

TESTIMONIAL INJUSTICE AND THE SUPREME COURT'S RECENT TREATMENT OF ROHINGYA REFUGEES IN MOHAMMAD ISMAIL AND JAFFAR ULLAH CASES: ENTRENCHING A JURISDICTION OF SUSPICION AFTER THE MOHAMMAD SALIMULLAH VERDICT

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The Supreme Court of India has refused to provide interim relief to Rohingya refugees, paving the way for their forced repatriation. Following its interim order in Mohammad Salimullah v. Union of India, there is little to suggest that the Court is willing to alter its stance unless a third-judge bench decides to the contrary. Notably, the issues framed by the bench does not explicitly address the right of non-refoulement, although the Court appears willing to engage with the question of whether the Rohingyas are 'refugees', even in the absence of a law for seeking asylum in India. By averring that Rohingyas have no fundamental right to settle on Indian territory, the Supreme Court in Salimullah had precluded the likelihood of reading a right of non-refoulement into Article 21. Pandering to the state's heightened security paranoia, the lived experience of Rohingya refugees is distrusted in favour of the executive's version of the story. Relying upon Miranda Fricker's exposition of testimonial injustice, I argue that this presumption of inauthenticity emanates from a politically-manufactured distrust of the 'other' refugee – who does not fit into the hegemonic imagination of an insider refugee that the Citizenship (Amendment) Act, 2019 legitimates. Dismissing the repatriation of

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Rohingyas as a 'fanciful' narrative, the Court inaugurates a jurisdiction of suspicion where the right to life is dispensable.

I. INTRODUCTION

"I want to go home, but home is the mouth of a shark. Home is the barrel of a gun. No one would leave home unless home chased you to the shore. No one would leave home until home is a voice in your ear saying – leave, run, now."

*- Warsan Shire, Home, and: Conversation about Home
(At the Deportation Centre)¹*

On July 31, 2025, the Supreme Court framed significant issues that could set the tone for the future of refugee law, in the want of domestic legislation in India.² The Court has chosen to settle whether Rohingyas could be classified as 'refugees' or illegal immigrants. Inevitably, the apex court would then have to grapple with the extent of the government's deportation power and if it can be constrained, with reference to the fundamental rights guaranteed under the Indian Constitution.

It is striking how the Court has erected a wall of separation between the 'refugee' question and Article 21 – juxtaposing the fundamental rights instead with the right of Rohingyas to basic amenities in refugee camps such as that of sanitation, drinking water or a right to pursue education.³ The right of non-refoulement, that is the fulcrum of international refugee law, is conspicuous by its absence. In fact, the reference made to 'refugees' without statutory backing could also push the Court towards tenuous ground, unless it engages with non-refoulement as an obligation that is embedded in the international human rights framework.

Refusing to give interim relief earlier in its May 16 order, the Court has effectively condoned the involuntary return of Rohingya refugees.⁴ News reports, highlighting how the Rohingyas were deliberately cast away into the sea by Indian authorities, were ignored in the process.⁵ Even after the Special Rapporteur on

¹ Warsan Shire, 'Conversations About Home (At the Deportation Centre)' (2021) 132 Transition 336.

² *Jaffar Ullah v Union of India* 2018 SCC OnLine SC 3674.

³ *ibid.*

⁴ *Mohammad Ismail v Union of India* 2025 SCC OnLine SC 2938.

⁵ Betwa Sharma, 'Supreme Court Said that there is No Evidence Modi Govt Forced Rohingya Refugees into the Sea. There is' (*Article 14*, 19 May 2025) <<https://article-14.com/post/supreme-court-said-no-evidence-modi-govt-forced-refugees-into-the-sea-there-is-682abd706d963>> accessed 16 September 2025; *see also* Sanhati Banerjee, '2 Months After India Allegedly Abandoned

the situation of human rights in Myanmar is said to have initiated an enquiry into such flagrant rights violation, the Supreme Court appeared unmoved.⁶ It was opined that external agencies should not be allowed to impinge on India's sovereignty.⁷

Hearing a batch of petitions challenging the forced repatriation, the Court had also observed that if the Rohingyas on Indian soil are found to be foreigners under law, they have to be deported accordingly.⁸ The apex court noted that a three-judge bench in *Mohd Salimullah v Union of India* ('*Salimullah*') had also refused relief in response to an earlier interlocutory application.⁹ Applying the principle of *res judicata*, one of the judges even indicated that the interim order would continue to operate.¹⁰ The petitions concerning the Rohingyas were then consolidated for the July hearing that led to the framing of legal questions. An expeditious change in the Supreme Court's stance appears unlikely in the next hearing, at the time of writing.

Pitted against a wide of arguments, from security interests being compromised to the bogey of unchecked immigration, the Rohingya testimonies have been written off as untrustworthy on more than one occasion. The judiciary's indifference towards the plight of Rohingyas, however, should not be depoliticized and be viewed as a prosaic irregularity. In this paper, I adopt Miranda Fricker's philosophical lens to argue that such testimonial injustice effectively transforms judicial proceedings into a lopsided theatre for performatively establishing the state's truth-claims.

Rohingya Refugees at Sea, Agonised Families Desperate to Know Where They are' (*Article 14*, 18 July 2025) <<https://article-14.com/post/2-months-after-india-allegedly-abandoned-rohingya-refugees-at-sea-agonised-families-desperate-to-know-where-they-are--6879c0714421d>> accessed 16 September 2025.

⁶ Alarmed by Reports of Rohingya Cast into the Sea from Indian Navy Vessels, UN Expert Launches Inquiry of "Unconscionable, Unacceptable Acts" (*OHCHR*) <<https://www.ohchr.org/en/press-releases/2025/05/alarmed-reports-rohingya-cast-sea-indian-navy-vessels-un-expert-launches>> accessed 16 September 2025.

