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Indian Rohingya Deportation and Its Constitutionality

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ABSTRACT

Constitutionality. It is a word that haunts every legislation and executive action that is ever made in a democratic and sovereign nation. One such executive action that is being questioned and criticised across the world is the recent decision of India to deport the Rohingyas back to their home nation, which has been challenged by the Rohingya Community members in the Supreme Court of India. Many people across the world have criticised India for this decision, and many International organisations under their veil of international morality policing has questioned India on various occasions for its exercise of Sovereign power. A nation under its sovereign capability must be in a position to exercise its powers in interest of its citizens and cannot be held responsible at any stage in the world on the basis of International responsibility and be labelled as violation of Human Rights. As for any Nation in this International Community the utmost and highest responsibility would be to secure the interests of its Citizens and the executive decision taken by India to deport Rohingyas is such decision and India has enough Rationale and validity to take this decision.

Keywords: Constitution. Deportation. Rohingyas. Refugee.

I. INTRODUCTION

The Rohingyas are a small ethnic minority from Myanmar's Rakhine state who predominantly follow Islam. They have been facing violent prosecution at the hands of the Myanmar Government and Military. Lakhs of Rohingyas have fled their home country in the recent past to seek shelter in neighbouring countries. The Rohingyas claim that they are indigenous to the Rakhine region of Myanmar but the Myanmar government has for more than a century considered them to be refugees from the neighbouring state of Bangladesh. The Rohingyas situation has led to many international organisations to recognise them as the most persecuted community in the world.

Most of these refugees migrated to Indiana through family and community members, and few with the assistance of the smugglers. After entering the Indiana soil, the refugees settle largely

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in Hyderabad, Delhi, West Bengal etc. As these refugees do not possess any travel-related documents, they are deprived of the basic necessities and are often victimised

The COVID-19 has further aggravated the plight of the Rohingya refugees; the World Bank estimates that COVID-19 would push 150 million people into extreme poverty by 2021². The COVID-19 outbreak has forced the States to tighten their national borders and impose strict immigration measure to tackle illegal immigrants.

On 7th March 2021, there were newspaper reports that 150-170 Rohingya refugees in Jammu had been detained and placed in holding centres. There are 6,523 Rohingyas in Jammu, who are concerned about the situation. They feared they would be deported to Myanmar.³

A petition was filed by Mr. Mohammad Salimullah claiming that 40000 Rohingyas are being deported back to Myanmar, the country of their persecution. The Supreme Court of India refused to grant Interim Relief and directed the Government of India to deport the Rohingyas according the law.

There has been lot of criticism against India for going ahead with this decision and a lot of International organisations have criticized the State of India for going ahead with this deportation and this case is still ongoing in the Supreme Court.

In this all the aspects behind the legitimacy of this very action of the state and why it is the most reasonable option for the state to go ahead with would be explored.

II. THIS ACT OF STATE IS NOT A VIOLATION OF FUNDAMENTAL RIGHTS OF THE REFUGEES

The major issue these Rohingyas have contended for is Article 14 and 21 in the Supreme Court. These fundamental rights do apply to the refugees as already settled by the Supreme Court in the case of *State Trading Corporation of India Ltd v. The Commercial Tax officer*⁴ and *Anwar v. State of J & K*⁵ that these fundamental rights do apply to foreigners and are not only confined to citizens.

The contention of article 14 raised by the Rohingya refugees is the fact that similarly placed refugees are not being deported.

Firstly is to be take into consideration that that Article 14 comes with an exception of

² Press Release October 7 2020, The World Bank, November 19 2022, <https://www.worldbank.org/en/news/press-release/2020/10/07/covid-19-to-add-as-many-as-150-million-extreme-poor-by-2021>.

³ Hakeem Irfan Rashid, 170 Rohingyas detain in Jammu, *The Economic Times*, March 7th, 2021.

⁴ *State Trading Corporation of India, Ltd. v. The Commercial Tax Officer*, 1964 SCR (4) 89.

