Title: Statelessness of Rohingyas and their right to Bangladeshi citizenship

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Abstract

Since the outbreak of violence and persecution against Rohingyas in 2017 they have been fleeing Myanmar and taking refuge in Bangladesh. A significant number of them are married to a Bangladeshi citizen and their children are entitled to Bangladeshi citizenship by descent. However, these Rohingyas are not registered as Bangladeshi citizens. As a result, a significant number of Rohingyas and their children have become stateless. As Bangladesh is not a party to the statelessness conventions, the issues surrounding the statelessness of these Rohingyas can hardly be addressed under these conventions. This article explores the citizenship rights of these Rohingyas outside of these conventions. It argues that, although Bangladesh is not a party to the statelessness conventions it is a party to the Convention on the Rights of the Child and other international human rights treaties under which it is obliged to grant citizenship status to the Rohingyas who are married to a Bangladeshi citizen or born to a Bangladeshi parent.

1.1 Introduction

Rohingyas have faced decades of systematic statelessness in Myanmar due to mass denial of their citizenship. Since the breaking of violence and persecution against them in August 2017 they have been fleeing Myanmar at a staggering rate with their families and many of those families have children. About 900,000 Rohingya refugees have travelled to Bangladesh and

*2024.

more than 40% of these refugees are children.[1] It is estimated that out of these children nearly 10% were born to a Bangladeshi parent.[2] In other words, these 10% children (about 36,000) have at least one Bangladeshi parent. The citizenship law of Bangladeshi entitles children of whom one parent is a Bangladeshi to be recognised as Bangladeshi citizen.[3] However, citizenship right has not been granted to those Rohingya children of whom one parent is a Bangladeshi national.[4] As a result, these Rohingya children are left in a limbo where they are deprived of their right to Bangladeshi citizenship. This situation has led these children into statelessness as they are arbitrarily deprived of their citizenship by the Bangladeshi authorities.

Bangladesh is not a state party to the 1954 Convention Relating to the Status of Stateless Persons (1954 Convention) and the 1961 Convention on the Reduction of Statelessness (1961 Convention) which obligate state parties to take certain measures to protect persons who are stateless or at risk of statelessness.[5] Therefore, the protections under these conventions are not available to these stateless Rohingya children taking refuge in Bangladesh. As a result, they are currently staying in Bangladesh as refugees. Moreover, Bangladesh is not a state party to the 1951 Convention Relating to the Status of Refugees or its 1967 Protocol and for this reason these child Rohingya refugees are not entitled to enforce their rights under this convention either.[6] There is no provision for refugees in national legislation of Bangladesh except the regulation governing the presence of refugees in the 1946 Foreigners Act which allows the government to exercise wide discretionary powers through administrative mechanisms. As a

[1] Human Rights Watch, Bangladesh: Rohingya Refugees Stranded at Sea, available at <https://www.hrw.org/news/2020/04/25/bangladesh-rohingya-refugees-stranded-sea> accessed 30 April 2024.
[2] Rahman Nasir Uddin, *Not Rohingya, But Royangya: Stateless People in the Crisis of Existence* (Murdhonno Press 2017) 79; see also UNHCR, Universal Periodic Review: 3rd Cycle, 30th Session (October 2017) available at < https://www.refworld.org/pdfid/5b081ec94.pdf> accessed 6 May 2024.
[3] Citizenship Act 1951 (Act No. II of 1951) s 5; Bangladesh Citizenship (Temporary Provisions) Order 1972 (President's Order No. 149 of 1972) art 4.
[4] UNHCR, Universal Periodic Review: 3rd Cycle, 30th Session (October 2017) available at <https://www.refworld.org/pdfid/5b081ec94.pdf> accessed 6 May 2024.
[5] *Convention Relating to the Status of Stateless Persons*, 28 September 1954, United Nations; *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations.
[6] *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations; *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations.

result, the rights of these child refugees are at the discretion of the administration and far below international standard.

Bangladesh is a state party to the United Nations Convention of the Rights of the Child (CRC).[7] The CRC has made robust provisions to reduce statelessness of children.[8] Since Bangladesh has signed as well as ratified the CRC in 1990, it is the least responsibility of the Bangladesh government under international law to ensure that children born in the country and outside of it to a Bangladeshi parent do not become stateless. For this purpose, the government of Bangladesh is under a primary obligation to officially confer citizenship to children born to a Bangladeshi parent forthwith their birth and without making the application process lengthy or complex.

This article examines the obligation of the Bangladesh government to recognise the citizenship right of Rohingya children who have at least one Bangladeshi parent. It begins with an examination of the citizenship law of Bangladesh to understand the extent of legal protection available to Rohingya children. It will outline the provisions of 1954 convention, 1961 convention, and the 1951 Refugee Convention concerning child statelessness to show that the citizenship law of Bangladesh is far below the current international standard. This article will also examine the international conventions and instruments about the statelessness of children to which Bangladesh is a state party such as the CRC and the International Covenant on Civil and Political Rights (ICCPR) to show that the Bangladesh government is obliged, even outside of the stateless conventions and 1951 Refugee convention, to recognise the citizenship of the Rohingya children who have at least one Bangladeshi parent. It concludes that Bangladesh must recognise the citizenship right of these Rohingya children to comply with its citizenship

[7] 'UN Treaty Collections' available at <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en#EndDec> (accessed 2 April 2024).
[8] *Convention on the Rights of the Child*, 20 November 1989, United Nations.

law and the international standard of statelessness law in order to prevent child statelessness particularly those of Rohingya children born to a Bangladeshi parent.

