

# EXISTING PARADOX IN THE NATIONALITY STATUS OF BIHARIS IN BANGLADESH: AN APPRAISAL

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## ABSTRACT

*The liberation war of Bangladesh has left the Bihari people stranded. Although 200,000 Biharis have been repatriated to Pakistan under the Delhi Tripartite Agreement, 1974,<sup>1</sup> however, a significant number of Biharis were living in Bangladesh without any specific nationality. They have faced identity crisis for long time and finally the problem of citizenship was first resolved in 2003 by the landmark judgment of *Abid Khan and others vs. Bangladesh* and later in 2008 by the landmark decision of *Sadat Khan vs. Chief Election Commissioner*. The Supreme Court's rulings were important for resolving the matter of citizenship. However, some Biharis are being denied the citizenships of Bangladesh. This paper analyses the current status of those Biharis who despite being denied of Bangladeshi citizenship claims that they are still citizens of Bangladesh and they will not be eligible to surrender their citizenship until they acquire another country's citizenship.*

**KEYWORDS:** Refugee rights, Stateless, Bihari Rights, International Human Rights

## 1. INTRODUCTION

After the liberation war of Bangladesh in 1971, a significant number of Biharis living in Bangladesh were against the independence of Bangladesh. They also wanted to go to Pakistan after the war, but could not go because of complex repatriation procedure.<sup>2</sup> These people are generally called the

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<sup>1</sup> Dr. Mizanur Rahman, *A Community in Transition the Biharis in Bangladesh*, 118, 1<sup>st</sup> Ed, Sumi Printing & Packaging, (2003)

<sup>2</sup> Kazi Fahmida Farzana, *The Neglected Stateless Bihari Community in Bangladesh: Victims of Political and Diplomatic Onslaught*, JOURNAL OF HUMANITIES AND SOCIAL SCIENCE, Vol. 2, Issue 1, 1 (2008)

Biharis or “stranded Pakistanis”.<sup>3</sup> In one report, it shows that approximately 300,000 Biharis are living for more than 3 decades in several places of Bangladesh including Geneva camps administered by the ICRC, Mohammadpur.<sup>4</sup> However, Biharis are not recognized as refugees under the United Nations High Commissioner for Refugees (UNHCR). As a result, they do not receive any benefits extended to the refugees by the UNHCR. Hence, they are facing many problems in Bangladesh with identity crisis. They are living in several camps for many years with poor quality of lives and without any recognition of Bangladeshi citizens.<sup>5</sup> However, in 2003, the problem of Biharis’ citizenship was first resolved by the judgment of *Abid Khan and others v. Bangladesh*, 55 DLR (2003) 318 and later in 2008 by the landmark decision of *Sadakat Khan v. Chief Election Commissioner*, 60 DLR HCB (2008) 407. By virtue of these two Supreme Court rulings they are now lawful citizens of Bangladesh and they can apply for voter identity card and citizenship as well.<sup>6</sup> Although, now they can apply for citizenship of Bangladesh but some of the Biharis are declining to receive citizenship of Bangladesh. This is a new identity crisis of that particular group of Biharis who are unwilling to receive the citizenship of Bangladesh. The objective of this paper is to examine the status of that particular group of Bihari people in Bangladesh who are unwilling to receive the citizenship of Bangladesh.

The analysis of that classified Bihari group problem is divided into three following sections. The first section discusses about the background of those Biharis living in Bangladesh. Then the next section argues the status of Biharis under national and international instruments. And finally, the third section discusses the status under Bangladeshi instruments that are not willingly to receive Bangladeshi citizenships.

## 2. BACKGROUND OF BIHARI PEOPLE

In 1947, India was divided and as a result a large number of Biharis moved in Bangladesh (previously known as East Pakistan). The main reason for this movement was a communal violence preceded by the so called ‘Great Bihar Killing’. Almost 30,000 Muslims have been killed in October-

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<sup>3</sup> The Bihari community is also referred to as Muhajirs (defined by the Census of Pakistan, 1951, “a person who has moved into Pakistan as a result of partition or fear of disturbances connected therewith”), Indian-Bangladeshi, non-locals, non-Bangladeshi, stranded Pakistanis or Urdu speaking people.

