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The illegalisation of Rohingya refugees in India: a (non)citizenship crisis promoted by law and policy

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ABSTRACT

Detentions and a looming threat of deportations have significantly increased for Rohingya refugees since 2017, when the Indian government drastically changed its protection policy and categorised them as ‘illegal migrants’ under law. The result has been an impetus to the security authorities to proactively detect and monitor with the eventual aim to detain and deport Rohingya refugees to Myanmar. Fuelling such illegalisation process is the Indian authorities’ arbitrary manipulation and contraction of the long-standing hosting of certain ‘non-citizen’ refugees in the country to suit the politics of the day. In addition, the Supreme Court (ostensibly the arbiter of rights *for all* within India’s territory) recently issued an interim order which effectively approved this Rohingya refugee ‘illegalisation’ position, hardening the perilous illegalisation of the community in India. To interrogate these developments, the present article analyses the growing illegalisation through detention and deportation of Rohingyas in India by contextualising the conception of ‘non-citizenship’ as a legal status and a normative category. The article proposes that the notion of ‘non-citizenship’ must be engaged with in a broader analytical manner than a static illegality based on lack of documents, in legal, judicial and policy discussions around refugee protection in India.

KEYWORDS

Rohingya; refugees; immigration; non-citizenship; legal status

Introduction: exclusion of Rohingyas in India

Rohingya refugees¹ have been present in India in relatively small numbers for many decades, as Myanmar state forces have targeted the community in cycles of extreme violence. They largely come to India via the more porous borders with Bangladesh which entails risks to their lives and well-being yet presents as the only option to seek refuge in India. Their population numbers in India are difficult to accurately document as there is no mechanism to document refugees at India’s border areas and the community has to keep a low profile because of security concerns (Shwe, Field, and Brinham 2021). Rohingyas’ unofficial numbers tend to fluctuate between 18,000 (as per the United Nations High Commissioner for Refugees in India) and 40,000 (expressed most frequently in the media), although it is difficult to verify the exact number conclusively (Ministry of Home Affairs 2017a; Tremeau 2021).

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State-backed violence against Rohingyas in Myanmar was particularly brutal in 2012 and 2015. Then, in late-August 2017 Myanmar military forces launched their largest assault yet – committing violence that is being prosecuted as potential acts of genocide and war crimes by the International Court of Justice, and forcing nearly one million to flee (Perez-Leon-Acevedo 2021). While only a relatively small number of these asylum seekers made their way to India to seek refuge, the Indian government was already beginning to change its policies and attitude of tolerance towards the community. The August crisis in Myanmar coincided with a momentous executive order by the Indian government in early August 2017. Through this order, the state governments were to direct police and intelligence forces to proactively detect, and monitor Rohingya refugees in order to initiate their deportation (Ministry of Home Affairs 2017a, 2017b). The order classified Rohingya refugees as ‘illegal migrants’ under the law, which was a significant step denigrating an entire refugee community as *undesirables* liable to be deported from India and, in the interim, to be potentially detained (Bjånesøy 2019; Fouratt and Castillo-Monterrosa 2022).² Further, as ‘illegal migrants’ the law also provides for criminal prosecution for foreigners entering or remaining in India without ‘valid documents’.³

This article explores the manner in which the Indian government has illegalised Rohingya refugees *en masse* through law and policy, and the implications of these developments. We argue that this illegalisation has emerged from, at times, a deliberate lack of clarity by the Indian government about the constitutional rights and humanitarian aspects of Rohingya lives in India – a position that has been validated, for the time being, by the Supreme Court. The justifications for this illegalisation have emerged from appeals to protect the rights of the Indian citizens and of the Nation, thereby promoting skewed framings about how (non)citizenship determines constitutional protection for individuals belonging to certain refugee communities. Both these illegalisation reasonings (i.e. ambiguity around rights and an appeal to discretion-based protection) have been enacted through law and policy and have resulted in degrading of the conditions for the Rohingyas in India at an alarmingly fast rate, since 2017.

To explore the implications of this recent illegalisation of Rohingya refugees in India, the article uses two related theoretical frames: Linda Bosniak’s framework on ‘status non-citizenship’ and notions of personhood, as well as Tendayi Bloom’s ‘non-citizenism’. The former posits a ‘non-citizen’ through (il)legal status as a key actor in challenging the nationalist aspect of bounded citizenship, and similarly, the latter highlights the normative opposition, through autonomy and agency, that *non-citizenism* poses to the exclusionary idea of citizenship towards certain individuals. Importantly, both rely on legal personhood as a key foundation for their respective interrelated concepts, which emphasises the rights claim of ‘persons’ irrespective of any other classification including (il)legal status. The growing scholarship on Rohingya protection in India tends to look at, and analyse, the implications of single or multiple legal/policy decisions in the country and their discreet implications (Jose 2022; Mitra and Srinivasan 2022; Nair 2022). What we seek to do with the personhood, noncitizenism, and status non-citizen frameworks is to evaluate the *process* of illegalisation, which has been undertaken through various *inter-connected* legal and policy means – and which has been legitimised by (and have legitimised in turn) the wider political environment. Further illegalisation moves in law and policy, should they manifest in India, could then be scrutinised as part of this broad normative shift in viewing ‘non-citizenship’.

