

# **THE CONTOURS OF CRIMMIGRATION CONTROL IN INDIA**

Global Detention Project Working Paper No. 25

# THE GLOBAL DETENTION PROJECT MISSION

The Global Detention Project (GDP) is a non-profit organisation based in Geneva that promotes the human rights of people who have been detained for reasons related to their non-citizen status. Our mission is:

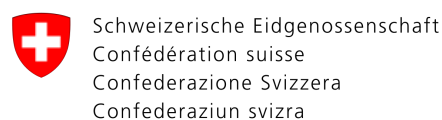
- To **promote the human rights** of detained migrants, refugees, and asylum seekers;
- To **ensure transparency** in the treatment of immigration detainees;
- To **reinforce advocacy** aimed at reforming detention systems;
- To **nurture policy-relevant scholarship** on the causes and consequences of migration control policies.

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The Global Detention Project Working Paper Series is edited by Michael Flynn (GDP) and Matthew Flynn (Georgia Southern University).

This working paper series is made possible in part by the generous support of the Open Society Foundations, Oak Foundation, and the Swiss Federal Department of Foreign Affairs.



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## THE CONTOURS OF CRIMMIGRATION CONTROL IN INDIA

By Sujata Ramachandran

**ABSTRACT:** The criminalisation of irregular migration through escalated enforcement of toughened immigration laws is often referred to as *crimmigration* or *immcarceration*. Detention and deportation are important aspects of such enforcement across the globe. While these processes have received much scrutiny in the Global North, far less attention has been given to them in the context of South-South migration. This Global Detention Project Working Paper helps address this gap by identifying distinctive aspects of crimmigration control in India and its connections with the governance of migration in wealthier countries. The paper argues that the Indian subcontinent's British colonial history has helped shape the country's contemporary crimmigration system, targeting the objects of control and bestowing a set of severe policies. The large-scale refugee flows that occurred during post-colonial nation formation entrenched deep-seated anxieties about informal migration, which today are manifested in a purported national "infiltration" crisis and unchallenged anti-Muslim xenophobia, with a particular focus on "irregular Bangladeshis." Increasingly influenced by these anti-immigrant impulses and the perceived failure to effectively deter cross-border migrations in the past, punitive forms of control have become default options in the country's response to migration challenges. The paper provides an assessment of India's principal immigration law, the Foreigners Act, to draw attention to its role in propping up the country's crimmigration system. It reviews the workings of crimmigration through the existing legal and bureaucratic systems, highlighting the variety of hurdles detainees face, many of whom are extraordinarily vulnerable residents who have survived on the fringes of Indian society. Important, too, is the paper's analysis of the impact of framing immigration enforcement as a matter of public and national security, which results in a veil of secrecy being drawn around many procedures. The paper underscores the important influence exerted by Hindu right-wing political forces on immigration processes, in part through the strategic manipulation of migrants' identities.



## **GLOSSARY**

<b>BJP</b>	Bharatiya Janata Party
<b>BSF</b>	Border Security Force
<b>GOI</b>	Government of India
<b>IIRICA</b>	Illegal Immigration Reform and Immigration Control Act
<b>LCI</b>	Law Commission of India
<b>MHA</b>	Ministry of Home Affairs
<b>NCRB</b>	National Crime Records Bureau
<b>PIL</b>	Public Interest Litigation



## I. INTRODUCTION: MOYNA'S STORY

Moyna, a 22-year-old Bangladeshi woman, did not expect that her brief, informal trip to India to assist a relative in poor health would result in her having to petition an Indian High Court for its assistance in returning her to Bangladesh (Karnataka High Court 2013). But when she was apprehended in India without adequate papers, Moyna found herself "charge-sheeted" (formally charged at a local police station) for her infractions. Placed in detention, she was eventually found guilty of "breaching" Indian immigration regulations and sentenced to 107 days in prison (offset against her three months in detention while awaiting trial). Several months later, the Bangalore city police transported her to a Border Security Force (BSF) camp to await deportation. But when Bangladesh's Border Guards declined to accept her as a citizen by issuing a "No Objection Certificate" (official document sanctioning the deportation process)<sup>1</sup> she was returned to Bangalore, the city in which she had originally been arrested and detained.

Despite making several deportation requests to the local police, Moyna remained in detention at Bangalore's Reception Centre (Karnataka High Court 2013). Her father travelled from their home village to Bangalore to seek her release, but his efforts were to no avail. After more than a year and a half in detention, Moyna was forced to petition the Karnataka High Court seeking its intervention to "immediately deport her to her homeland, Bangladesh," (Karnataka High court 2013). The interminable wait for her return, the long isolation from her family, and growing concerns about her uncertain fate inexorably led to a deterioration of Moyna's mental health and treatment for depression at a local hospital (The Hindu 2013a). On the day of her hearing, Moyna informed the court that she had arrived in India without any "bad intention"—she simply lacked knowledge of immigration procedures and requirements (The Hindu 2013b). The court responded by issuing notices to the state and central governments, the Bangalore police, and the local Foreigners' Registration Office, ordering them to expedite her expulsion from India. Nearly 31 months, or 931 days, after her initial arrest, Moyna finally returned home.

Moyna's case is not uncommon in India. In fact, the country's detention and deportation policies have begun to receive widespread international attention in the wake of a recent crackdown on purported "illegal" residents in the Indian state of Assam, which is located in the far northeastern corner of the country. Sharing borders with Bhutan, Bangladesh, Myanmar, and a few other small Indian states, Assam is connected to the rest of the Indian mainland only by a narrow strip of land. Here, the process of identifying and removing "irregular Bangladeshis" has gained considerable momentum as the state updates its "National Registry of Citizens," which threatens millions of Assam residents with imminent statelessness, in particular Bengali-speaking Muslims who have been targeted as part of a Bharatiya Janata Party (BJP)-led campaign against Muslim-majority and Bengali-speaking Bangladeshis, including many who were born in India but lack documentation (Siddiqui 2019). This has led officials to call for the construction of new detention centres in Assam and other states to accommodate potentially large populations of people facing deportation.

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<sup>1</sup> In South Asia, a 'No Objection Certificate' or NOC is a document issued by government agencies confirming their approval for a specific procedure or request.

According to one report, a 2019 BJP-developed “Model Detention Manual” calls for establishing “detention camps” in all districts that have a “a major immigration check post” (Tripathi 2019).

Outside India, Moyna’s case is also very familiar. As migrant-receiving states escalate immigration controls in response to refugee or migration “crises,” this general pattern can be observed with increasing frequency from Asia to Europe to the Americas. This has spurred growing numbers of scholars to examine the manner in which detention and deportation processes are deployed to regulate migration (Bibler-Coutin 2015; Miller 2012; Weber 2015). The concept of “crimmigration” has proved helpful in focusing scholarly attention on the judicial systems—including laws, legal structures, and enforcement mechanisms—shaping these processes and heightening their disciplinary tendencies (Stumpf 2006). With few exceptions, however, this burgeoning discussion has centred almost entirely on the Global North.<sup>2</sup>

This Global Detention Project (GDP) Working Paper<sup>3</sup> helps fill this gap by mapping the distinctive configurations of crimmigration control in India, and, in particular, its preoccupation with migrants from neighbouring Bangladesh. Drawing on the history of Indian immigration laws dating from the colonial period, the analysis is developed using a range of primary materials, including: immigration regulations; documents from the Ministry of Home Affairs (the department responsible for immigration-related matters), including annual reports and statements to MPs’ queries in the Lok Sabha and Rajya Sabha (Lower and Upper Houses of Parliament, respectively); statistics from the National Crime Records Bureau (NCRB); selected case law; and Public Interest Litigation (PIL) court judgments, supplemented with key informant interviews.

