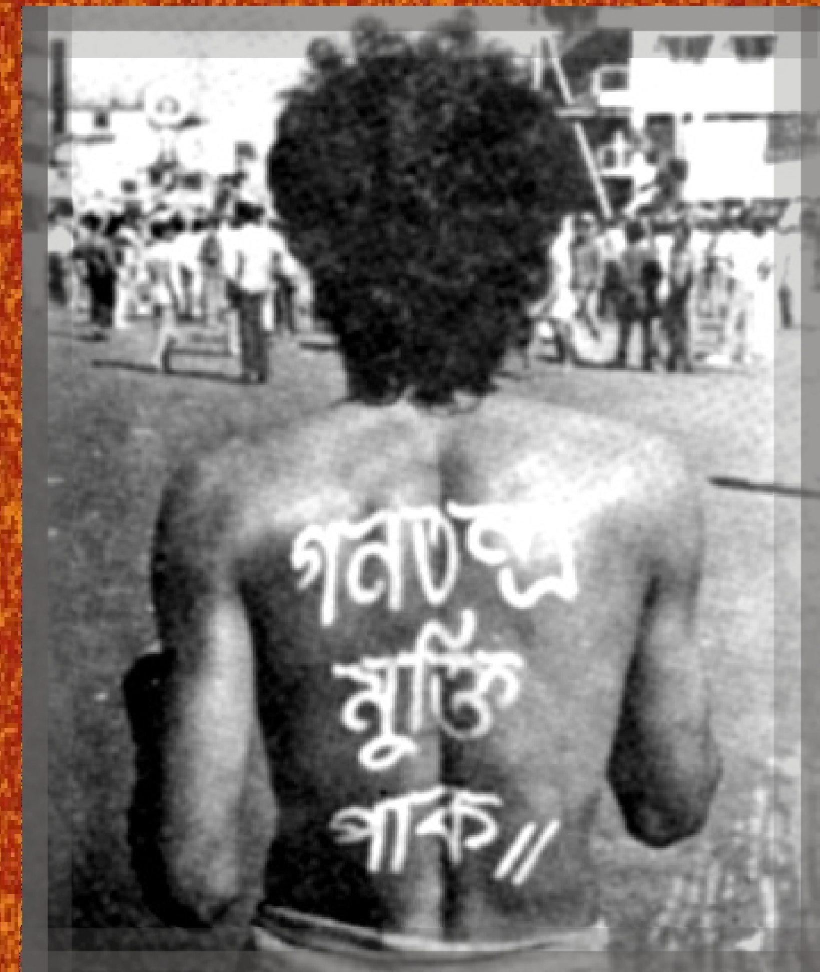
Previous Edition

Citizen's Campaign for Preserving Democracy
C/o Hazards Centre
92 H, Third Floor
Pratap Market
Munirka
New Delhi-67
E-mail: hazardscentre@gmail.com
Ph: 011-26714244

REDEFINING CITIZENSHIP

In The Era of Globalization



Citizen's Campaign for Preserving Democracy

JUNE 2008

Cover page Photograph

A Photograph of Shaheed Nur Hossain taken by Rumi Ahmed.

Nur Hossain (1961-1987)**:** Born in Dhaka, Nur Hossain was a son of Mujibar Rahman, an auto-rickshaw driver. He left school in Class VIII to become an activist in politics as the publicity secretary of the Banagram unit of the Awami League. When the alliance of political parties declared 'Dhaka Blockade' in November 1987, to demand the holding of elections under a neutral government, Nur Hossain had his bare back and chest painted with the slogan "*Sairachar nipat jak, Ganatantra mukti pak*" (Down with autocracy, let democracy be freed). Looking so prominent in the crowd he was shot dead by the police in front of the General Post Office. But the slogan imprinted on his body soon turned into the slogan of the mass movement that led to the fall of the Ershad government on 6 December 1990. while participating in a Bangladesh's struggle for democracy. The photograph was taken by Rumi Ahmed

Rumi Ahmed: Born in Bangladesh, the photographer always finds himself in the middle of nowhere in his unorthodox thinking and vision about Bangladesh. He is absolutely against self-censorship in expressing opinions. He presently is in USA but has Bangladesh in his thought all day and night so he is planning on moving back to Bangladesh pretty soon. CCPD is grateful to him since this photograph has been taken from his blog on internet.

REDEFINING CITIZENSHIP

In The Era of Globalisation

June 2008

Citizen's Campaign for Preserving Democracy (CCPD)
c/o Hazards Centre
92 H, Pratap Market, Munirka
New Delhi 110067
haz_cen@vsnl.net, 26714244, 26187806

Publisher: Hazards Centre
92 H, Pratap Market, Munirka
New Delhi 110067
haz_cen@vsnl.net, 26714244, 26187806

CoverPage & Layout: Vartika Srivastava

Printer: Printcraft

Campaign Support: CCPD

Publication: June 2008

Suggested Contribution: Rs. 50

CONTENTS

Chapter	Theme	Author	Page
	Preface		5
	Acknowledgements		7
	Endorsing citizen's groups and individuals		9
1	Nationalism in the era of Globalisation, a summary of CCPD's first report	*D.Leena*	10
2	Deliberations on Citizenship by the Constitution Framers	*Anuradha Sharma*	14
3	Human Rights and Immigration Control	*Amanda Shah*	25
4	Indo-Nepal Peace Treaty	*Arup K. Deka, Binod Kumar, Abhay Ranjan*	39
5	Livelihood and Citizenship	*Anuradha Sharma, Sarina Virk*	44
6	An Unconscionable Judgement	*Prashant Bhushan*	52
7	Migration and Return	*Ram Narayan Kumar*	57
8	Conclusions, possible strategies	*CCPD members*	67

Preface

Globalisation is the order of the day. India 'Shining' is trying hard to jump on to the bandwagon and become one of the leading developing countries in this unequal race. It is believed that globalisation has re-defined the concepts of social, economic, political, cultural, and other aspects of modern society. Most importantly, it is changing notions about the nation-state. An image of the 'global man' is emerging. It has already emerged at the corporate level and now is in the process of percolating to the lower levels. It is perhaps no coincidence that, at this juncture, India has a Prime Minister, a Finance Minister, and a head of the Planning Commission, who are all ardent proselytisers of globalisation. They are facilitating the process as best as they can despite the limited political manoeuvrability of the government in power.

Since everything is being redefined in this global scenario, would it not be appropriate to find new dimensions to the concept of citizenship, distinct from the ones rooted in national identity? The necessity for this is felt all the more in the South Asian region because of large scale migration across national borders between neighbouring countries. Many vulnerable migrants cross the borders without any 'legal' documents, as they search to eke out a living that they are unable to find in their 'own' countries. The issue of dealing with such undocumented immigrants has become highly contentious across the region. Many attempts have been made by political forces to push them 'back'. And gradually this seems to have become a tool in the hands of 'globalising' authorities to harass all vulnerable people residing in slums and 'illegal' settlements. There is an urgent need, therefore, to look at the issue beyond its legal and political spheres and address it in the context of universal human rights. Like the dictum that no person is above the law, it is also valid to assert that no law is above human rights, that is, the right to life and liberty of human beings.

In view of the opening up of the Indian economy the Government of India has been making efforts to redefine or broaden several existing provisions, including those pertaining to citizenship. Thus, in order to accommodate the aspirations of the favoured Non-Resident Indians (NRIs) and their relations in India who build up the foreign exchange reserves through remittances the government has amended the Citizenship Act, 1955 to provide for dual citizenship to the NRIs, which has become operational from December 2005. The main argument behind this concession was that they are contributing to the economy of India. But, at the same time, the government has specifically excluded Indians who have acquired the status of citizens in Pakistan and Bangladesh. Hence, political imperatives determine who amongst those migrating in search of

viewed from such a perspective, the contentious issue of citizenship being denied to the so-called "outsider" becomes meaningless. This booklet is an attempt to examine various aspects of the issue and to initiate a healthy and informed debate in civil society.

The Citizen's Campaign for Preserving Democracy (CCPD) was initiated in 2004 by several organisations and concerned citizens in the wake of Operation Pushback launched by the Delhi Police to deport alleged Bangladeshis back to their 'native' country. As the investigation by the CCPD showed then, most of these unfortunates were born in India but did not have the necessary 'papers' to prove their identity. Distorted processes of 'democratic' procedure were being used to evict them under 'targets' defined by the courts on the basis of false and unverifiable information. Consequently, CCPD brought out its first publication in 2005 to examine the issue of citizenship within the context of the nation-state. The present publication is an attempt to broaden the investigation into the international arena.

It contains a brief summary of CCPD's first publication to provide a backdrop, and a series of essays to examine the possible ways of identifying citizenship in a humane and democratic fashion. We invite further comments, criticisms, and contributions to expand and give constructive shape to democratic debate.

....

Acknowledgments

This report would not have been possible without the insightful contributions of the following authors and editors:

Chapter 1, is a summary of CCPD's report **"Nationalism in the Era of Globalisation"**, edited by ***D. Leena***, who was working as a Legal Researcher in the Hazards Centre, and presently working on a project on International governance and associated with the Campaign for Judicial Accountability and Reforms.

Chapter 2, **"Deliberations on Citizenship by the Constitution Framers"**, was written by ***Anuradha Sharma***, who is currently working as a Legal Researcher in the Hazards Centre, a professional support group and resource centre based in Delhi. She has graduated from the Faculty of Law at Delhi University.

Chapter 3, "**Human Rights and Immigration Control"**, was contributed by ***Amanda Shah***, who is presently Assistant Director (Policy) at Bail for Immigration Detainees, an independent charity that exists to challenge immigration detention in the United Kingdom. Previously she has worked as a writer at the British Refugee Council and as a researcher at the Immigration Advisory Service, and was a volunteer researcher with AMAN Trust in Delhi. She holds a Masters in Human Rights and International Human Rights Law from the University of London and has a background in human rights research and advocacy within the Commonwealth.

Chapter 4 on "**Indo-Nepal Peace Treaty"** was prepared by ***Arup.K. Deka***, in collaboration with ***Binod Kumar*** and ***Abhay Ranjan***, all associated with Chintan Environmental Research and Action Group in Delhi. The authors have engaged with the recycling sector for the last few years and this article is part of their work in examining informal labour and in-migration.

Chapter 5, **"Livelihood and Citizenship"**, was written by ***Anuradha Sharma*** in association with ***Sarina Virk***, a volunteer with the Hazards Centre and a student at the University of California, currently participating in a study program in Delhi University.

Chapter 6 **"An Unconscionable Judgement"** was contributed by ***Prashant Bhushan***, who

has been a practicing lawyer in the Supreme Court of India since 1983, specialising mainly in Public Interest Litigation, particularly involving issues of Human Rights, Environmental Issues, and Accountability of Public Servants.

Chapter 7 on "**Migration and Return"** was contributed by ***Ram Narayan Kumar***, who has been involved with human rights and democracy issues since 1975 and whose work for justice and accountability in Punjab is widely recognized. Kumar is the author of several books on Punjab and Nagaland, is a former Reuters Foundation Fellow at the University of Oxford, and presently directs a research project on *Understanding Impunity* for South Asia Forum for Human Rights in Kathmandu. The Preface is written by ***Anand Kumar***, who is a consultant with the Hazards Centre. He has been a social activist engaging with *dalit* (scheduled castes) and human rights issues for several years.

The last Chapter 8 summarises the conclusions on possible strategies with regard to an alternative understanding of citizenship based on economic criteria, and was prepared after extensive discussions amongst ***CCPD members***, including representatives from Aman Trust, Bal Vikas Dhara, Beghar Mazdoor Sangharsh Samiti, Chintan Environmental Action and Research Group, Harit Recyclers Association, and Hazards Centre, as well as lawyer Vrinda Grover.

Endorsing citizen's groups and individuals:

This report on behalf of the Citizen's Campaign for Preserving Democracy is being published and endorsed by the following groups and individuals:

Aman Trust

Bal Vikas Dhara

Beghar Mazdoor Sangharsh Samiti

Chintan Environmental Research and Action Group

All India Kabadi Mazdoor Mahasangh

Hazards Centre

Anil Chowdhury

Harsh Mander

Praful Bidwai

Prashant Bhushan

Rajni Kothari

Justice Sachar

Siddhartha Varadrajan

Sumit Chakravarti

Vrinda Grover

Chapter 1

Nationalism in the era of Globalisation

(A summary of CCPD's first report edited by D.Leena)

Introduction

Human history is, in some senses, about the movement of people in search of making their own history. As disparities of incomes and opportunities increase, many more people leave their traditional boundaries to seek better livelihoods. Whether it is Information Technology professionals from South Asia seeking to enter the United States of America, or Turkish peasants searching for menial jobs in Europe, people are leaving their 'homes' in ever increasing numbers for whatever opportunities that exist elsewhere. However, this free movement of people is treated differentially by governments some are welcomed; others are dealt with harshly.

Bangladeshi migrants in India

Bangladesh is one of the poorest countries in the world, and shares a border of over 6000 km with relatively affluent India. Consequently, there has been an influx of poor and destitute economic refugees from Bangladesh to India, many of them dating back to the 1971 war of liberation of Bangladesh. Bangladeshi migrants, estimated to number between 20 to 30 million, are portrayed as "the biggest threat to national security" and a breeding ground for "subversive and terrorist activities", and have been the target of aggressive policies of some Indian governments and right-wing political parties.

The crackdown on Bangladeshi migrants started in earnest in 1993 when the then government announced 'Operation Pushback' to identify, round up, and deport all such people from the country. Thousands of Bengali-speaking Muslims have been picked up since then from various working class settlements all over Delhi (and other cities) and forcibly pushed into Bangladesh. It has never been clearly established whether these persons were actually from Bangladesh or not.

Identification of Bangladeshis - violation of the procedure

As the investigation by CCPD revealed:

- The Action Plan drawn up in May 1993 by the Government of the National Capital Territory of Delhi (GNCTD) for the deportation of illegal migrants, vests the local police with the job of detection and identification of illegal migrants. The over-burdened local police undertake this task through a network of local informers, often from within the target communities, who provide information about suspected illegal migrants.
- The government only accepts documents showing ownership of land as documentary proof of identity. Given the economic status of those arrested and the fact that, in India, more and more migrants to Indian metros are poor landless labour, unable to eke out a living in their native villages, this is an unrealistic demand and cannot be met.
- Even if the citizenship of the arrested persons is uncertain, they still enjoy the protection of the Fundamental Rights enshrined in Articles 14 and 21 of the Constitution, which provide that no person shall be deprived of life or personal liberty except according to procedure established by law. In direct contravention of the law, the police swoop down on the bastis (slums) in the dead of night to arbitrarily round up men, women and children. Families are violently broken up and women and minor children forced to face the situation alone.
- While the Government's own Action Plan requires that the local police records the statements of two independent witnesses, in practice this is hardly followed.
- Those arrested are detained by the orders of the Foreigners Regional Registration Office (FRRO) without any opportunity for being heard, at a place of detention near Shastri Nagar Metro station, under conditions far below the prescribed national and international standards.

Deportation to the Border

From the FRRO the arrested persons are taken to the Municipal 'Ren Baseraa' (night shelter), where the police are waiting for them, until there are sufficient numbers to fill a railway bogie. Subsequently, they are taken to the Old Delhi railway station in closed vehicles and put aboard a train. The Delhi police accompany them to Malda station in West Bengal, from where they are transferred to a Border Security Force (BSF) camp. Diplomatic Protocol requires that when deportation takes place, the Embassy or High Commission or any other representative of the State of the country of origin of the deportee be informed about the decision. This has not been undertaken, resulting in a breach of international protocol.

