treaty, it exposes the already vulnerable refugee population to further risks. The Global Compact seeks to correct the exclusionary tenets of the older treaties, and India is proactive in its formulation. Perhaps, it will lay the foundation for a universal framework on what refugees are entitled to in India, as in other countries.

Notes

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Exploring Differential Inclusion and Exclusion in Migration Studies: Definitions, Theories and Evidence from the Field

By

Reha Atakan Cetin *

Introduction

Throughout history, nation-states have been a major factor in determining who is to be included and who is to be excluded from the practices of assimilation and social cohesion of immigrants, refugees, and asylum seekers. The inclusionary and exclusionary policies and strategies of the immigrant-receiving nation-states are being designed and implemented in accordance with several intersectional interventions that emerge on the basis of race, gender, sexualities, immigrant status, as well as religious affinities of the foreign population residing in the host communities. With this background, in this review, I will critically examine the existing literature that engages with the concepts of differential inclusion and exclusion. While special attention will be given to the thematic and theoretical discussions, empirical studies will also be evaluated with respect to the contemporary scholarly debates on these concepts.

This review has the following structure: First, by referring to the key scholars in migration studies, I aim to provide a comprehensive definition of the concepts of differential inclusion and exclusion, along with an evaluation of similar concepts that inform related scholarly discussions. Second, by comparing and contrasting the concepts, areas, and themes, I will examine the ways in which scholars contribute to the theoretical development of these concepts. Third, I will examine several empirical studies under the light of such theoretical approaches and frameworks expanded by various scholars. Considering all these critical analyses as a whole, I will conclude the review by

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outlining existing gaps and limitations in the literature and provide suggestions for future research.

Key Definitions & Theoretical Dimensions

Being situated within a broad and complex genealogical category, differential inclusion has its genealogical roots in migration research, feminist thought, and antiracist studies.¹ In the context of migration, the concept refers to the ways in which inclusion, in society or in a specific sphere, involves varying degrees of subordination, exploitation, discrimination, racism, and segmentation.² Within migration studies, its focus has mostly been on “the effects of negotiations between governmental practices, sovereign gestures, the social relation of capital, and the subjective actions and desires of migrants.”³ These definitions serve a more comprehensive and nuanced approach in order to analyse better the existing migration regimes that sometimes operate beyond the binary categories of legality/illegality since, under this selective and differential process, governmental and political actors complicate the matrix of (il)legality.⁴

Differential exclusion, on the other hand, differs from the above-mentioned inclusionary practices, policies, and strategies. As Castles suggests, it refers to a double process in which, immigrants are incorporated into national/domestic socioeconomic processes, such as the labour market. In contrast, the same immigrant communities are excluded from other national spheres, concerning mostly the welfare and citizenship practices and policies.⁵ In terms of its strengths and practical applications, the emergence of the concept of differential exclusion within the literature has been a result of policies of inclusion and incorporation in which there occurs refinements and rearrangements in the implications that vary across national models. Having been conceptualising the migrant admission as a ‘temporary expedient’ and considering the national policies as disciplining strategies,⁶ differential exclusion has been mostly used to describe an immigration policy model which has been followed by mostly Western European countries, including Austria, Germany and Switzerland, for their guest worker policies mainly applied to Southern European countries.⁷ At this point, it becomes visible for the scholars of migration studies that labour market has been a primary area of this practices implemented through the creation of new temporal and internal limitations as such differentiation derives from the processes in which “the uneven accessibility of various areas of society to migrants, but leaves these areas themselves intact and discrete, at least regarding issues of migrant access.”⁸

It is also important to mention the concept of segmented assimilation, which significantly departs from the concept of differential inclusion in migration studies literature. Developed by Portes and Zhou, it refers to the various paths of assimilation processes that relate mostly to the new immigrant children in the context of ever-changing racial and ethnic demographics in the US.⁹ Departing from differential exclusion framework that involves the temporary arrangements, policies, and practices employed by

the nation state, segmented assimilation relies on the older theories of ethnic and racial succession that “seek to seal the course of individual migrants with that of ethnic communities identified within a stable typology of migrant groups which are bound to be successively integrated into the wider national society.”¹⁰ There are several particular types of such segmented assimilation that directly inform the processes and pathways for inclusion and exclusion in the context of the United States. These include straight line assimilation, downward assimilation, as well as selective acculturation.¹¹