⁷ Ananthakrishnan G, 'Beautifully Crafted Story When Nation Faces Tough Time: SC on Rohingya Deportation' *The Indian Express* (16 May 2025) <<https://indianexpress.com/article/india/beautifully-crafted-story-nation-tough-time-sc-rohingya-deportation-1001177/>> accessed 16 September 2025.

⁸ 'If Rohingya Refugees are "Foreigners" under the Foreigners Act, They will Be Dealt with as Per the Law: SC' *The Hindu* (8 May 2025) <<https://www.thehindu.com/news/national/if-rohingya-refugees-are-foreigners-under-the-foreigners-act-they-will-be-dealt-with-as-per-the-law-sc/article69554086.ece>> accessed 16 September 2025.

⁹ *Mohd Salimullah v Union of India* (2021) 19 SCC 191.

¹⁰ 'Rohingya Deportation | Day 11: State Constitutionally Obligated to Protect Refugees of Genocide, Petitioners Argue' *Supreme Court Observer* <<https://www.scoobserver.in/reports/rohingya-deportation-day-11-state-constitutionally-obligated-to-protect-refugees-of-genocide-petitioners-argue/>> accessed 4 October 2025.

In Part II of the paper, I delve into the reasoning resorted to by the Supreme Court to deny the interim relief sought by the Rohingya refugees that knocked on its doors. Even as the identification of refugees remains politically contestable, there are legal precedents to suggest that the Indian judiciary has not entirely turned its back to the idea of non-refoulement – a facet I have explored in Part III. Finally, in Part IV, I reflect upon the implications of testimonial injustice meted out against the Rohingya refugees, concluding that it institutes a jurisdiction of suspicion where the right to non-refoulement is obliterated.

II. THE SUPREME COURT'S VIEWS ON ROHINGYAS

Referring to the plea that Rohingya refugees had been forcibly left in the lurch near the Andaman Sea, the Supreme Court in its interim order of May 16 was not ready to be swayed by what was described as a '*fanciful*' story.¹¹ It came after a UN press release, from the Office of the High Commissioner for Human Rights, expressing alarm on how Indian navy vessels had been deployed for abandoning a group of Rohingya refugees with life jackets on international waters near Myanmar, where they face a credible threat to their life.¹² Significantly, the refugees possessed identity documents issued by the United Nations High Commissioner for Refugees.¹³

The UN publication also described how the refugees were said to have been detained in Delhi, blind-folded and transported to the Andaman and Nicobar Islands before being moved to a naval ship.¹⁴ They were given life jackets and forced to swim across the Andaman Sea to an island within the territorial expanse of Myanmar.¹⁵ Although the lawyer for the petitioners supplied a phone call

¹¹ 'Supreme Court Questions Plea on Rohingya Deportation, Cites Lack of Credible Evidence' *The Hindu* (16 May 2025) <<https://www.thehindu.com/news/national/sc-questions-plea-on-rohingya-deportation-cites-lack-of-credible-evidence/article69584982.ece>> accessed 16 September 2025.

¹² 'Alarmed by Reports of Rohingya Cast into the Sea from Indian Navy Vessels, UN Expert Launches Inquiry of "Unconscionable, Unacceptable Acts"' (n 6).

¹³ For an overview of the fragmented refugee recognition system in India that is administered parallelly by the Indian government and the UNHCR, refer to R Shanker and H Vijayaraghavan, 'Refugee Recognition Challenges in India' (2020) *Forced Migration Review* <<https://ora.ox.ac.uk/objects/uuid:b1597dfe-3a84-4370-a5d8-a1032e6be144>> accessed 23 September 2025.

¹⁴ 'Alarmed by Reports of Rohingya Cast into the Sea from Indian Navy Vessels, UN Expert Launches Inquiry of "Unconscionable, Unacceptable Acts"' (n 6); More recently, the United Nations High Commissioner for Human Rights has also taken strong exception to India's deportation of the Rohingyas, see HC Türk Updates the Human Rights Council: "We Need to Safeguard Eighty Years of Progress on Freedom, Equality and Justice" (*OHCHR*) <<https://www.ohchr.org/en/statements-and-speeches/2025/09/hc-turk-updates-human-rights-council-we-need-safeguard-eighty-years>> accessed 18 September 2025.

¹⁵ Vineet Bhalla, 'How India Allegedly Deported 40 Rohingya Refugees by Forcing them into Andaman Sea' (*Scroll.in*, 16 May 2025) <<https://scroll.in/article/1082411/how-india-allegedly-deported-40-rohingya-refugees-by-forcing-them-into-the-andaman-sea>> accessed 18 September 2025; see also Samira Hussain, 'India Put Us on the Boat like Captives — Then Threw Us in the Sea' (*BBC*, 28 August 2025) <<https://www.bbc.com/news/articles/c4gop0522zeo>> accessed 18 September

recording, the two-judge bench refused to provide any interim relief,¹⁶ instead tagging the petition with the ongoing cases on the Rohingyas before the Supreme Court. The Court was also dismissive of the UN report, making the sweeping remark that outsiders will not be allowed to intervene.¹⁷

It was not the first instance where the Court has passed on an opportunity to stay the deportation of Rohingyas. Responding to the plea that the Rohingyas have a right not be sent back to Myanmar where they face adverse political conditions, the Supreme Court remained unconcerned once again. As reported, one of the judges orally stated during the May hearing that the Rohingyas do not have a right to settle in India, replicating the *Salimullah* trope.¹⁸ In another case concerning a Sri Lankan Tamil who had undergone a prison sentence under the Unlawful Activities (Prevention) Act, 1967, a Supreme Court bench in May had commented that India cannot be turned into a haven for refugees and the right of residence is not available to foreigners.¹⁹

The Union government, on the other hand at the May hearing, had pushed for the deportation of Rohingyas as per domestic law, claiming that there were reliable national security threats arising from their presence on Indian territory.²⁰ It was argued that the Directive Principle to foster respect for international law in Article 51(c) of the Constitution would not apply where the Foreigners Act, 1946 gave an absolute power to the government for pursuing deportation measures.²¹ The Court's views have to be seen as a continuation of judicial pusillanimity that had its inception in the *Salimullah* case where the right to life of Rohingya refugees had been sacrificed at the altar of Article 19(1)(e) of the Constitution.²²

