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Transcript Of The XII Annual NLSIR Symposium on "Sovereignty-Rights Dichotomy: Exploring Issues Of Migration, Refuge And Citizenship"

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TRANSCRIPT OF THE XII ANNUAL NATIONAL LAW SCHOOL OF INDIA REVIEW SYMPOSIUM ON "SOVEREIGNTY-RIGHTS DICHOTOMY: EXPLORING ISSUES OF MIGRATION, REFUGE AND CITIZENSHIP

1. SESSION I: INDIA'S MIGRATION POLICY: INSTITUTIONALIZED STIGMA?

The primary purpose of this session was to set the tone for a general discussion on 'Immigrant Detention' in the context of the previous discussions on the Foreigners Act 1946, Labour Law, Regular and Irregular Migration, and how Foreign National Prisoners ('FNPs') get the short end of the stick under the current national legal framework. The panel consisted of **Mr Gurucharan Gollerkeri**,[1] **Ms Madhurima Dhanuka**,[2] and **Ms Seeta Sharma**.[3] The opening session of the symposium was moderated by **Ms Hamsa Vijayaraghavan**.[4]

Mr Gollerkeri began by commenting on the timeliness of the topic, commending NLSIR for tackling the issue of *international migration* and the concomitant problem of *refugee influx* and *asylum seekers* head-on. He characterized the problem as a *transnational* one. According to him, globally there seemed to be a sense of impending crisis surrounding the topic of immigration, and more particularly on refugees and asylum seekers. In the current scheme of things, he encouraged the panellists not to look at any issue in isolation. He made a brief departure from his presentation to acquiesce to any and all sedentary bias he might inadvertently bring to the table as a result of his long association with the Government of India as a career civil servant.

According to him, no country in present times can anymore be labelled as a *country of origin* and by logical corollary, no country could likewise be characterized as a *country of destination*. In his opinion, most countries today are countries of origin, destination, and transit in varying degree. He made known his long-held belief in a *borderless world* and made a case for all human rights to be based on residence and not on citizenship. He believed that the sooner

[1] Director, Public Affairs Centre, Bangalore.
[2] Coordinator, Prison Reforms Programme, Commonwealth Human Rights Initiative (CHRI).
[3] Technical Officer, EU-India CAMM Project, International Labour Organisation.
[4] Legal Director, Migration and Asylum Project.

countries realize this, the easier the move towards this enlightened system shall be.

He proceeded to highlight *three* points of importance on the current debate on international migration. Firstly, the international migration discourse has been dominated by the Global North. And, consequently, the pace, direction, and issues that the discourse focuses on are primarily representative of the concerns of the Global North. Secondly, we live in a world where the trans-national movement of goods and services is seen as a virtue. Yet, most parts of the world outlaw the producers of these goods and the providers of these services from crossing borders. In other words, borders seem to be not for goods but only for people. "We have a rule-based supranational body for goods and services (i.e., the World Trade Organization) but nothing of the kind for dealing with the transnational problems arising out of migration", he observed. Lastly, migration is seen as a problem rather than an opportunity.

The presentation then veered towards the question 'Does India have a migration policy?' The simple answer to which was 'No'. Since 1947, India has responded to the challenges posed by expedient circumstances on an *ad hoc* basis but to discern a policy *via* the legal instruments in place is an uphill task in itself. He identified *three* dimensions of international migration. First, the *humanitarian dimension*: refugees in international migration form the largest constituency of those crossing borders. Second, the *developmental dimension*: the mobility of economic migrants. And third, the *human rights dimension*: majorly constituting those seeking asylum. The last category arises due to a slew of reasons, including climate change, conflict, and global demographic trends.

Considering that the 70th anniversary of the Universal Declaration of Human Rights ('UDHR') convention was one day away at the time of the event, Mr Gollerkeri thought it appropriate to talk about the UDHR. Art 13 of the UDHR, which embodies the 'Right to Freedom of Movement', proudly states that, "(1) Everyone has the right to freedom of movement and residence within the borders of each state; (2) Everyone has the right to leave any country, including his own, and to return to his country".[5] However, what is interesting is that while, on one hand, the charter essentially gives the right to leave one country, it does not confer a corresponding right to enter another. This right is left within the sovereign domain of the individual nation-states. In Mr Gollerkeri's view, without the *right to immigrate*, the *right to emigrate* remains merely a theoretical construct. The authority or power to refuse entry still remains with the nation-states. Further, according to him, art 13(2) segues very smoothly into art 14, which provides for the 'Right to Seek Asylum'[6]. As a consequence, the power is put back into the lap of the State. Therefore, this

[5] Universal Declaration of Human Rights, Art. 13.

[6] Universal Declaration of Human Rights, Art. 14(1) ('*everyone has the right to seek and to enjoy in other countries asylum from persecution*.').

fundamental dichotomy between *sovereignty* and *human rights* is built into the charter, and for him 'this arrangement is not by default but by design'.

He also spoke on the 'Global Compact for Safe, Orderly and Regular Migration 2018'. Commenting on the voluntary nature of the UN negotiated agreement, he stated that, sadly, whatever is not binding simply translates into allowing the sovereign states to decide whether it is good for them or not. While elaborating on the focus of the Global Compact, he said that the countries must try and reduce drivers of migration and also ensure that there is proper proof of identity and proper documentation.

He then went on to list the primary concerns of the UN Global Compact. For him, it is to strengthen the international response to the smuggling and trafficking of migrants, primarily through the 'United Nations Convention against Transnational Organized Crime' and the 'United Nations Office on Drugs and Crime' ('UNODC'). Questions were raised about the legal framework that India functions under to deal with migration. The first question was 'How India deals with migration if it does not have a policy on migration?' To which Mr Gollerkeri answered that India is governed by the Emigration Act 1983, the basis for which was laid down in *Kanga* v. *Union of India*[7].

Second, he disagreed with what he considered was the majority view on the panel, that the modalities and implementation of the Foreigners Act 1946 is regressive and runs counter to interests of human rights. He said that a summary look at other countries indicated to him that India was much better off. His conclusion was that the Foreigners Act is a "reasonably competent piece of legislation", which enables the State to manage migration.

Third, the Illegal Migrants (Determination by Tribunal) Act 1983 was discussed. When it came to India's position on asylums seekers, he said that India has a history of providing succour to a lot of foreigners. He ruminated that, in his experience, the only time in recent history that India has departed from the 'United Nations Convention Relating to the Status of Refugees 1951' (even though India is not a signatory) is the Rohingya crisis in 2017 and the debate surrounding the desirability of Rohingyan presence in India.

He expounded on India's proud historical record of following the *principle of non-refoulement*. The discussion on migration then turned towards the 'Global Approach to Migration and Mobility' ('GAMM') in the European Union ('EU') and the 'Common Agenda on Migration and Mobility' ('CAMM') between India, EU and its Member States. On the issue of migration, India differs with the European countries on the topic of 'Return and Resettlement Agreement'.

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[7] *Erach Sam Kanga* v. *Union of India*, [W.P. No. 2632 of 1978 decided on 20.3.1979] (Supreme Court of India).(Not found plz chk)

He explained that India does so because of *two* reasons. First, *ethnicity* does not indicate *nationality*. Owing to the facial similarities among people residing in the Indian subcontinent, Pakistanis and Bangladeshis look like Indians. And when people from the subcontinent are apprehended overseas as irregular migrants, in the absence of ways to confirm their nationality, they often claim to be Indian nationals. Therefore, immigration asylum seeking is not a relationship only between individuals and the nation-state but really between nation-states. Second, the problem of India being a major 'State of Transit'.

