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**“QUALITY AND DIVERSITY”**

# Bangladeshi ‘Undocumented Migrants’ in India: Humanitarian Problem, Requiring Humanitarian Solution

SHUVRO PROSUN SARKER<sup>1</sup>

## Abstract

*This article analyses the background of Bangladeshi refugee influx into India and various causes for the influx. It attempts to examine the framework of legal protection available for Bangladeshi refugees in India and makes a critical analysis of the policy of the Government of India for the protection of the refugees from Bangladesh.*

## Introduction

The realm of refugee protection in India has been in vogue, since the time of Independence. In fact, the flow of refugees saw a phenomenal increase after the partition in 1947.<sup>2</sup> Although, these refugees came to India from various countries, a large number of these refugees were from Bangladesh (former East Pakistan). The flow of refugees was mainly due to the gross human rights violation & fear of persecution in East Pakistan, which saw an upsurge in 1971. Although, the formation of Bangladesh pacified the situation, the issue of refugees and their rehabilitation was left unaddressed. Nevertheless, amidst these events India showed its commitment by a benevolent and humanitarian approach, and acted promptly to tackle the crisis. It is quite interesting to note that India is not a party to the 1951 *Convention relating to the Status of Refugees* and its 1967 protocol, therefore, there is no law in the international sphere that binds India to the cause of protection of refugees. In spite of this

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<sup>1</sup> PhD Researcher at the WB National University of Juridical Sciences, Kolkata, India; Assistant Editor of the Asian Journal of Legal Education; the author is thankful to Prof. Manoj Kumar Sinha and Prof. TVGNS Sudhakar for their comments on the first draft.

<sup>2</sup> B. S. Chimni, *International Refugee Law : A Reader*, Sage Publications, New Delhi, 2000, p. 462

fact, the Government of India has generally attempted to provide prompt relief and rehabilitation to the refugees entering into India.<sup>3</sup>

After 'Bangladesh'<sup>4</sup> was carved out on the world map, the problem of refugees was thought to have extinguished. However, the carving out could hardly have much impact. The present problem of migration of minority population from Bangladesh has been increasing, owing mostly to the fear of such population being persecuted due to their religious, cultural and political opinion.<sup>5</sup> In view of the fact that India does not have a well settled refugee law or a national refugee policy to deal with the refugee problem, another problem in the nature of illegal immigrants has flared up. The migrant population from Bangladesh is being continuously labeled as 'illegal immigrants' and due to the absence of a well-settled refugee law, the terms 'refugee' and 'illegal immigrant' are being used synonymously. However, the present author wishes to use the term 'undocumented migrant'<sup>6</sup> instead of 'illegal immigrant'.

The unconditional help and assistance rendered by India in 1971 speaks of its commitment towards refugee protection. During the 1971 war, India hosted more than 9.5 million officially recorded refugees from Bangladesh.<sup>7</sup> In view of the fact that Bangladesh is a neighbouring country to India, it is, therefore, under an obligation to promote international peace and security by providing protection to these refugees.<sup>8</sup> The term refugee, in the present article, shall connote the 'minority Hindus of Bangladesh' who have left their own country due to fear of persecution, systematic deprivation, torture and state atrocities, but not those who crossed the international border due to economic reasons.

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<sup>3</sup> *Ibid*, p. 463. See also Kanti B Pakrasi, *The Uprooted: A Sociological Study of the Refugees of West Bengal, India*, S. Ghatak, Calcutta, 1971.

<sup>4</sup> On December 16, 1971, following the surrender by the Pakistan, Bangladesh got independence. India has played a crucial role in the independence of Bangladesh. See 'National Encyclopedia of Bangladesh', *Banglapedia* available at [http://www.banglapedia.org/HT/W\\_0020.HTM](http://www.banglapedia.org/HT/W_0020.HTM), accessed on 11 September 2013.

<sup>5</sup> *Refugee Convention Relating to the Status of Refugees*, 189 UNTS 150, adopted on 28 July 1951, art. 1.

<sup>6</sup> Fatma Marouf, 'No human being is illegal', *The Las Vegas Review Journal*, 2013, available at <http://www.reviewjournal.com/opinion/no-human-being-illegal>, accessed on 11 September 2013.

