

**NON-REFOULMENT OF REFUGEES IN INDIA- A HUMAN RIGHTS
PERSPECTIVE**

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INTRODUCTION

Delving into the words of Augustus Comte, '*demography is destiny*', invokes an understanding that the '*associated strands*' of political discourse (political framework of actions & inactions respectively), people and migration remain inherently inclusive in perspective.² This means that, with the very existence of population within a nation-state comes the inevitable interplay of policy framework as a natural denouement, along with the added vigour of cross-border migration standards. India has remained susceptible to varied perspective of cross border movements within South Asia for the longest time. For instance, the inter-relations between India-Pakistan, India-Afghanistan, India-Sri Lanka, India-Bangladesh, among the others, are trapped in a quagmire of cross-border movements vis-a-vis policy framework (legal stipulations). Therefore, it would be pertinent to infer that the Indian foreign policy in particular, succumbs to the politics of cross-national ethnic issues pertaining to the concerned nation-state. On the other hand, when the issue of granting refugee status come to the fore, India's position remains prone to objective interpretation. Objective in the sense that, India has always scrutinised the same (granting refugee status) on an *ad hoc basis*. The reasons for it germane from the lack of any substantial legal mandate in delineating the issues of refugees' or migrants' or asylum seekers on one side and the absence of a concrete/recognised refugee policy in consonance with international instruments on the other. Refugees and migrants are legally distinct. On one hand, owing to the 1951 Convention Relating to the Status of Refugees ('Refugee Convention') and the 1967 Protocol Relating to the Status of Refugees ('Protocol'), a refugee is a person "*who flees across an international border because of a well-founded fear of being persecuted in her country of origin on account of her race, religion, nationality, membership of a particular social group, or political opinion*".³

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² Bill Bonner, *Destiny is Demography*, Business Insider(17th Sept,2011,12.46 am)
<https://www.businessinsider.com/destiny-is-demography-2011-9?IR=T>

³ Convention Related to Status of Refugees,1951, Art.1

On the other hand, Migrants are a much wider group of people who move away from their usual residence to live somewhere else. Since it is an umbrella term, there is no legal definition of a migrant; The phrases refers to high-wage labour travelling between developed economies, people fleeing destitute countries, and those fleeing persecution. As a result, while all refugees are migrants in the sense that they leave their usual home, not all migrants are refugees. The extensive powers granted exclusively to the Centre to act with unconstrained discretion in regard to foreigners enable India's ad hoc refugee system. The Foreigners Act of 1864, passed by India's colonial government in the nineteenth century, was the first law to restrict, arrest, and expel foreigners. The law was harsh since it was meant to consolidate imperial dominance and retain social control. The colonial government considered the 1864 legislation to be too lenient for the absolute powers it requested, thus the Foreigners Act of 1940 was enacted to replace it. The 1940 wartime legislation was further consolidated as the Foreigners Act, 1946 ('Foreigners Act') following the war's end and the ensuing large-scale displacement.

DELINEATING REFUGEES

Refugees

At its Thirtieth Plenary Meeting on 12 February 1946, the United Nations General Assembly adopted Resolution A/8(1)⁴ that recognized the problem of refugees and displaced persons *of all categories was one of immediate urgency*. Importantly, the resolution was specific to delineate between *genuine refugees* and *displaced persons*, on the one hand, and *war criminals* and *other criminals* on the other side who may claim to be refugees.

Recognizing that the problem of refugees and displaced persons was an international one, the General Assembly recommended to the *UN Economic and Social Council* (ECOSOC) that the Council recognizes the principle that “*no refugees or displaced persons who have finally and definitely, in complete freedom, and after receiving full knowledge and facts, including adequate information from the governments of their countries of origin, expressed those who have valid objections to returning to their countries of origin will be forced to do so*”.⁵

Through this recommendations, resolution A/8(1) thereby became the first official international recognition that a genuine refugee could not be compelled to return to his or her country of origin.

⁴ United Nations Resolutions, I (Dusan J. Djanovich ed), 8 (1946).

⁵ *Id.*

An analysis of the determinants of refugee flows by Myron Weiner reveals those internal conflicts rather than wars between states are the principal generators of population flight.⁶ These conflicts include wars of secession by territorially based ethnic groups or wars of central or local governments against such groups⁷ and political persecution by authoritarian regimes such as Iran, Iraq, China among the others.

