



CRITICAL ANALYSIS OF LAWS RELATING TO REFUGEES IN INDIA

By *Pushpit Singh*
From *Symbiosis Law School, Hyderabad*

“Abstract”

“Among all countries which have had an influx of refugees in the last century, India is leading the pack with over nineteen million refugees living in this country”. The first such instance which saw the forceful migration of millions of people into the country was during the Indo-Pak partition in 1947 when a lot of families lost their shelter and were forced to relocate depending on whether they were Hindus or Muslims. In this context, one needs to look at the history of refugee crises that has generally plagued our planet earth ever since World War II and has been unsolved in India as well ever since the country became independent in 1947¹.

Chapter 1”

“INTRODUCTION”

1.1 Definitions

“Ordinarily, the term “Migrant” denotes a person who moves around from one place to another within the same country in search of better work and better living conditions”.

“An “immigrant” is one who migrates from one country to another in search of better job opportunities and better living conditions.

“An “Internally Displaced” person is defined under International Humanitarian Law as a person who is displaced from his original shelter due to war, armed conflict, any natural or man-made disaster.

“Finally, the term “Refugee” is defined in the United Nations Convention Relating to the Status of Refugees, 1951 as a person who has been staying outside the country of his nationality or that of habitual residence, i.e. domicile, as a result of the fear of persecution and is unable to return to the country because of the fear”. It is noteworthy that such persons are also alternatively known as “Asylum Seekers”².

“Asylum seekers are those who seek international protection from another state because of the fear of persecution in their own country”. People who are granted Asylum by the host country become refugees whereas those who are not recognized as such remain illegal migrants/immigrants. “Asylum is generally granted only when there is a “well-founded” (what is well-founded varies from case to case but is generally understood as the proof of fear backed up with solid factual evidence on the basis of incidents of persecution that a particular group of refugees may have faced in the past and that may have been discovered through media reports, legislative and executive action) fear of persecution and also in furtherance of the principle of “Non-

¹ Pritam Ghosh, *The “Illegal Migrant” and “Refugee” Status Dilemma: A critical analysis with special reference to the Rohingya Muslims in India*, ACADEMIA (Oct. 1, 2019, 10:04 A.M.), https://www.academia.edu/35968762/The_Illegal_Migrant_and_Refugee_Status_Dilemma_A_critical_analysis_with_special_reference_to_the_Rohingya_Muslims_in_India.

² Pritam Ghosh, *The “Illegal Migrant” and “Refugee” Status Dilemma: A critical analysis with special reference to the Rohingya Muslims in India*, ACADEMIA (Oct. 1, 2019, 10:04 A.M.), https://www.academia.edu/35968762/The_Illegal_Migrant_and_Refugee_Status_Dilemma_A_critical_analysis_with_special_reference_to_the_Rohingya_Muslims_in_India.



Refoulement” (This is explained in Art. 33 of the UN Convention Relating to the Status of Refugees, 1951 which provides that “*No Contracting State shall expel or return (“refoule”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion*”) in International Refugee Law³.

1.2 Massive Overflow of Refugees into India

“India has seen a huge influx in its refugee population since 1947 wherein a good part of its population comes under the unacknowledged category of “Refugees” by the Government of India”. “After Independence, 25 years were involved in accepting over 15 million refugees due to the India-Pakistan partition. Initially, over a 100 relief camps were set up and a total expenditure of over Rs. 59 crores were incurred by the Government of India⁴. Step of primary importance that was taken to deal with the refugee crisis during this period was the enactment and enforcement of the Rehabilitation Finance Administration Act, 1948⁵.

India faced another refugee crisis in the year of 1959 wherein the spiritual leader of the Gelug, Dalai Lama, along with his followers had to flee from Tibet due to China’s Communistic approach to Anti-Religious legislations. The Government of India provided the Dalai Lama and his followers a Political Asylum⁶.

The refugee influx continued in 1971 when more than a decade millions of refugees fled from East Pakistan to India during and immediately after the Indo-Pak war. In this case, India had no choice but to consider the plight of the refugees on humanitarian grounds forced by the humanitarian obligation to give shelter to such refugees⁷.

“With the increasing gap of time, India’s already-bursting population continued to be affected by the massive in-take of refugees from Sri Lanka and Bangladesh in 1983 and 1986 respectively”. “As per the World Refugee Report published every year by the UNHCR, India hosted approximately at least over a million refugees and some 2,37,000 internally displaced persons⁸.

1.3 Insight into the Rohingya Community

“A group of Stateless People, The Rohingyas have Indo-Aryan as their origination roots who are described as the “*world’s most*

their basic needs such as food, clothing and shelter by starting a new industry or business. The authority also received financial support from the government for easier disbursement of loans. For the sake of transparency and accountability to the government, the rehabilitation finance administration had to maintain proper books of accounts and was registered as a company with a common seal and perpetual succession) .

⁶ *supra* note 2 .

⁷ *supra* note 2 .

⁸ *supra* note 2 .

³ *supra* note 2 .

⁴ *supra* note 2 .

⁵ See Rehabilitation Finance Administration Act, 1948, No. 12, Acts of Parliament, 1948 (India) (This piece of legislation was enacted to provide financial support for rehabilitation and resettlement of people who were displaced to the Indian side post-partition. Under the Act an authority called the rehabilitation finance administration was formed under the direct supervision and control of the then central government which was supposed to lend money to displaced individuals and families so that they could arrange for



*persecuted minority*⁹. Alternatively known as Arakanese Indians and hailing from the Rakhine State of Myanmar, such community comprises majorly of Bengali Muslims and minority as Hindus. In October 2017, the Rohingyas were highlighted by the fickle Media because reportedly around 5 lakh Rohingyas crossed the Myanmar border and entered into Bangladesh and India due to the persecution and being a constant subject to fear, violence and torture by the Myanmar Law Enforcement Authorities¹⁰.