From a theoretical and conceptual standpoint, differential inclusion and exclusion also informs the multiculturalist and pluralist approaches. In that regard, considering the discussions on the crisis or failure of multiculturalism which is more evident in migration studies in the European context,¹² existing critical theoretical approaches reveal that there emerges a radical asymmetry between the white citizen and the other ethnic minorities who are to be ‘tolerated’ and acknowledged.¹³ With their emphasis on the variety of scope and implementation of certain strategies, on the basis of racial and ethnic identities, these approaches that focus on such asymmetrical relations within the multiculturalist perspectives, for example, differ from the existing approaches that rely on historical multicultural practices and theories that are structured around multi-layered, centralised public policies that range from more pluralist to communitarian models.¹⁴ Such conceptual distinctions within the selective and differential models of multiculturalism have been made by several scholars. For instance, in his study in Australia, Hage argues that, far from reflecting the ‘multicultural real’, ‘white multiculturalism’ is rather a ‘fantasy’ which remains highly utopian and unattainable.¹⁵ In a similar vein, referring to the gap between the actual policies of multiculturalism employed by the government and realities of ethnic, racial, and cultural differences that emerge as a result of everyday practices, in his study, Hall (2000) makes a conceptual and theoretical distinction between “multiculturalism” and “multicultural.”¹⁶ Extending Hall’s arguments on this distinction, Gilroy claims that this difference in everyday life might lead to more differential and non-homogeneous practices and implementations that emerge within political, scholarly, cultural, and aesthetic indifferences, rather than being a direct outcome of governmental shifts and institutional frameworks.¹⁷

These analyses with regards to the differences between the governmental policies of inclusion and the real-life realities that emerge at the intersections of race, ethnicity, and culture can be well connected to other theoretical debates focusing on state-society relations in the context of immigrant inclusion and migration management. For instance, there are studies aiming to examine the ways in which states seek to control and monopolise the “legitimate means of movement.”¹⁸ Focusing on such monopolistic power of the state and arguing against the perspectives of “penetration”, Torpey explores the ways in which states embrace their populations through certain migration controlling practices.¹⁹ As a governmental practice of differential inclusion in which people become the

administrative subjects, Torpey underlines the nation state's need to identify and control populations through document checking systems such as internal and international passports as well as ID cards.²⁰

In the context of European immigration literature, several studies continue to advance the theory of differential inclusion. With the methodology of surveying this literature in the European context, for example, O'Brien reviews the major elements and practices of differential inclusion employed and managed by the state.²¹ Similar to the studies mentioned above that underlines the major role of the states and governmental authority in selective, inclusive/exclusive migration management strategies,²² O'Brien's exclusive focus on varying degrees of citizenship and residency rights (e.g., legal, semi-legal, and illegal) that "translate into significant political and socio-economic stratifications" reveals that three major types of migration, including regular, irregular, and blocked-have different consequences for immigrants.²³ Furthermore, similar to Torpey's analytical focus on state and society, in the study of O'Brien, differential inclusion is conceptualised as "re-mediavalisation" of the contemporary European state and society that addresses the similar hierarchical socio-political rank systems that once existed in feudal Europe.²⁴

Empirical Dimensions

Confirming the above-mentioned theoretical studies that underline the selective nature of differential inclusion/exclusion at the intersections of race, gender, and citizenship status, several empirical case studies delves into the various governmental responses to the migratory flows. While a more detailed and in-depth analysis will be given to the timely study of Loyd and Mountz, *Boats, Borders, and Bases: Race, the Cold War, and the Rise of Migration Detention in the United States*, a particular critical review will also be made based on the studies that explore similar multiple inclusionary/exclusionary migration practices in the context of Europe.²⁵

In their comprehensive research, Loyd and Mountz shed light on the inclusionary and exclusionary processes within the case of the United States by comparing the migration movements from Vietnam, Mexico, Haiti, and Cuba.²⁶ Focusing on these comparisons, it is claimed that a racialising immigration discourse and practice appears along the racial lines within such migratory movements.²⁷ Such differential approaches in determining who is to be included and who is to be excluded from the immigrant inclusion/exclusion processes reveal that this racialising process is actually heavily influenced by the context of the U.S. foreign policy. It becomes evident from this finding that countries' relations with other countries determine the state's approach to the processes of differential inclusion and exclusion as various dichotomies, such as good/bad immigrant, along the lines of inclusion and exclusion, are employed by the state.²⁸