The earlier *Salimullah* order has already been subject to stringent criticism for the Supreme Court's misreading of the Fundamental Rights chapter, contrary

2025; Esha Mitra, 'How India Secretly Sent Refugees Back to the Land Accused of Committing Genocide Against Them' (*CNN*, 14 September 2025) <<https://www.cnn.com/2025/09/13/world/india-secret-deportations-rohingya-myanmar-intl-hnk-dst>> accessed 18 September 2025; 'India: Scores of Rohingya Refugees Expelled' (*Human Rights Watch*, 28 August 2025) <<https://www.hrw.org/news/2025/08/28/india-scores-of-rohingya-refugees-expelled>> accessed 18 September 2025.

¹⁶ Ananthakrishnan G (n 7).

¹⁷ *ibid.*

¹⁸ 'If Rohingya Refugees are "Foreigners" under the Foreigners Act, They Will be Dealt with as per the Law: SC' (n 8).

¹⁹ 'India Not a Dharmshala to Host Foreign Nationals': SC Rejects Sri Lankan Tamil's Plea for Settling in India' *The Times of India* (21 May 2025) <<https://timesofindia.indiatimes.com/india/india-not-a-dharmshala-to-host-foreign-nationals-sc-rejects-sri-lankan-tamils-plea-for-settling-in-india/articleshow/121268920.cms>> accessed 22 October 2025.

²⁰ 'If Rohingya Refugees are "Foreigners" under the Foreigners Act, They Will be Dealt with as per the Law: SC' (n 8).

²¹ *ibid.*

²² See Aishwarya Birla, 'Evaluating the Indian Refugee Law Regime: How has the Judiciary Responded to Refugee Claims in Light of International Law Obligations, and How Can it Do Better?' (2023) 35 *International Journal of Refugee Law* 81.

to India's international obligations.²³ In *Salimullah*, the Supreme Court had disposed of the interlocutory application, holding that the right not to be deported is ancillary to the right to reside or settle in any part of Indian territory as per Article 19(1)(e).²⁴ While the said provision confers a right to settle and reside in any part of Indian territory, non-citizens cannot avail it. By associating the Rohingyas' right of non-refoulement with Article 19(1)(e), the Supreme Court has created an insurmountable barrier to the refugees having access to constitutional remedies, freezing the application of Article 21. As argued in the next segment, the Court also erred in its decision by hemming in the non-refoulement principle as a part of treaty law, that can be solely traced back to the Refugee Convention. Article 21 must be seen alongside the legal status of non-refoulement in international refugee law.

III. RECOGNIZING NON-REFOULEMENT IN INDIA

The non-refoulement principle ensures that a refugee is not sent back to their country of origin where there is a serious likelihood of persecution. Not only is it a part of customary international law, it is also said to have attained the status of an established norm from which no derogation is permitted.²⁵ Even if India is expected to adhere to this international obligation,²⁶ the presence of the Foreigners Act 1946 has historically given ammunition for state functionaries to argue that the principle can only be incorporated if it is not contrary to domestic legislation.²⁷

Yet, domestic law in India does not call for the right of non-refoulement to be infringed.²⁸ The Foreigners Act cannot be said to subsume the claims of asylum-seekers as its application does not cover refugees. Given the statutory vacuum, international law has to plug the gap. The Supreme Court has demonstrably

²³ Atul Alexander, 'Critical Analysis of Mohammad Salimullah v. Union of India: Has the Supreme Court of India Acted as Executive?' (2021) 3 CMR Journal of Contemporary Legal Affairs 113.

²⁴ *Mohd Salimullah v Union of India* (n 9).

²⁵ Guy S, Goodwin-Gill, Jane McAdam and Emma Dunlop, *The Refugee in International Law*, vol 4 (Oxford University Press 2021) 299; Siddeeqa Iram, 'Reimagining the Asylum Law in India: A Study on the Duty of Non-Refoulement' (2025) 36 National Law School of India Review <<https://repository.nls.ac.in/nlsir/vol36/iss1/6>>; Birla (n 22) 96; Shuvro Prosun Sarker, *Refugee Law in India: The Road from Ambiguity to Protection* (Palgrave Macmillan 2017) 24.

²⁶ Priya Pillai, 'International Law Omissions: Rohingya Deportation Order of the Supreme Court of India' (*Opinio Juris*, 19 April 2021) <<https://opiniojuris.org/2021/04/19/international-law-omissions-rohingya-deportation-order-of-the-supreme-court-of-india/>> accessed 16 September 2025.

²⁷ B S Chimni, 'The Legal Condition of Refugees in India' (1994) 7 Journal of Refugee Studies 378, 380.

²⁸ Gautam Bhatia, 'Complicity in Genocide: The Supreme Court's Interim Order in the Rohingya Deportation Case' (*Constitutional Law and Philosophy*, 8 April 2021) <<https://indconlawphil.wordpress.com/2021/04/08/complicity-in-genocide-the-supreme-courts-interim-order-in-the-rohingya-deportation-case/>> accessed 29 September 2025.

incorporated principles from the international human rights regime earlier in landmark precedents to expand the normative content of fundamental rights.²⁹

While the Court's incorporation of treaty principles into domestic law has been plagued by a lack of consistency, it has not stopped scholars from asserting that the right of non-refoulement is a part of customary international law or even a jus cogens norm that binds India, a non-signatory to the Refugee Convention.³⁰ Human rights instruments like the ICCPR, that India has joined, also offer a complementary regime of wider protection without limitation³¹ and must be read in conjunction such that the right to life under Article 21 of the Constitution can be invigorated.