The paper provides an assessment of India’s principal immigration law, the Foreigners Act, to draw attention to its indispensable role in propping up the country’s crimmigration system. It reviews the workings of crimmigration through existing legal and bureaucratic systems, highlighting the variety of hurdles detainees face, many of whom are extraordinarily vulnerable residents who have survived on the fringes of Indian society. Important, too, is the paper’s analysis of the impact of framing immigration enforcement as a matter of public and national security, which results in a veil of secrecy being drawn around many procedures. Additionally, the paper underscores the important influence exerted by Hindu right-wing political forces on immigration processes, in part through the strategic manipulation of migrants’ identities.

## II. PLACING THE CRIMMIGRATION LENS ON THE GLOBAL SOUTH

The intersection of immigration and criminal legislation and the increasing use of enforcement tools associated with criminal punishment has been characterised by scholars as “crimmigration” (Stumpf 2006, 2015). As Kalhan (2010) describes it, the system of crimmigration law, with its excessive immigration control procedures, has led to the creation of a quasi-punitive system of “immcarceration.” Analysing the evolution of this “crimmigration crisis” in the United States, Stumpf (2006) contends that the crimmigration merger has

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<sup>2</sup> Works that have focused on the Global South include: Galvin 2015; Vigneswaran 2013; and Hedman 2008.

<sup>3</sup> The Global Detention Project Working Paper Series is available at : <https://www.globaldetentionproject.org/category/sidebar-publications/publications/working-papers>

occurred in three important ways: 1) immigration and criminal law have increasingly blended into each other; 2) immigration enforcement has begun to mimic criminal law enforcement; and 3) procedural aspects of prosecuting immigration violations have acquired traits of criminal trials. The complicated processes used to regulate non-citizens function such that in the “procedural web” shaped by crimmigration, “process has become punishment” (Stumpf 2013). The growing convergence between criminal enforcement and immigration controls has been highlighted, in a related vein, as “border criminology,” where the judicial system has been significantly adjusted towards matters of citizenship. Others have drawn attention to the marked intertwining of “crime controls” and “border controls” (Pickering et al 2015).

Writing about the United Kingdom and other western countries, Bowling and Westera (2015) argue that as a result of these developments, what is being witnessed is not just the unequal, differential treatment of “risky” or “undesired” migrants, but also the emergence of an independent, specialised penal system. This “crimmigration control system” incorporates a set of elements geared towards transnational social control. “Authorised by a unique panoply of crimmigration laws, the system harnesses all the elements of the crime control industry: physical defences; mechanisms for intelligence gathering and surveillance; policing and law enforcement; a specialised legal process, courts and tribunals; and a ‘secure estate’ of detention centres.”

Various manifestations of “crimmigration,” “immcarceration,” and this “punitive bent” are being researched for different countries.<sup>4</sup> Aliverti’s 2014 study of the “crimes of mobility” in Britain analyses the evolution of a hybrid system between administrative and criminal law in which 84 new categories of immigration-related offences have been added, along with their more systematic application by enforcing authorities. Kasun (2017) has examined the passage of the Illegal Immigration Reform and Immigration Control Act (IIRICA) during the mid-1990s, which forged a large-scale programme of mass returns to Central America from the United States. Beckett and Evans (2015) have investigated the new localised programmes tethering criminal and immigration enforcement that have enhanced state power to punish those deemed as offenders. Aas (2013), Bowling (2013), Chacon (2009), and Inda and Dowling (2013) have researched the way in which crime and punishment have become the preferred means for governing the undocumented, and De Genova (2002), Golash-Boza (2010), Kanstroom (2010), and Pickering et al (2015) have all examined the criminalisation of irregular entry and stay as a key aspect of such developments.

Detention and deportation are important mechanisms through which this “crisis” is operating (Stumpf 2006; Rosenblum and Meissner 2014). Studies have revealed the growing, often unrestrained use of such practices that were selectively applied earlier, and the expansion of facilitating structures that enable such strict management (Bosworth and Turnbull 2015; Chacon 2014; Garcia Hernandez 2014; Mountz et al 2012; Gibney 2008). Through them, several countries have expelled staggering numbers of undocumented residents (Golash-Boza 2015; Kanstroom 2012). The human rights of non-citizens have been seriously undermined, and new vulnerabilities have been forged through these control practices (Bosworth and Turnbull 2015; Bosworth 2014; Drotbohm and Hasselberg 2015; Schuster and Majidi 2015; Hagan et al 2011). In the United Kingdom, for instance, immigration detention is not considered a “punishment” but rather an administrative mechanism to facilitate expulsion (Bosworth and Turnbull 2015). Even so, detainees tend to experience this process as punishment in institutions operating like prisons, where the denial of liberty is compounded by a lack of detention limits (Bosworth 2014). In the United States, deportation

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<sup>4</sup> See: Bosworth and Kaufman 2011; Cote-Boucher 2015; Di Martino et al 2013; Guia et al 2013; Moran et al 2013.



is treated as a “civil penalty” for persons who lack the legal right to remain in the country. And yet, migration detainees in the American system are deprived of due process safeguards and can expect fewer constitutional protections than suspected criminals (Golash-Boza 2010).

Of course, the rapid removal of non-citizens in several western countries—often for minor, non-violent offenses—is itself suggestive that the stringent enforcement of immigration rules provides a partial explanation of these occurrences. Some more recent writings have sought to broaden the contours of crimmigration to assess the social control of migrants and asylum seekers (Bowling and Sheptycki 2015; Garner 2015). The hidden relationships between crimmigration controls and well-entrenched or newly-forged processes of social marginalisation and/or exclusion are slowly being uncovered. Attempts have been made to grasp the deeper, underlying strains animating such current tendencies. For Kanstroom (2010), deportation is an important component of the American immigration management system and simultaneously, a “powerful tool of discretionary social control, a key feature of the national security state, and a most tangible component of the recurrent episodes of xenophobia” that have beleaguered this country. Golash-Boza and Hondagneu-Sotelo (2013) highlight the disproportionate targeting of Latino working class men, delineating these “mass deportations” as a “gendered and racialised removal program.” Vazquez (2015) shows how crimmigration’s complex workings bolster white hegemony through processes generally seen to be “post-racial” or seemingly neutral to racialised and class-based differences. Still, as Bosworth (2017) has noted, there seems to be less interest among observers on the enduring relationships between newer tactics of immigration controls and broader projects of xenophobic stratification.

While these insights into the workings of “crimmigration” and “immcarceration” are based on largely western contexts, they also raise important questions about developments in South-South migration situations. To what extent are these aspects applicable and relevant for receiving countries in the Global South? Are the operations of crimmigration and their decisive aspects uniform across these contexts or do significant differences exist in their emergence, unfolding, and development? And if there are obvious divergences, why do they exist?

As the work of the GDP and other detention-focused civil society groups has revealed, there is a clear trend towards increased use of migrant detention and deportation in countries that have traditionally been considered mainly migrant source—rather than destination—countries and whose own citizens have borne the brunt of accelerating enforcement in wealthier countries (Flynn 2014). This paper seeks to contribute to efforts to reveal the multiple under-examined dimensions and complexities associated with crimmigration in South-South contexts by situating such tendencies within specific, diverse, national, and local configurations in India. In so doing, the paper also identifies the particular political forces propelling such tendencies in that country and highlights prominent recent developments.

### III. FEATURES OF CRIMMIGRATION CONTROL IN INDIA

#### III.a Regulatory Frameworks

Existing immigration laws and enforcement practices are the basis of crimmigration in India. As witnessed in other countries, immigration-related infractions are increasingly treated as serious criminal offences in India through punitive sanctions and additional negative repercussions for apprehended migrants. However, legal provisions for arresting and severely disciplining “undesirable foreigners” as well as closely regulating the movement of non-citizens have always existed under legislation that has been in effect for many decades, including the Foreigners Act (1946), Registration of Foreigners Act (1939), and Passport (Entry into India) Act (1920). In this regard, the criminalisation of certain forms of migration and the stringent control of non-citizens have been constitutive elements of the country's immigration management since well before the formation of post-colonial nation-states in the Indian subcontinent in 1947.