The next question was 'What has been the Indian judiciary's stand on migration and refugees?' To which Mr Gollerkeri's response was that the judiciary has taken a very liberal stand and strived to progress with the times despite India not being a signatory to certain conventions. The judiciary has very often codified the spirit of these conventions into its judgments so that at least migrants have the protection of art 14 and art 21. But, in most judgments, the Supreme Court of India has stopped short of giving them full-fledged rights under art 19.

Therefore, the takeaway advice of the speaker, as he made his concluding remarks to the discussion, was to look at the issue from the perspective of the challenges India will have to face in the coming years and make suitable contingency plans with an eye on the future.

Next, **Ms Madhurima Dhanuka,** from the **Commonwealth Human Rights Initiative** ('CHRI'),[8] started her presentation. She brought her decade long experience as Programme Coordinator for CHRI's Prison Reforms Programme, as she proceeded to set the stage for a more generalized discussion on the topic of *Immigration Detention*. Her presentation titled 'A Stranger to Justice: Foreign National Prisoners in India' highlighted how the Foreigners Act impacted and, at times, impeded the lives of foreign nationals confined in prison across India. The presentation underlined the problems and lacunae in the system that CHRI faced as a non-governmental organization while facilitating foreigners in the repatriation process and getting consular access. It also elaborated on the perils of navigating the bureaucratic nightmare in order to acquire occasional reprieves, such as letting FNPs talk to their families. She differed with Mr Gollerkeri's positive take on the Foreigners Act and went on to give reasons for the same.

Ms Dhanuka outlined the myriad ways in which one may find oneself in prison under the Passport (Entry into India) Act 1920, the Foreigners Act 1946,

[8] CHRI is an independent, non-governmental, non-profit organisation headquartered in New Delhi, with offices in London, United Kingdom and Accra, Ghana. CHRI works for the practical realisation of human rights across Commonwealth countries. It has specialised in the areas of Access to Justice (Police and Prison Reforms) and Access to Information for over two decades. It has special consultative status with the UN Economic and Social Council and is recognised for its expertise by governments, oversight bodies and civil society. It is registered as a society in India.

the Foreigners Order 1948 and the Citizenship Act 1955 for offences such as travelling without documents, travelling on forged documents, travelling with documents but violating conditions of stay, travelling with documents, but with expired visa, travelling with documents but having committed a criminal offence, and a litany of other acts that may potentially put one behind bars.

She went on to explain the international legal framework governing foreign prisoners. The United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) 2015, Body of Principles of All Persons under Any Form of Detention or Imprisonment 1988, Vienna Convention on Consular Relations 1963, UNODC Handbook on Prisoners with Special Needs 2009 featured prominently among those mentioned by Ms Dhanuka, whereas the Constitution of India 1950, Ministry of Home Affairs & Ministry of External Affairs Letters/Circulars/Advisories/Standard Operating Procedures, State Prison Manuals, State Police Manuals, The Prisons Act 1894 and judicial pronouncements were stated to be most pertinent to the current discussion on the legal framework on the national stage.

The session then turned to estimate the distribution of FNPs in prisons, in detention centres, or awaiting repatriation across states in India. With a total of 3415 prisoners, West Bengal had the highest population of FNPs, followed by Maharashtra (575) and Uttar Pradesh (420).[9] What was even more disturbing was a Right to Information query that revealed that among the FNPs languishing in Indian prisons (as of January 2018), 871 prisoners were 'awaiting repatriation' and 522 prisoners were those whose nationalities was 'not known'[10], and only 5.7% received any sort of consular access whatsoever.[11]

Thus, the discussion brought to the fore the lack of adherence to any sort of procedure from the stage of 'arrest' (particularly, lack of intimation to embassy at arrest[12]), 'adjudication' (lack of nationality verification at the time of trial as well as the reverse burden of proof residing on the shoulders of the accused to prove he/she is not a foreigner[13]), 'detention' (lack of consular access in prison,

[9] Prison Statistics India 2015, National Crime Records Bureau.

[10] This is due to the fact that the Foreigner's Act doesn't recognize '*regular migrant*' or '*economic migrants*', it only recognizes one black and white dichotomous categories of '*Indians*' and '*non-Indians*'. Therefore, Foreigners Act prosecutes people as '*non-Indians*', if you don't have any documents you are automatically a non-Indian and not prosecuted as another national.

[11] The responses from the right to information requests filed by CHRI have since been collated and published in Palak Chaudhari and Madhurima Dhanuka, Strangers to Justice–A Study on Foreign Nationals in Indian Prisons17, 23 (ISBN: 978-93-81241-54-7, Commonwealth Human Rights Initiative 2019).

[12] Vienna Convention on Consular Relations 1963, Art. 36(b) ('*competent authorities should* inform *the consular post of the concerned state,* **"**if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner**"**). It is interesting to note that there is no mandatory corresponding provision in national law which provides for the same rights to FNPs in India.

[13] The Foreigners Act of 1946, § 9 ("*Burden of Proof –The onus of proving that such person is not a foreigner ... shall ... lie upon such person*"). Also, *Sk. Abdul Aziz* v. *State of NCT of*

lack of contact with family and friends, lack of provisions to meet special needs–dietary, cultural, lingual etc.), all the way to the completion of sentence (delay in nationality verification, delay in obtaining emergency travel certificate, insufficient funds to support travel).

The detrimental impact on FNPs is amplified by the 'continued detention and deportation' which forces these vulnerable people, under the Foreigners Act, to reside only in predetermined places of confinement, with restrictions on their movement,[14] etc. All these factors, in turn, contribute towards the harassment and compromise in the rights of FNPs in India.

Finally, **Ms Seeta Sharma,** from the **International Labour Organisation** ('ILO'), started her presentation. She brought to the discussion the perspective of labour and migration in the context of India. She began by describing the ILO conventions on labour rights and how countries are unwilling to sign conventions and frameworks or fulfil their obligations under these conventions. She highlighted that the significant questions raised in the discussion on India's stance are regarding the blurring of the distinction between legal and irregular migrants, lack of protection afforded to Indian irregular migrants in other countries, and the fear of illegal migration despite the fact that India is a source country. She explained that these questions can be answered by reference to the factors in India's social and political landscape. According to India's stance, it is necessary to reduce the distinction between legal and irregular migrants in order to protect national boundaries and assuage the fears of the Indian labour market. Protection is not provided to Indian illegal migrants in other countries to maintain the image of being a good migrant country. Another significant factor is that irregular migrants often belong to minority groups.

The existence of such policies has the implication of leading to an increase in borders, detentions, and deportations, which does not prevent irregular migrants from entering countries. Ms Sharma referred to the point made by Mr Gollerkeri that just because there are hurdles in migration does not mean that the push factors that lead to such migration do not exist.

In the Indian context, due to the large population, there is massive unemployment and underemployment. If this is the case, the question that arises is 'How are there jobs that migrants can fill?' Migrants are able to take several jobs because of the flawed manner in which the labour market operates. Due to flexibility in the labour market, there is often lesser inspection, and therefore, workers need not be ensured of basic rights. There exists a race to get cheaper labour. In this hierarchy, migrant workers are always the weakest as conditions in the lowest jobs are still better than living in the origin country.

Delhi, WP Cri No. 1426 of 2013, decided on 1-5-2015 (Del) (plz chk) may be mentioned in this regard.

[14] The Foreigners Act of 1946, § 3(2)(e)(ii).