1.2 Citizenship law of Bangladesh

The statutes that regulate citizenship in Bangladesh are the Citizenship Act 1951 (CA 1951) and the Bangladesh Citizenship (Temporary Provisions) Order 1972 (BCTP Order 1972).[9] This section explores these statutes in order to identify the Bangladeshi citizenship status of those Rohingya children born to a Bangladeshi parent. It includes an analysis of the law in line with the statutory provisions and the decisions of the High Court Division and Appellate Division of the Supreme Court of Bangladesh. It shows that the current practice of the Bangladeshi government is discriminatory between children of Rohingya and non-Rohingya Bangladeshis. It concludes that the law, as it is currently in force, is arbitrary and far below the international standard.

The CA 1951 confers citizenship by descent to anyone who is born to a Bangladeshi parent.[10] The CA 1951 was initially enacted to determine Pakistani citizenship status after the partition of India and Pakistan in 1947.[11] This statute was adopted by the then newly independent Bangladesh after its independence from Pakistan in 1971 in order to confer Bangladeshi citizenship to the residents of the then East Pakistan (which is now Bangladesh).[12] Although the Laws Continuance Enforcement Order 1971 automatically adopted all the laws in force immediately before the independence such adoption had not automatically re-enacted those laws which conflicted with a post-independence statute. Moreover, the CA has not been amended since its enactment in 1951 to make it consistent with the laws after the independence

[9] Citizenship Act 1951 (Act No. II of 1951); Bangladesh Citizenship (Temporary Provisions) Order 1972 (President's Order No. 149 of 1972).
[10] Citizenship Act 1951 (Act No. II of 1951) s 5.
[11] Ridwanul Hoque, *Report on Citizenship Law: Bangladesh* (European University Institute 2016) 2.
[12] Ibid, 3.

of Bangladesh in 1971 in relation to citizenship by descent.[13] As a result, this Act serves very little to identify the citizenship status of anyone who was born after the independence of Bangladesh and this applies particularly to a significant number of Rohingya children who were born to a Bangladeshi parent after the independence of Bangladesh inside and outside of its territory. For example, the CA's provision on 'citizenship by descent' is subject to the BCTP Order of 1972, and therefore the only enabling legislation that directs the details of Bangladeshi citizenship by descent to the BCTP Order. The CA reads:

> Subject to the provision of the [President's Order No. 149 of 1972] a person born after the commencement of this Act, shall be a citizen of [Bangladesh] by descent if his [father or mother] is a citizen of [Bangladesh] at the time of his birth.[14]

Most of the Bangladeshi parents of Rohingya children obtained their citizenship on or after the independence of Bangladesh in 1971 and on that basis their citizenship was conferred by the BCTP Order 1972 rather than the CA 1951. This is because the Rohingyas began to arrive in Bangladesh from Myanmar for the first time in 1978, followed by in 1991, 2012, 2016, and from 2017 they are continuously arriving.[15] Many of these people never left Bangladesh and became parents. Since these arrivals and their becoming parents occurred after the independence of Bangladesh in 1971, the BCTP order is mostly relevant to address the issue of citizenship of Rohingyas by descent.[16] Article 2 of the BCTP Order outlines who can become a Bangladeshi citizen. This article automatically conferred Bangladeshi citizenship to anyone

[13] The only amendment that was made to the CA was to include the word 'mother' in order to recognise the citizenship of those children born to a Bangladeshi mother. This amendment was made to remove the discriminatory provision which only recognised citizenship by descent through the father. This amendment was made in 2009 by the Citizenship (Amendment) Act, 2009 (Act. No. XVII of 2009) (with effect from 31st December, 2008), s 2.
[14] Citizenship Act 1951 (Act No. II of 1951), s 5.
[15] Rahman Nasir Uddin, *Not Rohingya, But Royangya: Stateless People in the Crisis of Existence* (Murdhonno Press 2017) 66.
[16] For an analysis of the unconsolidated state of this area of law in Bangladesh see M.I. Farooqui, *Citizenship and Nationalities in Bangladesh* (Mullick Brothers, 2016) xii.

who or whose father or grandfather was born in the territories now comprised in Bangladesh (previously known as East Pakistan) and who was a permanent resident of such territories on the 25th March 1971 and continued to be a resident.[17] This provision is subject to the condition that they are not disqualified from being a citizen or permanent resident by or under any law.[18] As a result, Bangladeshi citizenship law is subject to a 'general disqualification clause' which confers the Government of Bangladesh a power to make a final decision in case of any doubt as to whether any person is a Bangladeshi citizen or not.[19] As a result, Bangladeshi citizenship status of anyone born to a Bangladeshi parent, whether in Bangladesh or aboard, is subject to the law in BCTP Order (*de jure* position) and the final decision of Bangladesh government (*de facto* position). Neither the *de jure* position nor the *de facto* position alone can confer Bangladeshi citizenship by descent. In other words, in order to become a Bangladeshi citizen by descent a person must satisfy *de jure* as well as *de facto* citizenship status. According to the power conferred on the government it may disqualify anyone of their Bangladeshi citizenship by making a declaration to that effect.[20] Since the independence of Bangladesh its successive governments have not made a declaration to deny citizenship to any Rohingya child born to a Bangladeshi citizen and for this reason their Bangladeshi citizenship is recognised by both *de facto* and *de jure* citizenship legal provisions of the BCTP Order 1972.