Since the required procedure has not been followed, care has to be taken by the BSF that their counterparts in the Bangladesh Rifles (BDR) do not know that the deportees are being pushed across the border. Hence, the deportees are released in batches of two in the middle of the night.

Thus, it may take several days for the entire lot of deportees to be evacuated from the BSF camp, and during the entire time armed guards are deployed to ensure that the people remain concealed within the camp. The people, both men and women, remain completely at the mercy and whims of the guards. Several incidents of rape, sexual harassment, and physical violence have been reported by those who have somehow returned from the border.

The Legal Regime

Admissions, deportation, stay, and control of movement of foreigners in India is governed by:

- Passport (Entry into India) Act, 1920 and Rules, 1950.
- Registration of Foreigners Act, 1939 with Rules.
- Foreigners Act, 1946 and subsequent orders issued from time to time.
- Indo - Bangladesh Visa Agreement, 1972.
- The Illegal Migrants (Determination by Tribunals) Act, 1983

The Foreigners Act, 1946, in a fundamental departure from liberal jurisprudence, reverses the burden of proof (Sec.9) and places the onus upon the person concerned to prove his citizenship. It thus replaces the cardinal judicial principle of presumption of innocence. In a country where poverty compels people to work in the burgeoning unorganised sector, it is extremely unlikely that they will hold any documents certifying them as citizens of India. The growing emphasis on documentary proof of identity eventually disenfranchises the poor. There is no forum for Appeal available under the Act, thus denying access to judicial remedy against a decision taken in the arbitrary manner described above.

The Illegal Migrants (Determination by Tribunal) Act, 1983 envisages the constitution of Tribunals, composed of judicial officers, to determine in a fair manner, the question as to whether a person is an illegal migrant or not. But while the Act was not extended to Delhi at the time of CCPD's first publication (2005), it was subsequently struck down in 2005 as unconstitutional by the Supreme Court of India. It was alleged in a Public Interest Litigation before the Court that, since this law adopts procedure grounded on principles of liberal jurisprudence and notions of natural justice, it has failed to get rid of illegal Bangladeshi migrants.

Conclusion

It is true that the physical and cultural similarity of people living on either side of the border makes it difficult for the concerned authorities to distinguish between them. However, instead of evolving a judicious mechanism, the Government has accorded legitimacy to an arbitrary and discriminatory procedure. The cumulative impact of this procedure is the systematic and targeted harassment and abuse of a specific religious and linguistic minority viz. the Bengali-speaking Muslim. In a polity where communal prejudice is increasingly manifest in various sections of both the public and government, this deportation drive, in the absence of necessary checks and balances, begins to acquire the colour of ethnic cleansing in contravention of the secular and plural foundations of Indian society. It also raises disturbing questions about how 'citizenship' is defined and determined in such a society.

Reference:

The Citizen's Campaign for Preserving Democracy report was published in 2005 by a citizen's group consisting of the following members:: Anil Choudhary, Bharati Chaturvedi, Dipankar Bhattacharya, Devrajan, Dilip Simeon, Dunu Roy, Harsh Mander, Praful Bidwai, Rajni Kothari, Rajinder Sachhar, Siddharth Varadarajan, Sumit Chakravarti, Surendra Mohan, Vrinda Grover, and Yogendra Yadav.

....

Chapter 2
Deliberations on Citizenship by the Constitution Framers
Anuradha Sharma

The impending liberation of British India from colonial servitude in early 1947 initially gave rise to the question of who would continue to be a British subject and who would become an Indian citizen. Hence, the founding fathers of the new nation were bound to deliberate on issues of race, ethnicity, birth, and domicile in order to arrive at a reasonable resolution of the question of citizenship. But the subsequent declaration by the British to divide the region led to the creation, on 14th and 15th August 1947 respectively, of two sovereign states, the Islamic Republic of Pakistan and the Republic of India, with one of the largest migrations of human populations in history across the new borders.

In addition, the partition of the Bengal province of British India into the Pakistani state of East Bengal (later East Pakistan, now Bangladesh) and the Indian state of West Bengal, as well as the similar partition of the Punjab region of British India into the Punjab province of West Pakistan and the Indian state of Punjab, laid the foundation for many decades of civil and communal strife. Hence, the framers of the Indian Constitution were seized with the further problem of deciding citizenship provisions in view of the fluidity in movement of people between India and Pakistan. *It is, therefore, historically important to note the deliberations in the Constituent Assembly*[i] *at that time and how different views were expressed and resolved.*

The Debates in the Constituent Assembly

On November 26, 1949 the Constituent Assembly adopted the Constitution of India bringing into force the provisions relating to citizenship after a long discussion spread out over more than two years on the merits of the issue. Prior to 1947 the Indian people were British subjects and were governed by the British Nationality Acts passed by the Parliament of the United Kingdom. The fundamental principle, which governed the laws of British nationality, was that every person born within any part of British territory became a British subject[ii].

After 1947, by the Government of India Act, 1935 it was not within the competence of the legislatures in India to make any law affecting the status of British nationality. Hence, the issue of Citizenship was one of the first matters to engage the attention of the Constituent Assembly; and it took two years of deliberations to arrive at a conclusion[iii]. In order to understand the different opinions of the Constitution makers, it is pertinent to study the debates in the Constituent Assembly. Several meetings of committees and sub-committees were held which churned out various drafts to cover all the necessary and desirable provisions.

Accrual vs. Retention

On March 24, 1947 the Sub-Committee on Citizenship had adopted B.N. Rau's[iv] draft on fundamental rights and provision relating to citizenship. This draft was criticised by K.T. Shah, who commented that the words accrual, acquisition, and termination which were used in the draft, should not be part of the citizenship section because they would not necessarily cover the retention of citizenship and might not include the case of a woman who, originally a citizen of the Union, married a non-citizen but desired to retain her citizenship by virtue of birth[v].

Separate or Unitary citizenship

The Advisory Committee also discussed the question whether the units in the proposed Union should be entitled to provide for separate citizenship rights. Alladi Krishnaswami Ayyar's views propounded that, while certain qualifications might be added to citizenship within a particular unit, there could be only single citizenship for the whole of the Indian Union[vii].

Race and Birth

Under consideration by the Constituent Assembly, there were two theories on which citizenship laws in various countries were based: in some European countries citizenship was determined by blood and race (lex sanguinis), while under the Anglo-American system citizenship was determined mainly on grounds of birth (lex soli). The Advisory Committee chose the birth principle on which the existing clause that a person born in India must get Indian citizenship, even if his parents were foreigners, is based. Alladi Krishnaswami Ayyar and K.M. Munshi[viii] emphasised that the birth clause was intended merely to lay down the indispensable conditions for citizenship. Exceptional cases could be taken care of by a separate Nationality Act to be enacted by the Union Parliament[ix].

Vallabhbhai Patel[x] referred to the struggle against racial discrimination in South Africa and other countries and cautioned that the members should not take a narrow view of the subject and introduce racial phraseology in the Constitution for a few cases, which could be controlled by law[xi]. President Rajendra Prasad[xii] expressed his apprehensions that if the clause was too widely worded it might confer citizenship on every person born in India, whether his parents were Indian citizens or not, thereby enjoying the privileges of both citizenship as well as the parents' national-

ity. This would naturally conflict with the interests of the true citizens of India who had no other nationality[xiii]. In April, the President appointed an ad-hoc committee to go into the issue.

The ad-hoc committee submitted the following redrafted clause: "Every person born in the Union and subject to its jurisdiction; every person either of whose parents was, at the time of such person's birth, a citizen of the Union; and every person naturalised in the Union shall be a citizen of the Union.[xiv]" The Union would have to enact a law to make further provisions regarding the acquisition and termination of Union citizenship. The committee also observed that a provision for children born in the Union, even of non-citizens, provided they are subject to Union jurisdiction, should also be included in the law, as accepted in the Indian Naturalisation Act, 1926. However, the children of visiting foreigners would be on the same footing as the children of foreign diplomats and would as such be regarded as non-citizens even if born in the Union.

The ad-hoc committee also made an express provision for supplementary legislation terminating citizenship in the case of dual nationality. But B.N. Rau suggested that the Constitution should confine itself to specifying who would be citizens at the commencement of the Constitution, the rest being left to the Union law[xv].

Partition and Nationality

The British Government's announcement of Indian partition on June 3, 1947, was followed by a series of consequential changes and adjustments both inside and outside the Constituent Assembly. The Union and Provincial Constitution Committees decided to re-examine the question of citizenship as an inevitable sequel to the announcement. The Government Solicitor, Dhiren Mitra, stressed the need for considering the question of nationality as it had a bearing on a person's employment in public service and his status abroad.

D.P. Khaitan[xvi], member of the Constituent Assembly, and later member of the (Constitution) Drafting Committee, highlighted that the definition of citizenship should cover the case of a woman who, on being married to a citizen of India, would automatically become an Indian citizen. He added that a large number of marriages were likely to take place between the citizens of India and those of Pakistan, as also between the citizens of India and those of the Indian States. In the absence of such a provision, therefore, India would be "full of what would legally be foreign women[xvii]."

Displaced persons

In October 1947, the Constitutional Adviser and Chairman of the Drafting Committee, B.R. Ambedkar, prepared another draft to incorporate the citizenship clauses as earlier recommended by the ad-hoc committee, for the large number of displaced persons who had come or were still coming to India from Pakistan as a result of Partition. Consequently, the meaning of citizenship was expanded by adding the basis of grandparents born in the territories initially included within the Federation. Another sub-clause provided that every person who, at the commencement of the Constitution, had domiciled in India would be a citizen of the Federation, to cover those persons compelled by the circumstances beyond their control to migrate to India.

An easy mode of acquiring domicile in India was also provided for displaced persons born in Pakistan, Burma, Ceylon, or Malaya but wishing for Indian citizenship, provided they did not have the right to abode in any foreign state. The procedure stipulated that a displaced person had to reside in India for a month and then to make and deposit a written declaration in a prescribed office of his desire to acquire domicile in India. To discourage double citizenship and prevent divided loyalties and to deal with the question of citizenship for persons born after the commencement of the Constitution[xviii] a clause was inserted that laid down that foreign nationals would be disqualified for membership of Federal Parliament or the Legislature of any unit[xix].

The Draft Constitution was published and circulated for eliciting opinion. Pattabhi Sitaramayya and others sought to replace the words "permanent abode" by the word "domicile" and to change the date of determination from "first day of April 1947" to the "fifteenth day of February 1947". He also proposed the removal of all restrictions like the deposition a declaration in the office of the District Magistrate /any officer authorized in that behalf by District Magistrate (as the District Magistrate might not be easily approachable for depositing the declaration of domicile) and the entitlement to Indian domicile of every displaced person from Pakistan who migrated to India after the first day of April 1947[xx].

In response, B.N. Rau commented that the term "permanent abode" had been used because the term "domicile" was vague and a foreign State might give it an artificial definition. Pointing out the significance of April 1, 1947, he noted that the date was crucially chosen because according to the information available, the exodus from what later became Pakistan did not begin before that date. He also highlighted that Sitaramayya's proposal would allow every temporary migrant the right of citizenship.

Work and Habitation

Members of the Calcutta Bar and the editor of the Indian Law Review criticised the definition of citizenship in the draft as being narrow, and excluding those persons who were born or had a fixed habitation in Pakistan but had spent their life in India in the pursuit of their profession, calling or vocation, because the definition of domicile in the Indian Succession Act excluded such persons. But the Committee pointed out that these persons could acquire citizenship by depositing the requisite domicile certificate with the District Magistrate

Burmese Displaced

The All-Burma Indian Congress underlined the need for giving an option to every Indian resident in Burma who was an Indian before April 1, 1937 (when the state was separated), an option where he should have the unqualified option of choosing the citizenship either of India or of Pakistan. Not only this but this right should be extended to those overseas Indians who were born in what subsequently became Pakistan territory. The process of easy option of re-acquisition of citizenship should also be prescribed for Indians residing in Burma who had taken Burmese citizenship but later wanted to acquire Indian citizenship[xxiii].

Other countries

B.N. Rau also observed that there was a lacuna in the clause, as it left out persons who were born in Pondicherry, Goa, Chandranagore, or other foreign territories in India or were born in South Africa, Fiji, or other countries outside India, but were domiciled in the territory of India as defined in the Constitution. It was pointed out that there should not be any discrimination in the treatment to persons born in Pakistan or Burma. However, for the person who was an Indian citizen by birth and became a citizen of the Malayan Federation by the automatic operation of Malayan law or became a British subject under the British nationality law, he would not be considered for the purposes of the article to have voluntarily acquired Malayan citizenship or British nationality[xxv].

Besides it was also proposed whether the Government of India should undertake legislation before the commencement of the Constitution to enable persons residing in Malaya to acquire Indian citizenship by declaration in writing before India's representative in Malaya. The citizenship provisions explained that no person should, at the inception of the new Constitution, be a citizen of India unless he was connected with the territory of India by birth, descent, or domicile. Persons unconnected with the territory of India in one of these ways could not, by merely making

a statement before some authority outside India, qualify for citizenship. When a person was not born in India and was not born of parents or grandparents born in India, it would be necessary that he should stay in India for at least a month and make a declaration of his intention to acquire Indian domicile[xxvi].

Persons of Indian origin

In respect of people originated in Indian territories before August 15, 1947 and living abroad on the date of the inception of the Constitution, but were keen on acquiring Indian citizenship, they would automatically become Indian citizens, considering that at least either of their parents or grandparents must have been born in India[xxvii].

Another difficult question concerned those persons who originated in territory included in Pakistan but were living abroad in Burma, Egypt, Indonesia, etc., and their homes had been destroyed and who wanted Indian citizenship. According to the draft clause such persons were required to submit a declaration of their intention to acquire Indian domicile and reside there for at least a month before the date of declaration. But Dutt raised the concern that for these persons who had no home left in India, it would be unfair to compel them to return to India immediately, merely to qualify for Indian citizenship[xxviii].

The Ministry of External Affairs was also not satisfied and wanted a special provision in the Constitution to deal with this class of Indians to qualify for citizenship at the commencement of the Constitution. The matter came to Prime Minister Nehru[xxix] and B.R. Ambedkar[xxx] for consideration. They thought that the apprehensions could be put aside by making changes in the clauses regarding naturalisation in the Bill on Indian Citizenship.

Pakistan residents migrated to India

Some mention was also made about the categories who were initially resident in India and had later migrated to Pakistan, and those who were resident in Pakistan but had migrated to India. Furthermore, the latter were divided into two classes. One class involved those who had come to India before July 19, 1948 and they were automatically qualified for citizenship, but another class were those who had come later and they could acquire citizenship only by making an application for registration to an officer appointed by the Government of India. Persons who had returned to India from Pakistan on the basis of a permit given to them, not merely to enter India but also to resettle, would become citizens of India on the commencement of the Constitution.

Persons residing abroad, but born in India, were allowed the right to Indian citizenship. After strong representations, the persons who were residing abroad, but whose parents were born in India, were allowed to make an application before the commencement of the Constitution to the Consular Officer or the Diplomatic Representative of the Government of India in the country in which they were staying, and get themselves registered as citizens.

