**RESEARCH PAPER ON THE TOPIC**

**CRIMINALISATION OF ILLEGAL ENTRY AROUND THE WORLD**

**By: -**

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**Abstract**

The paper discusses the matter of criminalisation of illegal entry in the world. It first debates about the terminology and the usage of the word “illegal” to refer to immigrants. Such language has a profound impact on the way the general populace perceives the existence of these people. Therefore, instead of “illegal” people should use more appropriate words like “irregular” or “undocumented”. Moreover, declaring an act as illegal and criminalising it has multiple legal consequences. The punishments imposed range from fines, imprisonment to detention and deportation even when such crimes could be classified as what is known as a victimless crime.

In recent times, Migration has increased by manifold, and in 124 countries of the 162 that were surveyed, illegal entry was criminalised. This often leads to the detention of these migrants. They are treated like any other criminal even when their act is not caused by an intent to harm others. The conditions of these detention centres are especially bad, denying these migrants their basic human rights. Multiple international treaties and covenants have guaranteed these rights. Even in India, multiple laws impose heavy penalties for such illegal entry, and the courts do not seem very sympathetic towards these migrants.

Further, the inherent belief that migrants are parasites and will always harm the country they enter has been countered by the book of Nobel prize winner Esther Duflo and Abhijit Banerjee. These conditions need to be remedied, and such harsh punishments need to be amended. The detention centres must not be seen as a default setting but only as a last resort and the authorities must meet the international standards while maintaining these detention centres. The criminalisation of illegal entry seems to be more of a political stunt to paint an adverse picture of these asylum seekers and migrants among the people of the country.

**Keywords**: Illegal, Human Rights, Covenants, International, Asylum

**Introduction**

It is a strange world, where we as a global community revere and preach the ideas of Human rights and basic Human Dignity, but refuse to acknowledge similar liberties for all. The ideas of nation and territorial boundary, is no doubt a necessary and sufficient one, but should these imaginary borders be drawn to an extent where our core value of dignity is hampered? The world is facing a massive migration problem. Natives of war-torn, disaster-hit countries travel across borders in search of a safe haven. Many countries, including India, the United States, United Kingdom, claim to be built on a foundation of “humanitarian” principles, but they do not extend this humanity to all. Status of “illegal migrants' ' is a debated topic, but it's criminalisation and the consequential inhumane treatment must not be.

Crime is a construct. An act is referred to as a crime because, through generations, powerful and influential people and institutions have deemed them to be against the very basis and the core moral values and principles of the society. Be it the monarchy or the religious institutions, criminal acts were defined through their eyes and broadly accepted by their “subjects''. With the advent of a more democratised form of governance, this construct of crime saw numerous modifications. Still, even today, our definition of crime is swayed by the political needs and influences of those in power. The very action of branding a person seeking a safe haven as a criminal is an example.

This paper looks into the meaning of “illegal entry” and the causes and effects of its criminalisation. It studies the various human rights violations and gives some suggestions toward positive humanitarian change.

**“Illegal Migrants”- The Terminology**

Migration is a controversial topic in the current world scenario. Millions of people cross borders in the discovery of a new home, a safe haven, where they can build a new life. The territorial borders are a lot more porous than they have ever been and the international community through many of its organisations have made efforts towards the assistance of these migrants. The evaluation of their success and impact is still murky.

Leaving behind one’s native place, culture and tradition to venture into an unknown world is not an easy decision to make. There are multiple reasons as to why people migrate; they are called the “push” and “pull” factors[[1]](#footnote-2). Push factors could be persecution, civil war, natural disasters, economic conditions, and pull factors majorly include better economic prospects, education, raised the standard of living or even safety.

Migration could be done officially by going through proper immigration laws and documents or by “illegal” means, that is by violating the immigration laws like through “trafficking”. Often people enter into a country with proper documentation but stay longer than what is permitted and after the expiry of their visas and other validating documents[[2]](#footnote-3). Though “illegal entry” typically refers to entry into a country without following the legal procedure, the term “illegal” is controversial.

