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Legal alchemy in defence of the displaced: a canvas of India's legal and juridical response to refugee rights

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Abstract: This study offers a comprehensive examination of the protection of human rights for refugees in India, focusing specifically on the legal framework and judicial responses. It sheds light on the multifaceted challenges faced by refugees within the Indian context and evaluates the effectiveness of legal safeguards in ensuring their rights. The analysis navigates through India's intricate legal architecture and jurisprudential landscape, highlighting the complexities and opportunities that define the refugee rights paradigm. The study addresses the evolving legal provisions, court decisions, and their impact on refugee well-being. The research aims to contribute to a deeper understanding of the protection of human rights for refugees in India, with the goal of fostering enhanced legal and judicial support for this vulnerable population.

Keywords: refugees; human rights; India; legal framework; judicial response.

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1 Introduction

“No one leaves home unless
Home is the mouth of a shark
You only run for the border
When you see the whole city running as well.” (Warsan Shire)

The present era is presently witnessing an unparalleled upsurge in involuntary displacement at a global level. Currently, the worldwide population of individuals who have undergone displacement amounts to approximately 68.5 million. This phenomenon emerges as a result of multiple factors, encompassing armed conflict, acts of violence, violations of human rights, and instances of persecution, among others. The demographic group affected encompasses a diverse array of individuals, including individuals who have been displaced from their homes due to conflict or persecution (refugees), individuals who have been forced to leave their homes but remain within their country’s borders (internally displaced persons), individuals who are seeking protection in another country but have not yet been granted refugee status (asylum seekers), and individuals who have migrated without proper authorisation (irregular migrants). Based on the data provided by the United Nations High Commissioner for Refugees (UNHCR, 2017), it is evident that there is a population of 25.4 million individuals who can be classified as refugees. Based on data collected in 2017, it was determined that the number of individuals who were newly displaced amounted to an average of 44,400 individuals who were compelled to evacuate their residences on a daily basis. Furthermore, it is evident that a substantial portion of the worldwide refugee population can be attributed to five particular nations. The nations mentioned encompass Syria, which has a notable 6.3 million refugees, Afghanistan with 2.6 million, South Sudan with 2.4 million, Myanmar with 1.2 million, and Somalia with an estimated 986,400 refugees (UNHCR, 2017). Since 2015, the international community has been faced with a substantial refugee crisis. However, the current legal and policy frameworks concerning this matter have demonstrated their insufficiency in efficiently addressing the problem. Since the year 2011, the ongoing conflict in Syria has resulted in the displacement of an estimated 12 million individuals, with over half of the nation’s populace residing in displacement as of 2017. The nations of Turkey, Jordan, and Lebanon have experienced a significant influx of refugees as a consequence of the ongoing conflicts in Iraq, Syria, and Libya. Throughout Asia, several nations including Iran, India, Indonesia, Malaysia, Pakistan, and Thailand have provided refuge to a substantial number of displaced individuals over an extended period of time. The United Nations Refugee Agency has encountered challenges in securing durable resettlement solutions for refugees, resulting in their

prolonged confinement within overcrowded processing centres. When examining the circumstances in India, it is evident that the Indian community adheres to the principle of *Atithi Devo Bhava*, a widely recognised traditional belief that equates guests with divinity. Throughout history, individuals hailing from various regions across the globe have consistently been accorded the highest level of regard and hospitality in the nation. In contemporary times, the significance of this longstanding historical tradition has diminished due to the uncertain status of refugees within the country. This uncertainty arises from a legal void, which leaves the nature and scope of their rights ambiguous. According to a report published by the United Nations High Commissioner for Refugees (UNHCR) in 2017, India currently provides refuge to approximately 197,146 individuals of diverse origins. The responsibility for ensuring the well-being and safety of these refugees lies exclusively with the national administrative authorities, who regulate their protection through policy measures. India has provided refuge to various groups of displaced individuals, including Tibetans, Sri Lankan Tamils, Hindu Pakistanis, Afghans, Chakmas, and Hajongs. The country in question is not a signatory to the 1951 Refugee Convention, nor has it implemented any domestic legislation pertaining to this matter. Many Asian countries, including India, have been deficient in this aspect. As a result, the refugees residing in these nations experience a persistent state of apprehension due to the absence of reliable security measures or safeguards accessible to them. The individuals in question are entirely subject to the authority of the government of the country where they have sought asylum. The presence of Rohingya refugees in India highlights this fact. The denial of equal treatment to refugees, both in comparison to citizens of the host nation and other refugee groups, constitutes a violation of their human rights.

Some of the issues that are being faced by the refugees in India may be as follows:

- 1 naturalisation and citizenship
- 2 restricted employment opportunities
- 3 recognition as refugee
- 4 renewal of refugee certificate and documents
- 5 residence permits
- 6 deportations.

Apart from the above, they also have to deal with the authorities on a regular basis. The recognition process is excruciating and extremely long. There is no certainty in their status while within the country.

The judiciary, UNHCR and other organisations operating in the country have been given the task of refugee protection covering up for the unsatisfactory legislation by the government which has not regarded any distinction between refugees and foreigners.

The ad hoc policies adopted by the government have resulted in creation of arbitrariness and uncertainty in the legal status of the refugees and asylum seekers leading to denial of their human rights.

2 Refugee – a creature of circumstance

Refugees are individuals who are forced to leave their homes and flee to other countries due to circumstances beyond their control, often as a result of human rights violations, socio-economic and political insecurity, generalised violence, civil war, or ethnic strife (Ananthachari, 2001). To comprehend the hardships, they endure, it is crucial to understand the meaning of the term ‘refugee’. This term is derived from the French word ‘refuge’, which means a place of safety, and refers to a person seeking protection from danger or distress.

