National Law School of India Review

Volume 31 | Issue 2 Article 2

2019

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Recommended Citation
Kumar, Dr. Ashwini (2019) "Hope for the Homeless: The Case of Rohingyas," *National Law School of India Review*: Vol. 31: Iss. 2, Article 2.
Available at: https://repository.nls.ac.in/nlsir/vol31/iss2/2

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HOPE FOR THE HOMELESS: THE CASE OF ROHINGYAS

—Dr. Ashwini Kumar*

Abstract Thousands of Rohingyas, who faced persecution and genocide in Myanmar, are seeking refuge in India. The Government of India has declared them as illegal immigrants and ordered their deportation. This article argues that the government has erred in declaring the Rohingyas as illegal immigrants and supports the case for granting them asylum. It argues that India is bound by the principle of non-refoulement as it is an established principle of international humanitarian law. It further relies on the Supreme Court's human rights jurisprudence to argue that the principle of non-refoulement is a constitutional obligation on the government. The article further contends that the government's decision to deport Rohingyas en masse and treating them as illegal immigrants without any rational classification or objective assessment on a case by case basis is ex-facie oppressive, unreasonable, and discriminatory.

The unspeakable and indisputable instances of brutalisation, plunder, torture, rape, and murder of the Rohingyas — the world's most persecuted ethnic minority facing genocide— have shocked the world's conscience. Over 9,21,000 Rohingyas displaced from the Rakhine State of Myanmar have sought refuge in Bangladesh.[1] In this context, the issue of granting refugee status to an estimated 40,000 Rohingya Muslims[2] in India has engaged national attention since 2017. This was triggered by the Order of the Government of India dated August 8, 2017,[3] to mandate their deportation and erroneously treat them as illegal immigrants. This Order has effectively foreclosed the Rohingyas' entry into India. Relevant extracts of the Order are reproduced hereunder:

* The author is a Senior Advocate, Supreme Court of India and has previously served as the Union Minister for Law and Justice, Government of India.

1 Situation Report - Rohingya Refugee Crisis, Inter-Sector Coordination Group (Sept. 27, 2018), https://reliefweb.int/sites/reliefweb.int/files/resources/iscg_situation_report_27_sept_2018.pdf.

2 Rina Chandran, *Rights Groups Slam 'Outrageous' Indian Plan to Deport Rohingya*, Reuters (Aug. 17, 2017) https://in.reuters.com/article/india-myanmar-rohingya/rights-groups-slam-outrageous-indian-plan-to-deport-rohingya-idINKCN1AX1GM.

3 Government of India, Ministry of Home Affairs Advisory, No. 24013/29/Misc./2017-CSR.III (i) (Aug. 8, 2017).

> "4. Detection and deportation of such illegal immigrants from Rakhine State, also known as Rohingyas is a continuous process. Therefore, it is essential to identify such illegal migrants/persons and also keep a watch on their activities for preventing any untoward incident that can take place. All States/UT Administrations are, therefore, advised to sensitize all the law enforcement and intelligence agencies for taking prompt steps in identifying the illegal migrants and initiate the deportation processes expeditiously and without delay." (*Emphasis Added*)

A group of spirited human rights activists have since petitioned the Supreme Court, questioning the legality of the deportation Order.[4] The challenge has been mounted principally on the touchstone of Articles 14[5] and Article 21[6] of the Constitution, on the grounds that the Order is unreasonable, arbitrary, and in violation of the inalienable right to life with dignity available to all individuals under Article 21. The Order's validity has also been questioned on the ground that it is in breach of India's international treaty obligations, and incompatible with India's state practice. The Order, thus, falls foul of Articles 51(c)[7] and Article 253[8] of the Constitution which mandate respect for international law.