Other terms like “undocumented immigrants” or “irregular immigrants” have often been promoted by academicians as a replacement of the term “illegal”. Language has power over how things are perceived and how people finally interpret it. The word “illegal” shows a very negative connotation and makes the acceptance of these people by the general populace even more difficult[[3]](#footnote-4). The final decision of their legality and acceptance needs to be done by an unbiased, authoritative court and before that judgement is finally pronounced, brandishing them as “illegal” seems more of a tactic to influence political sentiments.

Moreover, when something is portrayed as “illegal”, a stigma is developed around it. It is often argued that it is an act which is illegal, and a person cannot be referred to as illegal. It is through the media that the usage of such problematic terminology has been popularised and normalised.

Many international organisations and their working papers and resolutions emphasise these much-needed changes. Council of Europe’s Parliamentary Assembly Resolutions and Recommendation are an example of these positive changes[[4]](#footnote-5).

**Criminal Law and its Implications**

In many countries across the world, this act of “illegally” crossing the borders is criminalised. Throughout the course of history, many acts are often criminalised and decriminalised according to the changing socio-political environment of the nation. The most relevant and famous example in this regard is the decriminalisation of homosexuality. With the change in thoughts and an acceptance towards diversity, many countries across the globe have decriminalised homosexuality which was once seen as “unnatural[[5]](#footnote-6)”. Similar is the case, with the criminalisation of “illegal entry”.

Crimes could be committed against an individual, or it could be against society in general. While crimes against the individuals are well- defined and almost universally accepted and severely punished, crimes against society are often termed as “victimless crimes” and they do not come in such straight-jacketed formulas. Crimes like using illegal drugs are not always criminalised in every country. These migrants are also committing victimless crimes- *“To the extent that harm is done at all, it is to the integrity of the state’s border and immigration control laws.[[6]](#footnote-7)”* It is only attacking our ideas of nation and homogeneity and producing no specific victims.

The moral question is not whether the act on the part of the migrants is violating laws or not, and the question is whether their act is grave or heinous enough for them to be labelled as a criminal? Among the many differences between a civil and criminal offence, the most prominent one is the repercussions. A criminal act entails punishments like imprisonment and heavy fines while the civil offences entail damages and compensation. This is done because criminals are considered a threat to society and its values. These people who are often seeking asylum or refuge are doing it for their survival, and such motives must not be seen as criminal.

**Conditions of Migration around the World**

The exact number of such irregular immigrants can never be accurately determined, unlike the legal form of Migration which is extensively studied by multiple international bodies. For example, the United Nations International Organization for Migration created a report, according to which 272 million people, which is 3.5% of the global population, are migrants in the year 2019, with India being the country with the largest number of migrants living abroad[[7]](#footnote-8).

Many European Countries, United States, Canada, India and other countries, similarly, are facing this problem of undocumented Migration. These migrants around the world are travelling miles in search of a new beginning and refuge. Multiple Human Rights organisations are working towards the matters of criminalisation of illegal entry. The Global Legal Research Directorate made an extensive report studying 162 countries and their laws regarding the criminalisation of Illegal Entry. It includes data of various punishments and the relevant law applicable in the matter.

According to the report, 124 countries in the world have criminalised “illegal entry” and prescribed various punishments ranging from minor ones like fines and community service to more severe forms of punishments like detention, imprisonment, deportation, etc. The punishments are given according to the severity and the circumstances of the ‘crime’ committed. Any circumstance which is seen as a threat to society is more severely punished. Though some of these countries, on humanitarian grounds and to respect international resolutions and treaties, make an exemption from such penalties for people seeking asylum[[8]](#footnote-9). On the other hand, countries like Argentina, Australia, Spain, Turkey, etc. “impose civil or administrative penalties” instead[[9]](#footnote-10).

**Impacts of Criminal Punishments and Human Rights Violations**

The United Nations, though many of its resolutions and conventions have made an effort to resolve this conflict and provide a more safe and secure environment for the migrants. Many other multilateral treaties like the European Union and other bilateral treaties also serve a similar purpose. These international Organisations and the law they make are considered to be “soft laws”, but they provide a guiding framework for the formation of Human Right laws across the world.