However, problem arises the moment when the distinction in identifying case studies wherein, an individual or mass population facing persecution not 'on the basis of one of the protected grounds. In this situation, he may not be counted as a *refugee*. Further, they would also not be counted as refugees, when they face persecution on the basis of a protected ground, but who are not outside their country of citizenship. Interestingly, there may arise situations wherein they would be classified as Internally Displaced Persons (IDPs) involving individuals/groups who have not crossed international borders, albeit having all the characteristics of a refugee *except that they have not crossed an international border*.⁸

The office of the UNHCR, therefore, should adapt itself and reinvigorate its legal mandates as well as administrative procedures to understand the problem of refugees as a facet of the human displacement within the broader framework of security concerns, involving the security of refugees and humanitarian workers as well as states.⁹

INDIA'S POSITION WITH RESPECT TO REFUGEES

India is a non-signatory to both, the 1951 Refugee Convention and the 1967 Protocol on status of Refugees. However, it has acceded to other international instruments whose provisions are relevant to the rights of refugees. For instance, in 1979 India acceded to the "1966 International Covenant on Civil and Political Rights" (ICCPR)¹⁰ respectively. Further, in 1992 India acceded to the "1989 Conventions on the Rights of the Child" (CRC), wherein,

⁶ Weiner, M. "Bad neighbours, Bad neighbourhoods: an inquiry in the causes of refugee flows" 21 International Security, 36-39(1996).

⁷ *Id.* For instance, such groups against which there was wars of central or local government may include notably, Chechens, Kurds, Eritreans, Southern Sudanese, Sri Lankan Tamils, Serbs, Croats, Bosnian Muslims.

⁸ Lister, M, *who are Refugees?* 32 LAW AND PHILOSOPHY, 645-667 (2013).

⁹ S. Ogata, "Statement, UNHCR, to the Third Committee of the General Assembly of the United Nations," November 12, (1999).

¹⁰ Article 13 of the ICCPR deals with the expulsion of a person lawfully present in the territory of the state. India has reserved its right under this Article to apply its municipal law relating to aliens

the incorporation of Article 22 dealing with refugee children and refugee family reunification¹¹ remain vital.

The Factor of “*Well-Founded Fear of Persecution*”

The refugee framework in India is not well equipped to attend to situations of mass influx. While the framework sometimes succeeds in dealing with *individual claimants*, but it would still succumb to failure when large numbers of people flee persecution. Further, the refugee system affords substantially more protection to people who have crossed an international border than to those who have not. While this distinction makes sense in some cases, in others, particularly in situations of mass influx as a result of persecution by the state, it creates a large gap in the international protections.¹²

In incorporating the Convention definition into a domestic statute, “*nation-states decided to recognize refugee status when one is outside the country of origin because of persecution or a well-founded fear of persecution*”.¹³ The central question in the Convention definition and in most countries' refugee law, however, relates to the fear of future persecution. Decision makers thus focus on trying to determine what is likely to happen to the individual in the future if she returns to the home country.

In India, the general laws that regulate outsiders apply to refugees. These rules, however, do not ensure that refugees receive the treatment that they are entitled to.¹⁴ More importantly, both the Supreme Court and High Courts have on several occasions, provided a liberal interpretation of rights of refugees in specific cases dealing with *specific refugees*.¹⁵ It is important to note that, the Madras High Court has on various occasions prevented *forced repatriations* and upheld *non-refoulement*.¹⁶

¹¹Article 10 dealing generally with family reunification and Article 38 dealing with children in situations of armed conflict are also relevant.

¹² Arulanantham, T., *Restructured Safe Havens: A Proposal for Reform of the Refugee Protection System*, HUMAN RIGHTS QUARTERLY 22 ,1-56 (2000).

¹³ *Id.*

¹⁴ RAJEEV DHAVAN, “REFUGEE LAW, POLICY AND PRACTICE IN INDIA” 81-83 (2004).

¹⁵Dr. Malvika Karlekar v Union of India Crl. W.P. No.243 of 1988 (unreported, available on file with PILSARC), wherein, the Supreme Court stopped deportation of twenty-one Burmese refugees from the Andaman Islands whose applications of refugee status were pending and gave them the right to have their refugee status determined.

¹⁶ Gurunathan v. Government of India, W.P. 6708 and 7196 of 1992 (unreported, available on file with PILSARC).