<sup>4</sup> Farzana, *Supra* note 2, 1

<sup>5</sup> Mustakimur Rahman, *Assimilating the Biharis*, 21 May 2105, DAILY OBSERVER, available at: <<http://www.observerbd.com/2015/05/21/89980.php>> (last visited on 23<sup>rd</sup> January, 2016)

<sup>6</sup> *See id.*

November, 1946.<sup>7</sup> As a result of the violence, a large number of refugees migrated into East Bengal in 1947.<sup>8</sup> More than 95% refugees came from different parts of India. Particularly, they came from Sikkim, West Bengal, Assam, Nagaland, Manipur, Odisha and Tripura.<sup>9</sup> The independence of Pakistan has given some problems with the national assimilation of an ethnologically descriptor society.<sup>10</sup> This issue has created more intricacies than any positive solutions regarding those refugees who ran away from India. In addition, it also created the ‘insider-versus-outsider’ disorder. As a result, Biharis have faced problem in assimilating with the Bengali people in East Pakistan and then the situation had become worse.<sup>11</sup> Nonetheless, their ethnicity gave them access to preferential treatment in various sectors of East Pakistani economy and a relatively privilege position in terms of official patronage.<sup>12</sup> In major operational categories, Biharis have been given a comparatively better average percentage than the Bengali majority.<sup>13</sup> Interestingly, the ruling Pakistani leaders treated the Biharis as *mujahir*. They also said that it was the duty of East Pakistan to help the Biharis and also accept them as their own people.<sup>14</sup> Although, in some situations, the Bengali people did not think that the Urdu speaking people are subgroups.<sup>15</sup> However, this good moment was for short period of time. It was a new clash between Urdu speaking and Bengali speaking people started from the announcement of Jinnah. He came to Dhaka and said that Urdu shall be the state language.<sup>16</sup> Biharis were so happy with the decision of Jinnah and they also accepted the ruling West Pakistani leaders as their leaders and guardians.<sup>17</sup> Following the statement, in 1960, some Biharis willingly supported the quasi-military regime of Pakistan, whereas, Bengali people demanded independence.<sup>18</sup>

<sup>7</sup> Taj Hashmi, *The “Bihari” Minorities in Bangladesh: Victims of Nationalism*, paper presented at the Asian Studies Association of Australia (ASAA), Melbourne, 3 (1996)

<sup>8</sup> Minority Rights Group, *The Biharis in Bangladesh*, Report 11, 4<sup>th</sup> Ed., 7 (1982)

<sup>9</sup> E., Haque, Chowdhury, *Non-Bengali Refugees in Bangladesh: Patterns, Politics, and Consequences*, in Rogge, John (ed.), *Refugees: A Third World Dilemma*, ROWMAN & LITTLEFIELD, New Jersey, 220 (1987)

<sup>10</sup> Sumit Sen, *Stateless Refugees and the Right to Return: The Bihari Refugees of South Asia - Part 1*, INTERNATIONAL JOURNAL OF LAW, Vol. 11, No. 4, Oxford university Press, 1 (1999)

<sup>11</sup> *See id.*, 2

<sup>12</sup> Khurshida Begum, *The Stranded Pakistanis in Bangladesh and International Implications*, INTERNATIONAL CENTER FOR ETHNIC STUDIES, Kandy, 2-4 (1989)

<sup>13</sup> Sen, *Supra* note 10, 2.

<sup>14</sup> Hasmi, *supra* note 7, 6.

<sup>15</sup> *See id.*, 5.

<sup>16</sup> Sen, *Supra* note 10, 2.

<sup>17</sup> Hasmi, *Supra* note 7, 7.

<sup>18</sup> *See id.*, 9.

The Bihari community in the war mostly cooperated with the Pakistani army. As a result, Bangladeshis found them as ‘collaborators’ of the Pakistan army. Hence, their activities in the war were unlawful.<sup>19</sup> Several clashes between East Pakistan and West Pakistan fabricated the 1971 war and also caused two simultaneous big refugee movements.<sup>20</sup> The first group was a massive group of refugees who escaped into India while the second group consisted of the minority Biharis from some refugee camps within East Pakistan. An estimated 1,000,000 Biharis were living in several places in Bangladesh and wanted to repatriate to Pakistan.<sup>21</sup> In 1973 and 1974, there was an agreement<sup>22</sup> between India, Pakistan and Bangladesh and the outcome of this agreement was around 178,069 Bihari people being repatriated from Bangladesh to Pakistan.<sup>23</sup> Although they had been given an option to choose between staying in Bangladesh and Pakistan and they opted for Pakistan. From 1973 to 1993, around 534,792 Biharis had registered with the International Committee for the Red Cross for repatriation.<sup>24</sup> However, all of them could not move to Pakistan and those who could not move continued to live in Bangladesh. Those who could not repatriate remained in a state of halfway house where they were neither granted nor denied repatriate rights. However, rising figures of Biharis have assimilated into Bengali societies around the country, but there is a large number of Biharis who still want to move to Pakistan. Following these events, since 1971, Biharis are still facing severe identity crisis.

### 3. BIHARI STATUS UNDER NATIONAL AND INTERNATIONAL INSTRUMENTS

In 1947, the partition of British-India caused the first movement of Urdu speaking Muslims. These movements were from different Indian provinces

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<sup>19</sup> Sisson R & L E Rose, *war and Secession: Pakistan, India, and the creation of Bangladesh*, Berkely LA. Oxford: University of California Press (1990)

<sup>20</sup> Sen, *Supra* note 10, 3.

