"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW"-ARTICLE 27 OF THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH ● dslawdesk@yahoo.co.uk

LAW VISION

Denial of Rohingya identity and their right to internal self-determination

Sakhawat Sajjat Sejan

Rohingya's plight surrounding non-recognition is as old as the history of colonialism in South Asia and South East Asia. Their identity crisis has gone through clinical strategies and oppression forwarded by Myanmar government at different times. Historically, Rohingyas are designated as Kalar or Kula (lower class of people in a society) by the supremacist Buddhist believers. Undermining the Rohingya identity by disowning and calling them illegal immigrants is a part of 'Theravada Buddhism' that later turned into chauvinism in Myanmar.

From 1784 to 1942, King Budapawa, Anglo-Burmese Wars, Japanese invasion, Burmese Independence Army's operations somehow targeted the Rohingyas and focused on their identity extermination at different times of history. They were internally displaced from Eastern part of Arakan to Northern part of Arakan, fled to the Bengal and adjacent countries during these atrocities. Their struggle of self-determination started after the end of colonial period when they sought attachment with Pakistan, which became impossible too after Aung San's assassination. Later though they formed groups for political and social recognition in Myanmar, General Ne Win's regime technically reposed them and banned all sorts of political parties of the Rohingyas. Gradually they were left out of the national census of Myanmar. Eventually strategic denial comes into effect in black letters too.

> *ICJ may expand the definition of right to self-determination when giving final relief in the case of 'The Gambia v. Myanmar' for the mainstreaming of the Rohingyas in Myanmar.*

Emergency Immigration Act 1974 was passed to issue national registration certificate and foreign registration certificate to curtail illegal immigration from Bangladesh, Pakistan, and India. During this process, Rohingyas were offered foreign registration certificate only. To substantiate the extermination process, Burmese government started 'Operation Nagamin' to evict foreign nationals from the country. Those who were given foreign registration certificate were declared illegal immigrants and foreigners. The whole operation caused mass refugee influx in Bangladesh. *Modus operandi* of this operation was to exclude Rohingyas and their ethnicity in 'The Citizenship Act 1982', to increase relatability and reasonableness of the Act. Identity denial finally came into existence by the alteration of the name of Arakan to Rakhine by State Peace and Development Council in 1988. The rest of the atrocities and clearance operations is witnessed by the whole world contemporarily.

A whole race lost their ethnic identity and political recognition due to its religion in own country. Though, they struggled for their self-determination at several times, it had not sufficed for them in the absence of a clear trajectory of how self-determination would actually be exercised within the territory of a country, how actually right to internal self-determination will come into effect in the case of Rohingyas.

Article 1(2) of the United Nations Charter 1945, 'Declaration on Granting Independence to Colonial Countries and Peoples (GA Resolution 1514) 1960', Conference on the Security and Co-operation in Europe Final Act 1975 and Article 3 of the 'United Nations Declaration on the Rights of Indigenous People' have defined right to self-determination as a customary principle under international legal regime. To safeguard ethnicities around the world we need to capitalise and expand the aspects of 'right to external self-determination' to 'right to internal self-determination'.

Universal Declaration of the Rights of Peoples 1976 (Algiers Declaration) defines right to internal self-determination as a means for a particular group (ethnic or religious) to determine its political, economic and social status within a country. Denying the separate status of a race somehow justifies unilateral secession. But Rohingyas' never pleaded for unilateral secession rather their struggle always aspired for identity determination through legal, social, and political practice within the country. Also, Principle (e) of Declaration on friendly relations among states 1970 defines self-determination inclusively that actually implies that self-determination may be both external self-determination and internal self-determination.

Generally external self-determination is the right to have a separate state along with other necessary credentials; whereas internal self-determination means the right of an individual group in pursuance of an ethnicity to have themselves identified with political status to encompass heterogeneity and multiculturalism as a means of their cultural and political recognition. It also requires participation in election through their representatives. Internal self-determination advocates for equal participation in politics and other functions of state by an ethnicity. For this we need to determine, whether Rohingyas are a ethnic group or not? We may find this answer in the provisional measures forwarded in *'The Gambia* v. *Myanmar'* by International Court of Justice. The court referred the Rohingyas as 'protected group' under Convention on the Prevention and Punishment of the Crime of Genocide 1948. When a race has racial, religious, national or ethnic belonging, it should be considered as a protected group. International legal regime accepted Rohingya's ethnicity and then the whole process was termed 'textbook example of ethnic cleansing'. But the remoter interpretations do not suffice to establish 'right to international self-determination'. Comprehensive and clear articulation is required to establish this new jurisprudence apart from interpretation.

