

The role of rights based policy approaches to undocumented migration: a case study of Delhi

Since the early 1990s pressure to deal with the issue of undocumented migration¹ from Bangladesh has been a constant feature of the political landscape in Delhi (Ramachandran: 2003). Various policy initiatives including Operation Pushback, Operation Flush-Out, action plans, quotas, mass drives, etc. have attempted to solve what is frequently characterised as ‘the problem of illegal Bangladeshis’. However despite these policy efforts the issue remains live in popular and political consciousness. This paper will examine one policy approach which the author believes has not yet been properly explored in the Delhi context – a rights based approach to undocumented migration. It will briefly describe the issues that lead to undocumented Bangladeshi migration to Delhi before examining the policy responses employed by the governments of India and Bangladesh. The paper will then consider the rights based approach as an alternative policy perspective and apply this paradigm to the situation in Delhi.

Undocumented migration to Delhi

Delhi, a city of approximately 15 million people, is home to four main groups of foreign migrants from within the region: Bangladeshis, Burmese, Nepalis and Tibetans. Out of these four groups Bangladeshis represent the largest number of undocumented migrants. However the actual size of the undocumented Bangladeshi population in Delhi or in wider India is unknown. This is due in part to the difficulties of calculating data on undocumented migration the world over (Cholewinski: 2006, 5-6; Koser: 2005, 7-8) and in part because within India such data has often been used to further particular political agendas. Journalist Vir Sanghvi summarised the difficulties when he wrote:

Do you know how many illegal Bangladeshi immigrants there are in India? Are there 30 million of them? What about 20 million? Or is the figure as low as 10 million? I ask because the truth is that nobody knows how many illegal Bangladeshi migrants have made India their home. Every figure you read will be an approximation or – an (sic) this is more likely – a simple guess. The 30 million figure, for instance, is usually quoted by people who want to claim that the problem of migration has now veered dangerously out of control. Because 30 million sounds more alarming than 10 million, it is the figure that will get quoted. But nobody knows that there are, in fact, 10 million illegal immigrants (the 30 million figure is just plain ridiculous) because no statistics exist. (Sunday Hindustan Times, 2006)

Such issues have led the academic Ranabir Samaddar to caution against preoccupation with ‘the numbers game’ at the expense of other more important questions (Samaddar: 1999, 60, 199-212).

Numbers aside it is clear that there are undocumented Bangladeshis in India, largely around the Indo-Bangla border but increasingly in the country’s large metropolises. They are arriving in Delhi for all the reasons identified by the Global Commission on International Migration as prompting undocumented migratory flows (GCIM: 2005, 33). On the ‘pull’ side, regional income and development disparities render Delhi’s burgeoning economy and large informal labour market a magnet for those seeking employment opportunities, whilst a well-established resident population of Bangla-speaking Muslims (from West Bengal and Bangladesh) is evidence of a well-trodden migration route as well as the protection of community networks once in Delhi. A lack of regularised low-skilled migration opportunities means the majority of Bangladeshi migrants have no choice but to come to Delhi in an undocumented fashion, including those pushed by persecution or human insecurity. In fact Ranabir Samaddar believes many of those leaving Bangladesh for India would be better described as

¹ This paper refers to Bangladeshi migrants in India without the authorisation of the state as undocumented migrants. In sharp distinction politicians and the press in Delhi commonly characterise Bangladeshi migrants as ‘illegals’ or ‘infiltrators’. For reasons why undocumented migrants should not be referred to as ‘illegal’ see PICUM: 2007, 5.