This aspect of crimmigration in India is a legacy of British colonial rule as most important Indian immigration laws are “acts of Empire” (Banerjee 2010). This includes the Foreigners Act, which will be assessed in depth later. In their original design and intent, these laws were introduced to strictly regulate the mobility of colonised subjects across the various colonies and Dominions, and through it, restrict their ability to migrate into privileged geographies of the colonising powers (Banerjee 2010). An even older statute, the Passport Act, was introduced in 1920 to deny “trouble-makers” of Indian origin access to India and to preserve the interests of the colonialists (Chatterji 2013). This specific requirement for passports was also deployed to limit the entry of Indians into other Dominions, like Canada, reserved exclusively for white settlers (Singha 2013). The narrow, racist agenda of the Empire was the paramount concern in the creation of these migration laws, affecting both emigration and immigration. As Mongia's (2003) well-accepted analysis of the passport requirements has established, even if forged out of concrete endeavours to restrict mobility along national lines that were racialised in character and intent, the territorial boundedness of the national space was naturalised through this process. In contemporary times, the routinised execution of the global passport regime by implementing states reproduces these differences anchored in nationality/citizenship.

Despite the antiquated and illiberal nature of these laws, the post-colonial states of India, Pakistan, and Bangladesh opted to retain them for immigration governance. But, as this paper discusses below, beyond specific passport requirements, other key provisions in these inherited legal arrangements have also reified these and other discriminatory proclivities. In India, various provisions of the Foreigners Act constitute a core feature of crimmigration. The foundation of the Foreigners Act was laid by the colonial state as far back as 1864, to enable jurisdiction over the movement of “subjects of foreign states,” by making it compulsory for them to obtain a permit for such travel and, in certain cases, report their arrival in India (LCI 2000). It was eventually formalised as the Foreigners Ordinance of 1939, decreed under the emergency circumstances of World War II (Acharya 2004). That authoritative order was transformed into the Foreigners Act of 1940, later re-enacted in its largely current form as the Foreigners Act of 1946. This was a year or so before the Indian subcontinent ceased to be part of the British Empire and both Bangladesh and Pakistan have retained this stringent legislation, as has India. Strikingly, this law has often been applied by the Indian state to discipline migrants from these two neighbouring countries. As will soon be shown, Bangladeshi migrants now dominate attention on a regular basis. Created for the benefit of the colonial authorities and to buttress their rule over their

colonised subjects, this particular law is positioned outside the tenets of liberal jurisprudence and offers few spaces to accommodate the human rights of individuals against whom it is applied.

The Foreigners Act has fifteen clauses and sub-clauses that apply to the “whole of India” (clause 1(2)). It does not explain or define irregular migrants and fails to exempt groups such as refugees, asylum seekers, and trafficked migrants from its scope. However, it makes a pronounced differentiation between the “citizen” and the “foreigner.” The latter is defined as a “person who is not a citizen of India” (clause 2), definitively set apart by the far-reaching influence granted to the Indian state over this class of persons. A detailed review of these stipulations reveals the wide-ranging mandate that the state has been granted, with few restrictions and oversights. Clause 3(1) upholds this set of powers bestowed on the state for the governance of non-citizens. As the LCI (2000) described it, the Government of India (GOI) is “empowered under clause 3(1) to prohibit, regulate or restrict the entry into, [the] departure from, or presence in India” of all “classes” and categories of “foreigners.”

Clauses 3(2) (a) to (g) outline the ways in which this authority can be exerted through an extended set of conditions and restrictions that may be imposed on any or all foreigners in India. These can consist of any of one or more of the following: restriction of a non-citizens’ entry and exit; limitations on the right to remain in specific areas of India; voluntary or involuntary removal to such areas; the control of non-citizens’ freedom of movement within the country; the provision of fingerprints, handwriting samples, and medical examinations; limitations on freedom of association and the ability to engage in certain activities; and restrictions on the possession of specific articles.

Another important feature of this law is that the GOI can introduce unlimited sets of additional instructions for particular groups of “foreigners” for their specific management and, thereby, control the latter’s presence and conduct in many, unrestricted ways. A number of formal orders and instructions have been issued over the years, including the Foreigners’ Order of 1948, which outlines the conditions listed in clause 3(2) and incorporates many provisions of the two other laws, the Passport (Entry into India) Act and the Registration of Foreigners Act (Sarker 2017). For example, it permits the central government to confiscate “any money or property” to cover detention and deportation expenses (GOI 1948). Travel into India without a passport and visa is restricted and additional restrictions can be imposed on the entry of non-citizens in the public interest. Extra instructions can be issued for the arrest, detention, and confinement of any group of foreigners (clause 3(2)(g)) and access to places where detainees are being held may be limited (clause 4(4)). Since 1997, a detailed set of classified instructions for the identification, detention, and deportation of “irregular Bangladeshis” has been enforced (Gujarat High Court 2011). Many aspects of this directive have, however, not been publicly released. It includes instructions to the BSF to immediately expel “illegal migrants who are intercepted at the border while entering India” (Lok Sabha 2017).

There are no time restrictions or other identified limits on non-citizens’ detention under this law. Diverging from India, both Bangladesh and Pakistan addressed this particular, difficult aspect of the common, inherited law early on by imposing restrictions through additional provisos to this clause. Non-citizens cannot be detained for more than two months in Pakistan, without the approval of a two-person board consisting of a Supreme Court judge and senior official (appointed by the Chief Justice and President respectively) (Government of Pakistan 1946). Clause 14(c) was appended in 2000, enabling authorities to detain non-citizens for a “period not exceeding three months” beyond the prison sentences imposed on them to finalise their deportation proceedings. Bangladesh added similar procedural

protections in 1974 (Government of Bangladesh 1946). A state-appointed three-member advisory board can authorise a foreigners' detention for a period exceeding six months in special circumstances, when there is "sufficient cause" (Government of Bangladesh 1946). Two of the board members must be qualified to be Supreme Court judges, while the third will be a senior government official. A hearing must also be conducted with the detainee within this stipulated period.

The extent to which such protective aspects have actually been implemented by India's two neighbors is unclear. But, it is a lesser known fact that such safeguards have not yet been added to this specific law in India, even though detention of a prolonged, indefinite tenure challenges the fundamental right to personal liberty granted to all individuals, irrespective of their citizenship status, by India's Constitution (Article 21) (GOI 1950). Article 22 of the Constitution imposes limits and conditions on detention, an advisory board to oversee protective detention similar to Pakistan and Bangladesh, time restrictions of three months, and other due process considerations. But, as its clause 3(b) reveals, these oversight measures weaken considerably for those arrested under laws such as the Foreigners Act, which authorise preventive detention. The crucial caveat, "except according to procedure established by law," inserted at the end of Article 21, too, destabilises the fundamental right to liberty in India. Referring to Articles 14 and 19 of the Constitution, India's Supreme Court has ruled that this procedure cannot be arbitrary and must be "reasonable, just and fair" (LCI 2001). Of these, only Article 14, which guarantees equality before the law for all individuals can be applied to non-citizens. The right to hold certain freedoms in India, listed in Article 19, including the ability to "move freely throughout the territory of India" (clause d) is only available to citizens. Broadly speaking, India's Constitution grants a differentiated set of rights favouring citizens and the critical appraisal of preventive detention practices have been undertaken by higher courts largely in cases involving citizens. Besides, courts can downplay the human rights aspects associated with detention, even of citizens, when "public order" and "national security" interests are invoked by state authorities (Jinks 2001). Since the late 1990s, the embedding of informal migrations from the two neighboring countries of Pakistan and Bangladesh within national security parameters and arguably justifiable anxieties about cross-border terrorism has restrained careful scrutiny of mandatory detention for non-citizens and its adverse effects.