The 2017 Universal Period Review report of the United Nations High Commissioner for Refugees (UNHCR) confirms that Bangladeshi government has not officially recognised Bangladeshi citizenship of the Rohingya children born to a Bangladeshi citizen.[21] This has

[17] Citizenship (Amendment) Act, 2009 (Act. No. XVII of 2009), art 2 (i); citizenship by descent is also recognised in the Citizenship Act 1951 (Act No. II of 1951), s 5.
[18] Ibid, art 2 (ii); see also *Md Abid Khan v Government of Bangladesh* (2001) High Court Division, Supreme Court of Bangladesh, Writ Petition no. 3831.
[19] BCTP Order 1972, art 3.
[20] BCTP Order 1972, art 2A.
[21] UNHCR, Universal Periodic Review: 3rd Cycle, 30th Session (October 2017) available at < https://www.refworld.org/pdfid/5b081ec94.pdf> accessed 20 November 2022.

resulted in discrimination between children of Rohingya and non-Rohingya Bangladeshis. In addition, further discrimination occurred from the provisions of CA in relation to citizenship by descent.[22] This provision discriminated between children born to a Bangladeshi mother and father. Although the 2009 amendment to the CA 1951 extended citizenship by descent to a Bangladeshi mother (before this amendment it was only available to a Bangladeshi father) and thereby removed this discrimination, this amendment does not have retrospective effect.[23] As a result, this discrimination continues in respect to children born to Bangladeshi mothers before 31 December 2008. Moreover, many Rohingya children were born to a Bangladeshi mother outside of Bangladesh, such as in Myanmar, who did not register their citizenship in any Bangladeshi mission as required by the CA.[24] This situation has resulted in non-recognition of Bangladeshi citizenship of these Rohingya children as they cannot prove their birth registration. Since these children took refuge in Bangladesh, they became stateless due not being able to establish their Bangladeshi or Myanmar citizenship. It can be argued that, this provision does not apply to these Rohingya children as the application of CA 1951 in Bangladeshi post-independence citizenship law and particularly in modern times is mainly historical.[25] The highest judiciary of Bangladesh, the Appellate Division of the Supreme Court, has also confirmed the historical application of the CA 1951.[26] Therefore, any inconsistency between the CA 1951 and post-independence legislation of Bangladesh such as the BCTP Order 1972 must be resolved in favour of the latter. The Bangladesh Constitution guarantees citizenship right without discrimination between citizens by birth and by descent.[27] Hence the registration requirement is also arbitrary as it discriminates between children born inside and outside of

[22] Citizenship Act 1951 (Act No. II of 1951), s. 5.
[23] The Citizenship (Amendment) Act, 2009 (Act. No. XVII of 2009) (with effect from 31st December, 2008), s 2.
[24] Citizenship Act 1951 (Act No. II of 1951), s 5(a).
[25] For an example of historical application of the CA 1951 to Bangladeshi citizenship law see Ridwanul Hoque, *Report on Citizenship Law: Bangladesh* (European University Institute 2016) 10, 13.
[26] *Bangladesh v Prof Golam Azam* (1994) 46 Dhaka Law Reports (AD) 193.
[27] Constitution of the People's Republic of Bangladesh 1972, art 27, 31.

Bangladesh to a Bangladeshi parent. Furthermore, those Rohingya children born to at least one Bangladeshi parent who were married since they took refuge in Bangladesh are not being recognised as Bangladeshi citizenship by the government authorities and accordingly became stateless.[28] Bangladeshi government has already made a notification that instructed the registrars of Muslim marriages not to register a marriage between Bangladeshi citizens and Rohingya refugees.[29] As a result, these citizenship deprivations are arbitrary in nature which requires a particular attention.

In line with the international standard determination of citizenship by operation of the law is recognised in Bangladesh.[30] However, the *de facto* position is that there is no procedure set by law for such determination.[31] The *de facto* power conferred on the government that authorised them to make final decision on statelessness and their arbitrary exercise of such power resulted in statelessness of these Rohingya children. In any event, these children can make an application for Bangladeshi citizenship.[32] However, their application is most likely to be unsuccessful due to the exercise of the *de facto* power by the Bangladeshi government and the applicants' last known status as Rohingya refugees.[33] As a result, they are likely to be treated as foreigners taking refuge in Bangladesh and based on this they cannot challenge this decision in a Bangladeshi court of law.[34] Moreover, they can be forcefully deported from Bangladesh due to being classed as stateless and because the rule against refoulement of refugees do not apply to Bangladesh as it is not a state party to the 1951 Refugee convention.[35] In addition,

[28] Ridwanul Hoque, *Report on Citizenship Law: Bangladesh* (European University Institute 2016) 26.
[29] Ibid.
[30] Constitution of the People's Republic of Bangladesh 1972, art 6, 152 (1).
[31] Ridwanul Hoque, *Report on Citizenship Law: Bangladesh* (European University Institute 2016) 8.
[32] BCTP Order, art 4; see also the draft Citizenship Bill 2016, s 6.
[33] Foreigners Act 1946, Act no. XXXI of 1946 (23 November 1946), s 8 (1).
[34] Ibid.
[35] In a scarce writ petition the High Court Division of the Supreme Court of Bangladesh acknowledged that 'although Bangladesh is not a party to the 1951 Refugee Convention it applies to Bangladesh under the customary international law': see *Refugee and Migratory Movements Research Unit (RMMRU) v Government of Bangladesh* (2016) High Court Division, Supreme Court of Bangladesh, Writ Petition no. 10504.

