

VALIDITY OF CAA AND NRC IN HUMAN RIGHTS REGIME- A CASE STUDY ON ASSAM CRISIS

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ABSTRACT

With the CAB getting tabled at the centre, advent of outbreaks and protests took place especially in the state of Assam for it is the most affected state due to its geographical location and demographic conditions with respect to the ethnic communities. As due to its geographical location, the influx of refugees in this state has been the most and that it has been recognised as the treasure trove of ethnic communities giving rise to the fear of loss of their identities due to adulteration. The bill has also been controversial here for it violates the provisions of the Assam accord, 1985 concluded between the central government, state government and the indigenous people of Assam. However, the protection of the rights of refugees is very important with respect to the Human Rights regime. Any state cannot deny fulfilling its responsibilities towards the refugees for protection of their rights, as under the principle of non-refoulement, have taken the status of customary international law or a peremptory norm from which no derogation is allowed. Nevertheless, a state has to keep in mind its national security and the rights of its indigenous people which also form a part of the international law. Due to this conflict, this bill has become a matter of debate especially with respect to the human rights regime and that it has led to the development of two different schools of thought. One out of which supports the protection of rights of the refugees while the other one supports the protection of rights of the indigenous people and national security.

INTRODUCTION

The register is meant to be a list of Indian citizens living in Assam. For decades, the presence of migrants, often called “bahiragat” or outsiders, has been a loaded issue here. Assam saw waves of migration, first as a colonial province and then as a border state in independent India. The first National Register of Citizens was compiled in 1951, after the Census was completed that year. The Partition of the subcontinent and communal riots had just triggered vast population exchanges at the border.

Since 2015, the state has been in the process of updating the 1951 register. One of the stated aims of the exercise is to identify so-called “illegal immigrants” in the state, many of whom are believed to have poured into Assam after the Bangladesh War of 1971. In 1979, about eight years after the war, the state saw an anti-foreigners’ agitation. Assamese ethnic nationalists claimed illegal immigrants had entered electoral rolls and were taking away the right of communities defined as indigenous to determine their political future.

In 1985, the anti-foreigners’ agitation led by the All Assam Students’ Union came to an end with the signing of the Assam Accord. Under this accord, those who entered the state between 1966 and 1971 would be deleted from the electoral rolls and lose their voting rights for 10 years, after which their names would be restored to the rolls. Those who entered on or after March 25, 1971, the eve of the Bangladesh War, would be declared foreigners and deported. Later the citizenship amendment bill was tabled in the year 2016. The purpose of the bill is to provide citizenship to non-muslims who came to India fleeing religious persecution from Bangladesh and Pakistan and were residing in different parts of India. The bill was passed and became an act. The indigenous people of Assam didn’t welcome this step fearing that the act would endanger their very own existence by threatening their culture and language.

DEVELOPMENT OF TWO DIFFERENT SCHOOLS OF THOUGHT

Introduction of the citizenship amendment bill lead to development of two different schools of thoughts- one in favour and the other against the bill. In the context of human rights, the ones who were in favour stressed upon the right of a natural person to nationality, issue of statelessness and the fact that human beings have a right to seek asylum whereas those who were against it stressed upon the collective and cultural rights of the indigenous people and the fact that providing citizenship rights may disrupt the demographic conditions of the cultural communities and that it is also a threat to their language and culture.

ARGUMENTS IN FAVOUR

The contentious act is drafted considering the rights of persecuted minorities of Bangladesh which have no other place to go and are protected by the Indian constitution by the right to life. Moreover, the immigrants are subject matter of citizenship act, however section 6A in itself doesn't speak about the immigrants who came after the 1971, there is no definition of refugee in the citizenship act, foreigners act or the passport act and even constitution considers every immigrant as an alien. So there is no domestic law covering the rights of refugees in India and that in the absence of domestic law, the international law shall be followed.

