

THE “ILLEGAL IMMIGRANT” IDENTITY AND ITS FRAGMENTS— FROM “ENEMY FOREIGNER” TO “BANGLADESHI ILLEGAL IMMIGRANT” IN (POST) COLONIAL INDIA

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This article focuses on the fragmented “illegal immigrant” identity in (post)colonial India. Employing a critical postcolonial lens, it provides a genealogical investigation of the legality surrounding the illegal immigrant, which reveals a colonial legislation that served British wartime interests—the Foreigners Act (1946). The application of the legislation in contemporary times bolsters the (Hindu) nationalist rhetoric that views the Bengali Muslim as the “Bangladeshi illegal immigrant.” The production of the Bangladeshi illegal immigrant as a governmental category, however, has a longer history that is tied to the question of citizenship and mass migratory flows before and after Partition (1947) as well as to the birth of Bangladesh (1971). The Illegal Migrants (Determination by Tribunal) Act, 1983 was passed in Assam, but later struck down by the Supreme Court in 2005; both the promulgation and ultimate revocation point towards the ethno-religious bias inherent in the popular and politico-legal responses to immigrants, as well as the fact that Assam has become the locus for setting the agenda on migration. Assam has suffered the consequences of a politicization of immigration coupled with the poor political management of migratory populations, but the discourse on illegal immigration travels far and wide across the nation, uncovering the limits of the nation-state itself.

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I. INTRODUCTION

Why [has] the state always seemed to be the enemy of “people who move around”, to put it crudely... Nomads and pastoralists, hunter-gatherers, Gypsies, vagrants, homeless people, itinerants, run-away slaves, and serfs have always been a thorn in the side of states.

—James C. Scott, *Seeing Like a State*

On January 7, 2011, Felani Khatun, a fifteen year old girl, was shot by a Border Security Force (BSF) guard when she was attempting to cross the India-Bangladesh border—her corpse lay hanging on a barbed wire fence for days before authorities responded. Felani was traveling with her father from New Delhi, where the family had been living and working, to be married in Bangladesh where they hailed from.¹ In 2013, an Indian trial court acquitted the BSF constable Amiya Ghosh, who was charged with murdering her.²

When the case came up for hearing again, in 2015, before a special court constituted by the BSF, the decision was upheld, raising a number of important questions about “people who move around” as “enemies of the state” who are liable to be surveilled and shot.³ According to a Human Rights Watch Report titled “Trigger Happy” authored in collaboration with human rights organisations, Manab Adhikar Suraksha Mancha (MASUM) and Odhikar, Felani’s death is not unprecedented—a 1,000 people—both Indian and Bangladeshi were killed by the BSF, between 2001 and 2010—making that a death once in every four days.⁴

1 Odhikar, *Teenage girl Felani killed by the BSF firing at Anantapur border under Kurigram district*, Odhikar Report (2011) available at <http://odhikar.org/teenage-girl-felani-killed-by-the-bsf-firing-at-anantapur-border-under-kurigram-district/>.

2 Madhuparna Das, *BSF Jawan Acquittal: Family Says Justice Denied*, THE INDIAN EXPRESS (September 13, 2013) available at <http://indianexpress.com/article/cities/kolkata/bsf-jawan-acquittal-family-says-justice-denied/>.

3 Garga Chatterjee, *Borders, Murders and Good Human Beings*, DAILY NEWS & ANALYSIS (July 8, 2015) available at <http://www.dnaindia.com/analysis/column-borders-murders-and-good-human-beings-2102580>.

4 Sahana Ghosh, *Actions that Border on the Barbaric*, THE HINDU (September 26, 2013) available at <http://www.thehindu.com/opinion/op-cd/actions-that-border-on-the-barbaric/article5171113.ece>.

What was Felani's crime apart from crossing the border? One answer might simply be that she was an "illegal" immigrant—a discourse that is framed around people moving across bounded, sovereign nation-states as criminals—forming a particular paradigmatic example of "people who move around" that Scott does not explicitly mention in his aphorism.⁵ The biopolitics of migration has produced the illegal immigrant as a legal category that is *de facto* accepted as the only possible way of framing (im)migration policy, often ignoring the gross concomitant violations of what we have come to term 'human rights'—from the proposed US-Mexico border wall promised by Donald Trump to exterminate all Mexican illegal immigrants, to the daily detention and deportation of refugees and asylum seekers from the European Union.

In the context of South Asia, however, a region that was partitioned less than a century ago, and where the exclusionary basis of the politics of illegal immigration remains largely ignored within wider public and even academic discourse, we might ask how this illegal immigrant identity has been constructed, both through the law and society, as what Mouffe has termed the "constitutive outside"—the making of the "us" and "them" as collective political identities.⁶ The "us" is delimited to only include the rightful bearers of citizenship, and the "them" makes up the large swaths of the population whom the state anoints illegal immigrants, not deserving the rights and privileges associated with citizenship because their identity acts as a marker of not belonging to the nation-state.

On a global scale, state policy, more often than not, has specific rules regarding the status of those it deems illegal—they are seen as a threat to the state (and more specifically, national) security and also linked to larger social ills like crime and poverty. At the outset, then, laying out three interconnected features of illegal immigrant identity when viewed through the lens of state directed enforcement might be helpful in understanding the fields this paper navigates.

First, as has been established widely, the illegal immigrant must be racially,

5 I use scare quotes around "illegal" immigrant and "Bangladeshi" at the beginning of this paper, but do not continue the use throughout. It should be pointed out at the outset that I am not normalizing them, and believe these are politically motivated categories; indeed, I affirm that perspective through this paper.

6 Chantal Mouffe, *THE DEMOCRATIC PARADOX* (2000).

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ethnically, religiously, and/or linguistically different from the majority population.

Second, they must be identified as belonging to a “foreign” country—this becomes crucial when considered in conjunction with the first feature—as it is not enough that an illegal immigrant is viewed only as different from the majority population, but it must also be clearly defined as belonging to a foreign nation-state(s).

Lastly, they must be part of a sizeable minority (or framed as such in political discourse), in order for them to appear to pose a threat to the majority population—a threat by numbers.

These features are not a universal model that states operate within, but rather serve as a useful template to consider as we move forward in dealing with the more complex contours of illegal immigrant identity in India. The state and its institutions—in particular, law and policy, become important tools in constructing the illegal immigrant identity.

