

Ideas, Interests and Institutions: Conceding Citizenship in Bangladesh

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Introduction

In the mid 1980s, Michael Trebilcock decided to explore whether the factors that argued so persuasively for free trade of goods would be equally applicable to free movement of people. Canadian immigration policy, he felt, would be a good place to start this inquiry. Like many law students and recent graduates before and after me, I was fortunate enough to work with Michael in the early days this idea was germinating. What began as a summer project eventually turned out to be a continuous collaboration that has taken us from 18th century immigration to the New World to the present day.

Our research started in 1985 by looking at the economic arguments in favour of free movement of people. Canadian immigration history was a fertile testing ground, having seen periods of relatively unrestricted immigration, as well periods of tight regulation. But very early on, Michael refocused the work on the broader question of the determinants of community membership.

The lens we used was one that Michael had honed for some years. We examined the various periods in Canadian immigration history with a view to seeing whether it was ideas or interests that largely explained changes to policy over time. Our analysis eventually broadened, as Michael's own thinking on public choice theory expanded, to include looking at the role institutions played in major policy shifts over time.

The framework Michael brought to bear on our work made the retelling of the Canadian immigration history, and the determinants of it defining features, entirely possible. It also helped us to set out some prescriptive lessons drawn from the country's past.

It is an analytical framework that has broad and equally useful application in circumstances that often engage international organizations such as the Office of the United Nations High Commissioner for Refugees (UNHCR). As an illustration, this paper looks at one specific situation of concern to UNHCR that engages important public policy choices. The situation is far removed from the Canadian immigration experience. It is that of the Urdu-speaking Muslim minority in Bangladesh, who for over forty years constituted one of the largest yet not well known de facto stateless populations on earth.

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Their story stretches back to the time of Indian independence and partition when communal violence led to the mass exodus of approximately one million Muslims to former East Pakistan. Among them were tens of thousands of Urdu-speakers who had fled the Indian states of Bihar, Uttar Pradesh, Madhya Pradesh, West Bengal and the Punjab. As those from Bihar constituted the majority, the Urdu-speakers in East Pakistan, and up to today in present day Bangladesh, are commonly referred to as Biharis.

How this group became to be considered 'stateless' and relegated to the margins of society without a legal identity and associated rights to be educated, to work and to participate in public life is a gripping tale. The recent recognition of their citizenship is a significant human rights development and the story of how this came to pass a particularly telling one in terms of the determinants of public choice more generally.

Determinants of Public Policy Revisited

Early papers by Michael and colleagues¹ observed that policy choices by governments are often at odds with what welfare economics would prescribe since it may not be rational for governments to achieve policy objectives in the most efficient (i.e. less costly) way. This is because collective decision-making involves many participants (eg. politicians, bureaucrats, regulators, interest groups, media, voters) seeking to advance their own interests. Therefore, collective or government decision making had to be viewed as a kind of 'implicit market involving intricate sets of exchanges between and among self-interested actors.'

For example, these writers reasoned, politicians would find it rational to pursue policies that maximize their chance of reelection and have immediate visible impact over those that may be less costly, less visible and/or whose benefits would accrue at a later time. Bureaucrats would be motivated to promote policies that maximize their power, pay and prestige. For their part, regulators would want to accommodate those they regulate, so as to avoid problems and enhance their chance of employment in the regulated industry. The media, another key actor, was motivated to trivialize complex issues and sensationalize stories to cater readers limited attention spans and therefore maximize readership and consequently advertising revenues.

In time, this model to explain government choices, was seen as too limited because, as Trebilcock and others observed, those who impact public decision making can be also be motivated by a range of noneconomic and non self-interested values such as notions of distributive justice, corrective justice, due process, and equality. They pointed out that there are many examples of non self-interested ideas playing a key role in the political process even when the policies they supported went against the wishes of many

¹ Most notably with Douglas Hartle, Robert Prichard and Donald Dewees in their 1982 study for the Economic Council of Canada 'The Choice of Governing Instrument, International Review of Law and Economics, vol. 2(1), pages 29-46, June 1982.

prevailing interests.² These ideas, however, rarely worked alone. They needed to be supported by political interests. A political crisis, for example, could provoke a government to adopt a new policy or a new institution informed by ideas (both good and bad).

Just as non self-interested behavior was insufficiently accounted for in early public choice theory, so too, Michael observed, was the influential role that institutions play and the impact they have on policy. Institutions, including the way they are designed and how they work, can also influence policy choices. Courts are a clear example. So too are administrative processes, especially those that favour a high degree of public consultation and thus provide opportunities to a wider number of parties to affect public policy.

These observations have led Michael to conclude that while much of the earlier public choice framework he and others advanced twenty-five years ago remains valid, it is nevertheless too narrowly conceived and too deterministic. The public policy pursued by a government is driven not only by self-interest but rather is determined by a mix of factors. Ideas, interests and institutions interact in specific political contexts and it is this combination of influences that accounts for policy changes, deadlocks and improvements over time.³

It is this view of public choice theory, in fact, that best explains why the Urdu-speaking minority in Bangladesh was finally acknowledged to belong to Bangladesh.

From East Pakistan to Bangladesh

Many people are aware of the traumatic events that accompanied the creation of Pakistan. Less well known are the events that eventually pulled it apart and led to the creation of Bangladesh. It is that history that explains why tens of thousands of Urdu-speakers were disenfranchised and relegated to the margins of society for nearly forty years.

