



# Scoping a better strategy for Rohingya litigation

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ON 4 October 2018, a bench comprising Chief Justice of India Ranjan Gogoi and Justices S.K. Kaul and K.M. Joseph dismissed an application to restrain the Government from taking steps to deport to Myanmar seven Rohingya refugees jailed in Assam. The bench refused to intervene in a plea made by Mohammed Salimullah, speaking through advocate Prashant Bhushan, that a United Nations officer must be allowed to first talk to these seven Rohingyas. The UN Secretary General António Guterres was in town that day. And Justice Gogoi is the first ever Chief Justice from Assam.

Regardless, the Supreme Court's approval of India's deportation of the seven Rohingyas presents, both, despair as well as hope. The deportation brings despair to some 40,000 Rohingyas now lodged in India in states other than Assam. There is hope in that the October 4, 2018 ruling is not binding on Rohingya stationed in states other than Assam. Arguably, the deportation from Assam is a special case in light of the Indian Constitution, the Assam Accord and the Indian Citizenship Act Article 6(A). Many Rohingyas are settled in Jammu.

### Assam as a special case

Assam is a special case under Indian laws. In the Assam Mahasangha case, Justice Nariman began noted the history of Assam's annexation during the British rule. First, the Burmese "ceded Assam to the British on 24th February, 1826 as per the treaty of Yandabo". Subsequently, "the British annexed Assam and placed it as an administrative

unit of the Bengal Province."

The Government of India Act, 1935, made Assam under section 46(1) "a Governor's province". The Foreigners Act of 1946 put the burden of proving whether a person is or is not a foreigner upon such persons. Four years later, the Constitution of India, 1950, Article 5 stated "every person who has his domicile in the territory of India and who was either born in the territory of India; or either of whose parents were born in the territory of India; or who has been ordinarily resident in the territory of India for not less than 5 years immediately preceding" the adoption of the constitution "shall be a citizen of India".

Specifically, the Immigrants (Expulsion from Assam) Act, 1950, sought protect the "indigenous inhabitants of Assam". The statement of objects and reasons of this Act noted "a serious situation arising from the immigration of a very large number of "East Bengal residents into Assam." Given, such large migration impacted "the economy of the province, besides giving rise to a serious law and order problem, the Expulsion from Assam Act conferred "necessary powers on the Central Government to deal with the situation."

Only the next year, during the census of 1951, a National Register of Citizens was prepared under a directive of the Ministry of Home Affairs. The NRC sought to contain information village-wise. The Bangladesh War of independence of 1971 pushed more people into Assam. New Delhi and Dhaka signed on 19th March, 1972, a treaty for friendship, co-operation and peace. Article 8 of the Indo-Bangla Treaty put a clear premium on a

"security" narrative.

The influx of illegal persons continued unabated nevertheless. The All Assam Students Union first submitted a memorandum to Indira Gandhi inviting her urgent attention. In response, the Indian Parliament enacted the Illegal Migrants (Determination by Tribunal) Act, 1983. This Act, applicable only to Assam, sought a speedy determination of illegal migrants with a view to their deportation.

The subsequent Assam Accord between the Assam Government, the Central Government and various Assamese political parties under "Foreigners Issue" stressed upon the speedier detection of the illegals. The Accord set, "for purpose of detection and deletion of foreigners", 1 January 1966 as "the base date and year". All persons who came to Assam prior to this date "including those amongst them whose names appeared on the electoral rolls used in 1967 elections" were to be "regularised". But foreigners, who came after and on that date up to 24th March, 1971 were to be detected in accordance with the provisions of the Foreigners Act, 1946 and the Foreigners (Tribunals) Order, 1939.

The Assam Accord mandated that the names of foreigners so detected "be deleted from the electoral rolls in force." Such persons were required to register themselves before the Registration Officers of the respective districts in accordance with the provisions of the Registration of Foreigners Act, 1939 and the Registration of Foreigners Rules, 1939. The Assam Accord led to Section 6A being put into the Indian Citizenship Act in 1985. The Assam Accord allowed for a large number of illegal migrants to become deemed citizens of India.