<sup>7</sup> Veerabhadran Vijayakumar, 'Judicial Responses to Refugee Protection in India', vol. 12, *International Journal of Refugee Law* 235, 2010, p. 235.

<sup>8</sup> *The Constitution of India*, 1950, art. 51.

## The Influx of Bangladeshi Minority Refugees into India, Revisiting History

The relation between an individual and the state has been a well focused area in the realm of political science theories. Individual affinity to the state is quite normal. The questions which would then arise are: why would an individual assume the status of refugee? What are the circumstances that would coerce an individual to bear such status?

An observation of the state affinity phenomenon reveals that no individual would like to leave his own country of birth or origin and over to some other country unless there are circumstances compelling the individual to do so. Such circumstances arise due to massive human rights violation, social and political insecurity, deprivation of the protection from state machinery and even the oppression of the majority community people etc. Thus, for every refugee movement there is well founded fear of persecution.

In the 1951 Refugee Convention, the 'term "persecution" has nowhere been defined'<sup>9</sup> and 'it seems as if the drafters have wanted to introduce a flexible concept which might be applied to circumstances as they might arise; or in other words, they capitulated before the emergence of humanity to think up new ways of persecuting fellow men'.<sup>10</sup> Nevertheless, it appears that such flexibility is a serious problem. Therefore, as far as the refugees from Bangladesh are concerned, the term persecution would be such actions that would expose the minority community to some vulnerable state. Thus, 'the concept of persecution is usually attached to acts or circumstances for which the government (...) is responsible (...) which leave the victims virtually unprotected by the agencies of the State'.<sup>11</sup> This could be the cardinal reason for the refugees to cross the international border in the quest of a dignified & secured life. Another reason could be the dominant fear of oppression by the majority. Thus, the definition of persecution could be expressed as the 'sustained or systemic violation of basic human rights demonstrative of a failure of state protection'.<sup>12</sup>

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<sup>9</sup> P. Weis, 'The Concept of the Refugee in International Law', vol. 87, *Journal du droit international*, 1960, p. 970.

<sup>10</sup> Grahl-Madsen, *The Status of Refugees in International Law*, A. W. Sijthoff, 1966, p. 193.

<sup>11</sup> C. Fong, 'Some Legal Aspects of the Search for Admission into Other States of Persons Leaving the Indo-Chinese Peninsula in Small Boats', vol. 52, *British Year Book of International Law* 53, 1981, p. 92.

<sup>12</sup> James C. Hathaway, *The Law of Refugee Status*, Butterworths Canada Ltd, 1991, p. 104.

The partition of British India into India and Pakistan in 1947 marked the beginning of mass refugee movement in newly independent India. At present, the Ministry of Home Affairs of India has been dealing with the issue of influx of refugees.<sup>13</sup> The refugee movement in India has been witnessed at regular intervals since the time of partition. On the eve of partition in 1947, 3.4 million<sup>14</sup> people came to India from East Pakistan and the *First Five Year Plan* provided Rs.1357 million<sup>15</sup> for the rehabilitation of those refugees. By the end of July 1948, the number of refugees coming from East Pakistan (former Bangladesh) was around 1.1 million<sup>16</sup>. A majority of those refugees belonged to Hindu faith.

An attempt to encounter the refugee movement was the *Delhi Pact* between India and Pakistan, under which Pakistan had assured to provide protection to the minority Hindus in East Pakistan. However the Delhi Pact did not bring any change to the situation. Consequently, India had to encumber a higher burden of refugee protection. In June 1952, the average monthly rate of admission the government refugee camps were 2062 and increased till October.<sup>17</sup> The refugee movement saw a steep rise in 1965 during the India Pakistan war. Minority community people fled from East Pakistan to India due to fear of persecution by the Pakistani Army. In the period from 1964 to 1968 a large number of *Chakmas*<sup>18</sup> migrated to India due to the ethnic disturbance in the Chittagong Hill Tracts Area. But vast majority of the refugees were admitted at once in 1971, when the Liberation War of Bangladesh broke out.