The point of conflict arises when the fact that this community has been residing in Myanmar since the 12th century is acknowledged; “A large number of Migrant Rohingya Labourers, during 1824 - 1948, migrated from India and Bangladesh to Myanmar, which was still under the rule of British¹¹.

“Following Myanmar’s Independence from the British Rule in 1948 and passing of the Union Citizenship Act of 1948, the Myanmar government began to look at the migrant Myanmar’s, i.e. Rohingyas as illegal”. They were denied full citizenship rights and basic amenities as the aforesaid act defined which ethnicities would be granted citizenship and “according to a 2015 Report by the International Human Rights Clinic at Yale Law School, the Rohingyas were not included”. “However, The Citizenship Act did allow those people whose families had lived in Myanmar for at least two generations to apply for Identity Cards”. “Rohingya were

initially given such identification under the generational provision”. “During this time, several Rohingya also served in the state’s Parliament as well¹².

“After the 1962 military coup in Myanmar, things changed drastically for the Rohingyas”. “All citizens were required to obtain National Registration Cards”. “The Rohingyas, however, were only given Foreign Identity Cards which limited the jobs and educational opportunities they could pursue and obtain¹³.

“In 1982, a new citizenship law was passed, which effectively rendered the Rohingyas stateless”. “Under the law, the Rohingyas were again not recognized as one of the state’s 135 ethnic groups”. “The law established 3 levels of Citizenship”. “In order to obtain the most basic level of citizenship, i.e. Naturalized Citizenship, there must be proof that the person’s family lived in Myanmar prior to 1948, as well as fluency in one of the national languages”. “Many Rohingyas, despite being fluent in Burmese, lacked such paperwork as it was either unavailable or denied to them¹⁴.

“As a result of the new legislation, the following rights of Rohingyas has been restricted: To Study, To Work, To Seek Shelter and Safety, To Travel, To Marry, To Practice their Religion, To Access Health Services, To Vote and so on”. “Furthermore, limits are placed on them as to enter certain

⁹ *Human Rights Council opens special session on the situation of human rights of the Rohingya and other minorities in Rakhine State in Myanmar*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (Oct. 1, 2019, 10:04 A.M.), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22491&LangID=E> .

¹⁰ *supra* note 2

¹¹ *supra* note 2

¹² *supra* note 2

¹³ *supra* note 2

¹⁴ *supra* note 2



professions like Medicine, Law or Running for the Office”. “Since the 1970s, a number of crackdowns on hundreds of thousands of Rohingyas in Rakhine State has caused them to flee to neighboring states of Bangladesh, as well as Malaysia, Thailand and other Southeast Asian countries. During such crackdowns, refugees have often reported rape, torture, arson and murder by Myanmar Law Enforcement Forces¹⁵.

1.4 “Research Questions”

“In the light of the above-mentioned objectives the researcher dealt with the following questions in the research work”:

- a. What are the laws prevailing in India regarding Refugees?
- b. How is the treatment by Indian Government towards refugees?
- c. Why doesn't India have a National Legislation regarding Refugees?
- d. Why hasn't India ratified International Refugee Treaties and Obligations?
- e. What is the history of refugees in India?
- f. Why did Rohingyas enter India and what is their condition?

1.5 “Formulation of Hypotheses”

“On the basis of the Research Questions the following hypotheses have been formulated for conducting the research”:

- a. India, an overpopulated country, will continue with its ad-hoc methodology of dealing with the refugee matters considering its high rate of success in the past.
- b. India will neither pass a national legislation nor ratify an international convention or protocol or treaty pertaining to refugees due to the risks it poses to India's sovereignty and security.

1.6 “Objectives of the Study”

- a. “To find out the laws” prevalent in India that are used to deal with the current on-going refugee influx.
- b. To analyze the treatment of Indian government towards different groups of refugees.
- c. To find out the reason behind the absence of a National Legislation pertaining to Refugees.
- d. To find out the reason behind the absence of ratifying International Conventions, Treaties, Protocols or Obligations pertaining to Refugees.
- e. To observe why Rohingyas entered India of all the countries and their current situation.

1.7 Significance of Study

“This research work will be helpful in finding out the reasons behind India being put on trial for not ratifying the Refugee Convention and Protocol, and apparently abusing human rights and due process of law”. Furthermore, it will also give us insight into the pros and cons of India's different action towards Refugees. A critical analysis of Indian Law with International Law pertaining to refugees has not been done in detail. This research work will add on to the literature available and make valid and authentic information easily available to the public at large.

1.8 “Research Methodology”

“There are mainly doctrinal and non-doctrinal methods of study for conducting research work”. “Doctrinal method mainly gives emphasis to conducting research by analysis of materials available in the library whereas non-doctrinal research requires researcher to undergo field work to do the research work.

¹⁵ *supra* note 2



“Doctrinal method is found to be suitable for the present study since the research involves analyzing the laws related to refugees in India, the situation of Refugees in India and action taken by the Indian Government towards refugees”. “The research analyses the concept of Non-Refoulement.

1.9 Review of Literature: Need for Present Study

Since 1947, India has observed an influx of refugees. However, it has failed to adopt any kind of National Legislation or ratify an International Obligation pertaining to Refugees. “This has led to arbitrary and discretionary power vested in the hands of the Government of India which was duly and appropriately exercised”. “The highlight is the fact that India, despite numerous successful endeavors in dealing with refugee crisis and letting refugees stay on humanitarian grounds, it has come under sharp criticism from the international community for not adopting the 1951 Refugee Convention and 1967 Refugee Protocol”. “This study is important as it delves into the nuances and intricacies of International Law on Refugees with respect to India’s subsidiary resort to deal with the refugee matters on an ad-hoc basis in the backdrop of absence of a National Legislation.