Unfortunately, in the *Salimullah* case, the Supreme Court enabled statist considerations of internal security and allied concerns surrounding agents providing a safe passage into India to overshadow non-refoulement claims.³² Article 21, that is available to foreigners, had been wilfully ignored. The Court instead deferred completely to the executive, only mandating adherence to the regular procedure for deporting foreigners. While India's position in relation to the Convention Relating to the Status of Refugees, 1951 as a non-signatory state was emphatically stated, the Court stopped short of delving into international law principles any further.

The Supreme Court's disinclination in *Salimullah* to engage with the submissions of United Nations experts or its inattentiveness towards the International Court of Justice's ('ICJ') provisional measures in *the Gambia v Myanmar*³³ also underscores its insular approach to matters involving Rohingya refugees. Another disconcerting aspect of the judgement was the Court's refusal to see "*what was happening in another country*."³⁴

²⁹ See for example, *Vishakha v State of Rajasthan* (1997) 6 SCC 241; *National Legal Services Authority v Union of India* (2014) 5 SCC 438 : AIR 2014 SC 1863; *K S Puttaswamy (Privacy-9f) v Union of India* (2017) 10 SCC 1 : AIR 2017 SC 4161.

³⁰ Prabhash Ranjan, 'The Supreme Court of India and International Law: A Topsy-Turvy Journey from Dualism to Monism' (2022) 43 Liverpool Law Review 571, 590–591.

³¹ Birla (n 23) 99; General Comment No. 36 on Article 6: Right to Life (Human Rights Committee 2016) 7; Legal Opinion on India's Obligations under International Law to Not Deport Rohingyas (The UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance 2019) 13.

³² See *Mohd Salimullah v Union of India* (n 10).

³³ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar: 11 States intervening) (International Court of Justice); Marko Milanovic, 'ICJ Indicates Provisional Measures in the Myanmar Genocide Case' (*EJIL: Talk!*, 23 January 2020) <<https://www.ejiltalk.org/icj-indicates-provisional-measures-in-the-myanmar-genocide-case/>> accessed 16 September 2025.

³⁴ *Mohd Salimullah v Union of India* (n 9).

Although India's failure to enact a comprehensive refugee law³⁵ may play a role in the ensuing ad-hocism in state policy pertaining to asylum-seekers, the judiciary has taken a divergent path on occasions.³⁶ In *NHRC v State of A.P.*,³⁷ the Court was willing to engage with Article 21 of the Constitution when called upon to protect Chakma refugees in Arunachal Pradesh, on the verge of being forcibly evicted amidst localized upheaval against their continued presence.

Even if one is tempted to distinguish the Chakmas' case as one where the government had already committed to conferring citizenship, there are many High Court decisions where the courts have adopted a more humane approach by recognizing a right of non-refoulement into Article 21,³⁸ even when the final remedy has been heavily circumscribed by considerations of 'national security' or the 'social fabric' - coming in the form of a momentary reprieve from deportation or the exploration of a third country alternative. The sharp contrast between the views of High Courts and the Supreme Court's approach has reiterated before extensively.³⁹

³⁵ Saurabh Bhattacharjee, 'India Needs a Refugee Law' (2008) 43 Economic and Political Weekly 71.

³⁶ Introduced in 2011, the Ministry of Home Affairs' long-term visa policy to foreign nationals, upon well-founded fear of persecution, typified such ad-hocism. Interestingly, that policy did not offer a preferential and exclusionary path to citizenship like the Citizenship (Amendment) Act 2019 that provides an expedited avenue for obtaining citizenship to members of the Hindu, Sikh, Buddhist, Jain, Parsi, or Christian communities who migrated before 31 December 2014 from Afghanistan, Bangladesh or Pakistan. Responding to the influx of Rohingya 'refugees' in Bangladesh, India has also previously provided humanitarian aid. Thus, there appears to be prior official acknowledgement of the Rohingyas in Bangladesh as 'refugees' and unlike the Supreme Court, the government has taken political interest in what happens beyond its borders to control the inflow, see Maansi Verma, 'India has Long Granted Citizenship to Refugees; CAA is Just a Step towards a Hindu Rashtra' *Caravan* (2020) <<https://caravanmagazine.in/politics/india-has-long-granted-citizenship-persecuted-refugees-caa-step-towards-hindu-rashtra>> accessed 29 September 2025; Ministry of External Affairs, Government of India, Operation Insaniyat — Humanitarian Assistance to Bangladesh on Account of Influx of Refugees <https://mea.gov.in/press-releases.htm?dtl/28944/Operation_Insaniyat__Humanitarian_assistance_to_Bangladesh_on_account_of_influx_of_refugees> accessed 29 September 2025; 'India Sends Relief Materials for Rohingya Refugees in Bangladesh' *The Hindu* (14 September 2017) <<https://www.thehindu.com/news/international/india-sends-relief-materials-for-rohingya-refugees-in-bangladesh/article61473751.ece>> accessed 29 September 2025; Shanker and Vijayaraghavan (n 14).

³⁷ *NHRC v State of A.P.* (1996) 1 SCC 742 : AIR 1996 SC 1234.

³⁸ *Ktaer Abbas Habib Al Qutaifi v Union of India* 1998 SCC OnLine Guj 304 : 1999 Cri LJ 919; *Dongh Lian Kham v Union of India* 2015 SCC OnLine Del 14338 : (2016) 226 DLT 208; *Nandita Haskar v State of Manipur* 2021 SCC OnLine Mani 176; Shuvro Prosun Sarker (n 25) 35–36.

³⁹ Rongeeet Poddar and Shrutika Pandey, 'Contrary to SC Ruling, Manipur HC Reading of "Non-Refoulement" Recognises Right of Asylum Seekers' (*The Wire*, 28 May 2021) <<https://thewire.in/law/contrary-to-sc-ruling-manipur-hc-reading-of-non-refoulement-recognises-right-of-asylum-seekers>> accessed 16 September 2025.

