

LEGISLATIVE GAP IN THE DETENTION SCHEME OF RELEASED BANGLADESHI PRISONERS

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INTRODUCTION

India, which shares a border with Bangladesh, longer than that with China running through Indian states of West Bengal, Assam, Meghalaya, Tripura and Mizoram, has to deal with far reaching bilateral issues with it on its illegal immigrants into India which has reshaped the demography of India's border areas significantly jolting the ethnic balance, electoral regularity and employment opportunities for its nationals.

The porousness of the Indo-Bangladesh border, which runs through jungles, hills, villages, paddy and jute fields as also along small rivers, cause difficulty in monitoring more so as it is almost possible to distinguish a Bangladeshi from his Indian counterpart. Illegal and immoral acts such as arms smuggling, drug trafficking and those of women and children go on unabated owing to the permeable border. This fragile border allows militants with bases in Bangladesh to cross over for subversive acts and then easily flee back to their safe haven.

As India's suggestion of joint patrol along the border to rein in this menace did not meet the approval of Bangladesh, India was compelled to tackle this problem itself to strike down illegal immigration.

The illegal infiltration from Bangladeshi into India can be assigned to the social, economic and political factors – density of population and object poverty are the root cause for such infiltration. Since, Bangladesh came into existence in 1971, 15 million illegal immigrants, both Hindu and Muslim, crossed over to India of which as many as 5 million into West Bengal. Six districts of

West Bengal namely South 24 Parganas, North 24 Parganas, Nadia, Murshidabad, Malda and West Dinajpur as well as Bihar's four districts and ten of Assam have been termed as extensions of Bangladesh.

Diplomatic efforts have failed to rein in the unhindered illegal cross-overs through the porous borders posing a serious threat to Indo-Bangladesh relation. By some estimates there are millions of migrants in Asia, largest being Nepalese and Bangladeshi in India, Afghans in Pakistan, Indonesians and Philippines in Malaysia and Myanmarese in Thailand.

One can trace back the tradition of immigration in to India from Bangladesh to the British Raj when these regions were part of undivided British India. During this time these movements were known as internal migrations. After Pakistan (1947) and Bangladesh (1971) were carved out of the Indian subcontinent, the internal migrations were reversed to international and mostly illegal migrations. Border fencings were erected to halt or atleast restrict what was once known as free movement and trade zones.

As long as the stretch of 4000km Indo-Bangladesh borders, running along the Indian states of Assam, Meghalaya, Tripura, Mizoram and West Bengal remains pervasive with unhindered and unregulated influx of illegal migration, the growth rate differential of Hindu and Muslim, as swished by Indian experts, will be a direct consequence if the illegal migration in both countries. By pulling its troops out of Bangladesh soon after war, India was the first state to grant it recognition as also acknowledged the new State's sovereignty.

APPLICABILITY OF FOREIGNERS ACT 1946

The Foreigners Act 1946 is, at present, the only permanent legislation applicable to a foreigner. It being a penal statute, the violation of provisions contained therein is an offence punishable with imprisonment up to eight years.

In this crucial juncture, an attempt has been initiated to make a clear and logical analysis and review of the provisions of The Foreigners Act, 1946. The said Act confers unbridled power and unlimited authority to the Central Government of India regulating entry of foreigners, their duration of presence in the Indian soil and lastly their exit from India. The Preamble of the said Act of 1946 bears testimony to the legislative policy. Section 3 and 3A of the said Act deal with the unlimited and unfettered power of the Central Government to make orders regarding foreigners or a particular foreigner or a class of foreigners. The power conferred under Section 3(2)(c) of the Foreigners Act is a power for implementing or giving effect to the purpose of the Act as mentioned. But Section 3 of the said Act does not provide the Central Government to proceed judicially and so there is no procedure laid down by the Act to be followed by the Central Government regarding the entry of the foreigner, their presence and their departure from India.

Both, the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economics, Social and Cultural Rights (ICESCR) clearly enumerate that prisoners be accorded the highest attainable standard of Physical and Mental Health and various methods for welfare of prisoners have been provided for by the United Nations Standard Minimum Rules for the treatment of Prisoners, 1955. There are no specific rules directions, by laws or guidelines, however, regarding the method of treatment meted out to foreign detainees, especially where one country considers it a utmost obligation to take due care of the protection of a foreign prisoner.

The burning debate raging is whether the right to return to their homeland is enjoyed by the Bangladeshi immigrants as per Article 35 of the Universal Declaration of Human Rights of 1948. Illegal Bangladeshi migrants continue to live in the border lands till a way of return to their motherland is found for the procedure of deportation can only be complete after a flag meeting between the Border Security Force of India and the Border Guards of Bangladesh.