She stressed on the falsity of the rhetoric that migrants are the reason for job losses. The true cause is the failure of the government to ensure basic rights for its own citizens. In many families, domestic workers take care of the elderly. Further, in order to cut costs, several hospices and old-age care homes replaced trained nurses and professionals with migrant domestic workers who work for cheaper salaries. It was possible for the industry to do so because of lack of regulation and lack of protection afforded to workers in the industry. Thus, the issue is one of failure of the government to ensure basic rights for workers. A simple solution to these problems in the labour market is to ensure basic rights, such as fair wages, job security, and the ability to organize, for all workers. These are the fundamentals of labour law and human rights.

Ms Sharma ended her presentation by raising the issue of the factors that lead some migrant groups to be accepted more than others. For instance, while on one hand, we have two million Bangladeshis in India who are seen as a problem, on the other hand, we also have five to seven million Nepalis who are not seen as a problem as they are integrated into the labour market. It is necessary for us to investigate the factors that lead to such differences. According to Mr Gollerkeri, apart from the communal reasons, there are political reasons for such a distinction, such as the existence of the friendship treaty between Nepal and India and the role Nepal plays in acting as a buffer between India and China. She concluded by stressing that there is a need to see migration as part of a larger international political context.

The presentations were followed by a panel discussion amongst the presenters.

PANEL DISCUSSION

Ms Hamsa Vijayraghavan was the moderator for this session and set the context of the discussion by identifying the major challenges related to migration and the rights of migrants in India. She first focused on how the use of the phrase *forced migrants* stigmatizes voluntary migration. The first issue in creating a framework on migrant rights is the inability to resolve the discrepancy between the problem of resolving push factors and pull factors as India is a source as well as a destination country for migrants. As there is no cohesive framework for migration in India, statutes such as the Foreigners Act 1946 are applied inconsistently.

Ms Vijayaraghavan posed a question to Mr Gollerkeri regarding the efficacy of the United Nation High Commissioner for Refugees ('UNHCR') and its role in regulating the movement of refugees. Mr Gollerkeri elaborated upon the characteristics of the UNHCR that render international arrangements inefficient in tackling such issues. The UNHCR is important but its influence is limited because it is not binding on sovereign states. No consequences exist

for violating bilateral arrangements. Therefore, there is a need for sovereign nations to allow a supranational body to enforce certain laws.

Another question posed by Ms Vijayaraghavan to all the panellists was regarding the position of India in the global compact on migration. Although India is a source as well as a destination country, it is often seen that India does not accept its irregular migrants living in other countries. Ms Sharma replied saying that two major factors exist for this attitude of the State.– First, India wants to promote regular migration and focus on regular corridors and thus, an apathetic attitude is adopted towards irregular migrants. Second, some irregular migrants are labelled as anti-state and no understanding is shown to the push factors that they experience. There is also a difference between how the Indian diaspora is treated differently based on their destination countries. For instance, migrants to the United States are treated differently than those who migrate to Middle East Asia.

As Ms Dhanuka's area of work is in the field of the rights of arrested and detained persons, a question was posed to her regarding the mechanisms that exist to help Indians detained in other countries. As per the Repatriation of Prisoners Act 2003, in some cases, there can be a transfer of prisoners to India, who then serve the rest of their sentences in Indian prisons. However, this Act can be applied only when the consulate is aware of the detention of the person and has access to him. Moreover, the consulate is often given no information or is informed that the detenu has refused consular access. The cause of the latter is that, in most cases, people are not aware of the consulate and the help it can provide. Lastly, she noted the efforts of the Ministry of External Affairs which has set up an online portal (*Madat*) to reach out to Indians stranded abroad.

The Panel was then opened up for questions from the audience.

A question was put forth with respect to the issue of death of migrant workers and whether the recruiter or the State bears the liability for the same? Ms Vijayaraghavan answered that those who migrate to the Middle East for employment opportunities are often insured by their employers. And, in cases where the worker is not insured, the Indian government bears the cost of bringing back the body. In most countries, the responsibility of ensuring the safety of workers rests with the employers and the destination country. India has often taken measures in individual cases to help the family of the migrant worker.

The next question was with respect to migrants from Afghanistan in India. A member from the audience sought a response from Ms Vijayaraghavan on why many people are not granted UNHCR refugee cards. She presented the various factors that prevent this specific group of migrants from seeking refugee status. She highlighted that in several cases migrants from Afghanistan

overstay their visas. Further, she stressed that the distinction between refugees and migrants is essential and must be kept in mind. Drawing from her experience, she explained that it has often been seen that taking on a refugee status means losing any benefits provided by Afghanistan. In cases where asylum has been sought but rejected, the Indian government provides documentation and transfers such persons to Afghanistan.

The next question, addressed to Ms Dhanuka, was regarding the treatment of minors who are migrants or smuggled across borders. She explained that as per existing guidelines and government directives, women and minors should not be prosecuted. However, repatriation is a significant issue and children often spend years away from their families in jail or in government-run homes for juveniles. States are beginning to take cognizance of this issue. For instance, West Bengal has a task force to ameliorate the condition of minors.

Lastly, the panel was asked about the potential of a 'uniform migration policy'. It was highlighted that, currently, there are bilateral, multilateral, and regional agreements between countries on the basis of existing migration patterns. Ms Dhanuka explained that in India attempts are being made to make frameworks on the basis of ensuring human mobility as well as social security. She also reiterated the need for a uniform policy for migrants in India and stressed on the fact that diversity of political relations between India and other nations is not a reason to not have a policy.

CLOSING REMARKS

Before concluding, the panel commented on the Anti-Trafficking Bill and observed that the Bill shifts focus from trafficking and will, in fact, cause hurdles in migration. The panel ended the session by describing the way in which we must move forward. According to Ms Sharma, the government is taking cognizance of the issue and inter-ministerial consultations are also taking place. While Ms Dhanuka emphasized the need to bridge the gap between aim and application, Ms Vijayaraghavan hoped that any new laws on migrants that come into force are well thought out and address the issues put forth in the discussion.

2. SESSION II: ON SHIFTING SANDS: INDIA'S REFUGEES AND THE WAY FORWARD

This session sought to highlight the position of refugees in India. It also explored the interplay between India's constitutional guarantees and the obligations under international law for protection of refugees. The Panel consisted of

Dr. Ashwini Kumar,[15] **Ms. Cheryl D'souza,**[16] **Mr. Prashant Bhushan,**[17] **Ms. Roshani Shanker**[18] **and Dr. Srinivas Burra.**[19]

Ms. Shankar, moderating the session, began the session by setting the tone for the discussion. Recalling when the Migration and Asylum Project was set, she noted that there were several misconceptions and aspersions regarding the work that they were doing. However, there has been a sea change in the way people look at the issues highlighted by the organisation. The issues have become more mainstream, and people want to know the nuances of the situation. Unfortunately, it required the Arab Spring, the Syrian Civil War, and the Rohingya Crisis to kindle this awareness. Nonetheless, as it stands, the refugee/migrant crisis is at our doorstep. This requires us to become more thoughtful than we have hitherto been. With different parts of the globe facing similar crises, Refugee Law has come to the forefront in contemporary discussion in International Law. The next step, therefore, is to see how we can implement the international legal order and what changes the current paradigm requires.