In Sarbananda Sonowal case, the Supreme Court in 2005, while striking down the Illegal Migrants (Determination by Tribunal) Act 1983, noted that this Act "operated in the reverse direction". Instead of supervising the deportation of illegal migrants, the Act placed the burden of proof on the Assam Government. This Supreme Court found this reversal violating Articles 14 and 355 the Indian Constitution in so far as the Central Government had "failed to protect the State of Assam against the external aggression and internal disturbance caused by the huge influx of illegal migrants from Bangladesh to Assam".

This left the Immigrants (Expulsion from Assam) Act 1950 together with the Foreigners Act and the Foreigners Tribunal Order, 1964, as laws in the hands of Indian Government for the detection of illegal migrants for deportation. A year later, Justice SB Sinha in Sonowal II case

lamented that "there is a lack of will in the matter of ensuring that illegal immigrants are sent out of the country." The deportation of Rohingya in Assam is a step in that direction; centre government has sent seven Rohingyas back under an understanding with Myanmar.

In Mahasangha the Supreme Court in 2014 directed the "updating of the NRC in Assam so that the entire updated NRC is published by the end of January, 2016." The task of NRC updating is more complicated that the Supreme Court might think. Subsequent litigation in Gauhati High Court and the Supreme Court has proved this.

### Is a better litigation strategy possible?

India has not ratified the Refugee Convention, 1951, and the Optional Protocol of 1967. And India has no law on refugees. India grants refugee status through executive orders passed by the Central Government.

Therefore, advocate for the Rohingya, Prashant Bhushan, invoked India's violation of customary international law of non refoulement in deporting Rohingyas. Article 38(1)(b) of the International Court of Justice (the ICJ) Statute, 1945, defines customary law as "international custom, as evidence of a general practice accepted as law".

The Rohingya litigation before the Supreme Court has not been flawless. Bhushan has stressed far too much on non-refoulement only to see the Supreme Court rejecting this. Although various High Courts have held non refoulement as a jus cogens rule from which no state can derogate.

Notably, Article 51 of the Indian Constitution calls upon India to "foster respect for international law and treaty obligations in the dealings of organised peoples with one another". Might Article 38(1) of the ICJ statute offer a better litigation strategy? This ICJ Article points to another main source of international law "the general principles of law recognised by civilised nations".

Lawyers before the Court could argue that when noting "international law" and "treaty obligations" separately, the Indian Constitution points to international law's non-treaty sources, such as "general principles of law" that India should follow. And India would not want to be called an "uncivilised nation" under international law. After all, a constitutional responsibility of the court to protect lives even of aliens is part of the "general principles of law recognised by civilised nations" from which no civilised state should derogate.

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## Mediation to resolve migration related disputes

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A case takes decades to resolve in our judicial setting. Accustomed to that idea, people have become reluctant to take matters to the court nowadays. Particularly, people in the rural areas, unwilling to bear the unaffordable litigation cost, have grown apathetic to getting involved with any legal proceeding.

In this regard, alternative dispute resolution tools can be applied aptly in our country which is yet to gain traction.

Mediation, a process not so different from the traditional Salish, can prove to be effective in resolving disputes in rural areas. Traditional Salish has been the popular method of solving disputes in the rural areas for a really

In rural areas dispute related to migration process is a common issue with a large number of workers falling victim to fraudulence by dalals. The number of migrant workers is increasing every year. In 2017, about 10, 08, 525 workers have migrated from Bangladesh. These workers play an undeniable role in ameliorating the economic status of the country by maintaining a lucid flow of remittance whose protection should be taken more seriously. Refugee and Migratory Movements Research Unit (RMMRU), for example, has formed a mediation committee in Tangail that has been running its activities fluently to resolve fraudulence related disputes of migrant workers.