The refugee movement saw a great upsurge during the *Babri Mosque Incident* in 1992, when a huge, but unknown, number of Bangladeshi Hindus came to

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<sup>13</sup> In the year 1947, an independent Ministry of Rehabilitation was created to assist the displaced persons from both West and East Pakistan. This Ministry of Rehabilitation was abolished and a Department of Rehabilitation was created under the Ministry of Works, Housing and Supply. This department was again shifted under the Ministry of Labour, Employment and Rehabilitation. In the period of 1984 to 85, the Government of India abolished the Department of Rehabilitation and created a Rehabilitation Division under the Ministry of Home Affairs. It is since then that the Ministry of Home Affairs has been dealing with the issue of influx of refugees. K. C. Saha, 'Refugee Assistance and India's Policy', vol. 4, no. 1, *Bulletin on IHL & Refugee Law*, 1999, p. 46

<sup>14</sup> Government of India, *Annual Report of Ministry of Rehabilitation, 1954-55*, p. 1.

<sup>15</sup> Chimni, (n 2).

<sup>16</sup> Prafulla K Chakraborty, *The Marginal Men*, Naya Udyog, Calcutta, 1999, p. 1.

<sup>17</sup> Hiranmay Banerjee, *Utvastu* (In Bengali), Sishu Shahitya Samsad, Calcutta, 1970, p. 195

<sup>18</sup> An indigenous tribal community, generally resides at the Chittagong Hill Tracts of Bangladesh.

India.<sup>19</sup> The 2001 elections in Bangladesh also created an alarming situation for the minorities due to the atrocities and brutal treatment meted out to the Hindus by the political party in power with the help of Muslim fundamentalists.<sup>20</sup> A large number of minority population in Bangladesh crossed the international border after the 2001. Recently, after the trials and sentencing of war Criminals of the 1971 War, the fundamentalist group reportedly engaged themselves again in demolition of Hindu and Buddhist temples, burning houses and business places etc and again unknown number of Hindus crossed the border to come to India.<sup>21</sup> Thus, the refugee movement from Bangladesh has been quite silently, but consistently, continuing

### **Persecution and Minority Fear Psychosis and the Decreasing Minority Population in Bangladesh**

It is seen that most of such aforesaid situations have created enormous fear of persecution in the minds of the minority population in Bangladesh. The fear psychosis of the minority has led them to believe that they have almost no rights to pursue any legal remedy and avail state protection against atrocities, brutal treatment, discrimination and persecution. The history behind this fear psychosis traces its roots to the time of partition of India and Pakistan in 1947, on the basis of Two-Nation theory<sup>22</sup>.

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<sup>19</sup> 'Chronology for Hindus in Bangladesh, Minorities At Risk Project', *University of Maryland*, 2010 available at <http://www.cidcm.umd.edu/mar/chronology.asp?groupId=77102>, accessed on 10 September 2013. See also Subir Bhoumik, 'Bangladesh Hindu atrocities 'documented'', *BBC News*, November 2001, available at [http://news.bbc.co.uk/2/hi/south\\_asia/1645499.stm](http://news.bbc.co.uk/2/hi/south_asia/1645499.stm), accessed on 10 September 2013.

<sup>20</sup> *Ibid.*

<sup>21</sup> Rumi Ahamed, 'The Minorities of Bangladesh', *The Daily Star*, October 2012 available at <http://archive.thedailystar.net/newDesign/news-details.php?nid=252436>, accessed on 10 September 2013; The Hindu community in Bangladesh is at extreme risk, in particular at such a tense time in the country. It is shocking that they appear to be targeted simply for their religion. The authorities must ensure that they receive the protection they need. Amnesty International, 'Press Release (March 2013)', *Amnesty International*, 2013 available at <http://amnesty.org/en/for-media/press-releases/bangladesh-wave-violent-attacks-against-hindu-minority-2013-03-06#.UTeKDSrYyD8.twitter>, accessed on 10 September 2013. See also 'Hindu Temple Attacked, Idols Destroyed in Bangladesh', *The Times of India*, February 2010, available at [http://articles.timesofindia.indiatimes.com/2010-02-06/south-asia/28137103\\_1\\_idols-hindu-temple-miscreants](http://articles.timesofindia.indiatimes.com/2010-02-06/south-asia/28137103_1_idols-hindu-temple-miscreants), accessed on 10 September 2013.