1.10 Chapterisation

“This whole work is divided into 4 chapters”:
“Chapter 1 – Introduction”

This chapter introduces the definition of certain terms related to refugees; it provides insight on the history of refugee influx in India, and it provides a detailed background on the Rohingya Community. “Besides, the chapter discusses elaborately the research

problems existing in the research field, enumerates the research questions, hypothesis, narrates the objectives and explains the significance of the study. The chapter also chalk out the methodology adopted, scope of the study and Chapterisation.

“Chapter 2 - Critical Analysis of Legal Provisions”

It gives a detailed insight into the various laws pertaining to refugee’s prevalent pre-independence and post-independence in India by taking into consideration a 3-tiered structure: Non-Refoulement, Constitution of India and International Obligations of India towards the International community.

Chapter 3 - Critical Analysis of India’s Behavior

“It gives a detailed insight into the way India has treated its refugees and the refugee crisis on an ad-hoc basis by considering the merits and demerits of each and every case”.

Chapter 4 - Conclusion and Recommendations

“The 4th chapter being the last chapter summarizes the whole work and enumerates the findings of the research”. The chapter also enumerate recommendations for the better functioning of refugee laws between the Government of India and Refugees.

Chapter 2

“CRITICAL ANALYSIS OF LEGAL PROVISIONS”

“Before the Supreme Law of the Land was enforced in 1950, certain provisions existed in order to take care of the non-citizens of India. Such provisions are:



1. “East Punjab Evacuees (Administration of Property) Act, 1947”
2. “UP Land Acquisition (Rehabilitation of Refugees) Act, 1948”
3. “East Punjab Refugees (Registration of Land Claims) Act, 1948”
4. “Mysore Administration of Evacuee Property (Emergency) Act, 1949”
5. “Mysore Administration of Evacuee Property (Second Emergency) Act, 1949”

After the Constitution of India was enforced in 1950, the following provisions were enforced alongside the aforementioned:

1. “Immigrants (Expulsion from Assam) Act, 1950”
2. “Administration of Evacuee Property Act, 1950”
3. “Evacuee Interest (Separation) Act, 1951”
4. “Displaced Persons (Debts Adjustment) Act, 1951”
5. “Influx from Pakistan (Control) Repelling Act, 1952”
6. “Displaced Persons (Claims) Supplementary Act, 1954”
7. “Displaced Persons (Compensation & Rehabilitation) Act, 1954”
8. “Transfer of Evacuee Deposits Act, 1954”
9. “Foreigners Law (Application & Amendment) Act, 1962”
10. “Goa, Daman & Diu Administration of Evacuee Property Act, 1969”
11. “Refugee Relief Taxes (Abolition) Act, 1973¹⁶”

The rights of a refugee are described in a 2-tiered structure as follows:

2.1 Non-Refoulement

¹⁶ Rathin Bandyopadhyay, *Human Rights of Non-citizens: Law and Reality*, DEEP AND DEEP PUBLICATIONS, 31-32 (2007) .

Non-Refoulement, the practice of forced repatriation, is discussed in elaboration below:

1. “Non-State Actors like United Nations High Commissioner for Refugees (UNHCR) and National Human Rights Commission (NHRC) prevent the return of Legal Refugees back to their home country”: “UNHCR’s presence is not guaranteed by any constitutional provision”. “The reason why UNHCR exists in India is solely because of political agreement between the Government of India and the United Nations”. “The short-term political considerations outweigh the long-term interests to protect the refugees”. Furthermore, the Indian Judicial system provides the mere right to apply to UNHCR to refugees which is also decided on an ad-hoc basis; it doesn’t give them the right to non-refoulement. “In *Zothansangpuri v. State of Manipur*, Imphal bench of Guwahati High Court held that the refugees have the right to not to be deported if their life was in danger.” “UNHCR’s funding can cater to only to above 21,000 refugees and considering the sudden influx of refugees in India, UNHCR had to cut back on the level of aid per refugee”. Finally, UNHCR has been accused of secretly repatriating the Sri Lankan refugees back to Sri Lanka on the context of ‘liberated zones’; However, no such liberated zones existed and the Sri Lankan Refugees were forced to come back to India¹⁷.

When it comes to NHRC, it just provides a ‘procedural mechanism’ through which the refugees petitions and cases are brought to the Indian Courts. NHRC just investigates human rights abuses, provides non-binding

¹⁷ Omar Chaudhary, *Turning Back: An Assessment of Non-Refoulement under Indian Law*, 39 ECONOMIC AND POLITICAL WEEKLY 3257, 3257-64 (2004) .



recommendations to the Government of India and helps in litigation but in no way provides new rights to citizens or non-citizens. Considering the current budget of NHRC, it cannot possibly attend to above 40,000 human rights abuses cases¹⁸;

2. “Article 21 promises Non-Refoulement as a fundamental and substantive right to non-citizens”:

In *Louis De Raedt v. Union of India and State of Arunachal Pradesh v. Khudiram Chakma*¹⁹, the Supreme Court of India held that foreigners are also entitled to the protection of Article 21. However, Article 21 provides different rights in different contexts because it provides less protection when applied to foreigners as against citizens and when it conflicts with state’s interest in immigration or national security. Moving on, it provides no protection to a person whose life or liberty has been deprived by a Non-State Actor (NSA)²⁰. Indian Constitution’s and Judiciary’s ad-hoc approach to Article 21 neither confirms nor denies that it is granting substantive rights to a citizen only because there are very few cases involving non-citizens being granted the substantive rights as mentioned under Article 21²¹.

In *NHRC v. State of Arunachal Pradesh*²², wherein there was a dispute between Chakma Refugees who were forced to move migrate from Assam to Arunachal Pradesh and the All Arunachal Pradesh Students Union (AAPSU), the Supreme Court ruled that the Chakma Refugees cannot be moved –

“because Arunachal Pradesh formulated plans to move these displaced people to another state despite these people being under the threat of severe violence, harm and death - unless and until the Federal Government ruled on their citizenship, and Arunachal Pradesh government had an obligation to protect these group of people, i.e. Chakma Refugees from harm²³”. Firstly, the NHRC merely assisted the Chakma Refugees by taking their case to court and petitioning the State and Federal Governments: No new right of Non-Refoulement was given to such non-citizens²⁴.