Deportation has become a nightmare for those deportees who have been refused to be accepted as Bangladeshi nationals by the Bangladeshi Border Guards. Such unfortunate Bangladeshi foreigners suffer the brunt of misery in the over-crowded West Bengal correctional home they are sent to.

India should realize that it cannot fulfill its promise to deport all foreign nationals in its system of deportation in so far as it adopts the international protocol; so there is no international/national guideline or procedure, in case of refusal to deportation, to push forward with renewed zeal or explore the applicability of new rules for deportation.

That the constitutional law is not static if it were to meet the needs of society was intended by those who framed the Constitution and in following cases the Supreme Court exhorted the necessity of the implementation of the rule of law and assigned effective accountability for administration of justice.

Through the rule of law and natural justice, arbitrariness in administrative process is dispensed with. The Indian Constitution has in its core the rule of law and all exercise of power by the legislature or the executive must, necessarily, stay with the Constitutional limit.

Important components of our Constitution are fairness and reasonableness and the Supreme Court has taken this forward to expand the basis of the right to live to encompass everything that is critical for a quality life. There is a wide gap between Article 21 of our Constitution and Section 3 of the Foreigners Act, 1946.

The Foreigners Act 1946 is central legislation with statutory rules under it, whereas the Foreigners Order 1948 is subordinate legislation. The Registration of Foreigners Act 1939. Foreigners are required by the Restriction of Foreigners Rule, 1992, which was in force, to report their addresses in India to appropriate authority. Illegal foreigners were mandated to report to the nearest police station within 24 hours of their illegal entry or their stay by the Foreigners (Report to Police) Order 2001. The ministry of Home Affairs had issued official memorandum relating to black listing of overstaying foreigners and also took measures to send them back to their country.

The Foreigners (Restriction on Pakistani Nationals) Order 1965 and the Restriction of Foreigners (Bangladesh) Rules 1973 were introduced to allow exercise of powers permitted by Section 3 of the Foreigners Act 1946 and to clamp restrictions on Pakistani and Bangladeshi nationals.

The Central Government has outlined the Foreigners (Tribunal) Order of 1964 consisting of people with judicial experience, as deemed fit and proper by it, to exercise powers enumerated in Section

3 of the Foreigner Act 1946 (31 of 1946). The question of whether a person is a foreigner or an Indian citizen within the framework of the Foreigners Act 1946 would be referred by an Order by the Central Government and the tribunal shall try the suit by virtue of the power of the civil court and Civil Procedure Code 1908 as conferred upon it.

What one needs to remember is that the British parliament, so to say, gifted the Foreigners Act 1946 and India, then was merely a police state. The British rulers paid little heed to the welfare of the people for they were busy consolidating their dominance in India. All these changed after independence.

The Central Government takes control on foreigners, as allowed to it by Section 3 of this act, in as much as their entry into, their presence in and departure from India as a class of foreigners can pose serious challenges to the security of the country – this situation arising primarily owing to political and other factors. Though the lacuna of the Foreigners Act 1946 lies in that it provides no machinery to discern who is a foreigners and who is not, its significant feature is that the policy and the purpose of the Act is clear and unambiguous from its introduction. Sweeping powers have been accorded by the legislature to the executives to address security of India where foreigners are concerned as various international and national factors come into play when a foreigner may seem dangerous or his activities may seem perilous to the security of India and for these the executives need to exercise their powers. As regards acceptability of Section 3 of the Foreigners Act, 1946, it can be stated that though in view of national security the application of Section 3 confines the rights of foreigners, it would not be right in saying that the foreigners will not be able to get protection under Article 21 of the Indian Constitution.

Only Indian citizens are privy to and can avail the Fundamental Rights embodied in Part III of the Indian Constitution such as Article 15, 16, 19 and 30, whereas some fundamental rights enumerated in Article 14, 20, 21, 23, 25, 27 and 28 are guaranteed to any person – citizen or foreigner – present on Indian soil. The executive government has enough jurisdictions, under Article 21 of the Indian Constitution, to expel foreigners from Indian Territory without any restriction to this discretion. The discussion on fundamental rights available to an outsider, however, does not envision the right of a foreign national to stay and settle in India permanently as under Article 19 (1)(e) of our Constitution which is only applicable to an Indian citizens. Article

19 cannot be applicable to a foreigner as his free movement cannot have a rigid rate. People born and domiciled in India before the propagation of the constitution are deemed to citizens of India unless they renounce their citizenship. The fundamental rights under Article 21 can never be violated even during an emergency, as made amply lucid in the 44th amendment to our Constitution, and onus is on the court to safeguard these rights guaranteed under Part III of the Constitution. Though immigrants enjoy the rights in Article 21, which is in the core of our Constitution, it should not be presumed that foreigners have the right to settle and reside in any part of Indian Territory of their choice. The illegal migrants from Bangladesh do not possess the legal right to remain in India.