Following the conclusion of World War II, a significant influx of individuals migrated from Eastern Europe to neighbouring nations. This mass movement of people prompted the United Nations to establish the 1951 Convention on the Status of Refugees. The international agreement offered the first formal definition of refugees: those who are outside their country of origin and are afraid of persecution due to race, religion, nationality, membership in a particular social group, or political opinion. Consequently, these individuals are either unable or unwilling to return to their home country due to the aforementioned fears. However, there was immediate criticism of the narrowness of the definition.

As a response to this criticism, the Organisation of African Unity created the Convention Governing the Specific Aspects of Refugee Problems in Africa in 1969. This agreement expanded the definition to include persons driven from their area of origin: due to the threat of external aggression, foreign domination, occupation, or severe turmoil in their country of origin or nationality.

In addition to the definition provided by the 1951 Convention, the United Nations High Commissioner for Refugees (UNHCR) presently acknowledges refugees as individuals who find themselves outside their country of origin or habitual residence, and are unable to return due to grave and indiscriminate threats to their life, physical well-being, or personal freedom arising from widespread violence or events that severely disrupt public order.

2.1 *Persecution*

Persecution encompasses various forms of harm inflicted by individuals, extending beyond the scope of natural disasters or socioeconomic deprivation. As per the Convention, persecution is regarded as an act of discrimination that encompasses enduring or systematic cruel or severe harm, rather than an isolated incident (Ananthachari, 2001).

2.2 *Principle of non-refoulement*

The principle of non-refoulement holds significant importance in the realms of asylum and international refugee law, and is widely regarded as the foremost principle within the domain of refugee and immigration law. The principle of non-refoulement, originating from the French term ‘refouler’ denoting the act of driving back or repelling, serves as a prohibition against the extradition, deportation, or expulsion of an individual to a nation where they are at risk of experiencing persecution. The principle of non-refoulement, which originates from custom international law, is a safety net designed to protect the

right to life and individual freedom of a person regardless of his or her nationality. This provision prohibits exposure to a danger or prosecution for certain reasons, such as race, religion, nationality, membership of a certain social group, and political views. This principle was also upheld in the landmark case of *Ktaer Abbas Habib Al Qutaifi vs Union of India* (1999).

3 Refugee population in India

Over the course of history, India has played the role of a host to numerous migratory populations originating from foreign territories, who subsequently integrated into the social, cultural, and political framework of the nation. India's historical position regarding the provision of refuge can be traced back to the 16th and 17th centuries, during which it displayed a hospitable reception to the Parsis, who have subsequently assimilated into the fabric of the nation.

It is evident that India has encountered the issue of refugees on multiple occasions. The region in question has been a witness to a significant migration event, involving approximately 14.5 million individuals, during the partition of 1947 between India and Pakistan. The country has consistently maintained a tradition of hospitality and inclusivity by providing refuge to various groups of displaced individuals. Notable instances include the acceptance of Tibetan refugees in 1959, Bangladeshi refugees in 1971, the influx of Chakma refugees in 1963, and the arrival of Tamil refugees from Sri Lanka in 1983, 1989 and 1995. The influx of refugees from Myanmar and Bangladesh remains consistent.

Table 1 Refugee population in India

<i>Country of origin</i>	<i>No. of refugees</i>	<i>No. of asylum seekers</i>
Afghanistan	28,40,672	2,70,533
China	1,64,342	1,16,868
Iraq	3,45,305	2,40,468
Sri Lanka	1,44,757	13,220
Myanmar	12,09,086	5,00,005

Source: UNHCR (2022)

3.1 Tibetan refugees

Just after a decade of getting its independence, in 1959, India faced the regional influx of refugees from Tibet. This was a result of Chinese invasion of Tibet in the year 1951 due to which the Chinese troops killed, detained and arrested a huge number of people. Tibet was governed by representatives from major monasteries, headed by The Dalai Lama who tried to find a peaceful solution to the situation but failed. When there was a threat to his personal security, he along with approximately 80,000 other Tibetans fled to India in the year 1959 with others following them in the subsequent years (Human Rights Law Network, 2007).

It is safe to say that the Indian Government has conferred more rights upon Tibetan refugees as compared to other refugee groups. For instance, they are the only refugee

group having travel permits and have also been provided with residence permit through which they may seek formal employment.

3.2 Sri Lankan refugees

People from Sri Lanka have been migrating to India since 1983 when the conflict began between the Sri Lankan army and the Liberation Tigers of Tamil Eelam or LTTE, who are fighting for independence of minority Tamil population in the country. The civil war has left around 1 million people displaced to escape torture, rape and frequent disappearances. The Government of India has recognised them as refugees and has thus granted the required protection to them.

3.3 Hindu Pakistani refugees

Prior to partition of 1947 between India and Pakistan, a majority of Hindu population in Pakistan was concentrated in the province of Sindh. There were few instances of clashes but the general environment was peaceful between the two communities. However, after the partition, a large group of Urdu speaking Muslims arrived in Sindh. Consequently, a wave of communal violence erupted and the Hindu Pakistanis were forced to flee and sought refuge in India.

More than 1, 00,000 Pakistani Hindus have taken refuge in India since 1965 and have settled in areas of Rajasthan or Gujarat and recently in Delhi. In 2015, about 4,300 Hindu and Sikh refugees from Afghanistan and Pakistan were granted citizenship by Indian government. Despite that there are still refugees who are waiting for a citizenship which was promised to them (Human Rights Law Network, 2007).