Prior to the end of British rule in the subcontinent, the Muslim League had long advocated for the creation of an independent Muslim state. This was realized in 1947 when the British granted Dominion Status to both Pakistan and India. Pakistan included two geographically separate and ethnically diverse parts of the former colony: East Pakistan with the province of Bengal, and, over a thousand kilometers away, West

² For example, consumer protection and environmental legislation in the 60s and 70s against the objectives of concentrated interests; deregulation and tax reform in the late 70s and 80s against the wishes of many powerful interests and why so many people vote in national elections even though they have minimal change of influencing the outcome. Steven Kelmen, *Making Public Policy: A Hopeful View of American Government* (1987) referred to in Michael Trebilcock, 'The Choice of Governing Instrument: A Retrospective' in *Designing Government, From Instruments to Government*, F. Pearl Eliadis, Margaret M. Hill, Michael Howlett eds, (2004), 51.

³ Michael Trebilcock, above note 2.

Pakistan with the provinces of Punjab, Sindh, Balochistan and the Northwest Frontier Province. The seat of government was in Islamabad, West Pakistan.

Signs that the two parts of Pakistan, which were separated by a sizable part of India, would be united in name only, appeared early. In March 1948, President Mohamed Al Jinnah took the occasion of his visit to Dhaka in East Pakistan to announce that Urdu and Urdu alone would be the state language of Pakistan. This immediately stoked resentment by the Bengali speaking majority in East Pakistan and led to a Bengali language movement that, in 1956, eventually succeeded in having Bengali recognized as one of the official languages.

Language recognition, however, did not lead to full parity in other areas, for Bengalis remained marginalized in the united Pakistan. They were less well-off economically and less politically influential than the Urdu-speaking community in East Pakistan. The latter formed a distinct yet privileged minority. They were affiliated linguistically with the governing elite in West Pakistan and received preferential treatment in regard to government jobs and housing. They lived in separate communities. They dominated the industrial sector, small businesses and trade and commerce, while the majority Bengalis were engaged largely in the agricultural sector.⁴

The relative lack of political and economic influence exerted by the Bengali majority helped to fuel the Bengali autonomy movement, which gained significant support over the years. This culminated in 1971, when the dominant voice of the movement, the Awami League, won all the East Pakistan seats in the National Assembly and a majority in the country as a whole. Meanwhile, the Pakistan Peoples Party, led by Zulfikar Ali Bhutto, won the majority of seats in West Pakistan. Attempts to form a coalition government were unsuccessful and short-lived. In March 1971, President Yahya Khan, postponed the sitting of the National Assembly and dissolved the civilian cabinet, leaving the army in control of Pakistan under his leadership.

The Pakistan government's attempts to suppress the aspirations of the Bengalis provoked a quick reaction. The Awami League called for a general strike in East Pakistan, which was accompanied by demonstrations and civil disobedience. The Awami League was swiftly banned and its leader, Sheikh Mujibur Rahman, arrested. Foreign journalists were expelled from East Pakistan and the media was censored across the country. Within weeks of these measures, the Bengali nationalists responded by unilaterally declaring the Independent People's Republic of Bangladesh and set up a provisional government in India.

President Yahya Khan pressed on, pledging to uphold the integrity of Pakistan and planning extensive response, 'Operation Searchlight', to deal a death blow to the independence movement in the East.

⁴ Kazi Fahmida Farzana, 'The Neglected Stateless Bihari Community in Bangladesh: Victims of Political and Diplomatic Onslaught,' *Journal of Humanities and Social Science*, Vol. 2, Issue 1 (2008)

Operation Searchlight, was planned to succeed in a relatively short time period by a significant use of force, initially on the major cities. President Yahya Khan is reported to have called his troops to 'kill three million of them and the rest will be eating out of our hands' and his troops to have taken him at his word.⁵

The operation started in March 1971 and ended nine months later, during which time it is believed that 3 million persons were systematically killed.⁶ The offensive was characterized by wide-spread torture, rape of women and girls and extensive destruction of towns and villages. In the Western world, Operation Searchlight remains one of the least well known massive military crackdowns of the twentieth century. The effects were felt across the entire country. A staggering twenty million people within East Pakistan are reported to have been internally displaced with an additional ten million refugees seeking refuge in India, marking this movement alone as the single most sudden and immense refugee flow in modern history.⁷

A report of the investigation by the International Commission of Jurists conducted the following year contains eye witness accounts of these months.

The military reign of terror in East Pakistan was directed almost exclusively against the unarmed civilian population. It was not a civil war of soldiers against a rebel army. It can be divided roughly into three phases. First, there was the general repression launched against all Bengalis, which began in March and continued with varying intensity for nine months. The second phase was the concentrated persecution of the Hindus, with the explicit intention of eliminating the eight to ten million Hindus left in the country, either by murdering them or driving them out. This second phase was accompanied by a secondary persecution of the Hindus by their Muslim neighbors with encouragement from the Army. The third phase was the Collective Punitive Reprisal Program which increased tremendously when the freedom fighters began hitting back.⁸

⁵ Robert Payne, *Massacre*, (1972), p. 50.

⁶ This estimate is commonly reported although as between Pakistan and Bangladesh the issue has been a source of contention. Bangladesh has always maintained this figure, while Pakistan has said it was much lower, claiming the total to be around 26,000. Hamoodur Rehman Commission (HRC) *Report of Inquiry into the 1971 War*, declassified by the Pakistani government in 2000; Human Rights Watch, 'Ignoring Executions and Torture', *Impunity for Bangladesh's Security Forces*, May 2009.

⁷ Over one third of the total population of Bangladesh was displaced. Sumit Sen, 'Stateless Refugees and the Right to Return: Bihari Refugees of South Asia- Part 1,' *International Journal of Refugee Law*, Vol. 11, No. 4 (1999) 632 at 629.

