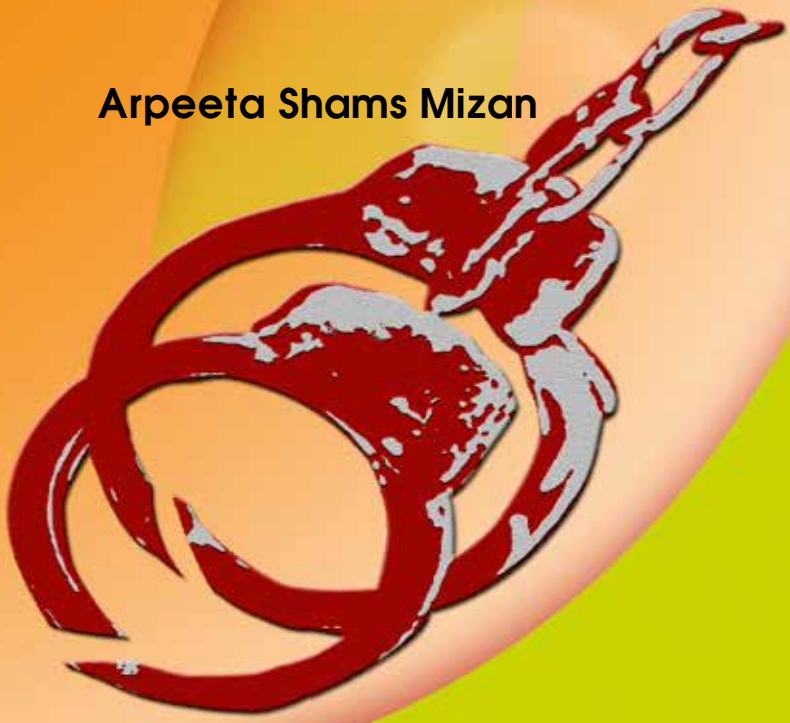
Analyzing the Legislative Gaps in the Detention Scheme of the Foreigners in Bangladesh

The Released Prisoners

Arpeeta Shams Mizan



National Human Rights Commission, Bangladesh

Analyzing the Legislative
Gaps in the Detention Scheme of the
Foreigners in Bangladesh

The Released Prisoners

Arpeeta Shams Mizan
Lecturer
Northern University Bangladesh

National Human Rights Commission, Bangladesh

Analyzing the Legislative Gaps in the Detention Scheme
of the Foreigners in Bangladesh:
The Released Prisoners

Arpeeta Shams Mizan
Lecturer
Northern University Bangladesh

1st Print : June 2014

Published by

National Human Rights Commission, Bangladesh
Gulfeshan Plaza (11th Floor)
8, Shahid Sangbadik Selina Parveen Sarak
Boro Moghbazar Dhaka-1217, Bangladesh
e-mail: nhrc.bd@gmail.com
web: www.nhrc.org.bd

ISBN: 978-984-90611-9-9

Printed by
BD Link
Phone: +88 01731 277194
e-mail: dlinkbangladesh@gmail.com

CONTENTS

Professor Dr. Mizanur Rahman

L.L.M (Hons), MCL (Cum Laude)
PGD (Distinction), Dip. in Journalism, DICL, Ph.D
Chairman, National Human Rights Commission, Bangladesh

Foreword

It was early 2011 while in Jessore I paid a visit to the District prison to gather first hand information about prevailing situation therein. It was an unannounced visit so as to enable me to get the 'true' picture of the prevailing standard of care and protection of the prison inmates. It was during this visit that I was taken to a one storied tin-shed building to see approximately 80 residents. The prison authority referred to them as 'Released prisoners'- the RPs. It was the first time that I heard the nomenclature 'RPs' and sought explanation from the accompanying jail super. What he told surprised me so much that I could hardly speak any word. I could not believe that any person even after finishing his/her prison term could still be interned inside the prison and deprived of liberty for the sheer reason that his/her state is yet to recognize and accept the person as its 'national'. And therefore, the person is destined to spend days in uncertainty inside the same prison where he/she has served the term! There, I was in the midst of RPs allegedly of Indian nationality. To me it appeared to be an extremely cruel form of human rights violation and vowed to do everything within the capacity of the National Human Rights Commission (NHRC) to create an enabling situation to put an end to the sufferings of those who already have had their share of 'lawful suffering'.

Having returned to Dhaka, I immediately contacted the Ministry of Foreign Affairs, Government of Bangladesh, had a personal audience with the Honourable Minister and at the same time wrote a letter to the Chair of the NHRC, India soliciting his cooperation in resolving this crisis with the RPs.

Sympathy for the RPs was overwhelming. What was necessary was someone to take the initiative and the first step to coordinate among different agencies and authorities on both sides of the Indo-Bangladesh border. NHRC Bangladesh fitted well into that role and within a few months the overwhelming majority of those RPs were repatriated to their motherland, reunited with their families and thus ended their long years of torment and agony. Timely intervention by the NHRC resulted in protection of human rights of these otherwise unfortunate RPs.

This however, did not put an end to the practice of RPs permanently. As this research paper suggests, RPs continue to haunt the legal system and administration of justice in the country. While some RPs have had the good fortune of coming out of this impasse, many others continue to languish inside the prison in pursuit of freedom inside a place of incarceration!

Mere existence of the RPs in any jurisdiction is a demonstration of violation of their human rights every moment of their existence. No state can remain oblivious to this matter, not to speak of an institution like the NHRC.

The readers of this research paper will find an appalling picture of the legal problems around the RPs – they are caught in a catch 22 situation. A person deprived of liberty because of violation of immigration or passport rules upon release may again be detained at the prison gate and again sent back to the same prison for the very same reasons of initial detention. The problem demands serious consideration by both the policy makers and administrators of justice.

Therefore, we requested this young researcher, Arpeeta S. Mizan who had had previous experience of working with the issue of the RPs to share her thoughts and research findings with the NHRC so that we could adequately inform ourselves with sufficient knowledge to make concrete recommendations to the government. This research paper, in my humble opinion, will also assist and guide the Foreign Office to formulate its policy of intervention with regard to the RPs which attains more critical nature when the concerned RP happens to be a stateless person.

The importance and significance of this work cannot be measured in terms of its volume. With this publication the NHRC Bangladesh once again demonstrates its commitment to its vision of 'Human rights for all, everywhere, equally'.

Professor Dr. Mizanur Rahman
Chairman
National Human Rights Commission
Bangladesh

ACRONYMS

FA :	Foreigners Act
GoB:	Government of Bangladesh
RPs:	Released Prisoners
UNHCR:	United Nations High Commissioner for Refugees
ECtHR:	European Court of Human Rights
PIL:	Public Interest Litigation
DLR:	Dhaka Law Reports
PLD:	Pakistan Law Decisions
CrPC:	Code of Criminal Procedure
SC:	Supreme Court
UDHR:	Universal Declaration of Human Rights
CAT:	Convention Against Torture
CEDAW:	Convention on Elimination of All Forms of Discrimination Against Women
CRC:	Convention on Rights of Children
SAARC:	South Asian Association for Regional Cooperation
UP:	Union Parishad
MoU:	Memorandum of Understanding
NGOs:	Non Government Organizations

Introduction

It is a long and recognized practice for States under International Law to regulate the entry and stay of aliens into and within their territories. A number of procedures have developed which take due account of the concerns of governments as well as the particular circumstances of the individual concerned.[1] International and Human rights Law demand that while States have the right to control the movement of non-nationals on their territory; this is subject to refugee and human rights standards.[2] However, in South Asia, the *modus operandi* of age-old immigration laws, which occasionally also encroach upon other territories of administrative function, often focus on a particular procedure: detention. This detention has a more direct effect on refugees, inter alia-other groups.

Bangladesh controls the immigration movement by the Immigration laws. The Foreigners Act 1946 along with its rules is the key legislation in this case. Foreigners who are found to be in the country illegally are arrested, charged, and detained. Immigration detainees who have served their sentences then become Released Prisoners (RPs).

A "Released Prisoner" is a person who is detained by the prison authority even after his/her term of imprisonment has been duly served. In general, foreign "Released Prisoners" fall under the consular jurisdiction of their respective embassies to whom they are released. Bangladesh has been experiencing an adverse situation for the Released Prisoners due to procedural complexities, the ineptitude of the Foreign Ministry of Bangladesh, and the indifference and tardiness of the concerned consular offices.

The question regarding the identification and treatment of Released Prisoners takes on a new dimension when it comes to the asylum issue. Bangladesh since early 80s of the last century has been sheltering a large body of asylum-seekers from Myanmar, most of who are Rohingyas, and are in refugee-like situation and denied any official registration. The case under discussion is how these

[1] UNHCR, "Refugee Protection and Mixed Migration: The 10-Point Plan in Action," February 2011, available at: *http://www.unhcr.org/refworld/docid/4d9430ea2.html*

[2] United Nations Human Rights Committee (HRC), "CCPR General Comment No. 15: The Position of Aliends under the Convenant," 11 April 1986, para. 5, http://www.unhcr.org.refworld/docid/45139acfc.html

undocumented asylum seekers suffer more than others under the current legislative framework. Due to want of papers, detention of these people prolong indefinitely, which under current human rights jurisprudence qualifies to become "Arbitrary Detention".[3]

This paper analyses the legislative anomalies in Bangladesh producing "Released Prisoners". It makes a comparative analysis between undocumented Rohingyas and other nationalities and tries to explore what can be the possible solution to these legislative vacuums.