Through Article 14 of the Constitution states the fundamental rights that can be enjoyed by a foreign national, the Central Government has the power to regulate his movement with an eye toward national peace and security. Though the ethnic similarities of Bangladeshis who illegal enter India, especially through the porous borders of West Bengal, help them to easily mingle with the crowd, they are a threat to sovereignty and integrity of India and this massive influx not only disturb our cultural texture but is a cause of internal disturbances, several judgments on rights of property have manifested the incidences of loss of property by Indian citizens owing to the massive and unhindered illegal influx.

The Foreigners Act 1946, which incorporates provision imposing restriction on foreigners, seems to have been introduced to allow exercise of control of foreigners in India. Foreigners with illegal entry or those who have overstayed their permit can be expelled by the government, as also foreigners whose removal is pending can be detained or even banned from re-entry after expulsion. The Constitutional obligation of proper deportation of such foreigners lies with the government.

Though the adaptation of the Foreigners Act 1946, a western origin, does not reflect the vision of those who framed the Constitution to nurture social, economic and political justice, India still seem hesitant in its attempt to do away with the legal system implemented by the British rule, even after seventy years of independence.

The yawning differences between Section 3 of the Foreigners Act 1946 and Article 21 of the Indian Constitution, though have kindled significant controversies, but have no simple formula and shall have to depend on situations, both national and international.

India is havens for illegal migrants from Bangladesh who find better employment opportunities, higher wages, modern facilities and amenities in India as a result millions illegally migrate to India posing danger to our peace and undermining our national security. As the Foreigners Act 1946 and the foreigners (Tribunal) Order are almost ineffective identifying foreigners, their presence and their deportation, India will have to take strict measures to put an end to the menace of illegal cross-overs.

The Criminal Procedure Code is, in conjunction with Foreigners Act 1946, which by nature self operative, followed to apprehend a person on suspicion of being a foreigner, for collecting evidence, for determining guilt or innocence and impose punishment to the guilty. The Criminal Procedure Code restricts the working of the machinery set up for investigation and trial of offences under Foreigners Act 1946.

The significance of the Foreigners Act 1946, which is the only legislation that restricts entry into, presence in and departure from India of foreigners, needs to be borne in mind, for in course of time such presence of foreigners may cause concern to the security of our nation.

The main essence underlying our Constitution being integrity in National unity, the Central Government uses the power, bestowed on it by the Foreigners Act 1946, to prohibit, restrict regulate entry into, stay in or expulsion from India without giving reasons to such foreign nationals, India applies the Foreigners Act of 1946, in matters relating to the stability of our country, to detain illegal immigrants, to rein in the incessant flow of outsiders without proper documents or to implicate those who overstay the validity of their travel papers.

Any nation has the right to expel foreign nationals under reasons of national security as stated in Article 13 of the International Covenant on Civil and Political Rights 1966. The Government, applying this Covenant, has the power to evict any foreigner, with illegitimate entry, out of India. Deportation, in fact, is a method of implementation of the rights of a migrant to return to his country, therefore, should not be viewed as a punishment. The Bangladeshis, however, constantly

violate the international border to sneak into India hiding behind the ethnic and linguistic similarities as well as their connections with their relatives who are Indian citizens and thereafter, causing immense difficulty in distinguishing them from Indian citizens.

The demography of India has changed owing to the never ending infiltration of illegal Bangladeshi affecting the lives, liberty and equality of our people and posing danger to our social security. Our land, resources, opportunity of employment have been encroached and they have caused stresses on our economy and if measures are not taken to protect the genuine rights and interests of Indian citizen, this could flare up into a disaster in future, like insurgency.

The guardian of our Constitution, which is the Supreme Law, is the judiciary. The welfare of its people is the cardinal duty of the sovereign, but these illegal Bangladeshi encroach on to the fundamental rights of Indian citizens causing unimaginable loss and irreparable damage to their lives. As the Constitution vows to protect the fundamental rights of Indian citizens, the sovereign is obliged to protect social order by ensuring adequate means of livelihood to its citizens, shielding them from exploitation and injustice and protecting their national income interests. Not only has the demography of India changed owing to failure in checking infiltration, but has also impeded the growth and prosperity of our country. There is a surge in population owing to persistent influx posing a threat to our social harmony, peace, security and economy.

The state is duty bound to protect every citizen's life and liberty as Article 21 came into being with the purpose of security life and personal liberty of Indian citizens, embodies as Fundamental Right guaranteed in part III of our Constitution. The words 'life' and 'liberty' allows more freedom to the citizen, when interpreted, as it includes their property. As custodian of all citizens, the state needs to be alive to challenges of continuous infiltration and the problem that comes with it.