they may be subject to inhuman and degrading treatment in Bangladesh due to being a foreigner.[36] For example, they may be subject to detention under the Foreigners 1946 Act. In *Refugee and Migratory Movements Research Unit (RMMRU) v Government of Bangladesh*, two stateless Rohingyas were detained for more than their sentence of five years under the Foreigners Act 1946 as they could not prove their nationality and hence detained for more than two additional years until this writ petition was decided.[37] Furthermore, the Bangladesh government has recently decided, withing consulting the UN and the concerned Rohingyas, that they are going to relocate about 2,500 Rohingyas to an isolated island known as 'Bhasan Char' which is located 37 miles off the coast of the Bay of Bengal and where they would be dangerously exposed to cyclones.[38] This arrangement is legal according to the Foreigners Act,[39] but the provisions of this Act are far below international standards.

The legally eligible Rohingyas cannot apply for Bangladeshi citizenship due to not being able to provide documentary evidence to prove their citizenship status such as a birth certificate or birth registration document. This is because the Bangladeshi authorities have adopted policies that banned marriages between the Rohingyas and Bangladeshi citizens (hereinafter known as 'mixed marriage').[40] The Inspector General of Registration (of Marriages) has issued an order prohibiting *kazis* (marriage registrars) from recording any mixed marriage.[41] In a writ petition at the High Court Division of the Supreme Court of Bangladesh, the policy ban has been

[36] Foreigners Act 1946, Act no. XXXI of 1946 (23 November 1946), ss 3 and 4; see also Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment 1987, art 3 (Bangladesh is a state party to this convention).
[37] *Refugee and Migratory Movements Research Unit (RMMRU) v Government of Bangladesh* (2016) High Court Division, Supreme Court of Bangladesh, Writ Petition no. 10504.
[38] Porimol Palma, 'Rohingya Relocation to Bhasan Char: All set with UN views put aside' (3 December 2020) available at < https://www.thedailystar.net/frontpage/news/rohingya-relocation-bhasan-char-all-set-un-views-put-aside-2004821> accessed 30 April 2024.
[39] Foreigners Act 1946, Act no. XXXI of 1946 (23 November 1946), s 3(2) (e) (i).
[40] The Daily Star, 'Ban on marriage with Rohingya refugees' (11 July 2014) available at < Ban on marriage with Rohingya refugees | The Daily Star> (accessed 6 May 2024).

[41] The Daily Star, 'Marriage Ban on Rohingyas' (15 July 2014) available at < Marriage ban on Rohingyas | The Daily Star> (accessed 6 May 2024).

challenged but the court summarily concluded that mixed marriage itself is an offence under the Foreigners Act 1946, without addressing the petitioner's arguments in detail which included a Bangladeshi citizen's right to marry and human rights treaties to which Bangladeshi is a state party.[42] This court also supported the government's policy ban which has been made by issuing administrative orders. However, the policy ban has not stopped mixed marriage as the parties are often getting married under their personal law, i.e., Muslim law. The interesting point is that, a marriage solemnised under Muslim law must be registered under the Muslim Marriages and Divorces Registration Act (as amended in 2005) 1974.[43] Failure to register a marriage registration is punishable by a fine or imprisonment for up to a maximum of two years.[44] This has given rise to a dilemma where parties to a mixed marriage have been forced to commit a crime due to the policy ban. Therefore, the parties to a mixed marriage are in limbo due to this dilemma between the law and policy. As Rohingyas are a vulnerable group, this situation has given rise to further vulnerability and exploitation.[45] According to the UNHCR, the policy ban is taking the lead over the law because of the division between registered and non-registered refugees by an administrative order issued in 2002.[46] This order also particularly prohibited mixed marriage.[47] As a result, the *de facto* power of the Bangladeshi authorities backed by the policy ban has been functioning as a hindrance to marriage registration. Without proof of registration, the parties cannot apply for Bangladeshi citizenship through marriage, and this has a knock-on effect on the children born to these parents. This is because a child's birth certificate, which is needed to apply for Bangladeshi citizenship by descent, cannot be obtained

[42] *Babul Hossain v Government of Bangladesh* (2017) High Court Division, Supreme Court of Bangladesh, Writ Petition no. 18163.
[43] Muslim Marriages and Divorces Registration Act (as amended in 2005) 1974, art 3.
[44] Ibid, art 5.
[45] For an excellent analysis of the vulnerability of the Rohingyas see Hassan Faruk, Md Al-Imran, and Nannu Mian, 'The Rohingya refugees in Bangladesh: A vulnerable group in law and policy' (2014) 8(2) Journal of Studies in Social Sciences, 226-253.
[46] UNHCR, 'Rohingya refugee crisis: Registration of the marriages and divorces of refugees' (31 January 2019), available at < Rohingya refugee crisis: Registration of the marriages and divorces of refugees - Bangladesh | ReliefWeb> (accessed 6 May 2024).
[47] Ibid.