<sup>22</sup> 'Two-Nation theory' is the basis of creation of Pakistan and was propounded by Mr. Mohammed Ali Jinnah. It states that Muslims and Hindus are two separate nations from

On 16<sup>th</sup> December, 1971 Bangladesh gained independence from Pakistan. The newly drafted Constitution of Bangladesh in 1972 declared Bangladesh as a secular country. Secularism, nationalism, socialism and democracy were the four fundamental principles of the 1972 Constitution<sup>23</sup>. As the newly born democratic state was struggling with its recently gained existence, there were fundamentalist forces which were in gradual attempt to mar the beacon of democracy. The situation took an ugly turn in 1975 when *Bangabandhu Skeikh Mujibur Rahman*, who is honoured as the Father of the Nation, was assassinated and martial law was declared. The stringent impact of the military administration was the amendment of the Constitution. The word ‘Secularism’ was deleted from the Constitution and the words *Bismillah-Ar-Rahman-Ar-Rahim* were inserted in its preamble, which means ‘starting in the name of Almighty Allah’.<sup>24</sup> Fear psychosis was building up in the minds of Minority Hindus. Secularism saw a further threat in 1988 when, during the second martial law rule, the constitution of Bangladesh was amended to declare that Islam was the state religion for Bangladesh.<sup>25</sup> All these moves severely impaired the future of human and fundamental rights of the minority Hindus in Bangladesh. As the Government was considered likely to invite Islamic fundamentalism into Bangladesh, the future of the minority Hindus was at stake. Reeling under the threat and fear of persecution and religious hatred, minorities could hardly have a say in their own country. Discrimination was not peripheral; minorities had to bear the atrocities of religious fundamentalists. This even kept them away from participating in the political processes or even in the social or religious activities.

Since then, the situation has not yet shown a positive trend. Discrimination, rampant atrocities have been increasing and thus the fear of persecution has increased many folds. There is minimum participation of the minority Hindus in state activities. The representation of minority Hindus in the civil, foreign

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every definition; therefore Muslims should have a separate homeland in the Muslim majority areas of British India, where they can spend their lives according to the glorious teachings of Islam.

<sup>23</sup> James Heitzman, *Bangladesh: A Country Study*, Federal Research Division, Library of Congress, 1988, chapter 4 available at <http://lcweb2.loc.gov/frd/cs/bdtoc.html#bd0105>, accessed on 10 September 2013.

<sup>24</sup> *Ibid.*

<sup>25</sup> Shah Alam, ‘State-Religion and the Eighth Amendment to the Constitution of Bangladesh: A Critique’, vol. 1, *Lawasia Journal*, 1990-1995.

and military services is almost negligible.<sup>26</sup> Torn amidst the demands of life and livelihood, refugees have no option but to approach India. The statistics below gives an idea of the problem of the decreasing minority population in Bangladesh, the consequential impact of which is the growth of the refugee influx for India.

### Population Table

<b>(in percentages)</b>				
<b>Year</b>	<b>Muslim</b>	<b>Hindu</b>	<b>Other</b>	<b>Total</b>
1901	66.1	33.0	0.9	100.0
1911	67.2	31.5	1.3	100.0
1921	68.1	30.6	1.3	100.0
1931	69.5	29.4	1.1	100.0
1941	70.3	28.0	1.7	100.0
1951	76.9	22.0	1.1	100.0
1961	80.4	18.5	1.1	100.0
1971	85.4	13.5	1.1	100.0
1981	86.6	12.2	1.2	100.0
2004 <sup>27</sup>	89.5	9.6	0.9	100.0

*Source: Ministry of Statistics, Bangladesh<sup>28</sup>*

It is estimated that between 1974 and 1981, around 3 million minority people left Bangladesh and on an average 475 Hindus are leaving Bangladesh every

<sup>26</sup> US Department of State, *Annual Report on International Religious Freedom*, 2001, p. 506.