Pakistan Refugees

Nehru stated that, as a consequence of Partition, India assumed that a great wave of migration from Pakistan was going to take place and thus it became obligatory for India to accept as citizens all those who came in that wave, irrespective of their religion. Moreover, he pointed out that a system of inquiry had been instituted with regard to people who came to India after July 1948. He also observed that the Muslims who came from Pakistan with permits for permanent settlement in India were around 2,000- 3000 only, and before the permits were issued each case was dealt with by the local officials and the local government concerned.[xxxi]

Some members shared the apprehensions of refugees, that migration should not extinguish their title to property that could only be settled between the new Governments of India and Pakistan. Only about three thousand Muslims had managed the permits to India, and compared to that the number of non-Muslims who wished to return to Pakistan was negligible. There was a fear that the treatment given to the persons returning from India would not be the same as that would be given in India to those returning from Pakistan.

Justifying the query, Ambedkar asserted that the provision which would allow the Muslims to acquire citizenship rights was based on an undertaking given by the Government of India permitting people from Pakistan to return and settle down in India. But the Government could always bring in a Bill in the Assembly to prevent itself from continuing the permit system (and if the Assembly denied citizenship rights to these persons who came on the assurance of the Government to make their home in India, it would be considered against the public interest). As regard to granting citizenship to East Bengal Muslims, Ambedkar emphasised that for those persons who had entered Assam, whether they were Muslims or others, the citizenship was to be granted only to those who entered Assam before July 19, 1948[xxxii].

Indian Citizenship Law passed by Constituent Assembly

After extensive debates on the above issue the Constituent Assembly passed the Constitution of

India on November 26, 1949 which came into effect on January 26, 1950. The Constitution of India provides for a single citizenship for the entire country. The provisions relating to citizenship at the commencement of the Constitution are contained in Articles 5 to 11 in Part II as follows:

- Article 5: Citizenship at the commencement of the Constitution
- Article 6: Rights of citizenship of certain persons who have migrated to India from Pakistan
- Article 7: Rights of citizenship of certain migrants to Pakistan
- Article 8: Rights of citizenship of certain persons of Indian origin residing outside India
- Article 9: Persons voluntarily acquiring citizenship of a foreign State not to be citizens
- Article 10: Continuance of the rights of citizenship
- Article 11: Parliament to regulate the right of citizenship

The Citizenship Act enacted later by Parliament in 1955 provides for acquisition and determination of citizenship. The modes of acquiring Indian citizenship, as defined by the Act, are:

- By birth (section 3)
- By descent (section 4)
- By registration (section 5)
- By naturalization (section 6)
- Registration of overseas citizens of India (section 7 A)

Redefining Citizenship

As is evident from the discussion above, the framers of the Constitution of India were initially faced with the problem of defining citizenship for a new nation and decisively rejected the racial or religious basis for a secular one based on birth and domicile. Later, faced with the reality of Partition and possible dual nationalities, the debates in the Constituent Assembly acknowledged the right of a person to choose single citizenship through a specific procedure as well as the rights conferred by descent, residence, refuge, and marriage subject to the stipulation of specific cut-off dates. However, there is one strand in the debate that seems to have been generally ignored, or

subsumed within the other categories. This strand related to the occupation or work in which the person was engaged, whether through domicile or migration. It is vital to keep in mind these prescient views of the founding fathers of the nation with respect to choice and work for the subsequent discussions.

References:

(i) The Constituent Assembly of India was elected to write the Constitution of India, and served as the first Parliament of an independent nation. The Constituent Assembly was set up as a result of negotiations between the Indian leaders and members of the British Cabinet Mission. It was indirectly elected by the Members of the Provincial legislative assemblies. It first met on December 9, 1946 in Delhi, while India was still under British rule. It originally included the provinces that now compose Pakistan and Bangladesh, and had representation from the princely states of India. In June 1947, the delegations from the provinces of Sindh, East Bengal, Baluchistan, West Punjab and the North West Frontier Province formed the Constituent Assembly of Pakistan in Karachi. On August 15, 1947, India became an independent nation, and the Constituent Assembly became India's Parliament.

(ii) The Framing of India's Constitution, A Study, 1968, New Delhi, The Indian Institute of Public Administration 1968, p149

(iii) ibid, p149.

(iv) Benegal Narsing Rau: eminent jurist and statesman of India, played a major role in framing the Constitution.

(v) op cit, The Framing of India's Constitution, p151

(vi) Alladi Krishaswami Ayyar (1883-1952): Advocate, Madras High Court; Advocate General, Madras 1929-44; member of various Committees in the Constituent Assembly.

(vii) op cit, The Framing of India's Constitution, p151.

(viii) K.M. Munshi: Advocate, Bombay High Court; Author & Novelist; Secretary, Bombay Home Rule League, 1919-20; member, All-India Congress Committee 1930-6 and 1947; Member, Bombay Legislature, 1927-46; Home Minister, Government of Bombay 1937-9; Agent General to the Government of India at Hyderabad, 1947-8; Minister of Food and Agriculture, Government of India, 1950-52; Governor of Uttar Pradesh 1952-7; member of various Committees in the Constituent Assembly.

(ix) op cit, The Framing of India's Constitution, p154

(x) Vallabhbhai Patel: Bar-at-Law; Advocate of Ahmedabad; associated with Gandhi since 1916; titled 'Sardar' by Gandhi for conducting Bardoli Campaign; President, Karachi session of the Indian National Congress, 1931; Member, Home, Information & Broadcasting, Interim Government of India, 1946; Deputy Prime Minister of Home Affairs, Information & Broadcasting State, Government of India, 1947-50; member of various Committees in the Constituent Assembly.

(xi) op cit, The Framing of India's Constitution, p153

(xii) Rajendra Prasad: Advocate, Calcutta & Patna High Courts, 1911-20; General Secretary, Indian National Congress, 1932, 1934, 1939, 1947-8; Member, Food & Agriculture, Government of India, from August 1947; resigned as Minister in January 1948; President, Constituent Assembly, 1946-50; Chairman of Rules of Procedure Committee; member of various Committees; President of India, 1950-62.

(xiii) op cit, Constituent Assembly Debates, Vol III, pp399-409.

(xiv) ibid, p 153

(xv) op cit, Memorandum on the Union Constitution, pp472-3.

(xvi) D.P. Khaitan: industrialist of Bengal; Commissioner, Calcutta Corporation, 1921-4 and 1936-8; Member, Legislative Council, Bengal, 1922-6; Member, Indian Delegation to the I.L.O., Geneva, 1928; Member, Governing Body of the International Labour Conference, 1929; member of various Committees in the Constituent Assembly.

(xvii) op cit, The Framing of India's Constitution, p154-155

(xviii) British Nationality and Status of Aliens Act, 1914, sec. 1(1).

(xix) Commonwealth of Australia Act, 1990, sec. 44(i).

(xx) op cit, The Framing of India's Constitution, p158

(xxi) ibid, p159

(Xxii) ibid, p159.

(xxiii) op cit, Comments and suggestions on the Draft Constitution, pp.22-3.

(xxiv) op cit The Framing of India's Constitution, p161.

(xxv) ibid, p161.

(xxvi) ibid, p162.

(xxvii) op cit, Constituent Assembly Debates, Vol III, pp470-1.

(Xxviii) op cit, The Framing of India's Constitution, p164

(xxix) Jawaharlal Nehru: political leader of the Indian National Congress, a pivotal figure in the Indian Independence movement, and the first Prime Minister of Independent India.

(xxx) B.R. Ambedkar: Bar-at-law ; Delegate, Round Table Conference, London; Founder Schedules Castes Federation; Member (Labour), Governor- General's Executive Council, 1942-6; Minister of Law, Government of India, 1947-51; Chairman of Drafting Committee.

(xxxi) op cit, Constituent Assembly Debates, Vol IX, pp398-401

(xxxii) ibid, p 422-4

....

Chapter 3
Human Rights and Immigration Control
Amanda Shah

Introduction

It is true that there is an international legal norm that nation states, such as India, have the right to control the entry of foreign nationals into their territory. However the right of any state to control its borders is not absolute. It must be exercised in accordance with internationally recognised human rights laws. This approach is most clearly articulated in the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (to which India is not currently a state party). The ethos of the Convention is that immigration control must treat people as human beings first and migrants second.

The purpose of this paper is to contribute to the formulation of Indian government immigration policy by pulling together case studies of how several national jurisdictions are responding to the challenge of undocumented migration within a framework of human rights. Many states are responding to - sometimes substantial - immigration inflows and trying to square the need for immigration control with their human rights obligations. For instance, the United States is thought to house the largest absolute numbers of undocumented migrants followed by South Africa[i], some studies estimate 10-15% of Europe's immigrant population is undocumented, and others believe that the majority of migrants in Africa and Latin America are undocumented[ii]. This paper will examine how different jurisdictions have responded to the challenge of formulating detection, decision-making and deportation policies within a rights based framework.

Detection

Bangladeshis in India

The Indian government's approach to detect undocumented Bangladeshi migrants focuses both on border control and in-country identification and removal strategies. The government has strongly favoured fencing the Indo-Bangladesh border to check 'infiltration'. However this has created problems in that, the fencing project contravened the Mujib-Indira boundary agreement, which prohibits construction within 150 yards of the border, and threatened to fence out 100,000 Indians living and working up to the 'zero line'. It is claimed that fencing the border has reduced the rate of 'infiltration' but there are no official figures to verify this.

In-country methods of detection have largely depended on information being supplied to the authorities by civilians. The 1993 Delhi Action Plan charged the police with the task of detection. However CCPD's 2005 report found that the police, in turn, used 'a network of local informers, often from within the communities that are targeted', to provide information. Maitrayee Chaudhuri's study of Bengali Muslims in the Vasant Kunj area of Delhi found that according to local accounts 'many young men of the jhuggis (slums) have established a very good relationship with the police who can now be used to settle personal scores' by picking up neighbours as suspected undocumented migrants[iii]. This short cut approach adopted by the government has resulted in arbitrariness, corruption, and manipulation.

<u>United States and Mexico</u>

The United States hosts upwards of 10 million undocumented migrants nearly one third of the country's foreign born population over half of whom are Mexican[iv]. The US-Mexico border is just short of 2,000 miles long (half the size of the US-Canada border) and attempts to fence sections of the border have been stepped up since the mid-1990s. According to the Migration Policy Institute (MPI), '[*in many ways, these efforts* [have] *paid off: Crossing successfully* [has] *became gradually more difficult and the fees charged by smugglers* [have risen] *accordingly*[v].'

However, according to the report of the Global Commission on International Migration, '[*despite increased efforts at border control, about 500,000 additional migrants enter the USA without authorisation each year.*'[vi] This figure is also quoted by the MPI which notes that despite increased investment in border control, '*net illegal immigration to the US has been rising by an average of 500,000 persons per year for a decade.*' The impact of the fence has not been to curtail undocumented border crossings but to move its location. As preferred crossing points became more heavily fenced and policed, migrants have shifted their crossings to other less fortified but more dangerous stretches of the border including large areas of desert and mountainous terrain. As a result, the number of border crossing deaths has risen[vii].

Another impact of fencing has been that the many Mexicans who traditionally migrated back and forth across the border (so-called 'shuttle migrants') have been pushed into making much higher personal and financial investments with people smugglers in order to thwart border security. Whereas their migration to the US was previously of a temporary or seasonal nature, they can now effectively be locked into the country by the beefed-up border control measures[ix].

Despite these problems, in December 2005 the House of Representatives passed Resolution

4437, also known as the Sensenbrenner Bill. Within the Bill is a provision to fence 700 miles of the US-Mexico border at points which produce the highest number of unauthorised crossings. At the time of writing, the Bill was being debated by the US Congress but had generated large-scale demonstrations by more than one million protesters. Most of those protesting were documented migrants, undocumented migrants and descendants of migrants of Hispanic origin[x].

<u>South Africa</u>

During March 2000, 7,068 people suspected of being undocumented migrants were arrested in areas of Johannesburg as part of Operation Crackdown. Law enforcement officers were empowered by legislation to arrest those who they reasonably suspected were undocumented migrants, a clause interpreted so widely by police that little effort was made to distinguish between who was legally resident and who an undocumented foreigner. Common reasons for arrest (which were concentrated in areas inhabited by black people) included: being too dark, mispronouncing words, and having inoculation scars in the wrong place. Some of those arrested were denied the opportunity to show identity documents, others had their documents destroyed by the police, and it was widely reported that the police used the opportunity to extort bribes.

According to the Southern African Migration Project (SAMP), of the 7,000 plus people arrested, more than 400 were later found to have a legal right to reside in South Africa and some were found to be South African citizens[xi]. Human Rights Watch also reported that '*[m]any of those detained had asylum claims pending, had been granted refugee status, or were South African citizens*.' In response to the numerous abuses, human rights organisations took a complaint to the South African Human Rights Commission, which criticised Operation Crackdown's identification processes for concentrating on physiognomy rather than immigration status.

<u>Recommendations</u>

Based on lessons from CCPD's 2005 study and from the above international case studies, this paper makes the following suggestions to policy-makers towards establishing detection strategies in Delhi which are both robust and rights-based.

Policy-makers should:

1. Review existing methods of detecting undocumented migrants in Delhi against India's domestic and international human rights obligations.

2. Adopt clearly articulated and objective detection criteria that are consistent with human rights standards. These criteria must be made publicly available.

3. Ensure that detection activity is carried out by public officials (police, immigration offi cials) and that any information provided by civilians is assessed against authorised detection criteria.

4. Implement a thorough training programme for public officials involved in detection work.

5. Implement clear and accessible structures to allow those wrongly accused as undocu mented migrants, or who have experienced abuses during detection operations, to complain to an independent investigating authority.

6. Ensure that public officials using subjective, arbitrary, abusive or corrupt methods of identification are subject to disciplinary procedures.

Decision-making

The process of deciding cases is a key point in the life-cycle of any immigration policy. It provides not only an opportunity to confirm or rectify actions at the detection stage but it establishes the need for any continuing intervention and eventual deportation. CCPD's findings on decision-making in Delhi raise a number of pertinent issues for consideration by policy-makers:

(a) There is currently no legal process for deciding the claims of those identified in the capital as possible undocumented Bangladeshi migrants. No tribunal has been constituted under the Foreigners Act 1946 in Delhi to hear such cases and the (now repealed) Illegal Migrants (Determination by Tribunals) Act 1983 (IMDT Act) was never extended to Delhi to cover this scenario.

(b) There is no judicial involvement in deciding the 'legality' of a person's status. There is therefore no system of checks and balances against abusive or erroneous actions at the detection stage. This is a violation of the constitutional principle of separated powers.

(c) The actions of the Foreigners Regional Registration Office (FRRO) (and of officials at the detection stage) are concerned with assessing a person's nationality and not with their legal status within India. There is a presumption that all Bangladeshis are in India without valid documents.

(d) The attitude of the FRRO towards documentation is indicative of a culture of disbelief and presumed guilt. The institutionalisation of this attitude within any process of decision-making almost inevitably leads to miscarriages of justice.

Documentary Evidence

The insistence on documentary evidence by government agents raises serious concerns because there is no official list of evidence that is taken as absolute proof of Indian citizenship. The lack of official guidance also allows arguably even encourages detection and decision-making agencies (i.e. the police) to treat evidence in an arbitrary and prejudicial manner. The result is a scenario, repeated across Delhi, where documents issued by one arm of government (the Ministry of Home Affairs, the Department of Labour, etc.) are dismissed or destroyed by another agent of government (the police).

Legislation provides no assistance in formulating an official list of accepted documentation. Neither the Foreigners Act 1946, the Citizenship Act 1955, the Passport Act 1967, nor the IMDT Act 1983, list evidence that can be accepted as proof of citizenship. Some pointers are to be found in case law. The Supreme Court decision that struck down the IMDT Act states: '*In order to establish one's citizenship, normally he* [the person whose citizenship is in question] *may be required to give evidence of (i) his date of birth (ii) place of birth (iii) name of his parents (iv) their place of birth and citizenship. Sometimes the place of birth of his grandparents may also be relevant* [...].'