The mediation setting is designed with an advisory committee, a mediation committee and youth

undertake post-mediation follow-up activities.

An innovative approach has been taken through the youth volunteer group who visit areas personally to gather complaints. Moreover, awareness raising campaigns and announcements in the mosques and community places have made the mediation work done by RMMRU known to the mass people of the areas they work at.

The presence of the local leaders influences the accused persons to attend the mediation and place their own arguments. After hearing them, the report prepared by the mediation committee is sent to the advisory committee where a decision is finalised in the presence of the parties.

Interestingly, even the accused persons generally favour mediation



long time. Mediation, however, is a more developed and systematic way where both the parties have an equal say, making the system more fair and transparent. Mediation, transformed from traditional Salish, has been being successfully utilised by the NGOs and other development organisations to moderate contentions.

volunteers. The advisory committee consists of experienced individuals with expertise in the field. The mediation committee consists of local leaders and reputed personalities who are obeyed and revered in that area, as well as RMMRU representatives and lawyers. The youth volunteers are 15-25 year-old local youths who assess the complaints, organise the sessions and

over going to the court. The mediators focus on balancing the claim of both parties so that each party is satisfied with the decision. As the whole process is voluntary, both the parties leave without any objection at the end of a successful mediation.

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## The British Academy writing workshop held



A three-day writing workshop for the South Asian early career researchers was held at Independent University, Bangladesh (IUB) from October 12-14. The event was organised by the Department of Law at IUB in collaboration with Birmingham Law School, University of Birmingham; British Academy and South Asian Institute of Advanced Legal and Human Rights Studies (SAILS).

In nine separate feedback sessions, 18 papers from Bangladesh, India, Sri Lanka, Afghanistan and Nepal were presented in this Workshop. Each presenter got five minutes to present his/her paper and two commentators made observation on the paper for 20 minutes, and at the end another 20 minutes were given for group discussion and question-answer by other participants. The paper presenters received in-depth and critical feedback from both national and international legal scholars, namely Professor Dr. Borhan Uddin Khan (University of Dhaka), Professor Dr. Ridwanul Hoque (University

of Dhaka), Dr. Rumana Islam (University of Dhaka), Dr. Sharif Bhuiyan (SAILS), Professor Dr. Susan Marks (London School of Economics and Political Science), Professor Dr. Kate Bedford (Birmingham Law School), Professor Dr. Matthew Craven (SOAS University of London), Professor Dr. Shirin Rai (Warwick Law School), Dr. Mohammad Shahabuddin (Birmingham Law School), Professor Dr. Fiona de Londras (Birmingham Law School), and Professor Prabha Kotiswaran (King's College London).

Three panel discussions were also arranged for the participants, focussing on the challenges of researching and publishing in South Asia, skills of and strategy for writing and publishing in globally standard and high-impact scholarly journals.

At the final day of the Workshop, Professor Dr. Fiona de Londras presented a keynote paper on the issue of human rights and counter terrorism, while Professor Dr. Kate Bedford and Professor Dr. Matthew Craven reflected on

the Workshop. In the closing session, Dr. Kamal Hossain, Senior Advocate of the Supreme Court of Bangladesh, and the Chairman of the Board of Trustees, SAILS, as the chief guest addressed the participants by saying that the South Asian young scholars have many things to contribute for the development and enrichment international law. He hoped that the participants would take the best lesson of learnings from this Workshop and utilise them to enrich their academic careers in the days to come. Professor M. Omar Rahman, the Vice Chancellor of IUB, also addressed the participants. In his speech, he assured that IUB would extend its support more to organise this type of programmes in future. The Workshop came to end with the vote of thanks forwarded by Professor Dr. Borhan Uddin Khan (Organiser from Bangladesh side) and Dr. Mohammad Shahabuddin (Organiser from UK side). The organisers are hoping to arrange a follow-up workshop in December 2018.

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