In the partisan theatre of Indian electoral democracy, the jingoistic tone has established a false binary as far as the debate on migration policy goes—the Congress as “pro-Bangladeshi” and the BJP as conversely “anti-Bangladeshi.” The recently concluded election in Assam, where the Congress was routed out and the BJP emerged victorious, painted the identity politics surrounding migration in an entirely partisan light. Little attention, however, has been paid to the genealogies of Bangladeshi as illegal by viewing the law and democratic politics as coextensively acting in concert in this identity production. This paper will be concerned with the law and governmental policy as linked spheres in constructing migrant identities; particularly how “foreignness” and “illegality” are ascribed to migrant populations, and their biopolitical meanings in different temporal and spatial contexts in India.

The place of migrants in national politics, of course, has a longer history. India has been proud of hosting Tibetan refugees since the 1960s, fleeing Chinese aggression; similarly, Sri Lankan refugees were welcomed during the Civil War, and Nepal and India have shared an open border, facilitating an exchange of goods and people. Nationalist discourse has often celebrated the humanitarian approach India has taken towards refugees, particularly post-1971, but this paper critiques that framing, and suggests that the state did not

necessarily support migrants and in fact allowed for discrimination based on ethnicity, religion, and nationality in adjudicating who *is* and *is not* illegal.⁷

By examining change over time along with the shifting and sedimentation of definitions of migrant identity, I show that it becomes clear that the use of legal policies to regulate migration have acquired religious and ethnic dimensions that ascribe the illegal immigrant identity to Bangladeshi, or in other words, Bengali Muslims, and this not only conforms to the three features I outlined, but also highlights how the Bengali Muslim has become the referent for the illegal immigrant, going beyond the strict limits of their putative national identity as Bangladeshi. The Bengali Hindu who could also be Bangladeshi has become the rightful claimant to Indian citizenship in the eyes of the BJP, and furthermore the case law and political discourse this paper explores, uncovers the historical limits of secularism as a constitutional ideal in constructing and interpreting migrant policy.⁸ What is most curious about this construction is that its legal foundations rest on a colonial law that the British legislated during World War II, calling into question how historically situated colonial legal mechanisms intersect with postcolonial politics, and what that means specifically for the criminalisation of migration in India today.

In the next brief section, I review the scholarship on the field thus far, and highlight the methodological assumptions this paper works with. I, then, take a longer historical view of the debate, starting with the sociopolitical conditions surrounding the birth of the Foreigners Act (1946), and onwards through the post-Partition years. Lastly, I focus on case law that has situated the illegal immigrant as a legal and constitutional subject, in recent decades.

II. THE POSTCOLONIAL LENS: CITIZENSHIP AND MIGRATION

Heeding Ratna Kapur's call to turn "a critical postcolonial gaze onto the project of citizenship, one that is detached from the confines of the modern nation-state," this paper addresses the question of the illegal immigrant identity as a legal historical one that informs the current day politics of migration and

7 Sumit Ganguly and Brandon Miliate, *When Refugees Were Welcome*, FOREIGN AFFAIRS (September 22, 2015) available at <https://www.foreignaffairs.com/articles/india/2015-09-22/when-refugees-were-welcome>.

8 Jayant Sriram, *Govt. set to grant citizenship to Hindus from Bangladesh*, THE HINDU (May 11, 2015) available at <http://www.thehindu.com/news/national/govt-set-to-grant-citizenship-to-hindu-immigrants-from-bangladesh/article7190826.ece>.

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citizenship in much of the postcolonial world.⁹ To this end, I have combined archival sources from the late colonial period with case law to interrogate the genealogy of migration and citizenship as not simply emergent from the time of India’s independence and Partition, but more intimately connected to colonial legislation than has previously been suggested by most scholarship in the area.

The complexities surrounding migration and citizenship in India has gripped scholarly interest since the 1970s with Myron Weiner beginning with his work on ethnic conflict and migration in the ’60s and ’70s.¹⁰ His work until his death in 1999, addressed migration as a “crisis” that needed to be solved by state intervention.¹¹ Later scholarship such as Kamal Sadiq’s work on what he terms “paper citizens” works with this assumption of a “global crisis” of illegal immigration that requires to be countered by more sophisticated techniques by the state.¹² This paper strongly disagrees with the framing of this matter as a simple zero-sum game between the state and the migrant subject, and asks more fundamental questions about the power of the nation-state itself as regards migration.

Scholarship on citizenship as a legal and political subject of inquiry has emerged with monographs such as Anupama Roy’s *Mapping Citizenship in India* and Niraja Gopal Jayal’s *Citizenship and Its Discontents* turning our attention to the historically situated differentiations in citizenship along gender and caste lines among other dimensions.^{13,14}

However, while previous scholarship has explored the illegal immigrant as a legal subject, the focus has primarily been on Assam as the locus of influence over law and policy. Assam does remain the state where migrant politics are the most insidiously vexed and where every election is dictated by political parties’ policies on the large swaths of population believed to be illegal immigrants, but this paper suggests that the temporal and spatial locations of this debate do

9 Ratna Kapur, *The Citizen and the Migrant: Postcolonial Anxieties, Law, and the Politics of Exclusion/Inclusion*, 8(2) THEORETICAL INQUIRIES IN LAW 569 (2007).

10 Myron Weiner, *SONS OF THE SOIL: MIGRATION AND ETHNIC CONFLICT IN INDIA* (1978).

11 Myron Weiner, *GLOBAL MIGRATION CRISIS* (1995).

12 Kamal Sadiq, *PAPER CITIZENS: HOW ILLEGAL IMMIGRANTS ACQUIRE CITIZENSHIP IN DEVELOPING COUNTRIES* (2008).

13 Anupama Roy, *MAPPING CITIZENSHIP IN INDIA* (2010).

14 Niraja Gopal Jayal, *CITIZENSHIP AND ITS DISCONTENTS: AN INDIAN HISTORY* (2013).

extend beyond Assam's political climate in the past three decades; therefore, I attempt to provide a more nuanced framework to examine the issue.

