IMMIGRATION AND JUDICIAL OUTREACH: A CASE STUDY OF SELECTED COURT CASES OF GAUHATI HIGH COURT

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DECLARATION

I declare that the dissertation entitled **"IMMIGRATION AND JUDICIAL OUTREACH:A CASE STUDY OF SELECTED COURT CASES OF GAUHATI HIGH COURT"** submitted by me in partial fulfillment of the requirements for the award of **Master of Philosophy** has not been previously submitted for any other degree of this University or any other university.

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CERTIFICATE

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INTRODUCTION

In the summer of 2016, I was 'Home' for vacations. By 'Home' I intend to refer to the place I completed my schooling from, in my case not necessarily my hometown or even my native state as a matter of fact. That year I got into an argument with a tenant of my neighbour's over the parking lot space. As expected, it did not end amicably. However, that night my Mother said something that hit me hard and has stuck with me ever since. Analyzing the incident, she remarked, "Don't forget, we are a minority here". Having to be made aware of how different we were from the majority after having lived some thirty odd years and sharing the same public space with no history of any conflict before was something I still have not been able to come to terms with. Immigration today is no different. I am not an Immigrant but my biological anthropology presents a different picture. It is this very yardstick which is used to categorize the 'Indigenous' from the 'foreigner' primarily because it is also the most evident and easiest way to identify and group populations, though not necessarily in the correct and efficient way. In today's times, people are not ready to listen but are quick to judge. In such a scenario, having a calm discussion on Immigration without offending one another is the stuff made of dreams. But at the same time, it is situations and times like Today that mandate more enlightened debates on Immigration that will help broaden perspectives and facilitate informed policy making.

The Indian context:

On the face of it, what Immigration usually immediately results in is a Majority versus a Minority population. Various aspects of it could then lead to cultural appropriation, demographic changes, economic instability and competition for resources. While most anti-immigrant movements are stirred primarily by economic determinants, cultural and social repercussions emerge as a close second. It is the economic register that highlights the ugly deep dark truths and everything that is

wrong with such patterns and movements. To protest the economic and socio-cultural misappropriation, the politico within one is invoked which manifests itself on the broader scale as a nation's sovereign power and right to determine its borders. On a domestic scale, it has managed to use anti-foreigner sentiments as a plank to win elections while not only restricting populations to its own states across international borders but also amongst states themselves. India is no exception. The call for "Mumbai for Mumbaikars", the North- South India disconnect and the most recent 2016 Assam Assembly elections are a case in point.

The often analyzed and over-stated perspectives on Immigration in India have been contingent on the social and economic registers. Highlighting the repercussions of such migratory patterns through case studies has been the common string of argument found in most books. Grateful and building on the sea of data available on the same, I strive to analyze Immigration through a different perspective –the Judicial lens.

The Judicial lens: In normal discourses on Immigration, one can make sense and locate and identify a role for the legislature and executive but not as much for the Judiciary in considerable proportions. India is however emerging as an exception to this norm. Having no official legislation or a document on Immigration applicable pan-India per se, it has increased the scope for Judicial involvement and interference all the more. Adjudication by the Judiciary on Immigration has been based on the Citizenship Act of 1955, its consequent four amendments of 1986, 1992, 2003 and 2005, the colonial era Foreigner's Act of 1946 amongst others. Given the differences in the nature of immigration patterns observed across the borders in Western, Southern and Eastern India, India today stands at crossroads, mandating a clear cut and well-spelled out legislation dealing with all aspects of the Indian scenario. The vacuum currently created given the lack of such legislation has led the Judiciary to step in, both willingly and unwillingly, to adjudicate on the same. As a result, Indian Immigration discourse is being shaped by a negative connotation of citizenship. Learned Judge Justice Jasti Chelameshwar, in his capacity as the Chief Justice of Gauhati High Court had observed that the Citizenship Act of 1955 defined a foreigner as someone who was not a citizen, thus entailing a negative definition of the same. The first major legislation to be enacted to address the Immigration situation in Assam was the 1986 amendment to the Citizenship Act of 2005 which followed from

the signing of the Assam Accord that added a new clause 6A titled "Special Provisions as to citizenship of persons covered by the Assam Accord". Amongst other provisions, it provided for a cut-off date to be used in the future henceforth in identifying and deporting illegal migrants. It reads-

(a) "Assam" means the territories included in the State of Assam immediately before the commencement of the Citizenship (Amendment) Act, 1985 (65 of 1985);

(b) "detected to be a foreigner" means detected to be a foreigner in accordance with the provisions of the Foreigners Act, 1946 (31 of 1946) and the Foreigners (Tribunals) Order, 1964 by a Tribunal constituted under the said Order;

(c) "specified territory" means the territories included in Bangladesh immediately before the commencement of the Citizenship (Amendment) Act, 1985 (65 of 1985);

(d) a person shall be deemed to be Indian origin, if he, or either of his parents or any of his grandparents was born in undivided India;

(e) a person shall be deemed to have been detected to be a foreigner on the date on which a Tribunal constituted under the Foreigners (Tribunals) Order, 1964 submits its opinion to the effect that he is a foreigner to the officer or authority concerned.

(2) Subject to the provisions of sub-sections (6) and (7), all persons of Indian origin who came before the lst day of January, 1966 to Assam from the specified territory (including such of those whose names were included in the electoral rolls used for the purposes of the General Election to the House of the People held in 1967) and who have been ordinarily resident in Assam since the dates of their entry into Assam shall be deemed to be citizens of India as from the lst day of January, 1966.

(3) Subject to the provisions of sub-sections (6) and (7), every person of Indian origin who—

(a) came to Assam on or after the lst day of January, 1966 but before the 25th day of March, 1971 from the specified territory; and

(b) has, since the date of his entry into Assam, been ordinarily resident in Assam; and

(c) has been detected to be a foreigner;

shall register himself in accordance with the rules made by the Central Government in this behalf under section 18 with such authority (hereafter in this sub-section referred to as the registering authority) as may be specified in such rules and if his name is included in any electoral roll for any Assembly or Parliamentary constituency in force on the date of such detection, his name shall be deleted there from".[1]

With clause 6A as the backbone of determining legislation on citizenship in Assam, Assam was ruled by the Illegal Migrants (Determination by Tribunal)Act (IMDT) of 1983, following which it stood repealed in 2005 by the Sarbananda Sonowal vs. Union of India (2005). It went on to be replaced by the Foreigners' Act of 1946, a colonial era legislation that was until then applicable for foreigner detection to the whole of India at the exclusion of Assam. While arguing his case, petitioner Sarbananda Sonowal in 2005 contented that he failed to understand why states like West Bengal which were also victims of the onslaught of illegal migrants from Bangladesh fell under the ambit of the Foreigners Act of 1946 while Assam immigrants were determined by the IMDT Act of 1983 which lay the onus of proving one's nationality on the prosecution, that is, on the law enforcement agencies and the State, instead of the proceedee/ accused/ petitioner himself like provided in the Foreigners Act. By deconstructing the court verdicts, I also want to study how the courts have viewed the Immigration discourse in Assam and how it has gone on to impact executive action on the same. My attempt will be to go beyond the socio-economic perspective on Immigration and study it through the Judicial lens by locating the historical trajectory of various legislations determining Immigration in Assam and analyse how the court has adjudicated on the same. My aim is to be able to characterize the Judicial discourse on Immigration through a cursory study of the judgement and conclude by providing a few insights into Assam immigration, which

[1] https://indiacode.nic.in/bitstream/123456789/1522/1/195557.pdf

if policy makers are made aware of and sensitive to, could lead to more applicable and practical solution to the Immigration situation in Assam.

The Scheme of the Chapters :

The study is divided into three chapters.

The first chapter deals with the Theoretical underpinnings on the generic Immigration discourse. Beginning by highlighting the scarcity of global organizations that deal with Immigration and Refugees as two separate groups and the need to address the two independently given the thin line that separates the two above distinctly, I delve into the two major strands of thoughts that centering Immingration literature today. The first strand refers to the Liberal school of thought that argues for open borders just as a sovereign state vociferously facilitates porous borders for economic trade and transits to the exclusion of human movements. Citing the works of Will Kymlicka, Immanuel Kant, Seyla Benhabib, Jospeh Carens among others, I examine the feasibility and applicability of each of these thinkers to the Immigration situation in Assam. The second and opposing school of thought is that of the Communitarian view that advocates for regulated borders with controls. Based on the much cited argument of a state's sovereign right to control its borders and determine who enters and leaves its territory, the votaries invoke the right to self-determination and the power of 'legitimate' states to decide on their own immigration policies. Referring to the works of communitarians like Andrew Altman and Christopher Heath Wellman, John Rawls, Michael Walzer, and Jacob.T.Levy, the right to "exclude others from its territory" however does not go unchecked without controls and constraints. Invoking the argument that by virtue of being human, every individual is entitled to enjoy a membership of some political community at some given point of time, communitarians call for conditional exercise of sovereign power. I end this chapter by opening the pandora's box and introducing the peculiar nature of Immigration in Assam.

Through the second chapter titled "Unfolding the historical trajectory of Immigration in Assam" I pick the threads from the preceding chapter and go on to trace the timeline of events of immigration in the history of Assam. I begin from the era two

hundred years before Christ and identify specific epochs that saw movements of people across borders thus culminating into the Assam Accord of 1985. To make the history more traceable, I divide the historical trajectory of Immigration into **four waves of Immigration.** The first wave of immigration refers to movements of people till the late 1800s which also covers the phase when Assam was incorporated into the Bengal presidency in 1838. The second wave began at the turn of the twentieth century where emigrations took even more enormous proportions leading to spikes in population reflected through reliance on Census datas. The third wave of immigration was marked by the Partition of India in 1947. While along the north western border, one was increasingly a witness to the outmigration of Muslims from Punjab and Hindus and Sikhs from West Pakistan, the collapse of minority population along the East was much more hushed. Such extensive was the magnitude that public opinion and local resistance pushed the Parliament to pass the Immigrants (Expulsion from Assam) Act 1950 amongst others. The final wave of immigration was engineered by the interstate war of Pakistan and Bangladesh serving as a proximate cause too escalate immigration flows into Assam post 1971. I end the chapter with a myopic view of the debate on Immigration as it stands in India today which has manifested into the update exercise of the 1951 NRC (National Register of Citizens) for the benefit of identifying and deporting the illegal migrants from Assam. I try to place this exercise against the political discourse currently underway in the state of Assam reflected in claims like one made by Prime Minister in the run up to the 2016 Assembly elections stating “Bangladeshi Immigrants must pack”.

The third chapter is a deconstruction of three selected Gauhati High Court verdicts on Immigration namely :

- The Kaziranga National Park vs. Union of India (2015)
- The Manowara Bewa vs. Union of India and Ors. (2016)
- The Moslem Mondal vs. Union of India (2010).

Through a detailed analysis of the verdicts supplemented with additional cases from varying learned judges, I explore the discourse of Immigration judgements and the legislations invoked in the process of such adjudication. I have also largely benefitted from the interviews I conducted of Mr. Samujjal Bhattacharya (Chief AASU Adviser)

and Mr. Nair (Senior Advocate of the Gauhati High Court). Taking cue from the interviews and understanding the court judgments, I problematize the vacuum created by a lack of legislations on Immigration and propose the need for a formal Immigration policy for India more than ever before. To assist in this, I conclude by forwarding a few observations made about the nature of the Assamese Immigration conundrum, which if policy makers are sensitive to, could help both the executive and the legislature to better discharge their duties.

CHAPTER 1

THE THEORETICAL UNDERPINNINGS ON IMMIGRATION

Immigration. A term that has gone on to define, characterise and shape the twenty-first century characterizing movement of people for reasons that may vary from search for

better opportunities and chances at living a 'good' life to escaping life-threatening situations. Almost every country in the world today, thanks to Globalization, has been the origin or at the receiving end of such movements of people, thus leading this age to be aptly termed as the 'Age of Migration'. According to the UN International Migration Report 2002, during 1910-2000 the world population had grown threefold from 1.6 to 5.3 billion. Migrations, by contrast, increased almost six fold during the same time period. Against the background of migrants accounting for fifty-six percent of the overall population increase in the more developed regions today[2], it becomes imperative to understand what the term 'migrant' really connotes. In layman terms, the term refers to an individual who lives in a country other than his or her country of birth. However, the UN Convention on the Rights of Migrants defines a migrant worker as a "person who is to be engaged, is engaged or has been engaged in a remunerated activity in a state of which he or she is not a national". The Commission on Human Rights covers all those as migration instances where "the decision to migrate is taken freely by the individual concerned, for reasons of personal convenience and without intervention of an external compelling factor". However, not all is black and white in the discourse on immigration. There remains uncertainty over 'how free is an individual when he makes a decision to migrate'. In such a scenario, the political community, one's cultural and religious identity and ties begin to emerge as a defining factor of one's life choices and decisions thus leading to lack of a universally accepted definition of the term. Thus this remains one of the many highly

[2] UNFPA. *Meeting the challenges of Migration: Progress since the ICPD.* International Committee of the Red Cross, 2012.

researched yet unanswered questions Immigration throws at every institution of the society. Whether the state today should be obliged to host immigrants and grant them the right to access resources and policies thus highlighting the conflict between the republican ideal of self-governance and the liberal ideal of the equal value of liberty, is one such question which I hope and strive to answer through this chapter.

The Liberal View :

The boundaries that serve as the framework for exercising sovereignty today were mostly the handiwork of the colonial rulers who drew such lines in haste with no consideration and regard for topography, culture and language of the region thus leaving behind warring communities and tribes to feud over territorial claims. These boundaries were drawn at a time different than today in many ways catering to needs much less dynamic than now. A case in point is the Brahmaputra riverine flood plains at the Indo-Bangladesh border which changes its course every monsoon thus presenting an ambiguous picture of the borders and consequently facilitating porous borders. The concept of Citizenship was soon formulated to cement this development of 'belongingness'. Despite the multifariousness surrounding the definition of Citizenship and its scope, there has been an overarching understanding over the years that the sovereign independent nation state has emerged as the accepted framework/ 'site' for citizenship.

Will Kymlicka, a modern liberal, defines a state comprising of more than one nation where nation meant "a historical community, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language and culture".[3] By this definition then, almost any given country in the world today is characterized by the simultaneous co-existence of numerous 'nations' and faced by the consequent challenge of continuous demands for recognition of their identity and accommodation within the larger social, cultural and political spheres for their empowerment. Following the partition of the Ottoman Empire, the Kurds around Iran, Iraq, Syria and Turkey is a case in point having constantly struggled for recognition of their rights as

[3] Will Kymlicka, *Multicultural Citizenship :A Liberal Theory of Minority Rights,* (New York, Oxford University Press, 1995), 11.

a separate identity from the mainstream while seeking autonomy within it. The unpopular divide between the North and South India in terms of culture, development and the feeling of 'belongingness' that has evaded the greater identity of being Indian further elucidates the co-existence of many nations within a state. However, not all minorities can be viewed through the same lens. Depending on the 'mode of incorporation' of such varied populations into the larger whole either by wilful movement of individuals or through colonization of whole larger society, the rights of the minority and its relationship with the majority population, among others, is determined. [4] However, such rights, though asserted in limited capacity, stood unrecognized till the 1960s compelling immigrants to embrace a fluid identity and dissociate themselves from their distinctive cultures and heritage while embracing the mainstream norms,[5] something which Kymlicka calls the 'Anglo-conformity' model of immigration. However, the migration landscape exacerbated quite dramatically from 1994 citing an expanding global economy, geopolitical transformations, wars and ecological disasters [6] having a profound impact on people's life choices. Today, with migrants making up nearly one of every 70 persons in developing countries, [7] Kymlicka, a contemporary liberal theorist, through his work 'Multicultural Citizenship' promotes the need for 'polyethnicity' primarily rooted in culture. The varied cultures are viewed as varied mediums of interpretation providing meaning to and better understanding of the world. Culture is also seen as the framework within which an individual is able to lead a fulfilling life wherein his interests and beliefs are free of any controls while being open to reconsideration and revision. [8] Such recognition of entrenched cultural divisions, contrary to fears of "escalating demands of immigrant groups"[9] , would involve "a revision in terms of integration, not a rejection of integration". [10] Kymlicka terms these cultural enclaves as 'societal cultures' "which provides its members with meaningful ways of life across the full

[4] Ibid., 10.

[5] Ibid., 14.

[6] UNFPA,*Meeting the challenges,* 8.

[7] UN Department of Economic and Social Affairs Population Division. *International Migration Report 2002*, (New York, US, 2002), 9-16.

[8] Kymlicka, *Multicultural Citizenship*, 81.

[9] Ibid., 68.

[10] Ibid., 67.

range of human activities, including social, educational, religious, recreational and economic life, encompassing both public and private spheres... based on a shared language" or shared vocabulary of tradition and convention. [11]He claims, contrary to popular imagination, Immigrants do not demand "for a parallel society" but merely demand recognition of their cultural distinctiveness to integrate better in the society. Thus, such polyethnic rights serve as guarantee for personal integrity and individual autonomy of immigrants helping him to enter the mainstream society faster and more easily. Despite, at least on the face of it, having appeared to have made conscious choices and decisions to abandon their homeland which provided the framework and context to make sense of their social and cultural practices and then attempt to make sense of their culture within the confines of the new laws of the new land, after performing the act of having wilfully uprooted themselves and thus relinquishing their rights, Kymlicka states such migrant populations do not have the 'right' to demand anything of their host state like demands for their assimilation and integration through various measures. However, he necessitates the need to ensure that the mainstream culture is hospitable and inclusive of the culture of the immigrants. He highlights the travesty of today's world order by acknowledging that there exists a very thin line between wilful immigrants and involuntary refugees, given the unequal distribution of resources. An individual's decision to migrate to a developed state may seem voluntary on the face of it but is so, 'in a very limited sense'. And thus to acknowledge such asymmetrical resource distributive patterns between the core North and peripheral south and the compounded issue of the rich countries having failed "their obligations of international justice to redistribute resources to poor countries"[12] thus ought to compensate them by allowing them to recreate their 'societal culture' and providing them with a fair shot at a basic decent life till the world order is rectified.