The criminalisation of “Illegal entry” and the way it is implemented in multiple countries often violate the basic human rights and dignity that an individual is born with. Forms of punishments like detention, deportation, etc. lead to inhumane conditions where these migrants do not get the benefit of the basic fundamental rights. In one of the policy briefs of Migrant Forum - ‘Detention of Undocumented Migrants in Asia[[10]](#footnote-11)’, the author mentions that detention conditions vary from country to country. Still, there is rampant human right abuse. Often even pregnant women, trafficking victims and minors are detained.

The vulnerable situation in which these migrants are put in does not let them exercise and demand their right. They are entering a foreign country with its legal regime and language, which often makes meaningful communication impossible. Embassies are not informed, and hence immediate legal assistance is not always provided. Often these prisons are overcrowded, and the migrants are made to do menial jobs[[11]](#footnote-12). Immigrants are either detained due to their lack of documentation or because of some sort of crime committed by them. Both of these crimes should not be viewed in the same light, because while the former is a mere desperate act to look for a new beginning and does not harm any other person, the latter act is an active crime with intentions detrimental to the society.

These two sets of “Criminals” must not be kept in similar detention centres. This will not only prevent the innocents from being influenced by the criminals but also save them from the stigma of the consequences of being a criminal. Even the International Convention of the Protection of the Rights of All Migrant Workers and Members of their Families, (MWC) 1990 in its Article 17(3) reiterate this:

*“Any migrant worker or member of his or her family who is detained in a State of transit or a State of employment for violation of provisions relating to migration shall be held, in so far as practicable, separately from convicted persons or persons detained pending trial[[12]](#footnote-13).”*

Recently in the news were the deplorable conditions in the United States of America regarding immigrants. A report by Amnesty International while surveying and interviewing many migrant families in detention revealed that many of these detainments were arbitrary[[13]](#footnote-14). The government rolled a policy of mandatory detention of asylum seekers till the time their asylum claims are settled. This was done as a measure to act as a deterrent to the people seeking such asylums. Such arbitrary mandatory detention goes against multiple International conventions like Article 9(1) of International Covenant on Civil and Political Rights, 1966[[14]](#footnote-15), or Article 9 of Universal Declaration of Human Rights, 1948[[15]](#footnote-16), Article 31(1) of Geneva Convention Relating to the Status of Refugees, 1951[[16]](#footnote-17) and Article 16(4), MWC[[17]](#footnote-18).

The “Zero-tolerance policy” of the Trump Government has led to the separation of many families as children are separated from their parents at the borders for the claims of efficient criminal prosecution. These detention centres are reportedly in inadequate physical conditions, food, clean water supplies and other basic requirements[[18]](#footnote-19). Many treaties and covenants have been signed-in this wake to prevent the inhumane condition in prisons and detention centre like the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.[[19]](#footnote-20)

These places have also extensively seen racial profiling as people with certain skin colour or physical features are discriminated against and are treated as outsiders. Black immigrants are often more susceptible to deportation even after all the attempts of assimilation[[20]](#footnote-21). With the current political scenario of the United States and an active campaign against racism, such behaviour must not be tolerated. Moreover, these detention centres, excessive criminalisation, and the consequential judicial review take up a lot of public money which could instead be used for a more noble purpose[[21]](#footnote-22).

**Indian Laws and Conditions**

Specific attention needs to be drawn to the legislations and rules which are specific to India, that criminalise “Illegal entry”. The section 14A of the Foreigners Act, 1946[[22]](#footnote-23) gives a penalty for entry and staying in India without proper documentation like visas and passport. The punishment for it is a minimum of two years of imprisonment and a maximum of eight years and also a fine of a minimum of ten thousand rupees. The use of the conjunction “and” shows that it is a mandatory fine.