III. THE 'ENEMY' AND THE 'FOREIGNER': THE FOUNDATIONS AND FRAMING OF THE FOREIGNERS ACT (1946)

The Foreigners Act, which finally got formalized a year before the British left India, is in effect today in India, Pakistan, and Bangladesh. In this section, I note the legal antecedents that led to its passing in 1946, but it might be worth noting what the purported aims and mechanisms in its current form are: at the outset a "foreigner" is defined as "a person who is not a citizen of India," and under Section 9, the "burden of proof" in establishing citizenship status lies on the person apprehended; furthermore, as per Section 11(2), "any police officer may take such steps or use such force...necessary for securing compliance."¹⁵ The law was clearly predicated on colonial coercion and its earlier iterations are proof of the specific wartime interests it served.

In 1940, the Government of India's Ministry of External Affairs, War Branch started proceedings to "...[consider] the desirability of replacing the Foreigners Order and Enemy Foreigners Order (and possibly Rule 31 A of the Defence of India Rules) by a consolidated order under the Foreigners Act, 1940."¹⁶ The Enemy Foreigners Order was promulgated just the previous year as a stopgap measure to secure legal control over India against the enemies of Great Britain in the Second World War, as evidenced from the following passage issued by the Central Government's Gazette of India detailing the precise definition of an "enemy foreigner" and his internment:

"enemy foreigner" means a foreigner who possesses the nationality of a State at War with His Majesty, or having possessed such nationality at any time, has lost it without acquiring any other nationality...Every enemy foreigner of the male sex who has completed the age of sixteen years, and who is, or may hereafter arrive, in British India, shall forthwith be arrested by the Civil Authority for the area in which such enemy

15 Foreigners Act of India, 1946.

16 Ministry of External Affairs, War Branch, 1940.

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foreigner, and shall be surrendered as soon as may be, to the Commandant of an internment camp [not applicable to consular officials].¹⁷

The shifting rhetoric of the British government’s response to those it deemed enemies of the state becomes evidently rooted in World War II politics as seen in an express letter from the Home Department dated February 15, 1940 that states that “mere dislike of a German name...will not be a sufficient reason” for a change in name, and if done for the reasons of employment, it will not “affect such surveillance as maybe necessary and does not alter the fact that the individual is a German subject.” This fixing of identity was crucial for the British in thwarting anti-colonial attacks by Indian nationalists who were viewed as “enemies” as well. The government had already passed the Defence of India Act in 1915, during World War I to suppress Indian nationalists during the period. In fact, a 1940 MEA report stated, “the Foreigners Ordinance of 1939...was proposed to be replaced by a permanent statute...a consolidated order under the Foreigners Act, 1940...[that has] the same relation to the ordinance and orders made thereunder as the Defence of India Act has to the Defence of India Ordinance and the Defence of India Rules.” Therefore, it is not entirely coincidental that the Defence of India Act is seen as the model legislation for this “consolidated Foreigners Act”—the Defence of India Act, 1915 was similarly passed during wartime conditions to brand native Indian nationalists “enemies of the state” and “terrorists.”

Under colonial rule, not only was the idea of citizenship as a site of freedom wholly absent, but also subjecthood allowed for unilateral decision-making for colonizers to establish order and maintain hierarchies, especially when it came to defence against enemy foreigners. Mamdani, explaining the salience of late colonial governance in contemporary African politics shows that colonial discourse often referred to the “native question” as a means of “stabilizing alien rule” to allow for the creation of “subjects” and “citizens” as separate categories.¹⁸ This also translates into the state building projects in the postcolonial phase that rely on abandoning “colonial corruption,” through freer and more democratic articulations of citizenship and rights, but also use colonial

17 Ministry of External Affairs, War Branch, 1943.

18 Mahmood Mamdani, *CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF COLONIALISM* (1996).

legal structures to create exclusions within citizenship and the rights it affords. Jayal quoting Baxi shows two competing elements that might explain the instrumentality of the Foreigners Act in postcolonial India—“the constitutional State (the normative and aspirational framework enunciating the desired social order) and the political State (as framework of competition for political power, or even the struggle to capture the constitutional State).”¹⁹ The constitutional State established exclusive citizenship in terms of the India-Pakistan divide that the political State within the partisan democratic framework animated with the threat of the “Pakistani” and “Bangladeshi” as an affront to the national fabric. Therefore, the normative need for a bordered, secure nation-state is supported by the nationalist rhetoric surrounding immigration.

The micro and macro foundations of the historical evolution of the Foreigners Act, however, are rooted in colonial relations that have little bearing on present day South Asia, but nevertheless have been used effectively to justify the inherently contradictory logics of migration politics, i.e., how to manage minority populations, both constitutionally and politically.

Partition was in fact not the region’s first brush with forced migratory population flows as a census conducted by the Commonwealth Relations Department in 1943 shows. Nearly 400,000 evacuees who were Asiatic British subjects and 11,368 European and foreign evacuees had arrived in India in search of refuge post the breakout of WWII, after 1941.²⁰ While these numbers were far smaller than the population flows during and after Partition, the British were well aware of the potential threats the presence of “enemy foreigners” posed to their government and thus, there was a strong urge to control foreign populations with the consolidated Foreigners Act. The partitioned Indian state also began to define through law and policy, those it viewed as foreign—belonging to the twinned neighbouring state, Pakistan.

Prima facie, such territorial management is not unusual as an assertion of national sovereignty, but what complicates matters in the South Asian context is its application to those persons (and their descendants) who were not “foreign” in 1946, before the partitioning of the country, and the next section will deal with flows, post-Partition and well into the 1970s, after the independence of Bangladesh, to show how the categories of “migrant,” “illegal immigrant,” and

19 Jayal, *supra* note 14, at 62.

20 Ministry of External Affairs, 1945.

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“foreigner” could all theoretically be ascribed to a single individual, usually based on their religious identity, and what that identity might hide about the messy political management of population flows in the decades following Partition.

IV. THE FRAGMENTED NATION(S) AND MASS MIGRATION

As Joya Chatterji notes in her study on the “spoils” of Partition, according to certain estimates, between the years 1946 and 1970, as many as 52.83 million people migrated from East Bengal into India, 39.56 million into West Bengal and 15.27 million into other states.²¹ Nehru was famously dismissive of state aid in the post-Partition flows of people on the Eastern front, and remarked that “(t)his business of shifting millions of people is beyond our capacity.”²² The Indian state, by 1958, had started formulating policy to curb migration, and the main way it did that was by institutionalizing temporal markers associated with groups of migrants. Table 1, below, shows how classes of migrants were created depending on when they migrated, which was correlated with how much financial rehabilitation they received from the state—the earlier they migrated the more access to rights they had.²³

21 Joya Chatterji, *THE SPOILS OF PARTITION*, 112 (2008).

22 *Id.* at 103.