The paper tries to discern these issues by answering four specific questions:

- What are the laws dealing with foreigners in Bangladesh
- Whether the present legislative scheme upholds or contradicts with Bangladesh's state obligations under various international and national instruments
- Whether the laws are applied equally to all foreigners, whether the male and female detainees are treated equally
- Finally, what are the reasons behind Prolonged RP situation and how to address this issue by formulating necessary legislative and policy reforms

[3] See *A v. Australia*, HRC, Comm. No. 560/1993, 3 April 1997, para 9.2, http://www.unhcr.org/refworld/docid/3ae6b71a0.html and *Mukong v. Cameroon*, HRC Comm. No. 458/1991, 21 July 1994, para 9.8, available at: http://www.unhcr.org/refworld/docid4ae9acc1d.html

Scope of the Paper

The paper explores the dimensions of judicial activism on the part of the human rights activist bodies and the highest judiciary of the State. It shows how the lower and higher judiciaries stand in stark difference to each other in point of view and attitude.

The second part of the paper deals with the nature of obligation on the part of the State. Bangladesh is not a party to the 1951 Refugee Convention. As such, the liabilities under the convention do not bind Bangladesh. This part looks into Bangladesh's obligation under the Bill of Rights- how the core human rights standard is applicable to the refugees, what are the international standards for detention, under what circumstances detention under the immigration laws of Bangladesh stand the threat of amounting to arbitrary detention, what constitutional provisions are being violated by the current immigration law regime, and specifically, how the current court practice differs from the law in theory.

In this part I have also tried to discern what effect the new laws, which are being contemplated by the legislature, might have and what changes it might bring to the existing scenario. Another point discussed is how the foreigners intentionally entering Bangladesh without a visa stand in distinction to the helpless refugees, which makes it incumbent not to treat the two streams at par.

In the third part, the paper analyses the nature of diplomatic relations Bangladesh has with countries of origin of the RPs.

In the fourth part, the paper looks into the conditions of the RPs, what aggravates the situation, what makes it difficult to ensure their liberty. The paper tries to analyze the arguments of various authorities: the Prison Directorate and the academicians. The UNHCR Detention Guidelines[4] (which is an authority in the field of detention) lay down specific standards for detaining foreigners as well as refugees. The issue of detainees who were in fact victims of trafficking has also been specifically addressed.

Finally, the paper concludes by way of recommendation on the alternatives to detention. The alternatives should be suitable to the context of Bangladesh, and it must be carefully noticed that alternatives should not be detention in alternative form.

[4] UNHCR, 'Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention', http://www.refworld.org/pdfid/503489533b8.pdf, 2012 (viewed 13 May 2014.)

Methodology

The paper tries to relate the historical and political context of the laws with their application today. It brings out the anomalies and paradoxes in the law, makes a critical analysis, and discerns what factors in the law contribute to manipulating the mind-set of the judges in dealing with cases under the Foreigners Act (FA) 1946. Here I take a holistic approach and discuss all the relevant provisions by putting them side by side under the same umbrella. In doing so, the resources were taken from Primary and Secondary Source. Primary sources included legislations, international legal instruments, case studies, interviews and policy guidelines.

1. The laws dealing with foreigners in Bangladesh:

The Foreigners Act 1946 is the main legislation dealing with the regulation and movement of the non-nationals within the territory of Bangladesh. Apart from this legislation, one shall also find The Foreigners order 1951, The Foreigners (Parolees) Order 1965, The Registration of Foreigners Act 1939, The Registration of Foreigners Rules 1966, The [Bangladesh] Control of Entry Act 1952, and The Passport Act 1920.

All these laws apply to all foreigners on the territory, regardless of the reason of their presence in Bangladesh. Moreover, Bangladesh does not have any particular domestic legal mechanism focusing on asylum seekers, refugees, stateless persons, or other persons who may be in need of international protection. Indeed, in 1978 and 1991-92, Rohingya asylum seekers from Myanmar were granted *prima facie* refugee status under executive decisions.[5] They were granted *prima facie* refugee status on a group basis.

Since these laws are immigration-centric, the treatment of foreigners (including those in need of international protection) is subject to the administrative and judicial interpretations. This in turn can vary according to the institution, or sometimes according to individuals, or even to the profile of the foreigners in question.

2. The Foreigners Act 1946: a controversial legislation

The proper implementation of laws requires first and foremost a proper understanding of the laws. The existent legislative convolution is a result of the insufficient understanding of the colonial domestic law, the human rights jurisprudence and the modern developments.

The key legislation in discussion, the Foreigners Act 1946, was created for the purpose of migration movements that were initiated by the British plantation owners.[6] Irregular migration has been prominent in the three countries born as a result of partition in 1947 and the liberation war of Bangladesh in 1971 and consequently this Act has constantly remained in diligent application. Both India and Bangladesh apply the law for detaining the illegal immigrants. The issues engulfing the Act remain more or less the same: how to control the continuous influx of neighboring aliens who enter the country without proper documentation, or overstay the validity of their travel papers. In India, it is

[5] U.K. Das, 'Legal Protection for Refugees: Bangladesh Perspective', ELCOP Journal on Human Rights and Good Governance, ELCOP, December 2004.

[6] Indian Law Commission, '175th Report of the Indian Law Commission on the Foreigners (Amendment) Bill, 2000', September 2000, http://lawcommissionofindia.nic.in/reports/175thReport.pdf (last viewed 13 May 2014)

the Pakistanis entering into Kargil, Jammu and Kashmir, Bangladeshis in West Bengal; while for Bangladesh, the main stakeholders are the Rohingya asylum seekers (who qualify unquestionably as refugees under persecution), handful of Indians, and occasionally other nationals.[7] In both the countries, there is a striking presence of the RPs: be it in India or Bangladesh, illegal Pakistani migrants or Rohingyas, the detainees continue detention though they have completed their terms of sentence as provided by law,[8] and also particularly for similar reasons, that the government could not complete the deportation or repatriation procedures necessary to send them back to their respective countries.[9] Insufficient guarantees in law to protect against arbitrary detention, such as no access to an effective remedy to contest it, could also call into question the legal validity of any detention.[10]

Another aspect of the problem arises when the authority fails to distinguish the target group (of the FA) from the persecuted asylum seekers. The FA is meant to deal with foreigners who are present in the concerned State (read Bangladesh) without lawful authority. For example, there has been a reported case of an Indian citizen for illegally crossing the border.[11] The accused was sentenced to 18 months of imprisonment. This case is a first hand example pointing out the anomaly in the application of the FA 1946. The accused in this case entered Bangladesh willingly to visit his ailing aunt without a valid visa, and it is particularly the situation intended by the legislation to deal with. Contrasting with the Rohingya refugees, who enter Bangladesh in order to save their life from persecution, this incident shows deliberate violation of law by foreigners unlike the helpless refugees and asylum seekers.

The asylum seekers are in fact "persecuted" (means they are under threat of life because of their race, religion, ethnicity, membership of a particular social or political group)[12]. But the illegal immigrants are violating the law purposefully.

---

[7] For a detail description of the nationality of RPs in Bangladesh, please see below.

[8] This was the ground on which a PIL for the release of RPs was sought in the case of *Bhim Singh v. Union of India* W.P. (Crl.) No. 310 of 2005 . The PIL was instituted in 2005 specifically for the release of foreign (mostly Pakistani) prisoners who had been convicted under the Foreigners Act and imprisoned in India.

[9] A. Rajan, 'Foreigners Act defective', http://www.mylaw.net/Article/Foreigners_Act_defective/#.U3Y9T9K-Szr0 , (viewed May 16)

[10] *Louled Massoud v. Malta,* (2010), ECtHR, App. No. 24340/08, http://www.unhcr.org/refworld/docid/4c6ba1232.html

[11] Doulatpur Police station case number 7/2010 corresponding to GD Entry numbered 279/2010 . Asian Human Rights Commission, 'India/Bangladesh: Indian detained in Bangladesh, after completion of his sentence', 11 July 2012, *http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-130-2012,* (viewed 19 May, 2014)

[12] Art.1 (A)(2) , Convention Relating to the Status of the Refugees 1951

This makes the asylum seekers more vulnerable than they already are. On the other hand, the intentional offenders manage to stay beyond the reach of Law.