Whilst the judgment does not go as far as to stipulate which documents should be used, it does signify what information should be established in order for citizenship to be proved. A real concern is finding acceptable evidence that is realistically obtainable. It would be a perversion of natural justice to make only two pieces of accepted evidence, a birth certificate and a passport, in the knowledge that most of those who will be called upon to prove their citizenship are unlikely to own these documents. Documents routinely presented as evidence of Indian citizenship include ration cards, election cards, Department of Labour cards, the name and address of employers, documents of land ownership, school certificates, hospital discharge slips, affidavits from *gram panchayats* (village councils), and certificates from Members of the Legislative Assemblies and Parliament[xiii]. Some of the documents are not of themselves indicative of citizenship but they do arguably help substantiate a picture of a history of gainfully working and living in India.

In the opinion of this many non-government organisations working with informal labourers, it is time for a more creative approach to evidence which acknowledges the worth of community

evidence and affidavits and corroboration with referees through telephone or in person interviews, based mainly on voluntary residence and productive employment within the country. This could be complemented with the vetting processes of other institutions. For example, accepting bank documents in the knowledge that in major banks opening an account requires proof of residence, and income rooted within the local economy.

Non-documentary evidence

To address the very real problems around false documents, or people who have no documents, some countries have incorporated non-documentary evidence into their assessments of nationality. This usually takes the form of tests to assess a person's country knowledge or a nationality assessment from people whose views are deemed to hold weight. These methodologies can also result in abuses of undocumented migrants, foreigners with legal status, and citizens when the means of testing nationality are blunt and crudely applied without due consideration for human rights standards. For example, when nationality judgments are based on physical attributes and mass stereotyping as has been the case in South Africa and the Dominican Republic.

In the North African Spanish enclave of Ceuta, Spanish authorities use several methods to identify the nationality of rejected asylum seekers, such as examination by linguists, assessments by trained embassy staff, or assessments by 'experts' on the basis of skin colour, shape of face, and accent. But according to a 2005 Amnesty International report, neither the national police, embassy staff, or 'experts' used by the authorities have special training on countries of origin or linguistics. Amnesty has described the identification processes used as '*clearly inadequate*[xiv]'. There is, therefore, a real need for decisions to be made within a judicial process, with official evidence of decisions given to suspected undocumented migrants (a letter, certificate, form, etc.), and records kept of decisions made.

Recommendations

Based on lessons from CCPD's 2005 study and from the above Indian and international case studies, this paper makes the following suggestions to policy-makers towards establishing decision-making processes in Delhi which are both robust and rights-based.

Policy-makers should:

1. Establish legally constituted tribunals which separate the roles of investigating powers and judicial authorities and ensure determinations of nationality are only made by appointed judicial officers.

2. Consider utilising the Foreigners (Tribunals) Order 1964 to constitute a tribunal for Delhi to hear cases under the Foreigners Act 1946 (taking cognisance of necessary modifications to meet the other recommendations in this section).

3. Ensure that each case is decided individually on its own merits and consider the role of appeals in constructing a rights-based decision-making system.

4. Adopt a clearly articulated and publicly available list of acceptable evidence in determinations of nationality. This must include evidence that working class and poor Delhiites can reasonably be expected to obtain.

5. Ensure that documents issued by state and central government agencies are regarded as proof of citizenship unless a judicial tribunal finds there is incontrovertible evidence of fabrication.

6. Ensure that non-documentary evidence is obtained only by personnel who have specialist experience and training in nationality and linguistic matters.

7. Maintain records of those whose status as Indian citizens or legally resident foreign nationals has been established through a judicial tribunal. The tribunal should provide individuals with documentation explicitly verifying their status and public officials involved in detection activities should be trained to recognise and accept these documents.

Deportation

This paper does not seek to suggest that India has no right to deport undocumented migrants or to maintain border controls. Instead it tries to show how current immigration control policies violate India's human rights obligations, and to suggest policy alternatives that centralise rights protection for all, regardless of their immigration status or citizenship.

Indo-Bangladesh border

When people identified for deportation are transferred to a Border Security Force (BSF) camp near the Indo-Bangladesh border there begins a cat and mouse game between the BSF and its Bangladeshi counterparts, the Bangladeshi Rifles (BDR), to push them over the border, a practice Amnesty International has referred to as 'push in - push out'[xv]. Contrary to international diplomatic protocol, the Indian authorities do not inform any representatives of the Bangladeshi

government before they attempt to forcibly return people to Bangladesh[xvi]. In its 2005 report, CCPD listed the repercussions of this 'game' for the rights of the people held at the BSF camp. Not all people identified for deportation make it over the border. The violence involved in maintaining the integrity of the border has resulted in a number of deaths. According to the South Asian Forum for Human Rights, its investigations suggest '*that very few people in the border areas have evidences of citizenship*' unsurprising considering that from the process of detection to deportation, Indian state agents destroy and confiscate identity documents presented as evidence of citizenship. As a result both the BSF and BDF claim that deportees '*do not belong to their part of the world*[xvii].' *One World South Asia has recorded that in 2003 'India made over 60 attempts to push thousands of people into Bangladesh from various points on the border. New Delhi claims these people are illegal immigrants from Bangladesh while Dhaka denies the charge.'*

CCPD has described the people caught in this process as '*poor people, deliberately bereft of identity and citizenship*' whilst a South Asia Forum for Human Rights article calls them '*no-where peoplex*[viii,xix]., Amnesty International describes India's deportations to Bangladesh as acts of '*collective expulsion*' which are contrary to much international human rights law[xx]. Ironically, India's deportation process, which is the policy conclusion of a world view which vilifies people because of their 'illegal' status, forces undocumented migrants '*to again take the path of illegality*' and cross the border clandestinely[xxi] thus perpetuating the cycle of 'illegal' migration across the Indo-Bangladesh border.

Other Approaches

There is a notable absence of sustained dialogue between the governments of India and Bangladesh about the management of migration over their shared border. By way of contrast, in a substantial number of other countries approaches are favoured which centralise the importance of agreements between sending and receiving countries as a way of managing deportations in a controlled and efficient manner. One of the legal starting points for dialogue between countries is provisions in international law on consular services. In 1963, consular relations which had been part of customary international law as well as the subject of individual bilateral treaties were codified into a multilateral international treaty, the Vienna Convention on Consular Relations[xxii].

Article 36 of the Convention explicitly states that if a national of state A is detained in state B, state B has a duty to inform the person of his/her right to consular access with state A and, if the person requests it, state B has a duty to inform state A of the person's detention. Furthermore,

consular officials from state A have the right to visit, communicate with, and arrange legal representation for their nationals whilst they are detained by state B unless an individual refuses such assistance. Whilst there are no enforcement mechanisms within the Convention itself, its Optional Protocol gives the International Court of Justice (ICJ) jurisdiction over disputes under the treaty[xxiii].

Many countries have transposed their responsibilities into training and information for front line officials. For example, to help ensure its compliance with the Convention, the US Department of State has produced an e-handbook for public officials giving detailed instructions on how the provisions of the Convention should be applied. It includes generic statements in 17 languages that can be given to foreign nationals to explain their rights to consular access, multi-language posters, and pre-printed fax forms to inform embassies of the detention of a foreign national[xxiv].

Beyond consular dialogue for the purpose of facilitating deportation at the stage when people are arrested and detained, dialogue between a sending and receiving state prior to a deportation procedure is accepted diplomatic protocol. This diplomatic etiquette is pithily articulated in Article 10 of the European Convention on Social and Medical Assistance which provides for advance advice, information, and mutual decisions on deportation arrangements[xxvi].

Building on diplomatic protocol, some states have formalised arrangements for sending and receiving deportees. For example, in response to growing numbers of undocumented migrants entering Spain, in 2005 the authorities reactivated a 1992 agreement with Morocco to facilitate deportations '*even if* [those being deported] *are of different nationalities'* - although refugee NGOs have expressed concern that methods used by Morocco to curtail undocumented migration do not meet international human rights standards. A 2004 report from the UN Special Rapporteur on the human rights of migrants in Italy noted that agreements with countries of origin and transit seemed to have contained migratory flows from Albania[xxviii].

According to a 2005 government strategy document, the UK has negotiated an arrangement to facilitate the deportation of rejected asylum seekers from Afghanistan, India, Sri Lanka, Turkey, China, Albania, Bulgaria, Romania, Vietnam and Somaliland. During a hearing of the Delhi High Court on 16 March 2005 on a related matter in Chetan Dutt vs Union of India, Senior Advocate Gopal Subramanium (appearing for the state) stated that an intergovernmental mechanism to facilitate deportations was a must and he suggested that India's agreement with the UK for returning undocumented migrants to India could be used as a model for a similar such agreement

with Bangladesh[xxix].

However, if human rights are not prioritised then negotiated agreements between sending and receiving countries can themselves lead to human rights abuses. In June 2006 Senegal refused to cooperate with Spain in the deportation of undocumented Senegalese migrants because the first group deported under a cooperative regime complained of ill-treatment. According to the BBC, during the deportation process deportees were handcuffed, told to lower the window blinds of the plane, and informed that they were on their way to Spain. A senior Senegalese official complained that '*[w]e'd hoped the repatriation would be carried out in a dignified manner. That wasn't the case'*.

To facilitate such dialogue it is suggested that both parties consider the potential role for third parties particularly in providing technical assistance on how such rights-based migration policies can be achieved. So, while the situation of suspected undocumented Bangladeshis in Delhi does not fall within the ambit of the United Nations High Commissioner for Refugees (UNHCR), apart from for those who might have a claim to refugee status, in the refugee context UNHCR regularly assists in the repatriation process[xxxi]. At various times in South Asia refugee populations and NGOs have requested the involvement of UNHCR in returns processes (Bhutan, Nepal, Afghanistan, Pakistan, and Iran) to ensure human rights are protected, although these requests have not always been agreed to.

Another potential partner could be the International Organisation for Migration (IOM) which plays an active role in facilitating the 'assisted voluntary return of migrants', i.e. repatriations where migrants are not forced to return. The IOM undertakes programmes that facilitate the voluntary return and reintegration of displaced and stranded persons and other migrants taking into account the needs and concerns of local communities. IOM assists governments in the development and implementation of migration policy, legislation and administrative mechanisms. To this end, it provides technical assistance and training for border guards on border management, visa systems, and the use of biometric information[xxxii].

Recommendations

Based on lessons from CCPD's 2005 study and from the above international case studies, this paper makes the following suggestions to policy-makers towards establishing deportation strategies which are both robust and rights-based.

Policy-makers should:

1. Review existing deportation procedures against India's national and international human rights obligations and diplomatic protocol as established in international law.
2. Ensure that undocumented migrants are returned to Bangladesh in a safe and dignified manner that guarantees that their rights are not violated as a result of the deportation process. This should be the prime objective of all deportation policy, current and future.
3. Ensure sufficient and particular attention is given to the protection and humanitarian assistance needs of women, children, the elderly, and other vulnerable groups.
4. As a matter of urgency, commence dialogue with the Government of Bangladesh to establish bilateral border management strategies that are underscored by human rights.
5. Consider the involvement of an international third party in overseeing deportation strategies.
6. Implement a thorough training programme for public officials involved in deportation work that covers procedures, implementation, human rights standards, and complaints mechanisms.

References:

i The Global Struggle with Illegal Migration: No End in Sight', Demetrios G. Papademetriou in Migration Policy Institute, Migration Information Source Special Issue: The Unauthorized, September 2005, http://www.migrationinformation.org/Feature/display.cfm?id=336

ii Report of the Global Commission on International Migration, Migration in an interconnected world: New directions for action, October 2005, p.32, http://www.gcim.org/attachements/gcim-complete-report-2005.pdf

iii Maitrayee Chaudhuri, 'Betwixt the State and Everyday Life: Identity Formation among Bengali Migrants in a Delhi Slum'

iv Report of the Global Commission on International Migration, Migration in an interconnected world: New directions for action, October 2005, p.33, http://www.gcim.org/attachements/gcim-complete-report-2005.pdf

v Statement of Dr. Demetrios G. Papademetriou before the US Senate Foreign Relations Committee on

US and Mexico Immigration Policy and the Bilateral Relationship, 23 March 2004 , p.6,

http://www.migrationpolicy.org/research/papademetriou_032304.pdf

vi Report of the Global Commission on International Migration, Migration in an interconnected world: New directions for action, October 2005, p.33, http://www.gcim.org/attachements/gcim-complete-report-2005.pdf

vii 'The Global Struggle with Illegal Migration: No End in Sight', Demetrios G. Papademetriou in Migration Policy Institute, Migration Information Source Special Issue: The Unauthorized, September 2005,

http://www.migrationinformation.org/Feature/display.cfm?id=336 .

viii Wikipedia , United States -Mexico Barrier, 2006, http://en.wikipedia.org/wiki/United_States%E2%80%93Mexico_barrier

ix 'The Global Struggle with Illegal Migration: No End in Sight', Demetrios G. Papademetriou in Migration Policy Institute, Migration Information Source Special Issue: The Unauthorized, September 2005, http://www.migrationinformation.org/Feature/display.cfm?id=336 Platfform for International Cooperation on Undocumented Migration (PICUM), Ten Ways to Protect Undocumented Migrant Workers, 2005, p.88 http://www.picum.org/

x The Guardian, US counts cost of day without immigrants, 2 May 2006, http://www.guardian.co.uk/usa/story/0,,1765520,00.html

xi Southern African Migration Project, Policing Migration: Immigration Enforcement and Human Rights in South Africa, Migration Policy Brief No. 14, undated, s.2.5-6,

http://www.queensu.ca/samp/sampresources/samppublications/policybriefs/brief14.pdf

xii Human Rights Watch, World Report 2000: South Africa , 2001, http://www.hrw.org/wr2k1/africa/southafrica.html

xiii CCPD field notes and Citizen's Campaign for Preserving Democracy, Democracy, Citizens and Migrants: Nationalism in the Era of Globalisation, 2005, http://www.amanpanchayat.org/test/hsc_ccpdfinalreport.htm .

xiv Amnesty International, Spain : the southern border, June 2005, pp.44-46 and p.96, http://web.amnesty.org/library/pdf/EUR410082005ENGLISH/$File/EUR4100805.pdf

xv Amnesty International, India/Bangladesh: "Push in - Push out" practices at the border not acceptable, 14 February 2003, http://web.amnesty.org/library/print/ENGASA200072003

xvi Citizen's Campaign for Preserving Democracy, Democracy, Citizens and Migrants: Nationalism in the Era of Globalisation, 2005, p.10, http://www.amanpanchayat.org/test/hsc_ccpdfinalreport.htm

xvii South Asia Forum for Human Rights, Refugee Watch No 18: Editorial, April 2003, http://www.safhr.org/refugee_watch18.htm

xviii Jagat M Acharya, Manjita Gurung, Ranabir Samaddar, 'No-Where People on the Indo-Bangladesh Border' in South Asia Forum for Human Rights, Paper Series 14, 2003, http://www.safhr.org/working_papers_14.htm

xix Ranabir Samaddar, The Marginal Nation: Transborder Migration from Bangladesh to West Bengal , 1999, p.107

xx Amnesty International, India/Bangladesh: "Push in - Push out" practices at the border not acceptable, 14 February 2003, http://web.amnesty.org/library/print/ENGASA200072003

xxi Citizen's Campaign for Preserving Democracy, Democracy, Citizens and Migrants: Nationalism in the Era of Globalisation, 2005, p.11, http://www.amanpanchayat.org/test/hsc_ccpdfinalreport.htm

xxii Vienna Convention on Consular Relations 1963, http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf.