'environmental refugees' (Samaddar: 1999, 65) a perspective echoed by Amnesty International which refers to those escaping extreme deprivation as 'survival migrants' (Amnesty International: 2006(a), 5-6) and the Citizen's Campaign for Preserving Democracy (CCPD) which has termed poor and destitute Bangladeshis migrating to India, 'economic refugees' (CCPD: 2005, 2). This speaks to the experience of many Bangladeshis in Delhi for whom research indicates 'the most dominant identity, at least for the moment, is human beings whose basic need is to fill their stomachs' (van Schendel: 2007, 328)

Policy responses to undocumented migration in Delhi

'Today in India, a large number of Bangladeshis are coming in. In no country of the world, such illegal immigration takes place'— LK Advani, Indian Deputy Prime Minister, 05/02/2003 (The Hindu: 2003)

'I don't think there is any illegal migrant from Bangladesh coming to India to live'— M Morshed Khan, Bangladesh Foreign Minister, 15/02/2003 (The Daily Star: 2003)

In Delhi the government of India's approach to undocumented migration is seemingly contradictory and reflects the different spheres of government and competing imperatives affecting this area of policy making. On the one hand there is an implicit if unacknowledged reliance upon the work provided by cheap informal migrant labour. In order to fulfil its mandated duties the Municipal Corporation of Delhi routinely sub-contracts its responsibilities to operators employing cheap sometimes undocumented workers (AMAN Trust: 2006) whilst many middle-class households employing domestic help have an ambivalent attitude to their employees' citizenship or immigration status (Chaudhuri, 293). This is part of what Amnesty International has described as the complex reaction of receiving states to undocumented migration where '[i]n many countries, governments tolerate the existence of this informal economy, and society reaps the benefits from its existence' (Amnesty International: 2006, 3). Commentators have also suggested a link between immigration policies and electoral politics with the two main parties accused of either using the undocumented Bangladeshi population to create vote banks or to garner votes from those opposed to immigration (Rediff on the Net: 1998; Ramachandran: 2005, 14-15).

There appears to be little contradiction in one sphere of government enjoying the fruits of cheap migrant labour whilst others simultaneously call for the removal of 'illegals'. Instead the official government position, of shoring up the country's eastern border (to tackle new migration flows) and identifying and deporting undocumented migrants already in the country (to address migration stocks), is justified as responding to the negative impact of undocumented migration into India. Arguments posited include, firstly, concern in an already populous nation about the demand placed by increasing migration on available resources; secondly, responding to the predominantly low socio-economic background of the bulk of Bangladeshi migrants, that India should not be responsible for Bangladesh's poor; thirdly, unease that one side effect of large scale unauthorised border crossings is that national boundaries are being re-drawn; fourthly, communalism is often cited as explaining why Bangladeshi Muslim migrants are seen as 'infiltrators' whilst Bangladeshi Hindu migrants are 'refugees', and why movement across the Indo-Bangla border is contentious whilst a treaty establishes freedom of movement across the Indo-Nepali border; and fifthly, the securitisation debate has fuelled popular perception that the porous Indo-Bangla border is being exploited by terrorists intent on destabilising India.

Based on these rationales, control policies to detect and deport have, in Delhi, focused on neighbourhoods principally inhabited by poor Bengali-speaking Muslims many of whom subsist within the informal sector. Delhi police use a network of community informers to identify those to be deported after which the deportees are arrested, denied any opportunity to present evidence of their citizenship, detained and eventually transported to the border. CCPD's 2005 study concluded that in Delhi, as elsewhere in the country, 'starting from [the]

identification of [suspected] Bangladeshis to their eventual deportation' the processes employed by state agents are 'fraught with arbitrariness, corruption, and communal and class biases' (CCPD: 2005, 3). The lack of due process has provided space for community informers, corrupt police and local power brokers to exploit the vacuum leading to the systematic and targeted harassment of the Bangla-speaking Muslim community, physical and sexual abuse, bribery and extortion (Ramachandran: 2005, 15-17). Furthermore CCPD's study cites '[m]any recent examples from various parts of Delhi [...where] Indian citizens from West Bengal and Assam, working as rag pickers in Delhi, were being routinely arrested on the charge of being illegal immigrants' (CCPD: 2005, 3).