3.4 Afghan refugees

The country of Afghanistan faced a civil war, starting 1992 between Talibans and the ruling Najibullah regime which lasted for four years. The war resulted in destruction of at least 80% of the country due to which people sought asylum in neighbouring countries. India hosts around 9,000 refugees out of which about 90% belong to Hindu or Sikh faiths (Human Rights Law Network, 2007).

Initially, they were not recognised as refugees but allowed to be protected under the UNHCR mandate. The Indian government issued most of the refugees with valid residential permits, though it became difficult for those who arrived between 2004 and 2007. The newly recognised refugees are also given a small allowance for the initial period of 6 months which includes Rs.2, 225/- for the principal applicant and Rs. 750 for each dependent. After the expiry of 6 months, the sum is received by only vulnerable groups such as female heads of household, elderly and disabled.

3.5 Chakmas and Hajongs

In the Chittagong Hill tracts region, southeast of Bangladesh, there was huge displacement of people from East Pakistan because of violent ethnic conflicts that have been going on since decades. Consequently they settled in Arunachal Pradesh, Mizoram, Tripura, Assam, Meghalaya and West Bengal.

They have fought a long legal battle for their citizenship rights. In the early 1990s, a Committee of Citizenship Rights for Chakmas of Andhra Pradesh was formed to fight for citizenship rights. The National Human Rights Commission moved to Supreme Court against the action of local tribes trying to oust the refugees to whom the Court directed the State government to prevent the outing as it was not in accordance with law. Finally, in 1996 the apex court directed the government to take action so that citizenship can be provided to them. However, the government did not execute the said order due to which the Court had to prescribe a deadline of 3 months in 2015 for the government to confer the said rights to the refugees. Their patience turned out to be fruitful as the Home Ministry announced citizenship to Chakmas in early 2017.

3.6 Rohingya

The Rohingya people, considered by the United Nations as the world's most oppressed minority group, reside primarily in western Myanmar and have been subjected to violence from the Myanmar state and military. The treatment in question has received extensive criticism from the international community, with certain individuals and groups categorising it as a manifestation of genocide or ethnic cleansing.

The Rohingya population is primarily composed of individuals belonging to the Muslim faith and is characterised by its long-standing presence in Myanmar, extending over multiple generations. The Rohingya community asserts their lineage from ancient Muslim merchants, predominantly of Persian and Arab origins, and communicates through the Rohingya language. The Rohingya community, despite their enduring historical presence within the borders of Myanmar, has been systematically deprived of citizenship rights since the year 1982, rendering them devoid of any legal recognition or affiliation with a nation-state. The denial of citizenship has imposed limitations on their ability to exercise fundamental rights, including but not limited to education, employment, travel, marriage, religious freedom, and healthcare.

Based on data provided by the Ministry of Home Affairs in India, it is approximated that the current population of Rohingya individuals residing within the country is approximately 40,000. The prevailing belief is that their ingress into the region transpired gradually via terrestrial pathways originating from Bangladesh. According to a recent declaration, Kiren Rijiju, the Minister of State for Home Affairs, has affirmed that the entire Rohingya population residing in India is categorised as unauthorised migrants and will be subjected to repatriation. This position has elicited astonishment from certain quarters, given India's past record of accommodating refugees. The Home Ministry, in an advisory to states, highlighted the issue of infiltration from Rakhine State of Myanmar into Indian territory. This influx not only places a strain on the limited resources of the country but also exacerbates the security challenges faced by India. According to a report by Asian News International in 2018, the Supreme Court of India declined to intervene in the deportation of seven Rohingya refugees to Myanmar by the Central government. The global community has widely condemned the aforementioned action for its infringement upon human rights and violation of international law (Mohammad Samilullah & Anr. v. Union of India & Ors., 2017).

4 Current framework of refugee population in India

4.1 Constitutional provisions

India is a sovereign state that adheres to the fundamental tenets of the Rule of Law. The Indian Constitution can be characterised as a dynamic and evolving legal instrument that maintains a commendable level of human rights protection. The Constitution confers distinct rights upon all individuals, while additionally bestowing supplementary rights upon individuals who possess citizenship. Every person is inherently entitled to be treated with equality under the law and to receive fair and impartial protection from the legal system. Moreover, it is crucial to acknowledge that the deprivation of an individual's life or personal liberty is only permissible when carried out in accordance with the legally prescribed procedure. Basu (2002) asserts that the state bears the duty of ensuring the protection of the life and liberty of every individual, irrespective of their citizenship status. The Constitution of India is in accordance with the international norms and principles set forth in the Universal Declaration of Human Rights. This declaration underscores the significance of the principle of non-discrimination and affirms the inherent freedom and equality of all individuals with regard to their dignity and rights. The statement additionally asserts that each individual is entitled to the complete spectrum of rights and freedoms delineated in the aforementioned document, without any manifestation of differentiation. Jain (2014) asserts that the Constitution of India provides safeguards for refugees by bestowing upon them specific fundamental rights. The aforementioned encompasses:

- Article 14 of the constitution guarantees individuals the right to equality and equal protection under the law.
- Article 20 of the legal framework encompasses three fundamental rights: the right to be protected against prosecution under ex-post facto legislation, the right to be shielded from double jeopardy, and the right to avoid self-incrimination.
- Article 21 of the constitution guarantees the fundamental right to life and personal liberty.
- Article 22 of the Universal Declaration of Human Rights guarantees individuals the right to protection against arbitrary arrest and detention.
- Articles 25 to 28 of the document encompass the concept of Freedom of Religion, which grants individuals the right to practise any religion of their choosing and to propagate it in a peaceful manner.
- Article 32 of the Constitution grants individuals the right to approach the Supreme Court for the purpose of seeking the enforcement of the aforementioned rights.
- According to Article 51(a), it is incumbent upon the State to make efforts towards the advancement of global peace and security. This provision establishes that the government bears a primary responsibility to demonstrate empathy, a crucial factor in acknowledging refugees as individuals with inherent human rights. Article 51 (c) of the aforementioned legislation outlines the obligation of the State to make concerted efforts in promoting the cultivation of reverence towards international law

and the fulfilment of treaty commitments in the interactions between organised groups of individuals.