In this timely research, Loyd and Mountz delve into the issue of the politics of asylum and differential inclusion/exclusion.²⁹ Throughout the first three chapters, by comparing the migratory movements of Vietnamese,

Mexican, Haitian, and Cuban citizens, the authors argue that there emerges a racialising discourse applied for people crossing borders. In addition, as part of this racialising process that is heavily influenced by U.S. foreign policy, they address various dichotomies animating varying practices of differential inclusion and exclusion, such as framing of good/bad immigrant, humanitarian/militarised policy responses. These dichotomies, in turn, have reflections on the geopolitical histories which shape the longer-term responses to migration, enforcement, and detention.³⁰

The empirical cases used in the research prove these statements. On the one hand, a highly militarised, externalised approach has been followed by the U.S. government to the Mexican and Haitian nationals where a process of exclusion has been applied. On the other hand, a more humanitarian, inclusive response has been evident for Vietnamese and Cuban nationals. Marielitos, an immigrant community from Cuba, can be an appropriate example that shows how specific communities have been the subjects of such selective migratory policies and practices implied by the state. Once seen as the victims of communism who were thought to be in need of support and protection, the members of this national community would later be considered as unwanted or dangerous, depending on the foreign policy approach of the state. It is shown by the authors that, parallel with these foreign policy approaches, there emerges state-led control and containment practices through remote detention centres, along with the emergence of local oppositions against these immigrants.³¹ At this point, the authors also reveal that such exclusionary and militarised administrative and legal practices would shape broader state response to the asylum crisis.³²

Similar to Loyd and Mountz's case study of the North American experience with migration flows, several other research that aim to discuss the role of the government in shaping different ways of migrant management have also been conducted in the context of Europe.³³ Following mainly qualitative methodologies such as in-depth interviews, and the survey of governmental policy documents/agreements, these studies provide detailed analysis of how various European states 'deal with' the (ir)regular migration flows and undocumented immigrants through the implementation of different policy approaches that are largely determined in accordance with local and national socio-political contexts.

Looking at the interactions between police, judges, and migrants within the internal borders in the case study of differential inclusion in Bologna, Italy, Fabini's research on illegality shows "how border control operates in the policing of undocumented migrants in Italy."³⁴ In that sense, the study reveals the ways in which administrative authorities effectively and selectively use certain immigration laws on the basis of non-enforcement and enforcement practices. As for the methodology, the article uses a mixed approach in which both qualitative (e.g., in-depth interviews and participant observation) and quantitative data (e.g., case files on pre-removal detention in detention centre of Bologna) are analysed with the hypothesis that production

of borders has been a provisional admission policy with the aim of including undocumented immigrants with a subordinated position at the local levels.³⁵

Engaging also with the similar concepts of ‘illegalisation’ and ‘deportability’, Cuttitta examines the integration strategies and measures in the Italian case from the conceptual perspective of differential inclusion.³⁶ Relying on the in-depth, qualitative analysis of the Italian Integration Agreement of 2012, this work examines both legal (e.g., principle of non-discrimination, freedom of thought) and symbolic discriminatory practices that emerge as part of the new models of Italian integration. Similar to the findings of Fabini, Cuttitta’s research finds a process of hierarchical differentiation occurs during the process of migrant incorporation based on an individual’s socioeconomic status, education level, and religious affinities.³⁷

Like these case studies underlining the transformative nature of the differential inclusion/exclusion practices, in their qualitative analysis that draws on the scholarly literatures of both critical citizenship and migration, Baban et al. make an attempt to analyse “the multiple pathways to precarity, differential inclusion, and negotiated citizenship status” that Syrian refugees go through in Turkey.³⁸ Confirming the theoretical dimensions of differential inclusion and exclusion that underlines the states’ selectivity in the context of labour market integration,³⁹ the authors here suggest that such multiple pathways of differential inclusion has been characterised and determined within the dimensions of state-led social services, humanitarian assistance, and labour market integration.⁴⁰

In terms of data and methodology, similar to the other empirical studies mentioned above,⁴¹ these authors also qualitatively rely on governmental documents, agreements, and centres of detention/refugee camps. With the support of a field research conducted in various cities in Turkey during the summer of 2015, this analysis has been made with a scholarly focus on EU-Turkey Readmission Agreement and government’s control and containment practices that is being implemented through refugee placement in refugee camps/urban centres.⁴²