⁸ For more on the events during this time see International Commission of Jurists, *Commission of Enquiry into the events in East Pakistan, 1971* at http://www.globalwebpost.com/genocide1971/docs/jurists/1_preface.htm

Others who documented the events of 1971 also tell horrifying stories of mass extermination and dislocation. Robert Payne, who went to Bangladesh in 1972 to research and report on what happened in 1971, describes in vivid terms how events unfolded, beginning in Dhaka when the university was attacked and hundreds of students killed. Estimates placed the number of deaths at 7,000 in a single night:

Within a week, half the population of Dacca had fled, and at least 30,000 people had been killed. Chittagong, too, had lost half its population. All over East Pakistan people were taking flight, and it was estimated that in April some thirty million people [!] were wandering helplessly across East Pakistan to escape the grasp of the military.⁹

Younger men and adolescent boys were specific targets as they were believed to be potential willing recruits for the armed resistance. Tens of thousands were reported to have been tortured and killed. Payne described how the killing of defenseless civilians had become so common for the soldiers it was 'like smoking cigarettes or drinking wine'. Not 'since Hitler invaded Russia had there been so vast a massacre'.¹⁰

The Pakistani army drew additional support from the police in West Pakistan as well as through local recruitment for the auxiliary force, the Razakars. Urdu-speakers made up a sizable contingent of the Razakars and were also implicated in the atrocities committed during this time.

For nine months the West Pakistan forces held sway over most of the country. Nevertheless, in certain areas, where Bengalis were in control, revenge attacks against Urdu-speakers was every bit as brutal as was the treatment visited upon Bengalis in other areas. Anthony Mascarenhas, writing in the Sunday Times in June 1971, described the attacks on the Urdu-speaking minority:

Thousands of families of unfortunate Muslims, many of them refugees from Bihar who chose Pakistan at the time of the partition riots in 1947, were mercilessly wiped out. Women were raped, or had their breasts torn out with specially fashioned knives. Children did not escape the horror: the lucky ones were killed with their parents; but many thousands of others must go through what life remains for them with eyes gouged out and limbs amputated. More than 20,000 bodies of non-Bengalis have been found in the main towns, such as Chittagong, Khulna and Jessore. The real toll, I was told everywhere in East Bengal, may have been as high as 100,000, for thousands of non-Bengalis have vanished without a trace.¹¹

The magnitude of the atrocities and the mass dislocation they precipitated prompted India to intervene on the side of the Bengalis, first through the provision of equipment, training and other assistance. Following Pakistan's declaration of war on India on December 3, 1971, India stepped up its engagement, launching ground, sea and air attacks against the

⁹ Robert Payne, above note 5, p. 48.

¹⁰ Ibid.

¹¹ Anthony Mascarenhas, Sunday Times, London, June 13, 1971.

Pakistan army. The Indian forces with the Bengali 'freedom fighters' stemmed and turned the tide of the Pakistan onslaught. On December 16, 1971 the Pakistan Army, including 93,000 servicemen, surrendered unconditionally, and the independent country of Bangladesh was established the following day.

An independent Bangladesh and the citizenship question

Within a month of independence, the country adopted a constitution providing for parliamentary democracy with a Prime Minister, a legislature, an independent judiciary and a largely ceremonial Presidency. The very popular Sheik Rahman became the first Prime Minister.

With the retreat of the Pakistani forces, all Urdu-speaking residents of the newly created state of Bangladesh were at heightened risk of severe revenge attacks. 'Each one', wrote a reporter at the time, 'is a living symbol of everything the Bengalis hate.' 'Everywhere there is a lust for blood' was another by-line. 'The jubilation of victory has given way to savagery as Dacca's Bengalis avenge their murdered relatives and comrades in blood', noted one Associated Press writer who continued with the following explanation:

They had plenty to avenge. Two days before the Pakistan surrender 120 local intellectuals were rounded up and butchered. Many were tortured to death. Their decomposing bodies, kicked over by crowds and feasted on by dogs, still lie scattered among the water logged clay pits on the outskirts of the city.¹²

Thousands of families were brutally murdered. Witnesses reported summary executions by firing squads, mass decapitations, rape and mutilation. Although the government estimated that 15,000 were killed, most estimates place the number of deaths of Urdu-speakers at between 70,000- 100,000 people in a matter of months.¹³

The Urdu-speaking minority fled their homes and sought sanctuary in some 166 Red Cross camps while awaiting repatriation to Pakistan. By the end of 1972 there were over 1 million displaced persons in these camps, which were so squalid that one UN official declared in desperation that the site he had visited could be described as nothing more than a concentration camp.

While the internally displaced were streaming into hastily constructed camps, laws were passed which facilitated the dispossession of their personal and commercial properties. Presidential Orders were promulgated permitting the confiscation, administration and management of properties owned by persons who were not present in Bangladesh, who had ceased to occupy or manage their properties or who were enemy aliens (citizens of a state at war or engaged in military operations against the country). The orders included

¹² Dennis Neeld, 'Blood flows in Dacca Streets as Bengalis Avenge Murdered Relatives and their Comrades'. Associated Press, 21 December 1971. For more press reports see: http://www.statelesspeopleinbangladesh.net/newspaper_reports.php.html

¹³ Sumit Sen, above note 7 and 'Stateless Refugees and the Right to Return: Bihari Refugees of South Asia- Part 2,' International Journal of Refugee Law, Vol. 12, No. 1 (2000).

property of enemy aliens as well as citizens who were deemed to have abandoned their properties, and, so worded; they provided the foundations for the seizure of property owned by the Urdu-speaking minority.¹⁴

At the same time, however, another Presidential order was passed which provided a means for the Urdu-speaking minority to acquire Bangladeshi citizenship.¹⁵ An estimated 600,000 did, with the remainder of over 500,000 persons opting to repatriate to Pakistan. Those choosing relocation to Pakistan anticipated that their move would be swift. They were wrong. Pakistan was not keen on admitting all of its citizens remaining in Bangladesh. Having accepted those that fought with Pakistan civil armed forces during the war, the government of Pakistan had little interest in accepting the remainder and went so far as to refuse to recognize the majority of them as citizens of Pakistan.¹⁶

