



BLIND FOLD LEGAL JOURNAL

VOLUME-1 ISSUE-3

{DECEMBER 2021-FEBRUARY 2022}

E-Mail:- blindfoldjournal@gmail.com

Website: - www.blindfoldjournal.com

THE EXPULSION OF ROHINGYAS: A VANISHED OPPORTUNITY

Author: Avishi Srivastava & Anjali Thakur

INTRODUCTION

The Apex Court denied the release of jailed Rohingya refugees in Jammu in early April, in the pending case of Mohammad Salimullah and Anr. v. Union of India. The petitioners had filed an interlocutory application, demanding that the Union refrain from deporting the imprisoned refugees until the main case involving the refugees' basic human needs was resolved. The Supreme Court, on the other hand, ruled that the refugees "shall not be deported until the procedure stipulated for such deportation is followed," putting the deportation process in motion.

The Rohingya are Myanmar's widest Muslim racial minority, and the UN Secretary-General has described them as "one of, if not the, most prejudiced people worldwide." Since the 1970s, the Rohingyas have faced rising discrimination in Buddhist-majority Myanmar. Since 2017, they have been the target of a concerted campaign by Myanmar's armed forces aimed solely at inflicting physical, psychological, and emotional harm on the Rohingyas. Close to a million Rohingyas have fled to neighbouring countries as a result of rampant violence and changes in citizenship legislation, leaving them stateless. In addition, an estimated 40,000 Rohingyas have sought refuge in India.

This article examines the issue from two angles. First, it criticises the Supreme Court's decision that India has no international legal obligation to protect refugees from deportation. Second, it claims that the refugees were also entitled to constitutional protections, but that the ruling did not extend those protections.

A Violation of International Human Rights

The Supreme Court has incorporated Customary International Law into the domestic regime and emphasised interpretations that are consistent with international commitments, as long as they do not violate municipal law. In its order, the Supreme Court, ironically, acknowledged that national

courts could "draw inspiration from international conventions/treaties," but stopped short of that. It refused to consider international law obligations, particularly non-refoulement obligations, that India owed the Rohingyas.

There is no municipal law in India that incorporates the principle of non-refoulement into the domestic regime, it is still required to follow it. This is true on two counts. First, everyone agrees that non-refoulement is CIL. While further elaboration is beyond the scope of this blog, there is enough evidence in state actions to demonstrate consistent state practise and the regard for non-refoulement as legally obligatory or *opinio juris*. As a result, it satisfies both CIL requirements. Foremost, while India is not a signatory to the Refugee Convention, it has ratified a number of other international treaties that uphold the essence of non-refoulement and make it directly applicable in this case. For example, Article 6 of the International Covenant on Civil and Political Rights states that no one shall be arbitrarily deprived of his life, while Article 7 states that no one shall be subjected to inhuman, degrading, cruel, or torturous treatment. The Human Rights Committee's 44th Session interpreted this provision to mean that individuals must not be subjected to inhuman treatment upon refoulement to another state. Furthermore, the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD") has been construed to give non-refoulement a voice. India has signed and ratified both treaties, and has unambiguously accepted its obligations under them.

Furthermore, under Article 3(1) of the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("CIDT"), state parties are prohibited from referring people to countries where they may be tortured. The ICJ has ruled that Article 3(1) of the CIDT is a peremptory norm that cannot be deviated from under any circumstances. As a result, the government should have been held accountable for failing to provide the Rohingyas with a fair and efficient asylum procedure that ensures adequate protection for their lives.

States must not be complicit in racial discrimination or implement foundationally discriminatory programmes, and this must be enforced as a peremptory norm. Apart from non-refoulement, deporting the Rohingyas may violate India's international human rights obligations under the ICERD and related treaties. As a result, India must not only refrain from discriminating against

the Rohingyas, but also ensure that they are not subjected to discrimination in Myanmar. Deporting them to Myanmar, on the other hand, would inevitably leave them vulnerable in a territory that has systemically violated their human rights.