Kymlicka's aforementioned argument had been argued previously in **Immanuel Kant**'s much famed work 'Perpetual Peace: A Philosophical Sketch' probably often seen as the starting point of contemporary liberal thought. As one of the clauses to achieve perpetual peace among states, Kant spoke of man's right to 'conditions of universal Hospitality'. He defined this right of Hospitality as "the right of a stranger

[11] Ibid., 76.

[12] Ibid., 99.

in consequence of his arrival on the soil of another country, not to be treated by its citizens as an enemy" [13] because he saw all men as being entitled "to present themselves thus to society in virtue of their right to the common possession of the surface of the earth, to no part of which anyone had originally more right than another..".[14]This often led to Kant being credited with propagating the notion of a cosmopolitan citizen. He however, did not view this right without any restrictions and called for it to be 'regulated' wherein the right of Hospitality did not "extend further than the conditions of the possibility of entering into social intercourse with the inhabitants of the country"[15] to avoid meeting the same fate of evils like famine that most countries with a colonial past were subjected to.

For the liberal democrat **Seyla Benhabib**, Kymlicka's approach to multiculturalism was a "preservationist one which protects culture simply because culture presents a secure context of choice for individual freedom" [16] leading towards cultural essentialism. Benhabib, on the other hand, saw cultures as being inherently dynamic formed out of constant interactions with other cultures. She disagrees with Kymlicka's understanding of culture through "societal cultures" [17] given its impracticality in theory as well as in practice, having failed to account for the difference in interpretations of culture, the indispensable status accorded to cultural identity over other types of identity and attempts at arriving at a uni-dimensional understanding of culture. To account for all the realities of current immigration trends, Benhabib noted an increased manifestation of "disaggregation of citizenship" [18] wherein there is now evident a distinct liquidity within the three components of citizenship namely collective identity determined by factors like religion, ethnicity, language; political membership ; and being recipients of social privileges. This has led to one enjoying political membership without having a collective identity or one enjoying social benefits and privileges without being a national. While this has proved

[13] Immanuel Kant, *Perpetual Peace,* (1795), 22.

[14] Ibid., 23.

[15] Ibid., 24.

[16] Seyla Benhabib, *The Claims of Culture : Equality and Diversity in the Global Era,* (Oxford University Press, 2002), 63.

[17] Ibid., 60.

[18] Seyla Benhabib, *Borders,Boundaries and Citizenship,* (Political Science and Politics, Vol.38, No.4, Oct 2005), 675.

that entitlement to privileges, benefits and rights are not contingent upon the status of citizenship, this has seriously undermined the sovereign exercise and authority of the state. Ambiguity surrounding the dilemma between the republican ideal of sovereign self-government and the liberal ideal of equality and state's obligation towards universal human rights is reflected even in the most comprehensive international law document in the world, the 1948 Universal Declaration of Human Rights which recognizes a conditional freedom of cross-border movement. Through article 13, it acknowledges the right of an individual to leave a country (emigrate) but not the right to enter a country (immigrate). Article 14 cites the "rights to enjoy asylum under certain circumstances while Article 15 proclaims that everyone has the right to a nationality. The second half of Article 15 stipulates that no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality"[19]. The document does not mention the 'states' obligations to grant entry to immigrants, to uphold the right to asylum and to permit citizenship to alien residents and denizens'. Seeing the status of being 'stateless' as not only being "deprived of their citizenship rights ... but also of any human rights"[20], Benhabib reiterates Hannah Arendt's phrase of "the right to have rights"[21] which acknowledges the right of every individual to "belong to some organized human community". She calls for the need to "resituate citizenship rights" at a time when "globalization and the rise of multi cultural movements have shifted the lines between citizens and residents, nationals and foreigners" by placing the emerging "sub-national and supra-national spaces for democratic attachments and agency" to "be advanced with, instead of in lieu of, existing polities"[22]. The recent manifestation of 'alien suffrage' increasingly practiced at the regional and municipal levels is a case in point. This practice of multiplying sites of citizenship at the sub-national, national and transnational levels has become necessary to establish a legitimate democracy and abridge the democracy deficit by encapsulating all the stakeholders to have a say in such decisions whose interests stand affected. Contrary to claims of breakdown of democratic culture, it is seen as revealing the 'depth and breadth' of the democratic setup as she sees only strong democracies as capable of constantly reinventing their definition of their people hood.

[19] Ibid., 674.

[20] Seyla Benhabib, *The Right to have Rights in Contemporary Europe,* (Polity Press,2011), 2.

[21] Ibid., 3.

[22] Benhabib, *Borders,Boundaries and Citizenship,* 675.

Such participation and belonging to a political community was seen as the only way to exercise rights as equals where one is judged based on their achieved status rather than their ascribed status. While advocating 'porous' instead of 'open' borders, she pleads for 'first admittance rights' followed by state-regulated norms bound by human rights and international laws to grant citizenship, all the while upholding cosmopolitanism.

Bhikhu Parekh too argues for multiculturalism with respect to immigrant minorities, but however differing fundamentally from Kymlicka's notion of liberal multiculturalism. Offering a philosophically deeper analysis of culture, he refuses to see culture as merely static, self-enclosed, water tight social constructs. For him, human lives and their social relations were determined by practices and beliefs which comprised a culture. However, he primarily saw culture as evolving through mutually beneficial conversations and dialogues with other cultures thus refraining from absolutizing itself and alerting both "to their biases, a gain in itself and enables then to reduce them and expand their horizon of thought".[23] For Parekh what constitute a multicultural perspective involved interplay of "the cultural embeddedness of human beings, the inescapability and desirability of cultural diversity and intercultural dialogue, and the internal plurality of each culture".[24]For him, no specific political ideology or doctrine could represent the real full truth of every aspect of human life. Given every culture's narrow understanding of human existence, a fusion of ideas and beliefs lead to an enhanced and enriched spectrum of cultural identity which results in a culture that is tolerant and inclusive of diversity. Parekh is also unsettled by Kymlicka's flawed concept of cultural equality. For Kymlicka, since the immigrant minorities made a conscious choice to immigrate into another country and constitute 'the other', they were required to respect and follow the general liberal norms of the host nation, even if it implied going against their private cultural beliefs. This, Parekh viewed as a tendency to, consciously or unconsciously, induce 'state assimilationist policies' implementing the political culture of the majority and consequently forcing the immigrant population to forcefully integrate into the popular majority culture and eventually even possibly leading to its demise. His thoughts are encapsulated when he

[23] Bhikhu Parekh, *Rethinking Multiculturalism : Cultural Diversity and Political Theory,* (Harvard University Press, 2000), 337.

[24] Ibid., 338.

states a good society accepts "the reality and desirability of cultural diversity and structures its political life accordingly... its constant concern is to nurture a climate in which dialogue can proceed effectively....and generate a body of collectively acceptable principles, institutions and policies".[25]

Like Benhabib and Parekh, **Joseph Carens** too finds Kymlicka's definition of societal cultures flawed for failing to account for minorities that are smaller and less significant in numbers. He finds such enclaves of minorities' specific cultural needs comprising a nation in itself, nourishing the idea of independent statehood and fuelling cessionist tendencies. A wrong inference of the relation shared between politics and culture led Kymlicka to grant cultural identity precedence over political identity and to define culture as static water-tight compartments devoid of any interaction to secure the interests of minorities from the interference of the majority. Given the dynamic nature of culture, Carens advocates the need for a context specific understanding of the culture-politics relation. Instead of evolving a political culture that allows for varying languages and identities to flourish and interact, Kymlicka is seen promoting "only one vision of political culture- a national culture". [26] Carens states "The concept of societal culture draws attention only to what distinguishes one group from another. It entirely neglects what connects people, institutionally and culturally, across those differences"[27] ,manifesting a theory of cultural nationalism. He approaches the citizenship-immigration debate through a context specific approach adopting an incremental approach from a new-born to the growing up formative years and finally ending with an adult immigrant eligible to formally participate in political processes. Citing repeated references to the duration of stay of an immigrant as a valid ground for granting citizenship, Carens advocates the need to grant such individuals a shot at citizenship status. Mere residentship, disregarding however long one resided at a place, was not becoming of a democratic polity in today's times. Carens goes on to advocate for incorporation of proposed changes by immigrants, after due reflection and careful consideration, to the society's conventional norms. He calls this the need for a concept of justice as even-

[25] Ibid., 340.

[26] Joseph Carens, *Culture, Citizenship and Community :A contextual Exploration of Justice as Evenhandedness.* (Oxford University Press, 2000), 67.

[27] Ibid., 68.

handedness: “a sensitive balancing of considerations that takes interests of citizens of immigrant origin seriously and gives them weight without assuming that those interests will always prevail”.[28] In his work “The Ethics of Immigration”, Carens delves into what is right and wrong. Stepping away from the public policy persepctive i.e legislation on immigration, he argues for a dual perspective: one that feeds off from both a realistic moral approach as much as from an idealist approach. Invoking the need to come together for debate while not having to jettison one’s ideology, beliefs and principles, Carens compels one to question principles that are believed to be conventionally justified as ethical, just and fair. Carens has never challenged the presumptive authority of the state to control its borders head on. Instead, through major part of his work, he has acknowledged this “conventional view” as he calls it. He says that most believe the state is bound by some constraints but on ground, such a situation does not stand. He cites the example of the fact that native born children have never had to strive for citizenship as it was seen as a normal and obvious state of affair and course of action . however, on the contrary, American history had witnessed how women who married a non-american were stripped of their citizenship. And that seemed just as normal too. So he delves into the question of who actually deserved to be a citizen. He based it on one’s feeling of belongingness, a communitarian feeling. He cites how even those opposed to his stand propose accommodative solutions like that of regularizing such a population and granting them citizenship over due course of time. He draws an analogy: barring major felonies, minor felonies call for a restricted time of penance and punishment. Similarly, he sees immigrants residing peacefully over years having established communitarian connection and membership in the due process should also be granted citizenship unless guilty of provoking unrest and harm. However, his approach to immigration and citizenship is in the context of the rich democratic states of North America and Europe consequently rendering most of his arguments stand at loggerheads with interests of developing nations. He also tacitly accepts the unfeasibility of his theory when he states that as a philosopher, he is bound to “tell the truth as they see it” as “it can be important to gain a critical perspective on existing arrangements, even if we cannot do much to change them at the moment”.[29] For him, mere “living in a community also makes people members”[30]

[28] Joseph Carens, *Immigration and Citizenship,* 115.

[29] https://openborders.info/blog/tag/joseph-carens/

does not hold feasible for a developing nation like India where in there is always a competition among the citizens themselves, let along immigrants, for access to the scarce resources. He employs the defence of a long duration of residence to justify and strengthen the immigrant's claim to formal recognition, while falling short of going into specificities and intricacies of it. While acknowledging the power of the government of the day to determine immigration flows, he specifies restrictions on the state's sovereign power to ensure its morality: familial unification and refugees. For him, there exists an obligation on democratic states to admit family members as "no one should be forced by the state to choose between home and family"[31] , not even under the circumstances of the "usual calculation of state interests". With respect to refugees, he puts a clear responsibility on the developed and rich nations to house and provide shelter for them and "not those of geographically-proximate states, to find a place for these people to live in".[32]

The Communitarian View:

As against the primacy accorded to the individual and their right to freedom of choice to pursue their own understanding of and living a 'good and secure life', communitarians on the other hand reject the idea that individuals should be placed prior to the community as a whole. They have high regard for the interactive nature of cultures around the world, something they cannot see in isolation from others. Such a dialogical relation thus makes one dependent on the other for their identity. Such views were echoed by theorists who argued for the sovereign right of a state to control and regulate its borders and hence the power of a political community to determine the political composition of the citizenry.

John Rawls, known primarily as a liberal, after having formulated 'A theory of Justice' to be implemented at the domestic level through the principal of equal liberty (every individual is to have an equal right to a basic set of liberties) and the difference principle (unless there is a distribution that makes both parties better off, an equal

[30] Ibid., 110.

[31] Ibid., 127.

[32] Ibid., 129.

distribution is preferred), sought to extend his theory into the international realm via 'The Law of Peoples'. He defined liberal 'peoples' as having three underlining features namely "a reasonably just constitutional democratic government that serves their fundamental interests; citizens united by common sympathies and finally, a moral nature".[33] Among the principles that would guide interactions between liberal states at the international level, he mentions of the "need to observe human rights' and to be duty bound to assist others who lived under unfortunate conditions that hampered their progress towards a liberal set-up. Rawls acknowledged 'a duty to assist the burdened societies"[34] through "economic aid and assistance"[35] which was seen as fulfilment of a liberal's 'duties of assistance' towards the non-liberal actors. However, Rawls theory of the Law of Peoples has been found to be faulty on many counts, one primarily being failing to extend his concept of justice to transnational trends of migratory patterns. He necessitated the need to limit immigration citing two arguments. First, boundaries were necessary as "unless a definite agent (politically organized people) is given responsibility for maintaining an asset (people's territory) ... the asset cannot be preserved in perpetuity for others".[36] He further mentioned that migrating to some other 'people's territory without their consent' was not acceptable to account for the failure of the aforementioned agent. Second, immigration was viewed as a threat to "people's political culture and its constitutional principles".[37] He was consequently criticised as being more "nationalist than liberal"[38] for failing to understand and appreciate that other than constitutional governments ruling over people belonging to a sovereign territory, there existed "significant internal divisions within human societies along the lines of class, gender, ethnicity, religion, language, etc."[39] Viewing a democratic society "as a complete and closed social system ... it is closed in that entry into it is only by birth and exit form it is only be death"[40] , Rawls

[33] John Rawls, *The Law of Peoples,* (1999), 23.

[34] Ibid., 106.

[35] Ibid., 107.

[36] Ibid., 39,8.

[37] Ibid., 39.

[38] Seyla Benhabib, *The Law of Peoples, Distributive Justice, and Migrations,* Fordham Law Review.1764, (2004), 1767.

[39] Ibid., 1766.

[40] Ibid., 1769.

fails to maintain a coherence throughout his liberal vision. Given his ambiguous stand on immigration and his analysis of its elimination contingent on "inequality and subjugation are overcome, and women are granted equal political participation with men and assured education", his idea of a 'realistic utopia' seems a far-fetched one.

Andrew Altman and Christopher Heath Wellman too were no exception. Their stand on immigration corresponded with the view of a state's right to have control over its borders and its membership by deciding whom to exclude from and include for admission through borders into one's territory and enjoy political membership. However, only "legitimate states are entitled to political self-determination"[41], states that adequately protected the human rights of its citizens and those of others thus granting them "a moral claim to rule and to political self-determination" [42] i.e each legitimate state's "right to exclude others from its territory".[43]This objective of self-determination and other rights associated with sovereignty was inclusive of the right to formulate one's immigration policy independent of external pressures and factors. Interfering with it implied disrespecting the state's members and the autonomy they enjoyed by virtue of performing their designated responsibilities, in this case being, the collective achievement of a population in maintaining political institutions that guarantee and protect their human rights. Such immaculate is this membership of belonging to a political community that Wellman affirms that outsiders ought to respect the group's autonomy and its right to self-determination even when it is believed to perform better than the group or the group members "carry out their responsibilities less than perfectly" [44] . Thus such privileged position of moral dominion enjoyed by the state is seen running corollary to the rights of its constituents. However, the right of the state to regulate immigration patterns was not to go unchecked and was thus bound by two constraints. First being the responsibility and duty of a legitimate state to treat all its citizens equally i.e. to "uphold the equal

[41] Christopher.H.Wellman, *Debating the Ethics of Immigration: Is there a right to exclude?,* (New York, Oxford University Press, 2011), 13.

[42] Ibid., 16.

[43] Christopher.H.Wellman, *A Liberal Theory on International Justice,* (New York : Oxford University Press,2009), 167.

[44] Ibid., 25.

citizenship of its members".[45] The second constraint pertained to a state's duty towards such immigrants/ non-citizens by virtue of them being human including their entitlement to enjoy membership of a political community. Such samaritan duties seemed more stark and compelling to fulfil when it concerned the wealthy affluent nations' responsibility to assist those embedded in abject poverty. However, such limitations were studied in a 'conditional' light where they seemed overbearing and compulsive to fulfil only when the state had failed to 'export justice' through grants of material aid or military intervention.