In introducing this special issue, Bhat and Shahid (2024) present the aspect of marginalisation through the construction, interpretation and modification of citizenship regimes. They highlight the importance of thematically engaging with the ramifications of such reification of citizenship particularly for the ‘excluded’. We intend to follow their lead. Further, several articles in this special issue have broadly pointed to a crisis of citizenship presently in India including through the anticipation of a nationwide National Register of Citizen exercise, building on a regional version undertaken recently in Assam. Relatedly, we wish to bring to the fore a ‘non-citizenship’ crisis that has been brewing in parallel involving Rohingya refugees in India, who are the contingent focus of several other articles in this issue. Other articles in this issue also take up the Rohingyas context. For instance, Berger and Garg (2024) highlight the recent politicisation of Rohingyas’ basic needs in India, where the national political narrative has completely turned against the community. Sharma (2024) highlights that this may not be limited to India and is also experienced in Pakistan. Further, Shahid and Lee (2024) examine the religious angle to persecution of Rohingyas in Myanmar. Our focus on the contrary is to evaluate how the Rohingya issue in India, especially in recent times, brings another facet to India’s wider citizenship crisis. From a purely ‘non-citizen’ perspective, where there is no claim to citizenship status rather a broader claim to a dignified life and protection from persecution, ‘non-citizenship’ may regardless be the main foundation to secure certain basic entitlements, on the anvil of being ‘humans’, ‘persons’ or ‘individuals’. For this, we argue that there needs to be a broader recognition of the analytical notion of ‘non-citizenship’ from the perspective of inclusion rather than exclusion, as the latter is understood from a traditional bounded idea of citizenship. We argue that the characterisation requires decoupling from ‘citizenship’ and a move towards *personhood* approach which recognises their inherent dignity and rights. In doing so, while we have used the term *non-citizen(ship)* multiple times to make our arguments, we do so recognising that the terminology itself is not without normative issues as the negation of *citizenship*, which in turn gets used exclusionary at various levels of lawmaking, policymaking and judicial decisions.

Henceforth, this article is divided into four sections: in the next section, we elaborate on the ‘illegalisation’ process and the impacts of the government’s changes policy towards the Rohingyas in India. Thereafter, we discuss the theoretical frames around ‘non-citizenship’ and contextualise in relation to the situation of Rohingyas. Before concluding we present briefly the constitutional aspect of the situation that brings to the fore the important yet unfulfilled role of the Indian Supreme Court in addressing the deteriorating situation of Rohingyas and the broader legal implications. Finally, the article will conclude with the argument that the Indian State including the courts need to engage further on the notion of ‘non’-citizenship, especially in an inclusionary rather than exclusionary manner, instead of statically and arbitrarily (mis)using it.

Rohingyas in India and the growing illegalisation trap

Since its independence, India has committed to refugee protection in several ways (Dasgupta 2016). Despite not being a signatory to the 1951 Refugee Convention and its 1967 Protocol, India has sat on the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR) since 1995. More recently, India affirmed the 2018 Global Compact on Refugees, thereby acknowledging the State’s role in protecting refugees and

supporting them to enhance refugee rights and their ability to break away from the acute marginalisation and exclusion (Field and Burra 2020). Importantly, the UNHCR has been permitted to function in a limited capacity in the country since 1981. Refugee status determination has been delegated to UNHCR India on an *ad hoc* basis, depending on the nationality of the asylum seekers (Bosniak 2010).

The country also has obligations under several refugee-relevant international human rights instruments and compacts, drawing their inspiration from the 1948 Universal Declaration of Human Rights, such as the 1965 International Convention on the Elimination of all forms of Racial Discrimination, the 1966 International Covenant on Civil and Political Rights, the 1979 Convention on the Elimination of all forms of Discrimination Against Women and the 1989 Convention on the Rights of the Child, etc., – all of which apply regardless of citizenship status (UN Special Rapporteur 2019). But the country's immigration laws do not differentiate between foreigners and 'refugees' or 'asylum-seekers', as a particularly special class. This means that India does not explicitly recognise a right to seek asylum, much less a right to asylum, or a right against *non-refoulement*. Nevertheless, it has implicitly recognised these rights for various refugee communities over the years by invoking exceptions under its immigration laws (Syam 2019).

Rohingyas have a clear *prima facie* claim for asylum, especially since India has, at least between 2012–2017, implicitly recognised this claim. Until 2012, Rohingyas were not recognised as refugees by the Indian government – nor were they initially provided the opportunity to register as refugees through the UNHCR in Delhi. After some high-profile protests by the community and their supporters outside of UNHCR offices in Delhi, the Indian government at the time permitted UNHCR to register Rohingyas as 'refugees' (Basavapatna 2018). Further, Rohingyas were issued Long Term Visas (LTVs) by the government after 2012, based on their UNHCR refugee cards.

LTVs are akin to official, though temporary, refugee status given to many other groups at the time – such as the Chin community from Myanmar, refugees from Afghanistan and groups from even further afield – enabling them to access certain key services and apply for important identification documents such as the *Aadhaar* cards, as well as enrol their children in public schools (Tiwari and Field 2020). Broadly this highlights that, particularly after 2012, Rohingyas were a tolerated community in India, able to take shelter and make lives for themselves while they waited and hoped for Myanmar to become safe enough for them to return. Notably, from a legal standpoint while Rohingya refugees were being provided LTVs, this entailed protection against arbitrary detention and deportations, and thus pointed towards the government accepting its obligations similar to *non-refoulement* with respect to the Rohingyas. As a minimum these policies also aligned with the Constitution of India which guarantees the right to life and personal liberty under Article 21 to all *persons* – recognising *personhood* in an inclusive way, rather than on the basis of legal status (Abdali 2022). Subsequently, the official change in the government's policy in August 2017 was momentous (BJP Manifesto 2014; BJP Manifesto 2019; Roy 2010).