According to the government of Bangladesh there are no undocumented Bangladeshis in India, its official position remains that instead of 'illegal Bangladeshis' being deported, it is in fact poor Bangla-speaking Muslim citizens of India that are being pushed-out. This was the view taken during an internationally publicised stand-off in 2003 when the Indian Border Security Force attempted to push a group of migrants, some of whom had been rounded-up in Delhi, across the border. The government of Bangladesh refused to accept them as Bangladeshis and, effectively rendered stateless, the group remained in no-man's land for a number of days sparking a full-scale diplomatic row until one night they mysteriously disappeared (Ramachandran: 2005; Amnesty International: 2003; SAFHR: 2003(a)). The 2003 standoff exemplifies how both governments' intransigence precludes constructive dialogue on the management of their shared border or any attempt to mitigate the position of the 'nowhere people' (SAFHR: 2003(b)) caught between the Indian government's heavy-handed control measures and the politics of denial maintained by the government of Bangladesh. Whilst the political, economic and social imperatives of both states predominate, the interests of the migrants themselves are left unaddressed.

The role of human rights in policies responding to undocumented migration

'This is what I order you to do, my son: Take care of your foreigners, esteem and support them. They should favour your country to others. Keep in mind, everybody has been born as a free human being' – Stephen the Great, King of Hungary (11th century)
(quoted in de Varennes: 2003, 5)

'The architecture of international human rights law is built on the premise that all persons, by virtue of their essential humanity, should enjoy all human rights...' – David Weissbrodt, *UN Special Rapporteur on Non-Citizens* (UN ECOSOC: 2003, 5)

The policy responses in Delhi and Dhaka exemplify the state centricity which has traditionally been the starting point for most discussions on human migration in modern times. As a result the needs and interests of the state have predominated and issues of state security, state sovereignty and the right of nation states to control their borders have characterised the discussion. States have sought to dictate who is allowed to leave and enter territory and have tried to privilege entry to those meeting state defined rules. Typically these rules have been based on a migrant's nationality (defining citizens or non-citizens) and/or their immigration status (defining groups of favoured or unfavoured migrants, usually based on economic utilitarianism) although protection regimes exist in some countries for refugees and trafficking survivors.

Those given permission to enter by a receiving state are able to migrate in accordance with the national laws of that country. This is often described as migrating in a documented, authorised or regular fashion. However the question remains, how do states respond to migrants denied authorised entry, like the Bangladeshis described above, who migrate anyway? This is a key issue not just for countries with highly developed economies in Western Europe or North America but, as the Indo-Bangla example demonstrates, it is assuming increasing political importance for many countries in the global South, not least regional economic powers or those bordered by situations of conflict or human insecurity. In

response to undocumented migration states around the world have to date built higher fences, commissioned faster boats, employed more border guards, constructed larger detention centres and conducted more raids against communities of suspected non-citizens. One result of these immigration control measures has been the abuse of both migrants and citizens, in particular citizens from ethnic, religious or linguistic minority groups. Human rights violations have, for example, been reported during actions against undocumented black foreigners in South Africa (Crush et al: 2002; Human Rights Watch: 2001), Haitians and Dominicans of Haitian origin in the Dominican Republic (Human Rights Watch: 2002; Amnesty International: 2006(c)), Indonesian migrant workers in Malaysia (Human Rights Watch: 2005), Sub-Saharan Africans seeking to enter the Spanish enclaves of Ceuta and Melilla (Amnesty International: 2005(a)) and suspected undocumented Bangladeshis in India.

Increasingly questions have been raised about the legitimacy of state actions which in the pursuit of controlling borders result in abuses of human rights. Affected communities, NGOs, international organisations and some sending states (concerned about the treatment of their citizens abroad) have been calling for the fundamental rights of all migrants to be recognised and upheld regardless of their nationality or immigration status. The starting point for this alternative approach is the rights of migrants and not the interests of states. Instead this 'rights based approach' places the human at the centre and focuses on human security, human development and human rights. It recognises state sovereignty but emphasises its limits and stresses that the right of any state to control its borders is not absolute but must instead be in accordance with internationally recognised legal and normative human rights standards. Or, as Amnesty International has put it, '[t]he exercise of state sovereignty cannot be at the expense of the fundamental human rights of [...] migrants, **whatever their legal status**' (Amnesty International: 2005(b), 2) (emphasis added).