The Foreigners Act has been a source of constant constitutional debate in the subcontinent,[13] and in recent times, judicial activism in the subcontinent has put these controversial aspects under more lucid discussion. India has seen handful of Public interest litigations (PIL) on the matter, while the Bangladesh Supreme Court has faced two. In both the countries, the apex courts have declared that the FA is ripe for a challenge: detentions under the FA have been declared outright unconstitutional.[14]

The Indian Supreme Court judgment in the *Maneka Gandhi Case*[15] has now well established that detention must not be just according to an express statutory provision, but that provision also has to be reasonable, fair and just.[16] Due process of law is another crucial point. Since the asylum seekers are not wilful violators of legislation, absence of exercising judicial discretion in dealing with their case on the part of the judiciary hampers the due process of law and thus is not just, fair and reasonable.[17]

The unconstitutionality the FA 1946 is also perceptible from the fact that detentions carried out under its scheme qualify as "arbitrary detention". Detentions of the RPs under the FA are indefinite, and this extended incarceration has no legal basis. As per the UNHCR Guidelines, detention is arbitrary and maximum limits on detention should be established in law.[18] Moreover, detention is the most frequently imposed punishment under the FA, whereas safeguards to arbitrary detention require that detention should be resorted to only when other available (alternatives to detention, and ensuring legislative protections such as bail) options are insufficient.[19]

The subjective administrative application of the FA adds to the vulnerability of its victims. On occasions foreign nationals having travelling documents get detained under the FA if the document somehow gets stolen. When the foreign national reports the police about the loss, s/he eventually gets arrested under the FA 1946. This is an illustration how a piece of legislation and a faulty legal

[13] *Supra n.9*
[14] *Supra n.8*
[15] *Maneka Gandhi v. Union of India*, AIR (1978) SC 597
[16] *Supra n.9*
[17] See *State of Punjab vs. Dalbir Singh*, INSC (2012) 84
[18] *Supra n.4*, Guideline 6
[19] *Ibid*, Guideline 4.2

system itself can hamper access to justice. However, once detained, all of these people face the same extended detention without possibility of release due to procedural laxity.

Study shows that FA is the main instrument under which the foreigners are detained. It is also the law under which the persons needing international protection are detained. For example, according to the analysis of RPs in Cox's Bazar Prison done by the researcher, amongst the 31 RPs, 26 are charged under the Foreigners Act. According to a Report[20] by the Physicians for Human Rights[21], the police in Cox's Bazar and Bandarban districts detained the Rohingya refugees presumably under the 1939 Registration of Foreigners Act 1939.[22]

2.1 The main Provisions of Foreigners Act 1946:

Bangladesh does not have any domestic legislation particularly covering the asylum seekers and the refugees. The foreigners irrespective of asylum seekers or visitors are treated on the same footing by these age old laws.[23] During 1978 and 1991-92, the asylum seekers from Myanmar were provided refuge under executive decisions.[24]

These measures do not address the need of an individual asylum seeker / refugee and also are not consistent with each other. This resulted in differences in authority's approaches. The result is that while the first influx of asylum seekers received a recognized status in Bangladesh, the next groups, up to the recent rush in August 2012, never managed any documentation.

[20] In 2010 Physicians for Human Rights Deputy Director Richard Sollom and Dr. Parveem Parmar from Harvard University surveyed over 100 households in the Kutupalong Refugee camp in Cox's Bazar.

[21] Founded in 1986 by a small group of doctors, Physicians for Human Rights (PHR) is a Cambridge (MA) based non-profit human rights organization who believed the unique scientific expertise and authority of health professionals can bring human rights violations to light and provide justice for victims. http://physiciansforhumanrights.org/ (viewed 12 May 2014)

[22] Physicians for Human Rights , 'Stateless and Starving: Persecuted Rohingya Flee Burma and Starve in Bangladesh: An Emergency Report', March 2010, http://reliefweb.int/report/bangladesh/stateless-and-starving-persecuted-rohingya-flee-burma-and-starve-bangladesh (viewed 19 May 2014)

[23] *Supra* n. 5

[24] *Ibid.*

The FA in Sec. 3 gives the government an express power to detain, confine, and imprison foreigners.[25] As per Section 14 of the Act, if any person contravenes the provisions of this Act or of any order made thereunder, or any direction given in pursuance of this Act or such order, shall be punished. What is worth noting is that the language of the Section is focused only on punishment but does not speak of the grounds upon which charges are brought. It allows law enforcement agents to arrest a foreigner without having to mention which provision of the Act has been violated/ why he is being prosecuted. In short, the sweeping language of the Foreigners Act makes it easier for law enforcement agents to arrest foreigners, and also is the main reason for challenging its constitutional validity.

However, Section 10[26] provides some discretion for taking protection-friendly approach. In short, Section 10 would allow the Government to waive punishment of persons in need of international protection, including unregistered refugees who do not enjoy access to registration process and for being unable to produce identity papers. If this be done, then the already over-crowded Prisons would have a sigh of relief.

2.2 Current dimensions of Applying of the FA 1946

Due to existing infrastructure and the legislative and procedural practices, the actual scenario in Bangladesh often deviates from the legislative standards involving protection mechanism. The Jail Super of the Cox's Bazar prison was interviewed in this respect. The accounts are given below:

1. The law enforcing agencies always detain foreigners without proper documents. The police often do not enjoy the discretion or the means to differentiate between an illegal immigrant and people under persecution. Often Rohingya refugees become victims of trafficking or other abuses, and

---

[25] Section 3:The Government may by order make provisions, either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into Bangladesh or their departure therefrom on their presence or continued presence therein.

In particular and without prejudice to the generality of the foregoing power, orders made under this section may provide that the foreigner – (a) Shall not enter Bangladesh or shall enter Bangladesh only at such times and by such route and at such port or place and subject to the observance of such conditions on arrival as may be prescribed; (c) shall not remain in Bangladesh or in any prescribed area therein (d) shall remove himself to, and remain in, such area in Bangladesh as may be prescribed; (e) shall comply with such conditions as may be prescribed or specified –(iii) requiring him to furnish such proof of his identity and to report such particulars to such authority in such manner and at such time and place as may be prescribed or specified.

[26] Section 10: The Government may be order declare that any or all of the provisions of this Act or the orders made thereunder shall not apply, or shall apply only with such modifications or subject to such conditions as may be specified, to or in relation to any individual foreigner or any class or description of foreigner. Emphasis added).

even then the police does not consider the direness of the situation. Most of the unregistered refugees from the makeshift camps also face detention whenever they set foot outside the camp.

2. The main reason behind detaining the RPs is the nature of the offence: since remaining on Bangladeshi soil without proper documentation is a continuing offence, so they would become illegal as soon as they were released, so from a theoretical point of view releasing them is not fruitful.
3. Sometimes registered refugees are also detained by police. Incidents have been reported when the police authorities in Cox's Bazar arrested Rohingya refugees from the Nayapara camp to work, and despite producing their identity cards and exact dwelling addresses within the camp they were denied bail.[27] But the Police must distinguish between various people while analysing a case. Police can never prosecute registered Rohingyas under the FA 1946 because they have been given *prima facie* refugee status[28] by the Government.[29]
4. Sometimes the asylum seekers are arrested right when they try to cross the border and are detained immediately.
5. The period of detention of RPs extend from 2 months up to 4/5 years.

2.3 Other laws in Bangladesh dealing with Foreign Prisoners

The detainees under the FA 1946 are governed by the provisions of the Prisoners Act 1900, Prisons Act 1894, Jail Code 1894, The Code of Criminal Procedure 1898, *Karagare Atok Shajaprapto Narider Bishesh Ain 2006* (Special Act for Women Incarcerated in Prisons), The Prevention and Suppression of Trafficking Act 2012 etc.

The legislations have vast provisions. All of them consider unpermitted entry into Bangladesh as punishable offence, with the term of punishment varying from legislation to legislation.

---

[27] On the basis of interviews with concerned authorities. Also see, http://www.kaladanpress.org/v3/index.php?option=com_content&view=Art.&id=2415:five-arakanese-rohingya-refugees-jailed&catid=117:february-2010&Itemid=2 (viewed 5 September 2012).

[28] Group determination on a prima facie basis means in essence the recognition by a State of refugee status on the basis of the readily apparent, objective circumstances in the country of origin giving rise to the exodus. Its purpose is to ensure admission to safety, protection from refoulment and basic humanitarian treatment to those patently in need of it. See, Global Consultations On International Protection, 'Protection Of Refugees In Mass Influx Situations: Overall Protection Framework' EC/GC/01/4m 2001, http://www.refworld.org/pdfid/3bfa83504.pdf, (viewed 19 May 2014)

[29] Pia Prytz Phiri,'Rohingyas and refugee status in Bangladesh' , http://www.fmreview.org/FMRpdfs/FMR30/34-35.pdf, (viewed on 11 May 2014)

The relevant provisions of the Foreigners Order 1951

According to Clause 7 every foreigner upon entering into Pakistan[30] (read Bangladesh) is obliged to obtain a permit to cover stay in this country. Obtaining a permit is mandatory. It does not lay any embargo upon sojourn, rather on the contrary it clearly and specifically requires him to obtain a permit.[31]

The Registration of Foreigners Act, 1939

Under Sec.3 of this Act, registration is not necessary for all foreigners,[32] though unfortunately it fails to clarify what category foreigners are liable to register themselves upon being present in Bangladesh. On a general reading, the registration is not applicable to the asylum seekers, since the Registration Act 1939 is for those who enter Bangladesh with Visa.