However, the reality is that anyone who enters the territory of India is treated under the Foreigners' Act of 1946. Relief is provided to only that refugee who is able to go to the Supreme Court for the enforcement of their rights and getting the chance to approach UNHCR for determination of status.

4.2 *Foreigner's Act, 1946*

The act extends to whole of India including the state of Jammu & Kashmir. It is intended to deal with three different aspects regarding foreigners-

- 1 their entry into India
- 2 their presence in India
- 3 their departure therefrom.

Furthermore, it facilitates the establishment of regulations pertaining to the registration of foreign individuals, as well as the associated procedures concerning their mobility and departure. The salient characteristic of the Act is its provision for a broad scope of administrative discretion. The administrative policies pertaining to aliens under the Act are notably concise and grant extensive discretionary powers to the executive branch. According to Basu (2002).

According to Section 3, the central government has the authority to issue the following orders pertaining to an individual foreigner or a group of foreigners:

- 1 conditions pertaining to entry into India
- 2 conditions pertaining to departure from India
- 3 the geographical region in which the non-native individual is authorised to dwell or stay temporarily
- 4 the implementation of limitations on the mobility of individuals
- 5 the individual is obligated to provide evidence of their identity to the designated authority whenever it is requested
- 6 the individual is mandated to consent to the capture of his photographic image and the recording of his fingerprint impressions
- 7 the act of detaining, arresting, or confining an individual from another country
- 8 the individual is prohibited from engaging in activities that have been explicitly designated or defined.

As per the provisions outlined in Section 8, it is mandated that an individual originating from a foreign nation should be accorded the same treatment as a citizen of the host country, provided they possess legal recognition within that jurisdiction. In circumstances characterised by ambiguity, an individual may be deemed a citizen of the nation with which they exhibit the most pronounced present affiliation in terms of personal interest or empathy. In the event that the nationality of an individual is ambiguous, it is possible to regard them as a citizen of the nation with which they have most recently established a

connection. Moreover, the final determination of an individual's nationality, as officially granted by the governing authority, shall be deemed conclusive and exempt from judicial scrutiny.

The aforementioned provisions indicate that the executive has been granted significant discretionary authority over individuals found to be without a valid passport or visa. Given the absence of explicit provisions regarding refugees within the Act, and the lack of alternative legislation addressing this matter, it is possible for a refugee to be apprehended, detained, and subsequently deported in a manner similar to that of any other unauthorised foreign individual. The authority to expel individuals has been granted to the Central Government under Section 3(2)(c). Additionally, Section 11 empowers the Central Government to enforce expulsion orders and utilise force if necessary.

Nevertheless, the Act includes specific provisions that are reserved for exclusive circumstances. Legislation has been enacted by the government exclusively targeting specific refugee populations, namely Tibetans and Ugandans of Indian descent. The necessity for the government to establish exemptions for certain categories of refugees serves as evidence that the Act has proven to be an insufficient legislative measure in meeting the needs of refugees and asylum seekers within the nation.

According to Section 14 of the Foreigners Act, 1946, individuals who are not citizens of the country are subject to potential imprisonment for a duration of up to five years, as well as being liable for a monetary penalty. As a consequence of the absence of a formal protocol for evaluating asylum applications, any and all individuals seeking asylum who entered India unlawfully or remained within its borders without proper authorisation were subjected to persecution and punitive measures in accordance with this particular provision. Nevertheless, when faced with a substantial influx of individuals, India has consistently adhered to the principles outlined in the Refugee Convention, refraining from imposing penalties on refugees. According to Chakrabarty (1998),

4.3 Registration of Foreigners Act, 1939

Under Section 3, the Central Government has the power to frame rules with respect to foreigners in the following matters:

- 1 reporting presence to a prescribed authority
- 2 reporting presence to prescribed authority when moving from one place to another within India
- 3 details of departure
- 4 production of identity proof as and when required
- 5 any other incidental or supplementary matters as the Central Government may consider necessary.

Under Section 6 of the act, the central government has the authority to issue an order declaring that certain provisions of the rules established under this legislation may not be applicable, or may only be applicable with specified modifications or conditions, to individual foreigners or specific classes or descriptions of foreigners. Any regulation established within this specific section must be presented to both chambers of parliament for a period of 30 days. The enforcement of the rule is contingent upon its approval by

both Houses of Parliament, or in the event that both Houses reach a consensus on any modifications made to the rule prior to its enforcement. According to Section 3(2) of the Registration of Foreigners' Act of 1939,

4.4 Passport (Entry into India) Act, 1920

Within this Act, the term 'entry' encompasses the act of entering through water, land, or air. Additionally, the term 'passport' refers to a passport that is currently valid and has been issued or renewed by an authorised entity, while also meeting the prescribed conditions pertaining to its designated passport category [Section 2 of the Passport (Entry into India) Act of 1920].