The international protection regime for migrants advocated by exponents of the rights based approach is diverse in origin. It draws on different spheres of law (domestic, customary, regional, international, etc.) as well as different areas of law most of which do not apply solely to migration (human rights, labour, refugee, humanitarian, consular, etc.), and non-binding policy agreements.² As a result no one body has a protection role for migrants similar to that of UNHCR's role for refugees. The most holistic articulation of migrants' rights is the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, one of the seven core international human rights treaties. The ethos of the 1990 convention is that immigration control must treat people as human beings first and migrants second. As such it establishes a set of fundamental rights to which all migrants, regardless of their immigration status, are entitled. These include (but are not limited to) the right to life (Article 9); freedom from torture and cruel, inhuman or degrading treatment (Article 10); freedom from slavery (Article 11); freedom of thought, conscience and religion (Article 12); right to liberty and security of person (Article 16); access to consular and diplomatic services (Article 23) and recognition as a person before the law (Article 24). It then articulates a further set of rights due to migrants with documented status (Articles 36-56). The convention, which came into force in 2003, has to date predominately been ratified by sending states in a bid to ensure the protection of their citizens working overseas. Many receiving states have refused to ratify arguing that the convention promotes undocumented migration, a charge that cannot be sustained by a reading of Articles 68(1)³ and 69(1)⁴ which seek to prevent undocumented migration and the employment of undocumented migrants. It

² The sources of international legal protection for undocumented migrants are enumerated in PICUM: 2007.

³ 'States Parties, including States of transit, shall collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation.'

⁴ 'States Parties shall, when there are migrant workers and members of their families within their territory in an irregular situation, take appropriate measures to ensure that such a situation does not persist.'

remains the newest and the least ratified of the international human rights treaties – in the South Asian context Sri Lanka acceded in 1996 and Bangladesh signed in 1998 but has not yet ratified⁵ – and yet its foundation in other legal instruments means its low ratification rate is not fatal to the protection of migrants resident in non-state parties.

A common misunderstanding about the 1990 convention is that it bestows a new gamut of rights on migrants. Instead the convention is mostly drawn from other core human rights treaties and International Labour Organisation standards. What it does is make explicit the application of rights found in these other instruments to migrant workers and their families. It reaffirms that migrants' rights are human rights because first and foremost migrants are human beings entitled to the protection offered by the international human rights legal regime. As a result migrants residing within the borders of states which are not party to the 1990 convention are not without legal protection. This is because whilst not explicitly referring to migrants, the universal nature of the core human rights treaties – recognising the fundamental rights of 'everyone' and application 'without distinction' – plus the fundamental principle of non-discrimination mean that in many countries the rights of migrants are already protected outside the framework of the 1990 convention (Amnesty International: 2006(a), 9). For example, all the core international human rights treaties reference non-discrimination and equality before the law, to the extent that the Inter-American Court of Human Rights has found that

the principal of equality before the law, equal protection before the law and non-discrimination belongs to jus cogens [i.e. the most fundamental and preemptory of rights], because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. (cited in Amnesty International: 2006(a), footnote 26)

This means that where disparities between the treatment of citizens and migrants occur, for these differences to be lawful states must demonstrate that they are for a legitimate reason, proportional to the achievement of that objective and that they do not interfere with a migrant's fundamental human rights regardless of his/her status (PICUM: 2007, 10-14; Amnesty International: 2006(a), 9-10).