His second premise on which rested the state's rights to control its borders read "freedom of association is a crucial component of self-determination".[46] Fundamental to the ethos of a free society, this freedom of association is based in the belief that every individual by virtue of belonging to a community enjoys a privileged position of "moral dominion over their self-regarding affairs".[47] The other side of the same coin of right to association included one's right to exclude/refuse association as well, i.e. "the discretion to reject a potential association". [48] He however warns against being absolutists with respect to the freedom of association by observing that the right was only a presumptive right and is thus prone to "being defeated in any given context".[49] Extending this argument into the political realm, he asserts that given the reality that every individual at the very minimum enjoys a presumptive right to freedom of association, likewise a group of citizens are eligible to determine whom to admit into their country. Thus against the background of immigration, "No collective can be fully self-determining without enjoying freedom of association because, when the members of a group can change, an essential part of group self-determination is exercising control over what the 'self' is" [50]and when admissions are legally carried out en masse, it implies the inclusion of new actors in determining future laws of the state, including the immigration policy to favor its own needs. Thus, the right of sovereignty includes, not an absolute but "a weighty presumptive right to freedom of

[45] Ibid., 145.

[46] Wellman, *Debating Ethics,* 29.

[47] Ibid., 31.

[48] Ibid., 31.

[49] Ibid., 36.

[50] Ibid., 41.

association"[51]. This could be exercised under a state's right to self-determination not only against macro institutions but also individual immigrants whose solitary existence would not have a discernible impact on a political community while many such individuals could be seen making an enormous difference. However, the impacts of such movements differ from class to class. While it provides employers with a benefit of increased supply of labor and talent pool to choose from, it hurts the working class population that now has to compete for decreased lowered wages. From a fear of losing their distinct cultural identities to national security interests, Wellman is aware that mere restrictions on immigration will not solve the issue at hand. However, he clarifies that he aims only to defend the state's rights to exclude immigrants while offering no opinion on how a nation can best exercise such rights.

Similar arguments were put forth by **Michael Walzer** who too advocated the right of states to determine the nature of their population and its membership by controlling and regulating the entry of immigrants at borders[52]. While controlling immigration was seen as a part of their sovereign right, just like how democratic states decided and chose their trading partners independently or when it came to deciding whom to enter into a defence arrangement or alliance with, determining cases of granting membership pertained to the more specific state's right of self-determination as this would decide on the state's composition eventually. He saw membership of a political community as a social good, access to which is to be determined by the existing members. The primacy of this right was made evident when Walzer states "at stake here is the shape of the community that acts in the world, exercises sovereignty and so on. Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination"[53]. Citing the example of a neighbourhood wherein individuals enter and enjoy membership without any predetermined admission criteria, state borders on the contrary cannot be open devoid of any restrictions for Walzer as citizens see such unregulated movement as a threat to their culture and political identity. Instead like a club, the state should be free to decide on the inclusion and exclusion of individuals within its boundaries. In his work "Spheres

[51] Ibid., 40.

[52] Michael Walzer, *Spheres of Justice: A Defence of Pluralism and Equality,* (New York :Basic Books, 1983), 33.

[53] Ibid., 61-2.

of Justice", Walzer while arguing for tighter control over borders, states that it would be impossible to have what he terms "communities of character" i.e. "historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life".[54] Walzer saw such distinctiveness contingent on closure of borders without which achieving stability in human life was not imaginable. Like most communitarians, Walzer too saw a community being built through its history and past, reflecting a continuity through generations of populations. He argued that porous borders, contrary to beliefs and dreams of a society without walls, would in reality set running a process of 'Balkanization' wherein societies would be fragmented into "a thousand petty fortresses"[55] with every fragment taking decisions and measures to preserve their own distinct tribe. A manifestation of this in today's world situation can be Catalonia referendum for independence from Spain. However, he too does not see this sovereign right of self-determination as an absolute right bereft of limitations. Given the right of choice of a political community to freely determine what immigration policy to adopt for its territory, Walzer restricts this free choice by limiting its area of influence and acknowledging the role of foreign factors/ stakeholders beyond that of the political community to include moral constraints emerging from the "external principle of mutual aid"[56]owed to prospective immigrants. This was to be exercised by realizing the inherent 'virtually undeniable' right of every individual, and hence as an asylum seeker, to be admitted to a political community, like stated by Seyla Benhabib and Hannah Arendt, so as to facilitate "a reasonably secure life which presumably generates a remedial right to asylum, a right that was violated in the seeker's country of origin"[57]. The second constraint pertained to, rather, a system of checks and balances stemming from the need for such self-determination decisions to be a result of "internal decisions" of the concerned community ensuring thus it remain a truly communitarian agreement. Thus Walzer called for a broad right to regulate immigration in accordance with the collective self-understanding.

[54] Ibid., 39.

[55] Ibid., 39.

[56] Ibid., 62.

[57] Ibid., 50.

While Altman and Wellman's conditionality of transfer of aid has raised questions on its effectiveness as a reprisal mechanism and the consequent non-egalitarian relation established between the donor and the recipient nation, it more importantly implied that this granted the state maximum wide powers, greater than Walzer, when it came to immigration policy concluding that "legitimate states are entitled to reject all potential immigrants, even those desperately seeking asylum from tyrannical governments"[58] as long as they discharged their duty and responsibility to the immigrants via other mediums.

Judith Shklar through "Liberalism of fear" famously propagated how liberal theory helped avert dangers of cruelty, terror, humiliation and political violence. Taking a cue from this, **Jacob.T.Levy** puts forth the concept of "Multiculturalism of fear" to advocate a theory on Multiculturalism that intended to be "centrally concerned neither with preserving and celebrating ethnic identities nor with overcoming them",[59] but instead "mitigating the recurrent dangers such as state violence toward cultural minorities, inter-ethnic warfare, and intra-communal attacks on those who try to alter or leave their cultural communities".[60] Levy, while championing Multiculturalism of fear does not project it as an alternative to multiculturalism of rights but instead see both supplementary to each other's existence. He is highly sceptical of the negative repercussions that consolidation of identity contingent on one's identity can have in a societal set up. Unlike other theorists, he does not see a solution in the political recognition of such fragmented ethnic identities and instead fears such competing interests would usually in the long run be marred by humiliation and cruelty. He interestingly argues "the multiculturalism of fear does see ethnic communities as morally important and distinctive, not because of what they provide for individuals, but because of what they risk doing to common social and political life".[61] Very much a part of every country's social reality, Levy sees ethnic group divisions as an easier way to victimise and perpetuate an era of exclusion and terror on specific identities, usually minorities. He cites the example of India's city of Bombay. He read that the underlying reason for the name change to Mumbai was primarily to reassert and

[58] Ibid., 188.

[59] Jacob Levy, *The Multiculturalism of Fear,* (Oxford: Oxford University Press, 2000),12.

[60] Ibid., 15.

[61] Ibid., 33.

champion Hindu identity at the cost and exclusion of the non-Hindus in the city. A more blatant manifestation of this was seen in the slogan of one of the main political contenders of the Bombay city -the Shiv Sena party- "Mumbai for Mumbaikars". It was seen as being addressed and directed towards mainly the daily wage workers in the city who were primarily Biharis. He helps us realize, through his theory on Multiculturalism, as to why such moves should be resisted. Guided by Montesquieu, Levy advocates that a sudden change or overhaul of cultures was as much not desirable as possible. Traditions, customs and cultural laws, even if mandated change and reform, should be left unaltered but in case of a dire situation should be reformed incrementally. Changing such aspects of customs through legislations was not desirable as people are usually emotionally attached to them and would very unlikely cooperate with the law in such a situation. Levy, in order to establish this normative theory of multiculturalism believes that there is a need to take some of the world realities like the ethno cultural identities and their enduring power and attachment as given and often not subject to reform. Seeing cultures as a product of dialogical relations with other cultures, he sees such entities as inherently heterogeneous characteristic of every modern state today. Given the role it plays through attributing order and meaning to daily lives of its people, culture today also serves as an instrument to perpetuate evils like violence against minorities and making citizenship rights exclusive to the inhabitants keeping immigrants outside its ambit. To deal with multiculturalism, he disagrees upon the need to do away with heterogeneity and embrace a uniform culture but instead with ethnic attachments being a given, it should be "channelled productively if possible and constrained if not".[62] Such 'civic nationalism' which compels people to merge their particularistic identities with the larger whole to be able to identify with the state must be avoided. Will Kymlicka seen as the flag bearer of cultural membership as a primary good is criticized by Levy for approaching multiculturalism from the ambit of individuals and the rights instead of "paying attention to the dangers of violence which so often accompany ethnic pluralism and ethnic politics"[63] . He argues for a "political theory of multiculturalism which neither calls for the removal nor preservation of ethno cultural identities but one which focuses on "mitigating the recurrent dangers such as state violence towards

[62] Ibid., 8.

[63] Ibid., 12.

cultural minorities, inter-ethnic warfare and intra-communal attacks on those who try to alter or leave their cultural communities". [64] This theory known as the 'Multiculturalism of Fear' deals with four major dangers arising from multiculturalism: "forcible inclusion of an ethnic minority which wishes to retain its own identity; forcible exclusion from citizenship and the protection of the state of small and stigmatized minorities; internal cruelty arising from attempts by communal leaders to prevent members from assimilating to or hybridizing with a neighbouring culture; and the outcast status of those who leave their ancestral ethnic communities".[65]Fear emerging from such sites of action and the concerned agents involved seem central to Levy for whom, like Judtih Shklar, moral cruelty and humiliation are seen playing a pioneering role in engineering a feeling of isolation among the minorities. "It is not just a matter of hurting someone's feelings. It is deliberate and persistent humiliation, so that the victim can eventually trust neither himself nor anyone else". [66] Such institutional humiliation is seen to subsequently make it easier for an individual or society to perpetuate cruelty and degrading behaviour upon the person or the larger collective. Such victimization today is commonly used and synonymously known as 'Islamophobia' in popular discourses on immigration which makes the identification of a particular community, in this case being the Muslims, with activities like terror acts facilitating the demonization of Muslims all over the world today. Symbols reflecting elements of violence of the past were used to serve as a device of humiliating the excluded in ethnic rivalry. Thus the liberal theory of fear in such a sensitive scenario of ethnic political violence cannot call for civic nationalism, ridicule the concept of 'ethnicity' or call for neutrality. With a proper and complete awareness of the ethnic conflict's history of oppressions along communal lines, a lot can be can be discussed and inferred facilitating multicultural groups to avert cruelty and live together peacefully which liberalism of rights would not. Thus Levy propagates the Multiculturalism of Fear to deny trying to recognize and respect aspects of cultures that would consequently render some other groups unworthy of respect. He instead calls for multiculturalism of fear "not because

[64] Ibid., 13.

[65] Ibid., 47.

[66] Ibid., 24.

of what they provide for individuals but what they risk doing to common social and political life".[67]

The core question that **Jacob.T.Levy** strives to address through his work 'Strange Multiplicity' is whether a modern constitution can recognize and accommodate cultural diversity. He does so by forming many central arguments throughout the length of his text -the first being identification of six primary ways in which such "politics of cultural recognition" manifests itself namely cultural demands from within in the form of nationalist movements demanding recognition as a separate independent entity, pressures from without to include and accommodate supranational bodies with powerful cultural dimensions, demands of recognition forwarded by linguistic and ethnic minorities, the 'intercultural' demands of migrants, those of the cultural feminists and the indigenous and aboriginal demands for recognition of their government, cultures and environmental practices. Contrary to previous studies that focused on their incompatibility, Levy instead highlights their similarities for the purpose of his study. First, he sees the demands for cultural recognition as expressive of calls for self-rule in accordance with one's customs and traditions as "the oldest political god in the world". The second similarity is reflected in their claim of the constitution and its institutions of modern societies serving as 'an imperial yoke' that suppresses and denies people their sovereign right thus 'rendering unfair the daily politics that the constitution enframes'. Finally, all see culture as an 'irreducible and constitutive aspect' of their lives that determines their speech and actions. Hence, if due recognition of the cultural ways of people accorded through an agreement on a constitutional association, the constitutional order and its politics would have been just. However, today's time sees a multiplicity of such demands of recognition which stand at loggerheads with each other in practice. Thus, Levy calls for different various cultures to be entirely recognized notwithstanding the other's exclusion or assimilation, while calling for a revision of the dominant constitutional norms that are seen as misinterpreting the calls for cultural diversity. This has been manifested through the inherited constitutional normative vocabulary that saw new nation states of the 1990s leave out the overlapping minority cultures of their boundaries. On the contrary, Levy sees the essence of culture in their interdependence and constant

[67] Ibid., 76.

interaction when he says 'the modern age is intercultural rather than multicultural'. After being constantly contested and challenged through interactions, interrogations and reimaginations, cultures have emerged as heterogeneous identities from within making cultural diversity 'internal to a culture' and forming a 'common ground' from where serious contemplation on the issues of constitutionalism in the age of cultural diversity should begin. Calling for a world reversal, from a habitual approach of studying cultural diversity demands through the imperial lens to "a genuinely inter-cultural popular sovereignty, where each listens to the voices of the others in their own terms" is seen as the first step forward in contemporary constitutionalism. This led Levy to his second argument which called for a review of the authoritative language used in assessing claims to recognition that consequently is seen stifling cultural differences while imposing a dominant culture uniformly. Constrained by the restrictive normative vocabulary available to them, claims stand distorted and misinterpreted along terms like 'nation', 'sovereignty' and 'right of self-determination' as it is presupposed to pose a threat to the democracy, unity, equality and liberty of the nation state, just as a federal setup is seen at loggerheads with the unitary system of legal and political institutions. As Harold Berman correctly observes, the conventional use of constitutional language by courts, the bureaucracy, police and other institutions has further helped modern constitutions insulate themselves from the continuous challenges and threats posed to various aspects of constitutional recognition. While the three authoritative traditions of interpretations namely liberalism, communitarianism and nationalism called for the legitimate demands of recognition to be adjudicated and accommodated within the prevailing conventions of constitutional recognition, the three non-authoritative traditions viz. post modernism, cultural feminism and interculturalism call for a complete deconstruction of the language of modern constitutionalism which is seen as 'an imperial meta-narrative'. While the post modern narrative is built on the debris of European imperialism, the cultural feminist tradition calls for an investigation into the unexamined masculine bias in the language that occludes what remains to be said in women's other voices and traditions as "the limits of my language are the limits of my world". Meanwhile, the intercultural school calls into question the language of modern constitutionalism by reiterating the fact that citizens are in cultural relations that overlap, interact and are negotiated and reimagined. Levy concludes thus that the way out of the impasse would entail to listen to not only what is said "but also to the

way or language in which it is said". Through a historical survey of the modern and common constitutionalism, he also concludes that according just constitutional recognition and accommodating cultural diversity enhances, rather than threatens the primary goods of equality and individual liberty.

The movement of immigrants cutting across sovereign borders lead to claims of forceful occupancy and misappropriation of the indigenous lands. Given the political, social and economic dimension of land in today's contested times, John Bern and Susan Dodds work examining concerns about the Aboriginal right to self-determination or self-government assumes special significance. In contrast to Henry Reynolds concept of a 'single aboriginal nation' that brings all political forces marked with their distinct languages, histories and cultures under a larger diffused identity, John Bern and Susan Dodds highlight the chronic nature of such an assumption being the exclusion of the indigenous interests of the indigenous people thus in effect reducing their power over self-determination. With respect to formal recognition of group-based entitlements to enhance self-determination within state boundaries, James Tully champions a pluralism of national institutions and structures as federated within one over-arching plural confederation. However, to deal with the risk of overlooking differences inherent within the groups themselves, Tully advocates a new sort of sovereign authority which implies the authority of the culturally diverse people to govern themselves, like setting the membership criteria specific to their group and specifying the group specific interests, in accordance with their own laws free from the role of external forces. Iris Young on the other hand, calls for a pluralistic perspective by calling for special representation of the oppressed groups for ensuring effective democracy to grant them a political voice. Her goal was "development of institutional conditions necessary for the development and exercise of individual capacities and collective communication and cooperation". Seeing the oppressed groups historically disadvantaged with respect to the opportunities granted to shape debates and be heard, especially on issues that affect and determine their lives, Young calls for special representation to fight the systemic constraints enforced by the inherent institutions of the state.

The Indian case: A Pandora's Box

An individual citizen's public domain is closely interconnected with their community membership in the private space. This peculiarity of Indian citizenship highlights two domains co-existing within the Citizenship paradigm –the public and the private. The liberal universal abstract citizenship underlining the Constitutional provisions provide for every citizen to emerge as an egalitarian society wherein every individual enjoys rights just as much as his fellow citizens irrespective of one's religion, race, caste, gender, class and social divisions. This concept is what Anupama Roy calls 'differentiated citizenship'.[68] The phrase 'Men ought to stay where they are' no longer holds true for today's age of migration. India is no exception. An Indian state which has garnered considerable attention citing the immigration problem has been the state of Assam which has been beleaguered by the inflow of immigrants from the neighbouring country of Bangladesh since pre-colonial times while registering considerable fraction in recent decades since the 1980s. Through the literature studied in the course of formulating this chapter, there has been evident the stark reality of acute lack of literature on theories of ethics of immigration. While research works remain available in bounty with respect to quantitative aspects like economy, the trends of migration and the socio-political impacts, the literature on the ethics / philosophy of migration remains scarce. This has resulted in accessing theories pioneered by western dominated thinkers who advocate context specific, and in this case developed nations specific, theories and solutions to the question of immigration. This has rendered most of these theories a misfit for the Indian scenario which is primarily placed in a completely different context of a developing nation. A case in point is Benhabib's claim in support of immigrants to have 'the right to have rights'. Such a theory stands at loggerheads with the Indian nation's interests which has always been starved for providing resources to its own citizenry. In such a situation, obliging to the so called universal human rights of immigrants would not fare well for the citizens who stand to lose in such a situation. At such times, Joseph Caren's assertion that the onus to provide for shelter lies on the rich and developed countries and 'not those of geographically-proximate states, to find a place for these people to live in' renders well for India. The failure on the part of liberal theorists to see the

[68] Anupama Roy, *Mapping Citizenship in India.* New Delhi :OUP, (2010), 18.

potential danger that such inflow of immigrants could cause to the political fora of the host state and the assertion that such communities do not demand for a separate space for themselves rather just mere recognition, reflects the utter lack of knowledge of these theorists about the larger immigration picture including that of developed nations. This holds particular significance and relevance in the light of the case of Assam where in the political demography stands challenged and in favour of the new immigrant population and the lack of available free land seems to seriously challenge the livelihoods of the citizens. Likewise, Noah Pickus's concept of 'Civic nationalism' seems unfavourable for the Indian scenario as it calls for extreme allegiance to the state by ways of forceful assimilation running the risk of a fractured polity over which it rules which risks breaking out into communal rivalries and conflicts at the slightest of provocation. This is not to advocate disregard for universal human rights while calling for closed borders. This only strengthens the dire need for India to now formulate an 'immigration policy' for itself independent of international influences while maintaining a balance between human rights and its sovereign rights. Such consideration is necessary as Indians today form the second largest diaspora in the United States while a considerable Indians find their way to the United Kingdom and the Middle East in search of better avenues. This diaspora, which initially was no different than immigrants in their host nations today has made India the highest recipient of remittances in the world helping the economy to maintain its foreign exchange reserves and growth trends. Against this background, Indian polity has to tread carefully to formulate a policy sensitive to the Indian needs and interests to reduce ambiguity and reliance on foreign actors.

