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REFOULING ROHINGYAS: THE SUPREME COURT OF INDIA'S UNEASY ENGAGEMENT WITH INTERNATIONAL LAW

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Abstract: *The complex relationship between international and municipal law has been the bone of significant scholarly contention. In the Indian context, despite a formal commitment to dualism, courts have effected an interpretive shift towards monism by espousing incorporation of international law. The case of Mohammad Salimullah v. Union of India, which involves the issue of deportation of Rohingya refugees from India, represents a challenge in this regard owing to the lack of clarity as to India's obligations under the principle of non-refoulement. The paper uses the Supreme Court's recent interim order in the said case as a case study to examine India's engagement with international law. It argues that the order inadequately examines the role of international law in constitutional interpretation and has the unfortunate effect of 'refouling' Rohingyas by sending them back to a state where they face imminent persecution.*

Keywords: *Rohingyas; Non-Refoulement; Constitution; International Law; Refugees*

INTRODUCTION

The historical divergence amongst jurists on the question of the relationship between international and municipal law led to the emergence of two rival theories, namely, monism and dualism. As per the dualist view, international law does not transform into municipal law until and unless the former is adopted as valid law through the regular mode of lawmaking by the state (Ratnapala 2013, 93). On the other hand, monism views international law as being automatically incorporated into the domestic legal order, with there being no need for additional authorization by the state (Chandra 2017, 27). In the modern context, these theories are regarded as unsatisfactory. (Bogdandy 2008, 400). Rather, "[i]t is actual practice, illustrated by custom and by treaty,

that formulates the role of international law, and not formalistic structures, theoretical deductions or moral stipulations" (Shaw 2017, 97). The role of international law within the municipal legal system is significantly more complicated than that of municipal law in the international sphere (Shaw 2017, 103). For instance, to what extent, if at all, should domestic courts place reliance on international law to interpret the constitution? Regrettably, the role of international law in the realm of Indian constitutional interpretation is "understudied and under-theorized" (Gautam 2019, 29). The Constitution of India refers to the state's engagement with international law "only in the vaguest terms" (Shaw 2017, 130). Whilst India's apex court has formally proclaimed India to be a dualist country, there is a significant divide between theory and practice (Chandra 2017, 44). Thus, the role of international law in domestic constitutional adjudication remains a contested domain.

The case of *Mohammad Salimullah v. Union of India* (2017) (hereinafter: *Mohd. Salimullah*) poses some interesting doctrinal and methodological questions in this regard (Gautam 2019, 32). *Mohd. Salimullah* is a public interest litigation filed before the Supreme Court of India (hereinafter: the Court) seeking to prevent the deportation of 40,000 Rohingya refugees in India. Whilst the principal plea remains pending, the Court passed an interim order, on 8 April 2021, allowing the deportation of Rohingya refugees back to Myanmar so long as "the procedure prescribed for such deportation is followed" (Mohd. Salimullah v. Union of India-Interim Order 2021). This case raised the issue of whether the principle of non-refoulement, which essentially entails that "no refugee should be returned to any country where he or she is likely to face persecution, other ill-treatment or torture" (Goodwin-Gill and McAdam 2007, 201), can be read into the provisions of constitutionally guaranteed fundamental rights. Thus, it presents an opportunity to investigate the Court's application of international law in domestic constitutional adjudication. To that end, Part 2 of the paper provides a conspectus of the Court's jurisprudence concerning the use of international law for constitutional interpretation. Part 3 delves into the principle of non-refoulment and situates it within the international and domestic legal framework. Part 4 embarks on an analysis of the recent interim order in *Mohd. Salimullah*. Part 5 concludes with remarks about the legal status of the principle of non-refoulment in India and its larger implications for India's engagement with international law.