Secondly, this case does not involve whether the rights involved were procedural or substantive in nature because the court was clearly not trying to protect the Chakma Refugees from freedom from involuntary movement as the court expressly permit non-citizen Chakmas to be moved by the state after they are given a valid opportunity to apply for citizenship. As for the Right to Life, the Ministry of Home Affairs demanded that the state government provides protection. Therefore, any contrary policy pursued by the state government would not be according to a procedure established by law since that would violate the federal law. If the state does not follow proper procedure in carrying out its policy, then it violates the procedural aspect²⁵.

Thirdly, the Supreme Court clearly upheld the principle of primacy of state’s interest over individual interests because it was just protecting the citizens but not the non-

¹⁸ *supra* note 17 .

¹⁹ *Louis De Raedt v. Union of India and State of Arunachal Pradesh v. Khudiram Chakma*, (1994) AIR 1461 (India) .

²⁰ *supra* note 17

²¹ *supra* note 17

²² *NHRC v. State of Arunachal Pradesh*, (1996) AIR 1234 (India)

²³ *supra* note 17

²⁴ *supra* note 17

²⁵ *supra* note 17



citizens because it was trying to prevent an interstate feud from taking place. Furthermore, in *Dr. Malvika Karlekar v. Union of India*²⁶, the Supreme Court of India held that the authorities should consider whether refugee status should be granted, and until this decision was made, the refugees should not be deported²⁷.

3. “Article 51 of the Indian Constitution incorporates Customary International Law, i.e. principle of Non-Refoulement into India’s Domestic Laws”: According to Indian Jurisprudence, the government should follow domestic law in case of an international legal catch. 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. However, considering the latter scenario, India cannot follow international law because firstly, non-refoulement has a very weak basis in custom because the country who decides to provide protection to the refugees also chooses to exercise some sort of discretionary power over such cases which leads to variable customary practices finding no common ground²⁸. “Secondly, India has not signed any agreement that expressly or impliedly requires non-refoulement and therefore is not bound by any treaty-based international obligations, i.e. United Nations Convention Relating to the Status of Refugees of 1951 and the Protocol Relating to the Status of Refugees of 1967²⁹”. “Thirdly, Customary International Law has never been incorporated into Indian Law under Article 51 despite having numerous

opportunities to do so in *Vishaka v. State of Rajasthan*³⁰. “Even if Customary International Law suddenly became acceptable to incorporate into Indian law, it would not happen in the refugee context because while non-refoulement definitely qualifies as customary international law, there are three problems with non-refoulement as binding customary law”:

- a. First, India's several broad statutes covering immigration 'occupy the field' of refugee law. Domestic Legislations in India 'occupies the field' of immigration and refugee law completely, thus leaving out any hope for 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. Parliament is said to 'occupy the field' when it legislates in such a broad and comprehensive manner that it indicates it 'owns' a particular subject matter of legislation. According to this logic, the legislator has not forgotten to include an extra norm or rule but must have intentionally left that rule out. The exclusion of the rule or norm is considered intentional due to the broad legislation of Parliament in the area³¹. “India has passed several laws governing immigration, including the Passport (Entry into India) Act of 1920, the Registration Foreigners Act of 1939, the Foreigners Act of 1946, the Foreigners Order of 1948 and the Citizenship Act of 1957”. As previously mentioned, the Constitution also grants parliament broad powers over these areas. “Both the Foreigners Act and the Foreigners Order permits India to restrict movement of foreigners inside India, to mandate medical

²⁶ *Dr. Malvika Karlekar v. Union of India*, (1992) (India)

²⁷ *supra* note 17

²⁸ *supra* note 17

²⁹ *supra* note 17

³⁰ *Vishaka v. State of Rajasthan*, (1997) AIR 3011 (India)

³¹ *supra* note 17



examinations, to limit employment opportunities, and to control the opportunity to associate”.

- b. “Second, India's statutes directly oppose the principle of non- refoulement. Foreigners Act, 1946 deals with the matters of “entry of foreigners in India, their presence therein and their departure therefrom””. “Paragraph 3(1) of the Foreigners Order, 1948 lays down the power to grant or refuse permission to a foreigner to enter India”. “It stipulates a general obligation that no foreigner should enter India without the authorization of the authority having jurisdiction over such entry points. It is mainly intended to deal with illegal entrants and infiltrators”. “In the main condition is that unless exempted, every foreigner should be in possession of a valid passport or visa to enter India”. “If refugees contravene any of these provisions, they are liable to prosecution and thereby to the deportation proceedings just like any other foreigner or illegal alien”. “Thus, there is no clearly defined category of refugees under Indian

law³²”. “Foreigners, generally, are a classified category which can be further subdivided as per the Foreigners Act regime, but no such sub-classification has been made for refugees”. “As such, refugees, like other foreigners, are generally subject to deportation with minimal due process”. “Therefore, the status of refugees is presently determined by the extent of protection they receive from the Government of India which in turn has been influenced more by political equations than by humanitarian or legal obligations³³”.

“There are certain refugee communities like Tamil refugees from Sri Lanka, Jumma and

Chakma refugees and Tibetan refugees who have received (at least normatively) full protection according to the standards set by the Government of India”. “Apart from security screening, no formal status-determination procedures exist for these groups of refugees and there is a prima facie recognition”. “Asylum policies have been generous as far as these groups are concerned”. “They are accorded legal stay indefinitely through executive discretion exercised under the Foreigners Act³⁴”. There are few other communities like the Burmese, Afghan, Iranian, Somalian, Sudanese and Iraqi refugees whose presence in Indian territory is acknowledged only by the UNHCR and there is no protection from the government of India except those under the principle of Non-Refoulement. They remain as foreigners and on the basis of UNHCR refugee certificates are issued temporary residence permits under the Foreigners Act pending durable solutions. However, the condition of such communities is precarious. They do not have any work permit and are not able to make subsistence for themselves. A small number of refugees who have been able to gain employment in the informal sector are subjected to persistent harassment and abuse from their employers and the police. The subsistence allowance that the UNHCR provides is meagre and entirely inadequate for survival. “To make their survival more difficult, the UNHCR has arbitrarily started terminating payment of this subsistence allowance³⁵”. “There are other refugees like the Chin refugees in Mizoram who have entered India and have assimilated into local communities or have not been recognized by the

³² *supra* note 17

³³ *supra* note 17

³⁴ *supra* note 17

³⁵ *supra* note 17



UNHCR”. “Neither the Indian government nor the UNHCR acknowledges their presence.