The UN Office of the High Commissioner for Human Rights has summarised the obligations incumbent upon states by the international human rights framework and the principle of non-discrimination as follows:

The prohibition on discrimination, which is at the centre of all the human rights treaties, gives equal protection to citizens and migrants. The fundamental rights protections contained in the two International Covenants [International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights], and in the conventions protecting the rights of children [International Convention on the Rights of the Child], and prohibiting racial discrimination [International Convention on the Elimination of All Forms of Racial Discrimination], discrimination against women [International Convention on the Elimination of All Forms of Discrimination against Women], and torture [International Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment] apply universally to citizens and to all migrants, **regardless of their immigration status**. (OHCHR: 2006, 2) (emphasis added)

This is a view echoed by the Global Commission on International Migration which endorsed the principle that migrating without state authorisation does not impact on a migrant's fundamental rights entitlements or a state's obligations to protect them:

entering a country in violation of its immigration laws does not deprive migrants of the fundamental human rights provided by [...] human rights instruments [...] nor does it affect the obligation of states to protect migrants in an irregular situation [...] As a general rule, the provisions **apply equally to citizens and non-nationals and to regular and other migrants**,

⁵ As of 13/03/2007 there were 36 state parties to the Convention:

<http://www.ohchr.org/english/countries/ratification/13.htm>

Reasons for the non-ratification of countries within the Asia-Pacific have been explored in Piper et al: 2003.

and therefore form an important component of the normative framework. (GCIM: 2005, 55) (emphasis added)

So how does this protection framework apply to the situation of undocumented Bangladeshis in Delhi? One of the weaknesses of the protection regime for migrants, that it is a 'fragmentary universe' (PICUM: 2007, 4), conversely offers potential opportunities for migrants' rights advocates in countries like India which are not, and are in the short-term not likely to become, state parties to the 1990 convention. India's non-accession does not negate its responsibilities to undocumented migrants on Indian soil because of the obligations it has freely entered into through other legal instruments. India has either ratified or acceded to the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, International Convention on the Elimination of All Forms of Racial Discrimination, International Convention on the Elimination of All Forms of Discrimination against Women and International Convention on the Rights of the Child. It has also signed, but not ratified, the International Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (OHCHR: 2004). Even taking account of the reservations India has made to its treaty obligations (Human Rights Internet: 2003) they still provide a clear framework of legal entitlements due to undocumented migrants within India based upon the rights they enshrine and the non-discrimination clauses they contain. Furthermore over and above India's treaty obligations it's government is bound by the human rights obligations that form part of customary international law, not least the Universal Declaration of Human Rights. Of particular significance, in the face of the abuses against suspected undocumented migrants outlined in CCPD's 2005 report, are three rights enshrined in the International Bill of Human Rights and with application to 'everyone':

(i) the right to life,

'Every human being has the inherent right to life' - International Covenant on Civil and Political Rights, Article 6(1)

'Everyone has the right to life, liberty and security of person' - Universal Declaration of Human Rights, Article 3

(ii) freedom from torture or cruel, inhuman or degrading treatment or punishment,

'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment' - International Covenant on Civil and Political Rights, Article 7

'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment' - Universal Declaration of Human Rights, Article 5

and (iii) freedom from arbitrary arrest and detention,

'No one shall be subjected to arbitrary arrest or detention' - International Covenant on Civil and Political Rights, Article 9(1)

'No one shall be subjected to arbitrary arrest, detention or exile' - Universal Declaration of Human Rights, Article 9.

Conclusion

It is hard to reconcile the protections offered by the international human rights regime outlined above with the abuses of rights occurring in Delhi and elsewhere in India against those who have crossed the Indo-Bangla border without state authorisation. The problem, as identified by the UN Special Rapporteur on the rights of non-citizens, is that '[t]here is a large gap between the rights that international human rights law guarantee (sic) to non-citizens and the realities they must face' (UN ECOSOC: 2003, 2). India may be obligated to protect everyone within its borders from cruel, inhuman or degrading treatment but if the state does not hold its agents accountable to these obligations, they offer little solace to the migrant being beaten by a police officer during an immigration raid. Migrants are not the only group of Delhi-ites to experience the disjuncture between human rights obligations in law and state practice. However the economic, social and political marginalisation engendered by their perceived 'illegality', the impact of communalism, securitisation and class biases render suspected undocumented migrants particularly vulnerable to abuse.