THE SUPREME COURT OF INDIA'S USE OF INTERNATIONAL LAW IN CONSTITUTIONAL INTERPRETATION

The Constitution of India does not delineate the relationship of municipal law in the state with international law (Chandra 2017, 30). Primarily, Articles 51, 246, and 253 of the Constitution of India outline its engagement with international law (Hegde 2013, 70). Article 51 (c) enjoins the state to "foster respect for international law and treaty

obligations". However, Article 51 (c) is one of the Directive Principles of State Policy, which whilst "fundamental in the governance of the country" (Constitution of India, Article 37), is non-justiciable and merely cast a duty on the State to apply them in the process of lawmaking. Thus, the fulfillment of the mandate of Article 51 (c) rests squarely on implementation through legislation (Hegde 2013, 68). Under Article 246, the distribution of legislative power between Parliament and the state legislatures is specified through three lists including the Union List, which falls within the sole purview of Parliament. Entry 14 in the Union List deals with entering into treaties and agreements with foreign countries and implementation of such treaties, conventions, and agreements. Article 253 of the Constitution provides for such implementation by endowing Parliament with the power to make laws for the whole or any part of India for the implementation of any treaty, agreement, or convention as well as decisions made at international conferences, associations, or other bodies whereas Article 73 of the Constitution provides that "the powers of the Union Executive are co-terminus with those of Parliament" (Chandra 2017, 32). A joint reading of Articles 253 and 73 of the Constitution recognizes treaty-making as an executive function (Hegde 2013, 70). That said, a treaty entered into by the executive does not transform into municipal law and cannot be implemented unless Parliament enacts a law under Article 253 (*State of West Bengal v. Kesoram Industries Ltd.* 2005). Therefore, from a textual perspective, treaty law is not applicable in India in the absence of appropriate domestic legislation to that effect (Chandra 2017, 33). However, in actual practice, the constitutional courts have incorporated and internalized several norms of international law (Rajamani 2016, 145). It has been argued that, over the years, the Court has effected a shift from 'transformation' towards 'incorporation', i.e. from a dualist to a monist position (Chandra 2017, 40).

In the case of *In Re: Berubari Union and Exchange of Enclaves* (1960), the Court held that the treaty-making power of the executive must be exercised by what the Constitution contemplates and subject to the limitations imposed by it. Subsequently, in *Maganbhailshwarbhai Patel v. Union of India* (1970), the Court noted that legislation giving effect to treaty obligations is necessitated in cases where the treaty operates to restrict justiciable rights or modifies municipal law. The Court adhered to this "transformation doctrine framework" until its judgment in *Gramophone Company of India v. Birendra Bahadur Pandey* (1984) (*Gramophone Company*), wherein it recognized the doctrine of incorporation by holding that the rules of international law are incorporated into the domestic legal framework unless they conflict with an Act of Parliament (Hegde 2013, 72). Thus, owing to *Gramophone Company*, "[i]nternational law move[d] from being inapplicable unless legislatively internalized to being applicable unless legislatively resisted" (Chandra 2017, 41). Subsequently, in *Vishaka v. State of Rajasthan* (1997), it was held that international conventions and norms are to be read into the provisions of fundamental rights of the Constitution of India, in case of a void in the domestic legal framework, provided there is no inconsistency between them.

This judgment forms part of a larger trend in common law jurisdictions, referred to as 'creeping monism', whereby judges utilize unincorporated human rights treaties to interpret domestic law (Rajamani 2016, 148). Subsequently, in *Shatrughan Chauhan v. Union of India* (2014), the Court relied on the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) and held that international covenants to which India is a party form a part of the domestic legal framework unless they conflict with a specific law in force. Concerning customary international law, in *Vellore Citizens Welfare Forum v. Union of India* (1996), the Court held that once a principle is accepted as being a part of customary international law, there would be no difficulty in accepting the same as a part of municipal law. Thus, despite categorically stating that "India follows the doctrine of dualism and not monism" in *Bhavesh Jayanti Lakhani v. State of Maharashtra* (2009), the Court has displayed a shift from dualism to monism (Chandra 2017, 44).

NON-REFOULMENT AND INDIA

The principle of non-refoulement finds articulation in Article 33 of the Convention Relating to the Status of Refugees, 1951 (hereinafter: the Refugee Convention, 1951). Vide Article 1 of the Refugee Convention, 1951, Article 33 applied only to individuals affected by events occurring in Europe before 1 January 1951. Subsequently, Article 1 of the Protocol Relating to the Status of Refugees, 1967 (hereinafter: the Refugee Protocol, 1967) abolished these temporal and geographical limitations for almost all signatory states (Hathaway 2005, 97). However, India is not a signatory to either of these instruments. India also does not have a domestic law or policy dealing with the status of refugees on Indian soil, with there being no official definition of refugee despite the existence of numerous legislations regulating migrants such as the Passport Act, 1967, the Foreigners Act, 1946, and the Foreigners Order, 1948 (Patnaik and Siddiqui 2018, 4). Thus, recourse must be had to human rights treaties and customary international law.