“The government has also denied UNHCR access to the seven states of the North-East including Mizoram where the vast majority of Burmese refugees are sheltered”. “Thus, these refugees receive no official acknowledgement whatsoever”. “As such, they have been consistently subjected to harassment and periodic eviction drives by sections of civil society in Mizoram and other parts of the north-east³⁶”.

- c. Third, India has clearly expressed its interest to not be bound legally by the Refugee Convention. As previously mentioned, India has considered and rejected the idea of being bound by the Convention multiple times. Indian courts only incorporate international law via Article 51 when domestic law and policy are ‘ambiguous’. Therefore, Indian courts would be hesitant to enforce a customary norm that clearly violated the policy of the nation³⁷.
- d. “Finally, Article 51 remains a ‘Directive Principle’ and is not a mandatory rule of governance or not enforceable upon the courts”. “Instead, Article 51 has merely been a way for courts to construe legislative intent, assuming that Parliament does not intend to violate international law unless given indications otherwise”. The courts do not operate under compulsion of law to effectuate the language of Article 51³⁸.

4. “The Parliament retains full control over citizenship and foreign affairs as granted to them in *Railway Board v. Das*³⁹ that stated the primacy of nation’s interest and security must be ‘read into’ other parts of the Constitution and such international affairs are of paramount importance when a nation’s interests and security are concerned. In *Mohammed Sadiq v. Government of India and Khadija v. Union of India*⁴⁰, the Supreme Court of India and the Delhi High Court clearly confirmed the state interests in national security and criminal matters outweigh the refugee’s life and personal liberty”. “In the aforementioned cases, the courts were found to have returned the refugee back to their home countries”, despite serious threats against their lives, because *“their presence interfere with the criminal laws or National Security of India”*⁴¹.

“In the matter of *Gurunathan and others vs. Government of India and others*⁴² and in the matter of *A.C. Mohd. Siddique vs. Government of India and others*⁴³, the High Court of Madras expressed its unwillingness to let any Sri Lankan refugees to be forced to return to Sri Lanka against their will”. “In the case of *P .Nedumaran vs. Union Of India*⁴⁴ before the Madras High Court, Sri Lankan refugees had prayed for a writ of mandamus directing the Union of India and the State of Tamil Nadu to permit UNHCR officials to check the voluntariness of the refugees in going back to Sri Lanka, and to permit those

³⁶ Saurabh Bhattacharjee, *India Needs a Refugee Law*, 43 ECONOMIC AND POLITICAL WEEKLY 71, 71-75 (2008)

³⁷ *supra* note 17

³⁸ *supra* note 17

³⁹ *Railway Board v. Das*, (2000) 1 SCC 465 (India)

⁴⁰ *Mohammed Sadiq v. Government of India and Khadija v. Union of India*, (1978) ILR 557 (India)

⁴¹ *supra* note 17

⁴² *Gurunathan and others vs. Government of India and others*, (1992) 2 SCC 1 (India)

⁴³ *A.C.Mohd.Siddique vs. Government of India and others*, (1998) 47 DRJ 74 (India)

⁴⁴ *P .Nedumaran vs. Union of India*, (1993) 2 ALT 291 (India)



refugees who did not want to return to continue to stay in the camps in India”. “The Hon’ble Court was pleased to hold that” “*since the UNHCR was involved in ascertaining the voluntariness of the refugees’ return to Sri Lanka, hence being a World Agency, it is not for the Court to consider whether the consent is voluntary or not*”. “Further, the Court acknowledged the competence and impartiality of the representatives of UNHCR⁴⁵.”

“The Bombay High Court, in the matter of *Syed Ata Mohammadi vs. Union of India*⁴⁶, was pleased to direct that” “*there is no question of deporting the Iranian refugee to Iran, since he has been recognised as a refugee by the UNHCR*”. “The Hon’ble Court further permitted the refugee to travel to whichever country he desired”. “Such an order is in line with the internationally accepted principles of ‘*non-refoulement*’ of refugees to their country of origin⁴⁷.”

“In the matter of *Malavika Karlekar vs. Union of India*⁴⁸, the Supreme Court of India directed stay of deportation of the Andaman Island Burmese refugees, since” “*their claim for refugee status was pending determination and a prima facie case is made out for grant of refugee status*”⁴⁹.

“The Supreme Court (SC) Judgment, *Romoni KR. Chakma v. State of Arunachal Pradesh*⁵⁰, in the Chakma Refugee case clearly declared that no one shall be deprived of his or her life or liberty without due process of law”.

“Earlier judgments of the Supreme Court in *Luis De Raedt vs. Union of India*⁵¹ and also *State of Arunachal Pradesh vs. Khudiram Chakma*⁵² had also stressed the same point⁵³. There is yet another aspect of *non-refoulement* which merits mention here. The concept of ‘International Zones’ which are transit areas at airports and other points of entry into Indian territory, which are marked as being outside Indian territory and the normal jurisdiction of Indian Courts, is a major ‘risk factor’ for refugees since it reduces access of refugees to legal remedies. This is violative of the internationally acknowledged principle of non-refoulement. In *Mukesh & Anr vs State for Nct Of Delhi & Ors*⁵⁴, a Palestinian refugee who was deported to New Delhi International Airport from Kathmandu was sent back to Kathmandu from the transit lounge of the Airport. He was once more returned to New Delhi International Airport on the grounds of being kept in an ‘International Zone’. Such detention is a classic case on the above point barring legal remedies to the detained refugee. The only relief in such a case is through the administrative authorities.