As one of the advocates representing the Rohingya before the Supreme Court, **Dr. Kumar** laid bare the problems in the stance taken by the Government. He stated that the inextricable link between democracy and human rights is the only moral and political idea that has gotten universal acceptance. Therefore, it was striking to witness the insensitiveness to the opposition by the Government. This was especially disturbing given that this was a sovereign Government, representing a sovereign people, who on record and through past practice have maintained their commitment to upholding human rights. It is a matter of pride that the Supreme Court has placed personal liberty at the pinnacle of human rights. Since *Maneka Gandhi* v. *Union of India*,[20] there has been a flurry of similar judgments, the most recent being the *Puttaswamy judgment*.[21] Through its jurisprudence, the Court has affirmed that the right to dignity and personal liberty is fundamental to all humans. The Constitution guarantees this right to all *persons*, not only citizens. Therefore, the protection of life and personal liberty is not linked to the existence of citizenship. Once it is established that those claiming refuge or asylum face a threat to their life, it is unfathomable that a State takes the stance that it will not protect them.

There are primarily three arguments upon which the Government has based its case. *Firstly*, that there exist national security concerns which do not

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[15] Senior Advocate, Supreme Court of India and ex-Union Minister for Law and Justice, Government of India.

[16] Human Rights Activist and Advocate, Supreme Court of India.

[17] Advocate, Supreme Court of India (Lawyer representing the petitioners in the Rohingya Deportation Case before the Supreme Court).

[18] Founder and Executive Director, Migration and Asylum Project.

[19] Assistant Professor, Faculty of Legal Studies, South Asian University.

[20] (1978) 1 SCC 248 : AIR 1978 SC 597.

[21] *K.S. Puttaswamy* v. *Union of India*, (2017) 10 SCC 1.

allow it to give refuge to the Rohingya. *Secondly,* that giving refuge/asylum to the Rohingya would place a substantial strain on the finances of the Union. *Thirdly*, since India has not ratified the *Convention Relating to the Status of Refugees* ('the Refugee Convention'),[22] it has no legal obligation to give refuge to the Rohingya. With respect to national security, it must be kept in mind that a large portion of the refugee population comprises children and the aged. These are people escaping persecution, murder, and rape. Therefore, it is a stretch to argue that they pose a national security threat to the Union, given the latter's sheer size and resources. The argument of financial strain can be best characterized as counting pennies to escape an obligation to defend destitute people. These arguments beg the question of whether democracy can exist in the absence of human rights. At its core, democracy is about the dignity of the individual and protecting certain basic, inalienable, and non-negotiable rights. The chapters on Fundamental Rights and Directive Principles of State Policy represent certain values. These are the defining values of not just our Republic, but also of the international order. Lastly, the argument with respect to India not ratifying the Refugee Convention is misconstrued. Admittedly, India has not ratified the Refugee Convention. However, there are multiple other treaties that India has signed and ratified which oblige it to not deny refuge and asylum to those fleeing genocide and ethnic cleansing. These include the *International Covenant on Civil and Political Rights*,[23] the *Universal Declaration of Human Rights*,[24] the *International Convention for the Protection of All Persons from Enforced Disappearance*,[25] the *United Nations Convention Against Torture*,[26] the *New York Declaration for Refugees and Migrants*[27] *and the Bangkok Principles on the Status and Treatment of Refugees*.[28] The United Nations High Commissioner for Refugees ('the UNHCR') and the International Court of Justice ('the ICJ') have affirmed that the obligations found under the Refugee Convention are part of *jus cogens*. Hence, they oblige all States Parties to the UN Charter, regardless of whether they have ratified the convention itself or not.[29] Furthermore, the ICJ has observed that International Humanitarian Law and International Human Rights Law are inextricably linked.[30] It is evident that the Government's case can't be defended in law.

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[22] Convention Relating to the Status of Refugees, July 28, 1951, 189 UNTS 137.

[23] International Covenant on Civil and Political Rights, December 16, 1966, 999 UNTS 171.

[24] G.A. Res. 217 (III) A, Universal Declaration of Human Rights (December 10, 1948).

[25] International Convention for the Protection of All Persons from Enforced Disappearance, December 20, 2006, 2716 UNTS 3.

[26] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, 1465 UNTS 85.

[27] G.A. Res. 70/1, New York Declaration for Refugees and Migrants (October 3, 2016).

[28] Asian-African Legal Consultative Organization, Bangkok Principles on the Status and Treatment of Refugees, December 31, 1966, https://www.refworld.org/docid/3de5f2d52.html.

[29] UN High Commissioner for Refugees, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, January 26, 2007, https://www.refworld.org/docid/45f17a1a4.html.

[30] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ 136 (July 9).

We are obliged by our existing International Law obligations, despite us not signing the Refugee Convention, to provide refuge to all those escaping persecution and threat to life. These questions, however, raise a larger issue. They require us to reflect on the decline in democratic values that we are witnessing across the globe. The link between democracy and human rights demands that we construe our constitutional and international obligations in a way that advances human rights. The challenge of our times is to consolidate and expand the existing human rights regime.

Dr. Burra focussed on the historical context of the Refugee Convention, its drawbacks, and why India is not party to it. He echoed the views of **Mr. Gollerkeri** in noting that the discussion regarding refugee issues is skewed towards the Global North. The Refugee Convention has several drawbacks, many of which can be traced to the Convention's coming into being in the context of a Post-War world. It served the Global North in its ideological battle with the Soviet Union. It created the narrative that the Western Bloc would guarantee people individual freedom and liberty, incentivizing people to cross the Iron Curtain. This influx of refugees also facilitated the reconstruction of Post-War Europe since it created a supply of cheap labour. The Refugee Convention was, in certain ways, a tool for the Global North to serve its political purpose. While the political use of the Refugee Convention may have weaned, it can still be used as a tool to serve an economic purpose. Not only is the Refugee Convention marred by the context of its creation, it also has certain conceptual drawbacks and lacunae. *First*, it never conceptualised the possibility of refugees having to exist in camps as they do now. The understanding was that refugees would be relocated and rehabilitated. *Second*, it focused on refugees as individuals and not as a collective group escaping persecution. If one looks at the Palermo Protocols regarding trafficking and refugees, one sees that they criminalise migration without proper documentation.

According to Dr. Burra, this runs counter to the Refugee Convention. This, according to him is a consequence of the shifting of the gaze from a rights perspective to a criminalization perspective. The rights perspective, unlike the criminalization perspective, focuses on the victim rather than the perpetrator. However, the Refugee Convention itself also reflects this shift of gaze. This is evidenced from the fact that Convention states that you can only claim refugee status if you reach the border of the destination state. The result is that if States can prevent a refugee from reaching the border, they can render the principle of non-refoulment useless. This is one of the reasons why States are erecting fences and walls on their borders. Not only does this prevent refugees from reaching the border, it also leads to the practical problem that only well-abled people are able to become refugees.

Dr. Burra proposed that an alternative test should be utilized for determining refugee status. He stated that the test should be that of effective control. If a country can turn the person back, it is exercising effective control even

though the person has not reached the border. He reiterated that the arguments against signing the Refugee Convention have strong basis and need to be considered carefully. The primary concern with the Refugee Convention has been that it does not address the concerns of developing nations. Across the globe, especially in Latin America and the African Continent, countries are developing their own principles and modifying the Refugee Convention so as to better suit their framework. One of the biggest unaddressed concerns is that of burden sharing. He stated that eighty percent of the burden of taking in refugee population is borne by developing nations. The Global North started considering the refugee crisis a problem only when it reached their shores. The Syrian Crisis brought the refugee problem to their doorsteps, and conventions and global compacts such as the *New York Declaration for Refugees and Migrants*[31] is how the West responded. The Rohingya Crisis doesn't directly affect the West and therefore does not receive the same traction as the Syrian Crisis did. Dr. Burra argued for developing locally a legal framework that addresses the concerns that are specific to India, instead of pushing the government to sign the Refugee Convention.