On the whole, from this discussion we may define self-determination in two aspects. Broadly it depicts unilateral secession of a state if political, social or religious system is disturbed by the governing body. In the narrower sense it means social and legal recognition on the basis of historical or hereditary identity. Refusing this identity is a benefactor of ethnic cleansing, what we witnessed in the case of Rohingyas. The process of external self-determination in many cases begin with the claims of internal self-determination within a particular territory. The same process designates ethnic minorities as illegal immigrants and foreign nationals to appease economic instinct and majoritarian communal belief of a country. Rohingyas are the victim of this fractionalisation, identity denial, non-recognition- all resulting in ethnic cleansing.

To ensure right to internal self-determination, scholars may endeavor to explore the jurisprudence of self-determination for procuring the ethnicities around the world along with rohingyas to assist the world court. ICJ may expand the definition of right to self-determination when giving final relief in the case of *'The Gambia* v. *Myanmar'* for the mainstreaming of the Rohingyas in Myanmar. Moreover, other international parent agencies of human rights may focus on the possibilities to establish the practice of right to internal self-determination across the globe to save ethnic races from perils.

THE WRITER IS LECTURER, DEPARTMENT OF LAW, FENI UNIVERSITY.

RIGHTS WATCH

An analysis on different theories of human rights

Jalal Uddin Ahmed

Human rights and certain human rights in specific encompass the potential of remaining buzzwords in/under numerous disciplines. Certain human Rights make headlines around the world almost every day. However, often we do not understand what we mean by human rights, or where they derive from.

Marie-Benedict Dembour stated there are four schools of thoughts on human rights. These are the natural school, the deliberative school, the protest school and the discourse school.

The most well-known theory of human rights is propagated by the natural school. The natural school describes human rights as a concept which human beings possesses simply because they are human beings (Dembour, 2010). As per Dembour, proponents of the natural school assert that the right to freedom of thought, conscience and religion, are entitlements which a human possesses from "nature" – which can be addressed as the Creator, the Universe, reason or any other transcendental source. The Universal Declaration of Human Rights (UDHR) has followed the natural school with regard to the application of these rights, as these are protected unconditionally. Although there are no direct limitations on the right to freedom of thought, conscience and religion directly, there are limitations to the exercise/manifestation of the exercise of that right (Swaine, 2016). As Swaine states, freedom of thought, though different and unique, is relatable to the freedom of expression. Reasonable limitations can be imposed on the freedom of expression (ICCPR Article 19). Freedom of religion covers one's belief and choice (General Comment No. 22) but it is in the manifestation of that belief that reasonable restrictions can be imposed (Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion and Belief Article 1). As natural school is absolutist and historically has been in parlance with religious orthodoxy, the rights have been found to clash with one another and even has been termed as "nonsense upon stilts" (Bentham).

Scholars of the deliberative school sees human rights as political ideals that liberal societies want to follow. As per Dembour, deliberative scholars believe human rights have come into existence upon agreement of the members of the society. Although they want these values to be universal, they realise that this cannot be done in one go and would require persuasion that these are the highest suitable principles for governance. Dembour further states, constitutional law is one of the mechanisms for expressing agreed upon human rights. According to Miller et al, deliberative school allows the existence of the right to freedom of thought, conscience, and religion as per the social norms of the country. The downside with this school of thought is, in some case, consultation and dialogue may lead to agreement of imposition of hegemony of the majority over the minority (Nikuy Bandari, 2021).

As per protest scholars, the struggle for human rights is an endless one and it never ends as long as there are the needy, destitute and oppressed (Dembour, 2010). With regard to application of this school, to the said rights – the goal would not just be to establish the rights, but also to ensure this does not marginalise or harm others. Dembour states that, according to the protest school, as the fight for human rights is a perpetual struggle, after establishing one's own right, one needs to fight for the human rights of others as well.

The discourse school is suspicious of human rights and view it as an imposition of imperialist thoughts and ideas (Dembour, 2010). The discourse scholars are more interested in the implications of human rights (Valen-Sendstad, 2010). The discourse school sees no universal norms in the application of the right to freedom of thought, conscience and religion. (Dembour, 2010). These rights would only be implemented to the level the state would allow it to be implemented as it is only the state which has this right. (Asad, 2000). As per Asad, even gross violations of human rights do not warrant intervention, as the discourse school characterises it as an internal matter of the society.

The protest school agrees with the natural school on the point that everyone is entitled to human rights. It diverges on the point that the once entitled, it is one's duty to ensure others are entitled. This is the point where the protest school has similarity with the deliberative school. As the deliberative school asserts that human rights are those which are expressed through law (Dembour, 2010), the law places certain restrictions on those rights to ensure the rights of others are not marginalised (Encyclopedia Britannica, 2019). This is where the similarity between protest school and deliberative school is found as protest school emphasises not on individualism but on collectivism society. But it is to be noted that the similarity between the protest school and deliberative school is only in this case. Under deliberative school, rights of the marginalised could be trumped but the protest school is based on the premise that the fight for human rights for all must be undertaken.