Most notably, this sequence would violate the Convention on the Prevention and Punishment of Genocide ("Genocide Convention"). The prohibition of genocide is an obligation ergo omnes, which means that it is owed to the entire international community. States must act in ways that support their goals of preventing, prosecuting, and punishing genocide. An independent fact-finding mission, a UN Human Rights Council report, and several human rights scholars and activists have all concluded that Myanmar's actions amount to genocide against the Rohingyas. A deportation order to Myanmar would thus constitute a failure to prevent genocide.

Infringing on the Ethos of Article 21 of the Constitution

The court's primary reasoning on the constitutional claims is that the "right not to be deported" is enshrined in Art. 19(1)(e) of the Indian Constitution, which grants only citizens the right to freely settle or reside in any part of the country. Because the Rohingyas lack citizenship, they cannot assert a Fundamental Right not to be deported, and Arts. 14 and 21, while available to non-citizens, are inapplicable in this case. This interpretation completely disregards Art. 21, which prohibits depriving a person of his life and liberty except in accordance with a legal procedure.

As individuals, the Rohingyas have the right to seek asylum in Indian camps rather than being deported to a country where they will almost certainly face genocide. It was emphasised in both *Maneka Gandhi v. Union of India* and *Govind v. State of MP* that Art. 21 is an elastic concept with a penumbra of un-enumerated components that must be determined case by case. Previously, the Gujarat and Delhi High Courts used a similar approach to read non-refoulement into Art. 21, protecting refugees from life-threatening mistreatment. Unfortunately, the SC chose a different path, and as a result, missed out on a golden opportunity to establish the presence of non-refoulement within Art. 21.

Furthermore, the manner in which the Supreme Court ruled out the potential application of Articles 14 and 21 is inconsistent with previous jurisprudence. Articles 14, 19, and 21 form the golden pyramid of fundamental rights and should not be regarded as isolated islands. Even if it is agreed that the primary issue is that of Art. 19(1) (d), it must also meet the thresholds under Arts. 14 and

21, according to the reasoning used in *Maneka Gandhi*. The right to equality guaranteed by Article 14 forbids manifestly arbitrary executive or legislative actions. If they lack a "clear definitive principle or encompass a fickle or irrational measure," they are ineligible. Furthermore, under Art. 21, "procedure established by law" must be fair and reasonable in order to comply with procedural due process.

The Supreme Court concluded in this interim order that the refugees would be deported in accordance with the appropriate procedure. It tacitly accepted the Union Government's contention that the Rohingyas are foreigners under Section 2 of the Foreigners Act of 1946 and must be deported under Section 3 of the Act (1). The statute primarily governs illegal entrants, but it has also been used to deport refugees, despite the fact that their international legal status is very different. It gives the government complete discretion over deportation decisions and includes no safeguards such as non-refoulement or legal aid. Using a statute that provides no procedural safeguards to arrest and deport the Rohingyas to Myanmar, where they face significant risk of persecution and torture.

In contrast, the Manipur High Court recently ruled in the *Nandita Haksar* case that non-refoulement is a part of Art. 21 and that Rohingyas must be allowed to claim refugee status from the UNHCR as they have in the past. It took note of several cases in which courts granted asylum seekers protection of life and liberty and prevented their deportation until a decision on their UNHCR application was made. The Manipur High Court reiterated an expansive interpretation of Art. 21 in order to ensure that it maintains its fundamental identity – protecting life. It also clarified that the primary issue arose from Art. 21 rather than Art. 19(1)(d), an argument rejected by the Supreme Court, while also rejecting the application of the Foreigners Act. In utterances, the Manipur High Court did what was expected of the Supreme Court: it upheld procedural due process and halted deportation until the situation in Myanmar improved.

CONCLUSION

The current situation in Myanmar is a "perfect illustration of cultural genocide," and it is too dangerous for Rohingyas to return. Buddhist nationalists have used draconian laws and measures to flush out Muslims under the guise that Muslims were taking over the country. In such a case, the Manipur High Court sets a good example in how it handles the issue in the Indian context and should be emulated. However, even when there was sufficient support in international law, the Supreme Court failed to recognise the principle of non-recoupment. It squandered the opportunity to reveal the right of Rohingyas not to be exposed to arbitrary deportation procedures in a holistic interpretation of Arts. 14, 19, and 21. Unfortunately, this has resulted in considerable unpredictability of the Rohingya refugees in India.