<sup>21</sup> Sumit Sen, *Stateless Refugees and the Right to Return: The Bihari Refugees of South Asia – Part 1*, 11 INTERNATIONAL JOURNAL OF REFUGEE LAW 625, 635 (1999); Available at: <<http://ijrl.oxfordjournals.org/cgi/content/abstract/11/4/625>> (last visited on 10<sup>th</sup> October, 2015).

<sup>22</sup> Delhi Tripartite Agreement; under this agreement, Pakistan agreed to repatriate a substantial number of Urdu-speaking persons based on the following categories. They were: 1) persons who were domiciled of the Central Government and their families, II) employees of the Central Government and their families, and III) Members of divided families irrespective of their origin domicile.

<sup>23</sup> Sumit Sen, ‘*Stateless Refugees and the Right to Return: The Bihari Refugees of South Asia – Part 2*’, 12 INTERNATIONAL JOURNAL OF REFUGEE LAW 41-70, 41 (2000) available at: <<http://ijrl.oxfordjournals.org/cgi/content/abstract/12/1/41>> (last visited on 10<sup>th</sup> October, 2015).

<sup>24</sup> *See id.*

to East Pakistan (currently known as Bangladesh).<sup>25</sup> They used to think that they were part of the West Pakistan and they did not want to assimilate with the Bengali community. That is why in Bangladesh they are being viewed as ‘foreigners’ (Pakistanis). An universal law grants everyone the right to a nationality and states that,

“No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”<sup>26</sup>

In determining citizenship of any person, there are two principles applied by States; *jussoli*<sup>27</sup> (‘law of the soil’) and the *jussanguinis*<sup>28</sup> (‘law of the blood’).<sup>29</sup> Although they have been provisionally lodged in a number of refugee camps in Bangladesh, however, they were not recognized as refugees under the Refugee Convention, 1951. Let us discuss the issue as to why they were not classified as refugees under the Refugee Convention 1951. Bear in mind that Bangladesh is neither a party to the Refugee Act 1951 nor to the 1954 and 1961 Convention relating to the Status of Stateless Persons.

### 3.1. BIHARIS UNDER REFUGEE LAWS

According to the general principle of international law, the term “refugee” is a term of art with a content of variables.<sup>30</sup> It is a person who has to leave his present place of residence, who seeks to escape conditions or subjective contexts found to be intolerable. Literally, the destination is not so important here but the flight is to freedom, to safety is.<sup>31</sup> The journey could be for many reasons; such as: flight from oppression, from a threat to life or liberty, flight from prosecution, flight from deprivation, from grinding poverty, flight from war or civil strife, flight from natural disasters, earthquake, flood, drought, famine.<sup>32</sup>

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<sup>25</sup> Farzana, *Supra* note 2, 2.

<sup>26</sup> See Article 15 of the Universal Declaration of Human Rights, 1948

<sup>27</sup> *Jussoli* is a common principle used by most of the common law countries, whereby any child receives nationality of the State in whose territory it is born.

<sup>28</sup> *Jussanguinis* is a principle applied by most of the civil law countries, whereby citizenship is determined by descent from the parents.

<sup>29</sup> Shearer Ivan & Opeskin Brian, *Nationality and Stateless*, FOUNDATION OF INTERNATIONAL MIGRATION LAW, Cambridge University Press, 5 (2012)

<sup>30</sup> Pooja Ahluwalia, *The Fleeing people of South Asia*, RESEARCH ANALYSIS AT ROCSEARCH, Refugee Watch, Anthem Press India, 6 (2008)

<sup>31</sup> *See id.*

<sup>32</sup> *See id.*

According to Article 1(A) (2)<sup>33</sup> of the Refugee Convention 1951 and Article 6(A) (1)<sup>34</sup> of the Statute of UNHCR, a “refugee” is a person who belongs to the following three criteria:

- (a) The person is outside the country of his nationality, or in the case of stateless persons, outside the country of habitual residence;
- (b) The person lacks natural protection; and
- (c) The person fears persecution.