Discussion and Conclusion

As an evolving concept, differential inclusion/exclusion has a scholarly potential to shed light on various migration policies, practices, and strategies employed by the governmental authorities. Existing theoretical and empirical debates, in that sense, contributes greatly to the discussions within migration studies literature with their emphasis on varying degrees of inclusionary/exclusionary state approaches. Based on the above mentioned scholarly knowledge and observations in the field, it becomes evident that, coupled with the state’s own internal and international policy contexts that is determined by certain socio-political processes,⁴³ immigrants’ social identities along the axes of race, education, gender, class, citizenship status, country of origin, and religious affinities have been major factors that determine the ways in which the state manages international migration movements.⁴⁴ Yet, in these analyses, it has usually been the nation-state that is found to be a major

actor, whereas other actors/factors in shaping these practices remain understudied. Responding to Gilroy's scholarly call on the necessity to give particular attention to everyday practices,⁴⁵ future research might be conducted to explore alternative actors/factors, other than the state itself, that determine the 'multiple pathways'⁴⁶ that complicates transformative citizenship practices. More specifically, rather than approaching such practices as a direct result of state actors, additional socio-cultural factors that interplay within daily life, as well as additional actors, such as non-governmental organisations, that have a say in the migration governance systems in democratic regimes might be a focus of analysis in future studies.

Moreover, apart from this analysis that needs to go beyond the classical state-based approaches, many of these researches have been done through case studies that focus on single countries, localities, and specificities that mainly operate in the context of the Global North. While I acknowledge their scholarly contribution, I argue that there is an unfortunate omission of the Global South that would inform these debates in terms of data and methodology. In that sense, there are many understudied countries and contexts in the Global South that may reveal different outcomes and findings, depending on political regimes, socio-cultural structures, and systems of migration governance. For example, due to the increased violence, insecurities, and lack of access to basic needs, the last few years have witnessed the historically largest exodus in the Latin American region where approximately four million Venezuelan citizens have been seeking asylum in neighbouring countries in Latin America and the Caribbean.⁴⁷ From the perspective of differential inclusion/exclusion, it would be necessary to critically examine the ways in which emerging host countries, including Columbia, Peru, and Argentina, manage such unprecedented migration flows. What are the different policy approaches implied by these states? How and in what ways do they differ in their practices of inclusion/exclusion? Are there any other actors that play a role in these differing strategies? Further research should elaborate on these questions under the light of regional contexts. I also argue that rather than single case studies, comparative/regional perspectives have the potential to reveal more comprehensive and generalisable analysis of such differing policies and approaches. Thus, from a more comparative perspective, a closer scholarly examination of these pressing issues within the context of the Global South could expand this literature on differential inclusion/exclusion while contributing to the generalisability of the theoretical and empirical dimensions of these concepts.

Notes

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Book Review

By

Samata Biswas*

Bhaswati Ghosh, *Victory Colony, 1950*, New Delhi: Yoda Press, 2020, Pages: 292.

I came upon *Victory Colony, 1950* completely by chance this autumn—but the chance could not have happened at a more relevant time for me. Like the inmates of the camp set up to temporarily shelter East Bengali refugees in the aftermath of 1947, we had all been in some ways immobilised—watching, haplessly, the long march of migrants across the length and breadth of India, towards ‘home’. I have, and so have many others, compared these two movements of people across the Indian subcontinent, and noticed that they were, in both instances, treated as non-citizens, non-agential and non-human. My friend and I had begun to work on a documentary about refugee colonies in South Calcutta, for the Calcutta Research Group. While researching and interviewing people, we were struck by the resilience of the refugees who built new colonies, schools, hospitals, markets and residences for themselves; and brought about an unprecedented transformation of the land through their labour. The construction of home in this new place, the role of women in the colony and outside of it, the importance of politics and what happened to the original inhabitants of these spaces were also questions that occupied us during research and production.

Bhaswati Ghosh’s English novel *Victory Colony, 1950* is about one such colony—in fact, the title corresponds to Bijoygarh Colony (Bijoy, meaning victory and garh meaning fort), the first of its kind to be set up in Calcutta. Through the protagonist Amala Manna who lands in Calcutta’s busy Sealdah railway station in 1949, with her brother who is lost, immediately afterwards—the readers travel through the bewilderment of getting on a train, landing at a busy station, bereavement, being separated, being hungry, being forcibly inoculated and taken charge of by a group of volunteers. The descriptions of the Gariahata Refugee Centre and then that of the colony, the

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difficult task of unaccompanied able-bodied women, the task of gathering potable drinking water, the task of cooking with scanty resources, of an epidemic raging through the camp, and experiences of bereavement and trauma that needed to be shared—are all detailed, heart-wrenching and meticulous.