⁵ *Anwar v. State of J. & K.*, 1971 (3) SCC 104.

Reasonable Classification. The Supreme Court in the case of *Ram Krishna Dalmia v. Justice S.R Tendulkar*⁶, held and made it well established that article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. Also it is necessary for the reasonable classification to exist in order to achieve equity in society as every law cannot have an standard application to everyone because people are all not the same and equal treatment in unequal circumstances would only increase inequality. Also it needs to be taken into consideration that every administrative decision take by executive body in the nation is with respect to illegal immigrants in question in each case depends upon the variety reasons, empirical data, facts, potential danger to internal security the uber of illegal immigrants involved, disturbances in social fabric of the country or any particular part thereof, possibility of law, and problem arising in the country. So taking into consideration the very nature of such a decision which are to be taken on a case-to-case basis, there cannot be any comparison or claim of discrimination based upon some earlier decision taken with respect to one kind of immigrants with another set of immigrants. India has always been accommodative to refugees and all the refugees who come under the protection of CAA 2019 amendment was for the reason that these group of refugees have historical ties with India and the government took this step in order to heal the wounds of the Partition and other casualties that were cause due to the breaking apart of India. The Influx of Rohingyas has caused a threat to India's national security and the country cannot accommodate all the refugees as India itself has a huge population and the resources are only limited.

One more reason for why this classification is valid is because the article 14 is subject to few classifications in order to achieve equity in the society. This was laid down by the court in the landmark case of *Ram Krishna Dalmia v. Justice S.R Tendolkar*⁷, held that: It is now well established that while article 14 forbids class legislation it does not forbid reasonable classification. Also the court in multiple cases like *Budhan Chaudary v. State of Bihar*⁸ and *Vajravellu v. Special deputy collector of land acquisition*⁹, also have upheld this same view and this doctrine has become a norm in the legislation of the nation.

Now the Government of India has made a classification based on geographical nexus which is a permissible reasonable classification as laid down in the case of *Clarence Paris v Union of India*¹⁰, the Supreme Court held that historical geographical nexus is a reasonable justification

⁶ *Krishna Dalmia v. Justice S.R. Tendolkar*, AIR 1958 SC 538.

⁷ *Krishna Dalmia v. Justice S.R. Tendolkar*, AIR 1958 SC 538.

⁸ *Budhan Chaudhry v. State of Bihar*, AIR 1954 Pat 218.

⁹ *Vajravellu Mudaliar v. Special deputy collector*, AIR 1965 SC 1017.

¹⁰ *3 Clarence Paris v. Union of India*, AIR 2001 SC 1151.

for differential treatment of people from separate geographical regions provided it bears a reason and just relation to the matter in respect of which differential treatment is accorded.

The other refugees that Rohingyas are comparing themselves to like those from Sri Lanka, Bangladesh, and other refugee groups are because these nations populations were formerly a part of India.

The next right being dealt with is the Right to Life under article 21 which reads out “ No person shall be deprived of his life or personal liberty except according to procedure established by law.

The judgement of *Maneka Gandhi v. Union of India*¹¹ laid down a principle of golden triangle through the interpretations of the Supreme Court which said that the article 21, 14 and 19 are linked together and are inalienable. Now in this case the Rohingyas refugees who are contending for the rights under article 21 and 14 eventually end up bringing in the rights under article 19 which is only exclusive to the citizens and thus cannot granted to the refugees as the citizens are the foremost priority and the state has the foremost obligation towards the citizens first. It was clearly established in the case of *Mohammad Salimullah v. Union of India*¹² that the right to not be deported is not ancillary to article 21 but article 19(1)(e).

As established in the case of *Louis De Raedt v. Union of India* that the foreigners also enjoy some fundamental rights under the constitution. The fundamental rights of a foreigner is confined to article 21 for life and liberty but it does not include the right to reside and settle in this country under article 19(1)(e), which is only applicable to the citizens of this country.