To determine refugee status, Article 1(A)(2) of the Refugee Convention 1951 must be satisfied. Furthermore, a two staged test has to follow to determine the status. At first, it is necessary to establish the significant facts of the case, and then the 1951 Convention and 1961 Protocol have to be applied to the facts thus ascertained.<sup>35</sup> In addition, to be a refugee, four basic conditions must be met. The applicant must be:

- a) Outside of his country of nationality,
- b) Have a well-founded fear of persecution,
- c) This fear must be based on five grounds, e.g. race, religion, nationality, membership of a particular social group, or public opinion,
- d) Unable or unwilling to avail himself of the protection of that country, or to return there, for reason of fear of persecution.<sup>36</sup>

Generally, these conditions are applicable to the Biharis living in Bangladesh. But there is a limitation under the cessation clauses of the 1951 Convention and the UNHCR Statutes of 1950. In the cessation clauses it says that a person will not be a refugee under the following circumstances:

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<sup>33</sup> Article 1(A)(2) of the Refugee Convention provides that As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

<sup>34</sup> Article 6(A)(1) of the statute of the UNHCR provides that Any person who has been considered a refugee under the Arrangements of 12 May 1926 and of 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization. The meaning of this Article is that the UNHCR has no responsibilities for those refugees who have been considered as refugees before 12 May 1926.

<sup>35</sup> Rahman, *Supra* note 1, 65

<sup>36</sup> *See id.*, 66

“S/he has voluntarily re-established him/herself in the country which h/she left or outside which h/she remained owing to fear of persecution”.<sup>37</sup>

This clause seems to be fitted for the Biharis of Bangladesh. This is because of their voluntarily migration to East Pakistan in 1947 from India and then, in Pakistan, they literally enjoyed protection by the state and they were full-fledged citizens under Section 3(d) of the Pakistan Citizenship Act.<sup>38</sup> As a result, the Biharis were not considered as refugees under the statute of UNHCR and the Refugee Convention. However, there is a counter argument to support the Bihari community as well. Biharis were prevented from returning to their State of former residence because of their denationalization by Pakistan. Given the fact, it creates the incident of arbitrary deprivation of nationality and also deliberate deprivation of nationality. Thus, it shows that Pakistan failed to protect the Bihari community.

### 3.2. BIHARIS UNDER STATELESS LAWS

Article 15 of the Universal Declaration of Human Rights provides that “everyone has the right to a nationality and that no one shall be arbitrarily deprived of his nationality”. However, it is sad to say that millions of people across the world are being deprived of any particular nationality.<sup>39</sup> ‘Stateless’ has been defined in the Convention relating to the Statute of Stateless Persons of 1954. Article 1 of the Convention relating to the Status of Stateless Persons 1954, a ‘stateless person’ is one who is not considered as a national by any state under the operation of its law. There are two categories of stateless people around the world: *de facto*<sup>40</sup> and *de jure*<sup>41</sup>. It does not cover many people, usually termed as *defacto* stateless persons,

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<sup>37</sup> See Article 6(A)(2)(d) of the Statute of the UNHCR.

<sup>38</sup> At the commencement of this Act every person shall be deemed to be a citizen of Pakistan who before the commencement of this Act migrated to the territories now included in Pakistan from any territory in the Indo-Pakistan sub-continent outside those territories with the intention of residing permanently in those territories.

<sup>39</sup> *The State of The World’s Refugee*; available at: <[www.unhcr.org/3eb7ba7d4.pdf](http://www.unhcr.org/3eb7ba7d4.pdf)> 3 (last visited on 10<sup>th</sup> November, 2015).

<sup>40</sup> *Defacto* stateless persons are persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country. Persons who have more than one nationality are *de facto* stateless only if they are outside all the countries of their nationality and are unable, or for valid reasons, are unwilling to avail themselves of the protection of any of those countries.

<sup>41</sup> “*Dejure* stateless refugees” are persons not having a nationality who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, are outside the country of their former habitual residence and are unable or, owing to such fear, are unwilling to return to it.

who are not able to establish their nationality or whose citizenship is disputed by one or more countries.<sup>42</sup> In broader sense, statelessness signifies those people who are thus unable to enjoy the rights of citizenship.<sup>43</sup> One of the main reasons of being stateless is the amendment of the citizenship law by the government. This is what happened in the case of Biharis living in Bangladesh. In 1947, the decolonisation partition of India has separated Hindus and Muslims between India and Pakistan.<sup>44</sup> However, this partition did not actually create any situation of statelessness. People who migrated between India and Pakistan had been given the option to choose Pakistani or Indian nationality. But in 1978, Pakistan has amended their citizenship law where it states that:

“All persons who, at any time before the sixteenth day of December 1971, were citizens of Pakistan domiciled in the territories which before the said day constituted the Province of East Pakistan and who were residing in those territories on that day and are residing therein since that day voluntarily or otherwise shall cease to be citizens of Pakistan.”<sup>45</sup>

This section has made a grey area to think about. It shows that the remaining Biharis living in Bangladesh are not the citizens of Pakistan anymore. Hence, we could say that the amended law has made the Biharis *de jure* stateless.