Therefore, it could be said that the Indian Judiciary's stand on refugees are far from uniform. The reason being not the conflicting judicial decisions rather, "*the lack of legal recognition of rights and a separate framework for refugees versus Ordinary Foreigners*".¹⁷

JUDICIAL EXPANSION OF RIGHTS TO REFUGEES

The Constitution of India is dogged of notable provisions¹⁸wherein, the refugees are given protections. In general, the rights granted to refugees in India are the same as those granted to all foreigners under the Indian Constitution, that is, under Art.14: the right to equality before the law; under Art. 21: the right to have unrestricted access to the courts for the protection of one's life and personal liberty, which may not be taken away except in procedure established by law; Art 25: the right to freedom to practice and propagate one's own religion. Further, Art.51 states that– "*The State [India] shall endeavour to foster respect for international law and treaty obligations in the dealings of organized peoples with one another*"¹⁹.

However, it is important to ask whether the Indian Courts are empowered enough to intervene & enforce any international instruments or not, especially when the same has not been incorporated into the Municipal law.

On one side, it could be argued that "*the Indian courts do not have the authority to enforce the provisions of the above international human rights instruments unless these provisions are incorporated into municipal law by legislation*".²⁰ The reasons for the same may be attributed to the fact that the Indian Parliament is under no responsibility to establish laws to give effect to a treaty unless there are compelling reasons to do so, and the judiciary is not competent to enforce the Executive's compliance with treaty commitments in the absence of such enactment.²¹Therefore, It might be claimed that each nation-state has a responsibility to observe its respective duties arising from international law, and that they cannot blame their failure to do so on their legislative or executive apparatus.²² Moreover, In the event of failure of a state to bring its municipal law in line with its international obligations, "*International*

¹⁷ *Supra* note 12.

¹⁸ INDIAN CONST. art. 13, 14, 15, 20, 21, 22, 23, 24, 25, 27, 32 and 51.

¹⁹ INDIAN CONST.art.51

²⁰ State of Gujarat v. Vora Fiddali A.I.R. 1964, SC 1043. Here, the Court observed that, the well-established position that "*the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action*"

²¹ CHANDRASEKHARA RAO, THE INDIAN CONSTITUTION AND INTERNATIONAL LAW, 130 (Taxman Publication) (1993).

²² Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports 1949, p.174, at p. 180.

*Law does not render such conflicting municipal law null and void and which”²³ On the other hand, various court decisions in the absence of a concrete legislative structure “have tried to provide humane solutions to the problems of refugees, primarily with regard to the principles on non-refoulement, right to seek asylum, and voluntary repatriation”.²⁴ By implementing the same, the Indian courts gave their own interpretation by-passing a deliberation on the principles of international refugee law.²⁵ Meanwhile, it is observed that in certain circumstances the courts *can* take the treaty provisions into account. In the case of Vishaka²⁶, the Supreme Court of India stated that the “*contents of international conventions and norms consistent with the fundamental rights must be reflected in safeguarding gender equality and right to work with human dignity that lacks in municipal law*”.*

The Indian perspective is often deluged with the debate concerning as to whether the constitutional protection afforded to the refugees & asylum seekers protects them from refoulement or not.²⁷ “Majority is of the opinion that the right to non-refoulement has neither been read into Indian constitutional jurisprudence, nor can be extrapolated”.²⁸ In the case of *Ktaer Abbas Habib Al Qutaifi v. Union of India*²⁹, the issue pertaining to whether Article 21 of the Constitution encompasses non-refoulement or not was raised. Here, the learned justice did not rule out refoulement, but instead ordered the government to reconsider its deportation order based on humanitarian concerns. Habib. J., categorically invalidated the principle of non-refoulement by reasoning that:

²³ “Standards Dealing with Specific Human Rights of Refugees adumbrated in Declaration on Territorial Asylum” 18 (1967).

²⁴ Ahmad.N., *The Constitution-Based Approach of Indian Judiciary to The Refugee Rights and Global Standards of the UN Convention*, 8 THE KING’S STUDENT LAW REVIEW, 30-55 (2018).

²⁵ T. Ananthachari, *Refugees in India: Legal Framework, Law Enforcement and Security*, ISIL Year Book of International Humanitarian and Refugee Law, www.worldii.org/int/journals/ISILYB1HRL7 2001.

²⁶ Vishaka Vs. State of Rajasthan (1997) 6 SCC 241.

²⁷ *Supra* note at 35.