It is true that India has not ratified the 1951 Convention and the 1967 Protocol to protection of rights of the refugees however; it acceded to various Human Rights treaties and conventions that contain provisions relating to the protection of refugees. As a party to these treaties, India is under a legal obligation to protect the human rights of refugees by taking appropriate legislative and administrative measures under Article 51(c) and Article 253 of the constitution of India and also under the same laws it is under the obligation to uphold the principle of non-refoulement.

OBLIGED BY UNHCR FRAMEWORK

India is a member of the Executive Committee of the office of United Nations High Commissioner for Refugeesⁱ which puts if not a legal but a moral obligation on it to build a constructive partnership with UNHCR by following the provisions of the 1951 Refugee Convention.

The competence of the high commissioner extends to any other person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationalityⁱⁱ

UDHR OBLIGATION

India is a signatory of United Nation Human Right Declaration and other core human right treaties which bind India to international law to protect the human rights of refugees. Article 51(c) of the constitution states that state shall endeavor to foster respect to international law and treaty obligation in dealing with the organized people with one another.

It is stated in the preamble of UN charter and Universal Declaration of Human Right that "the principle that human beings shall enjoy fundamental rights and freedom without discrimination"ⁱⁱⁱ In this context, refugee law is essentially human rights based. Universally recognized human rights are directly applicable to refugees. These include the right to life, protection from torture and ill-treatment, the right to a nationality, the right to freedom of movement, the right to leave any country, including one's own, and to return to one's country, and the right not to be forcibly returned.

Article 14 of UDHR^{iv} states that everyone has the right to seek and to enjoy, in other countries, an asylum from persecution. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

"No one shall be subject to arbitrary arrest, detention or exile"^v

“Everyone has the right to a nationality” (article 15 UDHR)

"Everyone has the right to freedom of movement and residence within the borders of each State" (UDHR, article 13; ICCPR, article 12)

Also by virtue of Article 2 of ICCPR, individuals enjoy the same fundamental rights and freedoms as nationals. The right to equality before the law, equal protection of the law and non-discrimination which form a cornerstone of international human rights law appear to ban discrimination against refugees based on their status as such. In addition, such provisions would prohibit discriminatory conduct based on grounds commonly related to situations of refugees, such as race, religion, national or social origin, and lack of property^{vi}. In addition, all guarantees providing protection against specific categories of discrimination such as race and gender specific discrimination are also applicable to refugees as per the various declarations^{vii}

The Migrants who are exempted are victim of persecution in their native country; it would be unjust to force their return. The Human rights regime provides for protection against forced return of individuals to territories in which their lives, safety and dignity would be endangered. Human rights law recognises the right of an individual, outside of national territory, to return to his or her country^{viii}

It is recommended by Indian judiciary in various judgements that in the process of return of asylum seekers or refugees, due attention is to be paid to the provisions of the Covenant and other applicable norm^{ix}

RELIANCE ON CORE REFUGEE TREATIES

In the absence of any national legislation on protection of refugee and no clarity of the legal status of individuals recognised as refugees by the Government of India; core refugee treaties can be relied onto even though they haven't been acceded to. The relationship between refugee status granted by the Government and corresponding laws governing the entry and stay of foreigners (i.e. Foreigners Act, 1946) is also unclear.

Justice J.S. Verma, Chairman of the National Human Rights Commission recently observed, “the provisions of the (1951) Refugee Convention and its Protocol can be relied on when there is no conflict with any provisions in the municipal laws^x

DUTY TO UPHOLD INTERNATIONAL LAW

Article 51 (c) stresses on “Pacta Sunt Servanda” principle^{xi}. Article 51 (b) and (d) explain how the relationship between India and other countries shall be maintained. Article 51 (a) provides that India is a peace-loving country, and it should promote International Peace and Security.

Moreover according to the principle of pacta sunt servanda as is laid down under Article 26 of the VCLT, every treaty signed by a country is binding on it and the obligations imposed by treaties must be performed by the country in good faith^{xii}. The global community has shown due concern for the refugee's rights which is evident from the fact that refugee law encompasses customary international law, peremptory norms, international legal instruments and regional legal instruments. As of now India and other 175 countries are parties to these international legal instruments. Protection under refugee law is ordinarily available to those who have left their countries of origin^{xiii}

India presently shelters one of the largest refugee populations in the world, its refusal to give shelter to refugees is not only beyond comprehension but is likely to tarnish India's image at the international level.