### 3.3. BIHARIS UNDER BANGLADESHI LAWS AND REGULATIONS

Citizenship is an important issue for all and it is a fundamental element of human security. It also provides us a sense of belonging and identity with many civil and political rights.<sup>46</sup> We have mentioned in the earlier that Biharis have been facing identity crisis. However, the question of nationality and citizenship was initially resolved for few Biharis in 2003. In the case of *Abid Khan*<sup>47</sup>, it was stated that,

“Even a diehard pro-Pakistani born in this country, is entitled to be a citizen of

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<sup>42</sup> Massay, H, *UNHCR and De Facto Stateless*, Legal and Protection Policy Research Series, 38; (2010) available at <[www.unhcr.org/4bc2ddeb9.pdf](http://www.unhcr.org/4bc2ddeb9.pdf)> (last visited on 24<sup>th</sup> October, 2015).

<sup>43</sup> See *id.*

<sup>44</sup> Ahluwalia, *Supra* note 30, 4.

<sup>45</sup> See Section 16 A(1)(i) of the Pakistan Citizenship Act 1951

<sup>46</sup> Rahman, *Supra* note 1, 110.

<sup>47</sup> [2003] DLR 55, Writ Petition No. 3831 of 2001.



Bangladesh if he fulfils the requirements under Article 2 and is not disqualified under clause (1) of Article 2(b).”<sup>48</sup>

However, the decision of *Abid Khan* was for limited number of Biharis. Successively, in 2008, in the case of *Sadakat Khan*<sup>49</sup>, the Supreme Court of Bangladesh (High Court Division) reaffirmed that all members the Urdu-speaking community were nationals of Bangladesh in accordance with its laws. Section 3(a) of the Bangladesh Citizenship Act, 1951 provides that

“At the commencement of this Act every person shall be deemed to be a citizen of Bangladesh who or any of whose parents or grandparents was born in the territory now included in Bangladesh and who after the fourteenth day of August, 1947, has not been permanently resident in any country outside Bangladesh.”

From the above Section, it is clear that since 1947, those who are living permanently in Bangladesh are the citizens of Bangladesh. Section 4(b) of the Act provides that:

“Every person born in Bangladesh after the commencement of this Act shall be a citizen of Bangladesh by birth: Provided that a person shall not be such a citizen by virtue of this section if at the time of his birth, his father is an enemy alien and the birth occurs in a place then under occupation by the enemy.”

This section tells that the Biharis who have born in Bangladesh after 1971 are the citizens by birth. However, such person shall not be a citizen if his father was an alien at the time of his birth. However, since the independence of Bangladesh, none of the government of Bangladesh has brought the issue of enemy and, therefore, we can say that the Biharis born in Bangladesh are the citizens of Bangladesh. The decision of *Sadakat Khan* is a landmark decision for the entire Bihari community. It has created a history and brought back some hopes to the Biharis. The Supreme Court decision of 2008 has made it clear that the Bihari community can no longer be viewed as stranded, as they are considered to be nationals of Bangladesh. However, a number of Biharis have apparently chosen not to take Bangladeshi citizenship,

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<sup>48</sup>See *id.*, 318.

<sup>49</sup> See *Sadakat Khan v. chief election commissioner* 60 DLR HCB (2008) 407.

fearing that would not be able to repatriate to Pakistan if they take Bangladeshi citizenship.<sup>50</sup> This is a new crisis of Biharis who are not willing to receive Bangladeshi citizenship. Thus, this issue can raise few questions that whether or not they can refuse to take Bangladeshi citizenship without acquiring another nationality and whether or not and if their allegiance is to Pakistan?

#### 4. STATUS OF THOSE BIHARIS WHO ARE UNWILLING TO RECEIVE BANGLADESHI CITIZENSHIP

Denying citizenship of a person from a country, it becomes a prospective problem for other countries.<sup>51</sup> Bangladesh had the similar problem when Pakistan refused to provide citizenships of Pakistan to Bihari people. However, the problem was solved in 2008 by the case of *Sadakat Khan*. Although this case law has confirmed that all the Biharis are the citizens of Bangladesh but the problem is for those Biharis who are unwilling to receive Bangladeshi citizenship. Now it is a matter of fact that whether or not their unwillingness is creating any cause to revoke their Bangladeshi citizenships? To identify this issue, we have to scrutinize the citizenship of law of Bangladesh. Especially section 4(2) of the Citizenship Act of Bangladesh, 1951 and section 2B(1)(i) of the Bangladesh Citizenship (Temporary Provisions) Order, 1972.

Section 2B (1)(i) provides that:

“Notwithstanding anything contained in Article 2 or in any other law for the time being in force a person shall not except as provided in clause (2), qualify himself to be a citizen of Bangladesh if he owes, affirms or acknowledges, expressly or by conduct, allegiance to a foreign state.”