As noted in the introduction, the August 2017 executive order, classified Rohingya refugees as 'illegal migrants' under the law and instructed state governments to detect, detain and deport the community. Overnight, this order illegalised Rohingya presence in India and went so far as to state that the security and well-being of Indian citizens

was dependant on identifying and deporting illegal migrants: *‘illegal immigrants not only infringe on the rights of Indian citizens but some pose grave security challenges’* (Ministry of Home Affairs 2017a). On the possibility of security challenges, it stated that *‘illegal migrants are more vulnerable for getting recruited by terrorist organizations’* (Ministry of Home Affairs 2017a). Effectively, through these justifications, the executive order legalised the specific exclusion of Rohingyas, stating that:

(i) infiltration from Rakhine State of Myanmar into Indian Territory specially in recent years besides being burden on the limited resources of the country also aggravates the security challenges to the country Detection and deportation of such illegal immigrants from Rakhine State, also known as Rohingyas is a continuous process. Therefore, it is essential to identify such illegal migrants/persons and also keep a watch on their activities for preventing any untoward incident that can take place.

Some key themes emerge from this order. First, the Indian government seemingly has a wide power to exclude an entire refugee community from protection in India, despite the various constitutional and international human rights obligations. It also has a wide array of ‘citizenship-based’ justifications for instance by invoking its primary duty towards Indian citizens, particularly their security and rights, including socio-economic rights. Second, the State considers surveillance and monitoring, as well as possible detentions, as a crucial part of its strategy to separate ‘illegal migrants’ from Indian citizens, in the latter’s interests. Third, in doing so, any humanitarian considerations or constitutional-legal obligations can be disregarded in relation to such undesirable refugee communities. These themes, irrespective of the fact that the Indian government has not adequately justified them, are worth analysing closely in relation to the Rohingya refugees in India. Moreover, these are also relevant with respect to refugee communities in India which may face the brunt of the State’s unbridled powers under the law.

One of the immediate effects of the 2017 order has been that police authorities have since ramped up arbitrary detentions of Rohingyas across different states in India, on various charges (Rahman 2022). Moreover, since the government stopped issuing Rohingyas LTVs in 2017, the community has been left without valid visa permission to remain in the country and without clarity on the conditions of their stay in India (Field, Tiwari, and Mookherjee 2017). This has meant that the authorities have several reasons to detain Rohingyas, or to initiate legal proceedings against them. Even if Rohingyas do undergo refugee status determination by UNHCR (RSD) and hold valid UNHCR cards, the Indian government’s announcement that it does not recognise these cards as official identification documents, has meant that the cards do not shield against detention or even deportations (Tiwari and Field 2020). Several hundred Rohingyas are currently being held on illegal immigration charges despite holding UNHCR issued refugee cards (Banerjee and Chaudhuri 2022). In a high profile case, on 6 March 2021, Indian authorities rounded up 168 Rohingyas in Jammu for an apparent identity ‘verification exercise’. Despite many of these Rohingyas holding UNHCR refugee cards, they remain detained in a sub-divisional level jail reclassified as a ‘holding centre’ with the declared intention of deporting them back to Myanmar (Ellis-Peterson and Hassan 2021).

Such exclusion has created a detention trap for Rohingyas is not an accident; legal, though uncertain, pathways for gaining ‘valid’ documentation have become more and more difficult – even practically. For instance, the Indian government has delegated

UNHCR to undertake RSD for Rohingyas, and the refugee agency's main RSD offices are in Delhi, with a satellite office in Chennai. NGO partners of UNHCR can also undertake RSD in Hyderabad and Pune. However, UNHCR is not permitted to operate in the border areas, which means that Rohingyas entering India via Bangladesh or occasionally directly from Myanmar must travel thousands of kilometres via rail or road to undergo RSD (Majumder 2018). While they are on route to UNHCR without valid visas, or while they are waiting for RSD to be processed, Rohingyas are vulnerable to detention (Tiwari and Field 2020). Therefore, Rohingyas in India are caught in a dangerous illegalisation process facilitated by law and policy; with all routes to safe asylum in the country now virtually closed.

In addition to increased detentions, many Rohingyas have been deported to Myanmar in the last few years. Between October 2018 and January 2019, the Indian government deported twelve Rohingyas to Myanmar – a group of seven men, and one family of five (Paliath 2022). In April 2021, Indian authorities attempted to deport an unaccompanied 14-year-old girl (Purkayastha 2021). In March 2022, a Rohingya woman was forcibly deported to Myanmar, separating her from her husband and three children who were unaware of her deportation (Muzamil 2022). This was despite the Manipur State Human Rights Commission putting a stay on her deportation. On 2 May 2022, a Rohingya refugee man was deported to Myanmar. He was also separated from his family (The Wire 2022a). Dozens more have reportedly been deported from northeast India to Myanmar (Rights and Risk Analysis Group 2021), yet these numbers are impossible to verify as UNHCR and other human rights organisations are prohibited from accessing these borderland areas. Essentially, the adverse immigration laws in India are being operationalised against the Rohingyas, which provides for detention and deportation of foreigners who are in India without valid documents – and such application is simultaneously leading to renewed entrenchment of the 'insider'-'outsider' binary between citizens and 'illegal migrants' in India.

Deportations have been met with condemnation from UNHCR and in the UN General Assembly as well as by other international bodies – not least as the conditions in Myanmar continue to deteriorate (Global Detention Project 2022; Tendayi Achiume 2020). As noted above, the 2017 Indian Government executive order coincided with Myanmar military's violent campaign against the Rohingyas in Rakhine State. Myanmar then experienced a military coup in February 2021, plunging the country into an ongoing violent civil war and repressive military action (Westerman 2021). Alongside mirroring repression, the Indian government has assiduously ignored international efforts to promote the respect of Rohingya human rights. For instance, even before the 2021 coup, the Gambia took Myanmar to the International Court of Justice alleging that its military has committed genocide and war crimes against the community.⁴ The court's initial findings have strengthened Gambia's stance although even these developments have not been considered by the Indian government or the Supreme Court in its recent interim order on the mass detention and deportation of Rohingyas. These international commentaries have been all but ignored and Indian authorities have continued in their policy of detection, detention and deportation under the domestic immigration laws.