Both the Universal Declaration of Human Rights, adopted in 1948 with India voting in favor, and the International Covenant on Civil and Political Rights, which India ratified in 1979, assert the right not to be arbitrarily arrested or detained. However, international instruments like these are not automatically binding in India, as emphasised in the LCI's 2001 report on arrest and detention practices in India:

*Treaties, agreements and covenants signed by the Government of India do not automatically become part of our domestic law unless and until the Parliament or State Legislature undertakes legislation in terms of such agreements or covenants. No one can rely on the provisions of the agreement/covenant to claim or found any rights thereon.*

A different, less-familiar feature of the Foreigners Act is that it grants the government extensive discretionary power to release individuals and groups of non-citizens from the law's provisions and other directives issued under it. While all non-citizens can be required to adhere to an elaborate set of conditions under India's immigration regime, this law permits the creation of special, adjustable rules for selected non-citizens, by using orders. These discretionary powers are noteworthy because they enable unequal treatment of migrant groups. They also expand the state's facilitative powers beyond what is generally

recognised, allowing the contours of this law to be modified by circumventing the extended procedure of legislative approval. These powers have acquired added importance under the current political regime, which will be discussed later.

The responsibility of confirming, using documentary evidence, that a person is a legitimate citizen lies with the accused person (clause 9). This provision deepens another major, unresolved predicament in a national and regional setting in which weak citizenship confirmation procedures exist and where the indigent cohort has limited capacity to easily fulfill this burden of proof (Ramachandran 2015). Moreover, it forges the regular, vexed scenario of extended detention and excessively delayed deportation of individuals arrested for flouting India's immigration regulations whose ascribed citizenship cannot be easily and conclusively established. Looking back to the case of Moyna, the Bangladeshi woman's whose prolonged detention was discussed in the Introduction, the fact that she did not carry a passport or other forms of official identification issued by the Bangladeshi government resulted in its border security personnel refusing to accept her at the first deportation attempt. In 2014, India's Supreme Court directed the Indian government to formalise a deportation agreement with Bangladesh to simplify and expedite the removal of the "irregular Bangladeshis" (Supreme Court of India 2014). Such an agreement is not in Bangladesh's interest, and in any case, it is not obliged to accept detainees until India offers proof that they are its citizens.

Foreigners who remain in India beyond the validity of their visas or fail to comply with relevant conditions and legal provisions can also face important penalties, including a prison sentence of up to five years and unspecified monetary penalties (clause 14(a) to (c)).

A critical point that emerges from this analysis of India's principal immigration law is the failure of the Foreigners Act to differentiate between categories of "foreigners" or non-citizens (Zutshi 2011). At the same time, it provides extraordinary discretionary powers to state authorities in the treatment of "foreigners." The retention of this archaic legislation some seventy years after the emergency circumstances of war, it has been argued, can only be explained as "the government's desire to retain almost absolute powers to deal with foreigners" (Acharya 2004). These rights granted to authorities and the state's "absolute" sovereign power over all non-citizens within its territorial boundaries have been upheld by Indian courts, which generally favour domestic immigration legislation over international standards. This is especially true with respect to certain groups like "irregular Bangladeshis," who are perceived as threats to India's well-being. Highlighting the "serious implications for internal security" of these migrations, the High Court of New Delhi (2008) has underscored the "right" of the Indian state to "expel such migrants" and "refuse to grant them certain rights...enjoyed by... [its citizens or] nationals,"

*The order of deportation is not punishment but a method of ensuring the return to his own country of an alien who has not complied with the [immigration rules and] conditions...Bangladeshi nationals who have illegally migrated or trespassed into India have no legal right of any kind to remain in India and...are liable to be deported.*

India's Supreme Court has previously endorsed the unrestrained authority of the state regarding deportation:

*...The power of the Government in India to expel foreigners is absolute and unlimited and there is no provision in the Constitution fettering this discretion. ...The*

*executive government has unrestricted right to expel a foreigner (Louis de Raedt v. Union of India in Chimni, 2005).*

In a more positive development, Indian courts have, during this decade, referred to the fundamental rights granted by India's Constitution to address some of these limitations of the Foreigners Act, including protection against deportation. Drawing on Article 21 of India's Constitution, which upholds the right to life of all persons, deportation proceedings against asylum seekers have been stayed or delayed to allow UNHCR to organise the resettlement of such individuals to a safe third country (Sarker 2017). But, this *non-refoulement* principle has been ignored by India's judiciary when the presence of asylum claimants is seen to undermine the security of India, reflecting developments in many countries in the Global North in recent years (Sarker 2017). The securitisation of cross-border migration has eroded India's longstanding tradition of hospitality towards refugees and asylum seekers.

### **III.b Decolonisation, Nation-State Formation, and Informal Mobilities**

The preceding discussion regarding the contemporary crimmigration framework in India shows that the subcontinent's past association with the British Colonial Empire has forged inflexible legal foundations for India, skewed excessively in favour of enforcement authorities. A different consideration that has crucially shaped such controls and its specific targets is again related to historical linkages with the west. It is the difficult, messy, and in the case of the Indian subcontinent, protracted processes of detachment from it, which shaped the territorial and symbolic boundaries of nation-states in South Asia and identified "Others" whose presence became tenuous. Decolonisation and violent nation-state formation in this region—including the partition of India and the divided state of (West and East) Pakistan (1947), and the subsequent creation of Bangladesh (1971)—triggered massive movements of people and entrenched the contours of belonging tied to religious identities (Alexander et al. 2010). Since the largest documented exodus of refugees in recent global history occurred then, it is not surprising that these large-scale flows laid the foundations for the present-day construction of "undesirable" or "illegitimate" migrants—the principal objects of crimmigration control (Murshid 2014; Datta 2013). Nuanced historical accounts confirm that India (and Pakistan) moved speedily to stem these forced mobilities by imposing a series of extraordinary legal measures involving special travel permits, passport requirements, and control over properties of those who moved, even if, temporarily. Its undisguised goals were to end newer refugee flows and block possibilities of return for those who had fled the recurring sectarian riots (Chatterji 2012; Zamindar 2010).

Consequently, the position of religious minorities weakened significantly across the three nation-states, in India too, even with its overtly secular orientation. It further constricted the mobility of those wanting to migrate via formal channels by acquiring official documents like passports and visas. But, the extent to which informal mobilities across porous borders outside this passport regime could be fully controlled remains uncertain (Kalir et al 2012; Sur 2012; Jones 2012b; van Schendel 2005; Samaddar 1999). After all, concerted efforts to securitise India's eastern border with Bangladesh through the lengthening border fence (McDuaie-Ra 2014; Jones 2012a) and violence targeting informal border-crossers (SAFHR 2010, 2011; Ramachandran 2011) did not materialise in any significant manner well until the early 2000s. Even so, the momentous consequences of those past events resonate up to this day. And, they acquire particular significance in the contemporary crimmigration regime in multiple ways, even beyond the boundaries of Indian territories. Bangladesh has been

disciplining such arrivals lately from its dominant neighbour, as a retaliatory measure against India's zealous efforts to arrest, incarcerate, and expel the "illegal Bangladeshi migrants." Some of those detained are prosecuted under the Control of Entry Act of 1952, originally conceived by Pakistan to stem the arrival of Partition-era refugees from India. Interestingly, this particular law also pre-dates Bangladesh's own existence as an independent nation-state distinct from the divided state of (West and East) Pakistan. A recent high-profile case concerned the lengthy detention (exceeding twelve months) of four-year-old Ariful from Behrampore village in Murshidabad, West Bengal, with his grandparents for crossing the border without passports. They were locked up for ten months in Bangladesh's Kushtia prison in blatant disregard of the original sentence imposed on them. Even after paying fines, 500 BTB each (approximately six USD), they were jailed to serve out the default sentence of two months (PRI 2013).

