

ROHINGYA AND BANGLADESH CONSTITUTION: CONSTITUTIONAL OBLIGATION TO PROTECT REFUGEES

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Introduction

S. Islam¹ observed that ‘*national legal frameworks have been and can be adapted and applied to recognize and grant refugee rights in the absence of formalized international or regional refugee protection frameworks.*’ This paper considers in detail how the needed protections for Rohingya refugees already exist in the domestic constitutional law framework of Bangladesh and argues that they ought to be used by the Rohingya as well as those who seek to assist them. What is substantially missing is the awareness of this possible application of the constitutional rights of Rohingya as residents, even though not as citizens of Bangladesh, and the financial resources to use the Bangladesh court system, which no Rohingya refugee from the genocide attempted in 2017 has tried to do.

Bangladesh, which has not signed the 1951 Convention on Refugees, should have given the Rohingya their constitutional rights under its own law.² At times, and in some piece-meal ways, it has done so. Laying aside the legal obligations, no one can deny the generosity of the Bangladeshi Government, which is itself struggling to develop their own least-developed nation with massive problems of poverty and ill health. It has provided refuge, rations and basic services to almost 1,000,000 Rohingya who have fled across the border from Myanmar in 2017, carrying little more than their children. The

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¹ S Islam, C Schupfer, Z Hydari, A Zetes and K Cole, “The Peril and Potential of Ambiguity” (2021) 22 *Asia-Pacific Journal on Human Rights and the Law* 7.

² Convention relating to the Status of Refugees, April. 22 1954, (1954) 189 UNTS 137.

Bangladeshi Government has done this without any legal obligation to protect the refugees.

Though Bangladesh is not legally bound to protect refugee under international law, it still is constitutionally obliged to protect human rights of people who are residing in its territory temporarily.

This article will argue that as a non-citizen resident group; Rohingya refugee's human rights can be better protected by Constitution of Bangladesh without having the need to apply international refugee laws.

I am certain that the Bangladeshi Supreme Court would say that Bangladesh must follow its own laws and Constitution when dealing with everyone. The Rohingya at least have the right to that formal standard of protection, without question.

Literature Review

Several international organizations and academics have written on the Rohingya crisis. It is a burning issue in international politics. UNHCR has been playing a key role in mitigating the problem. They have documented many Rohingya issues. Although many articles have been published on Rohingya issues, there has been a lack of research on the constitutional rights in Bangladesh and their implications for Rohingya as residents.

Most of the writing has been focused on the rights of Rohingya as refugees under Public International Law. There have been a few exceptions to this trend. Islam looked at applicable legislation in Bangladesh which set out rights and obligations applicable to Rohingya, including the Constitution, Criminal Law and Civil Law, referring to some relevant court decisions.³ He argued for a specific

³ See, Shawkatul Islam, Refugee Dilemma in Bangladesh (2015)

law to be written on this subject as, right now, there is no law at all referring to refugees in Bangladesh. Mohammad merely listed the Constitutional provisions that might apply to Rohingya without much discussion of the content of those rights as I do here.⁴

Bangladesh's judiciary has not yet directly dealt with the Rohingya's constitutional rights. In the past, the apex court of Bangladesh has guaranteed the citizenship of Urdu-speaking residents in Bangladesh, essentially Pakistani settlers who remained in Bangladesh after independence from Pakistan.⁵ The court has not, however, addressed the rights of Rohingya in a comprehensive way, except to decide that customary international law can apply in Bangladesh if it is not contradicted by domestic law or the Constitution.⁶

Gorlick reported that while there is action on the Rohingya crisis on many fronts, including by the Government of Bangladesh and Non-Government Organizations (NGOs), new ideas and options are very much needed.⁷ UNDP has published detailed accounts of the impact of the Rohingya influx on poverty, social cohesion and social safety nets in southeastern Bangladesh.⁸

https://www.academia.edu/20079961/Refugee_dilemma_in_Bangladesh_searching_for_a_specific_legislation

⁴ See, Nour Mohammad, *Refugee Protection Under The Bangladesh Constitution: A Brief Review* at https://www.mcrg.ac.in/rw%20files/RW39_40/12.pdf

⁵ *Abid Khan (& Others) v. Government of Bangladesh (& Others)* [2003] 55 DLR(HCD) 318.

⁶ M Sanjeeb Hossain, *Bangladesh's Judicial Encounter with The 1951 Refugee Convention* [July 2021] *Forced Migration Review* 67.

⁷ Brian Gorlick, *Rohingya Refugee Crisis: Rethinking Solution And Accountability*, 2019, University of Oxford RSC Working Paper Series 131 <https://www.rsc.ox.ac.uk/publications/the-rohingya-refugee-crisis-rethinking-solutions-and-accountability>.

⁸ *Impacts of Rohingya Refugee Influx in Host Community*. 2018, UNDP, at www.undp.org.