Alongside this worsening illegalisation trap (and in many ways, driving it), Indian media outlets have, in recent years, ramped up negative coverage of Rohingyas as 'illegals' and

‘security threats’. Political leaders have increased their public statements vilifying, criminalising and dehumanising Rohingya refugees. As a few examples: at a press conference on 7 April 2017, Rakesh Gupta – President of the Jammu Chamber of Commerce and Industry – threatened to launch an ‘identify and kill movement’ if the government did not deport Rohingya refugees (Mohanty 2022; Naqash 2017). In July 2018, Raja Singh, a BJP member of the Telangana Legislative Assembly, declared: ‘*If these Rohingyas and Bangladeshi illegal immigrants do not leave India respectfully, then they should be shot and eliminated*’ (Cockburn 2018). In 2019, around the West Bengal elections, viral Facebook posts falsely accused Rohingyas of cannibalism, and were accompanied by posts that threatened to burn their homes if they did not leave India (Goel and Rahman 2019). BJP Minister for Home Affairs (and previously BJP President), Amit Shah, has repeatedly categorised Bangladeshis and Rohingyas together and referred to them as ‘termites’ that need ‘forcing back’ (Ghoshal 2019). In April 2022, Delhi’s ruling Aam Aadmi Party mirrored BJP rhetoric, blaming ‘Bangladeshis and Rohingyas’ for a violent communal clash that occurred in a part of the city where no Rohingyas are known to live (Vincent 2022).

Amidst this growing anti-Rohingya rhetoric and policy developments, local police authorities have, in turn, increased immigration-related ‘checks’ and detentions. Since 2017, Rohingya refugees are frequently temporarily detained in nearby police premises or the Foreigners Regional Registration Office for biometric and documentation ‘checks’, and during these checks they have reported physical abuse and/or verbal intimidation. Rohingya families have also been subject to arbitrary visits to their homes and settlements across India for similar security ‘checks’. In October 2018, police authorities in Delhi issued identity verification forms entitled ‘Personal Data Forms’, which required Rohingyas to record their names, dates of birth, physical descriptions of themselves, criminal convictions, family members and close relatives in India and Myanmar. The form was in Burmese as well as English, leading the community to fear data were being shared with Myanmar – and yet they had no power to refuse the information gathering (Shwe, Field, and Brinham 2021). In another incident, in July 2022, 10 Rohingya settlements were raided by police authorities in Haryana, and many essential livelihoods items (e.g. bicycles and rickshaws) were confiscated (Yadav 2022). Incidents of temporary detentions and arbitrary checks have sharply increased in frequency in the last two years and these detained Rohingyas are at a particularly high risk of deportation to Myanmar, as the law provides for deportation to home country.

Most recently, the discourse around how Rohingyas refugees are to be monitored by the state and readied for deportation has been the subject of debate, and further entrenched the illegalisation process. In August 2022, nearly five years after the Indian State designated Rohingyas as ‘illegal immigrants’, there seemed to be a public contestation between the state government of Delhi and the central government regarding the provision of government-owned flats to the Rohingyas in Delhi. Up to that point, Rohingya refugees had largely self-settled in five areas across the city, typically in deprived shanty-type dwellings in or near other poor, marginalised communities. These dwellings have long-been identified as unsafe, with a lack of basic amenities and regular incidents of fire (Nair 2022). Some 55 Rohingya refugee families had even been forced to live in tents following a major fire in their settlement in 2018 (Akhtar 2018).

In August 2022, a curious public tussle emerged between the Union Housing Minister and the Ministry of Home Affairs with the former appearing to declare a new policy to

house and protect Rohingyas in Delhi with flats, police monitoring and UNHCR IDs. This announcement was almost immediately refuted by the Home Ministry, then retracted by the Union Housing Minister (The Wire 2022b). This public scuffle on social media has underlined the fact that the policy of the Indian government with respect to Rohingyas, post-2017, is yet to be altered or reviewed, regardless of the growing national and global criticisms and worsening safety context in Myanmar since the coup. This event also highlights the perpetuation of the government policy towards deporting the Rohingyas to Myanmar, and to detain them in the interim with a view to ensure that their movements can be monitored – and that such resolve is shared increasingly by other political parties and sections of the society. Overall what is clear is that neither international political developments nor basic international and domestic humanitarian claims to protection have reversed the narrowing of the humanitarian and protection space for the Rohingyas in India – a country where their presence is increasingly framed as a threat to Indian citizens.

Reimagining ‘non-citizenship’ inclusively

At this juncture, we turn to the (il)legal status of Rohingyas in India, as non-citizens, to highlight its pivotal role in their everyday lives. There are two theoretical frames that are relevant in this regard: Linda Bosniak’s analytical category of *status non-citizenship* (Bosniak 2006, 2017, 2022) and relatedly, Tendayi Bloom’s *noncitizenship* (Bloom 2018). As noted in the introduction, both these ideas are quite self-explanatory; they represent the conceptual designation for people who reside (legally or otherwise) in a nation state’s territory with a legal status that stops short of formal citizenship status. It is not an explicit legal designation but a descriptor with utility in its ability to highlight the metaphorical ‘inside’ and ‘outside’ of a state’s membership, entitlements and *borders*. For instance, Bosniak argues that *status non-citizenship is both product and precondition of the operation of state borders*. Where physical borders around a state are permeable, state authorities often seek to reinforce borders internally through the designation of certain people and communities within as ‘illegal non-citizen’ migrants. These are the undesirables in the State’s view, whose condition Bloom refers to as *unrecognised noncitizenship*. However, that does not mean all status non-citizens are necessarily excluded from key entitlements, protections and rights – but implies the precarious situation for some of them, particularly the undocumented, contributing to their marginalisation while in exile.