3. Detention of the refugees and asylum seekers in Bangladesh

Detention attempts to address the particular concerns of States related to illegal entry. However, its use against refugees and asylum seekers requires greater vigilance and caution in ensuring detention does not undermine the fundamental human rights and rule of law.[33] It is very important to keep in mind that detention itself is not a violation of human rights, therefore, the demarcating line between exercise of rule of law and respecting the vulnerability of the refugees is very important. The position of asylum-seekers may thus differ fundamentally from that of ordinary migrants in that they may not be in a position to comply with the legal formalities for entry. They may, for example, be unable to obtain the necessary documentation in advance of their flight because of their fear of persecution and/or the urgency of their departure.[34] Thus the detentions carried out under the FA 1946 and the subsequent detention exhausting the punishment undoubtedly amounts to violation of the constitution. Thus policies require to be reformulated in order to consonant with the constitutional obligations.

---

[30] As the specific adaptation of this legislation has not been made, the Adaptation of existing Bangladesh laws Order, 1972 (President's Order No.48 of 1972) determines the existing provisions of these laws.

[31] *Amir Khan v. State*, PLD 1963 Dacca 92, 13 DLR 892

[32] Section 3: The Government may after previous publication, by notification in the Official gazette, make rules with respect of foreigners for any or all of the following purposes, that is to say - (d) for requiring any foreigner entering , being present in, or departing from Bangladesh to produce, on demand by a prescribed authority, such proof of his identity as may be prescribed.

[33] Frontiers Association , "Legality vs. Legitimacy", legal Study by, Funded by Ford Foundation and the Delegation of the European Commission in Lebanon, May 2006, http://frontiersruwad.org/pdf/FR_Report_Legality%20vs.%20Legitimacy_Eng_2, (viewed 13 May 2014)

[34] *Supra* n.4, Guideline 1.11

The UNHCR Guidelines on Detention 2012 can be a useful resource in this case. According to the UNHCR Guidelines, detention should not be used as a punitive or disciplinary measure for illegal entry or presence in the country.[35] The UNHCR states in its Guidelines on Detention of Asylum Seekers that the right to liberty is a fundamental right, recognized in all human rights instrument.[36] Detention deprives individuals of their most fundamental right to liberty. For refugees and asylum seekers this measure more often than not appears to be more torturous in comparison to the citizens of the concerned State. Since this measure is often unnecessary, International Law articulates a presumption against detention.[37]

Detention as a punishment developed in the early ages of civilization when the offenders and criminals were perceived as a threat to the society and thus their segregation from the rest of the community was necessary. Detention of asylum seekers and refugees always requires careful speculation because these people are traumatized, and subjecting them to further penalization for apparently no due reason is a gross violation of their right to respect for human dignity. In Bangladesh, the immigrants are mainly detained for one reason: absence of proper documents or illegal entry into Bangladesh. Detaining the asylum seekers thus appears absurd when becoming an asylum seeker is never a choice, more so in case of the Rohingyas, who are deprived of citizenship of their country of origin.[38] The situation deteriorates when the refugees after becoming victims of trafficking are discovered by the police, and arrested for want of identity papers in clear contravention of the Suppression and Prevention of Trafficking in Human Act 2012.

4. Released Prisoners (RPs): Victims of Arbitrary Detention

A detention, which is legal, can become arbitrary afterwards. The UN Human Rights Committee has explained that the key in determining whether detention is "arbitrary" under Art. 9(1) of the ICCPR[39] is whether the detention is in compliance with international detention standards rather than merely

[35] UNHCR, 'UNHCR guidelines on Detention, referencing subcommittee of the Whole of International Protection', Note EC/SCP/44 paragraph 51(c), 1999, www.refworld.org/pdfid/3c2b3f844.pdf , (viewed 19 May 2014)

[36] Refugee Action Committee, www.refugeeaction.org/policy/summary.htm,(viewed 11 September 2012)

[37] Detention Watch Network, 'Alternatives to detention', 2008,http://www.detentionwatchnetwork.org/atd, (viewed 19 May 2014)

[38] The Myanmar Government promulgated the Citizenship Act in 1982 by the reason of which the Muslim Rohingyas are never recognized as the citizens of Myanmar.

[39] binding upon Bangladesh

authorized under domestic law. It also asserted that illegal entry itself is not sufficient as a ground for detention.[40] (emphasis added)

Sovereignty of a State means it has the sole authority in determining and promulgating laws suited to its culture and particular socio-political context, so long as it does not violate any peremptory norms under International Law. In the present case, the legitimacy of the FA 1946 is questionable due to the nature of detention imposed under its scheme.

The Human Rights Council in *A vs. Australia*[41] observed that detention of foreigners *per se* is not arbitrary. Detention of asylum seekers or refugees can be arbitrary if it is without adequate analysis of their individual circumstances.[42] As such, the nature of detention under the FA might at given situations amount to arbitrary due to the sole reason that the legislation is not meant for refugees under persecution. Moreover, Bangladesh has ratified the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment 1987 (CAT)[43], and the detention of individuals pending trial intended to prove their identities is a violation of the provisions of CAT.[44]

The detention of the asylum seekers and refugees amount to arbitrary and unlawful pursuant to following circumstances:

- Unless it is reasonable in all circumstances
- Unless it is proportionate to the intended objective
- Unless it is open to periodic review: this seems to be very relevant in case of Bangladesh. Although the FA 1946 in proviso to Section 3 provides for an Advisory Board to review the detention exceeding 6 months, that is not followed.
- Unless the asylum seekers or refugee gets opportunity of effective representation before the Court of law, which is also not ensured.

---

[40] *Supra* n.33

[41] See *A vs. Australia*, HRC Case No. 560/1993, para 9.2. Also See, Ophelia Field , 'Legal and Protection Policy Research Series : Alternatives to Detention of Asylum Seekers and Refugees', Division of International protection Services, 2003, www.refworld.org/pdfid/4472e8b84.pdf, (viewed 19 may 2014)

[42] *Supra* n.33

[43] The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention") was adopted by the United Nations on 10 December 1984 (resolution 39/46). The Convention entered into force on 26 June 1987 after it had been ratified by 20 States.

[44] Excessive and arbitrary pre-trial detention is universally prohibited by international legal norms. See, R. Walmsley, 'World prison Population List', 8th edition, cited in Open society Justice Initiative, 'Pretrial Detention and Torture', 2011, http://www.opensocietyfoundations.org/reports/pretrial-detention-and-torture-why-pretrial-detainees-face-greatest-risk, (viewed May 15,2014)

4.1 Detention Situation in Bangladesh:

From the data received from the authorities[45], it appears that upto 2012 there were 108 foreigners detained with RP status in different prisons. The RPs come from a wide range of background such as Myanmar, India, Pakistan, Nigeria and Somalia.

Detainees under the FA 1946 - At a glance[46]

District	Number of cases/detainees	Nationality	Legislation under which Charges were brought	Current condition
Cox's Bazar	36 detainees	2 Indians 1 Nepalese 1 Estonian 32 Burmese	Foreigners Act 1946	pending
Maulavibazar	1 case	India	Control of Entry Act	pending
Panchagarh	3 cases	Burmese	Foreigners Act	Decided
Bandarban	50 cases	2 Indians 48 Burmese	Foreigners Act	Pending, one is decided and appealed against

There is no legislation or established procedure dealing with the release of foreigner prisoners. The practice till date remains as follows: as soon as an alien detainee is acquitted of the charge against him/her or the jail term is over, the Prison authority informs the Ministry of Home Affairs of the Government of the People's Republic of Bangladesh. The Home Ministry informs the Ministry of Foreign Affairs which then contacts the concerned Embassies or High Commissions. After getting permission from the Ministry for repatriation of the prisoner, jail authorities contact the respective foreign mission to receive the RP from jail. Jail authorities in the presence of the Special Branch of Police hand over the prisoner to foreign Missions if and when they are willing to receive the RP. The mission concerned then sends that person back to his country. The process is lengthy and most of the time information regarding the status of the RPs is lost in the process.

[45] As updated till November 2012

[46] The statistics in this paper have been acquired from the Prison authorities and is updated as of November 2012

With regard to the increasing number of RPs in the prisons, the jail authorities highlight the unwillingness and negligence of the concerned embassies. This is more so in case of Myanmar, which does not recognize the Rohingyas to be their citizens. The embassy seldom bothers to receive the RPs. However, from the decision in the *Faustina Pereira v. State* (2001), it appears that the High Court Division holds that indifference of the foreign missions is not a viable excuse for continuing detention of the prisoners.[47]

There are various factors operating behind this prolonged state of RP status. The Prison Directorate has pointed out two main loopholes in Bangladesh's legal regime that lead to the appalling situation in the prisons: lack of legal advice/ legal representation/ legal assistance to the prisoners and the slow judicial procedure that keeps the prisoners waiting.[48]

In case of Rohingya refugees, due to the sensitivity of the matter the court deals very cautiously every case. The unregistered Rohingyas mainly receive legal representation under the District legal Aid Scheme under the Legal Aid Act 2000. Various NGOs willing to do *pro bono* service also step forward to the aid of the refugees but cannot be much effective due to procedural tardiness. Absence of separate legal regime regulating the applications for seeking political asylum in Bangladesh complicated the whole situation further.