Faced with the prospect of the National Register of Citizens, and the Citizenship Amendment Act 2020—even readers born and brought up in independent India have faced apprehensions about camps. Detention camps are our contemporary reality, from Greece to Australia, USA to India—but its history is something we have engaged with very rarely. During the Coronavirus lockdown in the United States, one detention center performed forcible hysterectomies on women migrants. We have worried about what happens to refugees, especially women refugees in detention camps when formerly mobile and thinking individuals are treated like convicts, not allowed to move or to work. *Victory Colony, 1950* brings to the fore the terrible experience of alienation in a city where the language is familiar yet distant, people's faces similar but lifetimes away from the shelter of the remembered village—and this unexpected encampment incomprehensible.

First guided by young male volunteers (of which the other protagonist, Manas Dutta, the scion of a rich Calcutta family is foremost), and later, through their own agentive actions and decisions—these east Bengali refugees organize themselves. They occupy land and set up homesteads, build huts, schools and roads, divide labour and set up shops. Remarkably, young and inexperienced Amala gathers destitute and unaccompanied women around her, a family of sorts grows with an aged couple and a single mother. Amala becomes one of the central figures in the colony—earning money, visiting and protecting young women and taking decisions. Manas's admiration for her grows, while the enigmatic Chitra finds in her someone who could head her sewing class, to enthusiastic volunteer Manik she is an elder sister—Amala's thoughts, actions and apprehensions take the reader through a wondrous and difficult journey of discovery and growth. Travelling on a bus and a taxi, visiting a flat and having breakfast served at a table, going to New Market, reading the newspaper and listening to the radio—grow parallelly with Amala's unfolding relationship with Manas. But the remarkable depth and detail that the author has invested Amala's character with, is at times lacking in Manas's. A student and activist inspired by socialism (undoubtedly reminiscent of Communist Party workers and students who helped set up colonies like Bijoygarh and Katjunagar)—he is a singularly disconnected person. Immersed in only himself, his thoughts and his family—Manas has only three friends: Subir, Proshanto and Manik. Despite being a volunteer at the relief centre, he does not seem to have lasting connections beyond this small circle—something unusual, and perhaps improbable. The contrast between the material and intellectual comforts at Manas's parental home, and the life Amala leads, provide important perspective for readers, who probably read the book while complaining about the difficulty in managing without domestic workers during the lockdown.

Victory Colony, 1950 pays attention to class, caste, and gender; the difference within the refugees themselves, among the host community and between the refugees and the host community. It needs to be read not merely because of its easy prose and evocative imagery, neither for its extensive research—but because it promises and delivers a better life. A strong sense of empowerment and hope run through the novel, one in which women take charge of their lives, build communities by virtue of their work and empathy, families are built out of choice—not merely history, and marriages are of equals. We, as readers of the Indian novel in English, need this hope—now, perhaps, more than ever.

Refugee women and colony women have historically occupied contested categories in Calcutta—from victims to martyrs, from public women to political activists—literature and cinema have painted them in many shades, as have public perception and popular prejudice. Amala and her compatriots fall in the category of hard-working makers of their destiny—eager to be part of economic production. I was afraid that *Victory Colony, 1950* might turn out to be yet another romance of men rescuing women, but despite its propitious ending, it does no such thing.

NOTES FOR CONTRIBUTORS

Articles submitted for consideration of publication in REFUGEE WATCH should be around 5,500 -7,500 words. Book reviews can be around 1000 words and review articles can be around 2000 words. Articles will have endnotes and not footnotes. Endnotes should be restricted to the minimum. Please refer to www.mcrg.ac.in for a details style sheet. Roundtables can also be proposed for publication. Enquiries about possible submissions are welcome.

For submission of articles and all other matters, correspondence should be addressed to the Editor, Refugee Watch, Mahanirban Calcutta Research Group, IA-48, Ground Floor, Sector-III, Salt Lake, Kolkata – 700 097 or paulabanerjee44@gmail.com. For book review and review-articles correspondence to be addressed to Samata Biswas, Review Editor, Refugee Watch, at the same address or at bsamata@gmail.com.

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