23 Prafulla Chakrabarty, *MARGINAL MEN* (1991).

Period of Migration	Category of Migrants	Assistance Provided by the State
October 1946-March 1958	Old Migrants	Eight crores were spent on 2.6 million migrants, which allowed for only 20 rupees per capita. After nearly 720,000 more migrants came in, an additional twelve lakhs were spent. The ceiling on house loans was Rs. 1,175 and the average was around Rs. 500.
April 1958-December 1963	In-Between Migrants	Little to no rehabilitation was offered, as the state deemed that the migrants were motivated by the financial compensation to shift to West Bengal
January 1964-Late 1970s	New Migrants	Eligible for assistance only if they moved out of the state (West Bengal). Nearly 600,000 were therefore ineligible for compensation.

Table 1: Categories of Migrants According to Period of Migrants and State Assistance received.²⁴

Even as the central and state governments struggled to formulate immigration policies that became more draconian, they were not able to completely eradicate the flows of population, especially with the “in-between” and “new” migrants—people still continued to move across borders into India, which was further aggravated by the birth of Bangladesh and the consequent exoduses post-1971. For example, even the category of new migrants carried on in the early 1970s, but it remains unclear if it went much beyond 1971, when Bangladesh was created and there was a call by the government to deem those who migrated after 1971, “illegal immigrants.” It could very well be that the government retroactively applied the category of “illegal immigrant” in the 1980s, for those who migrated after 1971. Identity, however, started to be fixed along certain lines, first temporally, but also, and more dangerously religiously—which continues to be the way much of the identity politics surrounding illegal immigration plays out today.

²⁴ *Id.* at 235-6.

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The Assam Movement, which began in 1979 as an agitation against Bangladeshi immigrants quickly acquired a religious tenor that targeted primarily Muslims. While the Assam Accord, planned as a settlement between the state and various groups associated with the Assam Movement, in 1985, stated that only migrants who entered between 1966 and 1971 would be “regularised,” and the ones who came after 1971 would be expelled, the Accord is seen as largely unsuccessful on this count because census figures show a significant increase in the Muslim population post 1985.²⁵ The uncritical reliance on census figures and the immediate branding of any Muslim as non-Indian or Assamese highlights how policy implicitly indicts the Muslim as a non-citizen.

V. “CAN A MUSLIM BE AN INDIAN?”

Chatterji and Pandey raised the question of Muslim lives in the wake of the Babri Masjid demolition and followed the legacies of Partition that continued to mark Muslims. The Muslim identity strikes at the core of the ways in which the Indian state understood migration following independence.²⁶

Vazira Zamindar in her extensive study of Muslims in post-Partition South Asia, prefers using the word *displacement* as opposed to *migration* “for the momentous movement of people at the time” because as she says:

The word migration came to imply both a movement with the intention of permanent relocation as well as a voluntary exodus, and acquired bureaucratic and juridical meaning in attempts to control, legislate, and ultimately fix these displacements—to produce, with some force, bounded citizens of two nation-states.²⁷

25 Chaitanya Kalbag, *Ticking time bomb in Assam: A final count of illegal immigrants*, THE QUARTZ (April 1, 2016) available at <http://qz.com/652033/ticking-time-bomb-in-assam-a-final-count-of-illegal-immigrants/>.

26 Joya Chatterji, *The Bengali Muslim: A Contradiction in Terms? An Overview of the Debate on Bengali Muslim Identity*, COMPARATIVE STUDIES OF SOUTH ASIA, AFRICA AND THE MIDDLE EAST 16-24 (1996); Gyanendra Pandey, *Can a Muslim Be an Indian?* 41 COMPARATIVE STUDIES IN SOCIETY AND HISTORY 608–629 (1999).

27 Vazira Zamindar, *THE LONG PARTITION AND THE MAKING OF MODERN SOUTH ASIA: REFUGEES, BOUNDARIES, HISTORIES*, 7 (emphasis author’s) (2013).

Chatterji disagrees with Zamindar for forwarding a claim that shows little space for how battles for citizenship were being “fought in the streets” by people as opposed to simply being handed down by the state. In the years following Partition as the state began taking a more active role in regulating movements of people, there was also greater attention paid to what constituted “migration” by the courts looking at claims made by migrants themselves.²⁸

The Law Ministry, in 1958, collated a list of judgments issued by different high courts on the question of migration in relation to movement of people between India and Pakistan, noting that “(t)he expression “migrated” appearing in Article 7 of the Constitution has been considered by several High Courts, although that expression appearing in Article 6 has not so far come up for judicial notice.”²⁹ The legal system for permits for resettlement and citizenship was evidently in response to the India-Pakistan divide, and had become, as Chatterji puts it “messy.”³⁰ However, what is important to note is that even abstract legal definitions of the term “migration” had become inflected with the territorial divide between India and Pakistan. For example, the Allahabad High Court issued the following judgment in 1951:

[T]he expression “migration” embraces in scope two concepts: firstly, going from one place to another, and secondly, the intention of making the destination a place of abode or residence in the future. It was further observed that “in the context of the Constitution, the expression has the notion of transference of allegiance from country of departure to the country of adoption...migration should be of such nature that the person migrating would lose the citizenship of the country from which he migrated.”³¹

28 Joya Chatterji, *South Asian Histories of Citizenship: 1946–1970*, 55(4) THE HISTORICAL JOURNAL 1049–71 (2012).

29 Articles 5, 6, and 7 of the Indian Constitution deal with the question of citizenship and settlement rights for those seen as belonging to Pakistan.

30 Chatterji, *supra* note 28..

31 Law Ministry’s views regarding the interpretation of the term “Migration,” 1958, Ministry of Home Affairs (Indian Citizenship Section), File no. 1619/34.