In this regard, Bosniak has primarily focussed on the effects of the American immigration law on various classes of vulnerable non-citizens, especially undocumented migrants. A key observation grounding Bosniak’s framework is that the presence of status non-citizens becomes essential for the State to entrench its boundaries inwards and justify their incessant surveillance, detentions and in some instances expulsions, in the interests of status citizens. Bosniak’s framework is pertinent to the contextual discussion on Rohingyas previously, especially the Indian government’s August 2017 shift in stance. Relatedly, Bloom highlights the theoretical developments in citizenship studies around the category of ‘non-citizenship’ that encapsulates the need to understand the idea not as a corollary to ‘citizenship’ but as a ‘means by which to examine how citizenships and noncitizenships intertwine through an individual, sometimes in her/is

citizens and noncitizen relationships with one State, sometimes in her/is citizen and non-citizen relationships with more than one State'. The emphasis is thus on the agency of 'non-citizens', as individuals or *persons* to challenge the binary produced by the traditional understanding of citizenship as membership of a community within a bounded territory.

Notably, both Bosniak and Bloom are attempting to shift the gaze on 'non-citizenship' away from its exclusionary connotation with respect to 'citizenship' to a potential inclusionary understanding with respect to 'personhood'. To probe the theoretical shift further, sovereignty, juxtaposed with borders, creates a central position for 'non-citizens' as subjects of exclusion and consequently as one of the main actors for the State to reinstate a *bounded* idea of citizenship. The boundedness relates to the perceived 'insiders' within a border, territorial or internal, as against the 'outsiders' or the non-citizens, foreigners, illegal migrants, etc. Consequently, within such a conception, borders define citizenship and whoever finds themselves within the borders are entitled to a *universal* inclusive notion of citizenship. Evidently, *borders* in this sense are not only territorial borders but also borders re-created internally through legal status designations mediated through identity documents (Roy 2016). What is important is the demarcation of 'non-citizens' as against the *citizen* by identifying, monitoring, detaining or deporting. These are in addition to the exclusion from key services and basic rights even within the territories through an elaborate monitoring scheme facilitated under the immigration laws. States seek to regulate borders both externally and internally, and in its internal iteration, the rights and protections of certain 'non-citizens' who are present within its territory are regularly violated through detentions and deportations.

Here it is important to highlight the implications of the State pushing against the 'non-citizen' claims to protection and basic rights by potentially undermining their *personhood*. Such a push could be extended arbitrarily to completely strip certain persons from even the most essential aspects of protection against persecution. The concept of personhood does not have a universal definition (Ahmed and Bakshi 2022; Kingston 2019). However, in relation to 'non-citizens' such as refugees, it evokes recognition of rights irrespective of legal status and thus stands for the 'universal' and the inclusionary (Bosniak 2010). In law it is often taken to mean a human being (i.e. natural person) who has rights and duties ascribed to them which are not (necessarily) linked to citizenship – and the extent to which personhood and citizenship are intertwined can vary country-to-country. The purpose here is to highlight as our starting point that the Indian constitution already recognises personhood as plainly stated: Article 21 states that 'No person shall be deprived of his life or personal liberty except according to procedure established by law'. In other words, the Indian constitution already (and has long) recognised that *all* persons within its borders have a right to life and liberty, regardless of citizenship status.

In this context, Bosniak and Bloom illustrate on the relationship between *personhood* and *non-citizenship*. Bosniak stresses on the ways in which in the guise of regulating non-citizenship status, in fact it is the *personhood* of such 'non-citizens' that is sought to be undermined or diluted by the State,

(p)ersonhood may not be formally withdrawn, and yet it may be diminished in its effect, evaded, effaced, diluted, displaced. This is the real risk to constitutional personhood for

noncitizens and for some citizens, as well; not outright removal but depreciation – at times specifically imposed by government and at others, perhaps, a function of the inherent incompleteness of the category itself.

Similarly, Bloom observes,

(t)hose without a recognised relationship with a State may be without a clearly protected legal personhood ... this denial of the self is damaging, as are the physical conditions to which it allows people to be subject. The banal dehumanisation of noncitizens seems to facilitate the supposition that there is some category of ‘featherless bipeds’ towards whom such treatment is acceptable. (whether because they are lesser humans or their existence is unacknowledged)

The key point is that ‘non-citizenship’ as an analytical conception in relation to vulnerable communities within a State’s territorial borders is critical for the overall idea of rights, dignity and humanitarianism that forms part of the said polity. Therefore, through the direct and indirect effects of the status of non-citizenship, the emphasis that is being placed by Bosniak and Bloom is on the *experiential* exclusionary aspects of non-citizenship status for certain marginalised communities, which need deeper engagement in juxtaposition with their *personhood*. The exclusionary push by the State perpetuates a legal fiction that *personhood* can be undermined solely based on (il)legal status. In fact, this could be to the extent that protection can be withdrawn through expulsion. However, this is amenable to challenge once ‘non-citizenship’ is viewed from the inclusionary lens of *personhood* incorporating key rights of vulnerable refugees present within India.

Yet, there are limits to such a theoretical emphasis on ‘non-citizenship’ that is exemplified by the Rohingyas’ context discussed previously, especially in relation to deportation back to Myanmar. According to both Bosniak and Bloom, states rarely exercise expulsion in relation to asylum seekers/refugees given the spread of the international refugee law, at least its key principles. In effect, a State may not be able to apply its immigration laws coercively due to international standards, i.e. under the 1951 Refugee Convention and its 1967 Protocol, and broadly under international law. However, such a view does not engage in detail with the implications of non-signatories, or even signatories, when they do not pay heed to legal obligations and seek to detain and deport asylum seekers and refugees, not individually but as a community (Janmyr 2021). This also raises another question: when the domestic laws and even the constitution can be interpreted in a way to deny refugees’ legal personhood, is there merit in analysing the normative underpinnings of such interpretations through an ongoing contextual analysis? We argue that the situation of the Rohingyas presently highlight that there is indeed merit in such an analysis since the implications of an unsettled normative and legal conception can have real impact on further marginalising certain communities.