Schendel's 2005 study of the "Bengal borderland" highlights that the official narrative of hospitality for partition refugees in India, or of "homecoming," was seamlessly replaced by the hostile discourse of "infiltration"—a term that is also, notably, used widely in Israel with similar intent—rejecting permanent settlement by cross-border migrants. This negative, xenophobic strain was amplified further by succeeding events associated with the formation of Bangladesh—in particular, the "great exodus" of some ten million refugees (Datta 2013). In Indian provinces close to Bangladesh, ethnic (linguistic and cultural) differences between refugees and local residents produced sharp resentment of the growing presence of refugees. Most of these later arrivals returned to the newly formed nation-state of Bangladesh. In spite of this, the historical memory of accommodating these various flows, even if temporarily, generated deep, festering anxieties concerning migration per se and its seemingly adverse consequences in India's north-east, prominently in the state of Assam (Baruah 2015). These unaddressed anxieties would later be magnified in public discourse and political rhetoric, producing a corroding effect on migration governance. It would pave the way for the escalation of controls and the regular use of migrant detention and deportation practices, which were previously infrequently used.

As is now amply evident, both the recent past and the subcontinent's particular political geography acquire special importance in crimmigration control processes in India and the larger subcontinent. One conclusion we may draw from this is that while the selective aim of western regimes is the rigid management of asylum seekers and undocumented migrants from non-western countries, in the Global South the focus is on the informal movement of low-wage migrants across spatially contiguous states and within the region.

### **III.c "Infiltration" and the Hindu Right**

It is this unabated unease—especially in India's north-east region—regarding the perceived mass cross-border flows that has been deployed as an effective tactic by Hindu right-wing political forces in recent decades. The latter's spectacular shift to mainstream Indian politics during the 1990s is inextricably entangled with the attenuation of these various mobilities as "irregular migrations." Equally importantly, these localised anxieties were magnified into a "national crisis," both in terms of exigency and adversely-affected Indian geographical areas, involving a further separation based on the migrants' religious character. Reworking the older narrative of "infiltration," attention was drawn to the growing presence of migrants from neighbouring "Islamic states" into Indian territories, prominently from Bangladesh, and their manifold dangers to the insecure Hindu-Indian nation-state (Gillan 2002; Navlakha 1997).

The Hindu right's increasing prominence vitiated public and political discourses on such migrants, unleashing a virulent form of unrestrained xenophobia targeting this national group, which has seldom been challenged (Ramachandran 2015). It also brought sharp scrutiny to the well-entrenched patterns of informal mobilities outside of the passports and visa regimes across India's eastern borders (Kapur 2010; Moodie 2010). The popular representation of the "irregular Bangladeshis" began to merge with that of the Muslim resident and entrant. Such selective bias centring on this specific group and its Muslim cohort continues actively, as will be evident in Part IV of this paper, which examines the operations of crimmigration and its negative effects. This anti-Muslim bias will be re-visited in the concluding section.

The recent histories of refugee flows associated with post-colonial nation-formation and longstanding patterns of informal cross-border migrations in the Indian subcontinent have rendered the category of "irregular migrant" highly fuzzy and indistinct. It has also made it difficult to produce realistic estimates of migrants in India, especially from neighbouring countries. The government of India, under successive political regimes, has repeatedly maintained that "since illegal migrants enter without valid documents, there is no accurate data regarding such migrants in the country" (MHA 2019a). Migrants from Bangladesh are considered to be the largest such group. The Bharatiya Janata Party (BJP) government has claimed that there are 20 million "irregular Bangladeshis" in India (MHA 2016a). More reliable statistics indicate that there were 5,188,550 non-citizens in mid-2017, including 196,662 registered refugees and 9,814 asylum seekers, constituting 0.4 percent of the total population (UN Statistics 2019). The latest official data suggests that some 300,000 refugees existed in India at the end of 2014 (MHA 2017b).

There are several forms of intensified migration governance, which are closely associated with Hindu nationalist political forces, that bolster crimmigration in India today. Some of these involve highly-visible, spectacular tactics ranging from the enlargement of the border-fence separating India from neighbouring Bangladesh, to the mammoth undertaking of the National Register of Citizens to conclusively differentiate legitimate citizens from "illegal" migrants (Roy 2016). In an unusual occurrence, Assam is the sole state/province where the creation of this register is actively underway and already at an advanced stage of completion. India's Supreme Court imposed the time-bound preparation of this database in 2014 and a two-member team is monitoring its progress (The Hindu 2019). In the first draft released in July of 2018, some four million residents were excluded and face the serious risk of being permanently classified and rejected as "irregular Bangladeshi migrants" (MHA 2018a). It is no coincidence that this momentous exercise has been approved and is being carried out by central and state/provincial government headed by the anti-immigrant BJP. Its execution proceeded more briskly after a new BJP regime was elected in Assam in 2016, and the task of identifying and detaining these migrants has also sped up in the area.

The deepening consensus on the pivotal issue of "irregular Bangladeshis" amongst India's various political and social quarters has paved the way for the escalation of controls and the implementation of expensive and complicated undertakings. The perceived failure of previous governments to effectively manage migration in the past has contributed to the undue prominence of punitive practices of migrant detention, incarceration, and deportation in immigration control. The latest information released by the Ministry of Home Affairs (MHA) revealed that 552 persons, including 145 women and 28 children, were being held in six detention camps inside existing prisons in Assam (MHA 2016b). Other information suggests that the actual figures of detainees may be much higher, exceeding 1,000 detainees (HRW 2018). Assam has recently received approval and funding from the government of India to build a dedicated immigration detention centre with a capacity of 3,000 persons.



Two other aspects relate to the regulatory frameworks for crimmigration. The BJP-led government bolstered the disciplinary aspects attached to the Foreigners and Passport Acts during the early 2000s, adding new punitive and deterrent measures (GOI 2018). These newer provisions (clauses 14A, B, and C) imposed an elevated combination of incarceration and fines for immigration-related infractions converting such misdemeanours into medium-level offences, on a par with dangerous criminal activities (e.g. attempted robbery) (GOI 2018). Strict sanctions were incorporated for abetment and these infractions began to be treated as “non-bailable” offences and as serious “crimes.” Persons detained for such infractions would not be released. Mandatory detention, thus, became the norm for those arrested under these rules. With these changes, the penalties for immigration-related breaches in India’s Foreigners Act far exceed those in the contemporary versions of this law for India’s western and eastern neighbors, both of whom have maintained the original provisions. In Bangladesh and Pakistan, any person charged under this law can face a combination of unspecified fines and incarceration for up to five years. The Passport (Entry into India) Act received similar attention by significantly augmenting its penalisation structure (Rajya Sabha 2000). These modifications enabled the increased detention of migrants and the unfolding of India’s crimmigration system.

#### **IV. CRIMMIGRATION EFFECT**

As a result of the maximum duration of punishment that can now be handed out under the Foreigners and Passport Acts, many immigration-related infractions have been entrenched as cognisable and non-bailable offences. In India’s Code of Criminal Procedure, accused persons cannot be released on bail or sureties for non-bailable offences, especially if they are charged for cognisable offenses (GOI 1974). The latter are serious transgressions for which a police officer can arrest individuals without a warrant or court order. Preventive arrests for cognisable offences authorise the use of extended detention, especially when such arrests are made using laws which permit such actions (section 151(2)). This is clearly the case with the Foreigners Act and most individuals arrested, detained, and convicted for immigration-based infractions in India are charged under the strict terms of this act. In 2016 for example, 656 migrants were arrested under the Foreigners Act, and 29 under the Registration of Foreigners Act (NCRB 2017). 847 non-citizens were charge-sheeted or indicted, and 553 migrants were convicted under the Foreigners Act in that year. In 2015, 1,367 and 59 non-citizens were detained under the Foreigners Act and Registration of Foreigners Act in that order (NCRB 2016). There were 1,284 new cases registered under the Foreigners Act in 2011, 1,132 persons were charge-sheeted or indicted, and 8,337 cases were awaiting trial, including 7,205 cases pending from the previous year (NCRB 2012).