without producing a valid marriage certificate. Additionally, there is no scope to challenge the exercise of the *de facto* arbitrary power exercised by government officials because rarely a judicial intervention has been made or a hearing offered to review the exercise of such power.[48] These are *de facto* positions that resulted in the arbitrary deprivation of Bangladeshi citizenship and consequently the statelessness of these Rohingya parents and their children. The appalling conditions of the refugee camps and the lack of access to the basic needs of the children i.e., food, appropriate shelter, education, and healthcare, are evidence of the denial of basic human rights to the Rohingya children.[49]

As Bangladesh is not a state party to the 1951 Refugee Convention[50] the Rohingya refugees are subject to the Foreigners Act 1946 which does not confer the right to asylum, permanent residency, or citizenship in Bangladesh.[51] As a result, the Bangladeshi authorities are exercising wide discretion under the citizenship law and the only protection available to Rohingyas is through administrative mechanisms.[52] For instance, the administration has unequivocally stated that Bangladesh accepted Rohingya refugees from Myanmar not out of any obligation but rather acting under its prerogative and on a humanitarian ground.[53] Therefore, the Rohingya children born to Bangladeshi parents are being left in limbo. The government of Bangladesh proposed a bill in February 2016 which is currently undergoing the parliamentary process. This draft Citizenship Bill of 2016 has adopted a drastic provision to prevent the growing number of Rohingyas taking refuge in Bangladesh from marrying Bangladeshi citizens. It provided that foreign spouses cannot obtain Bangladeshi citizenship through marriage if they are

[48] Except the one writ petition (see n 42 above).
[49] M. Mahruf C. Shohel, 'Lives of the Rohingya children in limbo: Childhood, education, and children's rights in refugee camps in Bangladesh' (2023) 53 Prospects, 131-149.
[50] *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations.
[51] Foreigners Act 1946, Act no. XXXI of 1946 (23 November 1946).
[52] UNHCR, Universal Periodic Review: 3rd Cycle, 30th Session (October 2017) available at < https://www.refworld.org/pdfid/5b081ec94.pdf> (accessed 6 May 2024).
[53] Ridwanul Hoque, *Report on Citizenship Law: Bangladesh* (European University Institute 2016) 12.

unauthorised or unregistered immigrants.[54] This provision, if becomes legislation, would result in the statelessness of those Rohingyas who are married to a Bangladeshi citizen. This would also result in statelessness of any children born from this marriage and this is because when a parent is stateless this increases the risk of the child becoming stateless as well.[55] A further effect of this provision is that the Rohingyas would be categorised as 'unauthorised/unregistered immigrant' who can never be a citizen of Bangladesh by marrying a Bangladeshi citizen and it would be very difficult for any children to provide documentary evidence to establish their Bangladeshi citizenship by descent. The UNHCR's Periodic Review has concluded that Bangladeshi government are not including adequate information in the birth certificate to indicate the nationality of children born to a Rohingya Bangladeshi parent.[56] Although the government has enacted the Children Act 2013 with the aim to implement the CRC in the domestic law no provision of the Act addresses the issues in relation to citizenship rights of the Rohingya children born to a Bangladeshi parent and the arbitrary withholding of this right by the government.[57] Thus the Children Act 2013 does not implement the CRC regarding prevention of child statelessness. As a result, the Bangladeshi citizenship law, as it currently in force, is arbitrary and falls way below the international standard in relation to citizenship and statelessness of children. It can be concluded that the approach of Bangladeshi government towards citizenship by descent is very regressive. This approach of the government officials together with other barriers stated above and the current exercise of wide discretionary power by the executives have created further obstacles for these Rohingya children in claiming Bangladeshi citizenship according to the law. Therefore, the citizenship law of Bangladesh

[54] The Draft Citizenship Bill 2016, s 11.
[55] UNHCR, Universal Periodic Review: 3rd Cycle, 30th Session (October 2017) available at < https://www.refworld.org/pdfid/5b081ec94.pdf> accessed 20 March 2023.
[56] ibid.
[57] Children Act 2013 (Act No. XXIV of 2013), preamble.

must be amended to maintain the minimum international standard which the country is obliged to do in order to discharge its obligation under the CRC and ICCPR.

1.3 Child statelessness in international law

The International Covenant on Civil and Political Rights (ICCPR) 1966 and Convention on the Rights of the Child (CRC) 1989 recognise the right to a nationality as a fundamental human right.[58] The general prohibition of arbitrary deprivation of nationality has also been adopted in other instruments of international human rights law.[59] Therefore, arbitrary deprivation of nationality is prohibited in international law. What is 'arbitrary deprivation' is a very important issue which requires special attention. In this regard, the United Nations Human Rights Committee ('UNHRC') has stated in its General Comment 27 that:

> '20. ...This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them.'[60]

The above General Comment from the UNHRC acknowledges that a citizenship deprivation is arbitrary if it violates international law. This position has been supported by Eric Fripp who has stated that 'arbitrary deprivation of nationality may mean a deprivation which defies national law or one which is in accordance with such law but is objectionable for some other reason, such as discrimination for some prohibited reason or absence of due process.'[61]

[58] ICCPR, art 24(3); and CRC, art 7.
[59] Human Rights Committee, *General Comment 27, Freedom of Movement (Art 12)* U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999).
[60] UN Human Rights Committee (HRC), *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 2 November 1999, CCPR/C/21/Rev.1/Add.9, available at: https://www.refworld.org/docid/45139c394.html (accessed 4 April 2024).
[61] Eric Fripp, 'Deprivation of Nationality and Public International Law – An Outline' (2014) 28 Immigration, Asylum and Nationality Law 367, 373.