A ray of hope appeared in 1972 as the Bangladeshi government insisted that resolution of the problem would be a precondition to establishing diplomatic relations with Pakistan, and as the Urdu-speaking population in Sindh province in Pakistan pressed the government to admit the Urdu-speaking minority stranded in Bangladesh.¹⁷ As a result, the New Delhi Agreement and the Tripartite Agreement were reached in 1973 and 1974 respectively, providing for the registration and repatriation of those who wanted to repatriate to Pakistan as well as those Bengalis who wished to return from Pakistan to Bangladesh. Over 500,000 individuals registered with the International Committee of the Red Cross (ICRC) for repatriation to Pakistan, but the ICRC and UNHCR were only able to facilitate the movement of some 108,000 due to a shortage of funds. After that, although Bangladesh called for the resumption of the movement, Pakistan expressed little willingness to see it revived and maintains, to this day, that the original terms of the 1973 and 1974 agreements have been implemented substantially.¹⁸

Stranded Pakistanis

For fifteen years there was little progress on the issue, although some 100,000 Urdu-speakers moved illegally to Pakistan during this time. Those who remained lived in the

¹⁴ Sumit Sen, above note 7, 637, Refugee Watch (South Asia Forum for Human Rights), 'Bangladesh State and the Refugee Phenomenon', No. 18 (2003), http://www.safhr.org/refugee_watch18_4.htm

¹⁵ More fully discussed in the section further in this paper on 'Legal Recognition'.

¹⁶ It only issued clearances for repatriation to those who could prove they were domiciled in former West Pakistan and were employees of the central government or were members of families divided between former East and West Pakistan. These provisions were very narrowly interpreted, so as not to include most of these who had opted for repatriation. Sumit Sen above note 7 at 640-641.

¹⁷ Mehtab Ali Shah, *The Foreign Policy of Pakistan: Ethnic Impacts on Diplomacy, 1971-1994*, 1997

¹⁸ From interview in the Tanvir Mokammel's documentary 'Swapnobhumi' The Promised Land, 2009 which through extensive interviews, news footage and reporting, tells the story of Urdu-speakers in Bangladesh from the time of India partition to the present day.

now government managed camps and settlements, in abject poverty and with none of the rights of citizens. Within these settlements the Stranded Pakistanis General Repatriation Committee (SRGCRC) was formed, which continued to advocate for repatriation to Pakistan.

During this time, Bangladesh tried to interest Islamic states in helping to resolve the matter. Finally in 1985, Pakistan President Zia-ul Haq expressed a willingness to resume dialogue on the issue, claiming that it was a humanitarian problem that required a humanitarian solution. He offered to accept the remaining Urdu-speakers in Bangladesh who wanted to repatriate to Pakistan provided sufficient resources were made available to facilitate their movement and their rehabilitation in Pakistan. A plan that was subsequently drawn up for a cost of over 278 million dollars, which included transportation, housing constructions and provision of community services to the returnees. Some 14 million dollars were raised, including a sizable donation from the Rabita al Alam Al Islami, a Saudi charity, but the remainder of the money was not forthcoming and the proposed movement was again forestalled.¹⁹

Within Pakistan, the relocation of the ‘stranded Pakistanis’ was controversial. The Muttahide Quami Movement (MQM), originally formed by the Urdu-speaking Muslims who migrated to Pakistan at the time of Partition, was strongly supportive of the ‘stranded Pakistanis’ in Bangladesh and their aspirations to be repatriated. The MQM drew significant support within the province of Sindh. However, many non Urdu-speaking residents of Sindh were opposed, not wanting to be overpowered by Urdu-speakers and arguing that the prospective arrivals would likely support para-military groups against local populations as they had in Bangladesh.

During Benazir Bhutto’s tenure as Prime Minister between 1988–1990, she too retreated from her initial support for repatriation because of a similar fierce backlash by Sindh residents. Succeeding her, Nawaz Sharif promoted the return of the Urdu-speakers in Bangladesh to Punjab. This faced double opposition. The MQM protested that, as Muslims and Pakistani citizens, the returnees should be entitled to settle anywhere in Pakistan. Meanwhile, many residents in Sindh objected on the grounds that the returnees would surely settle in Sindh, leaving the local inhabitants a minority in their ancestral territory.²⁰ Within Pakistan, there was never a powerful enough coalition to help bring the stranded Pakistanis home nor strong enough political reasons for the government to pursue their return unilaterally.

Over these years, the stranded Pakistanis felt betrayed by Pakistan. Many had sold all they owned in 1974 in anticipation of being repatriated to Pakistan. Their dreams were never realized, leaving them with few belongings, limited opportunities and perpetual separation from their families in Pakistan. They saw themselves as quite literally stranded and as the years passed their embitterment towards Pakistan deepened even though for many of the older generation, their wish to repatriate did not diminish.

¹⁹ Mehteab Ali Shah, above note 17 , 73 -74 ; Kazi Fahmida Farzana, above note 14.

²⁰ Mehtab Ali Shah, *ibid*.

Second Generation

With time, a whole new generation was born in Bangladesh. While they shared the language of their parents, these children of stranded Pakistanis had been born and raised in Bangladesh, were fluent in Bengali, felt more a part of Bangladeshi community than a part of Pakistan, and wanted recognition of their Bangladeshi citizenship.

Today there are an estimated 250,000 persons within the Urdu-speaking minority, with over 151,000 living in 116 camps and settlements in Bangladesh.²¹ These camps and settlements are dilapidated and by all accounts utterly dismal. They lack adequate water supplies. Sanitation services are practically non-existent, with few toilets, washing facilities, garbage disposal or proper drainage. In Geneva camp, one of the largest, for example, there are only 250 public latrines for 25,000 inhabitants.²² Ten to twelve family members typically live in spaces averaging 8 feet x 8 feet. There is no privacy and poor health is endemic.