<sup>27</sup> 'The World Fact Book- Bangladesh', *Central Intelligence Agency* available at [www.cia.gov/library/publications/the-world-factbook/geos/bg.html](http://www.cia.gov/library/publications/the-world-factbook/geos/bg.html), accessed on 10 August 2011.

<sup>28</sup> Ministry of Statistics, *Statistical Yearbook of Bangladesh*, Dhaka, 1987, p. 46.



day; thus, the yearly figure has been fixed at 173,375.<sup>29</sup> The question that arises here is – how is India dealing with such refugee influx?

Interestingly, the refugees are migrating to India illegally, as India does not have any regularized system of refugee protection. These minority Hindus enter India generally in states like West Bengal, Tripura and Assam. Some of them take shelter in the houses of their ancestral relatives, and with minimum linguistic differences, it hardly takes them considerable time to integrate themselves into the Indian society. Some of them have managed to obtain ration cards, voter identity cards and other necessary documents with the help of the political party leaders.

### **Protection of Bangladeshi Refugee in India, the Legal Dilemma**

India is not a party to the 1951 Refugee Convention and 1967 protocol, but is a signatory to various other international human rights instruments viz. 1966 *International Covenant on Civil and Political Rights*, 1966 *International Covenant on Economic, Social and Cultural Rights*,

1984 *Convention against Torture*, 1989 *Convention on the Rights of the Child*, among others. It became a member of the Executive Committee of UNHCR in 1992. There is no doubt that all these international instruments have casted an obligation on the member states to protect refugees, and India is no exception. Some of the member states have specific statutes to deal with the issues in their countries. However, India does not have any specific legislation with regard to refugees. Such refugee legislation have to be framed by the Indian Parliament. The Indian Parliament only has power over the laws relating to citizenship, naturalization and aliens.<sup>30</sup>

No doubt, India has attempted to regulate the status and protection of refugees by administrative measures, but an iota of doubt remains with regard to the effectiveness of such measures. In the absence of a strict legislative framework, the possibility of bias and discriminatory treatment by the Government to refugees cannot be ousted. This raises a question- which municipal laws would apply to refugees in India?

<sup>29</sup> Salam Azad, *Hindu Sampradaya Keno Deshtayag Korchae (Bengali)*, Swatantra Publication, Calcutta, 1999, p. 100.

<sup>30</sup> B. S. Chimni, 'Legal Condition of Refugees in India', vol. 7, no. 4, *Journal of Refugee Studies*, 1994, p. 379.

Owing to the absence of a specific legislation, the laws relating to the regulation of aliens apply to the refugees in India. The major Indian law relevant to aliens is the *Foreigners Act*, 1946 which empowers the central Government in respect of entry, presence and departure of aliens into India. The pertinent feature of the *Foreigners Act*, 1946 is that it leaves a wide scope for administrative discretion. The administrative policies under the Act relating to aliens 'are very skeleton and leave very wide discretion to the executive'.<sup>31</sup> Owing to such ample governmental plenary power, biasness is sure to creep in and disturb the basic tenet of the rule of law. There is no doubt that the 'skeleton legislation with wide delegation of rule making power as well as conferment of very wide discretion on the administrative authorities are contrary to the rule of law, and can be challenged respectively on the grounds of unconstitutional delegation of legislative functions and the violation of right to equality'.<sup>32</sup>

### **The Impact of International Human Rights Instrument in the Refugee Law of India**

As stated earlier, India is not a party to the 1951 *Refugee Convention* or the 1967 Protocol, however this does not absolve India's obligation to refugee protection. The principle of non *refoulement* has been accepted as a principle of customary international law. This goes on to add that the other principles regarding refugees enumerated in various international law instruments have to be taken into consideration. This leads to the international law and municipal law debate. Thus, stands out a question- why would a nation respect international principles and policies unless they have been incorporated in the municipal laws of that nation? The Supreme Court of India deserves a laud for its decisions that highlight the duty of the state to accord refugee protection.

In its two major decisions, the Supreme Court of India referred to article 14 of the *Universal Declaration of Human Rights* and article 13 of the *International Covenant of the Civil and Political Rights* to uphold the obligation of refugee protection.<sup>33</sup> The first instance was the case of *Khudiram Chakma v. State of*

<sup>31</sup> M. P. Singh, 'Positions of Aliens in India' in GK Ofoosu-Ammah, *Legal Position of Aliens in National and International Law*, Heidelberg Colloquium, 1985, p. 12.