It seems like that this section is a big obstacle to prove that the Biharis are Bangladeshi; particularly for those Biharis who are unwilling to receive Bangladeshi citizenship. However, thousands of Bangladeshis have applied for DV-1 visa but all of them were not qualified for USA visa. There are so many Bangladeshis who want to go to abroad and be settles there. The fact is that a mere expression to go abroad cannot

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<sup>50</sup> Mukhlesur Rahman, *More Biharis want to enrol as voters*, The Daily Star, 17 January 2009, available at: <<http://www.thedailystar.net/story.php?nid=71702>> (last visited on 2<sup>nd</sup> November, 2015).

<sup>51</sup> Batchelor, C. A., *Transforming International Legal Principles into National Law: The Right to a Nationality and the Avoidance of Statelessness*, REFUGEE SURVEY QUARTERLY, Vol. 25, Issue 3, 10 (2006)

be a certain amount of allegiance to a foreign country. Hence, we can say in case of Biharis, their option to go to Pakistan does not show any direct allegiance to Pakistan. However, if it shows that the Biharis have allegiance to Pakistan, then section 2B(1)(i) can cease their citizenship. Let us discuss the issue of allegiance.

#### 4.1. ALLEGIANCE OF BIHARI PEOPLE

An allegiance is a duty of loyalty which is owed by a citizen to his/her state.<sup>52</sup> It is the tie which binds the citizen to the state and it is also a mutual connection and obligation between state and citizen and therefore, citizens are bound to act upon state.<sup>53</sup> Now the question is that what kind of protection Pakistan is giving to the Biharis living in Bangladesh? What kind of mutual bond is existing between Pakistan and Biharis? Does any kind of duty owe by the Biharis to Pakistan? Does any legal connection exist between Pakistan and Biharis under any Pakistani law? Answer of the first question is very clear and we all seem to know this. Since Biharis living in Bangladesh, they are not receiving any protection from Pakistan. Therefore, Biharis have nothing to return to Pakistan. In addition, under the current citizenship laws of Pakistan, Biharis living in Bangladesh are not citizens of Pakistan anymore. Section 16A(1)(i) of the Pakistan Citizenship Act, 1951 provides that

“Certain persons to lose citizenship who were residing in those territories on that day and are residing therein since that day voluntarily or otherwise shall cease to be citizens of Pakistan.”

We have already discussed this segment and found out that the remaining Biharis living in Bangladesh are not considered to receive the citizenships of Pakistan. Hence, we can say that without any citizenship, there is no mutual bond exists between Pakistan and Biharis. Furthermore, the Biharis who have born in Bangladesh have never seen Pakistan, never visited Pakistan and they have no physical connection with Pakistan. A young Bihari boy living in Geneva camp said that,

“We don’t know anyone there; we don’t even know the place. We have friends, family and jobs here. What will we do in Pakistan? Our future is here and we would like to tell the

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<sup>52</sup> Priyanka Chanda, *Predominance of Allegiance in the Creations of Kamala Markandaya*, NATIONAL MONTHLY REFEREED JOURNAL OF RESEARCH IN ARTS & EDUCATION, Vol. III, 21 (2014)

<sup>53</sup> Solum, L. B., *Originalism and the Natural Born Citizen Clause*, MICHIGAN LAW REVIEW, Vol. 107, No. 3, 597 (2008)

Bangladeshi government that at least those of us who were born here cannot be termed 'refugees.' I speak Bangla just as well as anyone else here,"<sup>54</sup>

This is the reality of most of the Biharis who have been born in Bangladesh. Just because the Biharis ancestors were born in Pakistan, a duty of fidelity cannot be owed to Pakistan by the Biharis living in Bangladesh.

#### 4.2. MUTUAL BOND BETWEEN BIHARIS AND BANGLADESH

In 2003, the Supreme Court of Bangladesh (HCD) held in the case of *Abid Khan*<sup>55</sup> that the ten Bihari petitioners born before and after 1971, were Bangladeshi nationals pursuant to the Citizenship Act 1951.<sup>56</sup> Therefore, we could say that the Biharis have a specific category of allegiance to Bangladesh. This kind of allegiance is called natural allegiance. We know that natural allegiance has to be acquiring by birth. Natural allegiance is due to all men born within the king's dominions immediately upon their birth. For, immediately upon their birth, they are under the king's protection.<sup>57</sup> Primarily natural allegiance is based on being born within the territory subject to the sovereign's rules.<sup>58</sup> Those who have born in the Kingdom have owed natural duty of allegiance to their king and the citizens are his natural subject.<sup>59</sup>

From the above discussion, we can say that Bihari people have natural allegiance to Bangladesh. Now the question is, will they be able to have another allegiance to any foreign state? The answer is 'yes', they are eligible to have another allegiance to a foreign state. It is possible to have dual allegiance; however, the second allegiance could get by operation of law if the Biharis are able to enter into another country in a friendly way. This is

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<sup>54</sup> Navine Murshid, *The Politics of Refugees in South Asia Identity, Resistance, Manipulation*, 93- 94, Routledge, 1st Ed, (2014)

<sup>55</sup> See *Abid Khan and others v. Govt. of Bangladesh and others*, (2003) 55 DLR (HCD) 318.