CONSTITUTIONAL MANDATE

Any Article under Part IV (Directive Principles of State Policy) of the Constitution of India must be read with Article 37 of Constitution of India,^{xiv} hence if there is any inconsistency between the International Law and the Domestic Law, the court has to interpret and construe in harmonious manner to protect the interest of both the laws^{xv}.

DOCTRINE OF INCORPORATION

It is a legal principle that, in general, the provisions of international law are enforceable in a jurisdiction so far as they are consistent with the provisions of its domestic law.

The Honorable Supreme Court of India interpreted with liberal construction in the case of **Gramophone Co of India vs. Birendra Bahadur Pandey**^{xvi} opined that “the comity of nations requires that the rules of international law may be accommodated in the municipal law even without express legislative sanctions provided they do not run conflict with the acts of parliament ...the *doctrine of incorporation* also recognizes the position that the rules of international law are incorporated into the nation’s law and considered to be part of national law, unless they are in conflicts with an act of Parliament.

JUDICIAL ACTIVISM

In Vellore Citizens Welfare Forum vs. Union of India^{xvii}, the Supreme Court has laid down that “once these principles are accepted as part of customary International law, there should be no difficulties in accepting them as part of our Domestic law.

Hon’ble Supreme Court in cases of *Nilabati Behera v. State of Orissa*^{xviii} and *Vishakha v. State of Rajasthan*^{xix} tried to convey the idea that the international conventions can be used to supplement the domestic law if the former is not inconsistent with the latter. International conventions could be used to amplify the rights provided under the Indian Constitution.

In the case of *People’s Union for Civil Liberties v. Union of India*,^{xx} court adopted the liberalized rules by stating that the peremptory norms which have already adopted by the various states can be inculcated in the Indian municipal law if they are in conformity with the latter law^{xxi}

Gramophone Company of India Limited v. Birendra Pande^{xxii} it was observed by the court that international instruments must be respected provided they are not against the spirit of legislative enactments of the state. It becomes well-settled position in India that there is no need to enact the separate domestic laws for creating international obligation if the both operate

without any conflict. It follows from the notion that the states have obligation to follow the international conventions and the rules of international customary law in conformity with their domestic laws. Moreover India is a signatory of the Bangkok principles. Article III of the Bangkok Principles states that “*the person cannot be expelled if there is a possibility that he might be exposed to some danger on account of race, religion, nationality, ethnic origin, membership of a particular social group or political opinion.*”^{xxiii}

CONSTITUTIONAL PROTECTION

The Constitution of India guarantees certain Fundamental Rights to refugees. Namely, right to equality (Article 14), right to life and personal liberty (Article 21), right to protection under arbitrary arrest (Article 22), right to protection in respect of conviction of offences (Article 20), freedom of religion (Article 25), right to approach Supreme Court for enforcement of Fundamental Rights (Article 32), are as much available to non-citizens, including refugees, as they are to citizens

The Supreme Court has taken recourse to Article 21 of the Constitution in the absence of legislation to regulate and justify the stay of refugees in India. In *NHRC v. State of Arunachal Pradesh*, the Government of Arunachal Pradesh was asked to perform the duty of safeguarding the life, health and well-being of Chakmas residing in the State and that it was held that their application for citizenship should be forwarded to the authorities concerned and not withheld.

In various other cases it was held that refugees should not be subjected to detention or deportation and that they are entitled to approach the U.N High Commissioner for grant of refugee status. In *P. Nedumaran v. Union of India*, the need for voluntary nature of repatriation was emphasized upon and the Court held that the UNHCR, being a world agency, was to ascertain the voluntariness of the refugees and, hence, it was not upon the court to consider whether consent was voluntary. Similarly, according to B. S. Chimni, the Supreme Court has erred in concluding in *Louis de Raedt v Union of India* that there is no provision in the Constitution fettering the absolute and unlimited power of the government to expel foreigners under the Foreigners Act of 1946.