Ms. D'souza analysed the response of the Supreme Court to the refugee crisis. Beginning with the incident of the deportation of seven Rohingya refugees in October 2018, Ms. Dsouza stated that the decision of the Supreme Court to allow the deportation was in ignorance of the existing constitutional protections, humanitarian considerations, and international treaties and obligations.

Interestingly, Ms. D'souza noted, minutes before the refugees were to cross the border, the Government submitted an affidavit in court stating that the Myanmarese Government had accepted them as citizens and the refugees had agreed to be repatriated. The court accepted this without giving consideration to the fact that the UNHCR was not even allowed access to the refugees to determine whether they made an informed decision. Consequently, what happened was that as soon as the refugees crossed over, they were detained, given ID's, and denied citizenship. Ms. D'souza went through how the legal battle started. It commenced with the Union government issuing a circular directing all state governments to identify and expeditiously deport all illegal immigrants, including the Rohingya. This was in the backdrop of an international outcry against the treatment meted out to the Rohingya. This circular was challenged by refugees living in Delhi as being *ultra vires* the Constitution. It is established law that while not all constitutional rights are available to non-citizens, Articles 21 and 14 are.[32] Therefore, the circular was challenged on the ground that it violates Articles 21 and 14.

Ms. Dsouza pressed the point that the government's response was clearly based on the fact that the Rohingya were Muslim, and therefore, illegal. This

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[31] New York Declaration for Refugees and Migrants, n.13.

[32] *National Human Rights Commission* v. *State of Arunachal Pradesh*, (1996) 1 SCC 742 : AIR 1996 SC 1234.

was in sharp contrast to our past practice wherein we have opened our borders to people Sri Lanka, Afghanistan and Tibet. The second leg of the Government's argument was that we are not part of the Refugee Convention, and therefore the principle of non-refoulment does not bind us. She reiterated the previous speakers in noting that even if we are not bound by non-refoulment under the Refugee Convention, we are bound by virtue of the several other treaties that we have ratified. Furthermore, the UNHCR considers the principle of non-refoulment to be a *jus cogens* norm. Despite this, the government has been contending otherwise. The stance of the government was further belied by the fact that the definition of refugees within the Refugee Convention is mirrored in the Standard Operating Procedure followed by the Government of India.[33] Therefore, it was evident that the Rohingya are being discriminated against because they are Muslims.

Ms. Dsouza highlighted that the exemptions that were granted in 2015 with respected to passports and other documentations to people seeking asylum, specifically excluded Muslims as a community that could avail of the exemptions. Therefore, it is evident that they are being discriminated against. The principle of non-refoulment includes, within its fold, protection from being pushed back from a state's borders. Despite this, the Rohingya are being pushed back using stun grenades and chillies. According to Ms. Dsouza, the Rohingya Crisis is a test of India's international obligations.

Mr. Bhushan, concluding the opening segment of the session, noted that there was a divergence between the rhetoric that is being heard in the public and the government action that is being taken on ground. The true motive of the circular was not so much to deport a large number of the Rohingya, but to paint them as terrorists. Furthermore, it sought to create a conflation between being a Rohingya, a Muslim and a terrorist. The concern, as per Mr. Bhushan, was not so much to deport as it was to portray them as a population that was leeching off the scarce resources of the Union. The fact that we have not yet signed the Refugee Convention shows that we don't consider refugees to be a human rights issue. We still consider it to be an issue of exercising the sovereign right to determine whether a person can enter the borders of the State or not. Therefore, the need of the hour is to make the Rohingya crisis a human rights issue. Furthermore, it also needs to be made an Article 21 issue.

As per Mr. Bhushan, any reasonable reading of Article 21 would show that sending a refugee back to a State where it is certain that he will be persecuted, would be a violation of the article. Therefore, the government cannot hide behind the argument that the Refugee Convention does not apply. It must tackle the issue that Article 21 applies to non-citizens as well, and that the effect of the circular is clearly violative of Article 21. Under the Foreigners Act, enforcement authorities detain refugees indefinitely, even if they have

[33] Standard Operating Procedure for dealing with foreign nationals who claim to be refugees (December 29, 2011).

been tried and served their sentence. However, Mr. Bhushan reminded that while it is certainly important to put pressure on the Government, it is also important to reach an international understanding as to the disproportionate economic burden that is borne by the Global South while dealing with refugee crises. The UNHCR needs to devise a method of apportioning the settlement of refugees on the basis of equity and feasibility. Furthermore, there needs to be monetary aid provided by the United Nations in such cases. Such measures would help in tackling the concerns that are raised with respect to disproportionate burden sharing.

Suggesting a future direction for human rights law, Mr. Bhushan said it was time that the international community recognised economic migration as a ground for considering someone as a refugee. According to him such an outlook would have important ramifications with respect to how we see crises such as the agrarian crisis in India. In the context of economic migration, an individual does not flee from certain death, but such an individual still tries to escape inhuman conditions.

PANEL DISCUSSION

The inter-panel discussion tied in the various issues that were addressed during the session. Prof. Burra began by explaining his view regarding signing the Convention. He noted that as the Convention stands today, it does pose distinct hurdles for developing countries. He further noted how several European Union countries, as well as other Western states, have developed their own frameworks independent of the Convention. In his opinion, India could adopt a similar approach of having a national legislation. He reiterated how the UNHCR in India barely has a legally recognized status or mandate, and that while the constitutional framework may provide protection against some cases of deportation, a national framework was needed that goes beyond that and makes it possible for people to settle down. Mr. Kumar agreed that Article 21 of the Indian Constitution is not broad enough and the better solution would be to have a standalone national legislation which deals with deportation and extends basic rights, such as healthcare, to the refugees. He further went on to critique the Supreme Court's myopic view of the case, given that is it supposed to be the guardian of constitutional morality and human rights of the republic. He highlighted that the ambivalence of the Court was perhaps understandable, but it was a classic instance of justice delayed being justice denied, because the deportation issues were not decided in time.

Ms. Dsouza also discussed the reaction of the Rohingya Muslims across the country–how they were confined to their circumstances and lived in dire poverty with no source of earning a livelihood. The instance of a BJP youth leader claiming responsibility for the attack on the Rohingya Muslims in Delhi was used as an example of the hostile attitude of the government and its people to

intimidate the Rohingya Muslims, and this rhetoric was also, in a way, he felt, reflected in Court.

This inter-panel discussion was followed by a question-answer round with the audience. The round began with a discussion on whether the Prime Minister, Mr. Narendra Modi, visiting Myanmar twice was to show India's solidarity with Myanmar for a geo-political purpose, in terms of India and China's competing sphere of influence. The panel responded with how a country's foreign policy is merely an extension of its internal policies. They explained how it would be contrary to posit that our Constitution contains a charter of human rights, but that our foreign policy dictates and justifies the government's stance. They emphasized that while India's relationship with Myanmar may have geo-political importance, the government should be cognizant of the cost, in terms of diluting our morality and the Constitution, and the State should not be allowed to get away with such a high cost so easily.

A student posed a question on the gaps in the Refugee Convention, and whether its principles could be imported and used in the case of the Rohingya Muslims. The panel contextualized the principles as having been formalized in the wake of World War II, specifically in the context of Jewish refugees and how, while the *Bangkok Principles* have expanded the scope of the Refugee Convention, it remains, at best, a broad framework; and more specific laws are required at a national level. The Supreme Court has the power to impact the policy underlying future legislative attempts to fill in these gaps. It could also use the principle applied in *Vishaka* v. *State of Rajasthan*[34] and fill these gaps itself, at least until the point that the government formulates relevant laws. However, the panel expressed its conviction that a standalone legislation based on the Refugee Convention would go a long way in protecting human rights, and given that India is a dualist country, a municipal law would anyway be required.

