Chapter-IV

INTERNATIONAL LAW, HUMAN RIGHTS AND CONSIDERATIONS EXTENDED TO THE CHAKMAS

"We may have different religions, different languages, different coloured skin, but we all belong to one human race. We all share the same basic values"

-Kofi Annan-
CHAPTER-IV

INTERNATIONAL LAW, HUMAN RIGHTS AND CONSIDERATIONS
EXTENDED TO THE CHAKMAS

Humanitarian Law, Human Rights and Refugee Law are the three Pillars of International Humanitarian Law (IHL). Refugee Law and Human Rights Law (HRL) are complementary bodies of law that share a common goal and the protection of the lives, health and dignity of persons. They form a complex network of complementary protections and it is essential that we understand how they interact. International law is the term commonly used for referring to the system of implicit and explicit agreements that bind together nation-states in adherence to recognized values and standards, differing from other legal systems in that it concerns nations rather than private citizens\(^1\). IHL is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. It does not regulate whether a State may actually use force; this is governed by an important, but distinct, part of international law set out in the United Nations Charter\(^2\).

IHL is rooted in the rules of ancient civilizations and religions warfare has always been subject to certain principles and customs. Universal codification of IHL began in the nineteenth century. Since then, States have agreed to a series of practical rules, based on the bitter experience of modern warfare. These rules strike a careful balance between humanitarian concerns and the military requirements of States. As the international community has grown, an increasing number of States have contributed to the development of those rules. IHL today forms a universal body of law\(^3\). A major part of IHL is contained in the fourth Geneva Convention of 1949. Nearly every State in the world has agreed to be bound by them. The Conventions have been developed and supplemented by two further agreements: the Additional Protocols of 1977 relating to the protection of victims of armed conflicts.


\(^2\) Ibid.

agreements prohibit the use of certain weapons and military tactics and protect certain categories of people and goods. These agreements include:

a. The 1954 convention for the protection of cultural property in the event of armed conflict, plus its two protocols;
b. The 1972 biological weapons convention;
c. The 1980 conventional weapons convention and its five protocols;
d. The 1993 chemical weapons convention;
e. The 1997 Ottawa convention on anti-personnel mines;
f. The 2000 optional protocol to the convention on the rights of the child on the involvement of children in armed conflict. Many provisions of international humanitarian law are now accepted as customary law – that is, as general rules by which all States are bound.

IHL applies only to armed conflict; it does not cover internal tensions or disturbances such as isolated acts of violence. The law applies only once a conflict has begun, and then equally to all sides regardless of who started the fighting. IHL distinguishes between international and non-international armed conflict. International armed conflicts are those in which at least two States are involved. They are subject to a wide range of rules, including those set out in the fourth Geneva Convention and Additional Protocol- I (one).

Non-international armed conflicts are those restricted to the territory of a single State, involving either regular armed forces fighting groups of armed dissidents, or armed groups fighting each other. A more limited range of rules apply to internal armed conflicts and are laid down in Article 3 common to the fourth Geneva Convention as well as in Additional Protocol- II (two). It is important to differentiate between IHL and HRL. While some of their rules are similar, these two bodies of law have developed separately and are contained in different treaties. In particular, human rights law unlike IHL applies in peacetime, and many of its provisions may be suspended during an armed conflict.

International humanitarian law largely covers two areas:

i. The protection of those who are not, or no longer, taking part in fighting;

---


ii. Restrictions on the means of warfare in particular weapons and the methods of warfare, such as military tactics.

IHL protects those who do not take part in the fighting, such as civilians and medical and religious military personnel. It also protects those who have ceased to take part, such as wounded, shipwrecked and sick combatants, and prisoners of war. These categories of person are entitled to respect for their lives and for their physical and mental integrity. They also enjoy legal guarantees. They must be protected and treated humanely in all circumstances, with no adverse distinction. More specifically it is forbidden to kill or wound an enemy who surrenders or is unable to fight; the sick and wounded must be collected and cared for by the party in whose power they find themselves. Medical personnel, supplies, hospitals and ambulances must all be protected. There are also detailed rules governing the conditions of detention for prisoners of war and the way in which civilians are to be treated when under the authority of an enemy power. This includes the provision of food, shelter and medical care, and the right to exchange messages with their families. The law sets out a number of clearly recognizable symbols which can be used to identify protected people, places and objects. The main emblems are the Red Cross, the Red Crescent and the symbols identifying cultural property and civil defense facilities.