Consular rights are also addressed in Article 16(7) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990

xxiii Optional Protocol concerning the Compulsory Settlement of Disputes 1963, Article 1 http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963_disputes.pdf Cases before the ICJ have included the US making a successful complaint against Iran over the taking of US hostages in 1979 and a successful complaint by Mexico against the US over consular access granted to Mexican death row prisoners. Washington Post, U.S. Quits Pact Used in Capital Cases: Foes of Death Penalty Cite Access to Envoys, 10 March 2005, http://www.washingtonpost.com/wp-dyn/articles/A21981-2005Mar9.html

xxiv US Department of State, Consular Notification and Access, undated http://travel.state.gov/law/consular/consular_636.html It should be noted at this point that in 2005 the US government pulled out of the Optional Protocol to the Vienna Convention on Consular Relations following cases in front of the ICJ involving foreign nationals on death row who, it was successfully argued, had not been given access to consular services. Washington Post, U.S. Quits Pact Used in Capital Cases: Foes of Death Penalty Cite Access to Envoys, 10 March 2005, http://www.washingtonpost.com/wp-dyn/articles/A21981-2005Mar9.html

xxv Citizen's Campaign for Preserving Democracy, Democracy, Citizens and Migrants: Nationalism in the Era of Globalisation, 2005, p.10

http://www.amanpanchayat.org/test/hsc_ccpdfinalreport.htm

xxvi Council of Europe, European Convention on Social and Medical Assistance 1953, http://www.conventions.coe.int/treaty/en/Treaties/Word/014.doc

xxvii BBC News, EU outposts turn into fortresses, 29 September 2005, http://news.bbc.co.uk/2/hi/europe/4294426.stm

xxviii UN Special Rapporteur on the human rights of migrants, Report submitted by Ms. Gabriela RodrÃguez Pizarro, Special Rapporteur, in conformity with resolution 2004/53 of the Commission on Human Rights, Addendum: Visit to Italy, 15 November 2004, para 17, http://daccessdds.un.org/doc/UNDOC/GEN/G04/170/50/PDF/G0417050.pdf?OpenElement

xxix CCPD field notes of visit to Delhi High Court.

xxx BBC News , Spain halts Senegal deportations, 1 June 2006, http://news.bbc.co.uk/2/hi/africa/5037808.stm

xxxi '*UNHCR encourages voluntary return by providing transportation, financial incentives and practical help such as seeds, farming equipment and building materials.*' UNHCR, Helping Refugees: An Introduction to UNHCR, 2005, p.15, http://www.unhcr.org/cgi-bin/texis/vtx/basics/opendoc.pdf?tbl=BASICS&id=420795964

xxxii International Organisation for Migration, Regulating Migration, undated, http://www.iom.int/en/what/regulating_migration.shtml#return

....

Chapter 4

Indo-Nepal Peace Treaty

Arup.K. Deka, Binod Kumar, Abhay Ranjan

(In cooperation with Chintan Environmental Research and Action Group)

The Treaty

The Governments of India and Nepal, upholding their ancient ties and history of cooperation, signed an agreement on July 31, 1950 to strengthen and perpetuate peace between the two countries. This Treaty, popularly known as the *Treaty of Peace and Friendship*[i], encapsulates a holistic approach to security and other issues of mutual interest. Both the countries share socio-cultural and economic bonds. The Treaty addresses a wide range of issues emanating from each country's security concerns in view of China's expansionist designs. Additionally, it emphasizes on people-to-people contact.

The Treaty became a major turning point in the movement of Indians into Nepal. Article II of the Treaty envisages “[that] there shall be everlasting peace and friendship between the Government of India and the Government of Nepal. The two Governments mutually agree to acknowledge and respect the sovereignty, territorial integrity, and independence of each other.” The free movement of populations between the countries in search of livelihoods is clearly mentioned in Article VI: “Each Government undertakes, in token of the neighbourly friendship between India and Nepal, to give to the nationals of the other, in its territory, national treatment with regard to participation in industrial and economic development of such territory and to the grant of concessions and contracts relating to such development.”

Article VII mentions, “The Governments of India and Nepal agree to grant, on a reciprocal basis, to the nationals of one country in the territories of the other the same privileges in the matter of residence, ownership of property, participation in trade and commerce, movement and other privileges of a similar nature.” The provisions were favourable to the Nepali people as now they could enter India unhindered when seeking better livelihood opportunities. There was an exchange of letters along with the Treaty that explicitly stated, “It may be necessary for some time to come to offer the Nepalese nationals in India protection from unrestricted competition.”[ii] This was done basically to protect the interests of the Nepali people immigrating to India.

Migration and Occupation

The Nepal Government also agreed to grant preferences to Indian nationals in various develop-

ment projects related to natural resources. However, there is currently a controversy regarding the provision of such unrestricted movement. Several academicians and foreign policy experts from Nepal have raised their voices against the Treaty.[iii] They are of the view that with its huge resources, India would be the more powerful partner in development activities and the immigration of so many Indians would swamp Nepal.

It is a complex exercise to provide the exact data of Nepali citizens working as labourers in India, or of Indians working in Nepal. Newspaper columnists, activists, and researchers seem to routinely exaggerate figures in order to demonstrate the supposed seriousness of the problem. Based on several reports, Dahal (1997) estimates that "there are anywhere between 1.8 million to 3 million Nepali migrant workers to the south of the Nepal border." He adds that: "Likewise, the writings of Indian scholars…and even the Indian Ministry of External Affairs…have variously reported that there are between 800,000 and 3.2 million Indians in Nepal."[iv]

Conflict and Collaboration

In reality, there are two types of Nepali-speaking workers in India: The first type is those whose ancestors arrived one hundred to three hundred years ago and are, by definition, Indian citizens in spite of linguistic differences. The other type is the migrant workers who come to India to work for a period and then return at their convenience. The 1971 and 1981 censuses of India reported a Nepal-born population stabilising at just over half a million (1971 census: 526,526, and 1981 census: 501,592).[v] On the other hand, the Nepali censuses of 1981 and 1991 reported a significant increase in the India-born population (from 222,278 to 418,982) and a decrease in Indian citizens in Nepal from 116,755 to 68,489.[vi]

For this demographic reason, the *Treaty of Peace and Friendship* has been a bone of contention. In the last few years Ministers of the Nepalese Cabinet have suggested that the Treaty be scrapped after giving a one-year notice. At the same time, Article 126 of the new Nepalese Constitution (1990) clearly states that any new treaty has to be ratified by a two-thirds majority of both the Houses, which seems to be a virtual impossibility in the current faction-ridden politics of the country. However, although the Treaty has been breached by both sides and overtaken by events, it contains the core occupational philosophy, which defines the broad spectrum of political, economic, people-to-people, and security relationships between the two countries.

Although India has been invaded for centuries from the west across the rivers and plains of Punjab, the Nepal Himalayas are fixed in the Indian security psyche as an impregnable barrier.

Indian leaders, starting with Nehru and followed by Morarji Desai and others, have regarded the Himalayan divide as India's security frontier and Nepal itself as the strategic gateway to the Indo-Gangetic plains.[vii] The seeds of such a strategic perspective, sown first by the British, were cultivated later through the 1950 Treaty and the letter exchanged with it. The Treaty, in fact, is a scaled down version of a similar one between Nepal and British India in 1923.

Reviewing the Treaty

There is a constant demand from the Nepal side for reviewing the Treaty[viii] and this demand is mentioned mechanically by Nepal in every state-level bilateral meeting with India[ix], without clearly stating what to review and what the review means. Perhaps for this reason, while the Government of India has agreed to the demand, it has not made any attempt to take the initiative in providing alternatives to the existing Treaty. Thus the Treaty explicates a lack of mutual understanding in the security concerns of both the countries.

Nepal's possible gains from reviewing the Treaty could be: lessened dependence on India for strategic perception; pursuing a policy of equidistance between India and China; and reducing India's economic stakes in Nepal by abolishing reciprocity, while enjoying favourable treatment from India on socio-economic issues. The emerging relationship will be based on non-reciprocity. This non-reciprocal relation for India would imply a vulnerable border in the north and additional measures to consolidate its security. However, even with the Treaty in place, India's strategic vulnerability emerges from time to time.

Bangladeshi Immigrants

In order to resolve the Bangladeshi migration problem, an instrument like the *Treaty of Peace and Friendship* with Nepal would be ideal for a holistic solution. A treaty should be signed to ensure movement of populations from both the countries to each other to avoid illegal border crossings. These are the solutions to all conflicts between neighboring South Asian countries, not just Bangladesh, considering the current global political and economic climate.

In the past, a treaty was initiated between India and Bangladesh immediately after the Liberation War of 1971. The treaty was signed in 1972 for a term of twenty-five years, although it was not extended in 1997. The treaty emphasised aspects of lasting peace and friendship between the two countries, respecting each other's independence, sovereignty and territorial integrity, and refraining from interfering in the internal affairs of the other side. Both the countries expected immense

benefits in the long term in all areas of bilateral relations including security, trade and other issues. It is interesting to note that no article mentions the movement of populations or the repatriation of refugees displaced during the war. The treaty only delineates the status of war refugees. The following may therefore be suggested for dealing with Indo-Bangladeshi migration in the context of the Indo-Nepal Treaty:

- Incorporate the issue of movement of populations between the two countries by making special provisions in an agreement;
- Treat Bangladeshis as economic migrants, and regulate their movement through mechanisms at the border as in the case of the Indo-Nepal Treaty; and,
- Refrain from deporting "illegal" Bangladeshi migrants without a proper procedure based on international protocol.

Both India and Bangladesh cooperate extensively in regional fora such as SAARC and it should be the endeavour of citizens' groups to take this further so that a new and more constructive framework can be built within the sub-continent to the mutual benefit of the people of all countries.

References:

i www.mea.gov.in/treatiesagreement/1950/chap38.htm

Ii Vidya Bir Singh Kansakar, "Nepal-India Open Border: Prospects, Problems and Challenges," update of papers originally presented at a series of seminar on Nepal's Democracy organized by Institute of Foreign Affairs and Friedrich Ebert Stiftung in 2001.

iii Institute of Foreign Policy, Nepal's Foreign Policy: Issues and Options (Kathmandu: IFP, no date); http://www.nepaldemocracy.org/documents/treaties_agreements/nep_india_open_border.htm [last accessed 14 Feb. 2008] ; Rabindra Mishra, "India's Role in Nepal's Maoist Insurgency", Asian Survey, Vol. 44, No. 5, 2004, pp.631-2; Shastra Dutta Pant, Nepal-India Border Problems (Kathmandu: Lumbining Printing and Publication Pvt. Ltd, 2006).

iv Dahal, Dilli R., Lies, Damn Lies and Numbers: online source http://209.85.175.104/search?q=cache:793yG7WJlYwJ:www.himalmag.com/jan97/lies.htm+p+p+karan,gorkhaland+movement+report+1985/86&hl=en&ct=clnk&cd=1&gl=in.

V www.cbs.gov.np/Population/monograph/chapter%2014%20International%20migration%20and%Citizenship%20Nepal.pdf. Tables: 14.6,14.8.

Vi www.cbs.gov.np/Population/monograph/chapter%2014%20International%20migration%20and%Citizenship%20Nepal.pdf. Tables: 14.9 and 14.11

vii Krishna V. Rajan, "Nepal-India Relations," South Asian Journal (Jan March 2005 issue). URL:http://www.southasianmedia.net/magazine/Journal/7_nepal-india_relations.htm [last accessed 14 Feb 2008].

viii Surya Subedi, "India-Nepal Security Relations and the 1950 Treaty: Time for New Perspectives," Asian Survey Vol. 34 No. 3 (March 1994), pp. 273-284.

Ix Kripa Sridharan with T.C.A. Srinivasa-Raghavan, Regional Cooperation in South Asia and Southeast Asia (Singapore: Institute for Southeast Asian Studies, 2007).

....

Chapter 5

Livelihood and Citizenship

Anuradha Sharma, Sarina Virk

Based on an order of the Delhi High Court, the Government of India formulated 'Operation Push Back', targeting the poor Bengali-speaking Muslim community from various slum settlements of Delhi. As documented by CCPD[i] the majority of these victims are migrant labourers from Bengali-speaking States of India. Thus, in many cases it is not even established whether these persons are actually from Bangladesh or not. Most of these migrant labourers are engaged in the unorganised sector as rag pickers, household workers, rickshaw pullers, vegetable vendors, casual factory workers, etc. contributing to the economy of India. In the wake of the opening up of the Indian economy under globalisation, the policies of the government have adversely affected the livelihood prospects in both rural as well as urban areas. This has, in turn, impacted upon the processes of migration and exploitation of labour.

We need to acknowledge that the work undertaken by these petty workers is essential for the entire city. In fact, if they do not perform their functions for even one day the whole city can be plunged into chaos. But government agencies, instead of providing any substantial support, are adding to their agonies and not even providing them their basic human rights. Much of this is done under cover of upholding the 'law'. Hence, it is important to understand what the 'law' has to say about economic migrants and how it affects their rights as citizens.

We have the following legislations that deal with migration in India:

- Passport (Entry into India) Act, 1920 / Rules 1950.
- Registration of Foreigners Act, 1939 / Rules.
- Foreigners Act, 1946, and subsequent orders issued from time to time.
- Indo-Bangladesh Visa Agreement, 1972.
- Illegal Migrants (Determination by Tribunals) Act, 1983

But none of these legislations contain any provision which allows any person to apply for citizenship or permanent residence on the basis of employment in the country. In this era of globalisation, wherein countries are loosening the borders to permit the free flow of capital to achieve their economic objectives, it is curious that there should be no laws and rules in India to

permit the free flow of labour which contributes to the growth of local economies. We may, therefore, look at the legal structures of other nations to examine whether they acknowledge the contribution to the economy through work as one of the principles for acquiring citizenship and permitting migration.

South Africa

We have chosen South Africa with reference to its long history of apartheid and denial of human rights, in order to understand how new notions of freedom have been embedded into the law of the Republic. This section presents an outline of the laws mentioned in the Citizenship Act, the Immigration Act, and the Aliens Control Act. The focus is to highlight the provisions which describe the meaning of citizenship, the procedures followed in implementation of the law, nature of documents admissible as evidence in establishing citizenship, and the process of deportation of illegal migrants, etc.

In South Africa , the '**Bill of Rights**'[ii] gives many rights to everyone, but certain rights are reserved for citizens only, such as:

- Right to vote
- Right to stand as a candidate in elections
- Right to live in any area in South Africa
- Right to choose trade, occupation, or profession
- Right to be given a South African passport for travel to other countries
- Right to enter South Africa for long-term residents from elsewhere

Interestingly, the government can pass laws which give these above-mentioned rights to non-citizens. For example, in the 1994 elections[iii], some people who were not citizens were allowed to vote[iv] Equally, the government can pass a law which takes the vote away from them. To stay in South Africa the non-citizens must get a permit to live there.

The **South African Citizenship Act**, 1995[v] does not deal with illegal migrants; hence we need to examine the **Immigration Act, 2002**[vi]. The preamble of the Act states that it is enacted to regulate and set up a new system of immigration controls to ensure:

- Expeditious issue of temporary and permanent residence permits on the basis of simplified procedures.
- Access of the South African economy at all times to the full measure of contributions by foreigners.
- No adverse impact of the contribution of foreigners in the South African labour market on existing labour standards and the rights and expectations of South African workers.
- Prevention and countering of xenophobia both within Government and civil society.