The direct imposition of exclusionary measures against the Rohingyas could certainly be seen in the issuance of the initial August 2017 order designating Rohingyas as ‘illegal migrants’. From this moment, Rohingya refugees went from being a tolerated refugee group to a targeted ‘undocumented migrant’ group, with all of the rights-stripping that entails. The inherent room for manoeuvre within the ‘status non-citizen’ category has meant that other state and non-state actors have indirectly contributed to undermining the *personhood* for Rohingyas in the country. This is arguably a worrying implication

of arbitrarily excluding *en masse* a vulnerable non-citizen community such as the Rohingyas. What has happened to Rohingyas in India in the last six years is that they have been increasingly deprived of personal liberty and their lives have been put in danger by the policies of the state.

The question thus emerges: what are the implications of an undermined personhood for the Rohingya community, and for the security of all 'non-citizen' refugees in the country? The Indian government's direct denial of *personhood* can also be seen in the detention and forced deportations of Rohingya refugees to Myanmar; detention involves the suspension of liberty, and deportation to Myanmar for Rohingyas poses a very real threat of loss of life. This opens the doors to deny critical rights under the Indian Constitution which explicitly reserves certain basic rights for *persons* and not only *citizens*. However, to argue that a certain 'non-citizen' community, despite being marginalised asylum seekers, are a grave threat and thus must be dealt with under the immigration law as any other undocumented foreigners 'illegally' in India, is to essentially deflect from a key reality of refugeehood, i.e. their unique circumstances leading to seeking refuge and absence of legal pathways for doing so. Exclusionary application of law against this humanitarian and legal reality may not be constitutionally valid, and thus requires a deeper constitutional and legal engagement.

It is pertinent that either individually, or as a community, or even a sub-group within a community, 'non-citizens' within India continue to have recourse to constitutional fundamental rights based on their *personhood* (Pijnenburg and Rijken 2021; Shaw 2020). Presently, in the absence of a definite legal status or right to remain in the country, the judicial doors are essentially closed for asylum seekers, or it is difficult for the judiciary to provide effective relief (Singh 1985). In this respect, the Rohingya petitions currently pending before the Indian Supreme Court where it has reserved the order, the Court has an opportunity to progressively clarify the constitutional position, irrespective that its interim order delivered in 2021 has been disappointing. However, with the interim order, the Supreme Court may have in fact temporarily contributed to denial of *personhood* to Rohingyas.

The role of the Indian Supreme Court and the ensuing legal implications

In 2017, several Rohingya refugees and their legal representatives filed a petition to the Supreme Court of India in an effort to challenge the Indian government's 2017 executive order, and subsequently filed an urgent intervention pursuant to mass detention of Rohingyas from Jammu by the Indian government in 2021. The petitioners laid out the threat to Rohingya life and liberty that forcible deportation to Myanmar would entail, and the detrimental impacts of mass detentions in the interim, including of women and children (who have additional claims to rights protection due to India's constitutional and international human rights obligations). On this, in 2021, the Supreme Court (ostensibly the arbiter of rights and justice *for all* within its jurisdiction) issued an interim order which effectively approved the refugee 'illegalisation' position laid out in the 2017 executive order. In its order, the Supreme Court rejected the Rohingyas' humanitarian claim to not be returned to Myanmar and effectively accepted the Indian government's contentious position viewing them as a grave security (and economic) threat to Indian citizens. Further, the Supreme Court stated that it does not have the

authority to comment on the ‘internal affairs’ of another country, and so cannot consider the imminent threat of genocidal violence against the Rohingya in Myanmar in their decision-making. In effect, the Supreme Court, for the time being, has refused to engage with the tenets of *non-refoulement* or with the constitutional right to life entwined with their possible deportation, in relation to the Rohingyas (Alexander 2021). The Supreme Court’s interim order has effectively exacerbated the precarious legal situation of Rohingyas in India by allowing the Indian government to exclude this refugee group from protection – laying the foundations for their mass deportations (Bhatia 2021).

This has also led to convoluted legal implications affecting Rohingya refugees’ rights to *leave* a country that they are no longer welcome in. For instance, in recent times, several Rohingyas have been granted third country resettlement, facilitated by UNHCR. Yet the Indian government has refused these Rohingyas exit permits and therefore refused them the opportunity to obtain safe asylum elsewhere. Some have approached the courts to challenge these refusals – Senoara Begum is one such case. Begum and her three children have valid refugee visas for the United States but the government have refused her family the right to exit, citing apparent security risks (Banka 2022). It has also been argued that the community cannot be extended basic rights to leave the country due to their illegal status, the laws of which only provide for deportation as the solution (IndiaLegal 2022). In other words, approval for a Rohingya to cross outside of India’s borders of their own volition requires personhood recognition, which the Rohingyas no longer benefit from on account of being classified as ‘illegal migrants’. On the contrary such classification allows the government to push Rohingyas across India’s borders through deportation. While the decision remains at the Delhi High Court level and is still pending, the contentious view of the Supreme Court in its interim order makes it difficult for various High Courts and other lower courts to provide relief even where an alternate remedy in the form of third country settlement is being pursued.