The Government has defended its decision on multiple grounds. *First*, that India is not a signatory to, and is thus not bound by the United Nations Convention Relating to the Status of Refugees of 1951 ('1951 Convention'),[9] and the 1967 Protocol.[10] *Second*, that India's decision is in aid of its national security concerns. It has also pleaded limited resources at the disposal of the Indian State to provide basic humanitarian relief to non-citizens and has questioned the Court's jurisdiction to entertain a challenge to a policy decision of the Government. The matter is pending before the Court despite several hearings, while thousands of stateless Rohingyas seeking to enter our borders to

4 *Id.*

5 Constitution of India, 1950, Article 14 - *"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."*

6 Constitution of India, 1950, Article 21 - *"No person shall be deprived of his life or personal liberty except according to procedure established by law."*

7 Constitution of India, 1950, Article 51(c) - *"Foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and encourage settlement of international disputes by arbitration."*

8 Constitution of India, 1950, Article 253 -*"Legislation for giving effect to international agreements Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."*

9 United Nations Convention Relating to the Status of Refugees, 1951, July 28, 1951, 189 U.N.T.S. 137.

10 United Nations Protocol Relating to the Status of Refugees, 1967, Oct. 7, 1967, 606 U.N.T.S. 207.

escape torture and death find their fate hanging in the balance. Meanwhile, profound questions concerning the international legal regime relating to refugees fleeing from persecution, and related human rights jurisprudence, remain a subject of public debate. This article is in furtherance thereof and supports the case for granting asylum to the Rohingyas for the reasons discussed below.

First, the argument that India is not bound by the principle of non-refoulement simply because it is not a signatory to the 1951 Convention and the 1967 Protocol is *ex-facie* flawed and untenable. Although not a signatory to the 1951 Convention and the 1967 Protocol, India has ratified several international Conventions and Declarations that firmly commit us as a nation to the discipline of international human rights and humanitarian regime codified in the documents, which specifically include the principle of non-refoulement. These include the Universal Declaration of Human Rights (1948), International Covenant on Civil and Political Rights (1976), United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987), Convention on the Rights of Child (1990), The Advisory Opinion of the United Nations High Commission on Refugees on the Extraterritorial Application of Non-Refoulement Obligations (2007) ('UNHCR Advisory Opinion'), International Convention for the Protection of All Persons from Enforced Disappearance (2010), Bangkok Principles, 1966 - adopted in 2001 in New Delhi by the Asian African Legal Consultative Organisation ('AALCO'), and the United Nations General Assembly New York Declaration for Refugees and Migrants (2016). The compelling and decisive logic of UNHCR Advisory Opinion is extracted below for facility of reference:

> "That the UNHCR has been of the view that the prohibition of refoulement of refugees, as enshrined in Article 33 of the 1951 Convention and complemented by non-refoulement obligations under international human rights law, satisfies these criteria and constitutes a rule of customary international law. As such, it is binding on all States, including those which have not yet become party to the 1951 Convention and/or its 1967 Protocol. In this regard, UNHCR notes, inter alia, the practice of non- signatory States hosting large numbers of refugees, often in mass influx situations. Moreover, exercising its supervisory function." (Emphasis Added)

Further, India's state practice also recognizes the principle of non-refoulement applicable to refugees. The following statement[11] of the Indian Counsellor is unambiguous in this regard:

[11] Conference Report, 1st Thematic Discussion towards a Global Compact on Refugees, Geneva, (July 10, 2017).

> "We support the concept of Burden Sharing, including the relocation of refugees on case to case basis, that too with the consent of the refugees. While doing so, we need to be cautious not to open the path for re-defining the Refugee Convention and its protocol, and in no case diluting the humanitarian principle of 'non-refoulement'..." (Emphasis Added)

In a press release issued by the Government[12] regarding the exodus of refugees from Myanmar, it has been stated that *"India remains deeply concerned about the situation in Rakhine State in Myanmar and outflow of* refugees *from that nation."* (Emphasis Added) In the past, India has offered refuge to Syrian Christians, Tibetans, Afghanis, and Bangladeshis displaced from their countries. The State's contention that India is not bound by international law obligations to respect the principle of 'non-refoulement' is thus wholly misconceived and unsustainable.