India's reluctance to accede to the Refugee Convention⁴⁰ is earmarked as one of the reasons behind the disparate treatment of refugees.⁴¹ Consequently, refugees are under the risk of being sent back to their country of origin, being recipients of state benevolence, at best, if not the illegal 'intruder'⁴² that Indian immigration laws have sought to eject from its territory.⁴³ In political battles fought outside courtrooms, the demonization of Rohingya refugees, as explored in the next segment, is also glaringly visible—so much so that the Rohingya refugee now represents an abject figure embodying illegal immigration into Indian territory and prospective demographic swamping. Furthermore, the Citizenship (Amendment) Act of 2019 ('CAA') is widely recognized as another marker of how majoritarianism can seep into asylum policies,⁴⁴ even when supplemented by executive decisions to make amends for its inherent arbitrariness.⁴⁵

Yet, these substantive issues obscure a certain pattern that typifies the Rohingya predicament in the Supreme Court. The recent cases highlight an air of mistrust that pervades the Court's views about Rohingya refugees. Their right to life has been snuffed out by an insidious lack of procedural fairness that can only be unearthed with reference to Miranda Fricker's exposition of testimonial injustice. I argue, in the next part, that the undermining of Rohingya testimonies produces a jurisdiction of suspicion, that nullifies the right of non-refoulement.

⁴⁰ Jay Ramasubramanyam, 'Subcontinental Defiance to the Global Refugee Regime: Global Leadership or Regional Exceptionalism?' 24 *Asian Yearbook of International Law* 60; Bhairav Acharya, 'The Future of Asylum in India: Four Principles to Appraise Recent Legislative Proposals' (2017) 9 *NUJS Law Review* 173, 179–183; Prabodh Saxena, 'Creating Legal Space for Refugees in India: The Milestones Crossed and the Roadmap for the Future' (2007) 19 *International Journal of Refugee Law* 246, 248; B S Chimni (n 27) 396; For an understanding of the historical backdrop that contributed to India's dissonance, see Ria Kapoor, 'Removing the International from the Refugee: India in the 1940s' (2021) 12 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 1.

⁴¹ Saurabh Bhattacharjee (n 35).

⁴² 'Amit Shah Orders Crackdown on Networks Aiding Bangladeshi, Rohingya Intruders' (*DD News*, 28 February 2025) <<https://ddnews.gov.in/en/amit-shah-orders-crackdown-on-networks-aiding-bangladeshi-rohingya-intruders/>> accessed 18 September 2025.

⁴³ See 'Defined Registration, Exemption for Some Minority Religious Groups: What's in the New Foreigners Act?' *The Indian Express* (5 September 2025) <<https://indianexpress.com/article/explained/explained-law/whats-in-new-foreigners-act-10231108/>> accessed 17 September 2025.

⁴⁴ Rongee Poddar, 'India's Flip-Flop on Rohingya Refugees: Need to Address Majoritarian Tendencies in Recent Asylum Policies' (*Refugee Law Initiative Blog*, 4 October 2022) <<https://rli.blogs.sas.ac.uk/2022/10/04/indias-flip-flop-on-rohingya-refugees/>> accessed 16 September 2025.

⁴⁵ 'Relief for Refugees: On the Immigration and Foreigners (Exemption) Order, 2025' *The Hindu* (11 September 2025) <<https://www.thehindu.com/opinion/editorial/relief-for-refugees-on-the-immigration-and-foreigners-exemption-order-2025/article70037972.ece>> accessed 17 September 2025.

IV. TESTIMONIAL INJUSTICE AND A JURISDICTION OF SUSPICION

Refugee status determination regimes at the domestic level may be afflicted by a pervasive '*culture of disbelief*' as can also be seen in other jurisdictions.⁴⁶ For instance, national authorities of the host-state have shown a demonstrable trend of distrusting lived experiences of persecution in cases concerning individuals from sexual minority groups, demanding instead that asylum-seekers conform with stereotypical expectations of conduct or personal traits prevalent among similarly-placed communities in the host-state.⁴⁷ Systemic credibility deficit emanates from such profiling of asylum-seekers - leading to a chasm between those who adhere to the state institutions' notion of desirable refugees and others who can be stigmatized as illegal immigrants.

In India, after the CAA, it is religious affinity coupled with country of origin that moulds this new dynamic of difference, setting up an immutable persecution template where the Rohingyas cannot be accommodated. Since the unwelcome asylum-seeker's experience of persecution defies the preconceived worldview of state authorities, identity disbelief makes them suspect. The Supreme Court's approach since *Salimullah* suggests that such disbelief is being increasingly shaped by a latent testimonial injustice.

Miranda Fricker had written that the self-expression of certain disempowered communities may be discredited because of who they are. The ingrained prejudices of the listener are said to have a bearing upon their receptiveness to contrarian views that fly in the face of their established belief-system. Because of pejorative insinuations associated with the identity of a disempowered social group, the group in question may be presumed to be lying.⁴⁸ At the heart of testimonial injustice, lies a relational hierarchy between dominant and marginalized communities.

The preconceived impulses of a decision-maker, in the position of a listener, contribute to a distortion of vision. As a result, the claims made by those from disadvantaged groups are considered '*fanciful*' – as the Supreme Court had reportedly described the materials relied upon by the petitioners to shed light

⁴⁶ Jessica Anderson and others, 'The Culture of Disbelief: An Ethnographic Approach to Understanding an Under-Theorised Concept in the UK Asylum System' (2014) 102 RSC Working Paper Series <<https://www.rsc.ox.ac.uk/publications/the-culture-of-disbelief-an-ethnographic-approach-to-understanding-an-under-theorised-concept-in-the-uk-asylum-system>> accessed 1 November 2025; see also Lisa Marie Borrelli, Annika Lindberg and Anna Wyss, 'States of Suspicion: How Institutionalised Disbelief Shapes Migration Control Regimes' (2022) 27 Geopolitics 1025.

⁴⁷ Jenni Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom' (2009) 13 The International Journal of Human Rights 391, 392; Douglas McDonald, 'Freedom to Be: Assessing the Claims of LGBTQ Asylum Seekers' (2014) 10 Socio-Legal Review 35, 42.