<sup>56</sup> See Pakistan Citizenship Act, Act II of 1951. Technically this Act is still applicable in Bangladesh by virtue of the adaptation of existing Bangladesh Laws Order 1972. The ancestors of Urdu-speakers in Bangladesh came from the Indian State of Bihar. Historically they shared Urdu heritage which is West Pakistani practice. Later on they remained "stranded" in Bangladesh after the independence of Bangladesh. This is the main reason to referred them as "stranded Pakistanis".

<sup>57</sup> Solum, *supra* note 53, 597.

<sup>58</sup> See *id.*, 598.

<sup>59</sup> See *id.*, 600.

because of the sovereign's protection which is given by the state to their citizens and therefore, the citizens owe the state a native obedience.<sup>60</sup>

However, a simple oral or written declaration of loyalty of duty to any foreign state does not mean that they have any allegiance to that particular state. A real mutual bond between the state and individual has to be shown to prove that the allegiance exists. An alien has to enter into a new country for a new allegiance by operation of law. But the Biharis have never been to Pakistan. So, it can be said that they have no allegiance by operation of law to Pakistan. As far as Biharis have no other allegiance, they will be not disqualified for Bangladeshi citizenship under Article 2B (1) (I).<sup>61</sup> If they are not disqualified under the Article of 2B(1) of The Bangladesh Citizenship (Temporary Provisions) Order, 1972, then they are Bangladeshi citizens.

Based on the Supreme Court decision of 2008 and steps taken by the government of Bangladesh, it is clear that Biharis living in Bangladesh cannot claim themselves as stateless people. Furthermore, their denial of accepting the citizenship of Bangladesh does not mean that they will lose their citizenship right of Bangladesh.

#### 4.3. CITIZENSHIP RIGHTS

Nowadays, we cannot even think a person without citizenship. People without nationality may face difficulties or find it unworkable to connect in a range of activities that citizens take for granted.<sup>62</sup> Article 15 of the Universal Declaration of Human Rights, 1948 (UDHR) mentions that

“(1) Everyone has the right to a nationality;  
(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”

This is the most important international instrument which is universally accepted and ratified by most of the states. In addition, Article 24(3) of the International Covenant on Civil and Political Rights, (ICCPR) 1966 deals with child nationality and it says that “Every child has the right to acquire a nationality.” Children are the most vulnerable and unprotected victims and that is the reason to protect them through specific rules and regulations.

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<sup>60</sup> [1759] 2 Burr, 834.

<sup>61</sup> The Bangladesh Citizenship (Temporary Provisions) Order, 1972.

<sup>62</sup> Rahman, *Supra* note 1, 110

In Bangladesh, there are several laws dealing with citizenship issues.<sup>63</sup> Although there are several laws to deal with citizenship but it governs by the Citizenship Act, 1951 and the Bangladesh Citizenship (temporary provisions) Order 1972 (President's Order No. 149 of 1972). Regarding Biharis' citizenship issue, Bangladesh Supreme Court has made few rulings to settle down the citizenship status of the Urdu speaking people in Bangladesh. In the case of *Moktar Ahmed v. Government of Bangladesh*<sup>64</sup>, the Supreme Court held that under Article 2 of Passport Order 1972 the applicant was 'deemed' to be a citizen of Bangladesh by operation of law.

Therefore, by applying for repatriation, he neither relinquished his Bangladeshi citizenship nor assumed Pakistani citizenship. In the case of *Abdul Hoque v. Bangladesh*<sup>65</sup>, the court said that Hoque was a citizen by virtue of Bangladesh as well as the fact that he was a permanent resident of Bangladesh on 25<sup>th</sup> March, 1971. His temporary absence from the country did not render him stateless.

Apart from these two cases, in 2008, the question of citizenship right was raised again in the case of *Sadaqat Khan v. Bangladesh*.<sup>66</sup> In this case, the court held that there was no reason for disqualification of citizenship for these camp residents as they fulfilled the legal criteria and were not found to have ever owed, affirmed, or acknowledged, expressly or by conduct, allegiance to a foreign state; nor could the mere fact of their residence in the camp be considered as such. Therefore, the Election Commission was directed to register them as voters. Since the court settled the status only as to these petitioners, it was not until 2008 that the legal status of all Urdu-speaking people was finally settled.