CHAPTER 2

UNFOLDING THE HISTORICAL TRAJECTORY OF IMMIGRATION IN ASSAM

Following mortality and fertility as agents of population change, migration flows transcending borders and margins emerge as the third determinant that, unlike others, increasingly involve violation of one's entitlements by virtue of being A human. The United Nations Multilingual Demographic Dictionary defined migration as "a form of geographical mobility or spatial mobility between one geographical unit and another, generally involving a change in residence from the place of origin or place of departure to the place of destination or place of arrival". A rather generic and ambiguous definition of immigration, it fails to deconstruct the primary difference between refugees and migrants or immigrants in case of international flows. This is something that the UNHCR (United Nations High Commissioner for Refugees) attempts to address through its definition of migrants as someone who chooses 'to move not because of a direct threat of persecution or death, but mainly to improve their lives by finding work, or in some cases for education, family reunion, or other reasons. Unlike refugees who cannot safely return home, migrants face no such impediment to return. If they choose to return home, they will continue to receive the protection of their government".[69]In the course of the chapter, however we shall find the scope of this definition too stands challenged to extend beyond its mere economic connotation. Unlike refugees who are defined and protected by international law and conventions of the 1951 Refugee Convention, better known as the Convention Relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees, immigrants are dealt in accordance with a country's immigration laws and processes against the backdrop of an absence of a universally accepted definition of Immigrants. This has left vulnerable a large populace of individuals to the whims of the host nation who stand unbound by any international law. Politicization of the

[69] http://www.unhcr.org/news/latest/2016/7/55df0e556/unhcr-viewpoint-refugee-migrant-right.html

issue has only worsened the vulnerability of immigrants undermining their entitlements to basic facilities.

Such a trend has manifested itself in India through the state of Assam bordered internationally by Bhutan in the northwest and Bangladesh in the southwest alongside sharing borders with six other Indian states. The Report of the Governor of Assam to the then President in 1998 spoke of the Immigration problem primarily as only economic to begin with, which then became communal and political with partition and independence and in the post-independence era, expanded into an international concern.[70]Population flows into Assam transcends centuries. Traced back to nearly 200 years before Christ, Assamese history has seen global inflows like the Mongoloid race from west China, the Austric race, the Drabian race and finally the Aryan race from the Gangetic plains, all before 1st century A.D. Early 13th century marked the beginning of planned military interventions. The first attempt at a forcible entry into Assam was in 1205 led by Muhammad BakhtiyarKhalji from Bengal. By the time of the advent of the Ahoms, a Shan tribe, in 1228, several Muslim invasions had taken place and affected the district of Kamrup and its adjoining areas.[71]Repeated invasions led some to stay behind thus pioneering settlement of Muslims in Assam. The Ahoms however eventually took over central and eastern Assam across the Brahmaputra emerging as its undisputed ruler for the next 600 years. Its rule was marred by occasional invasions of the Mughals who consolidated their influence in parts of Kamrup and Darrang district (Central) of Assam by the 17th century. In contrast, districts like Sylhet attribute their Muslim settlement to its last Hindu ruler who embraced Islam thus naturally transpiring a large Muslim population to settle within its boundaries. It had a spill over effect on Cachar district's fertile Barak Valley which served as an attraction to the land hungry poor Muslim farmers.[72]Meanwhile, internal conflicts gradually plagued the central Ahom power wielders. This led to a faction of the dissident Ahoms to connive with the Burmese to invade Assam, a presence the British increasingly grew uncomfortable with. This resulted in the first Anglo-Burmese war of 1826 that saw the downfall of the Ahom kingdom. The same year

[70] The Report of the Governor of Assam (Retd) S K Sinha to the President of India, K R Narayanan, (1998).

[71] M.Kar., Muslim Immigration to Assam, *Social Scientist,* Vol.8 (1980): 69.

[72] *Physical and Political Geography of the Province of Assam,*Shillong, (1896): 80.

saw both entrepreneurs and skilled productive labor move (at that time such flows were seen positively) from Bengal to the virgin lands of the Brahmaputra valley.[73] Assam was later incorporated into the Bengal Presidency in 1838. Now as a province under British India, movements into Assam came to be seen as mere migration within the confines of the nation state. These included the import of labourers *en masse* to Assam for carrying out jute cultivation, the supply of cheap labour for the newly established tea industry, manpower for running various infrastructure projects, that of roads, railways, excavation of coalmines and the like from the Indian states of Bihar, Odisha, Madhya Pradesh, Rajasthan and other central Indian states. The development of agriculture under plantation type was one of the greatest magnets for migration to Assam during the colonial period that made it the fastest growing province in India. [74] This comprised ***the first wave of immigration***. Such movements were increasingly legitimized by the colonial policies designed to achieve the imperialistic goals of the British. Barring the more frequently travelled path by immigrants from across Bangladesh, open borders between Nepal and India, better economic prospects in India, recruitment of Gurkhas to the Indian national army along with Banaras emerging as the hotspot of exiled Nepalese, led Nepalese origin people to immigrate to India since the mid-nineteenth century.

At the turn of the 20thcentury, emigration from Bengal took even more enormous proportions, much of it coming from the Mymensingh district of Bengal reeling under a heightened population growth rate. The virgin tracts of the Brahmaputra valley, specifically that of the Goalpara district was the first to bear the brunt of the 'industrious agriculturists'. This was reflected in the increase of the district's population from amere1.4 percent between 1881 and 1891 to a whooping 30 percent in the following decade citing migration from Mymensingh. [75]The Census data of 1931 reflects a fourfold increase between 1911 and 1931 in the number of Bengal-born settlers residing in the Brahmaputra valley, much of it from the single, thickly populated district of Mymensingh. The changes in the demography of the state stemming from migratory flows began to raise its ugly head by early 20th century.

[73] A Dasgupta, *Char'red for a lifetime: Internal Displacement in Assam Plains in India,* (Sarwatch, 2001), 12.

[74] K. Davis, *The population of India and Pakistan*, (Princeton University Press, 1951).

[75] Kar., Muslim Immigration 71.

Measures like the line system introduced in 1920 to prevent immigrants from attaining ownership rights over new lands by restricting them to specific limited areas did not meet with much success. Infiltration further received an impetus in the form of pro-immigrant policies like the ready availability of grazing and forest reserves for the incoming populace and blatant disregard and violation of the Line system by the state administration. Unable to accept the loss of forestland to the migrants and the loss of language, the indigenous population pitched itself against the interests of the 'Other' henceforth. This ***second wave of immigration*** led to a formidable increase in the state's population in proportion to the overall population growth rate in India as shall be reflected in the data below from the Census of India over the past century.

Population Trend in Assam and India, 1901-2011

Year	Population (in Lakh)		Percentage Decadal Variation		Density (Person per Sq. Km)	
	Assam	India	Assam	India	Assam	India
1901	33	2384	-	-	42	77
1911	38	2521	+16.99	+05.75	49	82
1921	46	2513	+20.48	-0.31	59	81
1931	56	2789	+19.91	+11.00	71	90
1941	67	3186	+20.40	+14.22	85	103
1951	80	3611	+19.93	+13.31	102	117
1961	108	4392	+34.98		138	

				+21.64 -		142 -
1971	146	5481	+34.95	+24.80	186	177
1981	180*	6833	+23.36*	- +24.66 -	230	- 230 -
1991	224	8463	+24.24	+23.87	286	267
2001	266	10270	+18.92	- +21.54 -	340	- 325 -
2011	312	12102	+17.07	+17.68 -	397	382 -

*Interpolated

Source: (Census of India, 2011)

Between 1901 and 1931, the number of Muslims in Assam, excluding Sylhet had risen from 5,03,670 to 12,79,388, the increase being more than 150 percent which, of course, included the natural growth accounting for about 20 percent. [76] The total Muslim population then was 32,22,377. [77] However, not every migrant flow was planned. The immigration flow stemming from the great Bengal famine of 1943 is a case in point. The impact of the famine was felt with the supply of food grains to the rest of the country being affected even in the years following independence. Hoarding and black marketing only further worsened the situation. It was against this background that the colonial government launched the 'Grow More Food Campaign' in 1942 which was furthered by Nehru who saw the inflow of immigrants to Assam as a positive occurrence that would help increase food production. However, through the 1940s, the complacency shown by the state political leaders brought the disgruntled few to the floor of the Assembly to express their dissent by bringing an Adjournment

[76] Ibid., 72.

[77] Census of India, 1961.

Motion in November 1944 and submitting motions by Congress party workers that highlighted the plight of the indigenous citing the unfavorable land settlement policy of the establishment. This also highlighted and broadened the fissures between the Congress party and the state leaders. However, this is not to imply that the Congress at the Centre adopted an affirmative approach towards the local populace. A case in point was the indifference to the objection raised by the Assamese public opinion to their inclusion under section C along with Bengal to become a Muslim majority province under the recommendations of the Cabinet Mission Plan of 1945. The state administration led by Syed Mohammed Saadulla however saw the grouping of Assam with Bengal as a reflection of 'great statesmanship'. The increasing migrant numerical strength, the All India Muslim League's demand for Pakistan and the politicization of the issue of immigration transformed a basically economic influx into a matter of racial and communal conflict leading to the inevitable result of a legacy of mutual suspicion in the post-independence days. [78] Eventually the unswerving public opposition to the grouping plan of the Cabinet Mission rendered it null and void, enabling Assam to remain a part of the post-partitioned India. All the ambiguity surrounding what constituted the Indian nation was laid to rest in 1947 with the redrawing of international boundaries which raised new questions of legitimacy with respect to the movements between the two newly independent sovereign nations. Thus partition among others like colonization, annexation, invasion, agriculture, land and politics helped in constructing the history of immigration to Assam and the simultaneous construction and realization of an identity and imagination of Assam.

Previously seen a viable political compromise, Partition eventually marked the beginning of ***the third wave of immigration*** proving to be instrumental in engineering mass forced migrations. While along the north-western border, one was increasingly a witness to the outmigration of Muslims from Punjab and Hindus and Sikhs from West Pakistan, the collapse of minority population along the East was much more hushed. This is not to say that impacts of Partition did not raise its ugly head along the border with Bangladesh. Rather, after Independence, the local resistance and public opinion pushed the Parliament to take notice and attempt to address the problem of

[78] Ibid., 74.

immigration by passing the Immigrants (Expulsion form Assam) Act 1950. It proved to be a half-hearted inefficacious measure providing only for the expulsion of certain and not all immigrants as was observed during the post independence and 1971 war exodus. In fact, the first ever National Register of Citizens of India was also prepared for the state of undivided Assam in 1951 against the backdrop of cross-border immigration, following partition.[79] An anti-Hindu riot in 1964 pushed the Hindus to flee from East Pakistan. Following this, the Prevention of Infiltration from Pakistan Act was passed and a special Border Police Force was raised. Spanning over the next two decades post 1947, movements across the border were primarily motivated by majoritarian-led ethnic cleansing. This was reflected in the decadal growth rate of both Hindus and Muslims for the period of 1951-61 and 1961-71 which was higher than their respective all India growth rates, marking the third wave of immigration to Assam. The influx of Hindu refugees from East Bengal into Assam, West Bengal, Tripura, necessitated the need for a stricter security framework. With rising demands back at home for Jawaharlal Nehru 'to act decisively' against Pakistan, the Nehru-Liaquat Pact was signed in April 1950 that guaranteed bringing to book the perpetrators of communal violence in East Bengal while according equality of citizenship to each of their minorities.[80] However, between independence and the 1979 movement, the issue of immigration had not been a subject of major political controversy primarily for two reasons: the centrality of language issues in defining the contours of ethnic conflicts in the state and second, the aggregation of interests of interests within the political parties, primarily the Congress, but in other parties as well, which in effect produced a tacit agreement among political leaders not to raise the issue.[81] It occasionally garnered prominence to suit the political exigencies of the time, like that of the 1965 Indo-Pak war when the state government, against deteriorating relations with Pakistan, began 'expelling Pakistani infiltrators under

[79] Akhil Ranjan Dutta, *Political Destiny of Immigrants in Assam,* Economic and Political Weekly, Vol.53, No.8, 19.

[80] *Agreement between the Government of India and Pakistan regarding Security and Rights of Minorities (Nehru-Liaquat Agreement), 1950.*

[81] SanjibBaruah, *Immigration, Ethnic conflict and Political turmoil-Assam, 1979-1985,* Asian Survey, (University of California Press : 1986), 1190.

instructions from New Delhi'.[82] Immigration thus continued to serve the interests of the political class even in the post-colonial era. There continued to exist a vacuum of political will to seriously address the issue of Immigration.

The new decade of the 1970s witnessed the incongruent nature of the relationship between the popular public opinion and the administrative institutions. It all began with the growing discontent and administrative indifference towards Bengali dominated East Pakistan which was manifested through a lackadaisical response to the 1970 November cyclone and floods that devastated East Pakistan. This was followed by utter disregard by the West Pakistan establishment for the December 1970 electoral victory of the Awami League in East Pakistan which led to mass outrage eventually culminating into the freedom movement of 1971 and demand for a separate sovereign nation Bangladesh. The Indian establishment saw Pakistan's apparent reluctance to stop atrocities through the years against its minorities by its majority population and prevent the outflow of the Hindus across the border into India as a type of forced and induced emigration where in governments 'expel not just a handful of dissidents, but a substantial portion of the population hostile to the regime', an explanation offered by Myron Weiner when he tries to explain immigration not only as a consequence of mere internal upheavals or economic crises but also one that goes beyond to include the eagerness of some governments to reduce or eliminate from within their own borders selected social classes and ethnic groups and to affect the politics and policies of their neighbours. [83] The Pakistani government demonstrated this when it sought to weaken the insurgency in East Pakistan by forcing large numbers of Bengali Hindus, primarily the dissidents, out of the country. Aga Khan's special report on Human rights and Massive Exodus[84] stated that forced migrations were resultant of an interaction between the root cause and proximate causes. While the root cause by itself stood incapable of effecting mass migrations,

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[82] Ibid., 1191.

[83] Myron Weiner, *Security, Stability and International Migration,* International Security, Vol.17, No. 3, (The MIT Press: 1993), 103.

[84] Aga Khan, *Study on Human Rights and Massive Exodus: Question of the Violation of Human Rights and Fundamental Freedoms in any part of the world, with particular reference to colonial and other dependent countries and territories,* 1981.

the proximate causes were seen as the more immediate factors leading to migration flows. In case of Assam, while agricultural land availability and job opportunities were seen as the underlying root causes, the interstate war of Pakistan and Bangladesh served as a proximate cause to escalate immigration flows into Assam post 1971. This all eventually culminated to mark ***the fourth and the largest (in terms of volume) wave of immigration to Assam***. Such large migration streams are usually predicted given the 'small trickles in the years before'. 'Once the first migrants have explored a route, the growth of the movement becomes semi-automatic and individual motives irrelevant. Improved transportation facilities and migration networks (such as family, friends or social ties in the country of destination) also increase the size and likelihood of the migration stream by lowering the cost of migration'.[85] With Bangladesh accusing India of diverting the dry season flow of the Ganges into one of her internal rivers before reaching Bangladesh, India witnessed large scale migration from the affected areas of Southwest Bangladesh whose agriculture, industry, domestic water supply, fishing and navigation among others stood compromised.[86] However, migration streams crossing over to India from Bangladesh post 1971 stemmed equally from non-economical causes, that is, to escape the ensuing rape, genocide, religious persecution and political pressure post the 1971 war of liberation. This was reflected in the dramatic increase recorded in the number of registered voters in the light of the 1979 parliamentary Mangaldoi by-election[87] - from 6.3 million in 1972 to 8.7 million

[85] Edward Newman, *Refugees and forced displacement: International security, human vulnerability and the State,* (United Nations University Press: 2003), 139-40.

[86] Nandita Saikia, *Trends in Immigration form Bangladesh to Assam (1951-2001),* (2016), 9.