While one might explain the RPs by strictly interpreting the provisions of Jail Code[49], it is important to remember that under International Law, when a person is kept in detention after the completion of one's sentence, such detention falls under Category1of Arbitrary Detention which is prohibited under International Law.[50]

---

[47] 53 DLR (2001), Judgment para. 10 at p. 416

[48] GIZ, 'Improvement of the Real Situation of Overcrowding in Prisons in Bangladesh, Governance and Local Development',2012, Dhaka

[49] Please see below for detailed discussion

[50] The Mandate of the UN Working Group on Arbitrary Detention originally defined three categories of arbitrary detention:

Category I: when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty

Category II: when the deprivation resulted from the exercise of the rights or freedoms guaranteed by applicable international human rights instruments, such as detention on the basis of religion or political opinion/race When the violation of the international; norms relating to fair trial is of such gravity as to make detention arbitrary. See, UN Commission on Human Rights, 'Statement by the Working Group on Arbitrary Detention established by the UN Commission on Human Rights at the Conclusion if its Mission in Italy', http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9477&LangID=E (viewed 16 May 2014)

4.2 The Jail Code 1894: A Reason behind RPs

A look at the provisions of Jail Code shows that the practice of having RPs is not only a violation of Human rights, but also a violation of positive legislative provisions. Rule 516 says under no circumstances can a prisoner be detained in jail for a period exceeding the time of his conviction. In case of who overstay their incarceration, Rule 102 justifies such extended detention only on medical grounds.[51]

Specially relevant for the asylum seekers is the fact that other Rules in the Jail Code require the detainee to provide the jail authority with a clear address prior to his/her release.[52] Unregistered refugees living in the unregistered makeshift camps cannot provide any such address, for such camps are not recognised by the authorities. Furthermore, the Prison authorities require identity papers which the unregistered refugees cannot produce, and it is not possible or plausible for the UNHCR to procure identity papers for them.

5. Right to Bail: An ineffective Safeguard against Detention

The detail discussion on the right to bail is found in the Code of Criminal Procedure (CrPC) 1898. The Schedules[53] to the Code discuss the bailable and non-bailable offences, and the term of punishment for each type of offence. Non-bailable offences are more serious than bailable offences. According to the Code[54], the offence is to be treated as bailable if it is punishable with imprisonment for not more than two years or with fine only and the offence is non bailable if it is punishable with (i) imprisonment with two years and upwards, or (ii) imprisonment for transportation for life, or (iii) death.

The first schedule to the Code provides that, in case of offences punishable with imprisonment for not less than 2 years but not more than 5 years, the offence is bailable. When the offence is punishable with imprisonment for less than two years or with fine only, then the police has no right to arrest without a warrant and the offence is bailable.

---

[51] Rule 102 says in case of seriously ailing prisoner, such prisoner cannot be released against his will. If the medical officer thinks that the ailment of the prisoner is such as to pose a threat to the safety for the prisoner and the society then such prisoner shall not be released.

[52] Rule 568. As per the provisions of section 565 of the Code of Criminal Procedure 1898, before a convicted prisoner is released, the address where such prisoner would be dwelling after his release must be documented by the Jailor in his diary prior to the release.

Rule 968. In case of a convicted female adolescent, at least six months before her term of imprisonment is over, the Superintendent must confirm the name and address of the parents or near relatives of such prisoner. He shall send the information to the District magistrate of such address and request to inform the parents to receive the adolescent on her day of release.

[53] Schedule II, Column 5, CrPC 1898

[54] *Ibid.*

Under Section 14 of the FA, the punishment for contravening any provisions of the act is if any imprisonment for a term which may extend to 5 years. The Act does not provide for any lesser punishment, as this, the foreigners detained under this Act have committed non-bailable offences.

On the other hand, the Registration of the Foreigners Act 1939 under Section 5 provides that any foreigner who contravenes the provisions of the act shall be punished with imprisonment for a term which may extend to 1 year or with fine extending upto 1000 taka or with both. This means, arresting the asylum seekers under the FA 1064 deprives then of their possibility to acquire bail.

The Code further provides that in case of arresting or detaining women, children, and sick or infirm person for non-bailable offence without warrant by an officer in charge of a police station, they may be released on bail, unless there are reasonable grounds for believing that they have been guilty of an offence punishable with death or imprisonment for life. It means the Court has discretionary powers to grant bail to foreigners charged under the FA in particular circumstances. The Recent Children Act 2013 in Sec. 52 empowers the child-friendly police to release a child on bail even in non-bailable offence to avoid the use of police custody and to produce the child before the court within 24 hours if not granted bail.

But, in practice, even foreigners who are trafficking victims, including women and children, are charged under the Foreigners Act 1946, and are not able to benefit from this right to bail.

In most cases, inability to exercise the right of bail leads to their extended and sub-judice detention. The main factor for their non-exercise of right to bail is their inability to furnish sufficient bonds and to find a suitable guarantor. However, according to common court practice in Cox's Bazar, (according to the provisions of Criminals Rules and Orders) the Court in exercise of its discretionary power can request any renowned lawyer to furnish bails as guarantors if the unregistered Rohingyas cannot avail of any ensurer to furnish bail in bailable offences, since in those cases bail is a matter of right.

As part of the Government of Bangladesh's Legal Aid scheme under the Legal Aid Act 2000, in every district there is a District Legal Committee, which on application appoints defence lawyer for the accused persons. The defence lawyers are compensated by the District Judge from the monthly government allocation, the amount of which is 300 tk. Pro bono lawyers also enlist themselves for this service. Once enlisted, they have to serve for at least 5 years.

However, in reality, these lawyers do not receive sufficient incentive to continue their service diligently. If they have other cases running simultaneously, often they do not appear in the *pro bono* case. The reason is the meagre compensation, because while the State pays 300 tk per session, other clients pay much more. Availing of this service is more onerous for unregistered Rohingyas since only the Registered refugees can enjoy the benefit of legal provisions.

In this regard, the Judiciary must draw its attention towards the provisions of Section 498 of the CrPC[55] , a provision that vests the Judiciary with a discretion rarely applied.

Another avenue in exercising the right of bail is "own recognizance". Section 33 of the Prisoners Act 1900 provides for free liberty of a prisoner on his own recognizance.[56] However, this option is not a viable one either due to its procedural complexities.[57]

6. Judicial Activism and Case Laws on Detention of RPs

The recent judicial activism has also shed some important light on to this question. The fact that foreign nationals are detained in the prisons of Bangladesh is not a new phenomenon. A famous case on this topic is *Faustina Pereira vs. State*[58]. In that case, the Apex court of Bangladesh acknowledged that there is no rule either in the Jail Code or any other law as to the release of foreign prisoners.[59] The procedure, so long followed, is to contact with the respective embassies of such prisoners and to make arrangements for their repatriation through their embassies. Therefore, another reason for the extensive presence of RPs might be that Myanmar state authority is utterly unwilling to take back the Rohingyas. In December 2011, a group of Rohingyas attempting to reach Malaysia was arrested and sentenced to jail by the Myanmar government. It signifies how the Myanmar government policy works to ensure that the Rohingyas are not considered Myanmar citizens.[60] Now, whilst after

[55] The Section provides that in any case whether there be an appeal or not, the High Court Division or Court of sessions may direct that any person be admitted to bail, or that the bail required by a police officer or Magistrate be reduced.

[56] "Own recognizance" is the basis for a judge to allow a person accused of an offence to be free pending trial without posting bail on the accused's own promise to appear. By filing a bail /bond with the court, the accused is usually released from imprisonment. If no bail has been set, the accused is released in his own recognizance.

[57] For exercising self-cognizance, the case must be recommended to the President of the Republic for granting free pardon.

[58] 53 DLR (HCD) 414, Criminal Miscellaneous Case (Suo Motu Rule) No. 2737 of 2001

[59] *Ibid*, per Md. Hamidul Haque J. at para 7 , p. 415

[60] See, DVB, 'Burma jails Rohingya on immigration charges',2011, http://www.dvb.no/news/Burma-jails-Rohingya-on-immigration-charges/19094, (viewed 19 may 2014)

going through the imprisonment, the detainees are logically cleared of charges, setting them free would mean once again an unpermitted foreigner is on loose within the territorial jurisdiction of Bangladesh, once again constituting an offence. This would as such go on to create a vicious cycle.