PRINCIPLE OF NON-REFOULEMENT

Non-refoulement, the central doctrine to refugee protection that prohibits return of an individual to a country in which he or she may be persecuted^{xxiv} has taken on an increasingly fundamental character. Indeed, non-refoulement has attained the status of customary international law^{xxv} or, as many recent commentators have asserted, is now considered a jus cogens norm – that is, a peremptory norm of international law from which no derogation is permitted. The underlying idea of this principle is concomitant with the customary international law and other conventions related to refugees and human rights protection.

Article 38(1)(b) of the Rome Statute says “*international custom, as evidence of a general practice accepted as law*”, are the sources of law while deciding any issue or referring something. In the case of *Nicaragua v. United States of America*^{xxvi} position of customary international law has been represented in the following manner: “*In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.*”

International Court of Justice took the view to follow the customary norms of international law by stating:

“For speaking generally, it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted; whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour.”^{xxvii}

UNHCR adopted the activist approach in safeguarding the rights of the refugees and it also laid down the emphasis on the fundamental character of the principle of non-refoulement. It was said that the “prohibition to return” forms the part of the customary international law which

has been specifically adopted by the Article 33 of the 1951 Convention and other human rights conventions. Hence, it is said that UNHCR agrees to the point that the principle of non-refoulement has been developed into the customary international law due to its normative character.^{xxviii}

INDIAN LEGAL FRAMEWORK

By virtue of Article 14 and Article 21 of the Constitution of India, 1952, which applies to citizens and non-citizens, courts have tried to liberalise the rights of equality and right to life and personal liberty, respectively^{xxix}

Importantly, in the case of *Ktaer Abbas Habib Al Qutaifi v. Union of India & Ors.*, non-refoulement was recognized under Article 21 by the Gujarat High Court^{xxx}. Article 22 of the Indian Constitution also applies to refugees, meaning thereby the refugees also possess the right of protection against arbitrary arrest. Moreover, they also can practice their religion as per Article 25 of the Constitution.

Another facet, from where India assumes its responsibility is being the member of the United Nations. UNHCR, lays down emphasis upon the international protection of refugees on grounds of human rights and the humanitarian law. India, although is a non-signatory of the 1951 Convention, it infers its responsibility under Article 51 of the Constitution. Under Article 51 (c) of the Indian Constitution which talks about “Promotion of international peace and security”, it says that ‘the State shall aim to strengthen the international law and the treaties. Thence, the principle of non-refoulement which is the customary international principle is to be followed by India due to its prominence in the international jurisprudence.

It is specifically indicated in the constitution that by virtue of the Article 253, Parliament may enact the law for the purpose of incorporating the international treaties, agreements or conventions into the municipal law. This power has to be exercised with reference to the Entry 14 of the List I^{xxxi} which enunciates the legislative competence of the Union Legislature with regard to execution of treaties, agreements and conventions with foreign countries shall aim to strengthen the international law and the treaties.’

Further in the case of *Khudiram Chakma v. State of Arunachal Pradesh*^{xxxii} the Hon'ble apex court emphasized upon the Article 14 of the UDHR, 1948. The court said that every person who is seeking asylum in a state cannot be sent back to the state from where he has come if there is the risk of persecution is embedded. In promoting the interests of the refugees the apex court by belying the refoulement of the Andaman Island Burmese refugees asked for their status verification.^{xxxiii} Also those who want to seek the protection in another country cannot be sent back to their country of origin if the status determination of such persons is pending in the present country^{xxxiv}.

VIOLATION OF PRINCIPLE OF NATURAL JUSTICE

It is contended that associated aspect of non-refoulement is that there should not be violation of principle of natural justice. Meaning thereby, they should not be deported on the basis of subjective criteria. Talking about the same alignment, the Indian government has always put forward the best interests of the refugees. Mere inundation of the refugees in the country does not give right to any authority to send back them if they have fear in the country of origin or of habitual residence.