Also it is to be noted as stated earlier that India is a country with huge population and is burdened with the limitations caused by availability of the resources which cannot accommodate the influx of the illegal immigrants from all the neighbouring nations and also considering the fact that India has porous borders and are vulnerable as it is has volatile enemy neighbours and which in turn would lead to rise in terrorism in multiple parts of the border states and these Illegal Immigrants are more vulnerable for getting recruited by the terrorist organisations.

The right under article 21 is not absolute and is subject to the provision of procedure established by law. As per the laws of India any foreign national who enters the state without valid documentation must be treated as illegal immigrants and the government is empowered to deal with such immigrants under law.¹³

¹¹ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

¹² *Mohammad Salimullah v. Union of India*, 2021 SCC Online SC 296.

¹³ THE CITIZENSHIP ACT, 1955, § 2(b).

Thus clarifying the stance of state and establishing the constitutionality of the action of state from the aspect of right to equality under article 14 and 21 of the Constitution of India. As per the constitutional scheme, India, as a Sovereign has the first and foremost constitutional duty and obligation towards its and to ensure that demographic social structure of the country is not changed to their detriment due to influx of illegal immigrants into the territory of India and resources of the nation are utilised to fulfil the fundamental rights of the Indian Citizens.

There are a few legislations which empower the state to take such actions in interests of the citizens:

- i) The Passport (Entry into India) Act, 1920: This act empowers the government to make rules regarding persons entering India to be in possession of passports under section 3 of the act¹⁴. This section also empowers the government to prohibit the entry of such person who does not have possession of passport. It also granted powers to the government to remove any person from Indiana who enters without a passport under section 5 of the Passport (Entry into India) Act; 1920¹⁵.
- ii) The Foreigners Act, 1946: The act empowers the government to take such steps as are necessary to prevent illegal immigrants including the use of force under. The concept of ‘burden of proof’ lies with the person and not the authorities, this concept was upheld by the court in the case of Moslem Mondal v. Union of India¹⁶. Under Article 258(1), all the State Administrators of the Union Territories have also been directed to discharge the functions of the Central Government relating to the aforesaid powers. Central Government has issued instructions from time to time to all States & UTs regarding identification of illegal migrants and their deportation from India.¹⁷

It was also held in the case of Hans Muller of Nuremberg v. Supt., Presidency Jail, Calcutta¹⁸, “The Foreigners act confers the power to expel foreigners From India. It vests the Central Government with absolute and unfettered discretion and, as there is no provision fettering this discretion in the Constitution, an unrestricted right to expel remains.” This exclusive and absolute power has enabled governments to exercise a general power to deport individuals without being subjected to even minimal judicial review.

¹⁴ Passport (Entry into India) Act 1920, §3.

¹⁵ Hasan Ali Khan v. State of Rajasthan, 1961 CriLJ 283.

¹⁶ Moslem Mondal v. Union of India, 2010 SCC OnLine Gau 241.

¹⁷ Ministry of Home Affairs, Illegal Influx of People(July 27,2021, 04.49 PM), <https://pib.gov.in/PressReleasePage.aspx?PRID=1739494>.

¹⁸ Hans Muller of Nuremberg v. Supt., Presidency Jail, Calcutta, AIR 1955 SC 367.

In the case of *Mohammad Salimullah v. Union of India*¹⁹, the Supreme court refused to put a stay on the deportation of Rohingya even though such deportation may endanger their life on the rationale that the Rohingyas are subject to the municipal law first and then the international law or norms that are laid down.

III. IS INDIA BOUND BY THE PRINCIPLE OF ‘NON-REFOULMENT’ ?

The big question since the time the deportation of the Rohingyas has been proposed this has been the most debated upon topic and one principle that the persons who are advocating against the deportation of the Rohingyas are relying upon.

Non-Refoulement is principle of international law that provides a refugee or asylum seeker with the right to freedom from expulsion from a territory in which he/she seeks refuge or from forcible return to a country or a territory where he/she faces a threat to life or freedom because of race, religion, nationality, membership in a social group or political opinion.