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Thus, we begin to see that “migration” had assumed a particular political definition that demanded loyalty, and asserted a strong national identity. The national identity was arguably an effort to create a strong politico-legal identification with the “idea of India,” which stood in opposition to Pakistan. However, the religious definition of such an identity is hard to ignore, and what becomes especially problematic is the relegation of the Muslim to the “fuzzy edges” of a “secular” nation-state.³² Chatterji has shown that both India and Pakistan, were, in fact, moving towards “secularisation,” post-Partition, as they drew a distinction between “state” and “religion,” and often acted in concert towards the rehabilitation of migrants. She, however, claims this was “admittedly partial.”³³

The partiality, I think, is what bears consideration when studying the actions of the Indian state. As we have already seen, on one hand, there was a strict control on “migration,” both in terms of people’s movement and the legal rights it afforded them, but on the other, there was a need for the Indian state to appear as a generous provider and trustworthy fiduciary for Muslim migrant populations—in ways that immediately marked them as an outsider minority that needed to be included in the state. An article in the *Hindustan Standard*, filed by the Ministry of Home Affairs in 1973, makes mention of the benefits provided to Muslim migrants. The article announces that over Rs. 21 lakhs have been spent on Muslims in West Bengal, Assam, and Tripura, devising rehabilitation schemes that included business loans and property protection including those “who returned from Pakistan.” This appears to be a form of “strategic secularism” that allowed the state to construct for itself a secular identity that portrayed it as a protector of Muslims (while indeed providing them material benefits), but also marking them as outsiders entering (or returning to) the Indian state. There was a marked emphasis on using secularism as a political and legal tool that showed the state’s commitment to Muslims even though it was partial and often contradicted government action.³⁴

The establishment of the Muslim migrant as a putative minority citizen was complete, however, and it was only after the birth of Bangladesh in 1971, that the Muslim migrant also became “illegal immigrant.” In the wake of a new

32 Pandey, *supra* note 26, at 608.

33 Joya Chatterji, *Secularisation and Partition Emergencies*, 48(50) *ECONOMIC AND POLITICAL WEEKLY* 42–50 (2013).

34 Chatterji, *supra* note 28; Zamindar, *supra* note 27.

bordered nation-state in South Asia, the period immediately following 1971 was one of political liberation for Bangladesh, but also led to a “refugee crisis of epic proportions” where “over ten million people crossed borders,” identifying themselves as citizens of nation-states they did not previously belong to.³⁵ Datta also shows us how this period marked the creation of affective versus effective borders.³⁶

The affective borders were a result of increased hostility between Hindus and Muslims, where the Muslim was viewed variously, as the “enemy,” the “other,” the “infiltrator,” and the “illegal immigrant.” The effective borders were part of a larger political discursive sphere that operated at the bureaucratic and diplomatic levels, to ‘fix’ the refugee crisis, and mark the border regions with a nationally defined territorial integrity that betrayed its geographic porosity.³⁷ The Indira-Mujib Accord of 1974, signed by the then Prime Ministers of India and Bangladesh respectively was intended to fix the land territories of both nations, and also create another temporal marker to deem who belonged to which state—anyone who migrated before 1971, to India, could legitimately claim to be Indian, and anyone who migrated after was seen as an illegal immigrant.³⁸ The north-eastern states have been susceptible to political battles surrounding various issues, but Assam remains the state wherein migration remains the most violently present as a political reality throughout recent history.

The discursive and real battles over who an illegal immigrant really is have mostly taken place in Assam since the 1970s—state-wide riots broke out in the early 1980s, and two major political developments took place in 1983 and 1985.³⁹

35 Antara Datta, REFUGEES AND BORDERS IN SOUTH ASIA: THE GREAT EXODUS OF 1971, 8 (2012).

36 *Id.*

37 *Id.*

38 The fixing of territories remains incomplete. Although, with the Modi-Hasina Land Boundary Agreement (2015), the legal status of many parts of the area will change, it is yet to be seen how it will impact the lived experience of residents. See, Willem van Schendel, *Stateless in South Asia: The Making of the India-Bangladesh Enclaves*, 61(1) THE JOURNAL OF ASIAN STUDIES 115–47 (2002), for a fascinating account of the historical flux of the Indo-Bangladesh enclaves (*chitmabals*) that has produced unique “trans-territorial” identification amongst its inhabitants.

39 See, Harsh Mander, *Nellie: The Forgotten Massacre*, THE HINDU (December 14, 2008) available at <http://www.thehindu.com/todays-paper/tp-features/tp-sundaymagazine/nellie-indias-forgotten-massacre/article1437892.ece>. Nellie was the first state sanctioned ethnic cleansing in postcolonial India that would be followed by similar pogroms.

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The Illegal Migrants (Determination by Tribunal) Act 1983 (hereinafter referred to as IMDT), which applied specifically to Assam, was a legal mechanism instituted to regulate the entry of illegal immigrants, which at the time was seen as a grave concern that could not be tackled with the Foreigners Act as illegal immigrants kept entering the state in large numbers after 1971, and the Foreigners Act was not seen as effective enough in arresting these flows. Anyone that migrated on or after March 25, 1971 was officially declared an illegal immigrant. The state authorized the set-up of specialized tribunals to handle such cases. The major difference between the Foreigners Act and the IMDT was that under the latter, person A had to apply alleging person B’s “illegality,” with the burden of proof lying on person A rather than person B having to prove his legal status. While this could be read as one classic example of “vote-bank politics” attributed to the Congress, the post 1983 election riots in Nellie where minorities (especially, the Muslims) were expressly targeted, mandated a state response that provided some protection against discrimination and harassment of those identified as illegal. The IMDT Act was meant to extend to all parts of India after its initial promulgation in Assam, but the Indira Gandhi led government limited its reach to Assam.⁴⁰

The IMDT was accompanied by the Assam Accord (mentioned earlier) in 1985, where “a broad settlement on cultural and economic development concerns, which included the promise by the Central government to ensure ‘constitutional, legislative and administrative safeguards to protect...the heritage of the Assamese people’ and the ‘all round economic development of Assam.’”⁴¹ Therefore, the state began to draw a vexed causal link between (a lack of) “economic development” and those it deemed illegal immigrants—a contest that continues well into the 21st century, beyond the strict confines of Assam, and assuming national importance.

The recent elections in Assam and West Bengal and the primacy placed on the ethno-religious identity as a marker of inclusion suggests that the partisan

40 M.S. Prabhakara, *An Act Undone*, 22(16) THE FRONTLINE (2005) available at <http://www.frontline.in/static/html/fl2216/stories/20050812001904200.htm>.