However, a point worth mentioning is the attitude and approach of the Judiciary in the case. The High Court Division if the Supreme Court very clearly mentioned that even if after a reasonable time such prisoners cannot be released with the help of the respective Embassy, Government should release such prisoners and under no circumstances the prisoners should be kept in jail.[61]

7. Coherence of the present mechanism of Detention under FA with Bangladesh's obligations under International Law

The absence of clear domestic mechanism for addressing asylum issues has been one of the reasons behind the aggravated plight of the Rohingya RPs. The confusion about the prevalence of International Law provisions in absence of clear domestic legislation has been well elucidated by Justice B.B. Roy Chowdhury of the Supreme Court of Bangladesh in the *Hussain Muhammad Ershad vs. Bangladesh Case*[62]. The Supreme Court reiterated that, when the domestic law of a State on a given subject is not clear or when there is no domestic law on a subject, the Judiciary can derive principles from the International Law, and the state accordingly should make provisions in its municipal law for adopting those rules of International Law. Also, in case of conflict between International Law and domestic law, if the provisions of International Law are strict and clear whereas domestic law has no clear provisions, then International Law prevails in those cases.

As such, the international instruments dealing with asylum issues, specially the 1951 Refugee Convention can provide useful guidelines for Bangladesh, despite the fact that Bangladesh does not have any positive obligation to observe the protection mechanism laid therein since Bangladesh has neither ratified not even signed the instrument.

According to the recognized principles of International Law, Art. 31 of the Convention states that the contracting States are not to penalize refugees for illegal entry in case their lives were in jeopardy provided they present themselves to the concerned authority and show good cause for their illegal presence. Due to Bangladesh not being a party, the border forces of Bangladesh as well as the foreign policy of the State function to create a legal vacuum, and the legal

[61] *Supra* n.58

[62] *Hussain Mohammad Ershad v. Bangladesh and Others*, 1 BLD (2001) AD 69

regime as it stands for Bangladesh is not appearing helpful to the asylum seekers or the state itself. If and when the asylum seekers present themselves before the authorities, they do not qualify to receive any identity papers, nor is there much for the authorities to do in this regard.

Bangladesh has been treated by the Rohingya asylum seekers as the Country of First Asylum[63] for quite a long time, due to the fact that at the time of the first influx in the 1990s, Bangladesh Government did provide refugee protection to the Rohingya asylum seekers. This protection has been revoked in the later times, and theoretically, Bangladesh cannot be considered as a country of first asylum in a strict sense.

Apart from that, Bangladesh's resolve to respect the norms of International Law has been repeatedly asserted: it is a fundamental principle of the State Policy[64], and in the Proclamation of Independence Bangladesh duly affirms to observe and give effect to all duties and obligations that devolve upon the people of Bangladesh as a member of the family of nations and to abide by the Charter of the United Nations. By virtue of being a High Contracting party to various conventions, Bangladesh has incurred a number of obligations, specially from a human rights perspective:

i) Universal Declaration of Human Rights (UDHR) 1948:

UDHR is the pioneer of the human rights movement in the post world war II era. Despite being a declaration, throughout its 64 year-journey, the UDHR has now become binding upon every member of the international community, and its provisions have now become Customary International Law, derogation from which is not permitted save in extreme circumstances.

The UDHR provides for the right to liberty and security of every person.[65] As a member of the international community and as a signatory to the UDHR, Bangladesh is under obligation to prevent torture, cruel and inhuman punishment.[66] Right to seek asylum has been mentioned in Art. 14 of the

[63] According to the UNHCR, The first country in which an asylum seeker has been granted an effective hearing of his/her application for asylum. Country of first asylum means the country that permits refugees to enter its territory for purposes of providing asylum temporarily, pending eventual repatriation or resettlement. Usually, First asylum countries receive the assistance of the UNHCR to provide basic assistance to the refugees. See, US Legal 'Country of First asylum', http://definitions.uslegal.com/f/first-asylum-country/ , (viewed 13May 2014)

[64] Constitution of the People's Republic of Bangladesh, Art. 25

[65] UDHR, Art.3

[66] *Ibid*, Art.5

UDHR. This means Bangladesh must maintain the minimum standard in the treatment of asylum seekers, provide reasonable support and not deny the rights of the asylum seekers as humans in danger.

ii) International Covenant on Civil and Political Rights (ICCPR) 1966:

The ICCPR provides that each state party to the covenant undertakes to respect and ensure the rights enshrined in the covenant to all individuals present within its territory. Art. 9 of the Covenant provides that no one shall be deprived of his liberty except in accordance of law. This provision is seriously violated when the RPs are denied liberty due to procedural laxity.

The rights enshrined in the Covenant are derogable only in times of public emergency threatening the life of the nation and which is officially proclaimed. Therefore, Bangladesh is obligated to ensure the rights to the RPs who have already served their term.

iii) Vienna Declaration on Human Rights and Programme of Acton of 25 June 1993

One of the core reasons of Bangladesh's harsh policy towards asylum seekers is the serious lack of international burden sharing. Whilst asylum seekers continue to enter Bangladesh, very few have indeed been repatriated or resettled in a safe third country. For various reasons, the Rohingya refugees in Bangladesh cannot qualify for resettlement procedures. In handling this critical situation, Bangladesh proceeded with the legislations it had with all the faulty procedures along with it. in addressing this issue, international burden sharing could greatly help in resolving the pressure of influx.

Art. 23 of the Declaration is of specific pertinence as well as helpful for Bangladesh. It speaks of the increased refugee crisis all over the world, and provides that:

> "…in the spirit of burden-sharing, a comprehensive approach by the international community is needed in cooperation with the countries concerned and relevant organizations, bearing in mind the mandate of the UNHCR."

This provision underlines state obligation to ensure a safe environment, and to do that with international cooperation. Bangladesh by doing her part can pave way for creating justified pressure on the international community and other developed states to come forward for burden sharing. This would definitely put Bangladesh in a much better position in the arena of diplomacy, bargaining capacity and international relations.

iv) Convention on Rights of Children (CRC) 1989

The CRC has set a wide range of rights for Bangladesh.[67] Bangladesh is obliged to ensure proper birth registration of every child born in the territory of Bangladesh, and Sec.2 of the Birth and Death Registration Act 2004 (the implementing act in Bangladesh of the CRC) includes refugees within the beneficiaries of this Act.

It further provides that States Parties shall ensure the implementation of children's rights in accordance with their national law and obligations under the relevant international instruments especially where the child would otherwise be left stateless.

Bangladesh has ratified the CRC with reservations to Arts. 14 and 21. In accordance with the CRC , Bangladesh has enacted the Birth and Death Registration Act 2004. As such, the registrar has a primary obligation to register the birth of every child born in Bangladesh or within the jurisdiction of Bangladesh. But the facts show otherwise. The direct interview with the Refugees say that the Registrar is unwilling to register the birth of a child if he finds out that both or one of the parents of the child is a refugee. Such perspective makes the children suffer under the FA 1946, as it is not uncommon that Rohingya children are also arrested and detained under the FA 1946.

Art. 22 of the Convention provides that States parties shall take appropriate measures to ensure that a child seeking refugee status or who is a refugee shall receive protection and humanitarian assistance in the enjoyment of the applicable rights set forth in the CRC. Also in this case Bangladesh seems to fall behind her obligations, as the refugee children really do not receive much assistance or support in any form from the local government authority.

v) Convention on Elimination of All Forms of Discrimination Against Women:

The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) in Art. 3 provides that State parties shall take all appropriate measures for the purpose of guaranteeing to women the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

[67] Art. 2 of the Convention provides that state parties shall respect and ensure the rights set forth in the convention to each child within their jurisdiction without any discrimination and irrespective of the child's or his or her parent's or legal guardian's race, national, birth or other status. Art. 7 of CRC provides that every child shall be registered at birth, and that every child has a right to acquire nationality. This right has also been enumerated in Art. 24(2) and 24(3) of the ICCPR.

The Committee on the Elimination of Discrimination against Women in its 48th Session[68] made certain recommendations and comments for Bangladesh. As regards the refugee women in Bangladesh, the committee in its report[69] mentioned that:

> "The Committee is concerned at the very limited information and statistics provided on disadvantaged groups of women and girls, including minority women such as Dalit women, *refugee women,* older women, women with disabilities and girls living on the streets. The Committee is also concerned that those women and girls often suffer from multiple forms of discrimination, especially with regard to access to education, employment and health care, housing, protection from violence and *access to justice.*"(emphasis added)

This shows that Bangladesh has an obligation to maintain, upgrade and provide adequate information on the refugee situation. Due to non registration, it often becomes much difficult to have accurate statistics on the number of refugees, number of male, female and children refugees within the State. Therefore, when a refugee is displaced from the camps, it is not easy to discover the absence and to relocate the missing refugee, and the difficulties in providing with proper identities has already been discussed to be the main reason for their arrest and detention under the immigration laws in Bangladesh.

Disability of women in case of access to justice is more relevant when it comes to the RP issue. Women are more vulnerable in comparison to their male counterparts when it comes to prolonged detention and confinement.

vi) SAARC Convention on Prevention and Combating the Trafficking in Women and Children for Prostitution:

Under the regional instruments, the SAARC Convention on Prevention and Combating the Trafficking in Women and Children for Prostitution stands in extreme importance. This regional instrument aims at developing a regional task force for constant vigilance and effective prevention of trafficking. As of yet, none of the States have come forward with any initiative to create the task force, however, recently Bangladesh has enacted the Prevention and suppression of the Trafficking Act 2012 which is a step towards discharging the obligations under the instrument.