[87] This by-election was to be held following the death "of a sitting member of Parliament. The voters list was revised and during the process a large number of foreigners' name was discovered. Objections were raised against some 70,000 names in the constituency. But of this, 45000 were declared as foreigners by competent courts. It was then the dark forces behind the whole conspiracy against Assam rose their ugly heads. The political parties who would have benefitted by these foreigners' votes used all their influence and forced the authorities to stop deletion of foreigners names from the electoral rolls. Our thoughts were provoked. Then came mid-term Parliamentary election. The experience of burial of Indian democracy in Mangaldoi constituency was too fresh to be forgotten. What was true for Mangaldoi became true for whole of Assam…. The CEC directed authorities to stop deletion of foreigners' names and said 'A person whose name has been included shall be presumed to be a citizen of India… Scrutiny of electoral rolls can be taken up after the election gets over' … CEC believed that the anomalies in the existing list would be removed on the basis of the objection filed by the Indians

in 1979 – which was not the result of the enfranchisement of new voters who were previously ineligible.[88] These numbers highly inflated from the previous election two years earlier, rapidly drew public attention and sent waves of panic across the entire Brahmaputra valley. This culminated into the Assam Movement, the first organized resistance for expulsion of immigrants through mass civil disobedience[89] in the following years from 1979-1985,[90] turning violent in the given instances of the infamous Nellie and Gohpur massacres and marred by events like the boycott of the state elections and the 1981 Census. "The AASU through their memorandum presented to the late Prime Minister Smt. Indira Gandhi, conveyed their profound sense of apprehensions regarding the continuing influx of foreign nationals into Assam and the fear about adverse affects upon the political, social, cultural and economic life of the State". It read "the problem which is agitating the minds of people of the entire North east region is the problem of influx of foreigners from the neighbouring countries particularly Bangladesh and Nepal. The influx of foreign nationals into Assam is not a recent phenomenon. The problem has become so alarming that the very existence of the indigenous population is threatened. But we are determined to preserve our identity, our history, our culture and our heritage in our

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against the non-Indians… Section 22 of People's Representation Act was made inoperative in Assam. This open disregard to the security of the state could no longer be tolerated and the All Assam Students Union took the lead in launching a state-wide movement on a massive scale."

[88] Myrion Weiner, *The Political demography of Assam's anti-immigrant movement.* (Population and Development Review, 1983), 279.

[89] "Thousands of meetings were organized throughout the State to educate the people. Rallies were held. Mass picketing and mass satyagraha received support of everybody with a sense of belongingness to the region. Non-cooperation was extremely successful."

[90] In the Times of India, K.N.Malik on 18th December 1979 noted "for never before have lakhs of people participated in a movement so peacefully, in the true Gandhain style. Even independent evidence confirms that the movement was certainly not a case of a few students starting an agitation and some anti-social and militant element taking it over. A remarkable feature of the movement launched by the Students' Union and supported by all sections of society is the spontaneity and discipline displayed by the people… The call for a meeting is often given at a short notice. People read in newspapers about the program. They leave their houses and institutions to attend the program. One can hardly find a woman in any house when such a meeting is on. They go there accompanied by small children. The response from women has been remarkable. Nearly half of the seven lakh persons who courted arrest between November 12 and 17 at Gauhati were women".

strive to maintain the ethnic beauty of the people of North East Region…. A silent invasion by foreign nationals from the neighboring countries particularly Bangladesh and Nepal is taking place. We cannot remain silent spectators when sovereignty of India is attacked. The problem has been deliberately neglected by the leaders leaving the destiny of Assam at the mercy of foreign nationals. The foreign nationals pose challenge to the integrity of India. The first thing foreign nationals try is to enroll their names in the voters' lists with the connivance of anti-social elements, politicians and officials on this side of the border. The motive is crystal clear. The infiltrators vote for the politicians who protect them in respects. In fact politicians encourage infiltration to ensure their political survival. Therefore naturally the rapid growth in population of Assam as a result of large scale influx from the neighbouring countries is bound to be reflected also in the increasing number of electors in Assam from 1957 to 1979."[91]

Year	No. of electors	Increase	% of increase during
1957	44,93,359		
1962	49,42,816	4,49,457	10% (in 5 years)
1966	55,85,056	6,42,240	12.99% (in 4 years)
1970	57,01,805	1,16,749	2.09% (in 4 years)
1971	62,96,198	5,94,393	10.4% (in 1 year)
1977	77,29,543	9,33,345	14.82% (in 6 years)
1978	79,74,476	7,44,933	10.30% (in 1 year)
1979	85,37,497	5,63,021	7.06% (in 1 year)

(Source: Memorandum to the Prime Minister of India on Problem of Foreign Nationals in Assam by AASU, 1980)

[91] Memorandum to the Prime Minister of India on Problem of Foreign Nationals in Assam by AASU (All Assam Students Union)

The public resorted to strategies of civil disobedience rendering the state administration ineffective such that it was famously observed that the Government of Assam was running the movement and AASU (All Assam Student's Union) was running the Government. [92]A movement that 'began with a mood of optimism about a negotiated settlement' struggled midway to maintain its Assamese ethnic coalition despite its 'open-door approach to the self-definition of an ethnic group'. With Bangladesh refusing to acknowledge the immigrants prior to 1971, there was a tacit agreement by 1982 end to grant citizenship to those who arrived from 1951 to 1961 while denying the same to those who arrived in 1971 and thereafter. Amidst this, the government of India issued rules and guidelines for tribunals to detect foreigners in Assam under the Illegal Migrants (Determination by Tribunals) Act on February 2, 1984 where in an official stand on Nepalese immigrants was also made public. It declared all Nepalese nationals[93] who owned restricted area permits not be considered as immigrants, thus standing protected by law. [94]All discussions ultimately culminated into the signing of the much revered Assam Accord[95] on 15th August 1985 between

[92] Baruah, *Immigration,* 1194.

[93] In their memorandum to the then Prime Minister of India Smt. Indira Gandhi (1980), AASU stated that "in addition to Bangladeshis, Nepalis who have enteredAssam without restricted Area Permits either from Nepal or from Bhutan account for a sizeable number offoreigners. The increase of Nepali immigrants in the last two decades cannot be ignored." During the years between 1951-1971, the percentage increase in 'the Nepali population' was 13% higher than the percentage increase in the general variation for the same given period."

[94] Parmanand, *The Indian Community in Nepal and the Nepalese Community in India: The Problem of National Integration,* Asian Survey, Vol.26, No.9, (1986).

[95] In this Memorandum of Settlement, "keeping all aspects of the problem including constitutional and legal provisions, international agreements, national commitments and humanitarian considerations," other than the cut-off dates, the other considerations included securing the international border "against future infiltration by erection of physical barriers like walls, barbed wire fencing and other obstacles at appropriate places. Patrolling by security forces on land and riverine routes all along the international border shall be adequately intensified. In order to further strengthen the security arrangements, to prevent effectively future infiltration, an adequate number of check posts shall be set up.. A road all along the international border shall be constructed so as to facilitate patrolling by security forces. Land between border and the road would be kept free of human habitation, wherever possible. Riverine patrolling along the international border would be intensified. All effective measures would be adopted to prevent infiltrators crossing or attempting to cross the international border. It will be ensured that

Prime Minister Rajiv Gandhi and the leaders of the Assam Movement adding that those who entered the state between January 1966 and March 1971 would be disenfranchised for ten years while those arriving post March 1971 would face deportation. [96]This resulted in the first ever amendment to the Indian Citizenship Act 1955 effecting this constitutionally mandated cut-off date for granting of citizenship.[97] It was followed by an earnest revision of electoral rolls. Amidst claims about controversial procedures being followed, the final roll recorded 9,806,285 voters from the 1984 roll of 10,496,000 registered voters.[98] Two major parties resultant of the ethnic polarization emerged at the political forefront – the Asom Gana Parishad (AGP) comprising the student leaders of the Assam movement based primarily on the ethnic Assamese identity and the other being the United Minorities Front (UMF) formed by those threatened by the demands of the Assam movement. The Asom Gana Parishad, riding high on people's faith and belief post the Accord signing was expected to be the best contestant in the political fora to implement the Accord in letter and spirit. The ensuing years however witnessed the failure of both parties to address the immigration issue effectively while falling short of engaging in careful conflict management to assuage the fears of the migrants from neighbouring Indian

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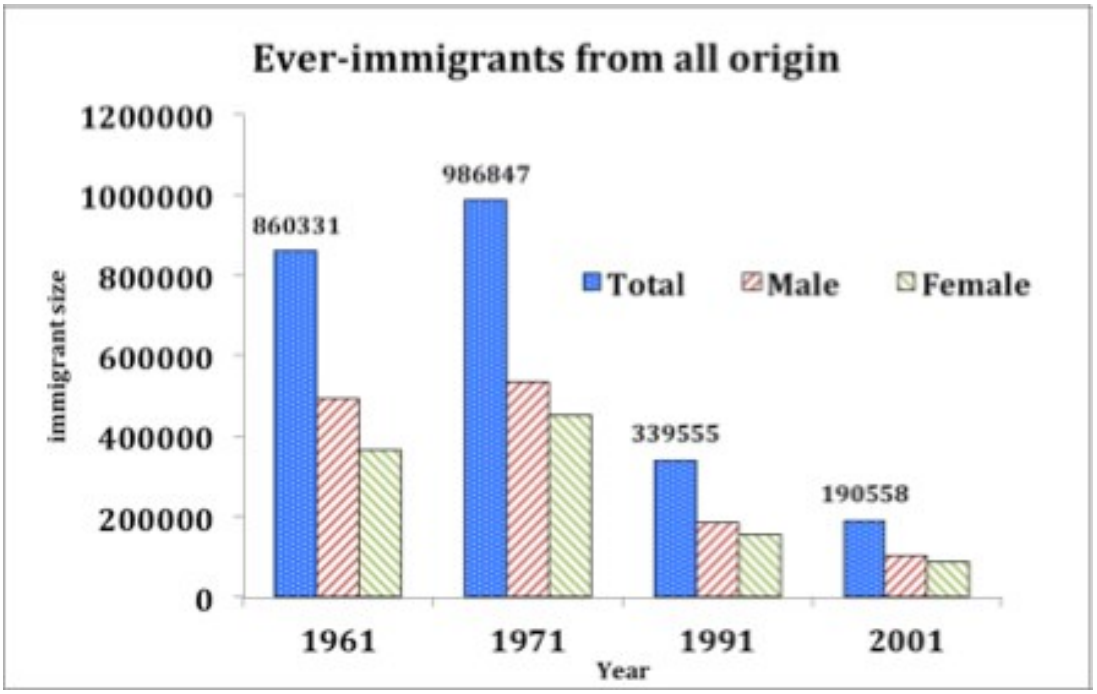
the law restricting acquisition of immovable property by foreigners in Assam is strictly enforced. It wil be ensured that the relevant laws for prevention of encroachment of government lands and lands in tribal belts and blocks are strictly enforced and unauthorized encroachers evicted as laid down under such laws. It will be ensured that birth and death registers are duly maintained.

[96] Ibid., 1203.

[97] This was followed by the 1986 amendment to the Citizenship Act wherein clause 3 (1) (A) was included in the act. "As per this clause, children of all illegal migrants would get citizenship." It reads " Except as provided in sub-section (2), every person born in India (a) on or after the 26th day of January 1950, but before the 1st day of July 1987;" shall be entitled to citizenship in India. AASU, who opposed the addition of this clause tooth and nail stated "after the Assam agitation, with understanding and human feeling, Assam has accepted the burden of all foreigners who have come before 1971, alone on behalf of the country. As per Assam Accord, all illegal foreigners who have come before 1971, would be able to stay in Assam. But people who have come after 1971, would be expelled. Assam cannot take the burden of the children of illegal migrants who have come after 1971. Lakhs of illegal foreigners have entered Assam and Assam cannot take the burden of these lakhs of children of illegal migrants. IMDT Act is a dangerous act and similarly the clauses of citizenship act which has given citizenship right to the children of illegal migrants who have come after 1971, is also equally dangerous. Those clauses are to be repealed along with the scrapping of the IMDT Act."

[98] Ibid., 1204.

states, the situation has come full circle. So deep-rooted was the tyranny of the majority that many people of Bangladeshi origin were too intimidated to report their actual place of birth or last residence information in 1991 Census. Thus the reporting of place of 'birth' or 'immigrant status' was severely under-accounted in the post 1971 Censuses[99] as the data below reinstates. (Ever-immigrants below denotes those individuals living in Assam at the time of Census enumeration but born outside India irrespective of their duration of stay in Assam).[100]



Source: Respective Censuses of India

However, over the years sceptics have cited various reasons for the unreliability of Census data. Primarily, given that there exists no official legal record on entry of immigrants into the country, the only other measure that remains is the data on birthplace which individuals of dubious legal status would very likely refrain from providing. This was evident through the 1991 Census data that stood highly compromised with intra-state migrants too refusing to divulge their details fearing majoritarian onslaught in the state. The dependence on the decadal Census data given that the Census fails to numerically account for the births and deaths of immigrants

[99]Saikia, *Trends in Immigration,* 10.

[100] Ibid., 14.

along with lack of inadequate information about the year and age of migration has rendered Census data as an obscure and questionable source of information for immigration-related analysis.

The decade of 1991 was marked by the end of the Cold war and the consequent fragmentation of the USSR. This triggered migratory flows from the communist countries to the West en-masse adding a security dimension to the situation. With growing Islamic fundamentalism on one hand and rising Islamophobia on the other, countries world over began to strengthen their borders and tighten their regulatory provisions against refugees and immigrants, and in particular, the Muslims. These had repercussions back at home wherein migratory movements now began to be seen more as a challenge to one's sovereignty and a consequent threat of aggression with a potential to threaten the internal social fabric of the nation. This trend manifested itself in the late 1980s when the Bharatiya Janata Party (BJP) and its allies sought to politicize the issue to polarize Hindu votes. This reflected the 'instrumentalist' model of ethnic political mobilization through cultural symbols which were manipulated by the elites to form suitable ethnic identities. [101] This led to 'the securitization of the issue of illegal migration' wherein illegal migration was seen as a loss of control of the Indian state over its borders. [102] However, the unsuccessful bid of successive governments both at the Centre as well as the state[103] has effectively kept the issue simmering for decades to be utilized suitably during elections to generate favorable support. Narendra Modi successfully rode on the plank of dislodging and returning the illegal immigrants back to their place of origin both in the 2014 Lok Sabha

[101] Paul Brass, *Language, Religion and Politics in North India*, (London: Cambridge University Press, 1974)

[102] Pushpita Das, *Illegal Migration from Bangladesh: Deportation, Border Fences and Work Permits,* IDSA Monograph Series, No. 56, (2016), 12.

[103] In 2005, in a tripartite meeting including the Government of India, the state Government of Assam and AASU, "steps to better facilitate the implementation of the Accord were taken. It included updating the 1951 National Register of Citizens, photo identity cards being issued to citizens based on the upgraded National Register of Citizens, sealing the Indo-Bangladesh border by installing proper infrastructure like flood lights, heightened electrified border fencing, enforcement of night curfew among others. Alongside, AASU called for scraping of clause 3 (1) (A) (B) of the Citizenship Act which protects the interest of illegal foreigners. "

elections as well as the 2016 Assam elections. His claim that "Bangladeshi Immigrants must pack" after his electoral victory is yet to see the light of the day given the partial publication of the NRC (National Register of Citizens of India) amidst contrary requests to the Supreme Court by the Centre seeking more time to publish the draft of the NRC.

Touted as the most authentic effort to detect illegal migrants in the state, the NRC's first draft was published on 31st December, 2017 recording 1.90 crore persons out of the 3.29 crore applicants amidst watertight security preparations and call for peace. The historical trajectory of Immigration that has been fundamentally altered more by judicial pronouncements than executive action and legislative law making, the NRC was clearly defined by the Supreme Court in the Kamalakhya Dey Purkayastha vs. Union of India (2017) where it argued that 'the exercise of upgradation of the NRC is not intended to be one of identification and determination of who are originally inhabitants of the state of Assam. The sole test for inclusion in the NRC is citizenship under the Constitution of India and under the Citizenship Act including Section 6A thereof'. [104]However, as was seen throughout, the NRC updating process was highly controversial and seen as inadequate. Developed by the Government of Assam through a cabinet subcommittee in July 2013 and approved by the Union government in November 2014, these modalities necessitated a total of 16 documents to be used for asserting eligibility of the applicants in order to be included in the updated NRC.[105] The final list of the NRC is fixed for publication on 30th June 2018. However, while on the surface it may seem like differences and irregularities have been ironed out, on the inside, the NRC list still remains a farce with many rightful individuals being left out of the citizenship status. This is given due to the inconsistency and contradictory legislative provisions. A critical case in point is the Citizenship Act of 1950 wherein there exists a provision of citizenship by birth, i.e. 'every person born in India on or after 26th day of January 1950, but before the 1st day of July 1987…shall be a citizen of India by birth'. Going by this provision, any person born to even illegal migrant parents after 24th march 1971 but before 1st July 1987 is entitled to the Indian citizenship. However, given the NRC modalities, they

[104] Dutta, *Political Destiny of Immigrants,* 20.