According to Section 3, the Central Government is vested with the authority to establish regulations pertaining to foreign individuals in the subsequent areas:

- 1 the act of preventing an individual from entering India if they do not possess a valid passport
- 2 specify the governing bodies responsible for the issuance or renewal of the passport
- 3 offer provisions for exemption.

The violation of a regulation outlined in this section shall result in a penalty of imprisonment for a duration that has the potential to reach three months, or a monetary fine, or both.

As stipulated in Section 5 of the act, the central government possesses the authority to issue general or specific orders for the expulsion of individuals from India who have unlawfully entered the country without a passport, as prohibited by any rule established under Section 3. Consequently, any government official is empowered with all reasonable means to enforce such directives.

4.5 Pending legislations

4.5.1 Asylum Bill, 2015

The bill strives to combine the various policies that apply to refugees in India, and give India recognition for its long standing obligation to refugee protection. Some of the provisions introduced in the Bill are as follows:

- 1 establishment of a National Commission and Appellate Board acting as authorities
- 2 procedure to apply for asylum
- 3 definition of the terms 'refugee' and 'non-refoulement principle'
- 4 rights and duties of refugees and asylum seekers.
- 5 providing identity and travel documents to persons recognised as refugees.

4.5.2 Citizenship (Amendment) Bill, 2016

The proposed amendment aims to modify Section 2(b) of the Citizenship Act, which provides a definition for the term 'illegal immigrant' in the context of individuals who

have entered India. According to the current definition, a ‘illegal immigrant’ refers to a foreigner who has entered India either:

- 1 without possessing a valid passport or other required travel documents as prescribed by relevant laws
- 2 with a valid passport or other travel documents as prescribed by relevant laws, but has exceeded the authorised duration of stay in the country.

The proposed Bill seeks to modify the existing definition by excluding individuals belonging to minority religious groups, such as Hindus, Sikhs, Jains, Parsis, and Christians, from being categorised as ‘illegal immigrants’ if they originate from predominantly Muslim countries, namely Afghanistan, Bangladesh, and Pakistan.

However, proponents assert that the Bill represents a strategic move towards a meticulously orchestrated process of demographic restructuring, aimed at implementing the agenda of the Rashtriya Swayamsevak Sangh (RSS) to establish India as a Hindu Rashtra.

5 India’s international obligations

India is not a signatory to the 1951 Convention on the Protection of Refugees or the 1967 Optional Protocol, a status shared by other South Asian nations. The regional approach to refugee policy is grounded in the premise that in the absence of legal frameworks, a state of arbitrariness prevails (Sarker, 2017). The endeavour of civil society organisations to establish a standardised framework for refugee protection in South Asia through structured discussions between governments and other entities has the potential to curtail the prevailing practise of seeking relief on a case-by-case basis from the judiciary (Oberoi, 1999).

The pivotal development in this context occurred in 1997 in Dhaka, when the Eminent Persons Group, led by Justice P.N. Bhagwati, undertook a significant initiative. The aforementioned panel of experts endeavoured to develop a Model National Refugee Law (MNRL) that could serve as a guiding framework for South Asian governments in formulating their respective national legislation (Oberoi, 1999). Nevertheless, the EPG proved to be ineffective as it did not yield any legislation pertaining to the safeguarding of refugees in any of the South Asian nations.

Despite the absence of domestic legislation pertaining to refugees in India, as well as its non-membership in the 1951 Convention on Refugees and the 1967 Protocol, India has ratified various other international conventions concerning Human Rights, refugee matters, and associated subjects. Therefore, India is bound by these conventions to address the issue of refugees.

India was admitted as a member of the Executive Committee of the High Commissioner’s Programme in the year 1995. The Executive Committee (EXCOM) is a governing body within the United Nations (UN) that is responsible for the approval and oversight of the material assistance programme of the United Nations High Commissioner for Refugees (UNHCR) (Ananthachari, 2001). There exists a moral, albeit not legal, obligation to establish a constructive partnership with the United Nations High Commissioner for Refugees (UNHCR), which demonstrates a commitment to addressing the refugee situation.

In addition, India also cast a positive vote in favour of adopting the Universal Declaration of Human Rights, thereby granting equal rights to all individuals, regardless of their citizenship status. Article 13 of the Universal Declaration of Human Rights (UDHR) ensures the fundamental entitlement to the 'right to freedom of movement'. Similarly, Article 14 of the UDHR establishes the 'right to seek and enjoy asylum', while Article 15 of the UDHR recognises the 'right to nationality'. India has ratified the International Covenant which encompasses provisions pertaining to refugees in various capacities.

The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights were established in 1979. The twelfth article of the International Covenant on Civil and Political Rights (ICCPR) pertains to the 'freedom to leave any country, including one's own', while the thirteenth article addresses the 'prohibition of expulsion of aliens, except through the proper application of legal procedures'.

The establishment of the United Nations Convention on the Rights of the Child occurred in 1992. According to the provisions outlined in Article 2A, it is incumbent upon the State to ensure the protection of the rights of all children within its jurisdiction, without any manifestation of discriminatory practises. As stated in Article 3, the paramount factor in all endeavours concerning children is the utmost welfare and well-being of the child. Article 24 of the legislation ensures the fundamental entitlement to health. The right to education is ensured by Article 28, while Article 37 guarantees the provision of juvenile justice.

The Convention on the Elimination of All Forms of Discrimination against Women was adopted in 1993. The first article has established a comprehensive framework of legally binding responsibilities that are applicable to all signatories of the agreement.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was established in 1997. According to Article 3(1) of the convention, it is prohibited for any state party to forcibly remove, send back, or hand over an individual to another state if there are reasonable grounds to believe that the person would be at risk of experiencing torture.