2.2 Constitution of India

“In addition to the above legislations, the Indian Constitution also lays down certain provisions such as Article 51 and Article 253, and Entry 14 of the Union List all of which collectively directs the Indian state to promote respect for international law”. “It also gives the Parliament the power to sign

⁴⁵ *supra* note 17

⁴⁶ *Syed Ata Mohammadi vs. Union of India*, (1998)

⁴⁷ DRJ (India)

⁴⁸ *supra* note 17 .

⁴⁹ *Malavika Karlekar vs. Union of India*, (1992) (India) .

⁵⁰ *supra* note 17 .

⁵⁰ *Romoni KR. Chakma v. State of Arunachal Pradesh*, (2008) (India) .

⁵¹ *supra* note 19 .

⁵² *supra* note 19 .

⁵³ *supra* note 17 .

⁵⁴ *Mukesh & Anr vs State for Nct Of Delhi & Ors*, (2017) (India) .



and ratify international treaties and conventions pertaining to the granting of asylum and refugee protection⁵⁵.

“Normally the Centre and the States are not supposed to encroach upon each other’s law-making powers”. “However, Article 253 read with Entry 14 creates an exception in the sense that while attempting to enact domestic laws to give effect to international treaties to which India may have become a signatory, the Centre may make laws upon any subject that may be a part of the state list because the true spirit of proper incorporation of international law into domestic laws puts forth the idea that even though international law is enacted at the global level with common consensus of the international community, the real enforcement of international law happens within the domestic sphere⁵⁶ and encompasses issues which may concern both the Centre as well as the states within a particular nation”. “Therefore, any law made by the Centre in accordance with these provisions that gives effect to an international convention cannot be invalidated on the ground that it contains provisions relating to the state subject⁵⁷”.

“Articles 22 (1), 22 (2) and 25 (1) of the Indian Constitution reflect that the rules of natural justice in common law systems are equally applicable in India, even to refugees”. “The established principle of rule of law in India is that no person, whether a citizen or an alien shall be deprived of his life, liberty or property without the authority of law”. “The Constitution of India expressly

incorporates the common law precept and the Courts have gone further to raise it to the status of one of the basic features of the constitution which cannot be amended⁵⁷.”

“The Indian Constitution does not contain any specific provision which obliges the state to enforce or implement treaties and conventions”. “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 can become part of the domestic law in India only if they are specifically incorporated in the law of the land”. “The Supreme Court has held, through a number of decisions on the subject - *Gramophone Company of India Ltd v. Birendra Bahadur Pandey*⁵⁸, *Civil Rights Vigilance Committee, SLRC College of Law, Bangalore v. Union of India*⁵⁹, *Jolly George Verghese v. Bank of Cochin*⁶⁰ - that international conventional law must go through the process of transformation into municipal law before the international treaty becomes internal law”. “Courts may apply international law only when there is no conflict between international law and domestic law, and also if the provisions of international law sought to be applied are not in contravention of the spirit of the constitution and national legislation, thereby enabling a harmonious construction of laws”. “It has also been

⁵⁵ *supra* note 1 .

⁵⁶ *Civil Rights Vigilance Committee, Bangalore v State of Karnataka (AIR 1983 Kar 85)* .

⁵⁷ Sreya Sen, *Understanding the Importance of a National Legislation for Refugee Protection in India*, RIGHTS IN EXILE REFUGEES LEGAL AID (2017) .

⁵⁸ *Gramophone Company of India Ltd v. Birendra Bahadur Pandey*, (1984) AIR 667 (India) .

⁵⁹ *Civil Rights Vigilance Committee, SLRC College of Law, Bangalore v. Union of India*, (1983) AIR (India) .

⁶⁰ *Jolly George Verghese v. Bank of Cochin*, (1980) AIR 470 (India) .



firmly laid that if there is any such conflict, then domestic law shall prevail⁶¹.

2.3 International Obligations

“India became a member of the Executive Committee of the High Commissioner’s Programme (EXCOM) that shows India’s commitment and particular interest towards protection of Refugees”. “Furthermore, India voted affirmatively to adopt the Universal Declaration of Human Rights (UDHR) which affirms rights for all persons, citizens and non-citizens alike wherein Article 13 guarantees ‘Right to Freedom of Movement’, Article 14 ‘Right to Seek and Enjoy Asylum’ and Article 15 the ‘Right to Nationality’”; “India voted affirmatively to adopt the UN Declaration of Territorial Asylum in 1967”; “India ratified the International Covenant on Civil and Political Rights (ICCPR) wherein Article 12 deals with ‘Freedom to leave any country including the person’s own’ and Article 13 ‘Prohibition of expulsion of aliens except by due process of law’”; “India also ratified International Convention on Economic, Social and Cultural Rights (ICESCR) in 1976”; “India ratified the UN Convention on the Rights of the Child in 1989 wherein Article 2 (a) of the UN Convention on the Rights of the Child, the State must ensure the rights of each child within its jurisdiction without discrimination of any kind, Article 3 lays down that in all actions concerning children the best interest of the child shall be a primary consideration, Article 24 relates to ‘Right to Health’, Article 28 to ‘Right to Education’ and Article 37 to ‘Juvenile Justice’”; “India also ratified the Convention on the Elimination of All Forms

of Discrimination Against Women (CEDAW) in 1974 under which Article 1 imposes legally binding obligation on the state”. “India accepted the principle of *non-refoulement* as envisaged in the Bangkok Principles, 1966, which were formulated for the guidance of member states in respect of matters concerning the status and treatment of refugees”. “These Principles also contain provisions relating to Repatriation, Right to Compensation, Granting of Asylum and the minimum standard of treatment in the state of Asylum⁶²”. “This obligation is further strengthened, as India is a signatory to the 1984 Torture Convention”. “A wider legal basis for respecting Customary International Law has been articulated by the Torture Convention, including the principle of non-refoulement”. “Article 3 states that,

1. “No State Party shall expel, return (refouler) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. “For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Chapter 3

”

CRITICAL ANALYSIS OF INDIA’S BEHAVIOUR

India has told the UNHCR that the scrutiny of a potential national legislation is under

⁶¹ *supra* note 41 .