Further, returning to the issue of detention, if a Rohingya is detained, local lawyers and judges have limited understanding of the domestic legal frameworks, which also stems from a general lack of clarity on refugee issues and the law, to reference when defending or judging Rohingya cases. There are also procedural gaps in the law which need urgent addressal. For instance, even with a sympathetic Judge, the Indian courts struggle to release Rohingya refugees into the community as – without the issuance of LTVs, a registered address, and someone ‘reliable’ (according to the court) able to act as a local ‘guarantor’, the bail provisions of the law are not helpful. Judges cannot grant bail unless it is evident that the accused will comply with the pending police investigation and be present at the trial proceedings, which requires discretion and is a grey area in the law for certain ‘non-citizen’ refugees. For that, a registered address in India is mandatory, along with another person acting as a guarantor that the accused will not flee. This is not always possible for any Rohingya newly seeking asylum in the country, who often do not even speak the language.

In a case in West Bengal, four Rohingyas had served their complete sentence under illegal immigration charges, yet the court could not release them – nor even transfer to an ‘open jail’ with improved detention facilities – because these Rohingya do not have residency rights in the state (Chattoraj 2021). An implication of these legal gaps is lengthy or indefinite detentions having a grave effect on the person and their families. Refusal of bail and lengthy detentions of refugees and asylum seekers for immigration

violations are thus deeply concerning, and these actions are at odds with India's international human rights commitments – but more importantly they have not yet been adjudged to be constitutionally valid. This is an extreme stripping of rights and legal *personhood* of a community *en masse* that has profound implications for the rule of law in India.

For some cases, lawyers have successfully argued for the release of detained Rohingyas registered with UNHCR. In these cases (where the union or state government does not object), the Court has ordered prison authorities to release the refugees under the 'responsibility' of members of the Rohingya groups such as the community representatives, or community-led organisations such as the Rohingya Human Rights Initiative and the Rohingya Refugee Committee. However, instances of release are few for several reasons. Once Rohingya refugees are in detention, they can struggle to make contact with UNHCR, or UNHCR are denied access – particularly in border areas. Moreover, violations of immigration law relating to being undocumented seem to be increasingly treated like a serious offence potentially percolating to the hard attitude of government authorities and judges (Tripathi 2021). As a result, Rohingyas are frequently left stranded in jail with limited prospects of release. While exact numbers of current Rohingya detainees are difficult to verify (Rohingya activists estimate around 550), it appears that many refugees have been lost in the penal system in this way, unknown to UNHCR and legal/civil society agencies (Human Rights Watch 2022; Shwe, Field, and Brinham 2021). Our own research has highlighted many such instances in Hyderabad and Delhi (Field, Tiwari, and Mookherjee 2017; Tiwari and Field 2020).

At the same time, Rohingya refugees have not (yet) had their constitutional personhood irrevocably undermined (Mutha 2022). In the case of the 14 Rohingyas detained in November 2020, Rohingya activists sought donations, loans, and further legal representation, and a subsequent bail application was successful in February 2021 (Mitra 2022). In another recent success story, a Judge in the High Court for Punjab and Haryana also released a Rohingya male to reside with his family in Haryana, following the petition of his mother to the Courts.⁵ However, these positive outcomes are infrequent. Various High Courts have been proactive on refugee issues, but since refugees as foreigners come under the central government's domain and in the absence of clarity on their constitutional rights, the Supreme Court's broader constitutional intervention becomes critical, particularly as the 'final arbiter' of the Indian Constitution.⁶

Thus, in addition to the government's direct depreciation of Rohingyas' rights to life and liberty through detention and deportation, Rohingyas have had their constitutional personhood undermined through multiple (and interconnected) indirect means: the inability of judges to release them from detention; accusations of illegality and threats of violence against them by political figures; and interim orders by the Supreme Court essentially stating that Rohingyas do not have rights to life and liberty in India. There are thus intersections with the criminal laws and the constitutional law of the country, meaning that despite the light shadow of international refugee law and a domestic legislation on refugees, law does not fade away rather it provides grey spaces for the legislature as well as the judiciary to evade. The law remains the same, and yet the latitude within the category of status non-citizenship has enabled legal and policy institutions to gradually strip a vulnerable community of their constitutionally protected personhood claims and protections (Ahmed and Bakshi 2022).

Conclusion: the dichotomy between ‘rights’ and ‘non-citizenship’

Using a contextual analysis of an ongoing crisis relating to Rohingyas in India, this article has attempted to apply the theoretical developments from Bosniak to Bloom around the inclusionary idea of ‘non-citizenship’ both as a (il)legal status and a normative conception to articulate a process of illegalisation. Applying these, Rohingya refugees in India pre-2017 could be considered as status non-citizens *with* personhood recognition that allowed some level of exercise of autonomy, including by accessing the Supreme Court. While legal frameworks in India (or, more accurately, an absence of dedicated legal framework that recognises refugees’ constitutional rights) may have precluded Rohingyas from a definite protection framework, nevertheless, in principle during that period, Rohingyas were still accorded protection through the extension of basic rights in line with the Indian Constitution (where the critical right to life and personal liberty under Article 21 extends to all *persons*). In other words, through allowing Rohingyas to register with UNHCR and access LTVs, work opportunities, education and health services, the Indian State was *de facto* acknowledging their inherent rights and their personhood.

Then, August 2017 marks a shift. After this point, Rohingya refugees in India experience status ‘non-citizenship’ *with a rapid depreciation of personhood* amidst an incessant appeal to the illegality of their ‘migration’. Rohingya rights after this date have been severely diluted, their basic protections have been undermined and, at times, completely suspended. Rohingyas have, not infrequently, been increasingly treated as a collective ‘enemy’ of the state. This has been a direct imposition on their personhood in law, policy and in general life – thereby relegating their individuality and any innate rights that may accrue due to their existence as human beings.