41 Roy, *supra* note 13, at 105.

42 For a comprehensive account of the deployment of “identities” to serve politics and policy in Assam, See Samudra Gupta Kashyap, *Assamese or “illegal migrant”? What “identity” of people means to different parties ahead of polls*, THE INDIAN EXPRESS (March 28, 2016) available at <http://indianexpress.com/article/elections-2016/india/india-news-india/assam-assembly-elections-2016-polls-bjp-congress-illegal-immigrants/>.

nature of vote-bank politics is inextricably linked with questions that have been raised in courts of law across the country too.⁴² In the next section, I look at two legal cases that emerged in the last decade that questioned state authority on the matter, reiterating the need for the nation-state to be purged of illegal immigrants, the Bangladeshis.

VI. BACK TO FOREIGN: THE LEGAL PATHWAY

On December 5, 2006, Sarbananda Sonowal's writ petition filed in 2005 came up for hearing in the Indian Supreme Court.⁴³ Sonowal who identified himself as former President of the All Assam Students' Union (and is currently the incumbent Chief Minister of Assam after having served as Minister of State for Sports Affairs at the Centre), stated the primary aim of the petition was to "[declare] certain provisions of the IMDT Act, 1983 as *ultra vires* [sic] the Constitution of India, null and void and consequent declaration that the Foreigners Act, 1946 and the Rules made thereunder shall apply to the state of Assam."⁴⁴ It is clear that Sonowal wanted to ensure the successful and efficient deportation of illegal immigrants in Assam, which he argued was being hampered by the IMDT Act in effect in Assam, which much like the argument made at the time of its passage with regards to the Foreigners Act, was unable to check illegal immigration. He makes his overarching case in the following section of the petition:

...[T]he IMDT Act is wholly arbitrary, unreasonable and discriminates against a class of citizens of India, making it impossible for citizens who are residents in Assam to secure the detection and deportation of foreigners from Indian soil. The Foreigners Act, 1946, applies to all the foreigners throughout India, but the IMDT Act which was enacted subsequently with the professed aim of making detection and deportation of the illegal migrants residing in Assam easier has completely failed to meet even the standards prescribed in the Foreigners Act...The result of the IMDT Act has been that

43 Sarbananda Sonowal v. Union of India and Anr., 2006 SCC 174.

44 Sarbananda Sonowal v. Union of India and Anr., 2005 SCC 655.

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a number of non-Indians, who surreptitiously entered into Assam after March 25, 1971 without possession of valid passport, travel documents or other lawful authority to do so, continue to reside in Assam. Their presence has changed the whole character, cultural and ethnic composition of the area and the IMDT Act creates a situation whereunder it has become virtually impossible to challenge the presence of a foreigner and to secure his detection, deportation or even deletion of his name from the electoral list as they get protection on account of the provisions of the act.⁴⁵

The claim lays out in many fundamental ways, the fact that migration and deportation as politico-legal processes have acquired ethno-religious dimensions. It becomes clear through Sonowal’s petition that “foreigner” and “illegal immigrant” are not abstract conceptual identities, but essentially refer to Bangladeshis, and more importantly, Bengali Muslims. He states in his case that the “(c)ontinuing influx of Bangladeshi nationals into India has been on account of a variety of reasons including “religious and economic,” including a list of “push” and “pull” factors that maintain that “religious and political elements in Bangladesh encourage immigration.”⁴⁶ The Supreme Court upheld Sonowal’s view stating that the IMDT “has created the biggest hurdle and is the main impediment or barrier in the identification and deportation of illegal migrants.”⁴⁷

In the petition, he draws on census data and statistics related to the implementation of the IMDT Act, such as how many complaints were filed under the Act, and how many of those led to deportations (less than 10%), to make the case for the “Assamese exception” that began in the 1980s.⁴⁸ The late renowned Marxist historian Amalendu Guha regarded this as a particular parochialism of the “small bourgeoisie” or the regional middle-classes where

45 Sarbananda Sonowal v. Union of India and Anr., 2005 SCC 655, at ¶2.

46 Sarbananda Sonowal v. Union of India and Anr., 2005 SCC 655, at ¶4.

47 Legal Correspondent, *IMDT Act is the biggest barrier to deportation, says the Supreme Court*, THE HINDU (July 14, 2005) available at <http://www.thehindu.com/2005/07/14/stories/2005071405551200.htm>.

48 Sarbananda Sonowal v. Union of India and Anr., 2005 SCC 655, at ¶10.

Assamese ethnic identity was seen as grounds for framing their appeal for political rights, which led to a form of “little nationalism” that turned “chauvinist” as it was rooted in anti-immigrant sentiments that galvanized large swaths of the population through parties like Asom Gano Parishad.⁴⁹ Quoting a report released by the former Governor of Assam and Deputy Chief of Army Staff, Lt. Gen. S.K. Sinha, he claims, “... (c) onsequent perceptible changes in the demographic pattern of the State (Assam) has been a matter of grave concern. It threatens to reduce the Assamese people to a minority in their own state, as happened in Tripura and Sikkim.”⁵⁰ This is an argument that has been echoed in academic discourse, as well—as Baruah demonstrates ethnic nationalism is a product of cultural marginalization exacerbated by migration in the face of the hegemonic nation-state.⁵¹

However, Sonowal’s agenda goes beyond the strict confines of the “Assamese exception,” which was more concerned with Assam as separate from the rest of India, and the preservation of a unique Assamese identity. Sonowal’s case highlights for us his line of argumentation as embedded in a broader Hindu nationalist framework that has taken political centre-stage in India since its liberalisation in the 1990s, and sees the “enemy foreigner” as Muslim.⁵² He says that the “absolute number of Muslims crossing into India is likely to be much larger than non-Muslims.”⁵³ Therefore, his legal case, it appears, rests largely against Muslims.

Why are Muslims the enemy, though? According to Sonowal, Bangladeshis are militant Muslims:

Pakistan’s ISI has been active in Bangladesh
supporting militant movement in Assam. Muslim

49 Amalendu Guha, *Great Nationalism, Little Nationalism and Problem of Integration: A Tentative View*, 14(7/8) ECONOMIC AND POLITICAL WEEKLY 455–58 (1979).