The International Convention on the Elimination of All Forms of Racial Discrimination was established in 1968.

Furthermore, India has formally acknowledged the Bangkok Principles of 1966, which embody the principle of non-refoulement.

In accordance with the provisions outlined in Article 51(c) and Article 253 of the Constitution, India, as a signatory to the aforementioned conventions, bears a legal responsibility to safeguard the human rights of refugees by implementing robust legislative and administrative measures. Article 51(c) of the Indian Constitution outlines a directive principle aimed at promoting the cultivation of reverence for international law and treaty obligations in the interactions between organised groups of people. Additionally, Article 253 confers upon the Parliament the authority to enact legislation pertaining to the entirety or specific regions of India, with the purpose of executing any treaty, agreement, or convention entered into with foreign nations or any decisions reached at international conferences, associations, or similar entities. According to Oberoi (1999), Article 51 of the Constitution embodies the Directive Principles of State Policy, which reflects the underlying principles guiding India's approach to international relations and obligations.

In the case of Gramophone Company of India Limited v. Birendra Pandey (1984), the Supreme Court rendered a verdict affirming the principle that nations are obligated to align themselves with the international community, and that domestic laws should adhere to the regulations of international law, in the same manner that nations uphold international conventions. The international community necessitates the incorporation of international legal principles into domestic legislation, even in the absence of explicit legislative approval, as long as they do not contradict existing Acts of Parliament.

In the case of Apparel Export Promotion Council v. A.K.Chopra (1999), the Supreme Court reaffirmed the aforementioned principle and emphasised that in instances where human rights violations are at stake, the Courts must consistently consider and apply international instruments and conventions. This should be done unless there is a conflict between these international norms and the domestic law that governs the specific situation.

In the well-known legal case of *Vishakha v State of Rajasthan* (1997), the court made an observation regarding the incorporation of international conventions into domestic legislation. The court acknowledged that it is permissible to draw upon international laws as a basis for legal reliance. The inquiry that emerged pertained to India's ability to invoke the 1951 Convention as a means of interpreting domestic legislation, as well as the necessity of ratifying said conventions. The court held the view that the ratification of the 1951 Convention does not guarantee the exclusionary prevention of asylum seekers. Furthermore, the aforementioned convention also permits the reservation of rights for refugees in accordance with Article 42. Hence, the objective of safeguarding the well-being of refugees and individuals seeking asylum would be rendered ineffective.

6 Role of Judiciary, UNHCR in protection of refugees

6.1 Judiciary

The responsibility of an autonomous and unbiased judiciary is to safeguard the rights of individuals and administer justice without apprehension of influence from other branches of government. According to Iyer (1990), in every constitution, the judiciary is established as the primary mechanism for upholding human rights in cases where they are violated by the state, any authority under the state, or an individual. The Indian constitution upholds a commendable level of human rights, as it includes provisions for fundamental rights and grants the judiciary the authority to safeguard these rights. The Indian judiciary has played an unparalleled role in safeguarding the human rights of its citizens.

The Supreme Court, in the case of *National Human Rights Commission v. State of Arunachal Pradesh* (1996), rendered a significant ruling affirming that the state has an obligation to safeguard the life and liberty of all individuals, regardless of their citizenship status. The Supreme Court reaffirmed the principle that the safeguarding of life and liberty constitutes guaranteed rights, even for non-citizens within the jurisdiction of India.

Our nation operates under the principle of governance through the rule of law. The Constitution bestows specific rights upon all individuals. Every individual possesses the inherent right to be treated with equality under the law and to receive equitable protection from the legal system. Furthermore, it is imperative to note that individuals cannot be

arbitrarily deprived of their right to life or personal liberty, unless it is done in accordance with the legally established procedures. Therefore, it is the responsibility of the state to ensure the preservation of the life and freedom of all individuals, regardless of their citizenship status. The state cannot tolerate any individual or collective entity, such as the Students Union of Arunachal Pradesh, to intimidate the Chakmas into leaving the state under the threat of coercion. A state government of significance cannot condone the aforementioned acts of intimidation, as it is obligated to safeguard the targeted group from such acts of aggression. Failure to fulfil this responsibility would result in the state government's inability to fulfil its constitutional and statutory duties.

It was additionally asserted that the state government is obligated to act in an unbiased manner and fulfil its legal responsibilities in order to protect the lives, health, and overall welfare of the Chakma community residing within the state, without being hindered by local political considerations.

The case of *The Chief Settlement Commissioner v. Om Prakash* (1969) established a precedent in which the highest court determined that, according to our constitutional system, the power to create legislation is entrusted to parliament, state legislatures, and other law-making bodies. Furthermore, any legislative authority held by the executive administration must be derived directly from the delegation of the legislature and exercised within the prescribed limits. The court additionally determined that the concept of inherent or autonomous law-making authority within the executive administration is a concept that must be firmly dismissed, given its inherent flaws, sluggishness, and inconveniences. Throughout history, it has been observed that men have not yet devised a method to effectively sustain a system of free government for extended periods, unless certain conditions are met. One crucial condition is that the executive branch of government operates within the confines of the law, ensuring that it is subject to legal limitations and constraints. Additionally, it is imperative that the legislative process involves parliamentary deliberations in order to establish the laws governing the society. Within our Constitutional system, a prominent and defining element is the notion of the rule of law. In the current context, this refers to the jurisdiction of legal courts to evaluate all administrative actions based on the criterion of legality. If an administrative or executive action fails to meet the required standard, it may be invalidated if the affected individual initiates the necessary legal proceedings in the appropriate jurisdiction. The court determined that the term 'displaced person' or the designation 'refugee' has been employed in the pertinent legislations to denote an individual who has relocated to India due to upheavals, apprehensions of upheavals, or the division of the nation. Consequently, in the event of an individual's demise prior to said migration, they would not fall under the purview of the term 'displaced person' or the designation 'refugee' as defined in the pertinent legislative provisions.