⁶² T. Ananthachari, *Refugees in India: Legal Framework, Law Enforcement and Security*, ISIL YEAR BOOK OF INTERNATIONAL HUMANITARIAN

AND REFUGEE LAW (Oct. 1, 2019, 10:04 A.M.), <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/7.html#Footnote6> .



process. However, the catch is, such statement was given by the Indian Government over a decade ago. “Furthermore, the Supreme Court has also enumerated a bright future that can lead to signing of international treaties and obligations such as the United Nations Convention Relating to the Status of Refugees of 1951 and the Protocol Relating to the Status of Refugees of 1967 but that is too far-fetched because:

1. “The Indian borders are highly permeable and porous, and lack the political, administrative or military capacity to enforce rules with regard to population entry”. “Cross border movements of people in South Asia are known to affect political stability, international relations and internal security, and not simply the provision of services to new arrivals or the composition and structure of the labor market.
2. “Refugee inflows would result in or be seen as effecting change in the religious or linguistic composition within the receiving area of the country.
3. “Another anxiety is the existence of a perceived economic or cultural threat leading to a dilution of decision-making. “In 1971, for example, owing to the substantive presence of Bengalis in the North Eastern States of Tripura, Assam and Meghalaya, state authorities were concerned that this Bangladeshi ‘influx’ would lead to indigenous people becoming minorities in their own land leading to a potential loss of cultural identity and leading up to communal riots. “Governments within South Asia believe that international agreements could

end up constricting their freedom of action due to heavy interference by International Organizations leading to a dissolution of power and control, and have thus largely concluded that unwanted migrations, including those of refugees, should be the focus of bilateral rather than multilateral relations.

“Third World Nations are highly sensitive to international humanitarian operations, even if these are conducted by neutral multilateral organizations”. “There are many examples of the unshakeable faith that the South Asian Association for Regional Cooperation (SAARC)’s member states have in bilateral negotiations to resolve conflicts. “The SAARC’s exclusion of population movement concerns from its purview, which was done primarily out of fear that its inclusion might disrupt the organization, is one such example, as are the ongoing dialogues between Bhutan and Nepal to improve the plight of the Lhotsampa Bhutanese refugees in the South of Nepal, and between India and Bangladesh to resolve the situation of Chakma refugees given asylum in the Indian state of Arunachal Pradesh⁶³.

“Article 35 of the convention which vests the responsibility of supervising the refugee processing on UNHCR”. “India does not want its sovereignty to be threatened by any International community. In addition to this, Indian government along with the governments of other South Asian countries voiced that migration is not a matter of multilateral relations but bilateral relations, and International agreements can restrict their freedom of action”. “India also fears

⁶³ 126 ACHARYA AMITAV AND DEWITT .B. DAVID, LEGAL CONDITION OF REFUGEES IN INDIA (7th ed. 2008) .



uncontrolled infiltration of terrorists, criminals and unwarranted elements.

4. “The rights that are incorporated within the 1951 Refugee Convention are entirely impractical for Third World countries like India which can barely meet the needs and requirements of its own citizens considering its lack of self-sufficiency, rampant poverty, an unstable economy and growth rate, rising crime rates, dearth of employment opportunities and the over-bursting population”. “India could always make use of or invoke a reservation clause in order to accede to the Convention but doing so would not restrict criticism from the Indian NGO community and the UNHCR.
5. “Legal scholars in India often reference the Eurocentric definition of a refugee as defined in the Convention⁶⁴. “These scholars have argued that the definition confines itself to the violation of civil and political rights of refugees, but does not extend to economic, social and cultural rights. “The definition does not allow for the protection of groups or individuals fleeing situations of generalized violence or internal warfare”. “If India is to be a party to the 1951 Refugee Convention, it would also have to allow for the intrusive supervision of the national regime by the UNHCR, via Article 35 and the UNHCR would be granted permission to access detention centers and refugee camps”. “The apprehension that NGOs could embarrass India before the international community by presenting negative reports that fail to take into cognizance the practical difficulties faced by a Third World nation like India is present⁶⁵”. “The Indian representative raised this concern at the 54th session of the Executive

committee meeting of the United Nations High Commissioner for Refugees (UNHCR) in 2003 by stating that the definition fails to recognize” “the fundamental actors which give rise to refugee movements”. “He further said that” “*most of the refugee movements are directly related to widespread abject poverty and deprivation around the globe...particularly in the developing world such as most of South Asia*”. “Thus, there are various categories of displaced people which the convention does not cover”.

6. “India retains a degree of skepticism about the UNHCR”. “This apparently flows from the Bangladesh war of 1971”. “At the time, UNHCR played a stellar role in helping devise India’s administrative response to the 9.8 million Hindu refugees who poured in from Bangladesh”. “It also helped to mobilize huge international finances to pay for Indian bills which wasn’t even the Western part of the world’s war. “And when it came to repatriation of the refugees, then again the UNHCR helped roll out an orderly return journey. “But India was upset that the UNHCR began talking about the need for repatriation of refugees—something India had emphasized from the very start of the Bangladesh crisis—only in June 1971, just around the time Pakistani atrocities were causing millions more to flee to India. New Delhi felt talk of repatriation at that particular point in time gave the wrong signals to the world. “Additionally, India was far from pleased by a visit to Bangladesh (then East Pakistan) by the UNHCR high commissioner, Sadruddin Agha Khan, on the invitation of Pakistani President, Yahya Khan”. “This was seen as

⁶⁴ CHIMNI B.S, STATUS OF REFUGEES IN INDIA: STRATEGIC AMBIGUITY 444-445 (2nd ed. 2008).