ARGUMENTS AGAINST

The Amendment *vis-a-vis* Assam Accord', addresses concerns about the Citizenship amendment Act, 2016 potentially invalidating the Assam Accord and the special citizenship regime legislated for Assam under Section 6A of the Citizenship Act 1955 that flows from it.

The specific charge is that the act invalidates the 1985 Assam Accord, which prescribed the lawful detection, deletion and expulsion of "foreigners who came to Assam on or after March 25, 1971" and the provision of "constitutional, legislative and administrative safeguards" to "protect, preserve and promote the cultural, social, linguistic identity and heritage of the Assamese.

Clause 6 of the Assam Accord reads as follows: *Constitutional, legislative and administrative safeguards, as may be appropriate shall be provided to protect, preserve and promote the culture, social, linguistic identity and heritage of the Assamese people*. Clause 8 of Assam accord states that foreigners who came to Assam on or after March 25, 1971 shall continue to be detected, deleted and expelled in accordance with the law. Immediate and practical steps shall be taken to expel such foreigners.

The amendment bill violates clause 8 and clause 6 by granting citizenship to non muslims and stands violative of the Assam accord. By considering persons from the six communities as legal migrants, the citizenship amendment act contravenes Section 6A of the Citizenship Act, which was derived from the Assam Accord's provisions and stipulates the political disenfranchisement for 10 years of every person of Indian origin who entered Assam from Bangladesh between 1 January 1966 and 25 March 1971 and are detected as 'foreigners' by the established Foreigner Tribunals^{xxxv}.

In the case of *Assam Sanmilita Mahasangha vs. Union of India^{xxxvi}* the Supreme Court validated the constitutionality of Section 6A. For the implementation of accord, Supreme court gave appropriate directions to the Union of India and the State of Assam to ensure that effective steps are taken to prevent illegal access to the country from Bangladesh; to detect foreigners belonging to the stream of 1.1.1966 to 24.3.1971 so as to give effect to the provisions of Section 6(3) & of the Citizenship Act and to detect and deport all illegal migrants who have come to the State of Assam after 25.3.1971

CITIZENSHIP ACT DEFEATS THE PURPOSE OF NRC

The Assam Accord mandated that those who settled in the state after the cut off date of March 24, 1971 would be weeded out and citizenship rights will be stripped off. However, according to the amendment bill, the minimum residency period for citizenship is being reduced from existing 12 years under the present law to 7 years. Subsequently, the first draft of the roster was published on 30 July, 2018 for the detection of immigrants^{xxxvii}.

The sole test for inclusion in the NRC is citizenship under the Constitution of India and under the Citizenship Act including Section 6A thereof. Citizens who are originally inhabitants/residents of the State of Assam and those who are not are at par for inclusion in the NRC^{xxxviii xxxix}.

In case of *Sarbananda Sonowal v. Union of India and Anr*^{xl} SC directed Union of India and the State of Assam to ensure that effective steps are taken to prevent illegal access to the country from Bangladesh; to detect foreigners belonging to the stream of 1.1.1966 to 24.3.1971 so as to give effect to the provisions of Section 6(3) & (4) of the Citizenship Act and to detect and deport all illegal migrants who have come to the State of Assam after 25.3.1971. The court also directed the union to take all effective steps to complete the fencing (double coiled wire fencing) in such parts/portions of the Indo-Bangla border (including the State of Assam) where presently the fencing is yet to be completed.

VIOLATION OF RIGHTS OF INDIGENOUS PEOPLE

Assam is the homeland of ethnic minorities/groups. The total population of Assam in 2001 Census has been 26,655,528. Of them, 3,308,570 persons are Scheduled Tribes (STs), constituting 12.4 per cent of the total population of the state. The state has registered 15.1 per cent decadal growth of ST population in 1991-2001. There are total twenty three (23) notified STs in the state.

The UN Declaration of Minority Rights 1993 believes that constant promotion and realization of the rights of ethnic, religious and linguistic minorities is an integral part of the development of society as a whole, and within a democratic framework based on the rule of law, would contribute to the strengthening of friendship and cooperation among peoples and states^{xli}

The ST population in Assam is predominantly rural with 95.3 per cent rural and only 4.7 per cent urban population. Of the eight major STs, Dimasas have recorded the highest 10.4 per cent urban population, followed by Mikir (8.3 per cent). On the other hand Miri have recorded the lowest 1.8 per cent urban population.