[68] Held in 17th January – 4th February 2011

[69] UN document no. CEDAW/c/BGD/CO/7, para 37

Under s. 37 of the Suppression and Prevention of Trafficking Act 2012, no victim of trafficking can be prosecuted under the Anti-Trafficking Act or any other law in forcein Bangladesh. Moreover, the Act says in s. 31 that if a foreigner is a victim of trafficking then the government of Bangladesh shall record the statement of such person and start procedure for repatriation of the victim. Thus a police officer cannot arrest a trafficking victim, even if s/he is an unregistered foreigner.

8. Constitutionality of the RP situation

Art. 31 of the Constitution of the People's Republic of Bangladesh guarantees protection of law and due process of law as an inalienable right of every person present in Bangladesh. Art. 32 of guarantees right to life and liberty. Any legislation providing for deprivation of liberty requires to be strictly scrutinized.[70] A law providing for deprivation of liberty must be reasonable according to an ordinary prudent man, and *serving merely legitimate government interest* does not suffice (emphasis added).[71] A law providing for deprivation of personal liberty must serve a compelling State interest and if the mischief sought to be remedied can be remedied by any other reasonable means, deprivation of personal liberty will be unreasonable and arbitrary and void in terms of Art. 32 of the Constitution of Bangladesh.

9. New Laws to be enacted in Bangladesh

The situation and position of the Government of Bangladesh is also to be taken into account here: despite not ratifying the 1951 Convention the State has been sheltering refugees for decades, adding on to the infrastructural pressure. It is a matter of concern that despite having refugees for a long time, there has not been any sound policy developed.

In recent times, most of the cases are being filed under the FA 1946 and the Passport Act 1920. According to legal expert Dr. Ridwanul Hoque[72], prosecuting the persecuted refugees under any of these legislations is unlawful. These laws are meant for normal situations, when foreigners deliberately intend to disobey the law despite having no persecution.

[70] In the American jurisdiction, statutes impairing life and personal liberty are subjected to stricter scrutiny by the court. Mahmudul Islam, "Constitutional law of Bangladesh" , second Edition, 2010, Mullick Brothers, at para 2.115

[71] *Ibid.*

[72] Associate Professor, Faculty of Law, University of Dhaka

The facts and circumstances of cases involving unlawful foreigners as opposed to refugees are covered by the opinion adopted by the United Nations Working group on Arbitrary Detention in Communication 4/2011.[73] This was also reiterated in the case of *A vs. Australia*[74] where the UN Human Rights Council said that:

"in order to avoid a characteristic of arbitrariness, detention should not continue beyond the period for which the state party can provide appropriate justification."

The existing legislations are therefore insufficient to address the problem. Altogether, the situation as it stands now is violating Art.s 27, 30 and 25 of the Constitution of Bangladesh.

10. Detention of RPs and The Principle of Protection from Double Victimization

This is the latest development in the field of criminal jurisprudence in the international arena. According to this notion, subjecting refugees to documentation process and penalizing them in breach thereof amounts to double or secondary victimization[75] of the refugees. The refugees primarily are victims of circumstances, specially political. No one chooses to be a refugee or to flee one's country of origin. After becoming the victims of persecution, if the refugees are further subjected to stringent rules as to providing proof of identity and face punishment for failure, that would mean the victims are further victimised albeit at a different place, at a different time and on different grounds.

10.1 Double victimization v. Continuing Offence under the FA:

An argument cited in favour of detaining the RPs is that the double victimization theory does not apply to the RPs, since the offence under Sec.3 of the FA 1946 is by nature a "continuing offence". This would be a wrong argument because RPs are compelled to remain without proper documentation as they are denied the opportunity to contact the concerned authorities to get the papers. Lacking the intention on their part, the RPs can not be said to continue the offense.

[73] *Supra* n. 41

[74] *Supra* n. 3

[75] Secondary victimisation (also known as post crime victimisation or double victimisation) relates to further victimisation following on from the original victimisation. Prentice Hall, 'Post-Crime Victimization Or Secondary Victimization', Comprehensive Criminal Justice Terminology, http://www.prenhall.com/cjcentral/crimtoday4e/glossary/s.html ,cited in Wikipedia, 'Victimization', http://en.wikipedia.org/wiki/Victimisation , (viewed 16 May 2014)

Secondly, the FA lays down the incriminating act to be *"for illegal entry and continuous stay in the country..."* Once the victims are arrested and detained, they remain behind the bars. Incarceration cannot be equated to continuous staying. Similarly, their release from prison is also not continuing their sojourn in a proper sense of the term, because according to the law (Jail Code), the prison authorities are required to hand them over directly to the representatives from the embassies. If this rule is followed, then there will be no "continuous staying", consequently no continuiung offence. Therefore, the extended detention of the RPs is from all aspects a fit example of double victimization.

11. Is the legislation Applied equally to All Foreigners?

The answer is a simple NO. As discussed above, the court enjoys discretion in applying the law and granting bail, more so when the country of citizenship differs for the detainees. On occasions, Rohingya asylum seekers and even registered refugees have been denied bail despite having guarantors, when they admitted to the court that there were Rohingya. On the other hand, Indian nationals are often arrested specially in the Sylhet region for illegal entry, yet the maximum punishment given for them is generally 2-6 months. The Control of Entry Act 1952 (which provides ales rigorous punishment in comparison to its counterpart the FA 1946) is used for Indian nationals only although section 7 can be interpreted differently. When any Indian national is arrested under this act the maximum punishment for illegal entry into Bangladesh territory is one year imprisonment. In recent days, Courts have become highly sensitive in dealing Rohingya cases.

Last updated information shows there have been 113 foreign detainees in the prisons of border districts of Bangladesh at a glimpse, the breakdown of which is as follows:[76]

Prison	Number of prisoners	Country of Origin
Dinajpur	8	Indian (7 of whom 2 are RPs), Myanmar (1),
Khagrachhori	11	Indian (10), Myanmar (1)
Cox's Bazar	40	Myanmar (36 all of whom are RPs), Indian (2), Nepalese (1), Estonian (1)
Bandarban	54	Myanmar (52), Indian (2 of whom 1 is an RP

[76] The data have been collected from the Jail Superintendents of the respective districts on condition of anonymity.

As shown, amongst the detainees and RPs in Bangladesh, the majority are of Indian and Rohingya origin. Bangladesh has a large border with India and many Indians frequently cross the border, without proper authorization. There exists wide discrepancies in treatment.

11.1 In case of Indian detainees:

The border guards placed on either side of the border in India and Bangladesh quite frequently take into custody people crossing border unlawfully, sometimes with extra legal assistance from the forces themselves. The RP situation gets worse because of the lengthy judicial and bureaucratic system involving the respective Foreign ministries. These cases receive least priority to the respective governments, making the repatriation harder. The only advantage is whereas the Indian government never denies its citizens, the Myanmar government denies the Rohingya refugees to be their citizens at all.

According to the Jail Super of the Cox's Bazar Prison, the method of "Push Back" is applied (only) in cases of Indian prisoners. While under international law and international norms, "Push Back" is a violation of Human Rights, it is nonetheless practiced in case of Indians; mainly due to the fact that, "Push Back" particularly helps to prevent further violation of the human rights of the detainee.[77]

In order to push back an Indian RP, the BGB (Border guard Bangladesh) takes the concerned RP near the border, calls the BSF[78] and when the BSF are satisfied with the identification of the RP, they take him back.

11.2 In case of Myanmar's detainees:

The Nasaka (Border force for Myanmar) are not cooperative like the BSF in this regard, especially so when it comes to Rohingya RPs. In December 2011, 19 RPs were sent back to Myanmar on being identified as Burmese by the Myanmar government. The present RPs are not identified as of yet by the Myanmar government.

12. Treatment of the RPs in detention

The RPs command some amount of sympathy from the jail administration. They enjoy more freedom to move about within the jail premises. They do not have to work unlike the prisoners under rigorous imprisonment.

[77] The Border guards of Myanmar

[78] Border Security Force, the Border guards of India

However, they are not given any separate cell and share their compartments with the local detainees. The women and the juvenile have separate cells. Generally, if the RPs request for any preferable ward to live in, the administration grants that.

13. Prolonged RP Status: How to Address?

13.1 The Best Approach: Alternatives to Detention:

The use of immigration detention as a migration management tool by governments is on the rise globally, especially in South Asia. Refugees, asylum seekers and stateless people face arrest, detention and penalties for immigration violations similarly to other migrants.[79] Overcrowding in prisons has become a grave concern for authorities in Bangladesh at present, which accelerates the need for alternatives to detention for the asylum seekers further.

At the South Asia regional Consultation on Detention of Non-Nationals held on 18th to 19th October, 2011 in Dhaka, several good practices regarding alternatives to detention were considered.[80] In Bangladesh, these practices mainly include release through bail, court orders to release children from prisons, reducing overcrowding prison by identifying and facilitating release of detainees etc. Unfortunately, as one can see, these practices are seldom exercised when the accused concerned is an offender under the Foreigners act 1946.