50 Sarbananda Sonowal v. Union of India and Anr., 2005 SCC 655, at ¶11.

51 Sanjib Baruah, *INDIA AGAINST ITSELF: ASSAM AND THE POLITICS OF NATIONALITY* (1999).

52 See, for example, Thomas Blom Hansen, *THE SAFFRON WAVE: DEMOCRACY AND HINDU NATIONALISM IN MODERN INDIA* (1999); Stuart Corbridge and John Harriss, *REINVENTING INDIA: LIBERALIZATION, HINDU NATIONALISM AND POPULAR DEMOCRACY* (2000); Ashutosh Varshney, *Nationalism, Ethnic Conflict, and Rationality* 1(01) PERSPECTIVES ON POLITICS 85–99 (2003).

53 Sarbananda Sonowal v. Union of India and Anr., 2005 SCC 655, at ¶9.

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militant organizations have mushroomed in Assam and there are reports of some 50 Assamese Muslim youths having gone for training to Afghanistan and Kashmir...(t)he dangerous consequences of large scale migration from Bangladesh, both for the people of Assam and more for the Nation, as a whole, need to be emphatically stressed. No misconceived and mistaken notions of secularism should be allowed to come in the way of doing so.⁵⁴

Sonowal, as an active member of the BJP, is apt to flag the imminent yet permanent threat of Islamic infiltration from Pakistan, an anxiety that is borne out of the understanding of Pakistan (and Bangladesh) as the Islamic antithesis to the Hindu nation as an ideology. What this further highlights, is the capture of the micro-politics of migration in Assam by the Hindu state. Assam, as is well known, has been marginalized in the context of the machinations of national politics, but the move to identify the solution to the issues surrounding migration the state faces with Hindu nationalism, is not only indicative of the inroads BJP has been able to make there, but also the danger of linking immigration with terrorism without substantiated evidence.

Some scholars such as Rao, based on the idea of “cartographic anxiety,” have suggested the case as emblematic of post 9/11 Islamophobia, but I think it would be incorrect to invoke the American brand of Islamophobia.⁵⁵ Rather, it is important to pay attention to the way in which Sonowal and the Supreme Court construct the illegal immigrant identity as uniquely situated in the historical context of South Asia, but also borrowing largely from the British, both through the re-assertion of the constitutionality of the Foreigners Act for Assam, and also through references to multicultural Britain facing the same predicament as India. Sonowal defines the term “aggression” as “an all comprehensive word having very wide meaning...[that] cannot be explained by a straight-jacket formula but will depend on the fact situation of every case.”⁵⁶ He goes onto mention the celebrated British judge Lord Denning, who in his

54 Sarbananda Sonowal v. Union of India and Anr., 2005 SCC 655, at ¶21-22.

55 Rahul Rao, *Review Essay: Revisiting Cartographic Anxiety*, 49(3) OSGOODE HALL LAW JOURNAL 575–92 (2012); Sankaran Krishna, *Cartographic Anxiety: Mapping the Body Politic in India*, 19(4) ALTERNATIVES: GLOBAL, LOCAL, POLITICAL 507–21 (1994).

56 Sarbananda Sonowal v. Union of India and Anr., 2005 SCC 655, at ¶32-33.

1982 book, *Due Process of Law* stated the “aggression” England was facing:

In recent times England has been invaded not by enemies nor by friends but by those who seek England as a haven. In their own countries there are poverty, disease and no homes. In England there is social security [sic] a national health service and guaranteed housing all to be had for the asking without payment and without working for it. Once here, each seeks to bring his relatives to join him. So they multiply exceedingly.⁵⁷

He also cites the legal exclusion of Chinese labour as permanent settlers in late nineteenth century America on the grounds of “aggression...dangerous to peace and security of the nation” through the *Chinese Exclusion Act*, to be additional proof of the fact that legal precedent suggests the valence of aggression in the Assamese case, notwithstanding the fact that “the number of Chinese labour coming to USA would have been miniscule compared to the Bangladeshis entering Assam.”⁵⁸

The Supreme Court affirms aggression through their official decision, claiming that the Central Government has a duty to “protect the State and nation against aggression.”⁵⁹ While the court’s decision does not specifically outline this aggression as Islamic, it does state that the “demographic balance” of Assam is under threat due to the passage of the IMDT, and that the restoration of the Foreigners Act would make Assam on par with the rest of the country, reaffirming the power of the illegal immigrant as representing a threat by numbers.⁶⁰

Furthermore, while the court attempts to correct the deleterious effects of the “Assam exception,” it does, in fact set legal precedent for the Foreigners Act’s statutory powers as an effective measure against purported Bangladeshis in the country. Through the petition and the concomitant court ruling, we begin to understand that the intersection of the historical framing of national ideology as

57 Sarbananda Sonowal v. Union of India and Anr., 2005 SCC 655, at ¶36..

58 Sarbananda Sonowal v. Union of India and Anr., 2005 SCC 655, at ¶35.

59 Sarbananda Sonowal v. Union of India and Anr., 2006 SCC 174, at ¶26.

60 Sarbananda Sonowal v. Union of India and Anr., 2006 SCC 174, at ¶1.

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“Hindu” and colonial legal understandings of migration, aggression, and foreignness, all contribute to a fundamentalist vision of state security.

Lest we think that it is only Assam as a geographical locus that is dominating discourses surrounding the construction of the illegal immigrant identity, let us turn our attention to another case that came up for hearing in the Delhi High Court, regarding the deportation of Bangladeshis, as handled by the Delhi police. While in *Chetan Dutt v. Union of India and Ors.* filed in 2001, there is far less authoritative information about the authorship of the petition when compared to the Sonowal case, similar trends begin to emerge in its framing. Dutt rests his case on the following assertion and demand:

We would like the entire matter regarding illegal migrants from Bangladesh and their deportation to be given a serious thought by the authorities concerned for which purpose Secretary Ministry of Home Affairs, Government of India will convene a meeting to be attended to amongst others by the representatives of the Ministry of External Affairs, Principal Secretary (Home) Govt. of NCT Delhi, Commissioner of Police, Delhi, FRRO and the representatives of Director General Border Security Force. Requisite modalities will be formulated about the steps required to be undertaken urgently for detection and identification of the illegal migrants of Bangladesh staying in New Delhi, Delhi, Delhi Cantt [sic] or other local areas concerned and the steps which are required to be taken for deportation of illegal migrants of Bangladesh and to ensure that they do not re-enter the territory of Delhi.⁶¹

Dutt seems to be identifying clearly a problem of deporting Bangladeshis from Delhi, classifying the efforts as “poor” because the Delhi government had promised the deportation of “more than three thousand” each month, and had only deported 1,678 in the preceding three months.⁶² He sees this as a vexing

61 *Chetan Dutt v. Union of India*, 2001 W.P. (C) 3170.