Indigenous peoples, also known as first peoples, aboriginal peoples or native peoples, are ethnic groups who are the original settlers of a given region, in contrast to groups that have

settled, occupied or colonized the area more recently. Groups are usually described as indigenous when they maintain traditions or other aspects of an early culture that is associated with a given region^{xlii}

ARTICLE 1 of ILO CONVENTION 16 defines indigenous people as tribal people in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations^{xliii}.

Since indigenous people are often faced with threats to their sovereignty, economic well-being and their access to the resources on which their cultures depend, political rights have been set forth in international law by international organizations such as the United Nations, the International Labor Organization and the World Bank.

UNITED NATION DECLARATION ON RIGHTS OF INDIGENOUS PEOPLE (UNDRIP)

The United Nations Declaration on the Rights of Indigenous Peoples ^{xliv}(UNDRIP) is an international instrument adopted by the United Nations on September 13, 2007, The UNDRIP protects collective rights that may not be addressed in other human rights charters that emphasize individual rights, and it also safeguards the individual rights of Indigenous people^{xlv}.

In *Orissa Mining Corporation Ltd. v. Ministry of Environment and Forest Court* ^{xlvi} the court recognized the customary and cultural rights of indigenous people living in Kalahandi and Rayagada Districts of Orissa. The three Judge Bench extensively referred to international laws for violation of the rights of tribal groups including primitive tribal groups and the dalit population and proceeded to observe:

The customary and cultural rights of indigenous people have also been the subject matter of various international conventions.

- International Labour Organization (ILO) Convention on Indigenous and Tribal Populations Convention, 1957 (No. 107).
- ILO Convention (No. 169) and Indigenous and Tribal Peoples Convention, 1989 and

- United Nations Declaration on the rights of Indigenous Peoples (UNDRIP), 2007, India is a signatory only to the ILO Convention (No. 107).

Self Determination

Article 3 states that Indigenous people have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Indigenous people have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State^{xlvi}

Cultural Rights

Article 11 states that Indigenous people have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

Duty of the State

Indigenous people and individuals have the right not to be subjected to forced assimilation or destruction of their culture. States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources; (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights; (d) Any form of forced assimilation or integration; (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them^{xlvi}

Rights

Indigenous people have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature. States shall provide

redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and custom

Article 26

- a) Indigenous people have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
- b) Indigenous people have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
- c) States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous people concerned^{xlix}
- d)

Article 32

Indigenous people have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

ICESCR

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of

the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Article 9

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

ICCPR

Article 27 of the Covenant provides that, in those States in which ethnic, religious or linguistic minorities exist, persons belonging to these minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language. The Committee observes that this article establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant.

DOMESTIC IMPLEMENTATION OF INTERNATIONAL LAWS

Promotion of international peace and security –

The State shall endeavour to –

- a) Promote international peace and security;
- b) Maintain just and honourable relations between nations;

- c) Foster respect for international law and treaty obligations in dealings of organised peoples with one another; and Encourage settlement of international disputes by arbitration.^{bv}

Clause (c) of this Article obligates India to respect international law.

A combined reading of this with Part III of the Constitution facilitated the judiciary in developing human rights and environmental jurisprudence in India. Clause (d) of the Article provides for 'settlement of international disputes by arbitration'.

In *Apparel Export Promotion Council v. A.K. Chopra*, it was pointed out that domestic courts are under an obligation to give due regard to the international conventions and norms for construing the domestic laws, more so, when there is no inconsistency between them and there is a void in domestic law.

Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into those provisions e.g. Articles 14, 15, 19 and 21 of the Constitution to enlarge the meaning and content thereof and to promote the object of constitutional guarantee^{li}

Article 51, as already indicated, has to be read along with Article 253 of the Constitution.