[105] Ibid., 19.

cannot apply for citizenship as such individuals have no linkages with valid documents issued till 24th march 1971.[106] In all likelihood, these contrasting provisions will be examined and set right through a judicial intervention. However, what is more challenging and uncertain is the fate of those found to be non-citizens under the NRC's faulty modalities. With no significant move taken to ensure Bangladesh's compliance in accommodating the ousted Bangladeshis from India, like the pre-mediated Myanmar-Bangladesh arrangement for the Rohingyas, the future of these individuals is hanging fire. Lack of political will on the Indian side is seen to have percolated through generations and varied political parties till date. This has been reflected in Weiner's explanation where immigration determinants extend beyond the individual's decision to a broader context marked by the interaction of factors including economic linkages between the sending and receiving states like movement of capital and technology, role of transnational institutions, patterns of global inequalities and decision making power of the state. He thus goes beyond the generic economic connotation of immigration inducing factors to highlight the role of government and political forces in having the final say when he argues that 'when economic conditions create inducements for people to leave one country for another, it is governments that decide whether immigrants should be allowed to enter, and their decisions are frequently based on non-economic considerations'.[107] India has over the years ensured this through unguarded, unregulated and porous borders, use of immigrants as a vote bank to suit their needs, lack of administrative and military capacity to enforce the rules of entry, [108] absence of an immigration policy and rampant corruption among the lower bureaucracy making it easier to obtain false documents of validating citizenship. On 29th May 1979, S. Guru Dev in a newspaper article remarked "Solution calls for intimate cooperation among the major agencies- the State, community and the Centre. It is axiomatic that immigrants cannot evade detection unless the communicates on the border are sympathetic or helpful. There has been little or no debate in the state about galvanizing the border communities into (a) denying sanctuary and (b) creating a climate of rejection based on national

[106] Ibid.,20.

[107] Weiner, *Security,* 97.

[108] Ibid., 124.

obligations and self-interest. There is some talk of primary responsibilities but the stress is more on safeguards against arbitrary deportation".

While keeping doors open for immigrants is untenable given the strain it would cause on the resources of a developing nation like India, diplomatic pressure tactics should be applied and coercive diplomacy in extreme situations should be resorted to through threat to trade and river flows.

CHAPTER 3

DECONSTRUCTING IMMIGRATION: A CASE STUDY OF SELECT CASES OF GAUHATI HIGH COURT

The Immigration narrative has always been central to the political scenario of the state of Assam. The latest electoral exercise of 2016 in the state saw political contenders garnering a vast support base by spinning narratives and election manifestos around the slogan of "jati (nation), mati (land), bheti (home)." With this promise of safeguarding the Assamese people and their identity from the onslaught of 'Bangladeshis', the right wing Bharatiya Janata Party was voted to power after 2001 by ousting the more centrally inclined Indian National Congress. However, such primacy attributed to identity is not new to Assam. The early 1980s were a defining period and lay the foundation stone for what would go on to determine immigration discourse, called the 'Assam Accord'. After years of unrest since late 1970s through early 1980s, the then Prime Minister of India Smt. Indira Gandhi was wise enough to call for negotiations and invite the stakeholders for dialogue to the discussion table. Consequently, the Illegal Migrants (Determination by Tribunals) Act 1983 IMDT Act was promulgated as a piecemeal measure to pacify the protestors. However, her sudden demise threw the political situation into turmoil necessitating instant significant measures to be taken. This condensed into the succeeding Prime Minister Rajiv Gandhi to take over the reins and initiate a more concrete dialogue ultimately resulting into the Assam Accord which was signed on 15th August 1985 between the Government of India and the representative of the All Assam Students Union representatives (AASU). As a result, a 1985 amendment was made to the Citizenship Act of 1955 where in a new section 6A were to be added to exclusively deal with determination of citizenship pertaining to the state of Assam. Initially seen as a victory of Assamese power and identity, emotions soon were on the wane when the Assamese people saw no change on the ground with the immigrants infiltrating their lands, seizing their job opportunities and misappropriating their culture. After years of

constant struggle, the student's Union of Assam led by Sarbananda Sonowal reached the doors of the Supreme Court in 2005 calling for the court to step in and adjudicate on the same in the light of the failure of legislative and executive measures. This condensed into the much famed Sarbananda Sonowal vs.Union of India case of 2005 which made many pioneering judgments, one of the most far reaching in terms of impact, being the striking down of the ineffective IMDT Act of 1983. It was replaced by the Foreigners Act of 1946 which until then applied to foreigners residing in all the other states of India including West Bengal which too faced the onslaught of immigrants from Bangladesh, though to a much smaller degree. Barring the decadal Census exercises which reflected an alarming increase in the Muslim population of the Assam as against the national increase of Muslim population, there was no significant measure taken to identify and deport the immigrants in question until the recent National Register of Citizens (NRC) update exercise, being closely monitored by the Supreme Court, which aims at serving as a registry of all authentic citizens of the state in consonance with the provisions of the law of the land. Currently through with its first phase of publication on 31st December 2017, the second and final updation of the registry, after postponement, is due for 31st July 2018.

The Preamble provides to the people of India multi- dimensions of justice, liberty, equality and fraternity to be provided through legislative policymaking, executive implementation and judicial adjudication. While the former two organs of the government remain directly and indirectly accountable to the electorate for their acts of omission and commission, the judiciary has over the years remained relatively insulated from the framework of accountability with an impervious Collegium system that recommends the appointment and transfers of judges. The proposed NJAC (National Judicial Appointments Commission) to be set up by the 99th Constitutional Amendment Act (2014) aimed at giving the political actors and the civil society a role in judicial appointments but was expectedly struck down by the Supreme Court thus cementing the iron curtain around the Judiciary and upholding its exclusive and independent character. Such unbridled exercise of power consequently has, over the years seen instances of power excesses and overstepping of one's jurisdiction. This, in political hearsay, is better known as Judicial outreach and Judicial overreach. Stemming primarily from the concept of judicial review provided for by the articles

13 and 226 of the Indian Constitution, it declares any law as ultra-vires if found to be contravening any fundamental right declared as a part of the 'basic structure of the Indian Constitution' in the Keshavananda Bharti case (1973). The aggrieved party has the liberty to approach the Supreme Court or the High Court for violation of their rights. A case in point is Section 66 of the Information Technology Act (2000) being struck down by the Supreme Court in 2015 which was seen as a victory of freedom of speech. When such grievances or causes are taken up suo-motu by the court, i.e. on its own initiative or via a PIL (public interest litigation) it accounts for the exercise of Judicial outreach which enjoys no constitutional backing. Historically tracing its roots to the American Constitution, the principle of locus standi is discontinued to dispense justice assuming that in most cases the aggrieved party usually lack the wherewithal to pursue a legal matter in the long run. In the Indian context, a few well known outcomes of Judicial outreach include on the basis of a PIL banning smoking in public spaces, ordering 10 years and older diesel trucks to go off the roads in Delhi, institutionalizing the PIL system itself among others. When the court extends its jurisdiction beyond its foray by venturing into the legislative and executive aspects of governance and destroying the essence of the separation of powers principle, such judicial adventurism amounts to Judicial overreach- a situation not desirable in any democratic state. The 2015 Allahabad High Court verdict ordering government servants and politicians to send their children all to government schools is Judicial overreach at its best. I shall analyze the same with respect to High court verdicts concerning illegal migrants in Assam after enlisting the legal provisions currently invoked to govern "foreigners, detection, deportation, citizenship, National Register of citizens(NRC) in respect of Assam :

The Foreigners Act of 1946: this Act was enacted to confer upon the Central Government certain powers in respect of entry of foreigners into India, their presence therein and their departure therefrom. The term 'foreigner' is defined in Section 2, clause (a) to mean a person who is not a citizen of India. The regulations regarding recognition of citizenship are contained in the Citizenship Act 1955 and the Indian Constitution. Section 3 of this Act empowers the Central Government by order, to make provisions, either generally or with respect to all foreigners, or with respect to any particular foreigner or any prescribed class or description of foreigners for

prohibiting, regulating or restricting their entry into India or their departure therefrom or their presence or continued presence therein.

The Foreigners Order 1948: In exercise of the powers conferred by Section 3 of the Foreigners Act 1946, the Central Government made the Foreigners Order 1948. This order came into force on 14th February 1948 and lays down regulations concerning foreigner's entry intp, movement in and departure from India.

The Foreigners (Tribunals) Order 1964: Under the provisions of this order, the matter whether a person is or is not a foreigner is referred to the foreigners tribunals within the meaning of the Foreigners Act for opinion. The Tribunals shall consist such number of persons as the Central Government may think fit. The tribunals shall have the powers to regulate its own procedure. And also shall have the power of the Civil Court under the code of Civil Procedure,1908 in respect of – summoning and enforcing the attendance of any person and examining on oath; requiring the discovery and production of any document; issuing commissions for the examination of any witness.

The Foreigners (Tribunal) Amendment Order, 2012: Under the Foreigners Tribunal amendment order 2012, every case should be disposed of within a period of 60 days after the receipt of the reference from the competent authority.

The Passport (Entry into India) Act 1920: This Act confers powers on the Central Government to make rules requiring the possession of passports by persons entering India. Under Section 3 of the Act, the Central Government may make Rules requiring that persons entering India shall be in possession of passports, and for all matters ancillary or incidental to that purpose, and also provides for fines, penalties for contravention thereof.

The Citizenship Act 1955: A comprehensive law dealing with citizenship was passed by Parliament in 1955 in accordance with the powers vested in it by Article 11 of the Constitution. The provisions of the Act may be broadly divided into three parts, acquisition of citizenship, termination of citizenship and supplementary provisions. The Act provides five modes of acquiring the citizenship of India. These are :

- By birth
- By descent
- By registration
- By naturalization
- By incorporation of territory

6(A) Special provisions as to citizenship of persons covered by the Assam Accord: Any person who came to Assam on or after the 1st January 1966 but before the 25th of March 1971 and has been ordinarily resident in Assam and detected to be a foreigner shall register himself before the Registering Authority as specified by the Central government in accordance with he rule and if his name is included in any Electoral roll in force on the date, his name shall be deleted there from on the date of such deletion. He shall be deemed to be a citizen of India for all purposes from the date of expiry of a period of 10 years from the date in which he has been detected to be a foreigner.

The Citizenship (Registration of Citizen and Issue of National Identity Cards)Rules 2003: The Central Government has made the rules for preparation of the National Register of Indian Citizen in the state of Assam in exercise of the powers conferred by Section 18 of the Citizenship Act ,1955.

The Citizenship Rules 2009: The Central Government had made rules in exercise of powers conferred by Section 18 of the Citizenship Act 1955 in respect of Application for citizenship, issue of certificates of citizenship and maintenance of Registers and connected papers; provisions as to citizenship of India for persons covered by the Assam Accord; renunciation and deprivation of Citizenship of India. These rules have repealed the earlier citizenship Rules, 1956.[109]

When the Indian Constitution saw the light of the day in January 1950, it only dealt with the mere identification of Indian citizens determined primarily by blood ties, lineage and descent through articles 5 to 11 under part Two of the Constitution.

[109] White paper on Foreigners Issue by Home and Political Department, Government of Assam. (2012).

Thereon having empowered the Parliament to legislate on the matter, the Citizenship Act of 1955 was enacted to now extend the discussion to aspects of acquisition and loss of one's citizenship. This concept of Citizenship underwent amendments in 1986, 1992, 2003 and 2005 with another proposed amendment in the pipeline, i.e. the Citizenship (Amendment) Act of 2016, which has caused considerable and understandable flutter and discomfort to all political agents with its exclusionary and selective targeting of certain religious minorities. Citizenship in India has thus transformed in essence from its pre-constitution days' 'natural' citizenship model to one of a 'cultural' notion of citizenship today. Ramifications of such legislations in most recent times have found expression in the state of Assam which has been facing the onslaught of unabated migration from across the border amounting to 'external aggression and internal disturbance' as was observed by the Supreme Court in the Sarbananda Sonowal vs. Union of India (2005) verdict.

Seen as a landmark case in immigration jurisprudence, the Sarbananda Sonowal case(2005) set the discourse and the ball rolling in more ways than one, the quashing of the Illegal Migration Detection by Tribunal (IMDT) Act of 1983 primarily among others determining immigration trajectory and history in the state even 13 years later. Enacted in 1983 by the then Prime Minister Indira Gandhi to lay down principles identifying illegal migrants (as the name suggests), but with special protection for the concerned minorities against the onslaught of the majority, this Act placed the onus to prove the nationality of the accused on the prosecution instead of the accused himself. It was later observed by the Supreme Court that the Act singlehandedly emerged as the biggest hurdle impeding the identification and deportation of immigrants from Assam. Given that the evidential proof needed to establish one's citizenship like date and place of birth, name of parents, lay well within the personal knowledge and capacity of the concerned individual, the burden of proof henceforth lay on the accused or the proceedee rather than the prosecution, in tandem with Section 9 of the Foreigner's Act 1946 which was operational for immigrant detection in other states of India. The principle underlying Section 106 of the Evidence Act (1872) too reiterates the burden of proof is to lay on the accused and in case of failure to do so, "an adverse inference of facts may arise against him, which coupled with the presumptive evidence adduced by the prosecution or the Department would rebut the initial

presumption of innocence in favour of that person, and in the result prove him guilty'.[110] The supremacy accorded to it was reflected in the continual judgments that upheld the principle like the Shambhu Nath Mehra vs. the State of Ajmer (1956), the Collector of Customs vs. D.Bhoormull (1974), the State of West Bengal vs. Meer Mohd. Umar (2000) to note a few. As a result, the post 2005 era sees a sudden spurt in cases of people being identified as illegal migrants by courts and being deported to their country of origin by the state administration. One such judgment was the Kaziranga National Park vs. Union of India.

First Case Study :

Kaziranga National Park vs. Union of India (2015)

Context of the case: Covering two writ petitions and two PILs, the Gauhati High court judgment on the Kaziranga National Park was delivered in 2015 amidst some understandably increased traction among different sections and classes of the society. Taking cognizance of news articles on illegal poaching of wildlife in and around the National Park, the Gauhati High court, exercising judicial activism suo motu filed a PIL (Public interest litigation) to enquire into the same. Another PIL filed called for the additional removal of people and the encroached lands around the National Park. The two writ petitions subsumed under it invoked the writ of Mandamus to ensure no such eviction "takes place without the due process of law" while calling for settlement of rights.

Historicity of the Kaziranga narrative: A historical background of the National Park would better equip one in an analysis of the verdict. An uninhabited forested impervious Kaziranga too, like the other forest areas of Assam in the 1900s was consequently cleared for human establishment and settlement with the spread of the colonial era tea plantations. As early as 1905, the Kaziranga Reserve Forest was created primarily with an eye on conserving the rhinoceros population in the forest. Shooting was formally banned in 1926 while it was declared a Wildlife Sanctuary in 1950, a National Park in 1974 and a World Heritage site in 1985. New areas were

[110]Jaesuddin Ali and Ors. Vs Union of India and Ors., (Gauhati High Court 2014) .

affixed to the Park through subsequent additions, six in total from 1977 to 1999. The deification and larger than life celebration of the rhinoceros finds its origins in this iconic National Park. Through the years, there has been increasing clamor in the media (electronic and print alike) and the civil society increasingly dotted with the sprouting of non-governmental organizations, to conserve this much revered animal even if it stood at loggerheads with an organization's ideals and practices. A manifestation of such hypocrisy is reflected in the presence of colonial era tea bungalows serving as guest houses to tourists in the midst of the National Park to provide a one-of-a-kind experience of being one with nature with rare glimpses of the Animal, not to mention the indiscriminate reserves of forest lands that were cleared in the beginning of the 20th century to accommodate the interests of these very tea corporations. It is common to see one switch stands just to be able to garner maximum profits and an acceptable public image, in this case emerging as an agent of conservation, rendering them on the right side of history. The tacit support of the government through selective passivism over the years has made such transitions that much more easier and assisted in escaping public scrutiny. However, the tribal populations (primarily agriculturists) who skirt the periphery of the Kaziranga National Park have had to bear the wrath of a faulty weak law, hostile urban public opinion that largely influence media houses and a government that sees them more often as a part of the problem than as a part of the solution. Like the losses incurred by trampling of their standing crop by animals of the forest were not enough, timely compensation for the farmers remain a far cry. "Local activists would seethe at the irony of having poor farmers pay the price for wildlife conservation, even as authorities allowed places like the neighboring Numaligarh Oil Refinery to construct an extravagant golf course along the elephant corridor".[111] Such adverse situations further push the already agriculture-averse youth of the Park to embrace non-agricultural pursuits that generally mandate the need to migrate to other parts of India for paltry amounts exposing one to extremist forces in a land where he now identifies as a minority. With the ones who decide to stay back, uncertainty looms large with erratic monsoons, lack of employment opportunities accompanied with an unfavorable public opinion that see them as accomplices of poachers. Alongside

[111] Sanjay Barbora, *Riding the Rhino: Conservation, Conflicts, and Militarisation of Kaziranga National Park in Assam,* (Antipode, 2017), 1151.

rampant poaching reports, there were also reports of increasing encounters of identified 'poachers' a claim that never required or called for evidential backing by the authorities. Such selective reception of facts was evident through the course of the trial and the final judgment dispensed by the Gauhati High Court in the Kaziranga National Park vs. Union of India case.