UNHCR in Bangladesh is working to protect the refugee rights of Rohingya. UNCHR provides refugee identification cards for Rohingya, which Bangladesh authorities accept. UNCHR seeks to assure basic services in the Rohingya refugee camps by working with the Bangladesh officials. UNCHR periodically publishes reports on Rohingya issues, which focus on the real condition of the Rohingya community.

The literature on Rohingyas places a lot of emphasis on describing their plight, but there is a pervasive feeling that new options are needed. The situation now is acceptable to almost only the Myanmar military. There has been almost no discussion of the option of using the Bangladesh court system to enforce the Constitutional rights of Rohingya as residents of Bangladesh, so as to improve their conditions until the question of where they will live permanently has been resolved. My motivation for writing this article is to outline some of the possibilities in this direction.

Human Rights and the Bangladesh Constitution

Bangladesh's Constitution gives certain human rights to its citizens and, in some cases to non-citizens present in Bangladesh. Rohingya, who have fled from Myanmar to Bangladesh as refugees from an attempted genocide, can access those rights which are categorically provided for non-citizens who are present in Bangladesh.

Human beings have some rights merely because they are humans. International human rights agreements like the Universal Declaration on Human Rights, 1948 (UDHR), the International Covenant on Civil and Political Rights, 1966 (ICCPR) and the International Covenant on Economic, Social and Political Rights, 1966 (ICESCR) are the three main international instruments that guarantee some basic rights to humans, irrespective to their legal status and

location. Bangladesh's Constitution has also provided those rights, as "fundamental rights". Some of the fundamental rights can be availed by both citizens and non-citizens of the country. These rights are the subject of this paper.

Rights to Protection of Law and to Life

These rights arise under the Constitution of the People's Republic of Bangladesh, Articles 31-32, which state:

Article 31. Right to protection of law.

"To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, *and of every other person for the time being within Bangladesh*, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law." [*emphasis added*]

Article 32. Protection of right to life and personal liberty.

"*No person* shall be deprived of life or personal liberty save in accordance with law." [*emphasis added*]

The emphases added in the above quotations demonstrates that these rights apply not only to citizens but to any person in Bangladesh. As the Rohingya are people in Bangladesh, these rights apply to them too. According to the Bangladesh Constitution as quoted above, the Rohingya community must be treated according to law, with no detrimental action against any Rohingya's life, body, liberty, reputation or property, except as provided by law. Only detrimental action provided by law may be applied to them, as a penalty, after due process in a fair trial which proves them guilty of an offence against applicable law beyond reasonable doubt. This is

obviously a high standard which gives anyone in Bangladesh, including Rohingya, significant protection from detrimental action by agents of the State.

All three of these rights, to the protection of law, to life and to personal liberty, are basic and inalienable rights for human beings. These are the basic requirements for a civilized State which upholds the rule of law and good governance. At least the life of the resident must be allowed to continue, and he/she must not be physically, socially or mentally interfered with except as a penalty provided by law.

These rights in the Bangladesh Constitution are also like those in the American Constitution, which grants the right to due process of law to every person present in the country⁹. The cardinal rule is that every action of the State which adversely affects a person should be permitted by a rule of law, whether Constitutional, Statutory or Juridical. If it is not so permitted, it is illegitimate and prohibited as an abuse of the State's power. This also relates to the customary international law of non-refoulement, which is one of the few legal rights that the Bangladesh courts have recognized in respect of Rohingya.¹⁰ The concept of non-refoulement means that no person shall be delivered to a country where there is a reasonable likelihood of that person being killed or tortured. Moreover, the State has a Constitutional obligation to do positive acts, or to refrain from acts, to save the life of any citizen as well as any non-citizen present in the country.

The Supreme Court of Bangladesh has explained that the constitutional right to life is something more than the right to an animal-like existence¹¹. It means having rights and access to all other

⁹ Constitution of the United States of America, Amendment 14 (1868).

¹⁰ (n. 9).

¹¹ Dr. Mohammad Mohiuddin Faruque v. Bangladesh (1996) 48 DLR 433,434 (AD).

humane facilities which ensure a dignified and meaningful life to a human being. To ensure the right to life, one should have access to proper health security, opportunity for livelihood and the necessities of life. Enjoyment of one's culture and protection of one's environment is also a part of the right to enjoyment of a human life, according to Islam¹². In other words, the State should ensure all necessary elements for life at the standard of an ordinary human being.

Implementation of the 'Right to Life' of Rohingya by Bangladesh

Bangladesh has given shelter to the displaced people of Myanmar. Rohingya were floating in the Bay of Bengal for want of shelter and wading across the River into some of the most wild, isolated and impenetrable places in Bangladesh. These are locations where agriculture even for the tribal peoples who live there is difficult and furthermore dangerous animals, snakes and insects abound. Bangladesh's Government decided to shelter them, and they are providing Rohingya's with their basic needs, including food, in collaboration with national and international organizations. Bangladesh has taken positive responsibility to save the lives of the Rohingya community. To this extent, the People's Republic of Bangladesh has given the Rohingya refugees their constitutional right to life.