From the analysis of citizenship laws of Bangladesh and case references, we have found that in theory the Biharis are the citizens of Bangladesh. In addition, they have no allegiance to any foreign state nor their mere intention go back to Pakistan will cease their citizenship right. Hence, we can say that there is no prohibition for the Biharis to become the nationals of Bangladesh. However, still there is a question that whether or not they can denunciate their citizenship.

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<sup>63</sup> These laws included Code of Civil Procedure, 1908, Passport Act, 1920 (Act No. XXXV of 1920); Naturalization Act, 1926, (Act No. VIII of 1926), Registration of Foreigners Act, 1939 (Act No. XVI of 1939), Foreigners Act 1946 (Act No. XXXI of 1946), Citizenship Act 1951 (Act No. II of 1951), Bangladesh Citizenship (Temporary Provisions) Order, 1972, Bangladesh Passport Order 1972, Children Act, 2013, Extradition Act, 1974.

<sup>64</sup> [1982] 34 DLR (HCD) 29.

<sup>65</sup> [1992] 44 DLR (HCD) 273.

<sup>66</sup> [2008] 60 DLR (HCD) 407.

#### 4.4. RENUNCIATION OF CITIZENSHIP

The Citizenship Act of Bangladesh allows denunciation of citizenship under limited conditions. Section 14 of the Citizenship Act provides that when a person holds dual nationality and is a citizen of Bangladesh with another country, he or she will be able to cease his or her citizenship of Bangladesh unless a formal declaration is made according to the laws of the other country renouncing his or her citizenship status. This topic was also raised in the case of *Sadakat Khan*. In the case of *Sadakat Khan v. Chief election commissioner*, the Judges stated that

“Those who have renounced their citizenship and/or are waiting to leave for Pakistan may be left to their fate.”<sup>67</sup>

However, there is a purpose of renouncing citizenship in domestic law as well as international instrument. It has been discussed earlier that denunciation is possible in the case of dual nationality. So, the question is whether or not Biharis have other nationality. When we are talking about the Bihari people, there is no question of dual nationality. Furthermore, the citizenship laws of Bangladesh make no such provisions for self-declared stateless persons. As a result, it is clear that the Bihari people are not eligible to renounce their Bangladeshi citizenship.

#### 5. FINDINGS

The identity crisis of Bihari people is an old problem. Their citizenship status was unsettled for a long time because of Pakistan's denial to give citizenship and Bangladesh had not wanted to give them any nationality. As a result, Biharis were stranded in Bangladesh for long time. Finally, the problem was resolved in 2003 through the landmark decision of *Abid Khan and others v. Bangladesh* and subsequently in 2008 by the landmark decision of *Sadakat Khan v. Chief Election Commissioner*. From the analysis of several citizenship laws of Bangladesh and the case references, I have found some propositions that may classify the identity of Bihari community living in Bangladesh. The propositions are below:

- A. Under the several international instruments, neither they are stateless nor are they refugees.
- B. The decisions made by the Supreme Court have confirmed that the Urdu speaking community living in Bangladesh are the

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<sup>67</sup> [2008] 60 DLR (HCD) 412.

*dejure* citizens of Bangladesh. Therefore, they are eligible for voter identity card as well as passport of Bangladesh.

- C. Since they are living in Bangladesh and have never been to Pakistan; so, they have no allegiance to Pakistan.
- D. Although some of the Biharis do not want to take the citizenships of Bangladesh, but this does not mean that they have no allegiance to Bangladesh and they have lost their rights of citizenship.
- E. The Citizenship law of Bangladesh says that renunciation is possible only if a person holds dual nationality. The citizenship laws of Bangladesh make no such provisions for self-declared stateless persons. As a result, Bihari people only can denunciate their citizenships if they have dual nationality.

## 6. CONCLUSION

The existing laws of Bangladesh and the Supreme Court rulings clearly show that Urdu-speaking people born in Bangladesh are *dejure* citizens of Bangladesh. They were not refugees nor were they stateless. Around 300,000 Biharis are living in more than 60 camps in Dhaka and across the country.<sup>68</sup> The government of Bangladesh should allow them to get voter identity cards as well as passports of Bangladesh. Although a certain number of Biharis are refusing to accept the citizenship of Bangladesh, but this does not mean that they have lost their citizenship rights and they have become stateless. They are still citizens of Bangladesh and they can apply for voter identity card and passport wherever they want. In addition, they can surrender their Bangladeshi nationality only if they receive another nationality status from another country.

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<sup>68</sup>*Citizenship for Bihari Refugee*, 19<sup>th</sup> May 2008, THE BBC, available at: <[http://news.bbc.co.uk/2/hi/south\\_asia/7407757.stm](http://news.bbc.co.uk/2/hi/south_asia/7407757.stm)> (last visited on 23<sup>rd</sup> July 2015)