Article 14 of the UDHR provides that all individuals have the right to seek and enjoy asylum from persecution. Article 6 of the ICCPR protects the right to life whereas Article 7 provides for the right against torture. Article 3 of the Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment, 1997 (hereinafter: CAT) states that no person shall be expelled, returned, or extradited to a state where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. Article 16 of the International Convention on Protection of All Persons Against Enforced Disappearance (ICPPED) states that no person shall be, *inter alia*, returned (refouled) to a state where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.

Of these, India has ratified the UDHR and the ICCPR whereas it is a signatory to the CAT and ICPPED. Concerning Article 14 of the UDHR, it has been argued that (i) the same deals with the right to enjoy asylum and not the right to be granted asylum, and (ii) the drafting history of the provision does not provide for a principle akin to non-refoulement (Gautam 2019, 50). Nonetheless, Article 7 of the ICCPR has been interpreted as casting an implied prohibition on refoulement (Goodwin-Gill and McAdam 2007, 209). The relevant provisions of the ICPPED and CAT also create a qualified duty of non-refoulement that is contingent upon the existence of substantial grounds for believing that the person would be subject to enforced disappearance and torture, respectively. It has been argued that the drafting history of the ICPPED and the CAT reveals that the relevant provisions thereof place reliance upon Article 33 of the Refugee Convention, 1951 and that India's non-signing of the same may be taken as an implied reservation to every non-refoulement provision in every international instrument after the Refugee Convention, 1951 (Gautam 2019, 50-51). However, whilst approaching the issue of implied reservations, it is pertinent to note that Article 23 (1) of the Vienna Convention on the Law of Treaties states that a reservation, an express acceptance thereof, and an objection thereto must be formulated in writing and communicated to the contracting states and other States entitled to become parties to the treaty.

In the *North Sea Continental Shelf* Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) (1969), for determining the existence of a rule of customary international law, the International Court of Justice stressed the existence of "extensive and virtually uniform" state practice coupled with "a general obligation that a rule of law or legal obligation is involved", i.e. *opinio juris*. The principle of non-refoulement first appeared in an international instrument in Article 3 of the Convention relating to the International Status of Refugees, 1933 (Goodwin-Gill and McAdams 2007, 202). Subsequent years witnessed the adoption of the Provisional Arrangement concerning the Status of Refugees coming from Germany, 1936, and the Convention concerning the Status of Refugees coming from Germany, 1938. The former was signed by seven states and the latter was ratified only by three states (Goodwin-Gill and McAdams 2007, 202). The Refugee Convention, 1951, was "a revision and consolidation of previous international agreements relating to the status of refugees" (Labman 2010, 2). Arguably, the scant ratification of the previous international instruments implies that non-refoulement was not a pre-existing principle of customary international law before 1951 and that the principle was codified and "elevated to the status of an obligatory norm" by the Refugee Convention, 1951 (Gautam 2019, 61). If this view were to be accepted, then the temporal and geographical limitations of the Refugee Convention, 1951 must be considered and the Refugee Protocol, 1967 may instead need to be viewed as the starting point of the universalization of the principle of non-refoulement. It is worth noting that "when a treaty-based norm stipulates a broadly

embraced sense of obligation and general practice among states in general (in particular, among non-party states), a cognate customary international legal obligation emerges" (Hathaway 2005, 365). In this regard, it becomes relevant that the Refugee Protocol, 1967 was followed by subsequent human rights instruments, i.e. the ICCPR, the ICPPED, the CAT, etc. embodying the principle of non-refoulement. As of February 2003, taking into account the Refugee Convention, 1951, the Refugee Protocol, 1967, the CAT, the ICCPR, and other instruments including regional conventions, 170 of the-then 189 United Nations (UN) Member States were party to at least one or more conventions that embodied non-refoulement as an essential component (Lauterpacht and Bethlehem 2003, 147). Furthermore, of the remaining nineteen Member States, seven were members of the UN when the Declaration on Territorial Asylum was unanimously adopted by the UN General Assembly on 14 December 1967 whereas there was found to be no suggestion of opposition to the principle from the other twelve Member States (Lauterpacht and Bethlehem 2003, 147). The same does lend support for the existence of non-refoulement as a rule of customary international law.