In addition to their grim living conditions, camp residents had limited means to escape the poverty that engulfs them. A camp or settlement address is a virtual bar to government education and to most jobs in the formal sector. Those Urdu-speakers who can afford to send their children to private schools are relatively few, with the result that only 10% of primary school aged children and 2% of secondary school aged children attend school – sobering statistics, especially when compared to the high rates of attendance of school children in Bangladesh²³ Limited job prospects relegate most Urdu-speakers to the informal sectors.

Beginning in the late 1990s, members of the younger generation sought means to regularize their status in Bangladesh. Many felt that in their refusal to consider Bangladeshi citizenship, the older generation had essentially betrayed the promises of the younger generation who were as a result relegated to the lowest echelon of society and to living in desperate poverty. A number of student papers presented at an intercommunity dialogue organized by an NGO, the Refugee and Migratory Movements Research Unit, at Dhaka University in 2000 captured the plight and frustrations of this younger generation. The papers illustrated the many ways the community was marginalized in Bangladesh and urged others to support them in their demands for full integration.²⁴

²¹ Based on a 2006 study by Al Flah Bangladesh, an NGO in Bangladesh and provided to UNHCR,

²² Durban Review Conference, Geneva 2009, 'The Story of Khalid Hussain', www.un.org/durbanreview2009/story27.shtml

²³ In its 2001 study, UNICEF noted that 'despite the issues still facing children, Bangladesh has surpassed most low-income countries on a series of social indicators regarding the achievement of the Millennium Development Goals: 72% (1980) to 98% (2001) increase in gross primary enrollment, already attaining the MDG of eliminating gender disparity in primary and secondary enrollment.' <http://www.globalmarch.org/campaigns/keepyourpromises/countryinfocus.php>

²⁴ 'Biharis in Bangladesh Seek Citizenship', The Hindu, 1 May 2000.

Unable to convince the older generation to abandon hopes for returning to Pakistan, a growing number of the younger generation looked ahead and claimed recognition of their rights as citizens of Bangladesh. These rights, they argued, they held in law, although they were not recognized in practice. The resolution turned out not to be in the political arena, as their elders had assumed, but in the courts.

Legal Recognition

Following independence, Bangladesh adopted a Constitution of the People's Republic of Bangladesh, 1972, which provides that the 'the citizenship of Bangladesh shall be determined and regulated by the law'. Also passed at that time was the *Adaption Of Existing Bangladesh Laws Order, 1972* which extended into force all laws that were in force in the territory prior to independence unless specifically excluded from its application. The *Pakistan Citizenship Act, 1951* therefore remained, and continues to remain in force in Bangladesh as does the *Bangladesh Citizenship (Temporary Provisions) Order (Citizenship Order)*.²⁵

The *Citizenship Act* provides that every person born in the territory after 1951 is a citizen.²⁶ A person can be deprived of citizenship where obtained through fraud, false representation, concealment of a material fact, and/or if the person has shown him or herself to be disloyal to the Constitution or to engage unlawful trade and communication with the enemy during a time of war. The *Citizenship Order*, promulgated at the end 1972, deems every person to be a citizen of Bangladesh who was born in or was a permanent resident of the territories now comprised of Bangladesh at independence and who continues to be resident. Anyone who 'owes, affirms or acknowledges expressly or by conduct, allegiance to a foreign state' is disqualified from the provision.²⁷

Urdu-speaking residents born before independence, and resident in Bangladesh at the time, are citizens of Bangladesh by virtue of the Citizenship Order. Those born in Bangladesh after independence are citizens by virtue of the application of the Citizenship Act.

The law therefore has always been clear. The fact this has not be readily recognized is due to several factors. These include the initial reluctance of camp residents to integrate and to be considered citizens of Bangladesh, and the reluctance of the government and general public to recognize them as such due to old enmities. As one leading advocate described the situation 'it is not a legal problem but a social one.'²⁸ It took the High Court to affirm the law and recognize them as citizens, and not just once, but on several occasions.

²⁵ *The Constitution of the People's Republic of Bangladesh (1972); Citizenship Act of 1951, (Bangladesh), as modified by Article 5 of President's Order No. 48; Bangladesh (Adaptation of Existing Laws) Order, 1972; President's Order No. 149; Bangladesh Citizenship (Temporary Provisions) Order, 1972.*

²⁶ Section 4. The Act also provides for citizenship by descent in certain cases.

²⁷ Article 2B(1).

²⁸ Tanvir Mokammel, above note 18.

One of the first citizenship cases to be heard by a High Court was that of Golam Azam, whom the government tried to deport from Bangladesh in 1992, nearly fifteen years after independence.²⁹ Azam was a former opposition leader who had opposed independence and supported the Pakistani army's crackdown on the independence movement. He had gone to Pakistan in 1971 and a month later tried to return to Bangladesh but was prevented from doing so by the Pakistan government. He continued to try and return, only succeeding in 1978 when he was granted the necessary exit visa by the Pakistan government. Azam had lived in Bangladesh continuously since that time, had surrendered his Pakistani passport and applied for the restoration of Bangladeshi citizenship. While his application was pending, the government of Bangladesh initiated proceedings for his deportation refusing an oral hearing of his case. He took his case to court and won both at the first instance and on the government's appeal to the High Court.

The government claimed that Azam could not be deemed a citizen of Bangladesh because of his anti-liberation role and because he had resided in Pakistan after the war. The Court held that these factors were not relevant in the determination of citizenship. Of relevance were the provisions of the Citizenship Order which Azam was found to come within: namely having been a permanent resident of Bangladesh in 1972 at the time the Order came into force. He could not be deemed to have abandoned Bangladesh in 1971, since he had tried to return to his home, surrendered his Pakistani passport, had taken an oath of allegiance to Bangladesh, and had been residing continuously in the country since he was permitted to return. Noting that citizenship was the 'right of all rights because on it depend rights to other constitutional guarantees', the Court also found that the removal proceedings had not adhered to the principles of natural justice.