The panel also answered questions regarding the practical problems that arise with the idea of burden sharing amongst countries, especially in terms of accountability and funding. Some members of the panel expressed their hope for the formation of a system under which the United Nations raises funds, as it does for other initiatives, and then pays compensation per refugee to countries accepting them. While this too has its fair share of complications such as calculating the cost of living, they maintained that it was worth striving towards and the system was not flawed in principle. They acknowledged that such a system may lead to backlash given the current trends of anti-globalisation, and thus, any way forward should be planned keeping this in mind.

This was followed by a question on how the Supreme Court's order of deportation may adversely affect India's policy with regards to the deportation and refugees in a broader sense. The panel recounted how the order for

[34] (1997) 6 SCC 241.

deportation was essentially based merely on an affidavit of the government claiming that the people concerned had consented and already gotten citizenship elsewhere. The Panel voiced the need for the Supreme Court to verify such claims before passing such drastic orders based on them, especially given the sensitivity of the matter and the implications of the Supreme Court order.

On being questioned about the legal status of non-refoulement under international law, Prof. Srinivas Burra explained that it is still, to an extent, contested whether the principle of non-refoulement is a part of *jus cogens* or not, but noted that if it was so, the exceptions to the principle would also form a part of customary international law. These exceptions include threats to national security. However, the right approach would still be to allow the refugee asylum, even if suspected to be a terrorist, and then conduct a trial and even imprison the refugee, if necessary. It was also pointed out that the national security argument was weak in the present case of the Rohingya Muslims given that not even a single FIR had been filed against any such refugee alleging any militancy or terrorist links.

The question-answer discussion then veered towards the apparent political motivations behind the government's moves. It was highlighted how such targeted detentions and deportations have been extremely rare in India's history. Giving further historical context, it was mentioned that Rohingya Muslims have been residing in India for a number of years but only after the 2012 influx had the response to them worsened. They have, since residing here, been enrolled in schools, had livelihoods, and possessed long term visas; the recent treatment of the Rohingya Muslims in India reflects a marked difference.

The Panel was also questioned on whether it is practical to start recognizing and welcoming economic migrants given that a large percentage of Indians remain below the poverty line. Their response was that we as a country should be able to provide at least the basic rights guaranteed by the Constitution, even if this is done by making India a more welfare state and taxing the top 1% more. Further, it was emphasized that economic migrants too are under duress and should be recognized as refugees. The panel also elaborated how, because of the limited right to employment and social healthcare that most refugees are left with, even educated people who can contribute to the country are driven to the informal sector, rendering social integration much harder.

CLOSING REMARKS

The panel concluded by noting that the otherization of refugees, such as the Rohingya Muslims, was a combination of the fear mongering on the lines of drainage on economic resources and national security threat, which was a result of the ruling party's nationalist Hindu majoritarian propaganda to a large extent. It noted that hopefully in the future, the Supreme Court would exercise more caution, the legislature would materialize its international law obligations

towards refugees, and perhaps most importantly, the public attitude would improve and become more sensitised.

3. SESSION III: COURTING ISSUES ON CITIZENSHIP

The purpose of this Session was to shed light on three identified themes – *first*, in the context of the Citizenship (Amendment) Bill, 2018 ('Bill'), the issues of accelerated citizen influx from neighbouring nation states, and the allied constitutional matters; *second,* the issue of the consequences of the National Register of Citizens ('NRC') in Assam, which is a matter pending before the Supreme Court; *third*, in the context of the entry of refugees into India, the ecological problems associated with the same, the lack of legal documentation, and other humanitarian concerns. The panel was composed of **Mr. Arjit Sen,**[35] **Ms. Leah Verghese**[36] **and Mr. Harish B. Narsappa,**[37] **and was moderated by Mr. Alok Prasanna Kumar.**[38]

The moderator, Mr. Alok Prasanna Kumar, commenced with the introduction to the Session. The question of what citizenship is was identified. Mr. Kumar explained that citizenship is a legal fiction which is a matter of legal construct. Some countries, such as the United States of America ('USA'), famously follow the principle of citizenship by birth. The adoption of the same was an outcome of the American Civil War, and mandated the acknowledgement of the equality of African Americans.

In the Indian context, Mr. Kumar stated that the issue of citizenship was debated in the Constituent Assembly. He explained that Articles 5 to 11,[39] which took nearly two years to draft, were included in the Constitution, owing to the mass movement of people in the face of the inevitability of Partition. It is interesting to note that the Indian Constitution defines citizenship in a broad manner, deviating from the norm of a narrow definition. As per the broad construction, citizenship is not limited to ethnicity, language, or any other national aspect. This approach was considered to be radical at the time, as it was not based on the principle of identity. However, the Bill, which allows for the grant of accelerated citizenship to Hindus and Sikhs who are born in places other than India, violates the original broad scope accorded to the definition of citizenship in the Constitution. Bringing his introductory remarks to a close, Mr. Kumar invited Ms. Varghese to shed light on the process of identification of foreigners as was taking place in the state of Assam.

Ms. Leah Varghese, the opening speaker of the Panel, began by explaining that the above process is manifested in the mechanism of the procedure

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[36] Advocate, Policy Analyst, and Research Manager at DAKSH, Bengaluru.
[37] Advocate, Co-founder, DAKSH; Founding Partner, Samvād Partners.
[38] Senior Resident Fellow, Vidhi Centre for Legal Policy, Bengaluru.
[39] Constitution of India, Arts. 5-11.

which was adopted post the NRC Bill. A brief overview of the Assam citizenship issue was provided, with a focus on the Assam Accord as was signed between the Government of India and the State of Assam, but which was yet to be implemented. She spoke of how, in the current context, demands for the implementation of this Accord, and for the removal of foreigners from electoral rolls, were being put forth. She then moved on to discuss the underlying problem of documentation involved in the NRC process.

Setting the context, Ms. Varghese explained that the Illegal Migrants (Determination by Tribunal) Act, 1983 had imposed the onus of proving the foreigner status of a person on the State. This Act was eventually struck down by the Supreme Court, following which the burden of proof for establishing citizenship shifted to the person in question. This meant that such person was required to furnish documents to prove his citizenship, in line with the stringent requirements of the Indian Evidence Act.[40] The reversed burden of proof, and the lack of documentation with such persons, made proof of citizenship difficult. This explains why, originally, the number of people being categorised as foreigners was fewer than it is in the current regime.

A further point was that, owing to the reversal of the burden of proof under the current regime, investigations undertaken to determine the citizenship status are lax, in that the concerned persons are declared 'foreigners' with the mere sending of notices. Given the fact that cross-examination is also carried out by the officers involved in the investigation, their declaration is considered enough to deem the people in question 'foreigners'. Furthermore, Ms. Varghese highlighted that the laws under this regime are particularly harsh on women. Women born prior to Independence, who are not in possession of birth certificates or any other documents required to establish the status of their citizenship, have an added requirement of the Sarpanch testifying as to their relation to their parents. Even though the Gram Panchayat certificates are now considered sufficient proof, this additional requirement makes the process especially brutal for women.

In the context of migrants, Ms. Varghese explained that even if notices are issued, individuals lack knowledge of the same. The cumulative effect of this lack of knowledge, and the inability to afford legal aid, makes the entire process arduous. She also shed light on the problems stemming from the judicial adjudication of issues pertaining to this subject. The assumption of the foreign status of these people without any proper process for the determination of their citizenship status, accompanied by the long process of deportation and correspondence between the Indian and Bangladeshi governments, adds to the woes of the affected people. She concluded by adding that the Foreigners Act, 1946 does not lay down a time period for detention, due to which indefinite detention is common. The lack of provisions dealing with judicial review of this process worsens the situation.