This paper concludes by arguing that alongside the forces that currently drive the response to undocumented migration in Delhi, there is another convincing set of imperatives that should lead Indian policy-makers to prioritise rights based policies, and which underscore the need for India's rights obligations to take on practical meaning. First and foremost, the human rights framework outlined in this paper means India has an international legal obligation to uphold the rights of undocumented migrants within its borders. When state actions violate migrants' rights, or state inaction results in the rights of migrants being violated, then the government of India is in breach of its commitments and must expect to be called to account, whether that be by its own citizens or international actors. The 2003 Indo-Bangla border stand-off is an example of the international censure and embarrassment that results when abuses of rights commitments are picked up and reported across the world.

Secondly, in treating one set of people as 'rights-less', policies that result in the abuse of migrants end up eroding the rights of everyone because the fundamental idea of rights (that they are inalienable and are owed to us all by virtue of our common humanity) becomes devalued. CCPD recognised this in its 2005 report which concluded that '[i]f democratic norms and procedures are to be preserved for the greater good of the nation and its citizens, it is crucial that citizens resist this vicious cycle of inventing imaginary enemies against whom the nation has to be made secure, in the process of which the ordinary citizen is made more insecure' (CCPD: 2005, 9). What CCPD's report of state action against suspected undocumented migrants in Delhi recognised is that the impact upon Indian citizens of abuses committed against non-citizens is extensive and insidious. Most immediately, Indian citizens suspected as undocumented migrants and caught up in immigration raids are left more insecure, more pervasively citizens seeking to claim entitlements through the argument of rights are made more vulnerable, and significantly considering the number of Indians living and working abroad, Indian migrants overseas seeking to use the framework of rights are less protected.

The final point is of particular consequence to policy-makers. Globally current control measures to prevent undocumented migration are not working. In its final report the Global Commission on International Migration concluded that 'seeking to defend their sovereignty and security, states have devoted enormous amounts of attention and resources to stem irregular migration, **with limited success**' (GCIM: 2005, 33) (emphasis added). In Delhi, ten police task forces are each charged with rounding up 100 undocumented migrants every day and transporting 50-70 migrants to West Bengal for deportation every other day. Monthly reports are sent to the Delhi High Court to report on progress against the quotas (CCPD: 2005, 6). Even with the obvious temptation to meet targets by bumping-up the numbers with anyone who 'speaks Bengali, is a Muslim [and] looks like he lacks the resources to defend himself' (Sunday Hindustan Times: 2006) the quota is never met. The simple truth is that Bangladeshis are arriving into Delhi faster than the government can for practical, political and economic reasons 'identify them, locate them, and throw them out' (LK Advani quoted in Ramachandran: 2005, 2).

Whilst the rights based approach does not provide a blueprint for responding to undocumented migration in Delhi, or anywhere else, it does provide a framework of principles to underpin state engagement with migrants. As the 1990 convention makes clear, rights based thinking does not proscribe immigration control policies but it does proscribe control policies that violate human rights. A practical commitment to enforcing internationally agreed human rights obligations would not only reduce the vulnerability of Delhi-ites suspected as undocumented Bangladeshis, but in policy-terms it would offer an opportunity to break the current cycle of failing immigration control and abuse. Importantly in this regard the rights based approach encourages long term thinking, advocated by the Global Commission on International Migration as needed to meaningfully respond to the complex motivations that cause people to migrate (GCIM: 2005, 35-36). It therefore provides space to explore the long-term efficacy of policy options such as the role of more accessible

authorised low skilled labour migration routes, the regularisation of in-country undocumented migrants or the formulation of a domestic refugee policy. Fundamentally, in the case of migration to India's urban centres, it provides a framework of thinking which allows policy makers to respond holistically to the link between grinding poverty and migration. Ultimately, undocumented migration to Delhi from India's poorer neighbours, or similar internal flows from India's poorer states, will be ended not by higher fences, more border guards or larger detention centres but by acknowledging and responding to the voice of the would-be migrant, highlighted by the Bangladeshi poet Abul Faquir: 'Give me rice/Or I will eat up your map' (quoted in Rediff on the Net: 1998).

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