Part of the government's case was that having sided with Pakistan during the war of liberation, Azam could not claim the benefit of citizenship of the state he opposed. To find him to be a citizen would not be in the public interest. The Court reasoned that the government's argument was 'long on emotion and short on law', noting that even if the government's allegations against Azam had been correct, there was nothing in the law that denied citizenship to those who opposed the creation of Bangladesh or who killed freedom fighters and engaged in atrocities. The Court's concern 'is not politics but law and only law.'³⁰

The Azam case, while making a difference in Azam's case, did not change the circumstances of other Urdu-speakers in Bangladesh. The court's decision was specific to the facts in that case. An opportunity for a more wide-reaching ruling did not come until the *Khan* case in 2003, when ten Urdu-speakers filed a petition in the High Court to direct the Election Commission to register them as voters.³¹ All were over 18 years, had been born in the country, either before or after independence and all were residents of one

²⁹ *Bangladesh v. Professor Golam Azam*, (1994) 46 DLR(AD) 192

³⁰ For a detailed analysis of this case see Eric Paulsen, 'The Citizenship Status of the Urdu Speakers/ Biharis in Bangladesh,' *Refugee Survey Quarterly*, Vol. 25, Issue 3 (2006)

³¹ *Abid Khan v. Government of Bangladesh*, 55 DRL 318 (2003)

of the settlements. The Electoral Commission did not contest the facts, nor file an argument against the petition.

Like the Court in the *Azam* case, the Court in *Khan* referred to both the Citizenship Act and the Citizenship Order. The court found all the petitioners were citizens of Bangladesh and that there were no reasons for their disqualification. Specifically, the Court noted that there was nothing to show that any of the petitioners had ever owed, affirmed or acknowledged, expressly or by conduct, allegiance to a foreign state. Nor could their residence in any of the camps be taken as such. The Electoral Commission was directed to register the petitioners on the electoral role.

The government did not appeal the decision and made it known that it would implement the Court's ruling. The Election Commission moved in that direction, indicating it would register the petitioners and others in the camps. However, data collectors did not systematically do so, some refusing to register camp residents.

The lead-up to the January 2007 scheduled elections was fractious in Bangladesh. The two major parties were at odds, with the Awami League accusing the ruling Bangladesh National Party (BNP) of attacking its leaders, and the BNP countering that the Awami League engaged in false accusations to draw attention away from what the government claimed was its strong economic and development performance. In late 2006, the outgoing government of the BNP handed over power temporarily to a non-elected caretaker government, provided for in the Constitution as a means to ensure that new elections take place in a free and fair manner without undue influence of the outgoing party. Early on, however, the Awami League announced it would boycott elections and led nationwide strikes and protests demanding electoral reforms. A state of emergency was declared, and the caretaker government, controlled by the military, made it clear that it would extend its tenure to ensure major electoral reforms were made so that free and fair elections could take place at the end of the year. The Election Commission was reconstituted and authorized to prepare a new voter registration list, which would also be the basis for issuing national identity cards to all citizens.

It was amidst these events that a petition was filed in the High Court requesting that the High Court direct the Election Commission to enroll the petitioners as well as all Urdu-speaking people living in the camps. Neither the Election Commissioner nor the Attorney General appeared before the Court to oppose the petition. The Court, again affirmed that the Urdu-speaking population were nationals of Bangladesh and directed the Electoral Commission to enroll those 'who want to be enrolled in the electoral rolls, and accordingly, give them a National Identity Card without further delay.' In its reasons for decision, the Court noted that members of the Urdu-speaking community had been constantly denied their constitutional rights to work, to be educated, to be accommodated, to health and to 'a decent life like other citizens of the country.' The non-recognition of their citizenship rights for so long had deprived the country of the contributions they

could have made in building the nation. 'The sooner the Urdu-speaking people are brought to the mainstream of the nation' the Court affirmed 'the better.'³²

This time the government took quick steps to implement the decision. All Urdu-speakers were permitted to register for new national identity cards being provided to all citizens. National identity cards permit access to all public services including passports, public utilities, education, social assistance registration of businesses, and civil documentation (e.g. birth, marriage, death certificates). A national identity card also allows the bearer the right to vote.

Between 70 -80% of all Urdu-speakers registered and received their national identity documents. Among those that did not were those who retained a wish to repatriate to Pakistan. In some camps, it was alleged that members of the *Stranded Pakistanis General Repatriation Committee* worked to convince the community that they would lose the provision of free water and electricity and could even be evicted from the camp should they register. This led to antagonisms, particularly when local candidates came to solicit support and those who had not registered recognized the full costs of not having a national identity card.

For those who did, voting for the first time was, as one paper described it, 'a watershed day.' The elation was felt by young and old alike. One seventy year old resident who had voted twice before Bangladesh's independence spoke of his amazement at having a national identity card which allowed him, before he died, to actually be able to say 'this is my country', something that had been beyond his expectations. For Mithum, 20 years old, the sensation was equally profound: 'Never in my wildest dreams did I think I could have the right to vote.'³³

The old guard now faced protests against their leadership. Many have since softened their position, calling for 'rehabilitation' in Bangladesh rather than repatriation to Pakistan. National identity is acceptable, they say, provided it is accompanied by improved living conditions and services in the camps. This is the next hurdle for the community, for many see change as coming very slowly. Some claim that intolerance towards them remains high, and that relatively few local human rights, legal, charitable, or social service organizations have shown interest in the ongoing plight of the Urdu-speaking community.³⁴ At the same time, it is also the case that recent years have brought the plight of this community much more to the fore. For years, the recognition of their citizenship has been a priority for UNHCR, and the Office has also advocated their inclusion in programmes to combat poverty in the broader community. There is growing support for this. In recent years the UN Development Programme (UNDP) and the UN Children's Fund (UNICEF) also sought ways to include the Urdu-speaking minority in

³² *Sadaqat Khan and others v. The Chief Election Commissioner* (2008) (Writ Petition No: 10129 of 2007)

³³ 'Biharis Embark on a New Era', *The Daly Star*, 30 December 2008; 'Urdu-speakers Happy as they Cast Votes for the First Time', *New Age National*, 30 December 2008.