Scholarly opinion on the issue is still divided, with there being arguments against non-refoulement being considered a part of customary international law on the grounds, *inter alia*, that: (i) refoulement remains a stark reality for refugees across the world, (ii) merely because "most states have accepted some kind of non-refoulement obligation, applying in at least some cases and contexts, it cannot concluded that there is a universally applicable duty of non-refoulement owed to refugees by all states, and (iii) the nature of duties of non-refoulement being variable, there is no basis for a common *opinio juris* (Hathaway 2005, 363-365). Regardless, a robust case can be made for non-refoulement constituting a norm of customary international law, and the same warrants scrutiny by the Supreme Court of India when considering the issue of deportation of Rohingya refugees.

THE ROHINGYA CRISIS AND THE SUPREME COURT'S INTERIM ORDER IN *MOHD. SALIMULLAH*

A violent crackdown by Myanmar's army compelled hundreds of thousands of Rohingyas, a Muslim ethnic minority, to flee their homeland and cross the border into Bangladesh in 2017 (BBC 2020). Whilst the majority of Rohingyas have not made it past Bangladesh, there are 40,000 Rohingya refugees in India (Gibbens 2017). In response to the exodus, the Government of India issued an order directing state governments to "sensitize all the law enforcement and intelligence agencies for taking prompt steps in identifying the illegal immigrants and initiate the deportation processes expeditiously and without delay" (Government of India, Ministry of Home Affairs, Letter to Chief Secretaries: Identification of illegal immigrants and monitoring thereof 2017). Mr. Kiren Rijiju, the Minister of State for Home Affairs stated that as far as the Indian government

was concerned, the Rohingyas were illegal immigrants with no basis to live in India and that any illegal immigrant would be deported. Furthermore, in response to the United Nations High Commissioner for Refugees issuing identity cards to 16,500 Rohingyas, Mr. Rijiju stated that whilst the government cannot stop the Rohingyas from registering, India was not a signatory to the Refugee Convention, 1951 (Reuters 2017). This stance of the Government of India prompted the filing of the writ petition in *Mohd. Salimullah*, with the principal challenge still pending adjudication (Parthasarathy 2021).

The petitioners' case was that the proposed deportation would: (i) constitute a violation of the right to equality under Article 14 and the right to life and personal liberty under Article 21, read with Article 51 (c), and (ii) amount to a breach of India's obligations under international law, specifically those of the principle of non-refoulement (Brief for the petitioners, *Mohd. Salimullah* 2017). The state sought to defend its decision on three grounds: (i) the subject matter of the petition lying primarily in the executive domain, (ii) the state possessing intelligence suggesting links between several Rohingya immigrants and terror or extremist organizations, and (iii) India not being a signatory to the Refugee Convention, 1951 or Refugee Protocol, 1967 (Gautam 2019, 31-32).

On 6 March 2021, the Jammu and Kashmir police detained around 170 Rohingyas in preparation for their deportation to Myanmar (Nair 2021), prompting the filing of an interim application on 11 March 2021 in *Mohd. Salimullah* (Press Trust of India 2021). On 8 April 2021, the Court allowed the deportation of the Rohingyas detained in Jammu subject to the procedure prescribed for the same being followed (*Mohd. Salimullah*, para 15).In its order, the Court, whilst considering whether Article 51 (c) of the Constitution of India could be invoked in case India is not a signatory to or has not ratified a treaty or convention, asserted that "there is no doubt that the National Courts can draw inspiration from International Conventions/Treaties, so long as they are not in conflict with the municipal law" (*Mohd. Salimullah*, para 12). However, concerning the situation in Myanmar, the Court stated that it could not "comment upon something happening in another country" (*Mohd. Salimullah*, para 12). Whilst accepting that the rights under Articles 14 and 21 were available to non-citizens, the Court held that right to not be deported fell under the ambit of the right to reside or settle in any part of the territory of India under Article 19 (1) (e) (*Mohd. Salimullah*, para 13). The Court went on to take note of "two serious allegations" made by the state in its reply, namely, that there was a threat to the internal security of the country and that agents and touts were engaged in the activity of providing safe passage into India to illegal immigrants owing to "the porous nature of the landed borders" (*Mohd. Salimullah*, para 14). The Court also noted that it had previously dismissed an application seeking similar relief in respect of Rohingyas detained in Assam (*Mohd. Salimullah*, para 14). Furthermore, the Court refused to allow the senior counsel representing the Special Rapporteur appointed by the United Nations Human Rights Council (UNHRC) to make submissions by simply