In the case of *Chairman, Railway Board v. Chandrimadas & Others* (2000), the Supreme Court ruled that in instances where a foreign national, specifically a Bangladeshi woman, is subjected to gang rape, it is permissible to award compensation under public law (constitution) for the infringement of fundamental rights. This decision is based on the principles of domestic jurisdiction as outlined in constitutional provisions and human rights jurisprudence. The court's decision stipulated that in cases where a public official is implicated and there is a breach of fundamental rights or public obligations, the recourse would be accessible through public law, notwithstanding the possibility of pursuing a private legal action for compensatory damages. This assertion holds particular validity when the transgression pertains not to a typical entitlement, but

rather to a fundamental entitlement. In the present instance, the petitioner experienced sexual assault, resulting in a breach of their fundamental rights as protected by Article 21 of the Constitution. The court ruled that foreign nationals possess the same fundamental rights as citizens, drawing upon human rights jurisprudence established by the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the Constitution of India. This pivotal legal case significantly advanced the field of human rights jurisprudence, placing utmost importance on safeguarding human dignity. The aforementioned ruling also established the opportunity for public interest litigation (PIL) to be pursued by individuals from foreign nations, thereby establishing a precedent for the protection and promotion of human rights for refugees.

6.1.1 Types of protection provided to refugees

6.1.1.1 Physical security

The Indian judiciary has established, through legal precedents such as the case of Luis de Readt (Mr. Louis De Raedt & Ors vs Union of India And Ors, 1991) and Khudiram (State of Arunachal Pradesh vs Khudiram Chakma, 1994), that individuals seeking refuge are entitled to the safeguarding of their constitutional right to life and liberty, as enshrined in Article 21 of the Constitution of India. However, this particular right can be claimed by absolutely everyone, including extra-terrestrial beings.

6.1.1.2 Non-refoulement and the right of refugee status

The Indian judiciary has consistently demonstrated an unwavering commitment to ensuring that the fundamental rights of refugees are protected in cases where their lives are at stake. The Gauhati High Court, during the Zothansangpuri v. State of Manipur (1989) case upheld that the refugees' right to protection from deportation to the country where their life is threatened. Moreover, In the Dr. Malavika Karlekar v. Union of India (1992) case, the Supreme Court directed the authorities that the criterion of refugee status shall be treated as a substantial criterion in the inquiry to precede, confining only with the case where the extradition is based on the request from the other sovereign, however. The Bogyi v. Union of India (1989) was a case where the Guwahati High Court passed an interim order, allowing a Burmese national to get out of police custody. It also allowed him to stay in India for two months to initiate the process of getting refugee status through UNHCR. Unquestionably the case of U. Myat Kayew and Nayzan v. State of Manipur (1991) has had a significant impact on India's refugee policy. The Guwahati High court reiterated in this case that the asylum seekers, regardless of their illegal entry into India, were supposed to get an opportunity to argue their asylum claims through UNHCR under Article 21.

6.1.1.3 Right to basic amenities

In the Digbijay Mote v. Government of India (1994) case, a non-governmental organisation operated a school for Sri Lankan refugee students in Karnataka. Their challenging environmental conditions were distressing enough for the organisation to appeal through a PIL. Consequently, the Karnataka government offered their financial assistance to run the school. In the final case of Majid Ahmad Abdul Majid Mohd Jad Al

Hak v. Union of India (1997), the court ordered that refugees should be provided with necessary items like foodstuff, health care during the stay at the camps. The Gujarat High Court, in the case of K.A Habib v. Union of India (1999), rendered a decision affirming that the principle of non-refoulement is an integral component of Article 21 of the Indian Constitution. Consequently, refugees who harbour apprehensions regarding their personal safety and security are not to be repatriated to their country of origin.

6.2 *UNHCR*

India became a member of the Executive Committee of the High Commissioner's Programme in 1995 and is committed to working with the UNHCR to protect refugees in the absence of domestic laws regulating their treatment. The UNHCR has been actively involved in providing protection to refugees in India and officially opened its branch office in New Delhi in 1996. The UNHCR acts as a watchdog by monitoring the conditions of refugees and ensuring that no refugee is deported involuntarily. It deals exclusively with Tibetan and Sri Lankan refugees who are dealt with by the Government of India.

7 **Suggestions and conclusions**

7.1 *Suggestions*

- 1 It is the duty of every state, especially a democratic country like India to keep the doors open for those who are in distress.
- 2 Grant of refugee status should be followed with a document confirming such recognition along with the required permits including residential permits so that they may be able to seek employment anywhere in India.
- 3 An effective system is the need of the hour which could enable the management of refugees with accountability and transparency which could replace the existing arbitrary and ineffective policies.
- 4 There is a need for a uniform law as the policies adopted are scattered and differs in implementation. This can be achieved through consolidation of the various policies that are applicable to refugees.
- 5 The government should provide separate duties and right for refugees.
- 6 By legitimising their stay in India, the refugee law will allow refugees to overcome their past trauma, and help them to become contributing members of society during their stay in India.
- 7 The government should provide for setting up of an autonomous national commission to deal with the claims for asylums in the country.
- 8 As none of the South Asian countries have a separate legislation for refugee protection, India could set an example by being the first South Asian country to have its domestic law on the subject. It has immense scope for playing a leadership role in the South Asian region in this matter.