³⁴ 'The Story of Khalid Hussain' above note 22. Khalid Hussein, 'The End of Bihari Statelessness', 32 *Forced Migration Review*, 2009.

their programmes and the UN Resident Coordinator has been a similarly strong advocate on their behalf. International NGOs, like Refugees International, have also advocated for a two pronged solution to the problem: repatriation for those who wish to be part of Pakistan and citizenship and integration in Bangladesh for those wishing to remain.

Determinates of Change

Why, after close to forty years of disenfranchisement, did this remarkable turn of events eventually take place? There is no single idea, interest or institutional development that fully accounts for it. Rather, as with so much of significant public policy shifts, there are several contributing factors that come together at a specific point in time to make change possible.

At the time of Independence, the Bangladesh community was seriously traumatized and divided. The sharpest divisions were between the Urdu-speaking minority and the Bengali majority. Long resented for being favoured by the Pakistan elite, and recently suspected of participating in the genocide, there was little public sympathy for their bereft situation let alone support for their membership as citizens in the new nation. What is surprising, however, is that notwithstanding the deep fissures and understandably profound antagonisms, the Citizenship Order that was passed within a year of independence made it possible for all Urdu-speakers to be considered citizens even while other ordinances made possible the seizure of their properties and effective confinement of many thousands to camps. Hundreds of thousands of Urdu-speakers living outside the camps seized the citizenship opportunity, mixing with the larger community living outside the camps and being recognized as citizens of Bangladesh.

The many thousands who did not were viewed in subsequent years by the government as falling within the exclusion found in the Citizenship Order of those who 'owe, affirm or expressly acknowledge' allegiance to a foreign state. This was the assumption that justified their ongoing marginalization. It was an assumption that many in the Urdu-speaking community did not oppose. Their eyes were firmly set on Pakistan. Their past had been literally and figuratively burned in Bangladesh, and any hope they had of leading normal lives they believed lay with the State they had supported and risked their lives to defend. They were staunchly opposed to any concessions on this point and they used their influence within the camps to keep the focus on that solution for many years. By staying in the camps, and initially refusing integration, the camp residents contributed to their entrenchment in the most grim conditions far longer than they initially anticipated.

Certainly at the time of independence, the repatriation expectation held by many Urdu-speakers was equally shared by the Bangladesh government, who continued for some time to press the Pakistan government to facilitate this. Yet beyond its initial acceptance of just over 100,000 persons, the Pakistan government refused to budge.

Communitarian values were strong impulses that kept the Bangladesh government, supported by the majority of the population, from recognizing the Urdu speaking camps

residents as citizens. It was an equally strong force within that community itself, who for many years saw themselves as not one with Bangladesh but as part of Pakistan. The situation did not change until a whole new generation challenged those assumptions.

By the mid 1990s the post independence generation of Urdu- speakers was almost equal in number to those who were born before. They were raised in Bangladesh, indentified with life there, were fluent in both Urdu and Bengali, had not ever been to Pakistan, and unlike their parents and grandparents, had only distant family ties there. The British Indian born and East Pakistan born elders who advocated for repatriation for many years had dominated politics in the camps. This was to slowly change, as younger activists who were more firmly integrated in Bangladesh became more organized and vocal. Chief among these was the Stranded Pakistanis Youth Rehabilitation Movement, many of them college educated, who refocused attention to recognition of their rights as citizens in Bangladesh rather than a less realistic and, from their perspective, less favorable dream of repatriation. Their influence grew as the ranks of the older generation thinned, and with their demise some of the most powerful voices against integration disappeared.

This new group of activists found support for their demands from the courts. Very early on, the High Court made it clear that in regard to the citizenship question, it would be governed by the law and not by emotion or politics. Its early decision in the *Azam* case, involving a man suspected of taking part in the genocide, yet whose citizenship the Court found guaranteed by law, speaks to the independence of the Court. The fact that it took several cases and over 15 more years for the government to recognize the full impact of the Court's judgment on citizenship recognition writ large, also speaks to the limited extent of the Court's influence. By the time the *Khan* case was decided, some of the factors which had influenced government intransigence in previous decades had changed.

Chief among these was the fact that repatriation to Pakistan was clearly not a realistic option. As well, however, there was growing pressure by international agencies like UNHCR for the government to recognize in practice what was clear in law. Additionally, there was a growing shift in public attitudes. General public antipathy to the plight of the camp dwellers, and which supported their marginalization, shifted to resentment in later years, as it was perceived that the camp residents benefited from free accommodation, electricity and water supply which was not available to surrounding communities. As appalling as the living conditions in the camps are, they rival those of other slum dwellers in Bangladesh, leading some community members to support their naturalization and thereby end what they perceive to be unfair subsidies to this group.

Another important catalyzing factor was that Bangladesh was thrown into a political crisis in October 2006, which both distracted the public from the citizenship issue concerning the camp residents, and helped to provide the political incentive to register them. The Awami League's declaration that it would boycott the 2007 elections came at a time when European Union and UN monitors declared that free and fair elections were not possible. One of the chief complaints was electoral fraud on the part of the Electoral Commission. The caretaker government rescheduled elections for the December 2008, justifying the postponement as being necessary to establish a new electoral role. Following on the heels of the *Khan* decision, and under the watchful eye of domestic and international observers, the government took steps to ensure that all Urdu-speakers were

registered. The election swept the Awami League to power in elections considered at home and abroad as free and fair.