²⁸ The term ‘*foreigner’s issue*’ was first used in the “Memorandum of Understanding signed between the Central Government and the All-Assam Students Union.” (Assam Accord, 1985). http://www.assam.gov.in/documents/1631171/0/Annexure_10.pdf?version=1.0. Subsequently, the same term found its way into the Statement of Object and Reasons of The Citizenship (Amendment) Act 1986.

²⁹ *Ktaer Abbas Habib Al Qutaifi v. Union of India*, 1999 Cri LJ 919. The hon’ble court here observed that “Article 21 of the Constitution encompasses the principle of non-refoulement that is subject to “*law and order and security of India*”.

*“It expressly permits deportations on the basis of public order and national security, and it is powerless against the Supreme Court’s confirmation of the Centre’s unrestricted right to expel”.*³⁰

UNDERSTANDING NATIONAL SECURITY AND INDIVIDUAL LIBERTY WITH RESPECT TO RIGHT OF NON-REFOULEMENT

India though not bound by any of the major international agreements protecting the rights of refugees, has largely followed international norms.³¹ But, in cases involving matters of 'national security', India preferred to deviate from its conventional mode of hospitality. For instance, asylum seekers from Burma were jailed and approximately 5,000 Burmese refugees were pushed back home from 1995 to 1997.³² Therefore, it would be inferred that for a nation-state with no refugee laws in position till date, its general practice as regards to refugee remains a case study to pursue.

The right of non-refoulement in the Indian context remains a debatable topic to ponder. A facet of the perceptive observers tends to affiliate the contention that “the right of *non-refoulement* is very much operational in India even without having signed any related international agreements.”³³ Moreover, the prevention of refoulement generally, includes “both the rejection of refugees at the border as well as the deportation of refugees from inside India”³⁴. More importantly, *non-refoulement* prevents nation-states from returning a refugee to persecution in one’s country of origin. *Non-refoulement* operates as the first and most basic right of the refugee. Moreover, there exists several rights in the host country which are generally called as “*secondary rights*” in form of the right to education, the right to hold property among the others. However, it could be argued that these secondary rights exist, *generally* relative to citizens in the host country.

³⁰ Hans Muller v. Supt., Presidency Jail, AIR 1955 SC 367.

³¹ *Supra* note 22

³² TAPAN K BOSE, PROTECTION OF REFUGEES IN SOUTH ASIA: THE NEED FOR A LEGAL FRAMEWORK (2000).

³³ The two (2) main proponents of this theory include of Saxena and of Veerabhadran Vijayakumar respectively. Importantly, Saxena's argument is summarised in Tapan K Bose, Protection of Refugees in South Asia: The Need for a Legal Framework (2000), while Vijayakumar's argument can be found in Veerabhadran Vijayakumar, 'Judicial Responses to Refugee Protection in India', 12 International Journal of Refugee Law 238 (2000).

³⁴ The principle of non-refoulement constitutes a fundamental aspect of the 1951 Refugee Convention. Article 33 states that “[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories.”

Although, the very existence of international as well as national in form of current legal institutions like UNHCR and the NHRC prevent the return of valid refugees to their country of origin.³⁵ They contend that, *non-refoulement* is granted as part of a broader constitutional and statutory structure. To substantiate the same, two (2) main arguments emerge in support of *non-refoulement*.

First, the very enshrinement under Article 21 of the Constitution that promises “*non-refoulement* as a fundamental, substantive right.”

Second, the very incorporation of the “international rule of *non-refoulement* into India's domestic laws” owing to Article 51 of the constitution.

Moreover, the difference between the legal and literal/colloquial definitions of 'refugee' is causing impediments in evaluating refugee outcomes and its subsequent considerations.³⁶ The fact remains that, while many of those fleeing danger in the developed world would fit the legal definition, the same cannot be said for the least developing states and majority of the developing nation-states. Say for instance, the areas of *Latin American* and *sub-Saharan African* regions are particularly prone to mass-migrations situations due to famine, natural disaster or economic collapse.³⁷ On the other hand, although the Convention implies an *individualised determination of refugee status (RSD)* in a court of law, the same procedure for status determination may borne futile when considerations of mass influx situations remain at stake at the border of the receiving nation-state. Interestingly, albeit these, the existing predicaments, the advent of the 21st century bears testimony to mass influxes of people that fit the legal definition of refugee.