Migrants detained for immigration-related infringements face several adverse consequences: summary arrests without “warrants” (court orders) by police and border security personnel; lengthy detention for unspecified periods in police custody, BSF camps, and detention facilities; prison sentences combined with monetary fines imposed by courts; and finally, expulsion. With growing enforcement, the number of detained non-citizens has risen. Statistics from the NCRB, the main institution maintaining such records and affiliated with the MHA, shows a six-fold increase in non-citizens’ detention over time. The number of detainees shifted upwards from 1,064 in 1998 to 6,562 by the end of 2012 (see Table I). A similar pattern is noticeable in the two categories of “under-trial” (pre-trial detainees) and convicted non-citizens.

Table I: Pre-Trial Detainees and Convicted Migrants in India, 1998-2012.<sup>5</sup>

Year	Under-trials (Pre-trial detainees)	Convicted migrants	In police custody	Total
1998	701	363	Not available	1,064
1999	1,486	665	Not available	2,151
2000	1,673	752	Not available	2,425
2001	1,453	712	69	2,234
2002	2,057	613	119	2,789
2003	1,490	585	124	2,199
2004	1,602	785	145	2,532
2005	2,342	1,390	106	3,838
2006	2,772	676	110	3,558
2007	3,366	1,088	96	4,550
2008	3,142	1,847	102	5,091
2009	2,896	2,042	109	5,047
2010	2,884	1,715	136	4,735
2011	3,601	2,020	137	5,758
2012	3,984	2,483	95	6,562

Source: NCRB, 1999-2016.

Other official statistics confirm that a large segment of non-citizens held in India's prison system are those detained for immigration-related breaches. In 2015, for instance, of the 2,057 non-citizens arrested under various local regulations, 76 percent were detained according to penalties in three immigration-related laws: the Foreigners Act (1946), Registration of Foreigners Act (1939), and Passport Act (1967). The comparable share for 2016 and 2014 is 60 percent and 68 percent respectively. Although data has not been released for arrests and convictions under the Passport (Entry into India) Act, 1920, what is available shows that well over half of the non-citizens were in custody for passport and visa-based infringements.

Available official data on non-citizen detainees may not be complete as it is unclear if it accounts for those held in detention centres outside prisons. At most locations, adult non-citizens apprehended for immigration-related breaches are detained within prison complexes. (An uncommon exception is New Delhi, where the extensive, more active record of detaining and deporting irregular Bangladeshis since the early 1990s has led to the development of permanent detention structures outside the prison system, such as the Lampur Seva Sadan.) These estimates also likely omit child detainees in juvenile homes and those held at other quasi-correctional state institutions such as the Reception Centres outside the prison system. Since the NCRB statistics rely on information from police forces,

<sup>5</sup> This data does not disaggregate detainees by the specific law under which they were arrested, convicted and incarcerated. It consists of a combination of those held for immigration-related breaches and other offenses.

it very likely omits migrants detained and removed by the BSF from the border zones. This information has been infrequently released by successive Indian governments. Between 2006 and 2010, a total of 16,912 and 546 persons were detained by BSF personnel for informal crossings at India's eastern and western borders with Bangladesh and Pakistan respectively.

Given the heightened focus on “irregular Bangladeshis,” the number of Bangladeshi detainees and deportees is substantially higher than other non-national groups. Between 2005 and 2008, more than 90 percent of all deportees from India were returned to this eastern neighbour (see Table II). Even with a decline in the deportees' overall numbers over the past few years, Bangladesh has prevailed as the principal destination country for India (see Table III). That is, at least eight out of ten expelled persons were sent to this country. According to latest data, at the end of 2015 there were 3,795 non-citizens being held in Indian prisons as pretrial detainees, and another 2,253 migrants were serving sentences after having been convicted (see Table IV) (NCRB 1999-2016). Of these, Bangladeshis constituted 70 percent and 64 percent of the total pre-trial detainees and convicted persons, respectively. Lok Sabha MPs were informed in 2017 that more than 15,000 and 1,750 “illegal Bangladeshi infiltrators” had been arrested and deported in the previous three years (MHA 2017a). The politics of xenophobia in India and its particular contours has clearly had a profound effect on the policing of migrants from this country.

Table II: Foreigners' Arrests and Deportation by Citizenship, 2006-2008

Country of Citizenship	Number of Arrests by Year			Number of Deportations by Year		
	2006	2007	2008	2006	2007	2008
<b>Bangladesh</b>	10,723	12,080	6,816	13,692	12,135	12,625
<b>Nigeria</b>	76	66	104	69	37	169
<b>Sri Lanka</b>	55	46	105	20	13	145
<b>Pakistan</b>	34	42	45	100	24	19

Source: MHA 2010b.

Table III: Deportations to Bangladesh, 2005-2011

Year	Number of Bangladeshis deported	Total deportations of foreigners from India	Percentage of Bangladeshi deportations
<b>2005</b>	14,916	16,350	91.22
<b>2006</b>	13,692	14,933	91.68
<b>2007</b>	12,135	13,348	90.91
<b>2008</b>	12,625	13,995	90.21
<b>2009</b>	10,602	12,147	87.28
<b>2010</b>	6,270	7,248	86.52
<b>2011</b>	6,761	7,840	86.23

Source: MHA 2010a.

Table IV: Migrant Pre-Trial Detainees and Convicted Non-Citizens in Indian Prisons, 2015

Country of citizenship	Number of migrant pretrial detainees	Number of convicted migrants
<b>Bangladesh</b>	2,579	1,493
<b>Nepal</b>	361	228
<b>Nigeria</b>	340	59
<b>Various African countries</b>	177	18
<b>Pakistan</b>	113	97
<b>Myanmar</b>	41	376
<b>SUM</b>	3,611	2,271

Source: NCRB 1999-2016.

The punitive outcomes of such enforcement are especially acute for migrants from Bangladesh. Those held for informal cross-border trading, a long-standing feature of regional migration patterns in post-colonial states, are also likely to be arrested and disciplined. The punishment is particularly severe for persons, even citizens, held legally responsible for assisting such migrants. The consequences of these various infractions involve a combination of incarceration (often “rigorous imprisonment” involving prison labour) for two to eight years, as well as monetary fines ranging from 10,000 to 50,000 INR (approximately 144 to 721 USD). The minimum amounts may be close to, or exceed, the average monthly earnings of low-wage detainees. When indigent migrants and citizens are unable to forfeit these steep charges imposed on them, as is often the case, the incarceration period is extended.

Below, I provide a few examples using recent court judgments from West Bengal. A province/state with strong cultural and ethnic affinities with Bangladesh (its residents speak the same Bengali language), it now leads many other areas in detaining and disciplining Bangladeshi migrants. A total of 1,513 convicted persons and 1,768 “under-trials” (pretrial detainees) held in its prisons on 1 April 2016 were Bangladeshis (West Bengal Correctional Services 2019). In addition, 142 children, likely below seven years of age and considered too young to be separated from their mothers, were being detained along with their parents.

*Purna Chandra and Ganga Mondal were apprehended in Balurghat, South Dinajpur district for having arrived without “any valid passport or visa” (Calcutta High Court 2012a). They were sentenced to undergo “rigorous imprisonment” for two years and forfeit a penalty of Rupees 10,000 (approx. USD 144). Failure to pay the fine would result in additional incarceration of one month. The petitioners’ appeal against the “excessive” sentence was rejected on the grounds that the Foreigners Act imposes a minimum sentence of two years for “illegal entry.”<sup>6</sup>*

<sup>6</sup> Calcutta High Court (Appellate Side), *Purna Chandra Mondal and Another vs the State*, CRR No. 894 of 2012, 1 August 2012.