Beyond direct action, both Bosniak and Bloom posit that depreciation can be a function of the inherent lack of acknowledgment of the claims of those with ‘non-citizen’ status (Bosniak 2017). This in turn allows wide latitude for rights-stripping and the denial of personhood, which are resistant to judicial review. In fact, the Rohingyas’ latest claim before the Supreme Court to desist the Indian State from carrying out its policy of detention and deportation, that was rejected could have been the last possible effort which underlines the lack of any option to protection. The Supreme Court also stated that it does not have the authority to comment on the ‘internal affairs’ of another country, and so cannot consider the imminent threat of genocidal violence against the Rohingya in their decision-making.⁷ In doing so, the Court may have effectively disregarded the *personhood* of Rohingyas by not engaging with their persecution in Myanmar and by not engaging with the due process under India’s immigration laws for certain communities of ‘non-citizens’ who have a strong claim to be recognised as ‘refugees’.

To return to the questions we posed in our introduction, the illegalisation of Rohingyas (and the subsequent denial of their right to life and liberty in India) is certainly underway in India’s legal system and policy. This process is shored up by a toxic anti-Rohingya political environment that sought to deny Rohingyas’ worth as a people in parallel with the legal efforts to deny their personhood in law. While this process is at present directed at Rohingyas, and has grave implications for the community’s ongoing security in the country, it also has implications for other ‘status non-citizen’ groups. The

manoeuvring room within India's broad non-citizen category presents risks to many refugee communities. For instance, Afghan refugees, Burmese Chin refugees and other UNHCR-mandated groups have also experienced exclusions from jobs, rental accommodation and basic services, because their UNHCR refugee cards are not considered 'valid' documentation in the eyes of authorities and other service gatekeepers (Shankar and Vijayaraghavan 2020). It can be a challenge for many refugee groups to access other forms of government-issued IDs, because national documentation is required in the application. While other refugee groups do not currently appear to be experiencing surveillance and detention by the authorities at the same scale as Rohingyas, the ambiguity of status non-citizenship protections and a volatile public discourse creates a hostile environment that puts all refugees at risk.

Questions around the boundaries of citizenship and the fate of 'non-citizens' also hangs over current moves in the northeast to exclude millions of Indians from claims to citizenship with the National Register of Citizens and Citizenship Amendment Act. Such moves to reshape citizenship boundaries around Indian citizens is beyond the scope of this article and undergoes excellent analysis elsewhere in this issue. Yet, it is pertinent to highlight at this final juncture that more than refugee lives and liberty hang in the balance with these legal and policy illegalisation tactics. Increasingly, both liberal and non-liberal states have drawn territorial lines around inclusion and have not excluded people by citizenship status. Bosniak terms this as '*a commitment to personhood protection*' and the extension of basic rights to everyone, irrespective of their legal status, with the qualifying condition being territorial presence. For Rohingyas, this is relevant since in India the fundamental constitutional protections cover all within its territory, regardless of status.

What India has seen over the last six years is an increasingly rigid and bounded notion of citizenship, with hard(er) lines being drawn around citizens and against status non-citizens – or, at least, some status non-citizens. *How* the state is hardening these lines is significant, because it is being aided by using the law and the wide latitude it provides, without necessarily following the constitutional rights scheme which is meant to be apolitical and the ultimate arbiters of protection for all within India's borders. Further, the Indian government needs to honour its commitments to various international agreements around refugee protection and human rights, and end the detention trap it has created for refugees in the country. At the same time, as pointed earlier and evidenced by the Rohingyas' current predicament in India, even theoretically there needs to be further interdisciplinary and cross-regional analysis of refugee situations particularly in non-signatory countries which host considerable number of refugees.

In conclusion this article has sought to assess how the detentions and impending deportations of Rohingyas are an arbitrary step drawing essentially from notions of bounded citizenship, that pervades even judicial interpretations. The article proposed that 'non-citizenship' needs to be critically engaged within law and policy considering the constitutional personhood idea which has hitherto not been done by various State actors. In fact, the Supreme Court's and the Indian government's recent interpretations on Rohingya rights are problematic due to their disregard for the constitutional contours of inclusive (non)citizenship and consequently *personhood*. This, the article highlights, is a potentially significant normative issue facing India in the coming years due to the lack of clarity around how law and policy deals with status 'non-citizenship', particularly in relation to those present in India on humanitarian grounds. The aim of this article

thus has been to highlight the urgent need for deeper normative engagement at law-making, policy-making and judicial levels on the issue of vulnerable and marginalised ‘non-citizens’ is concerned. This is not merely a constitutional rights issue but one which shapes the contours of societal recognition of personhood and human well-being through the lens of the most vulnerable and excluded.

Notes

1. We use the terms ‘refugees’ and ‘asylum seekers’ interchangeably since in India there is no legal recognition of both terms, and neither is India party to the key conventions under the international refugee law framework. We recognise the claims of Rohingyas to refugeehood in India and hence choose to use the above terminologies, especially ‘refugees’.
2. The use of the term *undesirable* emanates from scholarship on refugee and migrant studies focussing on attitudes towards these communities in host countries.
3. Sections 29(a) and 14, *Foreigners Act 1946*. Section 3(2)(a), *Foreigners Order 1948*; Rules 3, 4 and 5, *Passport Rules 1950*.
4. *The Gambia v Myanmar*, Application of the Convention on the Prevention and Punishment of Genocide, Judgment dated 22 July 2022. <https://www.icj-cij.org/public/files/case-related/178/178-20220722-JUD-01-00-EN.pdf>.
5. *Julaha Yusuf v Union of India* (Punjab & Haryana High Court) 15 January 2021.
6. *Nandita Haksar v State of Manipur* (W.P. CrI 6 of 2021) Manipur High Court, judgment dated 3 May 2021. *Dongh Lian Khan v Union of India*, MANU/DE/4215/2015. *Ktaer Abbas Habib Al Qutaifi v Union of India* MANU/GJ/0433/1998.
7. Interim order *Mohd. Salimullah v Union of India* Writ Petition (Civil 793 of 2018) Supreme Court.

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