Deconstruction of the judgment: Two important reports/ findings emerged in the course of the trial. First was a report submitted by the Director of the Park outlining the key issues and providing a solution framework covering an array of subjects from finances to a revamp of protocols and policy. The second was a high court appointed high power committee that studied the composition of residences falling under the jurisdiction of the Park. Some noteworthy observations included the insurmountable number of pattas being issued by the Government to the residents of the second, third and fifth addition and land being procured by the government from tea estates was not followed by consequent removal of its residents. The petitioners, i.e. the residents of the fringe villages in the Park (primarily the Bandardubi and Deuchur Chang villages) contended that being rightful patta-holders and revenue villages, they could not be evicted. Whilst invoking provisions of the Wildlife Protection Act(1972) for proper settlement of rights and the Forest Rights Act(2006) "to ensure that no eviction takes place without the due process of law",[112] the residents of Golaghat district invoked the writ of Mandamus that empowers a court to direct a lower court or tribunal to perform their official duties that they have failed or refused to perform. In response, the Court adjudicated, after due inquiry that "none had any right or title over the land" in the second addition. With respect to the Deuchur Chang village, the court declared that a reserve forest could not be dereserved to make it a revenue village without the Centre's consent thus overturning and rendering the state government's action void while leaving the affected population hapless without recourse of any sorts. For Bandardubi village, having been an animal corridor any claim of right to occupation was held untenable by the court. The court observed that "the acquisition and eviction of human habitation is being done for protecting the wildlife which is exposed to rampant poaching".[113] The residents of the two aforementioned villages failed to

[112]Kaziranga National Park vs. Union of India, (Gauhati High Court, 2015).

[113]Ibid.,

receive any compensation under the Forest Rights Act primarily because they failed to assert their identity as Scheduled tribes or forest dwellers in their petition. While it became evident during the course of the trial, through the observations of the learned Advocate General and through documental evidences submitted that "since no social forest was developed, the forest department gave the land to the government and accordingly, it has become the revenue village",[114] the Court fell short of pulling the Government for encouraging such illegalities. However, the court was prompt to sacrifice the welfare of the peasants at the altar of environmental conservation with no provision for compensation in sight. It called for "expeditious steps to evict the inhabitants in the second, third, fifth and as well the six additions of the Kaziranga National Park, including Deuchur Chang, Banderbdubi and Palkhowa ,within one month".[115] The eviction drive faced staunch opposition from the village inhabitants leading to the death of two protestors. The Court refused to intervene or even address calls for compensation before dislocation. What is peculiar to the Rhino conundrum is that "the increasing clamour to address the poaching of rhinos coincides with the demands for evictions of Bengali-speaking Muslim peasants from the flood plains that form the perimeter of the park's core area".[116] It was more convenient laying the onus of rhino poaching on a specific community or class- in this case being peasants who were primarily Muslims or belonged to "indigenous communities like the Mishing" [117]- than to identify individual poachers. It suited the middle class urban perception that saw these primarily Muslim peasants as Immigrants poaching for their livelihood thus causing harm to the Rhino who had now become "synonymous with Assamese identity and pride".[118] The overlap of such issues was also reflected during the trial when the court ordered the state administration to take the biometrics of all the residences and verify the nationality of the 'encroachers' residing in the second, third and fifth additions of the Park. Amidst news reports of the administration having called upon only the Hindu inhabitants of the Park to discuss relocation hours before the forceful eviction, not to mention the very same news reports that led the Court to

[114]Ibid.,

[115]Ibid.,

[116]Barbora, *Riding the Rhino,* 1155.

[117]Kaziranga case, (Gauhati High Court,2015).

[118]Ibid.,

file a PIL in the first place, it leaves one wondering if a favorable verdict was possible had the inhabitants of the Park not been Muslims. The blanket protection against prosecution by law provided to the gun wielding guards has led to increased 'extrajudicial killings'. According to a BBC report, "from 2013 to 2014 the number of alleged poachers shot dead in the park leapt from five to 22. In 2015 Kaziranga killed more people in the park than poachers killed rhinos-23 people lost their lives compared to 17 rhinos".[119] The government's resort to further militarize the park as a measure to secure and fortify it has not born favorable results with respect to poaching incidents. This "guns and guard" approach has rather only caused fissures between the forest department and the inhabitants of the Park. This has found manifestation in public opinion reflected in the court's observation wherein it stated that given reports of poaching, "it is irresistible inference that the inhabitants in KKP area would fall in suspect group and they would be well-acquainted with the areas and animal movements, therefore they would alone be in a position o do poaching successfully or abet poaching by others". [120] Based on such assumptions lacking circumstantial evidence proves the trial was more a trial of perceptions than evidences, opening doors to allegations of a probable 'media trial' in the said case. This court thus failed to heed to its own observation earlier in the trial wherein it stated, through the report of the Director of the Park, that results would be borne depending on "… support of the stakeholders, especially the local stakeholders..",[121] recalling the concept of 'joint forest management'. However, what one witnessed through this trial was further alienation of the rural populace to suit popular urban mentality and discourse on conservation. Thus what began as a battle against poachers ended up as one against so called immigrants acquiring political hues and causing avoidable loss of life while leaving the Conservation and poaching issue still unaddressed. What was the need of the hour was a field survey of ground realities like extra-judicial killings, investigating the identity of the proclaimed 'poachers', a study of the lifestyle of the inhabitants of the Park while examining employment opportunities made available to them. By ordering a clear cut unassisted removal of the inhabitants, the Judiciary has

[119]As cited in a BBC news report.

[120]Kaziranga case, (Gauhati High Court, 2015).

[121]Ibid.,

only served its own conscience at the cost of the welfare of the less fortunate and under-empowered populace. One could argue such disconnect stemming from the fact that the Judiciary does not remain accountable to the people and hence is inadvertently out of touch with ground truths. The role of the judiciary in the Kaziranga case thus reflects how disastrous judicial overreach can be for a democracy that has always run on the principle of 'Separation of Powers'.

Second Case Study :

Manowara Bewa vs. Union of India and Ors. (2016)

Context of the case: The second case of interest is the Manowara Bewa vs.Union of India and Ors (2016) wherein the petitioner through her writ application under article 226 of the Indian Constitution, sought the quashing of the verdict of the Foreigners Tribunal. On the charges that the petitioner had failed to discharge the burden of proof as mandated by Section 9 of the Foreigners Act (1946) to prove her nationality, the Tribunal had declared her a foreigner. The petitioner, in this case being Manowara Bewa, had submitted the following evidences in her support, namely her school certificate, a copy of the 1951 NRC (National Register of Citizens), extract of the voters list 1966, extract of the land document and a certificate issued by the Gaon Panchayat Secretary and countersigned by the Revenue Officer of the state certifying residentship of the certificate holder in an area of his jurisdiction. However, during the course of the trial discontinuities in the provided information were observed in her 'evidence-in-chief' and the 'oral evidence' thus raising questions about its authenticity.

Deconstruction of the judgement: The court invoked the LICI vs. Rampal Singh Bisen (2010) wherein it was held that mere submission of a document as evidence did not serve as proof and there was a need to prove such claims by either primary or secondary sources. "At the most, admission of documents may amount to admission of contents but not its truth".[122] Consequently, based on circumstantial evidence, the High Court upheld the verdict of the Tribunal in declaring Manowara Bewa as an illegal migrant. However, adjudication by the Court did not stop with the

[122]Manowara Bewa vs. Union of India , (Gauhati High Court, 2016).

determination of the petitioner's nationality. It went a step further and decides to address the "Larger issue" at hand, in this case being the authenticity and validity of the certificate duly issued by the Gaon Panchayat Secretary and counter signed by a government official i.e. the Block Development Officer. The court believed that if it had ignored the matter at hand, it "would have amounted to shirking our constitutional responsibilities".[123] In its own defense, the court further stated that "this we are doing because such a certificate was pressed into service in the present writ petition in support of the claim of the petitioner to be an Indian citizen".[124] On deciding that "the entire matter required a closer look",[125] the court began tracing the timeline of events that led to the final decision on the documents admissible to determine the eligibility of people for entry in the updated NRC. In the course of the trial, two points were made with respect to the document in question: first, it was admissible only as 'a supporting document' to show one's linkage to her parent or grandparent who would necessarily have to be Indian citizens; second, the certificate was to be issued only to married women as they were more likely to "shift to a different location to reside with their husbands".[126] It was made clear through the details provided about the minutes of the meetings held between 2010 through 2015 that all the concerned stakeholders were taken into confidence on the updation process of the NRC. It was also approved by both the State as well as the Union government and presented before the Supreme Court before the actual process commenced. It also included the "All Assam Students' Union (AASU) and 26 ethnic Unions as well as All Assam Minorities Students' Union (AAMSU)". Finally, it was also stated that the "entire process of NRC updation is being closely and frequently monitored by the Supreme Court".[127] Finally, it was brought to the knowledge of the Court by the NRC State Coordinator that the said certificates would be subject to two levels of scrutiny namely: office and field verification, something that the Court believed was not of concern. It instead raised doubts about the veracity of those conducting such analysis as they were not judicially trained akin to the judicial officers. Thus the Court declared the certificate

[123]Ibid.,

[124]Ibid.,

[125]Ibid.,

[126]Ibid.,

[127]Ibid.,

issued by the Gaon Panchayat Secretary as having "no statutory sanctity". This was done on the following counts:

- Being held contrary to the Citizenship Rules of 2003 which mandates every applicant to furnish correct information of his family and himself.
- Cannot be held as a measure in national interest.
- The additional certificates created would require extra, money, energy, time and manpower to analyze its authenticity.
- No legislation has specified the functions of the GaonPanchayat Secretary, not even the 1994 Assam Panchayat Act. Hence, if issued, the certificate would serve as a 'private document'.

What becomes very obvious throughout the trial is that the Court misses the wood for the trees. The concerned certificate is not to serve as an evidence to establish one's citizenship but merely to acknowledge a married woman's shift in residence from one jurisdiction to another. Its limited purpose of establishing linkage with one's lineage is served only after due verification and establishment of facts using other documental evidence. Also, the list of documents to be furnished were arrived at after due consideration of all contenders and in consonance with the required law of the land. Casting doubt over the veracity of the certificate even after such deliberations is baseless. Such blatant was the judicial overreach in this case, that the Supreme Court duly observed in the Rupajan Begum vs Union of India (2017) that the High Court resorted to adjudicate on an issue that were not asked of it. "Resolution of the issue was not indispensible for answering the writ petitions under consideration of the High Court".[128] Instead as a result of overstepping its jurisdiction, what the High court initiated was a slew of new petitions from the women who were issued the said certificate by the Gaon Panchayat Secretary as a supporting document to enroll in the updated NRC exercise. Thus this case emerges as an example of how an instance of judicial review invoking the writ of certiorari goes awry on the exercise of judicial overreach adding to the woes of an already over-burdened under staffed judiciary.

[128]Rupajan Begum vs. Union of India, (Supreme Court of India, 2017).

Third Case Study :

Moslem Mondal and Ors. Vs. Union of India (2010).

Context of the case: The final case of interest has been the Moslem Mondal and Ors. Vs. Union of India (2010). Prima facie, it may seem to appear stemming in response to a writ petition filed by the proceedee, in this case being an individual called Moslem Mondal and his family of four including his wife and two sons to quash the verdict of the Foreigners Tribunal declared ex parte that held them as foreigners. Through the course of the trial, it was observed that a writ proceeding cannot serve as a substitute to a proceeding before a Foreigners Tribunal as established by the 1964 Order. Also, the tribunal is required to compulsorily only give an 'opinion' on whether the accused is a foreigner or not for which it is required to adjudge whether the individual is a citizen of India or not- a question which can also be determined and decided by a civil court if wished by the proceedee. The court broadly laid down the framework stating in unambiguous terms that a court did not have any right to determine the nationality of an individual, in this case, if he were an Indian citizen or not. Such a power rested only with the Tribunal which too is expected to only render an 'opinion' on the question of one being a foreigner or not. It is then up to the Central Government to decide on the deportation of the foreigner to its country of origin or not. Thus the approach adopted by Moslem Mondal through his writ petition in the High Court "cannot be said to be a legally permissible procedure".[129] In any case, if the Court decides to get into the merit of the judgement dispatched by the Tribunal, it is bound to determine such on the basis of the same evidence that was made available to the Tribunal and not any additional evidence that was later produced by the petitioner to support his claim. . However, in the concerned petition, it was alleged that having been let down by the counsel the petitioners had employed, they were deprived of their opportunity to submit evidences and establish their nationality as claimed by them. Thus the Court issued an interim order for the petitioners to be heard with new admissible evidence before the concerned Tribunal. Consequently, it was concluded that the four petitioners were not foreigners after having successfully proven their citizenship.

[129]Moslem Mondal and Ors. Vs Union of India, (Gauhati High Court, 2010).

Deconstruction of the judgement: Given the ambiguity surrounding Citizenship, primarily with respect to a state like Assam wherein politics has been determined in overwhelming proportions by the immigration narrative, the learned Judge felt the need to go beyond mere adjudication of the case based on its merits and demerits to address the underlying 'questions of law' which were identified as the following :

- "Whom does the burden of proof lie on with respect to proceedings initiated by the Tribunal established under the Foreigners Order 1964.
- If the state is required to satisfy the Tribunal of the charges leveled by it.
- If documents under the Census Act and the electoral rolls can serve as permissible evidences.
- What is the role of the Tribunal in such proceedings?"[130]

One must remember that the IMDT Act was repealed in the Sonowal (1) case of 2005 and was replaced by the already existent colonial era Foreigners Act of 1946 which until then was applicable to the whole of India at the exclusion of Assam. Thus the Judge reiterated that the Foreigners Act 1946 was formulated not to primarily deal with an issue of a nature like that of immigration in Assam but merely to "regulate the entry, stay and departure of individuals who are not citizens of India".[131] If one was found contravening provisions of the aforementioned act, Section 14 provided for penalty of imprisonment extending up to five years along with an additional fine. More so, the Foreigners Act was formulated at a time when the term 'India' subsumed present day India, Pakistan and the territory of Bangladesh. At a time when the footfall of foreign individuals entering India was not very high and identification of such individuals was possible by mere externalities given the absence of any overlap of culture, anthropology and history, the Foreigners Act served its purpose. This compounded with the lack of an official immigration policy of the Government necessitated the need for an unambiguous interpretation of the laws determining foreigners and their movements within the territory of India which was undertaken by

[130]Ibid.,

[131] Ibid.,

Justice Chelameshwar under the said petition. When a competent authority like the Central Government makes a 'reference' to a Tribunal raising doubts about an individual's nationality, the Tribunal is bound to notify the concerned individual about the grounds on which he is believed to be a non-citizen and give him "reasonable opportunity of making representation and producing evidence in support of his case".[132] If the proceedee proceeds with adjudication and decides to produce admissible evidence and successfully proves his claim, the state has to follow suit and "adduce evidence in rebuttal" to support their reference made to the Tribunal earlier. In case the proceedee refrains from pursuing the matter any further, the state is still bound to submit evidence in support of its claim regarding one's citizenship. To address the first question of law, there was a need to define the connotation 'burden of proof' that through the years emerged synonymous with every judgment dealing with determination of one's citizenship and nationality. The court hence delved in detail regarding the same by citing court verdicts to determine the scope and meaning of the term. Section 9 of the Foreigners Act 1946 in clear terms placed the burden of proof on the accused which was in consonance with most international immigration laws of leading democracies like the United Kingdom and the USA as was observed in the Sarbananda Sonowal Case (1) (2005). Section 106 of the Evidence Act too underlines the same principle by laying the onus on the accused person. However, the Court went above and beyond, referring to academic texts and judicial verdicts for references to deduce the scope and meaning of the term 'burden of proof' within the Foreigners Act 1946. It made an important distinction between two often mistakenly used interchangeably terms 'burden of proof' and 'onus of proof'. While the latter was to be invoked only when "the tribunal finds the evidence pro and con so evenly balanced that it can come to no"[133] conclusion about one's nationality, the former term included three major facets namely: "the persuasive burden, the evidential burden and the burden of establishing the admissibility of evidence".[134] Under persuasive burden, in a criminal case the burden of proof lay on the prosecution to prove the charges leveled against the accused as legislated under Section 101 of the Evidence Act. However, Section 106 stands as an exception to the above. It does not replace Section 101 as the

[132] Ibid.,

[133]Ibid.,

[134]Ibid.,

prosecution is still required to prove its stand and case. Instead Section 106 is invoked only when the burden of proof concerns facts that are within the complete and exclusive knowledge of the accused who can prove it without much hassle. "Thus when it is stated that the burden of proof is on a foreigner to prove that he is an Indian citizen, what it means is that if the proceedee claims to be an Indian citizen, he has the burden to establish his claim of being an Indian citizen, because the State is not expected to prove a negative fact, namely, that the proceedee is not an Indian citizen."[135] Pertaining to the question of evidential burden, it was held that it was not always constant and shifted continuously as the trial proceeded. Coming to the third question of whether Census documents can serve as admissible evidences, the Court held that despite such certificates being public documents, they could not serve as adduced evidences especially for exercises like an NRC update exercise. With respect to voters list, it was concluded that despite serving as admissible evidence, it did not amount to "conclusive proof of the correctness of the facts .." such entries in the electoral rolls only bore proof to the fact that the individual "whose name finds an entry in the voters list at a given point of time, is present on Indian soil on the date of the enumeration".[136] Such entries neither create nor destroy any rights or entitlements of citizenship. However, they are seen a relevant evidence under the Citizenship Act, section 6 A which strictly pertains to Assam. However, it was noted that one also had to prove that the entered name in the concerned electoral roll pertained to the said individual as it was "possible that more than one person with the same name existed."[137] After laying down the entire procedure to be followed in case of determination of one's citizenship, the concerned High Court after due consideration of facts and admissible evidences concluded that all the four petitioners concerned were indeed Indian citizens and upheld the verdict of the Tribunal dated 15.10.2008 (based on the High Court's interim order) . It concluded by pulling up the state for conducting proceedings in an inefficient and indifferent way and conduct. Through this verdict, the Court has done done more than mere laying out the framework of the manner in which proceedings should be conducted. It has provided clarity on judicial concepts prone to misinterpretation thus plugging the loopholes in colonial era

[135]Ibid.,

[136]Ibid.,

[137] Ibid.,

legislations that are still operative in the country against the background of a lacking immigration policy. What started as a mere writ petition hearing exercising the judicial review power, the court went on to address the larger question of the language of the concerned legislations thus exercising judicial overreach , while not necessarily consolidating into negative outcomes.