<sup>32</sup> J. N. Saxena, 'Proposal for a Refugee Legislation in India', vol. 2, *Bulletin on IHL & Refugee Law*, 1997, p. 391.

<sup>33</sup> Article 14(1) of the *Universal Declaration of Human Rights* states 'Everyone has the right to seek and to enjoy in other countries asylum from persecution'. Article 13 of the *International Covenant of Civil and Political Rights* states: 'An alien lawfully in the

*Arunachal Pradesh*<sup>34</sup>, where the Supreme Court of India referred to the Universal Declaration of Human Rights in the context of refugees in India in the following words:

Article 14 of the Universal Declaration of Human Rights, which speaks of the right to enjoy asylum, has to be interpreted in the light of the instrument as a whole, and must be taken to mean something. It implies that although an asylum seeker has no right to be granted admission to a foreign State, equally a State which has granted him asylum must not later return him to the country whence he came. Moreover, the Article carries considerable moral authority and embodies legal prerequisite of regional declarations and instruments'.<sup>35</sup>

A pro-refugee protection approach was further reflected in the case of *National Human Rights Commission v. State of Arunachal Pradesh*<sup>36</sup> where the Supreme Court of India held that *Chakma* refugees who had come from Bangladesh due to persecution cannot be forcibly sent back to Bangladesh as they may be killed or tortured or discriminated, and in result of this they would be deprived of their right to life under Article 21<sup>37</sup> of the Constitution of India.

The Supreme Court in the same case made a number of observations relating to the protection of *Chakma* refugees in India:

We are a country governed by Rule of Law. Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of

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territory of a State party to the present Covenant may be expelled there from only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority'. The Supreme Court used these international mechanisms to hold that it is the duty of the state to protect refugees.

<sup>34</sup> *Khudiram Chakma v. State of Arunachal Pradesh*, Supreme Court, India, (1994) Supp (1) SCC 615.

<sup>35</sup> *Ibid.*

<sup>36</sup> *National Human Rights Commission v. State of Arunachal Pradesh*, Supreme Court, India, (1996) 1 SCC 742.

<sup>37</sup> 'No person shall be deprived of his life and personal liberty except according to the procedure established by law'. *Constitution of India*, 1950, art. 21.

his life or personal liberty except according to the procedure established by law. Thus the State is bound to protect [the] life and personal liberty of every human being, be he a citizen or otherwise, and it cannot permit anybody or group of persons...to threaten the *chakmas* to leave the State, failing which they would be forced to do so...the State government must act impartially and carry out its legal obligations to safeguard the life, health and well being of *chakmas* residing in the state without being inhibited by local politics. Besides, by refusing to forward their applications, the *chakmas* are denied rights, constitutional and statutory, to be considered for being registered citizens of India'.<sup>38</sup>

A subtle derivation from the above trend would stand to claim that the obligation to protect refugees is paramount. The importance of Article 21 of the Constitution of India can be well inferred from the decisions rendered by the Supreme Court. Article 21 of India is a non-derogable right. Therefore, it would be not incorrect to claim that the International Refugee Law, through its 1951 Convention and 1967 Protocol, has been fully incorporated into Indian Law via Article 21 of the Constitution of India. The obligation to protect refugees exists irrespective of the Indian Government's stand with respect to the 1951 Convention or the *Refugee Protocol*.