*The BSF detained Bangladeshi citizen Dukhu Mian in February of 2008 for attempting to take cattle across the border (Calcutta High Court 2012b). He was convicted to serve the maximum punishment for this offense, eight years “rigorous imprisonment,” later reduced to four years for pleading guilty. Dukhu was also asked to pay a fine of Rupees 50,000 (approx. USD 721) and faced extra time in a West Bengal prison for an added year if unable to arrange for this large payment.<sup>7</sup>*

*Indian citizen Bishu Mahiruddin Khan’s bail application was rejected. He had been arrested for abetment by providing migrants’ shelter at his house located in proximity to the Indo-Bangladesh border. The presiding judge contended that the case was “serious” and Khan’s actions posed a “serious threat to national security” (Calcutta High Court 2013b).*

*Mahibur Rahaman challenged his judgment at the Calcutta High Court’s Appellate Division while he remained incarcerated at the Berhampore Central Correctional Home in Murshidabad city in northern West Bengal. Found to be “moving suspiciously,” local police had booked him in early 2008 and he was later asked to serve seven years for unlawful entry into India (Calcutta High Court 2013c). Mahibur’s refusal to accept culpability very likely adversely affected the outcome of his original trial. In his new submission, he requested the court to show leniency as he was the only earning member of his family and had already served nearly five years. However, the Court rejected his appeal by citing the “nature and gravity of the offense,” indicating that it would not “be safe to reduce the sentence to the period already gone.”<sup>8</sup>*

Besides the disciplinary intent, which is unmistakably evident from these selected cases, presiding judges have, on occasion, characterised immigration-related infringements as acute risks to national security. This is evident in both Bishu and Mahibur’s cases. The direct associations drawn between these detainees and security is especially troubling since neither of them had engaged in any seditious activities that could be understood as affecting India’s defence and security, including extreme acts of terrorism. Yet, court rulings involving this group reify such connections to social dangers and national security through repeated emphasis on the “seriousness” of informal entry and “irregularity.” In another case, the bail application of Fakir Ali was refused after his arrest for infringing immigration rules (Calcutta High Court 2013a). The court’s decision reasserted the “gravity of the offense” and linked informal entry to the purported wellbeing of the country: “These kinds of offenses [informal border crossings] are at a rise, posing *serious threat to the national safety*” (author’s emphasis) (Calcutta High Court 2013a). In addition to the draconian immigration regulations treating such acts as criminal deeds and more recently, as grave offences, their enforcement through the court system and beyond have reproduced and reinforced the criminalisation and securitisation of these migrants.

India’s rigid immigration regulations and their increased enforcement have produced unintended consequences for other migrant groups who travel without passports and visas. Since the Foreigners Act does not exclude groups such as asylum seekers and refugees from its strict terms, legitimate refugees who enter informally through India’s securitised eastern border have been vulnerable to arrest, imprisonment, fines, and deportation for breaching immigration laws. Rohingya refugees from Myanmar are a prominent recent

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<sup>7</sup> Calcutta High Court, *Dukhu Mian v the State*, C.R.R. 2482 of 2012, 17 September 2012.

<sup>8</sup> *Mallick Kumar Saha @Mahibur Rahaman vs. the State*, CRA No. 37 of 2009, Calcutta High Court (Appellate Side), 5 March 2013.

example (Majumder 2018; Velath and Chopra 2018). In one notable case from early 2019, a dozen Rohingya refugees were deported to Myanmar in violation of the *non-refoulement* principle (MHA 2019b).

Rohingya generally use the Bangladesh border to cross into India and because of their common religious identity, they are often crudely conflated with “irregular Bangladeshis.” This problem has been compounded by the absence of a national refugee law in India and the fact that it is not a signatory to the 1951 UN Refugee Convention (MHA 2017b, 2019a). Under a Standard Operating Procedure (SOP) executed by the Foreigners’ Regional Registration Offices since 2011, asylum seekers can be treated as exceptional cases and those approved receive long-term visas to legalise their presence in India (MHA 2016c). However, limited understanding about its provisions among enforcing authorities such as police and BSF personnel; unrestricted use of inflexible laws such as the Foreigners and Passport Acts to regulate the presence of certain non-citizens; and constant attention to deterrence through punishment for certain migrant groups, prominently “irregular Bangladeshis,” have undermined this newer humanitarian programme for refugees and asylum seekers (Basavapatna 2018).

Sarker’s (2017) new, detailed analysis of case-law involving detained asylum seekers and refugees reveals that lower courts have on occasion prosecuted such persons under the inflexible terms of the Foreigners Act. Short prison sentences and fines have been imposed on genuine asylum claimants who entered the country without passports and visas even after they produced valid refugee certificates issued by UNHCR. In some instances, the High Courts and Supreme Court have overturned these decisions, but this, unfortunately, has not been a consistent practice. In its submission for India’s last Universal Periodic Review, UNHCR recommended that the terms of the Foreigners Act should be modified to decriminalise informal entry, especially for refugees and trafficked migrants (UNHCR 2016).

If the existing regulatory system for crimmigration sanctions this dispensation through mandatory detention of such migrants with the ultimate objective of expelling them, then its execution buttresses this control through its lagging pace and palpable unconcern (Rajan 2012). Low-wage earning, often less educated, and sometimes illiterate, migrant detainees are routinely trapped in a rigid crimmigration system that is greatly indifferent to their circumstances. Arrested under various immigration rules and refused bail pending trial, these migrants are held as “under-trials” or pre-trial detainees for extended periods before their cases are presented before a magistrate.

As evident in the case of Moyna—the Bangladeshi woman discussed earlier—courts routinely commute sentences to offset the long period of pre-trial detention. But, this does not reduce the tediousness of the multiple formalities associated with the deportation process. Although their cases require considerable time and energy of government officials on both sides of the border (Supreme Court of India 2014), such migrants are ultimately too insignificant to matter to the system, unless we observe their suffering as an effort to reinforce jingoistic political sentiments in two countries. They can be easily lost within the system, staying confined, immobilised, and unreleased far beyond the completion of their sentences.

While India’s Code of Criminal Procedure underscores the fundamental right to liberty by limiting initial detention by police or other authorities to 24 hours, granting them immediate access to the court system and other due process rights, it is widely known that these safeguards are very poorly implemented, even for citizens. Indeed, a report from the Law Commission of India concerning arrest procedures some 20 years ago revealed the rampant

use of indefinite preventive detention by police agencies all over the country, often without obtaining court orders, even in cases where the detainees had been arrested for less-serious offenses and were eligible to be released on bail (Law Commission of India 2001). This pattern is acute for marginalised groups, such as indigent, Muslims, and *dalit* (low-caste) persons. These existing weaknesses in India's criminal administration system and the persistent gaps between legal safeguards and their consistent enforcement have also had a detrimental spillover effect on the detention of vulnerable non-citizens.

In comparison to Mahibur and others, Moyna received a brief incarceration term (a little over three months) at the presiding judge's discretion. Despite this leniency in sentencing, however, she continued to be confined for well over two and half years. Even if the first aborted attempt at deporting her had been successful, she still would have spent nine months in detention, six months beyond the term initially imposed on her. This drawn-out detention and considerable delays in expulsion place migrants like Moyna in a state of extreme limbo, facing persistent uncertainty and enormous anxiety regarding their future. This vexed configuration, in turn, amplifies the corrective aspects of control. Moyna's case had simply been forgotten by authorities until lawyers, providing pro bono assistance at the Reception Centre where she was being held, petitioned the Karnataka High Court contesting her indefinite detention and overdue deportation. It was Justice Bopanna's directive that persuaded the various enforcing agencies to belatedly finalise the procedural requirements for her repatriation.