Conclusion:

After a cursory study of over fifty verdicts of the Gauhati High court, the following three verdicts formed the basis of the entitled case study :

- The Kaziranga National Park vs. Union of India (2015). The learned judges were the Hon'ble acting Chief Justice Mr. K. Sreedhar Rao and Hon'ble Mr. Justice P.K. Saikia.
- Manowara Bewa vs. Union of India and Ors. (2016). The learned judges were Hon'ble Mr. Ujjal Bhuyan and Hon'ble Mrs. Justice Rumi Kumari Phukan.
- Moslem Mondal vs. Union of India (2010). The learned judges were Hon'ble Chief Justice Mr. Jasti Chelameshwar and Mr. Justice A. Ansari.

The first verdict demonstrates the Gauhati High Court exercising judicial activism at the start and slowly receding into judicial overreach which results in avoidable loss of human lives caused by a judicial order. It fails to address the incidents of poaching for which it was called upon in the first place. Instead it ordered a mass eviction of villages skirting the National Park with no compensation and rehabilitation insight.

The Second verdict after adjudicating on the nationality of the concerned petitioner overstepped one's jurisdiction to go on to determine the constitutional validity of a certificate issued by the Gaon Panchayat Secretary and counter signed by a government official. It concluded that the said certificate only added to the already existing large volumes of documents and did not serve any purpose other than draining resources and finances. Having disregarded the aspect that the list of

admissible documents were arrived at after due consultations with all stakeholders across the spectrum, the Supreme Court later pulled the High Court for overstepping its authority and upheld the validity of the certificate. This emerges as a classic example of unchecked judicial activism leading to judicial overreach.

The final verdict demonstrated how judicial overreach when exercised with caution and restraint could also reap dividends for concerned stakeholders. Herein, the court after determining the nationality of the petitioner , went on to outline the framework of processes involved in determining one's citizenship. Through this verdict, terms pertaining to colonial legislations were defined to make them relevant in present scenarios thus serving as a guide to future petitions.

However, through the course of research and verdict analysis, I observed that all cases that had filed writ petitions or against whom the state had made a 'reference' to the Foreigners Tribunals were Muslims. One could infer this trend as reflecting the inherent belief in the system and a grave systemic fault that Muslims alone comprise immigrants from across the border. The 2016 proposed amendment to the Citizenship Act is a case in point. Such a tendency of associating a whole community and disassociating others with the identity of immigrants is a telling picture of how disadvantaged Muslim petitioners are when they step into the world of litigation, irrespective of the merit of their cases. Such legislative inaction is compounded with executive lethargy which the High court aptly addresses in Md. Anwar Ali and Ors. Vs. state of Assam and Ors. (2011) stating that a foreigner who had been so detected in 2005 still had no action taken about his deportation until 2011 despite the entire proceeding at the tribunal taking over twenty years to complete.

The second observation made through the course of research was the tendency to determine the identity of the petitioner invoking the clauses of the Citizenship Act rather than a legislation on Immigration per se. The citizenship Act provides a negative definition of who is a citizen, that is, anyone who is not a foreigner. This mandates an individual whose citizenship is in question to prove that he is not a foreigner. Thus , the discourse on Immigration today is being determined by clauses of Citizenship rather than ones pertaining to Immigration itself. The other legislation mostly referred to, by courts in the process of adjudication is the Foreigners' Act of 1946. This colonial era legislation evidently falls behind its times unable to address

real issues that today's globalized world and porous borders create. Popular arguments forwarded for the repeal of the Foreigners Act pertain to that of conferring unfettered and unchecked powers of identifying and deporting an individual disregarding the due process of law, proving to be "an anti-thesis to the rule of law". The provisions of facilitating house arrest, solitary confinement and detention have negated the fundamental human rights of life and personal liberty ensured under the Constitution. What is further incomprehendable is the incompatible provisions of the Foreigners Act 1946 and the Citizenship Act of 1955. While the Foreigners Act provides for deportation of identified illegal migrants with disregard for the due process of law and the fundamental rights each person is entailed to by virtue of being human and the absence of tribunals to determine such questions of law, the Citizenship Act prescribes that in case of any doubt or ambiguity over "whether, when or how any person had acquired he citizenship of another country, the central government shall first determine such questions." [138] Despite such unambiguous conflicting provisions, the Gauhati High Court has read both these legislations in the same breath to determine the question of an individual's nationality.

Through the three cases, there emerges a constant thread of story: one of ambiguity surrounding the discourse of immigration in the absence of formal legislation on the same. Given the legislative vacuum, the Judiciary is left to itself to decide, determine the fates of people who it is not even accountable to, at the end of the day.

[138] https://www.thehindu.com/todays-paper/tp-opinion/why-archaic-citizenship-laws-must-go/article6410817.ece

Conclusion

While United Nations' description of the 2017 Rohingya refugee crisis as "a textbook example of ethnic cleansing"[139] garnered considerable attraction, India too alongside was dealing with severe backlash for its stand on deporting some odd 40,000 Rohingya Muslims residing all over India back to its country of origin, Myanmar. Paper editorials were dotted with advices, directives and commands on how the Government should trot on the situation given that India is neither a signatory to the 1951 United Nations Human Rights Convention nor its 1967 Protocol. Citing India's refugee history dating back as far as the 1950s with respect to the Tibetans, Afghanis, Nepalis, proponents of open borders called for India not to divert from its historical identity and global standing as a reliable nation, going as far as invoking the mythological Hindu texts citing verses that advocated the need for one to help thy neighbor. Amnesty International appealed to the Indian Prime Minister to "use his visit to urge the Myanmarese authorities to protect civilians and allow humanitarian aid to the affected areas" [140]. However, the Indian head of the government while expressing concern over the extremist violence, made no mention of the organized persecution of the Rohingya minority. Instead, like a veiled supporter of Andrew Altman and Christopher Wellman's communitarian stand on borders, India advanced a "$4.5 billion line of credit –its third and largest ever- to Bangladesh"[141] to help cope with the sudden influx of Rohingya refugees who fled to Bangladesh. It seemed like a compensation of sorts discharged as a duty towards the immigrants in exchange for their closed borders.

[139] https://news.un.org/en/story/2017/09/564622-un-human-rights-chief-points-textbook-example-ethnic-cleansing-myanmar

[140] https://www.thehindu.com/news/national/rohingya-are-illegal-immigrants-who-need-to-be-deported-says-kiren-rijiju/article19625459.ece

[141] https://www.livemint.com/Politics/PJNGy9mN1sOLFqVTKKdI5L/Bangladesh-signs-45-billion-loan-deal-with-India.html

The year 2016 too was marred by the immigrant narrative in domestic Indian politics. The run-up to the 2016 Assam assembly elections saw political discourse center around the Bangladeshi immigrant. Repetitive flashbacks and comparisons to the 1985 era became the norm of the day. An anti-immigrant stance won the day for the right wing party –the Bharatiya Janata Party- who rode high on the promise of deporting all illegal Bangladeshi immigrants. This was followed by a proposed amendment to the 1955 Citizenship Act. The conflictual clause included a religious basis for granting of citizenship making "illegal migrants who are Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, and Bangladesh, eligible for citizenship".[142] The exclusion of Muslims was so stark and blatant that it compelled 'all progressive forces' to join hands and garner dissident voices against the proposed amendment. As a result, in 2018, the amendment is still in the pipeline but suspiciously, not struck down. Today, if the amendment comes through, it would not seem unjustified to communitarians like Walzer and Andrew Altman and Christopher Wellman who uphold the sovereign right of every state to decide its own immigration policy as an element of the larger right to one's self-determination. However, liberals like Joseph Carens would be highly disappointed in India as it would be a direct manifestation of what he is principally opposed to- immigration policies serving as proxies to exclude or disadvantage a particular religion or race.

Taking it as a given that the nature of the polity at the Centre determines immigration flows and patterns, a country susceptible to immigrant exodus from all directions like India cannot afford to be determined by political interests and rationale in such a matter where its global standing and identity as a democracy is increasingly at stake in today's increasingly Indo-pacific centric world. Such a vacuum also induces the Judiciary to step in to fill the void by adjudicating petitions that contend that their fundamental rights have been violated by virtue of being Indian citizens. Other than an increased burden on the judiciary, it allows for the judiciary to navigate the open spaces and exercise judicial overreach by overstepping its jurisdiction. I proved this by citing and analyzing three Gauhati High court judgments: in the Kaziranga National Park vs. Union of India (2015), the Court addressed the writ petitions and the

[142] http://www.prsindia.org/billtrack/the-citizenship-amendment-bill-2016-4348/

PILs by exercising judicial activism by adjudicating on the issue of poaching reported from the Park but eventually going on to determine and call for an enquiry into the identity of the residents of the Park. This not only resulted in bringing to the forefront an array of unaddressed issues from extra-judicial killings to the lackadaisical approach of the executive, but also left the main issue of poaching unaddressed. Hence three years down the line, even today the Park's image is still marred by news about poaching incidents. The second case refers to Manowara Bewa vs. Union of India and Ors. (2016). After deciding on the nationality of the petitioner i.e. Manowara Bewa, the Court went on to decide which documents and certificates were valid to be submitted in support of one's citizenship evidence. By rendering a certificate issued by the Gaon Panchayat secretary as unconstitutional with no statutory backing, the court triggered a slew of petitions by women who possessed this certificate as a documental evidence of their citizenship. Such judicial overreach was undesirable and this was reflected when the Supreme Court reversed the order of the High court in the Rupajan Begum vs. Union of India (2017). The final case study was of Moslem Mondal vs. Union of India (2010). Adjudged by the then Chief Justice of Gauhati High Court Mr. Jasti Chelameshwar who then went on to become one of the senior most judges of the Supreme Court of India, this case deals with the interpretation of terms and phrases while outlining a framework for carrying out such judicial proceedings. While the aforementioned judge delved into the language of the law thus exercising jurisdiction beyond the mandate, it however did not lead to undesirable consequences. Instead it served as a guide to future cases, a task that primarily fell under the dominion of the Legislature but due to non-performance on its part, it led to Judicial overreach. Thus there is a need today more than ever for India to formulate and officiate an Immigration policy all the while asserting the difference between refugees and immigrants and the need to address the two very different group of people in their own given contexts. An example of what a clear spelled out legislation can do is Canada's Points-based immigration system that gives preference and more points to the higher-skilled immigrants who then go on to adapt and blend well with and into the environment and workforce. There remains no confusion with respect to the individual's citizenship, status, identity and political power, leaving little room for conflict and ambiguity. Treading safely by arguing that India is not

bound by any external convention by virtue of being a signatory, India is failing to address the root cause of the situation which if not treated on time will lead to dismal situations wherein loss to human life will be unfathomable.

So what type of Immigration policy should India adopt with respect to Assam? While this requires a wider area of research on more varied aspects than a mere judicial interpretation, I would like to highlight a few realities of the Assamese Immigration situation that could better enable one to be sensitive to such ground realities while formulating such a policy.

It is a known fact that identification and consequent deportation of illegal migrants from the state of Assam has been more difficult relatively given the cultural and lingual overlap among others. External features and other anthropological characteristics haven't made the situation any easier. For the proponents of closed borders and refoulement principle, the situation ends with deportation of the alleged immigrants. The situation emerging afterwards is believed to be one of a society cleansed of all foreign elements with only the indigenous living in complete harmony with no intrusions on one's land or employment opportunities. What such votaries spin is a utopian picture of reality with no solutions to offer. The sudden vacuum created with the deportation of such members will only serve to attract migrants from elsewhere. One of the reasons, though not among the primary determining ones, that initially attracted individuals from across the borders was the vacuum in the workforce available in the state given the great expanse of fertile lands that the state of Assam can boast of. With no people to work the fields, no manpower ready to get the industrial units churning, cheap easy labour force provided by immigrants was welcomed by the affluent class. Today's demand for deportation is primarily made by the middle classes, if I may say so. The late 1970s and early 1980s political churning was largely led by student organizations based in the middle classes of the society. A sudden crunch of workforce would mean higher wages for the limited available workforce which would in turn lead to higher costs for daily goods getting the wheel of inflation running. Unable to sustain such a toxic cycle for long, migrants either from across international borders or from across state boundaries would now form the new class of workforce coming a full cycle from where the process of reform took off

in the first place. What I would call such a situation is the replacement of one form of migrant population by another- in this case, the Bangladeshis will be replaced by another migrant group. The Assamese society cannot be ridden off its non-indigenous population unless its members are ready to work for basic wage. With no production cycle, no society can exist, not even a subsistence-based society. There is thus a need to root the solution to Assam's immigration problem beyond mere deportation of such alien subjects.

The second point I want to rally around is the fact that in due course of legislation on immigrations, the Gauhati High court has been able to identify a large framework within which the identification of foreigners and their consequent deportation can be carried out. Using this as the broad framework for a legislation on immigration, one would be able to identify and deal with the two very different kind of groups separately- namely the immigrants and the refugees. This distinction would better equip one to identify and deal with rights violations of the two concerned groups of people more efficiently. A case in point would be the applicability of non-refoulement policy in case of refugees while advocating a only a limited qualified residentship to immigrants with an appendage of the need to return to one's country of origin after a stipulated period of time. Another distinction that can be made is that of restricting the spectrum of voting rights to only citizens at every level: from Municipal elections to General elections. This would prevent external elements from determining electoral results and manipulating the same for their own personal gains. The Election Commission on its website has made clear such a provision wherein it has stated "A person who is not a citizen of India cannot be registered as a voter. Article 326 of the constitution read with Section 16 of the R.P.Act 1950 clarify this point".[143]

It is safe to argue that the executive machinery has let down the legislative setup and the judiciary with respect to implementation. This is to refer to the executive at every level: from the highest echelons of power, in this case being the Home Ministry to the lowest ranks of executive power holders like the officials engaged in the preparation of electoral rolls. On an analysis of the petitions filed and the judgments pronounced thereafter, it was common to observe petitioners producing photocopies of original

[143] http://eci.nic.in/eci_main1/Elecroll.aspx

electoral rolls as evidential proof of citizenship. On further analysis, the court more often than not found such documental evidence visibly overwritten with the accused failing to produce the original documents in most cases to prove the veracity of the claims made. Documents with contradictory claims were often submitted by petitioners hoping that mere submission of evidence would amount to proving the claims made therein. This clearly reflects a deep entrenched consociation of sorts where immigrants are seen being assisted by the very system they plan to defeat. Failure at such levels to stem the growth of immigrants eventually leads to a structure of society built on a shaky foundation bound together by the weak strings of rule of law susceptible to violence and complete breakdown even at the slightest of provocation. In such situations, communal, regional and other factional groups find it easier to build fissures within the already highly fragmented society to champion their cause and garner political favours by manipulating the electorate in their favour- something all political parties in the political for a have been guilty of. An immigration policy accounting for such realities would be better enabled to deal with extremely polarized situations leading to stronger institutions and an even stronger social fabric.

Assamese identity, like every other identity, is not wrong in wanting to preserve its own in the sea of global identities. However, one must remember that such identity cannot be built on the ashes of the fundamental rights of others. The ‘sovereign authority of the state’ argument cannot override human lives on both sides of the border. What is ideally right in a situation might not always be the most apt response to such a situation. There are a lot of grey areas, specially when it concerns an agenda like Immigration which is characterized by overlap of various facets like one’s ethnicity, race, color, gender, religion, region and other divisions. Like Jospeh Carens advocated, there is a way and a need for both conflicting sides to come together to the negotiating table without having to jettison their principles. A dialogue is usually the beginning of a ceasefire. This dialogue was initiated by the signing of the Assam Accord. Having been the first initiative of its kind, it was understandably ridden with faults and shortcomings, something which began to manifest itself through the years given the executive complacent nature and inaction despite being pulled up by the Judiciary repeatedly through the years.

What Assam can do today is to pick the strings up right where it left. While doing so, care must be taken to take together all rightful stakeholders on board together. The increasing number of "Doubtful voters", commonly known as D-Voters, are to include "those persons who are identified during electoral roll revision, cases of which are pending with the Foreigners Tribunals or as declared as foreigners by the Tribunal." [144] Interestingly, an increasing number of Muslims have made it to this list of D-voters. Recently, a poem by a Muslim youth gained considerable attention on a social media platform. It read:

"Write
Write Down
Iam a Miya (Bengali-origin Muslim)
My serial number in the NRC is 200543
I have two children
Another is coming
Next Summer.
Will you hate him
As you hate me?
…..
Beware!
I have nothing but anger in stock.
Keep away !
Or
Turn to Ashes."[145]

[144] http://nrcassam.nic.in/faq09.html

[145] https://www.aljazeera.com/indepth/features/2016/12/protest-poetry-assam-bengali-muslims-stand-161219094434005.html

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