Therefore, arbitrary deprivation may occur even where such deprivation is in accordance with national law but in breach of general international law such as discrimination between children born to a parent belonging to a minority group and rest of the citizens, out of country deprivations, and children born to a national in refugee camps.[62] Moreover, the prohibition on discrimination is considered a *jus cogens* norm of international law.[63] Articles 2(1) and 26 of the ICCPR prohibited discrimination based on birth or other status. The International Law Commission (ILC) has also affirmed that the right of States to decide who their nationals are is not absolute and that, in particular, States must comply with their human rights obligations concerning the granting of nationality.[64] Similarly, The Secretary-General's Annual report to the Human Rights Council in 2009 states that "Measures leading to the deprivation of nationality must serve a legitimate purpose that is consistent with international law and, in particular, the objectives of international human rights law."[65] Furthermore, the principle of non-discrimination is at the very core of international law. For instance, article 2 of the Universal Declaration of Human Rights (UDHR) and article 2 of the Convention on the Elimination of All Forms of Racial Discrimination 1969 (CERD). The Human Rights Committee, in its general comment No. 16, stated that the expression 'arbitrary deprivation' was relevant to the protection of the right provided for in article 17 of the ICCPR.[66] In the Committee's view, the expression "arbitrary interference" could also extend to interference provided for under the law.[67] In its general comment No. 27, the Committee further indicated that the reference to the concept of arbitrariness in this context was intended to emphasize that it applied to all State action, legislative, administrative and judicial, and guaranteed that even

[62] GA Res A/RES/50/152, Office of the United Nations High Commissioner for Refugees, 9 February 1996, para. 15, referring to the prohibition of arbitrary deprivation as a fundamental principle of international law.
[63] *South West Africa Cases (Liberia v. South Africa; Ethiopia v. South Africa)* 1962 ICJ Rep. 319.
[64] *Yearbook of the International Law Commission*, 1997, vol. II (1), p. 20.
[65] UNGA, A/HRC/13/34, para 25 (accessed 4 August 2022).
[66] UN Human Rights Committee (HRC), *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988, available at <https://www.refworld.org/docid/453883f922.html> (accessed 4 August 2022).
[67] Ibid.

interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant (i.e., ICCPR) and should, in any event, be reasonable in the particular circumstances.[68]

The international legal framework on the prohibition of deprivation of citizenship is reaffirmed across many core UN human rights conventions, including the ICCPR.[69] Alongside the core human rights treaties, the 1954 Convention Relating to the Status of Stateless Persons (1954 Convention) and the 1961 Convention on the Reduction of Statelessness (1961 Convention) obligate state parties to take certain measures to protect persons who are stateless or at risk of statelessness.[70] In 2011, to mark the 50th anniversary of the 1961 Convention, United Nations High Commissioner for Refugees (UNHCR) launched a worldwide campaign on statelessness. The plight of people around the world not recognised as a national of any state under the operation of its law and the urgent work needed to address the deprivations they experience as a result remain a central concern in the work of the Office of UNHCR.[71] The 1961 Convention's purpose is to prevent statelessness, thereby reducing it over time. Although international law endorses that everyone has a right to a nationality, it does not set out a specific nationality to which a person is entitled. Responsibility for conferring nationality lies with individual States.

In addition to international treaties and conventions outlined above, the general principles of international law also recognise prohibition of deprivation of citizenship. These general

[68] UN Human Rights Committee (HRC), *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 2 November 1999, CCPR/C/21/Rev.1/Add.9, available at: https://www.refworld.org/docid/45139c394.html (accessed 4 August 2022).
[69] ICCPR, art. 24.
[70] Convention Relating to the Status of Stateless Persons 1954, art. 1(1); and Convention on the Reduction of Statelessness 1961, art 1.
[71] United Nations High Commissioner for Refugees/Asylum Aid, *Mapping Statelessness* (UNHCR: London, November 2011) 10; See also UNHCR, *Commemoration of the Anniversary of the 100th Session of the Human Rights Committee (Statement by UNHCR)*, 2010,available at <http://www.unhcr.org/refworld/docid/4cd798752.html> accessed 29 March 2024.

principles are binding on all states.[72] Any state violating a general principle of international law is responsible to immediately cease the unlawful conduct and offer appropriate guarantees that it will not repeat the illegal actions in the future.[73] Moreover, the overall consequence for a state's failure to comply with international law may be disadvantageous. For instance, if a state is frequently depriving citizenship of its nationals based on unlawful discrimination it may not only face criticism by the international community but also lose any benefits in situations such as humanitarian crises. For instance, other states may reject assistance or cooperation to tackle cross-border terrorism or mass influx of refugees. In addition, as a violator of a fundamental human right a state is likely to lose or weaken its political influence in international organizations such as the UNHCR, UNHRC, UNGA (United Nations General Assembly).