⁴⁸ Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford 2007) 36.

on the abandonment of Rohingyas in the Andaman Sea.⁴⁹ Once the distinction between ‘us’ and ‘them’ intensifies, ‘their’ knowledge is never elevated to the pedestal of valid knowledge. The authenticity of such voices is doubted not because ‘they’ lack substance *per se* but because ‘their’ very identity colours the views of the listener.

With the speaker’s motives being imputed as insincere, such a deflation of credibility lies at the heart of testimonial injustice.⁵⁰ Reflecting upon Miranda Fricker’s idea, Mohsen al Attar recently argued, in the wake of the ongoing genocide in Gaza, that the dehumanization of certain communities like the Palestinians can be attributed to such testimonial injustice as their side of the story is prematurely disbelieved.⁵¹

Narratives advanced by refugees to bolster their asylum claims are also susceptible to being distrusted.⁵² It results in exclusion from the ‘communicative’ sphere where the refugees could have articulated their side of the story, without being bogged down by prejudices stemming from their identity.⁵³ As a consequence of such othering, national authorities in the host state are disinclined to facilitate a fair hearing to evaluate asylum requests. How does one then situate the Rohingyas inside Fricker’s prism?

The veracity of claims made by Rohingyas or petitioners on their behalf have been put to the test before a Supreme Court that has been increasingly differential towards the executive in recent years.⁵⁴ Functioning avowedly as custodians of the Constitution, the apex judiciary is not aloof from what transpires

⁴⁹ ‘You Come with Fanciful Ideas When Nation Facing Difficult Time: SC on Rohingya Deportation’ *The Times of India* (16 May 2025) <<https://timesofindia.indiatimes.com/india/you-come-with-fanciful-ideas-when-nation-facing-difficult-time-sc-on-rohingya-deportation/article-show/121215233.cms>> accessed 30 September 2025.

⁵⁰ Miranda Fricker (n 48) 27.

⁵¹ Mohsen al Attar, ‘Of Palestinian Liars and Israeli Saints: Confronting Anti-Palestinian Racism in International Law’ (*Opinio Juris*, 5 April 2024) <<https://opiniojuris.org/2024/04/05/of-palestinian-liars-and-israeli-saints-confronting-anti-palestinian-racism-in-international-law/>> accessed 16 September 2025.

⁵² It contributes to an ‘epistemic erasure’, described as “both a process and a consequence of one’s knowledge, credentials and values being sidelined and systematically eliminated by a dominant group or institution”, see Rahime Süleymanoglu-Kürüm and others, ‘Invisible Pasts, Erased Futures: Epistemic Erasure in Refugee and Migrant Experiences’ (2025) *Third World Quarterly* 1, 2–3.

⁵³ *ibid.*

⁵⁴ Rohit Sarma, ‘Judicial Powerplay: Independence of Judiciary under the Shadow of Illiberalism’ (2025) 9 *Indian Law Review* 109; Gautam Bhatia, “A Little Brief Authority”: Chief Justice Ranjan Gogoi and the Rise of the Executive Court’ (*Constitutional Law and Philosophy*, 17 November 2019) <<https://indconlawphil.wordpress.com/2019/11/17/a-little-brief-authority-chief-justice-ranjan-gogoi-and-the-rise-of-the-executive-court/>> accessed 22 October 2025; Gautam Bhatia, ‘Evasion, Hypocrisy, and Duplicity: The Legacy of Chief Justice Bobde’ (*Constitutional Law and Philosophy*, 23 April 2021) <<https://indconlawphil.wordpress.com/2021/04/23/evasion-hypocrisy-and-duplicity-the-legacy-of-chief-justice-bobde/>> accessed 22 October 2025; Tarunabh Khaitan,

outside the court premises. Amidst the fervour of hostilities with neighbouring Pakistan earlier this year, the Court quipped that the story about Rohingyas facing any imminent threat on account of their abandonment in the high seas was ingeniously crafted when the nation is at a '*difficult*' hour.⁵⁵

Not only does the plight of the Rohingyas appear out-of-sync with a prevailing sentiment of jingoism, but a veiled consumption of war hysteria also curtails the judiciary's responsiveness. Besides ruminating against the established tenets of international law, this judicial approach legitimates the suspension of fundamental rights in '*difficult*' situations. What then remains of the right to a fair hearing for an asylum-seeker seeking interim protection against forced return? In the *Salimullah* order, the Court accepted the '*serious allegations*'⁵⁶ made by the Union of India pertaining to internal security and touts taking advantage of porous international boundaries for facilitating the illegal entry of Rohingyas.⁵⁷ As pointed out by Gautam Bhatia, there was no engagement with evidence or concrete reasoning, but merely alarmist fear-mongering.⁵⁸ It was a case where the executive's version of events received a hasty rubber-stamp and was accepted as the gospel truth. With the petitioners' claims being pre-emptively considered unreliable, the legal representative of the state was accorded an exclusivity as the sole possessor of acceptable knowledge.

The specific vulnerabilities of the Rohingyas were brushed aside because they cannot be emplaced within the state's imagination of the ideal refugee.⁵⁹ Their testimonies thus become undeserving of recognition and await to be trumped by the state's security anxieties.⁶⁰ For this reason, the petitioners'

'Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India' (2020) 14 Law and Ethics of Human Rights 49.

⁵⁵ Ananthakrishnan G (n 7).

⁵⁶ *Mohd Salimullah v Union of India* (n 9).

⁵⁷ *ibid.*

⁵⁸ Bhatia, 'Complicity in Genocide' (n 28).