62 *Chetan Dutt v. Union of India*, 2001 W.P. (C) 3170.

reality that is confounded by the biophysical and linguistic problem of identifying the Bangladeshis:

It is submitted that no specific number of such illegal immigrant unauthorisedly staying Bangladeshi migrants can be given but surely they are lacs in number. Taking advantage of their physical features and ethnic similarities and language spoken they have mixed up in Indian population and staying in various identified jhuggis clusters in the NCT of Delhi. These illegal migrants are mostly staying in the area [sic] of Seelampur, Seemapuri, Azadpur Market, Nizamuddin, Jangpura, Shamsan Ghat near Nizamuddin Basti, Ansari Nagar, Sadik Nagar, Clustering around Jama Masjid opposite Dariba Gate, Alknanda, Yamuna Pushta, Delhi. Taking advantage of it many of them have succeeded in obtaining ration cards, Indian Election Commission Identity cards and other Indian documents including Indian Passports by giving false and fraudulent information to the authorities concerned.⁶³

These discourses, then, do indeed travel beyond the borderlands, and establish the Bangladeshi as the putative illegal immigrant across the country. While this petition was ultimately dismissed by the court due to the petitioner remaining in absentia, it provides useful evidence of an aspect of this debate that goes largely ignored—the role of urban spaces in shaping the construction of the illegal immigrant identity. Slums are seen as sites requiring increased surveillance because that is where illegal immigrants reside. The issue, then,

63 Chetan Dutt v. Union of India, 2001 W.P. (C) 3170.

64 Kanchan Srivastava, *India must have Immigration Policy Like the West*: RSS, DAILY NEWS AND ANALYSIS (November 5, 2015) available at <http://www.dnaindia.com/mumbai/report-india-must-have-immigration-policy-like-west-rss-2142030>.

65 Vipul Kharbanda, *The Aadhaar Case*, CENTRE FOR INTERNET AND SOCIETY (September 5, 2014) available at <http://cis-india.org/internet-governance/blog/the-aadhaar-case>.

66 Partha Chatterjee, *POLITICS OF THE GOVERNED: REFLECTIONS ON POPULAR POLITICS IN MOST OF THE WORLD* (2004). I borrow from my understanding of “civil society” as distinct from “political society” from Chatterjee’s work: the former, educated elites who

acquires a class dimension, as illegal immigrants are seen as territorially situated in slums, in addition to their being religious and linguistic outsiders.

Since the election of the BJP at the centre the RSS has become more vociferous in its stand against illegal immigrants.⁶⁴ However, the Supreme Court has invoked the issue in relation to recent public interest litigations about the Aadhaar cards, the most prominent of them filed by Retired Justice K.S. Puttaswamy.⁶⁵ Apart from showing the interaction between borderlands and cities, these legal cases highlight how the discourses surrounding illegal immigration can be shaped by actors outside of state institutions using legal recourse to frame the Bangladeshi as a bogeyman. By doing so, they inhabit a complex terrain as members of civil society acting in concert with the state and its institutions to fix mobility and mark state surveillance through juridical and bureaucratic means, as the quick-fix solution to the continual sense of crisis. For Partha Chatterjee, the immigrants themselves would constitute “political society”—existing despite and beyond the law by subverting state authority.⁶⁶

However, when this nature of biopolitical surveillance becomes the norm in urban spaces like Delhi (and the national capital, no less), with large heterogeneous populations, the singling out of communities to be put under surveillance puts into question what constitutes the national fabric—if the Bengali Muslim identity is automatically referent for the illegal immigrant identity in India, then how does the politico-legal nexus at work here uncover for us the fundamental limitations of constructing the nation-state in postcolonial contexts, particularly as global policy on migration considers territorial sovereignty as superseding human security.

VII. CONCLUSIONS

A historically rooted understanding of the state construction of the illegal immigrant identity shows us that the dialectical relationship between citizenship and illegal immigration was never settled with the birth of the nation-state(s) in South Asia—in constituting the “outside”—the spaces between “us” and “them”—showed that “us” and “them” were never fixed and were constantly

liaise with the state through “rational law”—clearly exemplified in the case studies presented here. While these categories do not map out neatly empirically in most cases (and indeed here too, an argument could be made to the contrary), I want to highlight the use of the rule of law to regulate migration, particularly through legal petitions as detailed here.

affected by the migrants' movements. In other words, "enemy foreigners," "migrants," "minority citizens," "illegal immigrants" are not neatly distinguished historical governmental categories in India, but reflect the inherent flux of law, politics, and society (including migrants themselves) in shaping the contours of these categories. This debate has its roots in an earlier colonial period, and the use of colonial legal structures lends the postcolonial state coercive powers with regard to regulating mobility.

The Foreigners Act, as a colonial law that served British wartime interests in keeping the Axis forces at bay, continues to be the main force in the legal definition of illegal immigration. Partition was a watershed moment, but clearly, in the case of the Bengal borderlands, governmental law and policy continues to wrestle with the migration question well into the present day. The birth of Bangladesh bore out belligerent battling over who exactly the illegal immigrant was, temporally, ethnically, and religiously.

Assam emerges as the site, both historically and more recently, where these contests get most heated, as seen through the Sonowal case and abrogation of the IMDT. However, that is not to say, that the discourses surrounding migration do not travel, and furthermore, do not have perceived and real ramifications for the state, civil society, and the large swaths of people ascribed the illegal immigrant identity because of their ethno-religious identification across as well as beyond the boundaries of the nation-state. The fact that migrants labelled 'Bangladeshi' and 'illegal' continue to challenge the arbitrariness of the borders and the legal identity sanctioned by the state, in their everyday lives, often risking their lives like Felani Khatun did, proves that there is indeed an alternative to the dominant nationalist narrative that must be heard.

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