NON-REFOULEMENT UNDER ARTICLE 21

Art 21 of the Constitution of India aims at placing a striking balance between the competing interests of governmental power and individual right. Article 21's right to life "*is the most fundamental of all ... [but] is also the most difficult to define.*"³⁸

³⁵Ahmad. N., 23 *Refugee Constitutionalism In India: Measuring Supremacy of Judicial Sovereignty Against Global Human Rights Standards*, RELIGION AND LAW REVIEW, 37-118(2014).

³⁶Ranee K L Panabi, *International Politics in the 1990s: Some Implications for Human Rights and the Refugee Crisis*, DICKINSON JOURNAL OF INTERNATIONAL LAW, 11 (1991).

³⁷*Id.*

³⁸ Technically speaking, *non-refoulement* is a duty of the host country, not a right of the refugee. However, the "*duty of non-refoulement,*" for all practical purposes, creates in the refugee a right to prevent return.

Delving through the initial vision of Article 21, the state could deprive someone of life or personal liberty if the state has followed a *valid procedure* established by parliament.³⁹ Importantly, in case of deprivation of one's life or personal liberty, the test for compliance with Article 21 encompass broadly of three (3) steps.

First, there had to be a law justifying interference with the person's life or personal liberty.

Second, the law had to be a *valid law* in consideration.

Third, the procedure laid down by the law should have strictly adhered to. Here, the state could justify serious infringements on life or personal liberty. For instance, the state could create a law allowing indefinite detention of suspected murderers, so long as the three procedural steps were followed in its creation and enforcement.

Further, as jurisprudence developed in the area of fundamental rights, the test for compliance with Article 21 *became entangled* with the standards for Article 14. The reason being, though the two articles comprise 'fundamental rights' of the Constitution that apply to non-citizens. The ensuing effect was that the Indian courts started implementing and adopting *similar tests* to gauge whether or not a particular law/(s) have complied to the pre-requisites of the said articles. The Indian courts have always maintained a position wherein, Article 14 is being viewed from a 'reasonableness' analysis, that is, if a law discriminated between two groups, that discrimination would have to be *'reasonable in character.'*

Most importantly, the scope of Articles 14 and 21 remain predominantly *procedural* in character. That is, while Article 14 protects people from disparate treatment by the courts and police. 'Reasonableness' therefore referred to the validity of a given procedure for both Articles 14 and 21. Here it would be pertinent to note that article 21 adopted substantive connotations when the 'reasonableness' test for Articles 21 and 14 were further entangled with the test for Article 19 compliance.

Interestingly, the co-relation of these rights (with the rights of Articles 14, 19 and 21 were seen as overlapping) act differently in its operation pertaining to citizens & non-citizens respectively. For instance, Articles 14 and 21 apply to citizens and non-citizens alike,

³⁹The term '*foreigner's issue*' was first used in the "Memorandum of Understanding signed between the Central Government and the All Assam Students Union." (Assam Accord, 1985). Available at http://www.assam.gov.in/documents/1631171/0/Annexure_10.pdf?version=1.0. Subsequently, the same term found its way into the Statement of Object and Reasons of The Citizenship (Amendment) Act 1986.

whereas, Article 19 applies only to citizens. Further, while the former provisions were intended to confer procedural rights and the latter attempts to confer substantive rights. The Indian courts since *early stages* maintained that the '*personal liberties*' described in Article 21 were mutually exclusive from those described in Article 19. However, the courts took a broader interpretation of Article 21, due to its all-encompassing interpretation as inferred from various notable judgments. Although Article 21 was never seen as completely subsuming the rights of Article 19, Amidst such developments, it would be garnered that since the interpretation of Article 19 extends solely to the citizens, then in that circumstance, any influence it had on Article 21 should probably be limited to citizens. Interestingly, delving into the Indian context there is no express mandate till date that *unwaveringly* confirms nor denies the hypothesis that only citizens receive substantive rights under Article 21.

In a notable case of *Railway Board V. Das*,⁴⁰ involving a tourist's (non-citizen's) right to 'life and personal liberty', the Supreme Court of India categorically stated the following:

“The primacy of the interest of the nation and the security of the State will have to be read into every article dealing with Fundamental Rights including Article 21 of the Indian Constitution”.