### **A comment on India's Future Policy for Bangladeshi Refugees in India**

It would unfair to proceed on to comment on a well founded refugee policy, unless the needs of the minorities in Bangladesh are understood. The open secret is that now almost everyone is concerned about the fact that the Hindus and other minorities continue to leave Bangladesh every day. The international community has also not been active in voicing its concern against such refugee influx. Perhaps, for this reason, the current social and political situation of Bangladesh, graphed by the rise of Muslim fundamentalism, is an open affair of debate. It would be now inhuman to push the refugees back or restrict them from coming into the Indian territory, where they dream of a life concomitant with human rights and human dignity. Justice Krishna Aiyer has commented that:

Geographically, India's borders have no great wall to forbid entry into its territory. So much so, the problem of refugee cannot be wished

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<sup>38</sup> *National Human Rights Commission Case(n 36 )*.

away by us since it is a reality growing in volume and tugging at our hospitality by people in gnawing agony. Humanism and compassion have been our ageless heritage and is a fundamental duty under Article 51(A) of our Constitution'.<sup>39</sup>

On similar footing, the specific actions taken by the Government of India, while dealing with the problem of Afghan refugees mostly of Hindus and Sikhs also deserve a mention. The trend for some Afghan refugees seems to be quite fair enough. These Afghan refugees have been given Indian Citizenship with the intervention of the UNHCR in New Delhi.

### **Suggestions for Refugee Protection Policy, can India Think of a Temporary Solution?**

A well founded refugee policy for the Bangladeshi refugees, or for all refugees, coming to India requires much analysis and dependent on economic and security concerns. However some policy initiatives adopted by the Government of India such as the 'person of Indian origin'<sup>40</sup> scheme, visa issue policy and liberal visa agreements can be fruitfully utilized to maintain check and balance into the undocumented migration from Bangladesh.

The Government of India declared the 'Person of Indian Origin Card Scheme'<sup>41</sup> in 2002. However, this scheme excludes the citizens of Bangladesh to avail the opportunity for settling down in India. The definition given in Section 2(b) of the Scheme clearly lays down that:

2(b)- "Person of Indian Origin" means a foreign Citizen (Not being a citizen of Pakistan, Bangladesh and other countries as may be specified by the Central Government from time to time) if,

(i) he/she at any time held an Indian Passport; or

(ii) he/she or either of his/her parents or grand parents or great grand parents was born in and permanently resident in India as defined in the

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<sup>39</sup> V. R. Krishna Iyer, *Symposium on Human Rights and Refugees*, Indian Centre for Humanitarian Laws and Research, Cochin, 30 December 1998.

<sup>40</sup> '... any person who or either of whose parents or any of those grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted), and who is ordinarily residing in any country outside India ...' Constitution of India, 1950, art. 8.

<sup>41</sup> *Extra Ordinary Gazette of India*, August 19 2002, part I, section I, no. 213.

Government of India Act, 1935 and other territories that became part of India thereafter provided neither was at any time a citizen of any of the aforesaid countries [as referred to in 2(b)] above; or

(iii) he/she is a spouse of a citizen of India or a person of Indian origin covered under (i) or (ii) above.”

The exclusion of citizens of Bangladesh is an adverse measure. The portion of Bangladeshi population which has its roots in India ought to be given an opportunity to return to India. This would necessitate structural and substantial change in the person of Indian origin scheme by allowing Bangladeshi minorities to avail its facilities.

It is evident that the definition of person of Indian origin derived from article 8 of the Constitution of India gets qualified in the ‘Person of Indian Origin Card Scheme’ of 2002. But it is quite unacceptable that the definition excludes the citizens of Bangladesh. The author suggests that all the foreign nationals be considered as one class and believes that exclusion of Bangladeshi nationals means that they are considered as a separate class from the other foreign nationals. This appears to be contrary to the principle of equality enshrined under article 14 of the Constitution of India, which declares equality of treatment among the equals and different treatment among unequal individuals. A classification must be reasonable. The test of reasonable classification as laid down in *State of West Bengal v. Anwar Ali Sarkar*<sup>42</sup> has two conditions to be fulfilled, namely:

1. The classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and
2. The differentia must have a rational relation to the object sought to be achieved by the statute in question.

The author claims that, under the ‘Person of Indian Origin Card Scheme’, the classification is not based on intelligible differentia, as discrimination against Bangladeshi citizens is *prima facie* evident. The object of the scheme is to give an opportunity to the persons of Indian origin to come back to their roots easily. The differentia so made has no rational nexus to the object sought, as the persons, who are declared as ‘Person of Indian Origin’ under Article 8 of the *Constitution of India*, are deprived of the opportunity of this scheme. The

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<sup>42</sup> *State of West Bengal v. Anwar Ali Sarkar*, Supreme Court, India, AIR 1952 SC 75.

author suggests that a new scheme for Bangladeshi nationals must be in place. This would mitigate the problem of refugee influx into India.