Second, pronouncements of the Supreme Court have repeatedly acknowledged the obligation to respect international law and treaty obligations consistent with the spirit of Articles 51(c) and Article 253 of the Constitution.[13] The non-refoulement rule has also received fulsome judicial endorsement as part of the constitutional guarantee under Article 21 of the Constitution. In *Dongh Lian Kham* v. *Union of India*,[14] the Delhi High Court ruled:

> "The principle of "non-refoulement", which prohibits expulsion of a refugee, who apprehends threat in his native country on account of his race, religion and political opinion, is required to be taken as part of the guarantee under Article 21 of the Constitution of India, as "non-refoulement" affects/protects the life and liberty of a human being, irrespective of his nationality. This protection is available to a refugee but it must not be at the expense of national security…"

The Gujarat High Court in *Ktaer Abbas Habib Al Qutaifi* v. *Union of India*,[15] similarly endorsed the importance of non-refoulement as an established principle of humanitarian law encompassed in Article 21. It held:

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[12] Press Release, Ministry of External Affairs, Government of India, Situation in the Rakhine State of Myanmar, (Sept. 9, 2017).

[13] *K.S. Puttaswamy* v. *Union of India*, (2017) 10 SCC 1; *National Legal Services Authority* v. *Union of India*, (2014) 5 SCC 438; *Destruction of Public and Private Properties* v. *State of A.P.*, (2009) 5 SCC 212; *D.K. Basu* v. *State of W.B.*, (1997) 1 SCC 416; *Vishaka* v. *State of Rajasthan*, (1997) 6 SCC 241; *Nilabati Behera* v. *State of Orissa*, (1993) 2 SCC 746; *Gramophone Co. of India Ltd.* v. *Birendra Bahadur Pandey*, (1984) 2 SCC 534.

[14] 2015 SCC OnLine Del 14338 : (2016) 226 DLT 208.

[15] 1998 SCC OnLine Guj 304 : 1999 Cri LJ 919.

> "This principle prevents expulsion of a refugee where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. Its application protects the life and liberty of a human being irrespective of his nationality. It is encompassed in Article 21 of the Constitution, so long as the presence of refugee is not prejudicial to the law and order and security of India. All member nations of the United Nation including our country are expected to respect for international treaties and conventions concerning Humanitarian law. In fact, Article 51(c) of the Constitution also cast a duty on the State to endeavour to "foster respect for international law and treaty obligations in the dealing of organized people with one another"…"

Third, the contention that India does not have the financial capacity to offer basic sustenance to around 40,000 Rohingyas which include children, women, aged, and the infirm does grave injustice to the nation that prides itself on having a GDP of almost $3 trillion,[16] and as being the fifth largest economy in the world.[17] More importantly, the insensitive plea is wholly incompatible with our civilisational ethos that celebrates the philosophy of universalism embodied in our ancient belief of *vasudeva kutumbakam*, i.e., the whole world is one family; and negates the nation's cultural and historical legacy reflected in the Preamble and promise of the Constitution. The State's case, thus, merits rejection because inalienable human rights are available to all universally, and not to citizens alone.[18]

Fourth, the Government's decision to deport Rohingyas *en masse*, unlawfully treating them as illegal immigrants without any rational classification or objective assessment on a case by case basis is *ex-facie* oppressive, unreasonable, and discriminatory in the view of Court's binding precedents in a series of celebrated judgments including *K.S. Puttaswamy*,[19] *Onkar Lal Bajaj*,[20] and *Nikesh Tarachand Shah*.[21] The principles of non-arbitrariness and non-dis-

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16 *India Maps Ambitious Plan to Become a $5-Trillion Economy by 2030*, Business Insider (Dec. 20, 2018), https://www.businessinsider.in/india-maps-ambitious-plan-to-become-a-5-trillion-economy-by-2030/articleshow/67173425.cms.

17 *India to become 5th largest economy globally this year; 2nd in APAC region by 2025*, The Economic Times (June 3, 2019), https://economictimes.indiatimes.com/news/economy/indicators/india-to-become-5th-largest-economy-globally-this-year-2nd-in-apac-region-by-2025/articleshow/69638064.cms.

18 *Supra* note 16; *Ktaer Abbas Habib Al Qutaifi* v. *Union of India*, 1998 SCC OnLine Guj 304 : 1999 Cri LJ 919; *National Human Rights Commission* v. *State of Arunachal Pradesh*., (1996) 1 SCC 742.