Here, the present case involved a situation wherein, the individual's right is being deprived, and since the state has no interest, the individual's right to personal liberty should therefore prevail. It would therefore be analysed that when the state's interest is weighed against the interest in individual rights, the interests of the nation and security assume the highest priorities. Therefore, it can be argued that the interests of refugees have rarely overcome the primacy of state interest in refoulement in India till date.

Further, with respect to the concerns of sovereignty that implies broad control over immigration and other matters of foreign affairs, the Indian courts have always opted for a perspective wherein, the same must be read into the constitution without an express constitutional provision. As stated by the hon'ble court in *Railway Board vs Das*, *“The primacy of the nation's interest and security must be 'read into' other parts of the Constitution. Other nations, including the US, have based their broad immigration powers on the sovereignty of the nation. Those countries argue, like India, that the very essence of*

⁴⁰ *Railway Board V. Das*, 2 SCC 465 (2002). The case involved a Bangladeshi woman visiting India. Several employees of the Indian railways raped her at a station and subsequently the hon'ble court upheld her claim that the state-run Railway Board breached her fundamental rights.

statehood involves federal control over immigration, which must be implied throughout one's constitution".⁴¹

More importance must be given where matters pertaining to citizenship & foreign affairs come to the fore, the Constitution grants broad powers to parliament to develop laws and regulate thereby. In particular, art. 11 of the Constitution read as follows:

*"Nothing in the foregoing provisions of this Part shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship"*⁴² Further, the Indian Parliament also retains full control over India's international obligations, with the sole authority to have a discretion to *create* and *maintain* international treaties on behalf of the nation.⁴³

However, on the other hand, the arguments put forth by *Saxena* and *Vijayakumar* tend to imply a perspective that rely heavily upon a 1996 court case in the form of *NHRC vs State of Arunachal Pradesh*.⁴⁴ They argue that through the judgment the hon'ble court establishes a more assertive right of non-refoulement for refugees.

Albeit aforesaid perspectives, the insights that would be gleaned remains that the principle of *non-refoulement* retains a rather arcane status under the Indian legal paraphernalia. The present case is dogged of a dispute involving between Chakma refugees residing in Arunachal Pradesh and a group of hostile locals, the All-Arunachal Pradesh Students Union (AAPSU). Delving into the historical context, the Chakma people were subjected mass displacement in 1964 from the erstwhile East Pakistan (now Bangladesh) and subsequently migrating from Assam to the current state of Arunachal Pradesh.

However, the problem ensued when majority of them applied for citizenship and got rejected by the orders of the local officials from reaching the federal government.

However, as the Chakma population proliferated, the AAPSU issued 'quit orders', demanding that the Chakma leave or suffer severe harm. Meanwhile, the Arunachal Pradesh government formulated plans to move the Chakma's to another state. On the other hand, the Ministry of Home Affairs (MHA) was furthering its attempt in according "*blanket citizenship*" and ordered the state government to provide security. Finally, the NHRC filed a writ petition in the court demanding the state government to stop the Chakma's' forced migration from the state.

⁴¹ *Id.*

⁴² INDIAN CONST. Art.11.

⁴³ INDIAN CONST, Art. 253

⁴⁴ (1996) 1 SCC 742

Importantly, the Supreme Court upheld that notices that were given to the Chakma's to quit the state as amounting to a violation of "Article 21 under the Indian Constitution, and categorically observed that no person can be deprived of his/her right to life and liberty except in accordance to the procedure established by law".⁴⁵ Emphasising the role of the state government herewith, the hon'ble court was decisive in observing that it remains the imperative of the state government to protect the Chakma's from such threats accruing to their respective lives and liberty. The hon'ble Court was upright in holding the observation that the Union government by not forwarding the Chakma's citizenship applications to the concerned department is flagrantly impinging upon the rights of the Chakma's, especially of their constitutional and statutory right in form of citizenship.

The temporal impact of the said judgment bore nuanced interventions that had telling effect with respect to the Chakmas in particular and refugees/asylum seekers in general. For the reason being, aftermath the judgment *periodic* interventions through the NGOs, the NHRC and the Supreme Court of India, enabled around 65,000 Chakmas (approx.) residing in Arunachal to the citizenship status by the Government of India.⁴⁶

Pervading through the interpretation forwarded by the hon'ble court, Saxena and Vijayakumar herewith opines the case to be a "*landmark decision by the Supreme Court with regard to refugee protection*" that in turn be read into the court's decision a right of non-refoulement under Article 21 of the Constitution.