Equality values and respect for the rule of law motivated several lawyers, academics and other human rights advocates who for many years, individually and collectively, had petitioned the government for a change in policy.³⁵ International interests supported their efforts, including several diplomatic missions, united through the Dhaka Initiative, who pressed the case of the Urdu-speakers as did international agencies, notably UNHCR. While these individuals and groups sought the same end result, their approaches diverged. Some, like the Dhaka Initiative, framed the issue as a humanitarian one, viewing the Urdu-speakers as a stateless community who should be given Bangladesh nationality for humanitarian reasons. Others, like UNHCR and the lawyers who argued before the High Court, framed the issue as a legal one, insisting that the Urdu-speakers were *de jure* citizens of Bangladesh and that what was lacking was official recognition of that fact.

Notwithstanding their differences in perspectives, these groups and individuals used public advocacy and quiet diplomacy to help effect a policy shift. In November 2007, a number came together to issue a joint statement urging the government to provide citizenship rights to all Urdu-speakers in the camps and settlements in line with the Constitution.

In addition to the above factors, there are others that, while not determinative, certainly helped to enable the change in policies. One of these is the fact that the Urdu-speaking population is virtually indistinguishable from the mainstream Bangladeshi community. They share the same culture, religion, and physical characteristics, and virtually all of the younger generation and many others in the Urdu-speaking community are also fluent in Bengali. They form a very small proportion of the entire population, less than 4%, and so the recognition of their nationality does not raise the specter of an overwhelming number of new citizens and associated social costs or fears of intensified competition for jobs. Moreover, as the years pass, and memories of the events of 1971 fade, the recognition of their nationality does not invoke as intense passions as it once did within

³⁵ In addition to the studies cited earlier see also C.R. Arar and Victoria Redcliff, 'Identity Rights and Citizenship, the Camp Based Urdu Speaking Community in Bangladesh', Refugee and Migratory Movements Research Unit, Dhaka, 2007; Ahmed Ilias, 'The Indian Emigres in Bangladesh', Shamsu Huq Foundation, Rangpur, 2004; C.R. Abrar, *A Forsaken Minority: The Camp Based non Bengali Community in Bangladesh*, Mimeo, 1998; Bhumitra Chakma et. al., 'Bangladesh State and the Refugee Phenomenon,' Refugee Watch (South Asia Forum for Human Rights), No. 18 (2003); Maureen Lynch and Tatcher Cook, 'Citizens of Nowhere: The Stateless Biharis of Bangladesh', Refugees International, 2006; Kitty McKinsley, 'The Biharis of Bangladesh,' Refugees Magazine, Issue 3, Number 147 (2007) Gerard Khan, 'Working Paper No. 47: Citizenship and Statelessness in South Asia,' New Issues in Refugee Research (October 2001).

both communities. In addition, there are few vested interests within the government that stand to lose from the regularization of the camp residents' status. The Ministry of Food and Disaster Management has responsibility for the maintenance of the camps, but as noted earlier, few services are provided outside of what the residents do themselves and assistance they receive from UNHCR and other international agencies. This may help to explain why the government has not argued against the petitioners in any of the recent cases brought before the High Court.

Conclusion

The dramatic shift in policy, that finally led to the recognition of citizenship for the Urdu-speakers of Bangladesh, cannot be ascribed to a single value, interest or institution but to a combination which, sparked by a constitutional crisis in 2007, accounted for the change. Among the most dominant values were communitarian ones, which both kept the communities separate for close to forty years, but which eventually helped to bring them together when a younger generation embraced full integration into the larger community. But equally important were equality values, and respect for the rule of law which motivated the advocates and governed the decisions of the High Court.

Interests groups were also influential, again both in contributing to the protracted nature of the problem as well as its final resolution. The intransigence of the camp and settlement based community to accepting any solution short of repatriation was a powerful interest that was not easily dislodged. The majority of Bangladeshis did not challenge it. They did not care to embrace a community that they held responsible for irreparable harm suffered during the Independence struggle. These interests stood unopposed for many decades, and were only seriously challenged when the younger generation repudiated the old guard view, and started to advocate full integration. They were supported by legal and human rights advocates and academics that helped keep the issue very much alive and in front of legal, international and government institutions.

These institutions were also key – notably the High Court, which consistently ruled according to the law and not according to politics. Without the Court's recognition of the citizenship of the Urdu speakers, they would undoubtedly today be waiting for a humanitarian solution to their dilemma as *de jure* rather than *de facto* stateless persons. Nevertheless, while the Court played an essential role in the resolution of the citizenship problem, it was not the sole catalyst of change.

The influence of international institutions, like UNHCR and the UN Resident Coordinator, was also a contributing factor. That UN and various diplomatic missions consistently placed the resolution of the citizenship problem before the government, and with renewed vigour during the period of the caretaker government, no doubt helped to ensure the issue was not ignored. The insistence by some of these institutions that registering the camp residents was a legal rather than a humanitarian imperative also probably helped to bring the government on side, by making it clear that, to do otherwise, would be to operate in contravention of the law.

The fact that the policy was effected by a caretaker government run by the military, is also a rather ironic twist to the story. The military's lack of a constituent base, in

combination with a mandate to oversee a free and fair election, may have made it more amenable to taking the potentially unpopular decision of registering the camp residents than either of the partisan political parties. Neither the Awami League nor the BNP had much to gain by bringing the statistically irrelevant camp based population into the electoral roles. It was a constitutional crisis that brought the caretaker government to power, not a democratic election. Had this not have happened, there may not have been a resolution of the citizenship problem. The political upheaval and the favorable consequences it occasioned for the camp residents, lend credence to Michael's observation that a political crisis can also be a catalyst for a policy shift, informed by ideas. In this case, non self-interested ideas of equality and respect for the law supported that shift.