The **Department of Home Affairs**[vii] has, therefore, been entrusted to pursue the following objectives:

1. Promoting a human-rights' based culture in respect of immigration control.
2. Detecting and deporting illegal foreigners.
3. Regulating the influx of foreigners and residents in the Republic to promote economic growth by:
   a) ensuring that the Republic may employ foreigners who are needed,
   b) facilitating international exchange of people and personnel, and
   c) enabling exceptionally skilled or qualified people to sojourn in the Republic.

For the above purpose, an **Immigration Advisory Board**[viii] has been constituted that is:

- Chaired by a designee of the Minister.
- Consists of representatives from the Departments of trade and industry, labour, tourism, finance, safety and security, revenue service, education, foreign affairs, and defence.

An **Adjudication and Review**[ix] procedure has been put in place that specifies that before making a determination adversely affecting a person, the Department has to notify the contemplated decision at least 10 calendar days in advance in order that the affected person can make a representation, after which the Department shall notify that either such decision has been withdrawn or modified. It even mentions the provision of an Appeal to the Director General within 20 days of the decision.

Other provisions include those of **Temporary Residence**[x] for those persons having permits as/for visitor, diplomat, study, treaty, business, crew, medical treatment, relative, work, retired person, corporate, and exchange. **Cross border and transit passes**[xi] are also issued for multiple admission of citizens of neighbouring countries with which the Republic shares a border, persons who are not holding passports but are registered with the Department, and foreigners travelling to another country and wishing to make use of the transit facilities at a port of entry. **Residence on the ground of employment**[xii] is also provided for those jobs for which no suitable citizens or residents are available, and the labour department certifies that the terms and conditions and salary are not inferior to what is offered to citizens and residents.

An **Inspectorate**[xiii] is established through regulation as determined by the Minister but its powers of conducting search, collecting evidence, etc are also regulated in accordance with the right to dignity, right to privacy, and the right of freedom and security. The procedure for **deportation of illegal foreigners**[xiv] specifies that:

- Every magistrate's court is an immigration court.
- An Immigration or Police officer may request any person to identify himself as citizen, resident, or foreigner and, if not satisfied, can take that person into custody without any warrant.

United States of America

The case of the United States of America has been taken because historically it has been a nation constituted by immigrants, and immigrant workers are recognised as having a healthy effect on the economy of the nation. They keep the US industries competitive, increase employment through higher rates of self-employment, and increase wages and mobility opportunities for many other groups of US workers. One of the important ways through which the US Government recognises this contribution is through the issue of the **Green Card** that signifies that the holder is a permanent resident of the United States. The term is a nickname for a plastic card whose official name is "**Alien Registration Receipt Card**[xv]". Until September 1989 it used to last forever, but is now valid for 10 years, after which it has to be renewed. Furthermore, it entitles the holder to a few public benefits but the **1996 Welfare Reform Law**[xvi] has withdrawn these benefits.

A Green Card may be obtained through petition filed by a US citizen or employer and application for political asylum. But it may also be taken away for committing certain crimes, or for abandoning residence within the US. If, on the other hand, a person plans to remain in the US permanently, then it would be advantageous for him/her to become a naturalised citizen as soon as he/she is eligible to do so. The date of the Green Card is very important since, depending upon the circumstances, 3 or 5 years from that date the holder of the card is eligible to apply to be naturalised as a US citizen. The **Immigration and Nationality Act, 1996**[xvii] specifies the procedure through which an alien can apply for temporary or permanent residence, or for naturalisation. A person cannot be denied naturalisation due to race, sex, or marital status but must understand the English language and the history of the United States and its Government, and not be opposed to such a government, and be of good moral character.

The United States currently has **foreign labour certification**[xviii] programs that allow employers to hire both temporary and permanent workers that help fill jobs that are crucial to the American economy. Since the early twentieth century, the Mexican labour force has been crucial in developing the American economy because it has been willing to work on lower wages in the different sectors of the economy. However, the certification programs mainly benefit those who hold professional degrees from abroad, and not those who seek work in agricultural, service, or industrial sectors. Mexican immigration has been a critical issue in the last few years since many argue that it is unfair to the American population for the Mexicans to take away their jobs. Others argue that many Americans do not want to fill the jobs that Mexican foreign workers take on, or that they are an integral part of the nation's economy, filling jobs in new geographic areas, or those that do not require advanced education.

Currently, **American immigration law**s[xix] are not in favour of foreign workers because many American policy makers fail to recognize their importance to the economy. However, there has been discussion about creating a temporary guest worker program that allows foreign workers to come into the United States to work. In this context, it is important to note that, prior to 1964, over 4.6 million Mexican foreign workers were legally imported to the United States under the 1942 **Bracero Accord**.[xx] After 1964 “the United States did not stop employing Mexican workers; it simply shifted from a de jure policy of active labour recruitment to a de facto policy of passive labour acceptance, combining modest legal immigration with massive undocumented entry.”[xxi]

According to the **Immigration and Naturalization Service**[xxii] in 2002, there were over seven million illegal aliens living in the United States. As a response, the United States government has attempted to enforce stricter border controls, but this does not prevent migrants from coming into

the country to work and build lives. Many corporations, such as Wal-Mart, Swift & Co, and Tyson Foods have been involved in hiring illegal aliens. Both the **United States Homeland Security Department**[xxiii] and Immigration and Naturalization Service have merged together to investigate companies to find illegal immigrants. In December of 2006, over 1300 illegal immigrants working in Swift & Co were arrested.

A major form of crime that enables United States law enforcers to identify an illegal migrant is identity theft. In the case of Swift & Co, the immigrants arrested were identified because they stole social security numbers that enabled law enforcers to track them down. According to the **United States Immigration and Customs Enforcement**[xxiv] (ICE), once the illegal immigrant is arrested, he or she is detained for an average of 30 days. In the case of non-Mexican illegal immigrants, the detention period can reduce to 15 days. Sometimes illegal migrants are detained for months at a time and sometimes they are deported before they can inform family members of their deportation.[xxv] In addition, some countries may not be willing to accept those with deportation orders which delay the process. Large immigrant groups, like Mexicans in the United States, are detained until special group flights are arranged for them to be deported.

The above commentary suggests that the legal structure of South Africa and the United States allows the non-citizens to be hired as both temporary and permanent workers in the jobs that are crucial to the economy of their countries. Even in India there are a great number of migrants contributing to the economy, but there are no legal provisions for their recognition. Hence, there is a strong need to publicly debate and amend the legal structure in India in accordance with the international framework laid down by the United Nations in the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

References:

i Citizen's Campaign for Preserving Democracy

ii The Constitution of the Republic of South Africa, 1996, was approved by the Constitutional Court (CC) on 4 December 1996 and took effect on 4 February 1997. The Constitution is the supreme law of the land. No other law or government action can supersede the provisions of the Constitution.

iii The South African general election of 1994 was the first free election held in South Africa after the end of apartheid, therefore also the first held on a non-racial basis and with universal suffrage

iv There were around 2.5 million people mostly blacks who lacked identity books, and most of them were given temporary identity papers. For most residents of the homelands, valid travel documents were accepted as legal identification.
http://www.country-studies.com/south-africa/the-1994-elections.html

v The acquisition, loss, deprivation and resumption of South African citizenship are regulated by the South African Citizenship Act, 1995

vi deals with the regulation of the admission of foreigners, residence and their departure from South Africa

vii Immigration Act, 2002, Section (2)

viii Ibid., Section (4)

ix Ibid., section (8)

x Ibid., section (10)

xi Ibid., Section (24)

xii Ibid., Section (27)

xiii Ibid, Section (33)

Xiv Ibid., section (34)

xv It is proof that the holder has permission to permanently reside and take employment in the U.S. Its former official title was Alien Registration Receipt Card, and it is now officially called a Permanent Resident Card, also referred to as form I-551

xvi The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), was signed on August 22,1996, dramatically reshaped cash and food welfare programs and helped reduce federal welfare spending. It imposed a citizenship requirement for many benefits.

xvii The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, vastly changed the immigration laws of the United States by making them more vigorous for undocumented immigrants.

xviii http://www.foreignlaborcert.doleta.gov/

xix Immigration and Nationality Act, 1996

xx The bracero program was born in 1942 of an accord between the governments of the United States and Mexico to send Mexican field workers and other Mexican manual laborers to America to fill in for

American workers who fought in World War II. The program continued until 1964 and involved a total of 4.6 million Mexican workers. After that, some returned and others stayed in the United States.
Http://www.azcentral.com/news/border/articles/0317braceros.html

xxi http://www.indiana.edu/~jah/mexico/jdurand.html)."

xxii United States Immigration and Naturalization Services was a part of the Department of justice, which was meant to promote national security, to eliminate immigration case backlogs, and to improve customer services.

xxiii The United States Department of Homeland Security (DHS), commonly known in the United States as Homeland Security, is a Cabinet department of the federal government of the United States with the responsibility of protecting the territory of the United States from terrorist attacks and responding to natural disasters. http://www.dhs.gov/index.shtm

xxiv Immigration and Customs Enforcement (ICE) is the largest and primary investigative arm of the United States Department of Homeland Security (DHS) and is responsible for identifying, investigating, and dismantling vulnerabilities regarding the nation's border, economic, transportation, and infrastructure security. Http://www.ice.gov/

xxv http://www.usimmigrationsupport.org/deportation.html).

....

Chapter 6
An Unconscionable Judgement
Prashant Bhushan

The problem of illegal migrants into India, particularly from Bangladesh has been a longstanding and vexed political and legal problem, particularly since 1971 when there was a large scale influx of Bangladeshi refugees into India as a consequence of the war of liberation of that country from Pakistan. However, a large number of Bangladeshis continued to enter India even after 1971 in search of jobs, through a long and porous border. While some of them went to Bengal, some to other parts of the country, a large number of them settled in Assam, leading to a series of agitations by the All Assam Students Union (AASU).

Prior to 1983, the detection and eviction of these foreigners was done under the Foreigners Act, 1940, which gave powers to the authorities to designate any person as a foreigner and detain and deport him/her. Anyone disputing his/her designation as a foreigner bore the burden of proving that he/she was not a foreigner. This was an impossible burden to discharge for most people in the country, who had no birth certificates and no land holdings. Furthermore, the detained person had no recourse under the Act to a judicial body. Though the Foreigner's Tribunals Order, 1964 framed under the Act did give the discretion to the government to refer any dispute to tribunals constituted for this purpose, the government did not constitute any such tribunals in any part of the country outside Assam. The result was that most people were completely at the mercy of the police.

Taking note of these problems, in 1983 Parliament enacted the Illegal Migrants (Determination by Tribunals) Act (IMDT Act) which, as the title suggests, provided for judicial tribunals to determine disputes about citizenship which might arise under the Foreigners Act. The rules under the Act also provide for an administrative screening committee which would examine the complaints under the Act and reject complaints found to be frivolous. The Act also, for the first time, gave a limited right to any person to lodge a private complaint with the Tribunals under this Act against persons regarding whom they had information of their being foreigners. Such a right did not exist under the Foreigners Act. The right was however, limited by providing that such a complaint could only be made against a person residing within the same local area and that persons could make a maximum of ten such complaints.

Though the Act itself was for the entire country, it was initially made applicable only to Assam

and was to be made applicable to other parts of the country whenever the government notified it for those parts. The government's statistics showed that in the 20 years of the operation of the IMDT Act, about 80% of the complaints were rejected by the screening committee itself. Out of the remaining 76,228 cases referred to the Tribunals during these years, only 21,169 were disposed off by the Tribunal till 2003. Out of these, 11,636 persons were declared as illegal migrants, but only 1,517 could be physically expelled.

When the Asom Gana Parishad (AGP) government (supported by the Bharatiya Janata Party - BJP) was in power in Assam it felt that the IMDT Act was coming in the way of expelling the foreigners that they wanted to expel. They began demanding that the Centre repeal the Act and thus give a free hand to the government and the police to expel anyone that they wanted to under the Foreigners Act, without any judicial determination of the rights of those that were sought to be expelled. Soon after the BJP government came to power at the Centre in 1998, it took up the demand of the AGP and the AASU and it's Governor in Assam sent a shrill report to the government in November 1998, which ended thus, “The silent and invidious demographic invasion of Assam may result in the loss of the geo-strategically vital districts of lower Assam. The influx of these illegal migrants is turning these districts into a Muslim majority region. It will then only be a matter of time when a demand for their merger with Bangladesh may be made. The rapid growth of international Islamic terrorism may provide the driving force for this demand.”

However, it was not possible for the BJP to convince its coalition partners about the need to repeal the IMDT Act. In 2000, a former president of the AASU, Sarbananda Sonowal, filed a writ petition in the Supreme Court seeking a declaration that the IMDT Act was unconstitutional because it impeded the expulsion of foreigners from Assam, as was evident from the figures of expulsion. It thus violated the right of the Assamese people to preserve their culture. The impediments against expulsion, he argued, were placed primarily by the reversal of the burden of proof from the Foreigners Act. Also, he pleaded that the restrictions placed on the complainant contributed to the problem. It was finally contended that the application of the IMDT Act to Assam alone was discriminatory since in other States, the authorities could resort to the Foreigners Act and throw out anyone that they wanted, without allowing recourse to a judicial Tribunal.

Meanwhile, in 2001, Abu Hanif, a poor Bengali Muslim who was detained by the Delhi police by branding him a Bangladeshi, filed a petition in the Supreme Court, seeking the application of the IMDT Act to Delhi. He pointed out that he had an Indian passport for the last 15 years and had been registered as a voter in Delhi for the last 15 years. He had all the other documents to prove his citizenship, including ration cards, jhuggi (slum) cards etc. Yet the police claimed that he had

come from Bashirhat in Bangladesh only 6 months ago. And to top it all Bashirhat was in West Bengal, not in Bangladesh! He therefore asked for the constitution of a Tribunal under the IMDT Act to determine his claim and not be left at the mercy of police officers who had even earlier tried to extort money from him.

Though Abu Hanif's petition, as also a petition by Jamait Ulema e Hind (which was also seeking extension of the IMDT Act to Delhi), was ordered to be heard along with Sonaval's petition, when the time came for them to be heard, the Court decided to first hear arguments only on Sonawal's petition, saying that the other petitions would be heard only after Sonawal's petition was decided. However, on a persistent plea by Abu Hanif's lawyer, Mr. Shanti Bhushan, that the decision in Sonawal's case would affect his case, the Court gave a brief hearing to him.

On July 12, a 3-judge Bench of the Court allowed Sonaval's petition and declared the IMDT Act and the Rules framed under it unconstitutional and void. It had been pointed out to the court that an Act of Parliament cannot be declared void merely because it had not succeeded in its objective. It could only be struck down if Parliament lacked legislative competence to enact it, or if it violated a specific provision of the Constitution. Being conscious of this limitation, the judgement written by Justice G.P. Mathur came up with a brilliant idea. It opined that the Act violates Article 355 of the Constitution which mandates the Central Government to protect the States against external aggression and internal disturbance. It went on to say that the onerous provisions of the Act and Rules makes it virtually impossible to expel foreigners and therefore the Act encourages infiltration of illegal migrants from Bangladesh, which amounts to external aggression against India!