Every state has ratified at least one treaty containing legal obligations to protect human rights and all states have acknowledged that 'the promotion and protection of all human rights is a legitimate concern of the international community'.[74] This acknowledgement has a direct effect on state sovereignty in that one aspect of each state's control and authority over its activities on its territory and within its jurisdiction is now subject to international legal review.[75] Any state that has signed and ratified a key human rights treaty, such as the ICCPR, is responsible to have in place a domestic legal system where any breaches of human rights can be challenged.[76] Where a domestic legal system fails to address the breaches in line with

[72] James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 51. Anthea Roberts and Sandesh Sivakumaran, 'The Theory and Reality of the Sources of International Law' in Malcolm D. Evans (ed), *International Law* (Fifth edn, Oxford University Press 2018) 89.
[73] Jan Klabbers, *International Law* (2nd edn, Cambridge University Press 2017) 144.
[74] Vienna Declaration (1993) 32 ILM 1661, para 4.
[75] Robert McCorquodale, 'The Individual and the International Legal System' in Malcolm D. Evans (ed), *International Law* (Fifth edn, Oxford University Press 2018) 259.
[76] See Human Rights Committee, General Comment No 31, 'The Nature of the General Legal Obligation Imposed on States Parties to the [International] Covenant [on Civil and Political Rights]', UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 2.

international law the UN may get involved to investigate it.[77] If the investigation finds any breaches a debate may be held on the state's human rights abuse and a condemnation issued. If the breaches continue a UN resolution may be passed condemning the state's abuse of human rights.[78] In the absence of any challenges, compliance with international law is subject to human rights treaty mechanisms that require states to provide periodic reports to internal committees outlining how they have complied with their treaty obligations.[79] As a result, the challenge and review systems make it more difficult for states to claim that other states that criticize their human rights are meddling in their internal affairs.[80] Furthermore, the state may have sanctions issued against it for committing an internationally wrongful act. In this regard, the International Law Commission provides that the characterization of an act of a state is governed by international law.[81] Such characterization is not affected by the characterization of the same act as lawful by internal law', and in a large body of international decisions.[82] Therefore, even where a national legislation authorises the government authorities to deprive citizenship such decision may not be legal in international law. However, the legality of deprivation of citizenship is often defended by states on national security grounds.[83] They do it by denying or distinguishing application of the treaties and conventions and claiming citizenship deprivation as an exception to the general prohibition. Such denial is a violation of the obligation *erga omnes* which denotes to common interest of every state in upholding

[77] Nigel Rodley, 'International Human Rights Law' in Malcolm D. Evans (ed), *International Law* (Fifth edn, Oxford University Press 2018) 774.
[78] Ibid.
[79] Fredrick Megret, 'Nature of Obligations' in Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (eds), *International Human Rights law* (Third edn, Oxford University Press 2018) 86.
[80] Ibid.
[81] The International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, art. 3.
[82] Ibid.
[83] Alison Harvey, 'Recent Developments on Deprivation of Nationality on Grounds of National Security and Terrorism Resulting in Statelessness' (2014) 28 Immigration, Asylum and Nationality Law 336, 341.

international law.[84] Likewise, the general principle of international law also requires every state to deal with its citizens according to the law.[85]

In line with the explanation of the concept of arbitrary deprivation, this is the case where citizenship right of the Rohingya children has been put on hold by Bangladeshi government based on their discriminatory exercise of *de facto* power conferred by its nationality law. Furthermore, international law recognises that any power of deprivation shall be according to law and shall provide for the person concerned the right to a fair hearing by a court or other similar independent body.[86] However, to date no judicial hearing has been offered to the discriminatory exercise of this *de facto* governmental power. As a result, no judicial oversight of those administrative powers is available to these Rohingya children.

1.4 State responsibility of Bangladesh under international law to prevent child statelessness

Depriving a child of his or her right to a nationality and making them stateless is a violation of the CRC and ICCPR.[87] This right has been recognised in the Bangladeshi nationality law. However, the *de facto* position of this law has conferred on the government officers a power to deprive citizenship. As a result, a significant number of Rohingya children who are born to a Bangladeshi national have been denied of their Bangladeshi citizenship and left in a limbo. Moreover, they have not been offered any judicial review of this discriminatory and arbitrary deprivation of citizenship.

[84] Christian Tams, *Enforcing Obligation Erga Omnes in International Law* (Cambridge University Press 2005) 6.
[85] James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 52.
[86] Convention on the Reduction of Statelessness (CSR) 1961, article 8(4).
[87] For discussion about the violation of CRC and ICCPR see section 1.3 (above).

When urging for recognition of Bangladeshi citizenship to these Rohingya children under international law Bangladeshi authorities have denied the application of the 1954 and 1961 statelessness conventions and the 1951 Refugee convention as it is not a state party to these international treaties.[88] However, Bangladesh is a state party to the CRC and ICCPR which apply to child statelessness. In order to broaden the scope of operations of the statelessness conventions, this part of the article argues to resort to other sources of international law to which Bangladesh is a state party. It concludes that, Bangladesh is responsible for protecting children against discrimination and arbitrariness, and for upholding international standards.[89] It also concludes that, Bangladesh is responsible for removing all the obstacles to accessing nationality for children to its nationals.[90]

International human rights law recognises the right of every person to a nationality and its provisions aid the application of CRC.[91] The CRC made robust provisions to reduce statelessness of Children. Article 7(2) of the CRC explicitly requires States parties to ensure the implementation of the right to acquire a nationality in accordance with their national legislation and their obligations under the relevant international human rights instruments, in particular where the child would otherwise be stateless.[92] Similarly, the Human Rights Committee, in the context of the provision of article 24(3) of the ICCPR, stated that the purpose of that provision is to prevent a child from being afforded less protection by society and the State because he is stateless.[93] Since Bangladesh is a state party to the CRC it is responsible