19 *K.S. Puttaswamy* v. *Union of India*, (2017) 10 SCC 1 (plz chk) ; *Dongh Lian Kham* v. *Union of India*, 2015 SCC OnLine Del 14338 : (2016) 226 DLT 208, ¶309-310.

20 *Onkar Lal Bajaj* v. *Union of India*, (2003) 2 SCC 673, ¶ 21.

21 *Nikesh Tarachand Shah* v. *Union of India*, (2018) 11 SCC 1, ¶ 17-19.

crimination that underpin the guarantee of equality in Article 14 are clearly insurmountable for the Government, and squarely applicable to the case of the Rohingyas.

Fifth, the argument of an assumed threat to national security to deny the Rohingyas asylum is also feeble. Whether the aged and infirm Rohingyas, children, women, and others without exception against whom there is no evidence of harbouring anti-India sentiments can cause a threat to national security is a question that begs itself.

Indian human rights jurisprudence is embodied in an expansive interpretation of Articles 14, 19 and 21, and places equality (Article 14), freedom (Article 19), and dignity (Article 21) "*at the pinnacle of the hierarchy of constitutional values*."[22] This jurisprudential tradition, in recognising that "*human dignity, equality and freedom were conjoined, reciprocal and covalent values*",[23] clearly leans heavily in favour of treating Rohingyas as refugees with consequential rights. The sweep of constitutional protection of the dignity of all individuals is premised on the broader philosophical view that recognition of one's own dignity must commit us to recognise the dignity of others.[24] An extension of the right to dignity beyond oneself is also traced to Kant's Formula of Humanity as an end in itself.[25] And, therefore, *"....acts are wrong if they insult the dignity of others...."*[26] Human rights inhere in us as a consequence of our humanity,[27] and are thus formulations of human dignity. The Supreme Court's endorsement of "*dignity as an inherent dimension of equality*" whose "*...boundaries do not depend upon the circumstance of any individual...*"[28] and which cannot be infringed by the State, leave no room for judicial restraint or abnegation when dealing with State policies that infract human dignity.

The constitutional jurisprudence expounded by the Court in decisions such as *Sunil Batra*,[29] *Francis Coralie*,[30] *D.K. Basu*,[31] *K.S. Puttaswamy*,[32] *Nambi Narayan*,[33] *Romila Thapar*,[34] have decisively proclaimed torture in any form as

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[22] *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212, ¶ 26.

[23] Sandra Liebenberg, *The Value of Human Dignity in Interpreting Socio-economic Rights*, 21 S. Afr. J. on Hum. Rts 1 (2005).

[24] R. Dworkin, Justice for the Hedgehogs, 19, 260, 264-267 (2011).

[25] *Id.*

[26] *Id.*, at 204.

[27] *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212.

[28] *Binoy Viswam* v. *Union of India*, (2017) 7 SCC 59.

[29] *Sunil Batra* v. *Delhi Admn.*, (1978) 4 SCC 494, ¶ 218.

[30] *Francis Coralie Mullin* v. *UT of Delhi*, (1981) 1 SCC 608 : AIR 1981 SC 746.

[31] *Vishaka* v. *State of Rajasthan*, (1997) 6 SCC 241, ¶ 22; *D.K. Basu* v. *State of W.B.*, (2015) 8 SCC 744, ¶ 1.

[32] *Dongh Lian Kham* v. *Union of India*, 2015 SCC OnLine Del 14338 : (2016) 226 DLT 208.

[33] *S. Nambi Narayanan* v. *Siby Mathews*, (2018) 10 SCC 804 : 2018 SCC Online SC 1500, ¶ 36-43.

[34] *Romila Thapar* v. *Union of India*, (2018) 10 SCC 753 : 2018 SCC Online SC 1691, ¶ 98.

an offence against humanity. The felicity of the Court in *D.K. Basu*,[35] citing Adriana P. Bartow remains unsurpassed and I quote,

> "...torture is a wound in the soul so painful that sometimes you can almost touch it but it is also so intangible that there is no way to heal it. Torture is anguish squeezing in your chest, cold as ice and heavy as a stone paralysing as sleep and dark as the abyss. Torture is despair and fear and rage and hate. It is a desire to kill and destroy including yourself."