If Parliament has made any legislation which is in conflict with the international law, then Indian courts are bound to give effect to the Indian law, rather than the international law. However, in the absence of a contrary legislation, municipal courts in India would respect the rules of international law^{lii}

Article 51(c) of the Constitution of India is a Directive Principle of State Policy which states that the State shall endeavour to foster respect for international law and treaty obligations. As a result, rules of international law which are not contrary to domestic law are followed by the courts in this country. This is a situation in which there is an international treaty to which India is not a signatory or general rules of international law are made applicable. It is in this situation that if there happens to be a conflict between domestic law and international law, domestic law will prevail^{liii}

Interestingly, the court, in cases such as *G Sundarrajan v Union of India, 2013*, and in the *Transgender* case has even resorted to those international treaties consistent with Indian law that India has not signed.^{liv}

In *Vellore Citizens' Welfare Forum v. Union of India, 1996*, the court said that there is no difficulty in accepting CIL, not contrary to domestic law, as part of the Indian legal system. Although both treaties and CIL impose equally binding obligations on a country, unlike treaties it is often not easy to ascertain whether a norm has indeed attained the status of CIL. A norm becomes part of CIL only if states customarily follow that norm from a sense of legal obligation^{lv}

As far as the principle of non-refoulement is concerned, it is true that it has been regarded as a customary international law however, one should always consider both the sides of the fence, meaning thereby refugees can be allowed to be sent back if there is any real likelihood to threat of the national security and the public order.

In case of *Ananda Bhavani Geethanando, Ananda Ashram, Pondicherry v. Union of India^{lvi}*, the court said that if the presence of some constitutes threat to the national security then their deportation order without hearing will not be considered the violation of principle of natural justice.

CONCLUSION

Thus, it can be concluded that it is very difficult to maintain a balance between the rights of the refugees and the rights of the indigenous people. As a general rule, it is upon the state to decide for its people and that it has been stated in the UN charter that the doctrine of non intervention and state sovereignty are to be followed. Therefore, whatever the state decides in national interest will supersede over the rights of refugees or the rights of indigenous people for that matter.

ENDNOTES

- ⁱ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V),
- ⁱⁱ ARTICLE 6B of UNHCR Statute.
- ⁱⁱⁱ Brain Gorlick, "Human Rights and Refugees: enhancing protection through international Human Rights Law", Working Paper No. 30 (Oct. 2000),
- ^{iv} UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III)
- ^v Article 9 UDHR
- ^{vi} UNHCR, *International Legal Standards*, note 12 at p. 18.
- ^{vii} Relevant instruments include the U.N. Declaration and (CERD), 60 UNTS 195; (CEDAW), *I.L.M.*, vol. 19 (1980), p. 33, the UNESCO Convention against Discrimination in Education, 1960; The Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief, 1981; The UNESCO Declaration on Race and Racial Prejudice, 1978; The Declaration on the Elimination of Discrimination against Women
- ^{viii} Universal Declaration, Article 13 (2); African Charter, Article 12 (2); CERD, Art. 5d (ii). Art. 12 (4) of the ICCPR, Art. 22 (5) of the American Convention; Art. 3 (2) of the Fourth Protocol to the European Convention prohibits the deprivation of the right to enter the territory of the state of which a person is a national.
- ^{ix} *National Human Rights Commission v. State of Arunachal Pradesh and another*, (1996) 1 SCC.295; *Khudiram Chakma v. Union of India* (1994) Supp. 1 SCC 614.
- ^x *Visakha v. State of Rajasthan*, AIR 13 August 1997
- ^{xi} Introduction to the Constitution of India – *Durga Das Basu*
- ^{xii} Vienna convention on law of treaty (Article 27)
- ^{xiii} *Supra* n. 3 at xii
- ^{xiv} Commentary On The Constitution Of India – *PK Agrawal*, *K.N. Chaturved*
- ^{xv} *Krishna Sharma vs. State of West Bengal*
- ^{xvi} 1984 AIR 667, 1984 SCR (2) 664
- ^{xvii} AIR 1996 SC (2715)
- ^{xviii} 1993 (2) SCC 746.
- ^{xix} AIR 1997 SC 3011
- ^{xx} 1991 (1) SCC 301.
- ^{xxi} This has also been affirmed in case of *Apparel Export Promotion Council vs. A.K. Chopra*, 1999 (1) SCC 756.
- ^{xxii} This has also been affirmed in case of *Apparel Export Promotion Council vs. A.K. Chopra*, 1999 (1) SCC 756.
- ^{xxiii} Text Of The Aalco's 1966 Bangkok Principles On Status And Treatment Of Refugees" As Adopted On 24 June 2001 At The Aalco's 40th Session, New Delhi
- ^{xxiv} GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 117 (1996
- ^{xxv} , U.N. High Comm'r for Refugees [hereinafter UNHCR], Executive Comm. Programme, Non-Refoulement, Conclusion No. 6 (XXVIII) (1977) [hereinafter Executive Committee Conclusion No. 6]
- ^{xxvi} 6 I.C.J. 14 at para186.
- ^{xxvii} I.C.J. Reports 1969 at 3, para 63.
- ^{xxviii} UNHCR, The Principle of Non-Refoulement as a Norm of Customary International Law, Response to the Questions posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93
- ^{xxix} *Louis De Raeds v. Union of India*, (1991) (3) SCC 554.
- ^{xxx} 1999 Cri.L.J. 919
- ^{xxxi} Entry 14, List I (Union List) states: "Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries."
- ^{xxxii} 1994 Supp (1) SCC 615.
- ^{xxxiii} *Malvika Karlekar v. Union of India* Criminal Writ Petition No. 583 of 1992 dated 25.09.1992
- ^{xxxiv} It has been agreed upon by the UNHCR's ExCom Conclusion No. 8.
- ^{xxxv} Foreign tribunal act 1946