⁶⁵ *supra* note 21



an endorsement of Pakistani propaganda that its eastern territory was normal.

Chapter 4 CONCLUSION AND RECOMMENDATIONS

4.1 Conclusion

Since Independence, India has been witnessing an exodus of refugees from their country of persecution to India. This has led to huge changes in the political, economic, cultural, social and legal spheres in India. Right from influx of Bangladeshis to Refoulement of Rohingyas, India has persistently and bona fide continued to be a receiver of Refugees, not Producer. India neither has a National Legislation nor an expressed International Obligation pertaining to refugees, asylum seekers and Inter Displaced Persons (IDPs) which has led to large criticism from the international community. India does not recognize Refugees in its conventional definition per se but identifies them as 'foreigners' or 'aliens' under the Foreign Passport Act. "Furthermore, India has not signed the 1951 Refugee Convention and 1967 Refugee Protocol giving arbitrary and discretionary power to its Government. "Such non-ratification has led India to adopt an ad-hoc approach to every Refugee Crisis wherein Article 14, i.e. Equality Before the Law is subjected to variable application. "This subjective and relative applicability of Article 14 has led to certain group of refugees being given full benefits that a normal citizen would receive whereas on the other hand, there also exist other group of refugees that were neither recognized nor acknowledged by the Government of India and UNHCR". "This applicability of Article 14 is passed through a 'reasonable test' wherein one

group is practically more advantaged than other group.

"Though India is not bound by any treaty or obligation to uphold the principle of Non-Refoulement, the aforesaid principle is peremptory to Customary International Law which was applied in India by the Madras High Court in *S. Murugadoss v. State of Tamil Nadu*". "It is of paramount importance that India takes an expressed cognizance of Non-Refoulement in order to prevent persecution by the International Community and obtain a permanent Seat in the Security Council. "India's unwillingness to ratify the 1951 Refugee Convention and 1967 Refugee Protocol is justified as the definition of 'refugee' is outdated because it does not deal with economic and social aspects of the refugee's situation". "Furthermore, India's ad-hoc stance towards every refugee crisis is also justified as Indian government is skeptical about foreign interference by NSAs that will lead to a reduction in sovereignty and dilution of powers over regional matters of bilateral importance.

4.2 Recommendations

The following recommendations are advisory in nature:

4.2.1 From Government of India's Perspective

It should continue with its Ad-hoc approach by not shifting away from the status quo. Indian government has continued to exercise its discretionary powers on a case-by-case basis that has worked out successfully in the past. However, minor discrepancies have arisen that were resolved due to the speedy trial offered by the justice system of India. If India decides to ratify the "1951 Refugee Convention" and the "1967 Refugee Protocol", then:



- a. “It will lead to a reconstitution of its refugee crisis redressal system. This will be a time-consuming process considering the urgency of the matter”;
- b. Furthermore, pending refugee crisis matters will be brought to light that will add an extra burden to the Indian Legal System;
- c. The influx of refugees would rise immensely considering India is a hotspot for refugees owing to its relatively better socio-economic conditions and diversity as compared to Pakistan, Bangladesh, Thailand, Vietnam, Myanmar, Nepal, China and Bhutan;
- d. The sudden rise in refugees would create a butterfly effect that will lead to disruption of the already existing communities in India as the aforesaid international statutes aim at integration. This will plant the seeds of communal riots, uprisings and rebellions by communal leaders looking at it as an opportunity to increase its voter bank;
- e. Apart from communal riots, the already strained and almost-depleted resources of India will be overburdened as these refugees come from third world nations possessing little to no employable skills. They will be an extra mouth to feed;
- f. In the International context, the convention and the protocol will lead to loss of sovereignty as it will subject India to interference by Non-State Actors and International NGOs. This kind of interference will lead to a loss of appropriate dominion over one’s own state;
- g. “Ratifying the 1951 Refugee Convention and 1967 Refugee Protocol will lead to an opening of Pandora’s Box with respect to the National Register of Citizens which required Citizenship to be proved” - I. “If the Applicant’s first family name was in the original draft of NRC of 1951 or in the electoral roll up in 1971”, or

II. “applicants also had the option to present documents such as refugee registration certificate, birth certificate, LIC policy, land and tenancy records, citizenship certificate, passport, government issued license or certificate, bank/post office accounts, permanent residential certificate, government employment certificate, educational certificate and court records” - “Citizenship Bill 2016 which provided citizenship to illegal migrants of Hindu, Sikh, Buddhist, Jain, Parsi or Christian religion”; “it received huge criticism as it excluded Muslims and citizenship couldn’t be granted on the basis of religion leading to an outright violation of Article 14 of the Indian Constitution, and Uniform Civil Code”;

- h. “If refugees are not granted benefits, that a normal citizen would get, on the basis of their religious history and home country’s background, then the Supreme Court should direct the Central Government to take appropriate measures that it employs while giving the suited benefits to the other class of refugees”.

4.2.2 From Refugee’s Perspective:

Refugees that are granted the benefits similar to that of Citizenship should follow certain guidelines:

- a. “When Refugees are provided Long-Term Visas by the Government of India or the UNHCR, then the refugees should strive to be gainfully employed in the informal sector in order to improve the economic condition of the host country i.e. India in this context”;
- b. Neither should they increase the burden on the state resources by being a subject of hidden unemployment nor should they indulge in any unlawful practices prohibited or banned or forbidden by the Law of the Land;



- c. The refugees should assimilate and integrate themselves into the already existing culture of India. At the same time, in order to prevent loss of homogenous cultural identity, they should practice, profess and propagate their religion in private that does not lead to cultural disharmony or with the consent of an existing communal group in their surroundings.