It went on to also state that:

> "...torture is a naked violation of human dignity and degradation which destroys, to a very large extent, the individual personality. It is a calculated assault on human dignity and whenever human dignity is wounded, civilization takes a step backwards - flag of humanity must on each such occasion fly half-mast."[36]

In *Jeeja Ghosh* v. *Union of India,*[37] the Court ruled that "*...human dignity is infringed if a person's life, physical or mental welfare is alarmed. It is in this sense that torture, humiliation, forced labour, etc. all infringe on human dignity...*" The Courts' affirmation that torture infringes human dignity, which is a non-negotiable constitutional principle, presents a very clear indictment of the Government's policy on the Rohingyas.

Finally, the State's last resort plea that the decision to deport Rohingyas is beyond judicial review negates the foundational basis of the Court's review jurisdiction, as eloquently expressed by Patanjali Shastri, J. in *State of Madras* v. *V.G. Row*,[38] and as affirmed in *Brajendra Singh Yambem*.[39] These decisions show that judicial review is undertaken by the Courts "*...not out of any desire to tilt at legislative authority in a crusader's spirit but in the discharge of a duty plainly laid down upon them by the Constitution...*" Indeed, "*...political decisions must treat everyone with equal concern and respect. Each individual must be guaranteed fundamental civil, and political rights which no combination of persons can take away no matter how numerous they are or how much they despise their race or morals or way of life.*"[40] Protection of human

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[35] *Vishaka* v. *State of Rajasthan*, (1997) 6 SCC 241, ¶ 22; *D.K. Basu* v. *State of W.B.*, (2015) 8 SCC 744, ¶ 1.

[36] *Vishaka* v. *State of Rajasthan*, (1997) 6 SCC 241, ¶ 22; *D.K. Basu* v. *State of W.B.*, (2015) 8 SCC 744, ¶ 1.

[37] (2016) 7 SCC 761.

[38] AIR 1952 SC 196 : 1952 SCR 597.

[39] *Brajendra Singh Yambem* v. *Union of India*, (2016) 9 SCC 20, ¶ 48-49.

[40] Ronald Dworkin, A Bill of Rights for Britain 35-36 (1990), quoted in Aharon Barak, Judge in a Democracy 25 (2004).

rights and democracy — both of which are part of the basic structure of the Constitution — are constitutional goals which are integral to each other. Aharon Barak's eloquent reminder is apposite and is quoted thus,

"There can be no democracy without human rights…democracy is not only majority rule. Democracy is also the rule of basic values and human rights as they have taken form in the Constitution …When the majority denies the minority human rights, it harms democracy...take the rule of basic values away from constitutional democracy and you have struck at its very existence."[41]

Human dignity is a unifying constitutional value which unites human rights into one whole and is a necessary condition of democracy. This declaration by the Supreme Court in *Jeeja Ghosh*,[42] citing Chief Justice Barak inescapably elevates the rule of non-refoulement as a constitutional obligation.

Thus, in terms of the letter and spirit of a jurisprudence anchored in the inviolability of human dignity, the applicable rules of international law and our civilizational ethos of universalism —the tortured Rohingyas cannot be denied asylum in India and are entitled to invoke the principle of non-refoulement to avoid persecution. It is hoped that the Supreme Court will decide the issue soon lest delay defeats justice. In the meantime, given the absence of a requisite statutory framework, a commitment by political parties to address the legal vacuum by enacting a comprehensive law of asylum[43] and torture[44] hold out hope for the homeless of the world. The imperative and urgency of vindicating constitutional and humanitarian morality cannot be emphasised enough.

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41 R.A. 6821/92: United Mizrchi Bank Ltd., cited in Aharon Barak, Judge in a Democracy 26 (2004).

42 *Jeeja Ghosh* v. *Union of India*, (2016) 7 SCC 761.

43 Congress Party Manifesto, 2019, ¶ 16(08), p. 27.

44 *Id.*,¶30 (05), p. 36.