NON-REFOULEMENT UNDER ARTICLE 51

Article 51 enshrined in the Constitution of India talks about the prospect of the *imperativeness* of national and international law respectively by mandating the Union government to '*maintain respect*' for international law. It reads as follows:

"The State shall endeavour to ... foster respect for international and treaty obligations in the dealings of organised people with one another."

⁴⁵ Importantly, the hon'ble court in its interim order on November 2, 1995 directed the state government to ensure that the "Chakmas situated in its territory are not ousted by any coercive action not in accordance with the law. The court further directed the state government to ensure that the life and personal liberty of each and every Chakma residing within the state should be protected."

⁴⁶ Mahanirban Calcutta Research Group, *The State of being Stateless: A Case Study on Chakmas in Arunachal Pradesh* (2009). Retrieved from http://www.mcrg.ac.in/Statelessness/Statelessness_Concept.asp.

The Indian Courts have interpreted Article 51 to demand adherence to international law when there is no clear conflict with domestic law. While recognising the supremacy of domestic over international law, the Constitution's drafters thus realised the importance of fulfilling international obligation. On the other hand, when India has a clear international obligation but an unclear domestic obligation in a particular area, it should follow international law.

Article 51 refers to both 'treaty obligations' and 'international law', some have interpreted the latter term as referring to '*customary international law*'.⁴⁷

NON-REFOULEMENT AS INTERNATIONAL CUSTOMARY LAW

Non-refoulement, as a principle invokes a rather feeble version of customary international law, for it to qualify as customary international law, the same must be widely incorporated to be morphed into "*an international custom, as evidence of a general practice accepted as law*".⁴⁸ However, the normative practice prevalent in most of the least developing nation-states including India remains that though they instil a framework protecting the refugees, the same remains subject to discretionary mechanisms outmanoeuvring the protectionary standard at any point.⁴⁹ Against this background, it would be pertinent to insinuate an observation that "[i]nsofar as there is legal consensus on an expanded conceptualisation of refugee status based on custom, it sure is... 'at a relatively low level of commitment.'⁵⁰

INAPPLICABILITY OF CUSTOMARY INTERNATIONAL LAW TO NON-REFOULEMENT

There remain concerns that even if customary international law become acceptable and being incorporated into the Indian domestic law, the same would remain a futile effort when interpreted in the refugee context. There remain three (3) notable problems for the same.

- First, the existing statutes pertaining to immigration aspect '*already occupy the field*' of refugee law.
- Second, the existing statutes offers an interpretation that sits directly in contrast with principle of non-refoulement.

⁴⁷ Statute of the International Court of Justice, Article 38(1) (b).

⁴⁸ *Id.*

⁴⁹ Kannan. A., & Supratim Guha. S., 3 *Humanising the Indian Refugee Policy: A case for the Refugees' Right to Work*, NLUJ LAW REVIEW 150 (2015)

⁵⁰ *Id.*

- Third, India's insistence to be not be legally governed by *any* the Refugee Convention.

Here, it would be inferred that the domestic legislation in India '*occupies the field*' of immigration and refugee law completely, thus leaving out any hope of incorporating new rules into the domestic sphere. The incorporation of customary international law is not permitted when parliament '*occupies the field*' of a given area.⁵¹ Parliament is said to '*occupy the field*' when it legislates in such a broad and comprehensive manner.

Importantly, India has effectively passed several laws governing immigration, notably, the *Passport (Entry into India) Act, 1920*, the *Foreigners Act, 1946*, the *Foreigners Order, 1948* and the *Citizenship Act, 1957*.⁵² Further, the Foreigners Act and the Foreigners Order respectively empowers the Union government to restrict movement of aliens inside the territory of India, subsequently mandating the likes of *medical examinations*, limiting employment opportunities thereby, and limiting opportunity to associate, among others. Therefore, the broad ambit of India's immigration stipulations indicates that the legislation '*occupies the field*'.

However, it remains to be analysed that the Indian courts only incorporate international law through Article 51 only when the ambiguity in the domestic law & policy framework ensues.⁵³ Therefore, it would be safe to conclude that the Indian courts powers remain *circumscribed* rather, inhibited to enforce a customary international norm that clearly impinges the policy framework. Finally, it would be argued that Article 51 is enshrined as a 'Directive Policy' and likewise cannot be enforced in the court of law. This remains a pertinent reason as to why the Indian courts remain hesitant to interpret the wordings enshrined under Article 51 of the Constitution of India.