noting that "serious objections were raised to his intervention" (*Mohd. Salimullah*, para 3). Despite stating that municipal courts may draw inspiration from treaties provided they do not conflict with municipal law, the Court did not engage with the international instruments relied on by the petitioners to make a case for the existence of an international obligation towards non-refoulement, leaving this strand of the petitioners' argument in abeyance (Bhatia 2021). Although adjudicating contentions about non-refoulement would necessarily require the Court to assess the state of affairs in the country of proposed deportation, it refused to "comment upon something happening in another country", thereby rendering the very principle of non-refoulement nugatory (Nair 2021). By holding that the right to not be deported was subsumed within Article 19 (1) (e), which is available only to citizens, the Court did not take into account the interrelationship between Articles 14, 19, and 21 (Bhatia 2021), and its jurisprudence that "the expression 'personal liberty' in Article 21 covers a variety of rights, some of which 'has been raised to the status of distinct fundamental rights' and given additional protection under Article 19" (Justice K.S. Puttuswamy (Retd.) v. Union of India 2018, para 23).

Furthermore, the Court also failed to deal with the judgments of the Gujarat High Court in *Ktaer Abbas Habib Al Qutafi v. Union of India* (1999) and the Delhi High Court in *Dongh Lian Kham v. Union of India* (2016), both of which had held the principle of non-refoulement to be inherent with the constitutional guarantee of life and personal liberty under Article 21. Concerning the allegations made by the Union of India, the Court brought the same within the operative part of the judgment without analyzing the same to any extent (Bhatia, 2021).

The Court's order did not satisfactorily engage with the issue of international law as an aid to constitutional interpretation. The Court neither surveyed nor reiterated its pre-existing jurisprudence in this regard. It only addressed the use of treaties that India may not be a signatory to as sources from which the domestic courts may draw inspiration. The said analysis was not taken to its logical conclusion as the order is silent on whether the court can read the obligation of non-refoulement as codified in the Refugee Convention, 1951 and the Refugee Protocol, 1967 into the fundamental rights guaranteed under Articles 14 and 21. It abandoned its previous monist leanings by not engaging with the international obligations enshrined in the relevant provisions of the ICCPR, the CAT, and the ICPPED. Furthermore, the order did not examine the incorporation of norms of customary international law, and the issue of whether the principle of non-refoulement can reasonably be said to constitute a rule of customary international law; something that has been categorically contended by the petitioners (Brief for the petitioners, *Mohd. Salimullah* (2017). As such, it may be said that the order suffers from an inadequate engagement with international law that constitutes a divergence from the Court's trajectory in this regard.

CONCLUSION

The Constitution of India, despite being the longest written constitution in the world, provides limited guidance as to the complex relationship between international and municipal law. Formally, India is a dualist state that endorses transformation rather than an incorporation of the norms of international law. However, in a striking example of 'creeping monism', the judiciary has increasingly stressed the applicability of norms of international law, be they conventional or customary, provided they do not conflict with municipal law. Gautam (2019) had suggested that *Mohd. Salimullah* presented several doctrinal and methodological questions concerning the role of international law in domestic constitutional adjudication.

Unfortunately, the Court's interim order, in this case, falls short of these expectations as the Court does not fully engage with either India's obligations towards the principle of non-refoulement or its incorporation into the domestic legal framework. Instead, what is seen is a judgment that not only fails to address the petitioners' contentions but has the regrettable effect of negating the very principle of non-refoulement by sending the Rohingyas back to the state of persecution.

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