The most important thing to be taken into consideration is the fact that India is neither a party to the 1951 refugee convention nor to its 1967 Protocol and does not have a national refugee protection framework. Irrespective of this it has always granted asylum to a large number of refugees, recently for sometime now India’s concerns about its security have made its impact on its asylum space in the country and this action is well and valid as the welfare of the citizens and the security of the nation are paramount priority for any nation’s government.

India is not a signatory to the United Nations Convention of 1951. The said Convention/ Protocol is therefore, not binding upon India and no other declaration/ Resolution/Convention/ International treaty or instrument of any kind is in force which prohibits India, as a sovereign state to exercise its right deporting illegal immigrants in accordance with laws of India and thereby protecting the fundamental rights of its own citizens more particularly in the in the interest of national security.²⁰

So any reliance placed upon by the people who advocate on behalf of the Rohingyas on the New York Declaration, 2016²¹, Declaration of Territorial Asylum, Universal Declaration on Human Rights²², etc is misplaced since these Declarations are mere recommendations and aims at

¹⁹ *Mohammad Salimullah v. Union of India*, 2021 SCC Online SC 296.

²⁰ *Id.*

²¹ New York Declaration 2016, A/RES/71/1.

²² The Universal Declaration of Human Rights (UDHR). New York: United Nations General Assembly, 1948.

reminding, reinforcing, and ensuring implementation of obligations specifically assumed under legally binding international instruments by States that become party to them. The obligations of non-refoulement are essentially covered by the provisions of 1951 Refugee Convention²³, to which India is not a party.

Also reliance upon any other Declarations/Resolutions is not only misplaced but does not confer any legal rights upon either the Rohingyas or anyone else which can confer any kind of right to pray for any kind of writ before the Hon'ble Supreme Court under Article 32 of the Constitution²⁴.

Therefore India cannot be compelled to comply with its obligations under Article 51(c)²⁵ of the Constitution of India. Unless it has expressly agreed to comply with the International agreement. Also the courts in India can only refer to the International Conventions and Agreements, as long as they do not conflict with the State Law.²⁶

Also it was ascertained by the court in the case of Ramlila Maidan Incident v. Home Secretary, Union of India²⁷ that the word fundamental is used in two separate senses in our Indian Constitution. When this word is used for rights then it means that these rights are very essential and any law which will violate the fundamental rights will be declared as void, but when this word is used for the duties then it is used in a normative sense as it set certain goals before the state which the state should try to achieve, confirming to the fact that Article 51 is not Justiciable and the State cannot be held to be obligated to give refuge to these illegal immigrants under this article of the constitution and this does not put any obligation of the state towards all the conventions as these International Conventions just are recommendatory in nature and is not binding on any state²⁸

Also, it is to be taken into consideration of the fact that Rohingyas have no constitutional right to stay in India and their deportation would be in consonance with the exercise of the sovereign power vested with the central government and their deportation does not violate international law nor any domestic law.

IV. CONCLUSION

As per the points presented above, laws stated, and Judgements referred to, it is made clear that

²³ United Nation Convention Relating to the status of refugee, 1951.

²⁴ IND.CONST. art 32.

²⁵ IND.CONST. art 51(c).

²⁶ *Supra* note 18.

²⁷ Ramlila Maidan Incident v. Home Secretary, Union of India, (2012) 5 SCC 1.

²⁸ *Id.*

the Union of India is under no constitutional obligation nor it is violating the constitution by deporting the Rohingyas back to their Home Country. As for some country to give shelter and refuge in the first place must prioritise its citizens welfare and safety first. As stated above, there is a risk to safety, and the supply of restricted resources acts as a great deterrent for the Indian Government to give refugee to the Rohingyas; also the recent involvement of the Rohingyas in Terror activities also is a major reason for the Indian Government hesitating from giving these Rohingyas refuge in the country. The Government of India is just fulfilling its duty towards its sovereign within its constitutional limits and as per the laws of the land, and no international nor domestic body or organisation has any rights to stop the Government of India from fulfilling its duties towards its citizens. Thus concluding that India's actions regarding the deportation were in Consonance with the constitution.