CONCLUSION

The Indian history is usually replete with instances where human rights jurisprudence has always occupied a place of *primacy* amidst other considerations at stake.⁵⁴ Looking closely, we cannot underestimate the affinity between the refugee problem and broader issues of

⁵¹ Vishaka vs State of Rajasthan, AIR SC 3011 (1997).

⁵² P. CHANDRASEKHARA RAO, THE INDIAN CONSTITUTION AND INTERNATIONAL LAW, 130 (Taxman publication) (1993).

⁵³ Chadrahasan. N., 16 *Access to Justice and Aliens: Some Insight into Refugee Groups in India*, Windsor Y B Access to Justice 135, 139 (1998).

⁵⁴ RATIN BANDYOPADHYAY, HUMAN RIGHTS OF THE NON-CITIZEN: LAW AND REALITY, 217 (Deep & Deep Publications Pvt. Ltd., New Delhi).

human rights. The ensuing realities of these flagrant violations of human rights may tend to proliferate instances of *mass exodus & non-voluntary repatriation* among the others that has grappled the imaginations of most of the nation-states of the 21st century.⁵⁵The introductory part primarily concerns itself with the position of the refugee within the Indian periphery and also identifies the problems, research questions and the methodology to tackle those issues. So, differentiating the intrinsically associated features of the said category of persons through the help of varied international instruments and through the perspective of various political theorists. Therefore, it would be argued that delineation of *refugees* from the *other categories of foreigners* remains an important step in ameliorating the present situation of mass influxes in India.

Further, It with the scope of constitutional provisions (right to equality before law, protection of life and liberty and the right to fair trial respectively. In this context, several judicial precedents, involving the decisions of Hon'ble High Courts and Hon'ble Supreme Court respectively. Here, it would be important to state that moreover, there is no specific provision in the Indian Constitution that requires the state to enforce or implement treaties and agreements. A joint reading of all the provisions as well as an analysis of the case law on the subject shows international treaties, covenants, conventions and agreements Only if they are specifically incorporated in the law of the country can they become part of Indian domestic law. Typical understanding persists that the Indian Courts *generally* apply norms of Only when there is a clear agreement between international law and domestic law should international law be applied, and the principles of international law should not be in conflict with domestic legislation.

Perceptive observers state that there is a blessing in disguise for not having in place a legal framework that may be prone to aspects involving *political character*. For they believe it would impose certain liabilities and obligations which may have political dimensions. But the same may suffer from misconception, as absence of laws pertaining to the refugees may not only affect the refugees, rather the broader framework of mass influx situations involving illegal migrants & asylum seekers respectively. Gradually, it diminishes the accountability factor of the Union government in terms of *affording* refugee protection and *observing* human

⁵⁵S.N. Bhargava, "The Relationship Between National Human Rights Institutions and the Judiciary in Protecting Refugees", Report on Judicial Symposium on Refugee Protection, 92 (13-14 Nov.1999, New Delhi).

rights. Therefore, by referring to the United Nations Charter and the Universal Declaration of Human Rights in its preamble, as well as efforts such as ensuring that refugees have the broadest possible exercise of these fundamental rights and freedoms, the document must be evaluated and given a rights-based approach to the issue.

RECOMMENDATIONS

Therefore, the following points must be considered in any future administrative, executive and legislative exercise by the national governments in this part of the globe, especially in case of India are as follows-

- In the case of countries hosting large refugee populations, states should also provide bilateral assistance both financial and technical support, depending on the host country's needs to enable the host state to provide support to refugees and asylum-seekers, including ensuring access to adequate shelter, food, health care and education. Further, the extent of such bilateral assistance should also be published annually. However, such aids & support (financial) should not be considered as a substitute for, or come at the expense of, programmes to accept people in need of protection.
- Proper stratification of refugees on terms of economic, climate, humanitarian and political factors must be carved out while re-defining the 'refugee'.
- The principles of *non-refoulement* must be enforced effectively into the administrative as well as legislative practice.
- In India's legal system, the principle of non-refoulement must be made a non-negotiable human right for refugees.
- Importantly, carving out necessary provisions to individuals who fail to refugee status, but whose return would be in breach of international human rights obligations. The instances of the same are replete in the Indian scenario. Therefore, the Union government should embark upon facilitating *appropriate status* in consonance with their fundamental human rights.