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- xxxvi Assam Sanmilita Mahasangha vs. Union of India (UOI) (17.12.2014 - SC) : SC/1173/2014
- xxxvii Assam Sanmilita Mahasangha vs. Union of India (UOI) (17.12.2014 - SC) : MANU/SC/1173/2014
- xxxviii Kamalakhya Dey Purkayastha and Ors. vs. Union of India (UOI) and Ors. (05.12.2017 - SC) : MANU/SC/1523/2017
- xl Sarbananda Sonowal vs. Union of India (UOI) and Ors. (12.07.2005 - SC) : MANU/SC/0406/2005
- xli 6th para of Preamble, Resolution No. 47, General Assembly, dated 3rd Feb 1993. Also see, Janusz Symonides, *Cultural Rights* ' in Janusz Symonides (ed.), *Human Right: Concept and Standards* (Aldershot: Ashgate Darthmouth, UNESCO Publishing 2000), p. 175 at 178
- xlii Sanders, Douglas (1999). "Indigenous peoples: Issues of definition". *International Journal of Cultural Property*.
- xliiii Article 1(a) ILO Convention 169
- xliv See Official Records of the General Assembly, Sixty-first Session, Supplement No. 53 (A/61/53), part one, chap. II, sect. A
- lv Taking note of the recommendation of the Human Rights Council contained in its resolution 1/2 of 29 June 2006,1 by which the Council adopted the text of the United Nations Declaration on the Rights of Indigenous Peoples.
- lvi Orissa mining cooperation ltd.v ministry of environment and forest(write petition Cno. 180 /2011) [2013] 6 SCR
- xlvii UNDRIP TEXT Article 5
- xlviii UNDRIP ARTICLE 8
- xlix UUDRIP article26
- ^l Article 51 constitution of India
- ^{li} Vishaka v. State of Rajasthan
- ^{lii} Rano and Ors. vs. State of Uttarakhand (28.09.2018 - UCHC) : MANU/UC/0784/2018
- ^{liii} Commr. Of Customs v. G.M. Exports reported in MANU/SC/1062/2015
- ^{liv} G Sundarajan v Union of India((2013) 6 SCC 620)
- ^{lv} Vellore Citizens' Welfare Forum v. Union of India (AIR 1996 SC 2715)
- ^{lvi} 1991 MLW (CrL.) 393.