While discussing alternatives to detention, one must beware that these alternatives do not become alternative forums of detention. Alternatives to detention do not replace non-detention or release. It should also be kept in mind that the options considered must be effective and suitable to the present conditions and infrastructure of Bangladesh.

Studies have found that, multiple alternatives exist in this regard, such as:

1. release provisions after registration and documentation
2. release based on own recognizance
3. community models placing persons in open reception centers, shelters with family/community groups
4. release with reporting conditions, monitoring and supervision.

[79] Final Report on the South Asia regional Consultation on Detention of Non-Nationals , 18th to 19th October, 2011, Dhaka, Bangladesh

[80] *Ibid.*

As we have seen, option 1 is out of question for the time being due to the State policy pursued by the GoB. As regards option 2, the procedure laid down in the Prisoners Act 1900 involve application to the President of the Republic which indeed is cumbersome and not effective in the practical sense.

One considerable option is release on bail/bond or sureties. However, the magistrates in Bangladesh do not entertain bail when the offence is non bailable according to the CrPC and in case of refugees, the court is extra cautious and sensitive and at times are unwilling to grant bail even if there are proper documentation.

13.2 Probable options in the domestic arena:

a) Separate Documents for the RPs:

According to the Jail Super of the Cox's Bazar prison, separate identity papers should be given to the RPs on setting them at liberty. These papers might function as certificates for their journey up to the border.

The senior District Judge of Maulavibazar in one his release orders specifically mentioned that the person must leave Bangladesh within 3 days from the issuing of the release order. Otherwise, he shall be punished according to the law.

In a case in the Chokoria court[81], the Judge in his release order mentioned the following:

> "The period of their conviction shall be terminated on 26.09.2011. After that the accused persons shall be freed at once or shall remand them in to the local refugee camp at Cox's bazaar. If the accused shall be freed, they must withdraw themselves from the territory of Bangladesh within 48 hours of the freedom and for that purpose this order will be treated as a passport for their departure from Bangladesh."

Photocopies of this release order were given to the persons so that the border forces did not impede their journey.

Such documentation would help both the victims and the State. While this would help the law enforcing agencies to recognize refugees and other RPs from general offenders, it would also reduce the pressure from the Jail authorities. The Bangladeshi Prisons are overcrowded[82]. This would prevent the unnecessary arrests.

[81] Case no. 299/10, dated 25.09.2010

b) Judicial activism:

According to Dr. Hoque, the best way out of this static situation would be filing a PIL under the writ jurisdiction of the Supreme Court by public bodies having such jurisdiction and mandate. It is quite unfortunate that despite being one of the biggest refugee hosting country in terms of number, the judiciary of Bangladesh till date has not addressed this issue seriously although we notice a vigilante judicial activism in other fields. What is found is a number of *Rule Nisi* issued by the Supreme Court in various PILs filed by the *Ain O Shalish Kendra (ASK)* and *Bangladesh Legal Aid and Services Trust (BLAST)*. *BLAST* has filed 3 cases before the SC of Bangladesh,[83] all of which are pending hearing. In these cases, the High Court Division ordered the Respondents to show cause as to why such detention of the foreign nationals should not be declared to be without lawful authority, to bring the detainees before the Court to satisfy itself that they are not held without lawful authority and to order their immediate release. However, as in other PIL cases, these rules managed to stay good in papers and implementation has not been carried out.

On July 14, 2012, a writ petition was filed before the High Court Division by Advocate Zia Habib Ahsan of the Chittagong Bar. As of May 2014, the matter is pending before the Court.

c) Amendment of law:

A proposal has been sent to the Ministry of Home Affairs for the repealing of the Foreigners act 1946. On a joint collaboration with an International Organization[84], the Government of Bangladesh is trying to repeal and modify the existing legislative scheme. If the project is successfully carried out, it would result in the repulsion of the existing laws on foreigners and immigration[85], and only 2 laws would take their place: a Passport Act and an Immigration Act.

[82] For example, the capacity of the Cox's Bazar prison is 400 prisoners, whereas currently it houses 2400 inmates. (according to the jail Super, CXB prison)

[83] *BLAST v. Bangladesh and others*, [Foreign prisoners in Dhaka jail Case], Writ Petition no. 6353/2003

BLAST vs. Bangladesh and others, [Burmese Prisoners Case], Writ Petition no. 1068/2006

BLAST vs. Bangladesh and others, [Indian Prisoners Case], Writ Petition no. 224/2004

[84] Due to reasons of confidentiality the name of the Organization has not been disclosed

[85] The Passport Act 1920, The Passport Rules 1955, the [Bangladesh] Control of Entry Act, 1952, The Foreigners act 1946, the Foreigners Order 1951, the Registration of Foreigners (Exemption) order 1966, the Foreigners (parolees) Order 1965, The Registration of Foreigners Act 1939 and the Registration of Foreigners Rules 1966

In the proposed Immigration Act, it is specifically being laid down that there is a clear distinction between a Stateless person and a citizen of a foreign State. Since the stateless people are deliberately deprived from any sort of identification from any authority whatsoever, that further complicates the issue when the country of refuge asks for identity papers as a prerequisite to recognizing their status either as asylum seekers or subsequently as refugees. Under the proposed regime, both the classes would get special protection.

d) Introduction of new laws:

In the field of protection, a significant development has been the newly passed Suppression and Prevention of Human Trafficking Act 2012. The Act has specific provision prohibiting the penalization of victims of trafficking on the ground of violating any other laws of Bangladesh for the time being. This provision is of particular interest when it comes to dealing with the issue of detention of refugees.

This provision is an example of applying soft law principles into the domestic law. The before mentioned principle of protection against double victimization has found place in our national legal framework by means of this section. Similarly we could draw analogy and sourt out a regime for addressing the issue of RPs in detention.

14. Conclusion by way of recommendations

a. Identification:

1. The government or the concerned authority should come up with a well formulated identity procedure. In this case, strict time limits need to be imposed on detention for the purpose of identity verification so that there is no probability of prolonged detention.
2. In many cases, the asylum seekers do not have any identity papers (from the home country). Also the state may require the asylum seekers to deposit the papers if it deems fit. In both the cases, the individuals need to be issued with substitute documentation which would clearly declare their position and distinguish them from illegal immigrants.
3. The government may create separate cells for carrying out identification procedure. This would facilitate knowing how many asylum seekers are within the State territory.

b. Promoting alternatives to detention:

4. There are various forms of alternatives to detention: registration, deposit /surrender of documents, bond/bail/sureties, community supervision etc. these forms have to be moulded to fit the native characteristics and surroundings in the areas where the asylum seekers prefer to go.
5. The court as well as the law enforcing agencies should promote bail/bond/ sureties. The government may make separate regulations to provide for special bail facilities for the asylum seekers, so that they do not end up in detention merely due to want documentation
6. Periodic reporting to concerned authorities can be a good option. In this case, the District Commissioner, the Local UP Chairman or the Ward Commissioner's office can act as the relevant authority. The asylum seekers can be obliged to report to the relevant authority from time to time. This would ensure the proper preservation of information as well as monitoring the asylum seekers so long as they are not given any solution. In this regard, the government can consider any MoU with local NGOs who have a close understanding with the local people.

c. Awareness building:

7. In dealing and detaining the asylum seekers, the law enforcing agencies should be conscious. They have to keep in mind that identity requirements should not have unrealistic provisions. The inability to produce identity papers should not be interpreted as unwillingness to cooperate.
8. In making the assessment, the judges as well as the law enforcing agencies should notice the behaviour of the concerned asylum seekers: whether they have plausible explanation for absence or destruction of identity papers, whether they possess false documents, whether they intend to mislead the authorities, whether they refuse to cooperate with the identity verification process.
9. The government may consider establishing separate asylum centres near the border areas where it would be easier for the immigration office as well as the Border Guards to monitor the influx of asylum seeker, render them the necessary assistance and differentiating them, with the other illegal immigrants.
10. Like the Probation system in our legal infrastructure, the Law enforcing agencies or the government may create separate officers who would be responsible for the asylum seekers under their care. Every local administrative unit can have such officers.
11. The UNHCR Guidelines contain certain Complementary measures and other considerations. Amongst them, the first one is Case Management.

Case management is a strategy whereby every individual; asylum seeker is attained personally by an assigned Case Manager. This Case manager is responsible for the entire case of the individual. This will continue during the entire period of Status determination and settling the claims of the asylum seekers.

These Case Managers may work under the separate cell in the immigration department. In that case, the government must consider recruiting skilled staff. This would have a multifarious affect. While it would facilitate the identification process, it would also reduce the pressure from the law enforcing agencies, the immigration department, and at the same time create new employment opportunities in the country.

As a final word, RPs are a group of people suffering from one of the cruellest form of human rights violation. As a State, Bangladesh started its journey with the spirit of ensuring human dignity. Much has been wasted in the long journey, yet there still is much to do. The policy reforms mentioned herein are just a persuasive suggestion, and the crux of the matter rests with the Government. They say faith can move mountains. It is faith, and a firm will on our part, that would be required to change the world of these unfortunate people. And that is what Bangladesh pledged to do, ever since, for ever after.

National Human Rights Commission, Bangladesh