[40] Indian Evidence Act, 1872.

The issue of Assam was further discussed by **Mr. Arjit Sen**. He highlighted the problems faced by the people whose names were absent from the NRC list. According to him, with the deadlines for enrolment with the NRC fast approaching, there was uncertainty regarding the legal position of such people, most of who belonged to the marginalised communities. Moreover, the lack of availability of legal aid, and the lack of clarity on the prospective governmental action that would be taken *vis-à-vis* such people left them in a state of suspended animation.

He then discussed the fifteen rounds of talks that culminated in the Assam Accord being signed between the Assam Government and former Prime Minister Indira Gandhi. These rounds were undertaken to discuss the use of the 1951 census to identify 'foreigners'.

The problematic offshoots of such use were stated to include the following: *first*, the multiple riverine islands or *chaul* areas were excluded from this census, and *second*, the list so made was not a public document, owing to which there existed people whose names were not included when this Census was carried out. Unaware of this exclusion, such people are bearing the brunt of not being considered 'citizens' even after nearly sixty eight years.

Mr Sen then shed light on the attempts of different organisations to reach out to such categories of people. However, he was of the belief that these proved to be gargantuan tasks, exacerbated by the fact that there was a lack of clarity on the prospective action to be undertaken by the government *vis-à-vis* these people. He gave the example of a family wherein a member was declared a foreigner, and was forced to sign fictitious documents. Following this, the said individual was made to cross the border, thereby ousting him from his place of residence, and separating him from his family. The purpose of the anecdote was to narrate the galvanisation of animosity between communities in Assam upon the return of the said individual to his residence, which was considered to be illegal.

Consequently, the period between 1975 and 1985 was said to be characterised by agitation in Assam, in which questions were raised pertaining to who would qualify as an original inhabitant of Assam. According to Mr. Sen, the social history of the Assamese region, and that of the history of partition of India, provide enough instances to demonstrate the porous nature of the country's borders, which allowed for migration to occur post the separation of families. The massacre of the Bengali-speaking Muslims of the region in 1983 aggravated this problem of division and animosity. The ramifications of these past problems are coming to the fore now, the tackling of which has become a challenge for the Government of Assam. Multiple tribunals post 2015 were established in order to tackle this problem of identification. However, the enumeration of names in the NRC list has opened the floodgates of chaos. Mr. Sen concluded by saying that rallies are being undertaken, and requests for election

manifestos being made, to address the honouring of the Assam Accord. However, all of these ultimately become gestures of tokenism without anything substantial being done to resolve the issue.

Next**, Dr. Harish Narsappa** commented on the relevance of the prevailing global context. He highlighted the fact that issues concerning immigration, migration, refugee and aliens have arisen because of the insistence on, and the demand for, the free flow of capital. To that extent, Trump's tenure and the Brexit crisis have not changed the game. The problem is co-extensive with the free flow of people across the world i.e. people moving for a better life for economic reasons, which countries seek to regulate. However, because these countries simultaneously push for free flow of capital, the advanced nations benefit from both the free flow of capital, and of people. This is essentially what happened with technology and innovation opportunities in the United States.

According to Dr. Narsappa, the current problem in India concerning citizenship is linked to 1947 and the way Partition took place, and subsequently, the war in 1971. In his opinion, the reading of the Bill is inconsistent with the Constituent Assembly debates and the very foundation on which independent India was built, regardless of the response of the Court. The Constitution of India reflects India's revolution, but the idea that one would restrict citizenship to certain communities within certain countries, especially those linked to Partition, repudiates what India stands for, and is fundamentally opposed to the choice made in 1950 to be a secular society. India adopted liberal values, which include universal adult franchise. The Constituent Assembly did not give this right to merely the gentry or to certain communities – it expressly rejected the notion of a society divided along religious lines. This decision cannot be whitewashed by the government today. In Dr. Narsappa's opinion, these recorded debates have become a part of the country's DNA. The principles and policies laid down in them cannot be challenged easily, despite new ideas taking root and new policies being questioned. Certain elements, such as the respect for a person's religion and for the person himself, define us, and these are not open to debate. He admitted that was no hue and cry in most countries, primarily because it affected citizens of other countries. However, the manner in which a country treats another country shapes its perception by other countries around the world.

Dr. Narsappa then moved on to discuss the lack of moral and political leadership displayed in the context of the Bill. Post-Independence, India saw instances of great moral and political leadership, in terms of how to treat citizens and lead the world. In his opinion, this Bill is a step backwards, and cannot simply be dismissed as an irrelevant measure. He also criticised the Supreme Court's position with respect to the NRC, and stated that the Supreme Court has no authority to monitor how the NRC should be set up, despite the evident lack of implementation by the Executive. This is part of a wider problem with the judiciary in India, given that it is not within its mandate to

make policy or oversee the implementation of administrative actions. Yet, there exists no forum for challenging the same, given that the field has been narrowed by the courts themselves. Judges have no ability or knowledge to deal with issues of knowledge-making, and it must be kept in mind that policies are essentially arbitral choices backed by political and moral reasoning. Dr. Narsappa argued that a judgment must be well-reasoned and based on the law, and cannot have overtones of moral or political issues that are a product of the subjective determination of the judge.

This violation of the concept of judicial independence is not simply restricted to non-interference by other organs with the functioning of the judiciary, but also a bar on the judiciary exercising independence beyond its own sphere. The NRC can certainly be questioned politically or by protests, but given this context of judicial interference, it becomes difficult to agitate politically or legislatively on these issues. There are regional, political, cultural, and military aspects to migration, which means that this situation cannot be viewed as a local border issue.

PANEL DISCUSSION

Prof. Kumar started with the last point made by Dr. Narsappa, and highlighted the concern that the issue of cross-border migration was also being caused due to global institutions such as the Bretton Woods organisations and the WTO, which have impacted the movement of goods, services, and capital. He claimed that no organisation in the world works with countries to lower barriers to the free movement of humans. The United Nations Human Rights Council has a defensive approach, acting only when approached. At the international or regional level, no such organisation exists, given that institutions like the European Union ('EU') function within their own regional contexts. He emphasised the need for a body to promote the free movement of people across borders as well.

Mr. Sen pitched in to state that he found this to be impossible within the Indian subcontinent. In Assam, work permits would work well, because the undocumented migrants, amongst others, do not have essential documents, in addition to being poverty-stricken. Therefore, this could be one possible step. However, given that the political compulsions are extensive, the blocs are unlikely to work towards this solution. He highlighted the case of the Dominican Republic, where people of Asian origin had been stripped of their citizenship in a manner similar to Assam, which the Inter-American Court of Human Rights eventually held to be impermissible. This thus seems to be a global trend.

Dr. Narsappa agreed that this works in the EU because it is a larger economic organisation. He argued that this is unlikely to happen in India in the duration of our lifetime, given the existence of issues concerning identity and

free movement. Nations may accept economic workers, but the simultaneous introduction of new cultural identities is the issue in the USA and the EU. He clarified that the problem in Assam arose long before the current government's actions, and has existed ever since Assam became a part of British India. He did admit, however, that the Bill takes advantage of the prevailing situation.