However, in some cases, the Bangladesh Government action was detrimental to the lives of Rohingya people, thus failing to give them their constitutional right to life in a substantive manner. Bangladesh authorities have sometimes refused to give shelter to Rohingya. Human rights groups had to lobby with the Bangladesh

¹² Islam, Mahamudul, *Constitutional Law of Bangladesh* (2d ed, 2009), Dhaka, p. 188.

Government to ensure the safety of Rohingya floating at sea in early 2020 and not to push them back into the sea¹³.

Bangladesh is constitutionally obliged to save the lives of Rohingya who are floating within the maritime boundaries of the country under Article 31 and 32 of the Constitution, which assures the right to protection of law to a person “wherever he may be”. Certainly, to push a destitute person back on to the sea in an unsafe, makeshift craft would be an action “detrimental to life” even by a common definition, let alone a legal one.

The human rights groups could have brought a Writ Petition to the High Court, on behalf of the Rohingya on the sea, asking for an interim order to the Government to bring the petitioners to safety and give them emergency care – food, shelter, medicine - as needed. Article 25 of the Constitution has given responsibility to the State to respect international law and policy. The courts may issue orders to do so where the Government have not done so¹⁴.

A study by the Asia Foundation documents the low quality of life of Rohingya refugees in Bangladesh camps.¹⁵ They have often lost all their assets and then become deeply indebted while trying to support the surviving members of their families left behind in Myanmar. Bangladesh provides a place to sleep, sometimes hut-building materials, food and medical care: but denies the right to earn income, to leave the camp, and does not provide access to telecommunication and internet facilities, education for children, etc. In recent years, Bangladesh has transported large numbers of Rohingya

¹³ Human Rights Watch, Bangladesh: Rohingya Refugees Stranded at Sea (April 25, 2020).

¹⁴ *Professor Nurul Islam v. Government of the People's Republic of Bangladesh* (2000) 52 DLR 413 (High Court of Bangladesh).

¹⁵ https://asiafoundation.org/wp-content/uploads/2020/05/X-Border_Securing-Livelihoods-and-Agency-for-Rohingya-Refugees-in-Bangladesh_Brief.pdf Accessed on 26th May, 2021.

from mainland camps to isolated small islands in the sea, with no modern facilities. These smaller camps became centers of disease during the coronavirus pandemic. Rohingya living in camps are far from enjoying the total benefit of the right to life guaranteed by the Constitution. The most that they are getting is a right to sojourn and a right to breathe. If all the facts were properly presented to the Supreme Court, the court would likely conclude that the Rohingya are not getting their 'right to life' guaranteed by the Constitution. They live in unhealthy, filthy camps. They lack proper sanitation and adequate medical facilities. So, they suffer from various diseases and malnutrition. The World Health Organization (WHO) has reported a serious health crisis among Rohingya.¹⁶

Desperate for income, Rohingya men, women and children have been found begging in the streets illegally as far away as Chottogram, Dhaka and Rajshahi, in Bangladesh. Unable to work lawfully or have a business, persons from the Rohingya community become involved in drug dealing and other kinds of crime, such as burglary and robbery, which sometimes leads to murder. As for action detrimental to liberty, the Rohingya are confined in camps under 24-hour surveillance by law enforcement. They are not free to go anywhere: any movement outside the camp is prohibited and leaves them liable to arrest.

The Bangladesh Constitution requires far more for the Rohingya than the picture presented here. Yet the Constitution does not enforce itself. People must bring lack of compliance to the attention of the courts in Dhaka so that they can order remedies. That is what has been missing.

¹⁶ <https://www.who.int/bangladesh/emergencies/Rohingyacrisis> accessed on 30th May 2021.

Right to fair trial and access to justice:

Bangladesh is an ex-British colony. It follows the British common law system. So, most of the laws and legal system have been derived from the British system. According to the criminal law, an accused must be given a fair opportunity to defend himself at trial against any accusation of criminal conduct made against him/her. This is also as per the principles of “natural justice” recognized across common law jurisdictions ¹⁷. Thus, no one can be arbitrarily arrested or detained, and this principle is enshrined in the Constitution as well, in Article 33, below.

33. Safeguards as to arrest and detention.

- (1) *No person* who is arrested shall be detained in custody without being informed, as soon as may be of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice. [*Emphasis added*]
- (2) *Every person* who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate. [*Emphasis added*]

Again, emphasis is added to show that the right applies to all persons, including Rohingya and not only to citizens of Bangladesh.