Other Act like The Passport (Entry into India) Act, 1920 under its Section 3(2)(a) and Section 5, criminalise such act-

*S. 3 (2)(a)- “Without prejudice to the generality of the foregoing power such rules may—*

*(a)prohibit the entry into India or any part thereof of any person who has not in his possession a passport issued to him;[[23]](#footnote-24)”*

*S. 5- “Power of removal- The Central Government may, by general or special order, direct the removal of any person from India who, in contravention of any rule made under section 3 prohibiting entry into India without a passport, has entered therein, and thereupon any officer of the Government shall have all reasonable powers necessary to enforce such directions.[[24]](#footnote-25)”*

Section 6(c) of the Passport (Entry into India) Rules, 1950 also mentions-

*“Any person who enters or attempts to enter, India on a forged passport or visa, [shall be punishable with imprisonment for a term which may extend to five years, or fine which may extend to fifty thousand rupees, or with both].[[25]](#footnote-26)”*

In recent times, the Indian government has seen a lot of controversy regarding its National Register of Citizen initiative, which has often been termed as an administrative nightmare, leading to the ruination of many innocent lives. The government is actively building detention centres to keep these people in custody. This was contested in the court, especially in the light of the COVID-19 pandemic. The unhygienic and overcrowded detention centres were feared to exacerbate the health crisis. The Supreme Court has stepped in with rules regarding the release of these detainees. Still, the conditions imposed like the benefit can only be availed by people who have already been in these centres for two years and the payment of 5000 rupees as surety were termed as irrational. The surety money is drastically reduced from what it was earlier, yet it’s still a lot for the most marginalised people[[26]](#footnote-27).

**Is Migration always an Evil?**

Everybody generally assumes that migrants are always a detriment to society; they are always seen as outsiders who consume the resources of another country. An exciting book by the Nobel Laureate Abhijit Banerjee and Esther Duflo, Good Economics for Hard Times[[27]](#footnote-28), argues otherwise. The authors emphasise on the fact that nobody willingly leaves their country until the circumstances force them too. They very uniquely have shown how migrants are actually positively impacting the economy of their host country because they don’t merely earn from the country and do jobs that the natives are unwilling to do. Still, they also spend in the host country. They have presented that the migrants do not take up the job of the natives as they are often disadvantaged in a situation like knowing the language of the country, which forces them to take unskilled jobs and the natives are further given better jobs.

**Suggestions**

The government not only penalises people “illegally” entering but sometimes also the people who provide them with transportation services and even their employers. This enhances the feeling of being “outsiders” for all the foreigners and makes their integration into the society an arduous task leading to hate crimes, xenophobia, etc[[28]](#footnote-29). The native population grows to be wary of them and avoid assimilation due to the abovementioned consequences. These laws leading to such harsh criminal punishments need to be amended. Irregular entry must be decriminalised keeping in mind the international standards and these people should be treated as civil offenders unless their conduct proves otherwise.

Detention should be seen as a last resort and must not be mandatory for all cases. The decision to detain must not be arbitrary and a judicial mind must be applied in the matter. Even if these migrants are detained, they must be informed and provided with all the basic rights like contacting a lawyer, minimum living conditions in detention centres, with adequate food and clean water, etc. These conditions should meet the International Human Rights standard. Moreover, an attempt should be made to keep families together.

**Conclusion**

The criminalisation of “Illegal Entry” is a hotly debated topic. People have different political orientation regarding the fate of asylum seekers and irregular immigrants. The fear of outsiders “encroaching” over others land does not often sit well with many, but the question here is of human rights and dignity. It is about the respect a person deserves as a human being. The criminalisation of illegal entry leads to many human rights violations, as shown by many reports.

The act of branding these migrants as criminals seems to be more like a political stunt with an aim to make these migrants look like a threat to the society and community. These policies of mandatory detention are made to act as a deterrent. Still, they do not serve the purpose and instead lead to xenophobia and discrimination on the basis of race, gender, etc. These punishments stigmatise these migrants and leave them in a precarious condition.

With the world torn with so much hatred treating people with kindness is important. These asylum seekers and immigrants are in need, and it is time for the global community to look forth its territorial division and respect its international human rights standards.

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