To summarise, migration-related detention in India is applied for both criminal and administrative reasons: as a penalty for breaching immigration regulations; as a preliminary step in removal proceedings; and to prevent absconding. Additional obstacles to speedily executing the deportation of detainees, especially for those who entered India informally without documents (passports and visas), and intensified emphasis on punitive sanctions for immigration-related infractions have made lengthy indefinite detention an inevitable and not easily resolved outcome of these legal and institutional arrangements. Based on visits to two detention centres in Assam, a new report by the National Human Rights Commission (NHRC) and its former Special Monitor for Minorities highlights the prolonged detention of many persons, extending up to nine years in several cases (NHRC 2018). The future of detainees who were branded as "irregular Bangladeshis" yet claim to be Indian citizens and are unlikely to be accepted by Bangladesh is even more uncertain. In 2016 and 2017, only 39 persons held in Assam's detention camps were formally deported to Bangladesh after conclusive verification of their nationality (MHA 2018b). Moyna's experience of protracted detention and delayed deportation is not, unfortunately, out of the ordinary in this respect.

## V. CONCLUSION

This working paper has endeavoured to identify and contextualise key dimensions and specificities of the crimmigration control regime in India as well as its multiple linkages with developments in the west, past and present. A constitutive element of this phenomenon are colonial-era immigration regulations fashioned to endorse the sovereign's power to strictly monitor the movement of colonised subjects across its dominions. Paradoxically, legal tools of containment developed by imperial powers to immobilise colonised subjects within less-privileged geographies are now being applied by India to control the presence of "Others" from neighbouring states, especially Bangladesh.

While in other countries and jurisdictions—most notably, in the European Union—immigration laws have been updated and undergone various transformation, such as shifting from criminal penalties to administrative procedures in their treatment of immigration violations, India’s antiquated laws have been retained and many of their original provisions and arrangements left undisturbed. Given the specific circumstances of their formation, these illiberal laws grant exceptional liberties to state authorities in the management of migrants.

Punitive provisions have existed since the earliest laws were written. This paper has carefully assessed the Foreigners Act to highlight important ways in which it has facilitated these controls. Key aspects of this law that undergird crimmigration in India include: extraordinary discretionary powers to target selected non-citizen groups for control and exempt others; weak procedural safeguards that fail to protect against prolonged detention; few restrictions on deportation powers; and failure to exempt genuine refugees and asylum seekers from punitive measures. This combination of elements has offered a pre-fabricated, unusually severe crimmigration system to enforcing authorities requiring little modification. India’s crimmigration system only weakly recognises the fundamental human rights of migrants and refugees.

The paper also presents various problematic outcomes of the “crimmigration effect,” like the preponderant application of control measures on Bangladeshis. Because crimmigration is highly securitised, vital details of immigration procedures remain shrouded in secrecy. Undocumented migrants make easy targets of control mechanisms, especially in social contexts where migrants are scapegoated by political actors—as has been evident during the recent elections in India—and little effort is made to identify vulnerable groups. Even though unintended in some respects, this disciplinary tendency and punitive strain are saturated throughout the drawn-out process, extending from migrants’ arrest up to their expulsion, and perhaps even beyond. Stumpf’s 2013 observations about crimmigration in the United States hold clear validity in this setting: it is the minutiae of the system that shore up the severe control of its targets, far past the deliberative, punitive exercises of incarcerating and expelling people. A further incongruity is that indigent persons like Moyna, Mahibur, and others facing the brunt of the harsh crimmigration system in India are unable to acquire the immigration documents required for safe travel across national borders. The irregular status of these informal border-crossers impedes their access to formal mobility regimes.

India’s neighbours have particular relevance here as the system targets migrants deemed “undesirable” who are both ethnically similar in some ways while different in others. The lengthy, fraught events of decolonisation have forged the troublesome contours of today’s policies towards these populations, who are comprised of both older refugees and newer informal migrants. Post-colonial nation-state formation rooted in dominant religious identities has enabled newer xenophobic proclivities, tied to the ascendancy of the Hindu right in India. The construction of the modern nation-state in South Asia, configured through territoriality and citizenship, has strong ethnic dimensions embedded within it, moulding particular nuclei of crimmigration controls.

Crimmigration laws have been enforced with increasing regularity in India since the late 1990s, when “special” classified instructions to state/provincial-level governments led to “illegal Bangladeshi migrants” becoming exceptional targets of control. This trend was deepened subsequently under the revised Foreigners Act, when penalties for various immigration-related infractions were augmented. These changes have also occurred due to



the growing “Hinduisation” of the Indian nation-space and marginalisation of religious minorities, principally Muslims, within it (Kumar 2013; Chatterji 2009).

Since 2014, the practices of detention and deportation have acquired special importance in the province of Assam, where a systematic inventory of “irregular Bangladeshis” has been carried out, leading to increased numbers of arrests. Unaddressed questions remain about the fate of those who are excluded from this Register of Citizens. India’s Supreme Court has repeatedly extended the deadline for the final draft of this database to be released, which at the time of this publication was set for end of August 2019 (Times of India, 2019; Rajagopal 2019). With massive numbers of individuals expected to be adversely affected, it is unclear whether many of these rejected persons can even be accommodated in detention facilities or deported. In May 2019, the Supreme Court approved the conditional release of individuals who have spent three years or more in detention in Assam provided that they are able to meet the stringent conditions for release. One of these conditions is sureties in the sum of 200,000 INR (approximately 2,885 USD) paid on their behalf by Indian citizens (Supreme Court of India 2019). Fulfilling this stipulation may be beyond the financial and personal capacity of a section of detainees.

The Hindu-right BJP government’s modifications to the Foreigners Act and Passport (Entry into India) Rules are the most recent development along this trajectory (MHA 2015a, 2015b). Drawing on the “exemption” clause (3A(2)) contained in the Foreigners Act (clause 3) permitting the central government or Government of India to release any individual or class of persons from immigration requirements, these new directives have solidified the “objects” of crimmigration even further. Migrants who entered Indian territories before 31 December 2014 without valid passports and visas or overstayed the terms of such documents—yet were from religious minority communities in Bangladesh and Pakistan—may now be able to escape such punitive mechanisms. With this policy, the Modi-led government is executing its established political tactic and fulfilling its latest electoral promise to accommodate Hindus from neighbouring “Islamic” countries as “refugees” in a Hinduised nation-state, the “natural home for persecuted Hindus” (Tripathi 2016). By accommodating other religious groups, these modifications have been made less blatantly biased. Even so, it concretely formalises what for many years have been informal and formal control practices focusing overtly on Muslim arrivals from neighbouring states (Jayal 2013; Jones 2009; CCPD 2008). The expansive provisions of these colonial-era crimmigration laws have legitimised this drastic change with ease through the newly formed rules, by liberating the Indian government from the burdensome requirement of gaining the “consent of the governed” through Parliamentary/legislative approval.

The BJP government’s efforts to codify these xenophobic tendencies has, however, not been entirely successful. The controversial Citizenship (Amendment) Bill of 2016 attempted to grant fast-tracked citizenship rights to these exempted migrants from neighboring countries. It faced two-fold opposition from residents of north-east India who reject all migrants irrespective of their religious identity, along with other groups who found its anti-Muslim character unacceptable (Mitra 2018). Lok Sabha approved this bill in January of 2019 where the BJP holds a majority, but the Rajya Sabha subsequently rejected it. According to news reports, the exemptions from passport and visa requirements for non-Muslim migrants from Bangladesh and Pakistan using the Foreigners and Passport Acts have also been legally challenged, though it had yet to be adjudicated at the time of this publication (FirstPost 2018).

In these contemporary control processes, not all informal mobilities are “crimes.” Some informal migration practices are exempted from such processes. These discriminatory

tendencies are being deepened through solid regulatory frameworks and newer enforcement practices. Due to limited institutional capacity for migrant detention, fiscal burden of detention and deportation on the state, and other unresolved barriers to easy removal, like citizenship confirmation for informal migrants, the number of detainees and deportees overall continues to be limited in India, even when measured against other prominent receiving states in the Global South like South Africa and Malaysia, which routinely detain and deport large numbers of migrants (Low and Mokhtar 2017; Crush and Ramachandran 2015; Garces-Mascarenas 2012). Nevertheless, the emergence of crimmigration control in the subcontinent ensures that criminalisation, securitisation, and xenophobia will continue to be the hallmarks of Indian immigration policy.



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