There are millions of unauthorized Bangladeshi in India who have breached the provisions of the Foreigners Act to stay in India, despite the executive being empowered with limitless discretion of entry into and presence in India of foreigners under the said Act, indicating clearly the failure of implementing the Act by the administration. It is being foxing, therefore, that with all penal provisions contained, why the Foreigners Act 1946 could not be applied on all immigrants and how big are the numbers of immigrants escaping the provisions of the Act.

India seems to be witnessing a strange but frustrating situation in that where there is a law against foreigners, its seems almost immune for Bangladeshi who enter India illegally and stay here. Though the executives have been conferred with wide range of powers by the Act, they seem to have failed in their performance to stop, restrict and control the unauthorized entry and existence of foreigners in Indian soil.

It is well known that a Government cannot run a court nor can a court intervene in an administrators failure in using of its powers. The current situation points at the failure of the administration in carrying out its obligation of deporting illegal Bangladeshis, who have complete their sentence term yet languishing in jail, to their country, thereby flouting the very doctrine of human rights and fundamental freedom as spelt out by law relating to the Protection of Human Rights. The uniqueness of Indian court is that when law and justice demand, it can merely direct the discharge of executive duties, but cannot set up parallel bodies to execute executive functions.

Any detention beyond terms of imprisonment is illegal. The Central Government, with powers conferred upon it by Section 3(2)(g) of the Foreigners Act, 1946, can detain, confine and imprison a foreigner or a class of foreigners. If the provisions of Section 3 of the Act are contravened by a person, the judiciary can convict him. If under Section 3 a Bangladeshi is imprisoned, it is considered lawful and recognized by international law as the prudence of a Sovereign state considering its integrity, national peace a security. On the other hand, if a Bangladeshi languishes in a jail in West Bengal beyond his sentence term, this same Section becomes unlawful and arbitrary. Though our Apex Court have enlarged the ambit of Article 21 of our Constitution, the question of its violation does not or cannot arise when a foreigners is put in jail. The perpetual flow of Bangladeshis into India, chokes the scope of Article 21 in respect of genuine Indian citizens. The Apex Court, opined that the provisions of any laws have to be fair, just and reasonable. Considering this the question that looms large from the above discussions is whether the Section 3 of the Foreigners Act is lawful when a Bangladeshi convicted and imprisoned by the judicial magistrate cannot be deported to his country after serving his sentence term on account of failure by our Executive or Administrative authorities.

For an offence punishable under Section 14 of the Foreigners Act if any person is found guilty and sentenced to imprisonment for a specified period in India, that person must necessarily be deported to his country after completing the sentence as per the order of a Magistrate. The judgment in any criminal court of original jurisdiction must be delivered in an open court and in a language clearly understood by the accused and if the Supreme Court sets aside any conviction, the order of deportation shall stand void. In the same line when a person is convicted and imprisoned by an order of the Learned Magistrate, the administrative authorities shall have no jurisdiction in complying with one part of the order and ignoring the other part because of failure on part of the Central Government to deport the person within time. The task of the judiciary is to ensure avoidance of miscarriage of justice, but noncompliance of its order does just that and as a result the detained Bangladeshi languish in Indian jails beyond the period of their sentence. Though we know that the inherent powers of the Apex Court should be exercised only under compelling circumstances, the administration's failure to deport detainees, being a gross violation of Article 21 of our Constitution, becomes compelling enough for the Apex Court to intervene and use its powers to undo the miscarriage of justice caused by our Executives.

The order of the Judicial Magistrate on the judgment is clear and unambiguous that the deportation of a foreigner on completion of his sentence term must be immediate as the interpretation of 'completion of sentencing period' is 'without any delay.' As has been reiterated, the Foreigners Act, 1946 is quite perplexing as on one hand, it bestows on the Central Government sweeping powers in regards entry into stay in and expulsion from India and on the other hand the judiciary shoulders the implementation of its penal provisions, which as pointed out has wide gap between Article 21 of our Constitution and Section 3 of the Foreigners Act.

CONCLUSION

The dis-alignment between intention and implementation is manifested in the need to deport foreigners to their own country soon after they complete their sentence term. No provisions for deportation of immigrants have been incorporated in the existing laws – the Foreigners Act 1946, the Foreigners Order 1948 and the Registration of Foreigners Act 1939. To allow the judiciary to

direct administration to swiftly effect deportation of foreign nationals on completion of their conviction term, Section 3 of the Foreigners Act 1946 needs to be amended with reasonable, fair and just provisions.

The applicability of the Foreigners Act, now, needs to be scrutinized as the Act, on one hand, is required to respond actively to the needs of the present situation and on the other hand, its proper implementation, but the predicament lies in the fact that though the executives are conferred with sweeping powers on entry, presence and deportation of foreigners under the Act, its implementation is vested upon the judiciary.