While giving this interpretation to Article 355 of the Constitution, I wonder whether the Honourable Judges were aware of the implications of what they were saying. For example, India has a treaty with Nepal which permits Nepali citizens to come and freely stay in India, without visa and vice versa. Will this treaty not be similarly unconstitutional on the principle that it encourages Nepali migration to India and thus promotes external aggression by Nepal? Or suppose that Parliament were to amend the Citizenship Act to provide that persons from any territory which was part of undivided India would be given Indian citizenship if they applied - would such an amendment also be unconstitutional on the same ground? If so, what of the existing provision which gives automatic citizenship to those who were born in undivided India such as Mr. Advani of the BJP? Clearly, the fantastic interpretation to Article 355 given in this judgement can have extremely far reaching implications on the citizenship and external policy of the country which is supposed to be made by Parliament and the Government.

The Court also ruled that the applicability of the IMDT Act only to Assam made it discriminatory and violative of Article 14, since other States did not have to adhere to the more stringent provisions of the IMDT Act before pushing out persons designated as foreigners. In saying so, the Court completely overlooked the fact that the IMDT Act as such was applicable throughout India. However the Government had not notified it for other parts of the country other than Assam. But that was an executive lapse and the other pending petitions sought precisely that direction from the Court that the Government be directed to notify the IMDT Act for other parts of the country. Similarly, if there was any problem with the screening procedure or the restrictions on the complainants, or the Tribunals were not acting expeditiously, the Court could always direct the Government to take whatever steps were required to remedy those.

In fact, one would have expected the Supreme Court, which is constitutionally mandated to protect the fundamental rights of citizens, to have declared the Foreigners Act unconstitutional, insofar as it allows the authorities to throw out citizens alleged to be foreigners, without a judicial determination. Instead the court says, "A deep analysis of the IMDT Act and the Rules made thereunder would reveal that they have been purposely so enacted or made so as to give shelter or protection to illegal migrants who came to Assam from Bangladesh on or after 25th March 1971 rather than to identify and deport them." The Court further held that no rights of an illegal migrant are violated when he is expelled from the country. But how can it be presumed that he is an illegal migrant without a judicial determination of this question?

A serious flaw found by the Court in the IMDT Act was that it did not place the burden of proving his Indian citizenship on the person accused of being a foreigner, unlike in the Foreigner's Act. This, the Court said, was completely unreasonable, since the person accused has the best means of knowing and proving whether he is an Indian or Foreigner. But that can be said for an accused in a criminal offence as well. After all, he has the best means of knowing whether he has committed the crime or not. So he should be required to prove his innocence. Yet it is well established in our jurisprudence that an accused is presumed to be innocent unless proved guilty. Consider how this will translate in practice in India. Most people in India do not have any document which could 'prove' their Indian Citizenship. Abu Hanif had a passport, a voter identification card, ration card etc. Yet he was declared by the police to be a Bangladeshi. But most people in the country do not have any of these documents or any 'official document' which would establish their Indian Citizenship. Should they, then, be thrown out of India in these circumstances?

In all of 30 years that I have observed the Supreme Court, I have yet to come across a judgement that is so illiberal, authoritarian, indeed fascist and communal in its mindset, uses such a fantastic

interpretation of the Constitution, betrays such ignorance of basic legal principles and shows such a lack of sensitivity to human rights and basic human values. The ball is now in the court of the Government and people of this country. Will they tolerate such a slur on the Constitution?

....

Chapter 7

Migration and Return

Ram Narayan Kumar

International Agreements

There are several examples of conflict-induced migration all over the world and the role of the international community in their resolution, which can be studied and analysed to yield clues on how a more universal body of law can emerge to address the issues of people choosing to stay and work in a particular region and wishing to return to their original place of birth or residence. These are particularly important for looking at the relationship between occupational mobility and the rights conferred by citizenship. In this context, the right to stay in a country of one's choice is as important as the right to return to the country of origin. We shall briefly summarise some of these examples.

For instance, the issues of migration and the legal status of ***Nepali*** citizens and the justiciability of their right of return have been examined and endorsed by many national and international bodies, linked up with the Indo-Nepal treaty. In the ***Balkans***, efforts made by the international community to stem the tide of ethnic cleansing and voluntary repatriation of displaced populations has alleviated the conflicts and even assuaged memories of atrocities associated with the wars.

But, in the case of ***Palestine***, the world community has failed to enforce the right of return of Palestinians and thus the conflict has continued unabated. Similarly, in ***Bhutan***, the forced dislocation of the Lhotshampa people of Nepali origin in the early 1990s and the failure of the United Nations and regional governments to chastise Bhutan has maintained a state of conflict. On the other hand, in ***Afghanistan***, millions of Afghan refugees in Pakistan, trained to fight the Soviet occupation from 1979 to 1989, and ignored after that, joined the Taliban to capture Kabul from former CIA stooges by September 1996. While, in ***Rwanda***, Tutsi refugees who had escaped ethnic persecution between 1959 and 1962, where the international community failed to find a lasting solution, played a major part in constituting the Rwandan Patriotic Front (RPF), which invaded Rwanda and resulted in the 1994 genocide.

There are several International Agreements that impact upon migration and the right of return of displaced people. The General Framework Agreement for Peace in ***Bosnia*** and ***Herzegovina***, also known as the Dayton peace agreement, guarantees the right of all refugees and displaced persons to "freely to return to their homes of origin". The Erdut Agreement for ***Croatia*** carries a similar guarantee, as do the 1999 Interim Agreement for Peace and Self-Government in ***Kosovo***

and the 2001 Framework Agreement for ***Macedonia***.

Negotiated repatriation and resettlement of forcibly displaced ***Nicaraguans***, ***Guatemalans*** and ***Salvadorans***, followed the peace agreements forged after long periods of conflicts in the 1990s, under the Central American Conference on Refugees, Returnees and Internally Displaced Persons also known as CIREFCA process. Conversely, the Law of Return was enacted by the ***Israeli*** parliament in 1950 but its implementation accompanied brutal displacement and expulsion of the Palestinian people from their homeland. The Treaty concluded between ***Bulgaria*** and ***Greece*** in 1991, provided for the relocation of 46,000 Greeks from Bulgaria and 96,000 Bulgarians from Greece. And the ***Greek*** and ***Turkish*** Treaty of 1923, provided for a mutual exchange of 2 million Greeks from Turkey and 500,000 Turks from Greece. Earlier, a transfer of German populations to ***Germany*** from ***East European*** countries had followed World War II under the Potsdam Declaration. The return of ***Ukrainian*** prisoners took place in Germany back to their country under pressure from Russia. The transfer of populations between newly created countries of ***India*** and ***Pakistan*** followed the transfer of power in 1947.

United Nations

The Universal Declaration of Human Rights (UDHR), made by the United Nations General Assembly in 1948, emerged from the ashes of World War II to detail the inalienable rights belonging to all people; the Magna Carta of all mankind. Article 13 of UDHR says: “everyone has the right to freedom of movement and residence within the borders of each State. Everyone has the right to leave any country, including his own, and to return to his country.” The UN General Assembly Resolution 1948, passed in the same year with reference to the Palestinian refugees, “resolves that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss or damage to property which, under principles of international law or in equity, should be made good by the governments or authorities responsible.”

The same principle is reiterated in the UN General Assembly Resolution A/Res/2535 (XXIV) A-C of 1969 which exhorts the government of Israel “to take effective and immediate steps for the return without delay of those inhabitants who had fled the areas since the outbreak of hostilities”, and also in Article 2 of the General Assembly Resolution A/Res/3236 (XXIX), adopted in 1974, which “reaffirms the inalienable right of the Palestinians to return to their homes and property from which they have been displaced and uprooted, and calls for their return.” Further,

Resolution 83/83J, adopted by the General Assembly in 1983, referring to the Israeli plans to resettle the Palestinian refugees in the West Bank, clearly reaffirms “the inalienable right of all displaced inhabitants to return to their homes or former places of residence in the territories occupied by Israel since 1967 and declares once more that any attempt to restrict, or to attach conditions to, the free exercise of the right of return by any displaced person is inconsistent with that inalienable right and inadmissible.”

Resettlement and Compensation

Although these UN General Assembly resolutions support a universal and secular interpretation of the UDHR Article 13 guarantee, some of the UN Security Council resolutions favour a more flexible interpretation of “right of return” including a resolution of the problems of displaced persons through resettlement and compensation instead of repatriation of the displaced. While the Security Council Resolution 242, adopted in 1967 in the aftermath of the six-day war between Israel on the on side and Egypt, Jordan and Syria on the other, merely asks for “a just settlement of the refugee problem”, and this is repeated in UNSC Resolution 338, adopted in 1973 in the wake of the Yom Kippur war, some international law scholars interpret the wordings of these resolutions to mean a readjustment on the right of return approach towards rehabilitation through negotiated settlements. Wide international endorsement of the 1993 Israeli-Palestinian accords, also known as Oslo Accords and Declaration of Principles on Interim Self-Government arrangements, is said to strengthen this view in favour of compromise.

Right of Return

The articulation of the right of return in Article 12(4) of the 1966 International Covenant on Civil and Political Rights (ICCPR) says, “no one shall be arbitrarily deprived of the right to enter his own country.” The Human Rights Committee (HRC) has interpreted this to include both nationals and aliens with “special ties to or claims in relation to a given country”, “persons who have been stripped of their nationality”, and also persons “whose country of nationality has been incorporated in or transferred to another national entity…” The HRC's comment clearly says that the right to return “implies prohibition of enforced population transfers or mass expulsions to other countries.” Additionally, the guarantee of the right does not depend on whether or not a person has obtained the refugee status or whether or not the person fled any form of persecution. The right remains irrespective of the cause of displacement and even when the issues of sovereignty over the territory are contested.

The International Court of Justice in Nottembohm Case, decided in 1955, interprets the right of

return and other entitlements of domicile and 'naturalisation' in broad terms to encompass not only "the habitual residence of the individual concerned but also the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc." The International Covenant on Economic, Social and Cultural Rights (ICESCR), asserts the freedom of people to "freely determine their political status and freely pursue their economic, social and cultural development". The International Convention on the Elimination of All Forms of Racial Discrimination (CERD), reaffirms "the right to leave any country, including one's own, and to return to one's country." Common Article 3 of the Geneva Conventions requires all parties to an internal situation of war and armed conflict to humanely treat all persons taking no active part in the hostilities in "all circumstances" "without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria." It very categorically prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment".

Protocol II, additional to the Geneva Conventions of 1949, which develops and supplements Common Article 3 for situations of internal armed conflicts, has a number of provisions whose benefits should extend to victims of forced migration and also to reinforce the right of return. Article 17 (1) states, "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." Article 17 (2) adds, "Civilians shall not be compelled to leave their own territory for reasons connected with the conflict."

The U. N. *Convention Relating to the Status of Refugees*, 1951 covers all persons who became refugees from events that occurred before 1st January 1951 and the 1967 Protocol removes all temporal and spatial limitations, covers all persons who fulfil the generic definition of refugees given under the 1951 Convention. The definition of a refugee is: anyone who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

However, the South Asian States, including India and Nepal, have not signed and ratified the 1951 Convention and the 1967 Protocol. Nevertheless, the exemption from compliance does not upset the principles, standards and definitions included in the Convention and the Protocol and their validity as international law norms.

Article 28 of the *UNHCR's 1979 Refugee Handbook* clearly explains: "He does not become a refugee because of recognition, but is recognised because he is a refugee." Article 16 says: "a person who meets the criteria of the UNHCR Statute qualifies for the protection of the United Nations provided by the High Commissioner, regardless of whether or not he is in a country that is a party to the 1951 Convention or the 1967 Protocol." Article 17 goes on to add: "He may, however, be in a country that is not bound by either of these instruments, or he may be excluded from recognition as a Convention refugee by the application of the dateline or the geographic limitation. In such cases he would still qualify for protection by the High Commissioner under the terms of the Statute." Article 33 of the Convention is categorical in prohibiting expulsion or return of a refugee "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his religion, nationality, membership of a particular social group or political opinion."

Conditions of Return

The *Guiding Principles on Internal Displacement* are no more than a set of guidelines with a lot of legal significance for being grounded in customary international law provisions and also seen to be useful as a basis for a negotiable approach to enforcement precisely for the reason that it is not a binding instrument. Principle 6 says: "Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence." Paragraph 3 of the Principle goes on to add: "Displacement shall last no longer than required by the circumstances."

Article 16 (3) of the *ILO Convention No. 169* says that "whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist." Article 49(2) of *Geneva Convention IV* specifies that "persons… evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased." Part I Para 23 of the *Vienna Declaration* calls for "lasting solutions to questions related to internally displaced persons including their voluntary and safe return and rehabilitation." Para 2 of Principle 15 of *Guiding Principles* guarantees "the right to be protected against forcible return to or resettlement in any place where their life, safety, liberty or health would be at risk."

Article 33(1) of the 1951 *Refugee Convention* states that "No Contracting State shall expel or return *(refouler)* in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a social group or political opinion." Article 3(1) of the *Convention against Torture* says: "No State party shall expel, return *(refouler)* or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Article 22(8) of the *American Convention on Human Rights* says: "In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions."

A significant imperative enunciated in the *Guiding Principles on Internal Displacement* is in its Principle 28, that says: "Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, to allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavour to facilitate the reintegration of returned or resettled internally displaced persons." Paragraph 2 of Principle 28 says: "Special efforts should be made to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration." Paragraph 2 of Principle 29 says: "Competent authorities have the duty and responsibility to assist returned or resettled internally displaced persons with recovery, to the extent possible, of the property and possessions they left behind or were disposed of upon their displacement. When recovery of such property and possessions in not possible, competent authorities shall assist these persons in obtaining appropriate compensation or other forms of just reparation or shall themselves provide such recompense."