⁵⁹ The dire human rights situation in Myanmar has led the UN High Commissioner for Human Rights to urge UN member-States to protect the displaced Rohingyas and take measures against their involuntary return, *see* Situation of Human Rights of Rohingya Muslims and Other Minorities in Myanmar: Report of the United Nations High Commissioner for Human Rights (2025) A/HRC/60/20 (Advance edited version) <<https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/sessions-regular/session60/advance-version/a-hrc-60-20-aev.pdf>>; *see also* Bachelet: Returning Rohingya Refugees to Myanmar Would Place them at Serious Risk of Human Rights Violations (OHCHR) <<https://www.ohchr.org/en/press-releases/2018/11/bachelet-returning-rohingya-refugees-myanmar-would-place-them-serious-risk>> accessed 24 September 2025; Brutal Attacks on Rohingya Meant to Make their Return Almost Impossible – UN Human Rights Report (OHCHR) <<https://www.ohchr.org/en/press-releases/2017/10/brutal-attacks-rohingya-meant-make-their-return-almost-impossible-un-human>> accessed 24 September 2025.

⁶⁰ Pratap Bhanu Mehta has argued that by criminalizing the entire group as a collective security risk and refusing to provide humanitarian support, India might fuel a wave of radicalization that would resultantly undermine its security, *see* Pratap Bhanu Mehta, 'A Few Sacks of Rice'

arguments have failed to garner traction in recent judicial proceedings and have been brushed aside for want of credibility.

By its outright rejection of the petitioners' views in the *Salimullah* case, the Supreme Court effaced the right of non-refoulement, instead inaugurating a jurisdiction of suspicion where the government is given leeway to establish a regime of truth while the version of asylum-seekers is promptly disregarded. Amplifying the vacuous arguments made in favour of deportation, the Court has contributed to the continuing stigmatization of Rohingya refugees as a collective security threat.⁶¹

The denial of interim relief, in the form of a stay on deportation, has grave consequences for an asylum-seeker because it gives considerably latitude to an overzealous state to initiate forced repatriation. Interestingly, there is a prior Supreme Court intervention where deportation of nationals from Myanmar back to their country of origin was stayed such that their refugee status claims could be assessed by the United Nations High Commission for Refugees ('UNHCR') – although no observation was made on non-refoulement or Article 21.⁶² More recently, however, the Court, in another case involving a Sudanese national and his family, has chastised the agency for issuing refugee certificates, without delving into the reasons behind such displeasure.⁶³

Consequently, the postponement of remedies by the Supreme Court in case of the Rohingyas marks an abdication of responsibility as a constitutional court, that is underpinned by a heavy air of testimonial injustice. When the Court assumes this jurisdiction of suspicion, the scales are tipped heavily against the asylum-seeker. In this void, there is no right to life.⁶⁴

With its pliant posture, the apex court has until now catered to the executive's whims by juxtaposing the right of non-refoulement with a fundamental right that is unavailable to citizens, thereby foreclosing the applicability of international legal standards. In the process, the judiciary has unwittingly

The Indian Express (23 September 2017) <<https://indianexpress.com/article/opinion/columns/a-few-sacks-of-rice-rohingya-refugees-myanmar-4856665/>> accessed 29 September 2025.

⁶¹ Ministry of Home Affairs, Identification of Illegal Migrants and Monitoring Thereof — Regarding (2017) <https://www.mha.gov.in/sites/default/files/advisoryonillegalmigrant_10092017.PDF> accessed 16 September 2025; Nitika Angelina Rao and Suresh Kumar Digumarthi, 'Research Article: The Securitization of the Rohingya in India's Shifting Refugee Approach' *The Round Table* 1.

⁶² *Malavika Karlekar v Union of India* 1992 SCC OnLine SC 249.

⁶³ "'Opened a Showroom...': SC Justice Surya Kant Taunts UNHCR for Issuing Refugee Cards in India' *The Wire* <<https://thewire.in/rights/opened-a-showroom-sc-justice-surya-kant-taunts-unhcr-for-issuing-refugee-cards-in-india>> accessed 22 October 2025.

⁶⁴ Scholars of international refugee law have opined that the right to life, a ubiquitous and non-derogable feature of every human rights instrument, also encompasses a right of non-refoulement, see Guy S Goodwin-Gill, Jane McAdam and Emma Dunlop (n 25) 377.

manufactured a vacuum in the fundamental rights chapter. The Court has precluded the application of Article 21 when asylum-seekers at peril seek urgent protection – a legal position that is untenable and needs to be rectified.

The Rohingyas, at the same time, find themselves being held prisoner by a political setting where they are vilified on account of their religious identity. Leaders of India's ruling dispensation⁶⁵ and even those from the other end of the political spectrum⁶⁶ have been culpable of casting aspersions on the Rohingyas – the group featuring on the electoral plank as objects of hate.⁶⁷ They are looked down upon as unwelcome intruders as the predominantly Muslim group is out-of-place to the hegemonic imagination of India's '*calculated kindness*'⁶⁸ where some asylum-seekers are more equal than others, ever since the CAA was on the anvil.⁶⁹ Long before the CAA, B.S. Chimni had lamented the discriminatory treatment between refugees.⁷⁰ In the aftermath of the legislation, the religious identity of Rohingyas is often portrayed as an ostensible marker of disloyalty, that bars them from seeking refuge in India as outsiders. The CAA constitutes the epitome of this political sentiment where national belonging has been made contingent upon select religious identities.⁷¹

⁶⁵ See for example, "Rohingya Muslims Using Bengali Language for Aadhaar Cards": BJP Leader' (NDTV, 25 July 2025) <<https://www.ndtv.com/india-news/rohingya-muslims-using-fake-ids-for-aadhaar-voter-cards-bjp-leader-8947851>> accessed 16 September 2025; Amit Bhelari, 'JMM, RJD, Congress Aid Infiltration; BJP will Throw Bangladeshis, Rohingya Out: Amit Shah' *The Hindu* (20 September 2024) <<https://www.thehindu.com/news/national/jmm-rjd-congress-aid-infiltration-bjp-will-throw-bangladeshis-rohingya-out-amit-shah/article68663908.ece>> accessed 16 September 2025; 'Jharkhand Converted into "dharmashala" for Rohingyas, Bangladeshi Infiltrators: Adityanath' *The Economic Times* (11 November 2024) <<https://economictimes.india-times.com/news/elections/assembly-elections/jharkhand/jharkhand-converted-into-dharmashala-for-rohingyas-bangladeshi-infiltrators-adityanath/articleshow/115175262.cms?from=mdr>> accessed 29 September 2025.