[88] UNHCR, Universal Periodic Review: 3rd Cycle, 30th Session (October 2017) available at < https://www.refworld.org/pdfid/5b081ec94.pdf> accessed 20 November 2022.
[89] 'Addressing the right to a Nationality through the Convention on the Rights of the Child' (Institute on Statelessness and Inclusion: June 2016) 9.
[90] Ibid, 17.
[91] Vienna Convention on the Laws of Treaties 1969 (United Nations, "Treaty Series", vol. 1155, p. 331), art 32 (3).
[92] CRC 1989, art 7 (2).
[93] UN Human Rights Committee (HRC), *CCPR General Comment No. 17: Article 24 (Rights of the Child)*, 7 April 1989, available at: https://www.refworld.org/docid/45139b464.html (accessed 5 May 2024).

under international law to ensure that children born in to a Bangladeshi parent do not become stateless. For this purpose, Bangladesh is under a primary obligation to officially confer citizenship to children born to a Bangladeshi parent forthwith their birth and without making the application process lengthy or complex. This obligation to children has been emphasised by the UNHRC in its General Comment 17 which stated at [8] that:

> '8. …States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born. In this connection, no discrimination with regard to the acquisition of nationality should be admissible under internal law as between legitimate children and children born out of wedlock or of stateless parents or based on the nationality status of one or both of the parents. The measures adopted to ensure that children have a nationality should always be referred to in reports by States parties.'[94]

In addition, the CRC has made provisions for every Member State to consider the 'best interest of the child' as a primary consideration when it makes decision on citizenship involving children.[95] Most statelessness is contrary to the principle of the best interests of the child and therefore arbitrary. This arbitrary deprivation of nationality places children in a situation of increased vulnerability to human rights violations.[96] As a result, state authorities are under a duty to consider 'the best interest of a child' while deciding to deprive citizenship of a child or those who have a child.[97]

[94] UN Human Rights Committee, General Comment No 17: Rights of the Child (Art 24) 29 September 1989.
[95] *Convention on the Rights of the Child*, 20 November 1989, United Nations, art 3.
[96] Report of the Secretary General, Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire nationality, inter alia, of the country in which they are born, if they otherwise would be stateless (United Nations General Assembly 2015) 1.
[97] This was emphasised by the Joint Committee of Human Rights during parliamentary debate on the bill that was proposed to enact the Immigration Act 2014. See HL Paper 142, HC 1120, para 49.

States have a responsibility to prevent and reduce statelessness, in appropriate cooperation with the international community, in accordance with the General Assembly resolution 61/137 and the Security Council resolution 26/14.[98] Furthermore, the fundamental nature of the right to a nationality and the prohibition of arbitrary deprivation of nationality have been reaffirmed by the General Assembly in its resolution 50/152 and the Human Rights Council in its resolutions 7/10, 10/13, 13/2, 20/5, and 26/14.[99] Therefore, States must enact laws governing deprivation of nationality in a manner that is consistent with their international obligations, including in the field of human rights. Therefore, it can be argued that Bangladesh must comply with the provision of the CRC and recognise the citizenship status of the Rohingya children born to a Bangladeshi parent without any delay. In addition, Bangladesh is also a state party to the ICCPR which expressly provided for preventing child statelessness. As a result, Bangladesh is legally obliged to recognise the Bangladeshi citizenship of these Rohingya children in order to discharge its obligation in international law. This obligation is enforceable even outside of the 1954 and 1961 statelessness conventions and the 1951 Refugee Convention to which Bangladesh is not a state party.

1.5 Conclusion

This article shows that the citizenship deprivations of Rohingya children who are born to a Bangladeshi parent are not only inconsistent but also a violation of international law. It has shown that these Rohingyas are being denied their right to Bangladeshi citizenship by the government because of the exercise of their *de facto* power conferred under Bangladeshi citizenship law. It argues that such deprivation is discriminatory between children born to a

[98] Report of the Secretary General, Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire nationality, inter alia, of the country in which they are born, if they otherwise would be stateless (United Nations General Assembly, 2015) 1.
[99] Ibid.

Rohingya and non-Rohingya parent. This discrimination is being continued due to the absence of a judicial review of the citizenship deprivation of these children. As a result, citizenship deprivation is often turned out to be arbitrary in international law. However, the application of international law to Bangladesh is limited to a few international conventions such as the CRC and ICCPR. This is because Bangladesh is not a state party to the two Statelessness Conventions and the 1951 Refugee Convention. Although Bangladesh is not a party to these conventions, their provisions indirectly apply to its law under the CRC and ICCPR to which it is a state party. Therefore, outside of the 1954 and 1961 statelessness conventions and the 1951 Refugee Convention Bangladesh must discharge its state responsibility under the other international conventions to which it is a state party such as the CRC and ICCPR.[100] Compliance with these conventions will discharge Bangladesh's current legal obligations under international law as well as maintain the minimum international legal standard in preventing child statelessness and their right to nationality.

[100] For a deeper analysis of this argument based on international human rights law please see Mohammad Sabuj, 'The Right to Citizenship of Rohingya Children of Bangladeshi Descent Under International Human Rights Law' (2024) 45 (1) Statute Law Review.