THE WRITER IS STUDENT OF LAW, UNIVERSITY OF DHAKA.

GLOBAL LAW UPDATES

The implications of India's new Customs Rules for Bangladesh and others

M S Siddiqui

The Indian Finance Act, 2020 incorporated many changes in the customs law and procedures, including administration of Rules of Origin under Trade Agreements. A new Chapter VAA has been incorporated in the Customs Act, 1962 to provide for enabling provision for administering the preferential tariff treatment regime under various trade agreements, including FTAs, etc.

As per WTO's statistics, there are 305 regional trade agreements in force as on date. India has entered into 15 free trade agreements, and one unilateral DFTP (Duty Free Tariff Preference) Scheme.

Each FTA contains a set of rules of origin, which prescribes the criteria that must be fulfilled for goods to attain 'originating status' in the exporting country. Such criteria are generally based on factors such as domestic value addition and substantial transformation in the course of manufacturing/processing. For instance, the originating criteria finalised under a trade agreement could be domestic value addition of minimum 30% plus substantial transformation through Change in Tariff Sub-Heading (CTSH). Under the South Asian Free Trade Area (SAFTA), the general criteria are Change of Tariff Heading (CTH) plus 30 per cent for LDCs, vs. 40 per cent for non-LDCs.

India issued a Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020 (CAROTAR,2020) dated August 20, 2020, to be implemented from September 21. Thus 30 days' time has been given to importers and other stake holders to familiarise with the new provisions. Where customs officer has given a discretionary authority for "a doubt" on genuineness/authenticity of the COO or on the accuracy of the information contained therein. The officer empowered to send a verification request to the designated authority in the exporting country through a nodal officer in the importing country.

Accordingly, Chapter VAA and section 28DA were inserted in the Customs Act, 1962, vide clause 110 of Finance Act, 2020. The new section inter alia provides for "a basic level of due diligence" on the part of an importer to satisfy himself that the claimed originating criteria have been met, and that mere submission of a Certificate of Origin may not be sufficient. For this purpose, the importer is required to possess "sufficient" origin related information. The first point of query into origin of goods, in case of doubt, will now be the importer, shifting from G2G to B2G model. Section 28DA further provides for verification of origin from foreign authorities, temporary suspension of preferential treatment, and situations under which a claim can be denied, or a certificate can be rejected.

The Rule (sec 4) requires an importer to possess sufficient information about the origin of goods, where preferential tariff treatment is claimed. To help guide importers and also to indicate the scope of such information, details have been provided in the Form I of CAROTAR, 2020. An importer is not required to submit this Form at time of filing customs declaration. However, when there is doubt on the declared country of origin, the customs officer may ask origin-related details from the importer, in which case the importer would have to submit the Form along with supporting documents.

The form focuses on the process through which a good has attained origin i.e. if goods are produced entirely from inputs from that country or also included inputs from third country. Even an input such as preservative should be added to the cost of materials (by value or weight). In the formation, the percentage of preservative in a product may be 0.03 – 0.05 percent. If a supplier/producer mentions that goods have non-originating components but meets the originating criteria, it is advised to check if the claimed originating criteria applies to that specific tariff heading. An importer should ask these questions to ensure that the claim is valid and to diminish chances of erroneous claim.

Section 28DA of the Customs Act requires an importer to possess sufficient information about origin of imports, where preferential tariff treatment has been claimed. Form-I helps guide and assist an importer in assessing origin of goods. Moreover, the importer is required to keep origin related information specific to each Bill of Exchange (BE) for minimum five years from date of filing B/E.

This new rule is frightening for an Indian importer of the fate of consignments from SAPTA countries due to uncertainty of tax. This uncertainty will remain even up to five years after import. The import from Bangladesh and other SAPTA countries may drastically fall due to such stringent rule and discretionary authority of Customs official. The request for verification may be sent within five years from the date of claim of preferential tariff treatment, unless specified otherwise in the trade agreement, and the preferential tariff treatment to the goods can also be temporarily suspended pending the verification. Further, according to amendments in Section 111 of the Customs Act, relating to confiscation of goods, the goods imported under claim of preferential tariff treatment and found to contravene the provisions of the new Chapter VAA or the Rules, will also be liable to confiscation. The law has amended giving discretionary power to the customs official and they can apply the investigation according to their choice.

> *The new Customs Rules is frightening for an Indian importer of the fate of consignments from SAPTA countries due to uncertainty of tax. The import from Bangladesh and other SAPTA countries may drastically fall due to such stringent rule and discretionary authority of Customs official.*

THE WRITER IS A LEGAL ECONOMIST.