Ms. Varghese commented that world over, countries are becoming more insular. Further, while people are more accommodating during periods of economic prosperity, migration is often blamed for the woes of recession, as was the case in Hungary. Prof. Kumar extrapolated the link between the Citizenship Amendment Bill and the NRC. Even though the passage of the Bill is currently in limbo, there has been a pushback against it in Assam for the wrong reasons. This is because, in their opinion, no migrant should be able to obtain citizenship, and they thus seek to reduce the scope of the rights granted.

Mr. Sen used the example of the proposal of a train line in Arunachal Pradesh, which is being countered by the political parties in that region because they do not want the entry of "outsiders". Even in West Bengal, the same kind of protests and manoeuvring continues for political reasons, as also in Meghalaya with respect to people of Bengali and Nepali origin. The people within the upper-class Assamese structure who control most of the resources, unfortunately also control the politics of the region. Ms. Varghese then added that despite the Bill being in limbo, the process of identification of these persecuted minorities has already begun.

Prof. Kumar elaborated on the role played by the Foreigner's Tribunals. He spoke of the procedural failings of these courts, and why the same were not being challenged. He attributed the latter to the lack of scrutiny and accountability, in addition to the larger failure of courts to take procedure seriously. Ms. Varghese added that these tribunals themselves were not clear on whether they were following criminal or civil procedure. These proceedings have to be completed within sixty days, with the specific linkage documents. They have to be conducted in a manner similar to a civil case, with elements such as written statement, chief-examination, cross-examination, etc. However, people have to go to different parts of Assam to get these documents, and the process does not take into account the reality of their struggle. The State has little to no burden of establishing the facts in issue, given the reversed burden of proof under the Act. The police investigations are lax, a fact which has been acknowledged by the Guwahati High Court as well. However, most people cannot afford to appeal to the High Court, and are thus caught in a vicious cycle.

Mr. Sen highlighted the lack of proficiency in English as a factor contributing to the hardship of the accused. The inability of the accused to defend themselves results in their declaration as a 'foreigner'. They are subsequently transferred to the detention centres, which happen to be the jails of Assam. As these jails practise gender-segregation, families are separated. Children spend

most of their childhood in these centres. Further, as the Tribunal is a quasi-judicial body, there is a lack of government lawyers. As a result, the Tribunal itself examines witnesses, which is in clear contravention of rules that must be followed.

Dr. Narsappa criticised the dysfunctional court system which has led to cynicism, especially with respect to these Tribunals. Given the lack of due process and procedure, the surprise is not that there is failure of justice, but that justice is done in the first place. The problem arises especially in terms of language, such as in cases involving English and Kannada, when the judge does not understand the context or the content. This makes it difficult to produce sound documentation in India, especially with respect to property claims.

Prof. Kumar intervened to point out that despite the Supreme Court overseeing the entire process, there would be at least one million people who have been unable to establish their citizenship, and that as of the last date for filing claims, only 20% would have been able to do so. The Supreme Court cannot offer a solution to this. The question is what the appropriate legal and political response is to this issue. There is a need for far more than the current number of tribunals to process the claims, and there is a possibility that the High Court will also be overwhelmed. Thus, the current judicial machinery is unequipped to take on the burden.

Ms. Varghese re-emphasized the need for work permits, especially given the fact that Bangladesh and India have had no talks on this matter, with Bangladesh having dismissed it on the grounds that it was an internal matter for India. The chief concerns pertain to the citizenship of the people detained, and whether they will be able to leave the country. Mr. Sen added that there have in fact been new detention centres sanctioned to hold people, with the government investing around Forty Eight Crore Rupees (Rs. 48,00,00,000/-) for the same.

Dr. Narsappa commented that there can be no solution to this in a legal sense, given that they will become stateless people. The solution cannot be to continue building new detention centres for the descendants of the current detainees. There is no political answer, and the path taken by the USA in separating children from their parents was declared illegal, with the courts stepping in to protect the families. He opined that the status quo was likely to continue.

Prof. Kumar argued that at the heart of this debate was not just a legal immigration issue, but larger political, cultural and socio-economic issues. Therefore, the solution to the same cannot be found in the domain of the law alone, with there being no legal quick fix solution. Opining that the people in power also need to take action, Dr. Narsappa concluded by commenting on the indecisiveness of the government, which may be gathered from the fact that

the date of broad amnesty has shifted repeatedly, from 1950 to 1966, and from 1966 to 1971.

Multiple questions were raised by the audience and the same were comprehensively answered by the panellists.

Dr Narsappa addressed the question on whether or not judges such as Justice Gogoi should be recused from deciding matters relating to the politically-charged subject at hand, given the fact that he hails from the state in question. Dr Narsappa replied that he had not had this particular judgment, which merely prescribed timelines for the NRC, in mind while he was discussing the issue of judicial activism and the possibility of decisions being affected by judicial and political overtones. He reiterated his belief in the constitutional concept of Separation of Powers, which in his opinion is used unidirectionally by the judiciary to prohibit the other organs of the government from interfering with the judiciary. He further added that the issue of moral and political overtones is a characteristic of every policy decision, however problematic it may be. He noted that realists argue that it is impossible for such undertones to not creep in. Addressing the question specifically, he said that he did not believe Justice Gogoi should have recused, as long as he was able to independently carry out his duties.

Ms. Varghese responded to the question on why the conditions of those in the detention centres are worse than those in the prisons by emphasising the issue of indefinite detention. She noted that in situations where deportation was not possible, the concerned person should be released, and how a Public Interest Litigation petition has been filed for the same. She concluded by stating that regardless of the plea, the government has not been keen on allowing the same. Mr. Sen added to the point by emphasising the non-implementation of the 2012 order which mandated that the detention centres be well-furnished.

Prof. Kumar intervened to pose the question of how the system must be navigated, in response to which Ms. Varghese elaborated on the instructions issued by the National Legal Services Authority mandating the provision of legal aid for those who were unable to afford it. She added that a large part of the population that has been victimised by the NRC issue is unable to avail the same, due to which the gross violation of due process, and entrenchment of arbitrariness, in the tribunal process continues.

Concluding the Q&A session, Prof. Kumar summarised the crisis surrounding the NRC as an interface of the issue of citizenship and the issue of the migration and refugee crisis, in a national, regional, and global context. He opined that viewing the concerned crisis in a unidimensional manner would lead to an inadequate understanding of the same. This is because historical, social, political, and legal aspects have concertedly given rise to the problem of NRC, which thus requires holistic comprehension and treatment.

CLOSING REMARKS

Ms. Varghese concluded by stating that Section 6A creates a completely different citizenship regime for Assam, which is different from that for the rest of India. Further, while the same was still under challenge before the Supreme Court, any action pertaining to the NRC should not have been decided. Mr. Sen commented that more time should be given to people for filing their claims and objections, because *firstly,* the government officials are not amenable to providing any assistance, and *secondly,* the affected individuals have been facing issues in the collection of their legacy documents.

Prof. Kumar concluded that there is a not only a local, but also a national, context to this issue. More importantly, there is also a global perspective to consider, which means that this issue cannot be analysed through merely one lens. The issue of citizenship within the NRC must be looked at keeping in mind that the government and the judiciary in this context are not acting separately, but are in fact feeding into each other. This issue is a reflection of larger trends that have been playing out in India, and thus the larger context will always be relevant here. This is especially true given the common dysfunctions of the judiciary in India, and they are not simply extraordinary aberrations to be dealt with lightly. The Indian state is blind to the impact of its actions, and is known to act without understanding the issue at hand. Therefore, serious political engagement with society is needed. To conclude, there is no quick and easy solution to this problem, but this complexity must be embraced in order to resolve the issues, as the current state of affairs is unsustainable.