In terms of temporary solution, the initiative of the Government of India with regard to liberal visa regime for Bangladeshi Nationals can be looked into. In early 2010 the Government of India issued a regulation by which certain powers to determine visa issues have been delegated to the State Government/ Union Territories concerned.<sup>43</sup> This regulation, in its paragraph no. 19, describes the terms, conditions and eligibility of Bangladeshi nationals to get 'Long Term Visa' (LTV) in India. Four categories of persons are eligible for the LTV, out of which three are on the ground of marriage. However, it is interesting to take a note on the fourth category, i.e. 'cases involving extreme compassion'. No definition of the term 'cases involving extreme compassion' is given on the regulation or on any other texts issued by the Government of India. However, one recent decision of the Government of India, which allowed Pakistani minorities to use this ground for issuing LTV, can be an example for Bangladeshi minorities.<sup>44</sup> Here it is interesting to note that there are some protections for persons coming with visas to India, but not for them who are undocumented. Information of this sort should come in websites of High Commission of India in Dhaka, to give the minorities a fair advantage. There is another notification of the Government of India which allows Bangladeshi nationals, who are staying in India on LTV, to be engaged in employment of purely private nature gives rise to the affirmative action towards their livelihood in India.<sup>45</sup> All these actions of the Government of India are believed to be a part of temporary protection towards Bangladeshi minorities. However, this system must be more transparent and the High Commission of India in Dhaka should be given the power to issue LTV to minorities on the ground of 'cases of extreme compassion'. But, after their arrival in India, it should also be looked after with convention refugee countries and UNHCR if there is any possibility of relocate these population to other convention refugee accepting country.

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<sup>43</sup> 'Powers and functions of State Governments / UT Administrations/FRROs/ FROs in Visa matters', *NASSCOM* available at <http://www.nasscom.in/sites/default/files/userfiles/file/MHA%20guidelines%20on%20visas-08-05-12.pdf>, accessed on 25 October 2014.

<sup>44</sup> Sandeep Joshi, 'Pakistani Hindus stay back, seek long-term visas', *The Hindu*, September 2012 available at <http://www.thehindu.com/news/national/pakistani-hindus-stay-back-see-longtermvisas/article3863703.ece>, accessed on 10 September 2013.

<sup>45</sup> Ministry of Home Affairs, Government of India, *F. No. 14051/37/2010-F.VI*, 11 November, 2010 in *NASSCOM* (n 43).

## Conclusion

The gross human rights violation is one of the reasons for the influx of Bangladeshi minorities as refugees. Owing to the strict laws relating to citizenship, migration, overseas citizenship, person of Indian origin card scheme and non-dissemination of liberal visa scheme, genuine cases of Bangladeshi minorities never come to light. This is one of the reasons for the illegal migration from Bangladesh. The Government of India should understand and appreciate the problems faced by the minority Hindus of Bangladesh. It should take into consideration the fact that the influx is not wilful but forced. Protection of refugees is an international customary obligation. It stands amidst the sphere of human rights. Justice V. R. Krishna Iyer in his Tagore memorial Lecture described the width and sweep of human rights as

human rights are writ on a large canvas, as large as the sky. The law makers, lawyers and particularly, the Judges, make the printed text vibrant with human values, not to be scared of consequences on the status quo order. The militant challenges of today need a mobilization of revolutionary consciousness sans which civilized systems cease to exist. Remember, we are all active navigators, not idle passengers, on spaceship earth as it ascends to celestial levels of human future'.<sup>46</sup>

A regulated system of entry for Bangladeshi minorities through the Indian High Commission in Dhaka and a well founded policy must be brought in place with the possibility of relocating this population to any developed and convention refugee accepting country. This would glorify India's position in the realm of refugee protection within the International community.

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<sup>46</sup> VR Iyer cited in *Rajnath Chauhan vs Bani Kant Das & Ors*, Supreme Court, India, WN 457 of 2005, para. 49.