Rohingya and other Stateless people have rights against arbitrary arrest and unlawful detention by any authority in Bangladesh,

¹⁷ *Abdul Latif Mirza v. Bangladesh* (1979) 31 DLR (AD) 33 (Supreme Court of Bangladesh, Appellate Division).

simply because they are people. Furthermore, Article 35 of the Constitution requires that the accused shall have access to a speedy trial and not languish for years on remand. An accused shall not be tried under a law which did not exist at the time of the alleged crime, and one shall not be tried twice for the same allegation. Moreover, the accused shall not be punished in a cruel manner. According to Article 44 of the Constitution, any person, including a Rohingya present in Bangladesh can go to court, even up to the apex court, to enforce his constitutional rights if they are violated. Again, the rights are broad, and the standard is high. The remedies are available to Rohingya. Yet they have never been used.

Implementation of right to fair trial and access to justice:

Arbitrary arrest and detention by law enforcing agencies is an endemic problem in Bangladesh,¹⁸ to which Rohingya refugees, having no social networks or legal status in the country, are especially vulnerable¹⁹. The High Court bar, who could bring these cases to the court for relief. The High Court bar have a monopoly on representation for constitutional Writ Petition cases and, while the Rohingya have the right to defend themselves, they know nothing of the legal system. Also, the language of the High Court documents, and some of the oral arguments, is English.

The UNHCR, in collaboration with BLAST, a non-government organisation of lawyers in Bangladesh, has taken some projects in this regard so that victims can get access to justice in informal and formal justice systems. However, UNHCR and BLAST have never tried to pay the legal fees for High Court representation of

¹⁸ Al-Faruque, A. and Bari, H.M.F., "Arbitrary Arrest and Detention in Bangladesh" (2019) 19(2) Australian Journal of Asian Law Art. 10: 1-11.

¹⁹ See Access to Justice for Rohingya and Host Community in Cox's Bazaar, International Rescue Committee, 2009.

Rohingya to enforce their constitutional rights, which has the best chance of success. Unlike the informal system, the High Court can issue mandatory orders on the Government and jail those who do not follow such orders for contempt. Their decisions are also precedent for all other courts and legal processes.

Bangladesh's Government have appointed some Executive Magistrates in the Rohingya camps who deal with offences covered by the Mobile Court Act, 2009 inside the camps. The Executive Magistrates deal with petty offences in the camp. However, usually the only persons present are the accused, the magistrate and the police. Usually no one is there to represent the interests of the accused. Thus, the accused is almost always convicted. This is true as much for Bangladeshi citizens as for Rohingya, despite the best efforts of the magistrates to give the accused a fair trial.

Rohingya who are not registered by the UNHCR as refugees are considered by the police to be illegal immigrants and prosecuted. They are often kept in jail even after completing their term of imprisonment, as they have nowhere to go²⁰. Myanmar also does not consider Rohingya citizens so they have no right to return there and would not be safe there if returned.

Prohibition against forced labor:

Any sort of forced labor is prohibited in Bangladesh, under Article 35 of the Constitution. But the United Nations has reported that at least 30 Rohingya girls were victims of forced labor in the fish processing sector and as domestic helpers²¹.

²⁰ *Refugee and Migratory Movements Research Unit (RMMRU) v Government of Bangladesh*, Writ Petition no. 10504 of 2016, Bangladesh: Supreme Court, 31 May 2017.

²¹ 'Un Says Rohingya Refugee Girls Are Being Sold into Forced Labour in Bangladesh' (The Indian Express, 17 October 2018) <https://indianexpress.com/article/world/un-says-rohingya-refugee-girls-are-being-sold-into-forced-labour-in-bangladesh-5406121/>.

Conclusion

Bangladesh is not a signatory to the UN Convention on Refugees, 1951 but it has voluntarily given some protection to non-citizens in its Constitution. Bangladesh can assure constitutional rights of the Rohingya. Therefore, it is recommended:

- (1) to set up an independent committee of constitutional law and human rights experts to observe the compliance of Bangladesh State authorities with the constitutional rights of Rohingya. The committee should periodically make public reports about the State's compliance with the Bangladesh Constitution in dealing with Rohingya individuals and the Rohingya community.
- (2) that the international donor countries and non-government organizations working with Rohingya, including BLAST, routinely instruct and pay High Court advocates to bring Writ Petitions on behalf of Rohingya whose constitutional rights have not been given effect. While this is expensive in Bangladeshi terms, it is well within the means of international donors and non-governmental organizations, who should also consider subsidizing Bangladeshi governmental and non-governmental organizations to take legal action.
- (3) that international donor organization should financially support Bangladesh Government to implement court order and constitutional obligation.

Though Bangladesh or its Constitution cannot permanently solve Rohingya refugee issues, its constitutional obligation can safeguard the basic rights of Rohingya for the time-being.