LITERATURE CONSULTED :

(1) American Convention on Human Rights "Pact of San Jose, Costa Rica", -- http://www.oas.org/juridico/english/Treaties/b-32.htm

(2) Bhandari, Prem, Relative Deprivation and Migration in an agricultural setting of Nepal, Population and Environment, Vol 25, No. 5, May 2004

(3) Caught in the Middle: Mounting Violations Against Children in Nepal's Armed Conflict, Watch List on Children and Armed Conflict, January 2005

(4) Convention (IV) Relative to the Protection of Civilian Persons in Time of War, August 12, 1949 http://www.yale.edu/lawweb/avalon/lawofwar/geneva07.htm

(5) Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session, entry into force 5 September 1991 -- http://www.unhchr.ch/html/menu3/b/62.htm

(6) Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3(1) -- http://www.hrweb.org/legal/cat.html

(7) Convention and Protocol: Relating to the Status of Refugees, Article 33 -- http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3b66c2aa10

(8) Convention between Greece and Bulgaria Respecting Reciprocal Emigration, signed at Neuilly-sur Seine, on November 27, 1919; Convention Concerning the Exchange of Greek and Turkish Populations, of 30 July 1923; Potsdam Conference Protocol, 2 August 1945, Section XII, reproduced in John A.S. Grenville & Bernard Wasserstein, The Major International Treaties Since 1945, 32, 37 (1987)

(9) David Seddon, Karim Hussein, "The Consequences of conflict: Livelihoods and development in Nepal", Working Paper 185, Overseas Development Institute, 111 Westminster Bridge Road, London, SE1 7 JD, UK, December 2002

(10) Deep Ranjani Rai, A Pilot Survey on Internally Displaced Persons in Kathmandu and Birendranagar, Kathmandu: SAFHR

(11) Dhakal, D. R., Plight of Internally Displaced Persons in Nepal, Kathmandu: Community Study and Welfare Centre (CSWC), 1 February 2004

(12) Dilli Raman Dhakal, Plight of Internally Displaced Persons (IDPs) in Nepal: A Call for an urgent Intervention by the HMG/ Nepal, United Nations, and International Community, a paper presented at a seminar at Hotel Shangri-La, Lazimpat, Kathmandu, 1 February 2004

(13) Farzana Shaikh Nepal: Early Warning Analysis, A Writenet Report Commissioned by the UNHCR, Emergency and Security Services, August 2004

(14) Farzana Shaikh, Nepal: Early Warning Analysis, A Writenet Report Commissioned by the United Nations High Commissioner for Refugees, Emergency and Security Services, August 2004

(15) General Framework Agreement for Peace in Bosnia Herzegovina, Dec. 14, 1995, 75 I.L.M. 138, reprinted in Office of the High Representative, Bosnia and Herzegovina, Essential Texts 16 (2d ed. 1998),

available at http://www.ohr.int/docu/d951208a.htm

(16) Gil Loescher and James Milner, Protracted Refugee Situations: Domestic and International Security Implications, Abingdon: Routledge for the International Institute for Strategic Studies, 2005
Global IDP Project, Internal Displacement: A Global Overview of Trends and Developments, Geneva, February 2004, p. 26 http://www.idpproject.org/press/2004/Global_overview.pdf

(17) Guiding Principles on Internal Displacement, Annotations by Walter Kalin, in Studies in Transnational Legal Policy, No. 32, The American Society of International Law and the Brookings Institution Project on Internal Displacement, 2000

(18) H. Knox Thames, "India's Failure to Adequately protect Refugees", Human Rights Brief, Volume 7 Issue 1

(19) Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng?REV.1 Reedited, Geneva, January 1992, UNHCR 1979

(20) International Crisis Group, Policy Briefing, Asia Briefing No. 41, Nepal: Beyond Royal Rule

(21) Irwin, D., van Duijn, L. Seaman, A. (eds), Nepal IDP Research Initiative Findings, Geneva: Global IDP Project, March 2003
http://www.db.idpproject.org/Sites/idpSurvey.nsf/wViewSingleEnv/B3F62983E88516E7C1256FB0042F573/$file/Final+IDP+Report.pdf

(22) Isabel Hilton, "The King and Maoist Nepal", Financial Times (London)

(23) James Milner, Protracted Refugee Situations: Human Rights, political implications and the search for practical solutions, Paper for the Canadian Council for Refugees, Fall Consultations, London, Ontario, 31 October 2005

(24) James Milner, Protracted Refugee Situations: Human Rights, political implications and the search for practical solutions, Paper for the Canadian Council for Refugees, Fall Consultations, London, Ontario, 31 October 2005

(25) K. C., Bal Kumar, Migration, Poverty and Development in Nepal, paper presented on the Ad Hoc Expert Group Meeting on Migration and Development: Opportunities and Challenges for Poverty Reduction in the ESCAP region on 27-29 August2003

(26) Kurt Rene Radley, The Palestinian Refugees: The Right to Return in International Law, 72 AJIL 586, 603-04 (1978)

(27) Mahmood Monshipouri, "The Paradoxes of U. S. Policy in the Middle East", Middle East Policy, Vol. IX, No. 3, September 2002

(28) Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary 220 (1993); Eric Rosand, "The Right to Return under International Law Following Mass Dislocation: The Bosnia Precedent", 19 Michigan Journal of International Law, 1091, 1130-31, (Summer 1998)

(29) Michael Hutt, "The Bhutanese Refugees: Between Verification, Repatriation and Royal RealPolitik", Peace and Democracy in South Asia, Volume 1, Number 1, January 2005

(30) Mission to Nepal: Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, Commission on Human Rights, Sixty-second session, Item 14 © of the provisional agenda, E/CN.4/2006/71/Add.2, 7 January 2006

(31) Mission to Nepal: Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, Commission on Human Rights, Sixty-second session, Item 14 © of the provisional agenda, E/CN.4/2006/71/Add.2, 7 January 2006

(32) Naresh Newar, Nepal Times, 02 June 2006, "Internally displaced Nepalis want Maoists to pledge a safe return."-- http://www.nepalitimes.com/issue/300/Nation/11921

(33) Nepal IDP Research Initiative Findings, An initiative of concerned agencies in Nepal, GTZ, INF, SNV, UNDP/ RUPP in cooperation with NHRC and the Global IDP Project, [Eds] David Irwin, Leonard Van Dujn and Alastair Seaman, March 2003

(34) Nepal: Dangerous Plans for Village Militias, ICG, Asia Briefing, Kathmandu/ Brussels

(35) Nepal: Displacement Crisis Worsens in Wake of Royal Coup, Global IDP Project

(36) No Safety Signs Here: Research on Migreation and HIV Vulnerability from Seven South and North East Asian Countries, UNDP, APMRN, 2004

(37) Prabhu Raj Poudyal, "Situation of Internally Displaced Persons in Nepal and Recommended Responses", March 2005 -- http://www.rupp.org.np/downloads/situation_idp.pdf

(38) Prevention of Trafficking and the Care and Support of Trafficked Persons: In the Context of an Emerging HIV/ AIDS Epidemic in Nepal, The Asia Foundation, Kathmandu & Horizons Project Population Council, New Delhi, Kathmandu: February 2005 --
http://www.popcouncil.org/pdfs/horizons/trafficking1.pdf

(39) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 –

http://www.icrc.org/ihl.nsf/FULL/475?OpenDocument

(40) Protocol Relating to the Status of Refugees, 1951
http://www.unhchr.ch/html/menu3/b/o_p_ref.htm

(41) Protocol Relating to the Status of Refugees, 1967
http://www.unhchr.ch/html/menu3/b/o_p_ref.htm

(42) Roberta Cohen and Francis M. Deng, Masses in Flight: The Global Crisis of Internal Displacement, Brookings: 1998, p. 235; Summary Report, Regional Conference on Internal Displacement in Asia, February 22-24, 2000, Bangkok, Thailand

(43) Somini Sengupta, "Village vigilantes, armed with axes, hunt suspected Nepal Maoists", The International Herald Tribune, 12 April 2005

(44) Stig Jagerskiold, "Freedom of Movement", in The International Bill of Rights, Louis Henkin ed., 166, at 180, 1981; Hurst Hannum, The right to leave and return in International Law and Practice (1987)

(45) Susan Theime, Ulrike Müller-Böker, "Financial Self-Help Associations Among Far West Nepalese Labor Migrants in Delhi, India", Asian and Pacific Migration Journal, Vol. 13, No. 3, 2004

(46) UNHCR, The State of the World's Refugees: Fifty Years of Humanitarian Action, Oxford: OUP, 2000

(47) Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993 -- http://www.ohchr.org/english/law/vienna.htm

(49) Walter Kalin, "How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework", Presentation at Roundtable Meeting, Ralph Bunche Institute for International Studies, CUNY Graduate Center, 19 December 2001

(50) Will Baxter, BBC News, "No end in sight for displaced of Nepal"-- http://news.bbc.co.uk/2/hi/south_asia/5050108.stm

(51) Yeoman Barry, "Soldiers of good fortune", Mother Jones, 1 May 2003, No. 3, vol. 28

(52) Yoram Dinstein, Book Review, 17 Is. YB. H. R. 318, 319 (1987)
William Shawcross, Deliver us from evil: Warlords and peacekeepers in a world of endless conflict, Bloomsbury, London, 2000

....

Chapter 8
Conclusion: Alternative Citizenships

This collection of analytical articles began with the question whether, in this redefined global scenario marked by large scale migration across national borders between neighbouring countries, it would not be appropriate to find new dimensions to the concept of citizenship, distinct from the ones rooted in national identity? Traditionally, nations have emphasised legal and political aspects of ethnicity as determining factors in deciding citizenship. But now that economic activity has taken precedence over everything, including the relations between nations, should not the concept of citizenship also take the economic dimension into consideration?

The significance of this question is especially important in the context of CCPD's earlier study that documented the status of so-called Bangladeshis in India. That study observed that the physical and cultural similarity of people living on either side of the border makes it difficult for the concerned authorities to distinguish between them. However, instead of evolving a judicious mechanism to resolve the issue, the Indian Government and Courts have accorded legitimacy to an arbitrary and discriminatory procedure which has resulted in the systematic and targeted harassment and abuse of a specific religious and linguistic minority. In a polity where communal prejudice is increasingly manifest, such a procedure begins to acquire the colour of ethnic cleansing in contravention of the secular and plural foundations of Indian society.

Anuradha Sharma finds that the framers of the Constitution of India were initially faced with the problem of defining citizenship for a new nation and decisively rejected the racial or religious basis for a secular one based on birth and domicile. Later, faced with the reality of Partition and possible dual nationalities, the debates in the Constituent Assembly acknowledged the right of a person to choose single citizenship through a specific procedure as well as the rights conferred by descent, residence, refuge, and marriage. However, there is one strand in the debate that seems to have been generally ignored, or subsumed within the other categories. This strand relates to the occupation or work in which the person was engaged, whether through domicile or migration. It is vital to keep in mind these prescient views of the founding fathers of the nation with respect to choice and work.

Amanda Shah takes this discussion further to contribute to the formulation of immigration policy by pulling together case studies of how several national jurisdictions are responding to the challenge of undocumented migration within a framework of human rights. Many states are

responding to - sometimes substantial - immigration inflows and trying to square the need for immigration control with their human rights obligations. Based on international case studies of India and Bangladesh, the United States of America and Mexico, and South Africa, she recommends that clearly articulated and objective criteria for decision-making must be adopted that are consistent with internationally recognised human rights standards, and all implementation must be carried out by specially trained public officials. Furthermore, wrongly accused and harassed persons must be able to complain to independent investigating authorities and tribunals and offer both documentary and non-documentary evidence to support their arguments.

Arup Kumar Deka, Binod Kumar, and Anhay Ranjan dissect the 1950 Indo-Nepal Treaty of Peace and Friendship to show how each of the governments has undertaken to give to the nationals of the other, in its territory, national treatment with regard to participation in industrial and economic development of such territory and to the grant of concessions and contracts relating to such development. The Treaty has further bound the governments to agree to grant, on a reciprocal basis, to the nationals of one country in the territories of the other, the same privileges in the matter of residence, ownership of property, participation in trade and commerce, movement and other privileges of a similar nature. In other words, the two governments and peoples, while recognising the fact of large scale migration across their borders, also accepted that there is mutual economic advantage to be gained from such migration and, hence, the rights and privileges of citizenship can be beneficially exchanged.

The relationship between livelihood and citizenship is investigated deeper by Anuradha Sharma and Sarina Virk, to argue that, while Indian laws do not contain any provision which allow any person to apply for citizenship or permanent residence on the basis of employment in the country, there should be laws and rules to permit the free flow of labour as they contribute to the growth of local economies. Examining the legal structure of South Africa, they discover that the government can pass laws which give the right to choose trade, occupation, or profession to non-citizens, and provide for access of the South African economy at all times to the full measure of contributions by foreigners, with specific issue of cross border and transit passes and residence permits for the purpose. Similarly, the United States issues the Alien Registration Receipt Card, or Green Card, and has put in place foreign labour certification programs that allow employers to hire both temporary and permanent workers that help fill jobs that are crucial to the American economy.

Prashant Bhushan then analyses the judgement of the Supreme Court in the writ petition filed in 2000 by Sarbananda Sonowal, a former president of the AASU, seeking a declaration that the IMDT Act was unconstitutional because it impeded the expulsion of foreigners from Assam. The judgement opines that the IMDT Act violates Article 355 of the Constitution, which mandates the Central Government to protect the States against external aggression and internal disturbance, because the onerous provisions of the Act and Rules makes it virtually impossible to expel foreigners. The Court also ruled that the applicability of the IMDT Act only to Assam made it discriminatory and violative of Article 14, since other States did not have to adhere to the more stringent provisions of the IMDT Act, which places the burden of proving non-citizenship on the detaining authority. According to Bhushan, he has yet to come across a judgement that is so illiberal, authoritarian, fascist and communal, and shows such a lack of sensitivity to human rights and basic human values.

In the final section, Ram Narayan Kumar studies several examples of conflict-induced migration all over the world and the role of the international community in their resolution, to yield clues on how a more universal body of law can emerge to address the issues of people choosing to stay and work in a particular region or wishing to return to their original place of birth or residence. These are particularly important for looking at the relationship between occupational mobility and the rights conferred by citizenship. In this context, the right to stay in a country of one's choice is as important as the right to return to the country of origin. Mustering legal cases from as far apart as the Middle East, Africa, Central America, and Europe, Kumar traces a series of resolutions passed by the United Nations General Assembly and Security Council as well as various international Treaties and Conventions to argue that every human being has the fundamental right to be protected against being arbitrarily displaced from his or her home or place of habitual residence.

This body of work, therefore, points powerfully towards an alternative definition of citizenship that rests on the right of human beings to choose the place where they wish to work and reside. In order to ensure that these are converted into legal instruments, **the following strategies may be considered for adoption:**

- **Modifying the definition of Citizenship to include the concept of work or livelihood**
- **Regulating the flow of migration by issuing permits to those migrants who desire to work in the country as per the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.**

- **Issuing Identity Cards through the Labour Exchange to each worker desirous of working, irrespective of the status of employment**

- **Providing a system of accountability of authorities entrusted with the tasks of detecting, detaining, and deporting unwanted aliens**

- **Amending the Foreigners Act to transfer the burden of proof on to the arresting authority**

- **Recognising international conventions on migration and passing and enforcing legislation based on a human-rights approach**

- **Training public officials (which should not be the police) in carrying out procedures and rules that are rooted in human rights and the fundamental right to work**

- **Excessive and arbitrary powers given to any specialised agency (Task Force) by a Ministry of Home or Internal Affairs should be withdrawn. All determination of nationality should only be through a legally constituted judicial Tribunal**

....

National Security, Terrorism, and Islamophobia

The migration pattern into India clearly indicates that the main movements are from Bangladesh and Nepal. The Treaty between India and Nepal legally permits free movement of people between the two countries, hence there is no explicit problem. Moreover, the religious background of the Nepali migrant matches with that of the majority Indian population and this dilutes the perception of a 'threat'.

The problem seems to lie with the migrants from Bangladesh. This is deliberately linked with the recent upsurge in terrorist activities connected with fundamentalist Islamic organisations and has made all Muslim migrants suspect. The existing prejudice against Muslims in the majoritarian mind is used to project the Muslim migrant as a threat to "National Security", making him/her an easy target for arbitrary harassment. There is barely any public sympathy, even amongst co-workers and co-habitants. On both sides of the border they have no identity and become the worst victims of human rights violations. Their miseries get multiplied when political power gets concentrated in the hands of communal parties and 'Pushback' and 'Cleansing' operations are intensified.

Some of these issues have been touched upon in the articles in this volume, but there is a need to delve deeper into this aspect of the problem.

Migration within India and related issues

Large scale migration from a region or nation may not create as many problems as large scale influx into the region or nation. Influx is often used to arouse certain fears amongst the native population, such as:

- Our job opportunities are being taken over by 'outsiders'.
- Our cultural values are being diluted.
- Our say in the political process is getting affected because of the demographic change in the population.

These are some of the concerns. There may be some other area-specific problems.
Though our Constitution confers on its citizens the right to reside anywhere in India, but it is clearly insufficient to address the problem of influx. It has emerged as a major problem for people migrating within the same country, let alone migrants from other nations, that provides fertile ground for opportunistic and jingoistic politics. How the passions of people are exploited and how this may be addressed within the framework of human rights and justice is an issue that needs to be studied in depth.