- 9 To adopt provisions to ensure that individuals who have not qualified for refugee status, but whose return would be in breach of international human rights obligations, are granted an appropriate status consonant with their situation and the dignity of the person and which respects their fundamental human rights.
- 10 NGOs and academia must have a crucial collaborative role to play for the protection of refugees in India.

7.2 Conclusions

India offers an interesting case about the rights of refugees because the country has not established a dedicated legislation that deals with the rights and treatment of displaced persons. Despite the absence of the dedicated law relating to refugees, India has over the years experienced a huge surge in the number of people coming into the country seeking asylum and refuge. Most of these persons are mostly subjected to conditions making them unable to return to their countries of origin within a reasonable period of time. An established legislation to address this situation is, therefore, essential. Through this law, the government would be able to have a significant provision that would give it enhanced control and monitoring capacity over this large group of people without citizenship, while at the same time, giving them justifiable and fair rights and privileges. While more needs to be done by India to protect the rights of refugees, the country is signatory to various human rights treaties as underpinned by the fact that Indian courts have repeatedly used international human rights instruments in reaching various judgements. The judiciary, through its judicial arm, has played a critical role in the interpretation of the Indian constitution and international human rights laws with the aim of protecting the rights of refugees. It is also important to note in this context that the UNHCR, an intergovernmental body, has significantly contributed to ensuring the welfare and protection of refugees in the country. The proposal by the National Human Rights Commission, a body with oversight over the human rights situation in India, involves the establishment of a comprehensive national legal framework focusing on refugees. The bill seeks to establish a balance wherein the urgent needs of refugees are acknowledged and at the same time the primary obligation of the government to ensure national security is upheld.

References

Ananthachari, T. (2001) *Refugees in India: Legal Framework, Law Enforcement and Security*, ISILYBIHRL 7 [online] <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/7.html> (accessed 10 November 2022).

Apparel Export Promotion Council v. A.K.Chopra (1999) 1 SC 756.

Asian News International (2018) 'Rohingyas will not be allowed to reside in India: Rijiju', *Business Standard India*, 25 July [online] https://www.business-standard.com/article/news-ani/rohingyas-will-not-be-allowed-to-reside-in-india-rijiju-118072500655_1.html (accessed 10 November 2022).

Basu, P. (2002) *Law Relating to Protection of Human Rights: Under the Indian Constitution and Allied Laws*, Modern Law Publications, Allahabad.

Bogyi v. Union of India (1989) Civil Rule No. 981.

Chairman, Railway Board v. Chandrimadas & Other (2000) 2 SCC 465.

Chakrabarty, M. (1998) *Human Rights and Refugees*, Deep & Deep Publications, New Delhi.

Digbijay Mote v. Government of India (1994) Writ Appeal No. 354 of 1994.

Dr. Malavika Karlekar v. Union of India (1992) (Criminal) 583 of 1992.

Gramophone Company of India Limited v. Birendra Pandey (1984) AIR 667.

Human Rights Law Network (2007) *Report of Refugee Populations in India* [online] http://www.hrln.org/admin/issue/subpdf/Refugee_populations_in_India.pdf (accessed 10 November 2022).

Iyer, V.R.K. (1990) *Human Rights and Inhuman Wrongs*, South Asia Books, Delhi.

Jain, M.P. (2014) *Indian Constitutional Law*, India Lexisnexis, Haryana.

K.A Habib v. Union of India (1999) Cr.L.J. 919

Ktaer Abbas Habib Al Qutaifi vs Union of India (1999) CriLJ 919.

Majid Ahmad Abdul Majid Mohd Jad Al Hak v. Union of India (1997) Crl. WP No. 60 of 1997.

Mohammad Samiullah & Anr. v. Union of India & Ors. (2017) Writ Petition (Civil) No. 793 of 2017.

Mr. Louis De Raedt & Ors vs Union of India And Ors (1991) AIR 1886.

National Human Rights Commission v. State of Arunachal Pradesh (1996) AIR 1234.

Oberoi, P. (1999) 'Developments. Regional initiatives on refugee protection in South Asia', *International Journal of Refugee Law*, Vol. 11, No. 1, pp.193–201, <https://doi.org/10.1093/ijrl/11.1.193>

Passport (Entry into India) Act (1920) No. 34, Act of Parliament, 1920, §2.

Registration of Foreigners' Act (1939) No. 16, Act of Parliament, 1939, §3(2).

Sarker, S.P. (2017) *Protection of Refugees in India: Quest for National Refugee Law*, 1 May [online] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2961103 (accessed 10 November 2022).

State of Arunachal Pradesh vs Khudiram Chakma (1994) AIR 1461.

The Chief Settlement Commissioner v. Om Prakash (1969) AIR 1969 SC 33.

U. Myat Kayew and Nayzan v. State of Manipur (1991) Civil Rule No. 516 of 1991.

UNHCR (2017) *Global Report 2017* [online] <https://www.unhcr.org/publications/fundraising/5b4c89bf17/unhcr-global-report-2017.html> (accessed 10 November 2022).

UNHCR (2022) *UNHCR – Refugee Statistics*, 27 October, UNHCR [online] <https://www.unhcr.org/refugee-statistics/> (accessed 10 November 2022).

Vishakha v State of Rajasthan (1997) AIR SC 3011.

Zothansangpuri v. State of Manipur (1989) Civil Rule No. 981 of 1989.