⁶⁶ "Centre Conspiring to Settle Rohingya Refugees in Delhi" *The Hindu* (17 August 2022) <<https://www.thehindu.com/news/cities/Delhi/centre-conspiring-to-settle-rohingya-refugees-in-delhi/article65780909.ece>> accessed 16 September 2025.

⁶⁷ Alishan Jafri and Quratulain Rehbar, "Criminalised for Politics": Rohingya Caught in Delhi Election Crossfire' *Al Jazeera* <<https://www.aljazeera.com/news/2025/2/4/criminalised-for-politics-rohingya-caught-in-delhi-election-crossfire>> accessed 29 September 2025.

⁶⁸ Ranabir Samaddar, 'Power and Responsibility at the Margins: The Case of India in the Global Refugee Regime' (2017) 33 *Refuge* 42; Shuvro Prosun Sarker and Shreyasi Bhattacharya, 'Where Kindness is Calculated: Refugee Regimes in South Asia' (2022) 19 *Indonesian Journal of International Law* <<https://scholarhub.ui.ac.id/ijil/vol19/iss3/4>>.

⁶⁹ See Mihika Poddar, 'The Citizenship (Amendment) Bill, 2016: International Law on Religion-Based Discrimination and Naturalisation Law' (2018) 2 *Indian Law Review* 108.

⁷⁰ B S Chimni (n 28) 401.

⁷¹ Niraja Gopal Jayal, 'Reinventing the Republic: Faith and Citizenship in India' (2022) 10 *Studies in Indian Politics* 14.

Allegiance is filtered through a baggage of persecution in neighbouring states, by weaponizing the festering wounds of Partition⁷² to identify the ‘*insider*’⁷³ refugee – a figure who could indisputably integrate as citizens in states where their religious allegiance lies.⁷⁴ With its exclusion from the legal realm, the identity of the refugee is constructed in opposition to the much ‘*detested*’ illegal immigrant.⁷⁵

By linking the right of non-refoulement to settlement on the Indian territory, the judiciary indirectly adds fuel to negative stereotypes about the illegal immigration of Rohingyas. Their lived experience of precarity is trivialized by the Court playing down their abandonment. In the long run, it could activate the Indian state’s carceral tendencies against asylum-seekers who are alien to the majoritarian imagination.⁷⁶ The judicial entrenchment of the Supreme Court’s approach in *Salimullah* extinguishes the right to life when an asylum-seeker is confronted by immediate deportation to the country of origin where there is a well-founded fear of persecution.

V. CONCLUSION

Since *Salimullah*, the Supreme Court’s consistent denial of interim relief to Rohingya refugees comes at the cost of legitimizing statist narratives around unchecked influx, all while refusing to distinguish between illegal immigrants and asylum-seekers facing a threat to their lives. The Court’s dismissive approach towards Rohingya testimonies contribute to the erasure of non-refoulement, at a time when the ICJ has conceded to the ‘*plausibility*’ of a Rohingya genocide in Myanmar. The Court’s treatment of the Rohingya refugees until now points towards a discernible miscarriage of justice that could lead to the withering away of all judicial compassion if the *Salimullah* precedent is treated as a benchmark.

⁷² Manav Kapur, ‘India’s Citizenship (Amendment) Act: A Throwback to Debates around the “Long Partition”’ (2021) 3 *The Statelessness & Citizenship Review* 208; Niraja Gopal Jayal, ‘The CAA and NRC Together will Reopen Wounds of Partition and Turn India into a Majoritarian State’ (*Scroll.in*, 29 December 2019) <<https://scroll.in/article/947458/the-cao-and-nrc-together-will-reopen-wounds-of-partition-and-turn-india-into-a-majoritarian-state>> accessed 16 September 2025.

⁷³ Since Partition violence, the Hindu refugee came to be ‘imagined’ as the default citizen as compared to the displaced Muslim who ostensibly remained stranded on the ‘wrong’ side of the border, see Udit Sen, *Citizen Refugee: Forging the Indian Nation After Partition* (Cambridge University Press 2018) 11.

⁷⁴ Vazira Fazila-Yacoobali Zamindar, *The Long Partition and the Making of Modern South Asia: Refugees, Boundaries, Histories* (Columbia University Press 2007) 7.

⁷⁵ Ria Kapoor, *Making Refugees in India* (1st edn, Oxford University Press 2022) 224.

⁷⁶ See for example Oohini Mukhopadhyay, ‘“Tortured Like Criminals”: Rohingya Refugees Reveal Chilling Details of Police Abuse Amid Deportations’ (*The Wire*, 22 May 2025) <<https://thewire.in/rights/tortured-like-criminals-rohingya-refugees-reveal-chilling-details-of-police-abuse-amid-deportations>> accessed 16 September 2025.

Testimonial injustice is not only dehumanizing but it could also mark the beginning of the judiciary's tryst as an agent of necropolitics⁷⁷ – deciding which asylum-seeker's life is worthy of protection and which is disposable. The signs, therefore, are ominous. It remains to be seen if the Supreme Court is able to dispel the dark clouds that have assembled above it. The three-judge bench that is seized of the petitions relating to Rohingya refugees must rise above past institutional apathy when it resumes hearing. Unless the ghost of testimonial injustice is exorcised, a silver lining appears far from sight.

⁷⁷ See J A Mbembé and Libby Meintjes, 'Necropolitics' (2003) 15 *Public Culture* 11; Rebecca Rose Varghese, 'Necropolitics: Who is Allowed to Live and Who May Die' *The Hindu* (6 August 2025) <<https://www.thehindu.com/education/necropolitics-who-is-allowed-to-live-and-who-may-die/article69897441.ece>> accessed 30 September 2025.