International humanitarian law prohibits all means and methods of warfare which:

a. Fail to discriminate between those taking part in the fighting and those, such as civilians, who are not, the purpose being to protect the civilian population, individual civilians and civilian property;

b. Cause superfluous injury or unnecessary suffering;

c. Cause severe or long-term damage to the environment. Humanitarian law has therefore banned the use of many weapons, including exploding bullets, chemical and biological weapons, blinding laser weapons and anti-personnel mines.

Sadly, there are countless examples of violation of IHL and there is increasingly, the victims of war are civilians. However, there are important cases where IHL has made a difference in protecting civilians, prisoners, the sick and the wounded, and in restricting the use of barbaric weapons. Given that this body of law applies during times of extreme violence, implementing the law will always be a

---

6 ibid.
matter of great difficulty. That said striving for effective compliance remains as urgent as ever. Measures must be taken to ensure respect for IHL. States have an obligation to teach its rules to their armed forces and the general public. They must prevent violations or punish them if these nevertheless occur. In particular, they must enact laws to punish the most serious violations of the Geneva Convention and Additional Protocols, which are regarded as war crimes. The States must also pass laws protecting the Red Cross and Red Crescent Emblems. Measures have also been taken at an international level and tribunals have been created to punish acts committed in two recent conflicts (the former Yugoslavia and Rwanda). An international criminal court, with the responsibility of repressing *inter alia* war crimes, was created by the 1998 Rome Statute. Whether as individuals or through governments and various organizations, we can all make an important contribution to compliance with IHL.

1. *International humanitarian law in refugee law and protection*

   Armed conflict and IHL are of relevance to refugee law and refugee protection in a number of ways, first to determine who is a refugee. Many asylum seekers are persons fleeing armed conflict and this made them refugees? Not every person fleeing an armed conflict automatically falls within the definition of the 1951 Refugee Convention, which lays down a limited list of grounds for persecution. While there may be situations, notably in conflicts with an ethnic dimension, where persons are fleeing because of a fear of persecution based on their "*race, religion, nationality or membership of a particular social group*", this is not always the case.

   The majority of persons, forced to leave their state of nationality today are fleeing the indiscriminate effect of hostilities and the accompanying disorder, including the destruction of homes, food stocks and means of subsistence. All violations of IHL but with no specific element of persecution, subsequent regional refugee instruments, such as the 1969 OAU Refugee Convention and the 1984 Cartagena Declaration on Refugees have expanded their definitions to include persons fleeing armed conflict. Moreover, states that are not party to these regional instruments have developed a variety of legislative and administrative measures, such as the notion of 'temporary protection' for example, to extend protection to persons

---

fleeing armed conflict. A second point of interface between IHL and refugee law is in relation to issues of exclusion. Violations of certain provisions of IHL are war crimes and their commission may exclude a particular individual from entitlement to protection as a refugee.

2. Protection of refugees under international humanitarian law

IHL offers refugees who find themselves in a state experiencing armed conflict a two-tiered protection. First, provided that they are not taking a direct part in hostilities, as civilians, refugees are entitled to protection from the effects of hostilities. Secondly, in addition to this general protection, IHL grants refugees additional rights and protections in view of their situation as aliens in the territory of a party to a conflict and their consequent specific vulnerabilities.

a. General protection

If respected, IHL operates so as to prevent displacement of civilians and to ensure their protection during displacement, should they nevertheless have moved.

i. The express prohibition of displacement

Parties to a conflict are expressly prohibited from displacing civilians. This is a manifestation of the principle that the civilian population must be spared as much as possible from the effects of hostilities. During occupation, the fourth Geneva Convention prohibits individual or mass forcible transfers, both within the occupied territory and beyond its borders, either into the territory of the occupying power or, as is more often the case in practice, into third states.

There is a limited exception to this rule, which permits an occupying power to 'evacuate' the inhabitants of a particular area if this is necessary for the security of the civilian population or for imperative military reasons. Even in such cases the evacuations should not involve the displacement of civilians 'outside the occupied territory' unless this is impossible for material reasons. Moreover, displaced persons must be transferred back to their homes as soon as the hostilities in the area in question have ceased. The prohibition on displacing the civilian population for reasons related to the conflict unless the security of the civilians or imperative military reasons so demand also applies in non-international armed conflicts.

---

9 Ibid., Pp. 1300-1320.
10 Ibid.
ii. Protection from the effects of hostilities in order to prevent displacement

In addition to these express prohibitions, the rules of IHL which shield civilians from the effects of hostilities also play an important role in the prevention of displacement, as it is often violations of these rules which are at the root of displacements in situations of armed conflict of particular relevance are:

a. The prohibition to attack civilians and civilian property and of indiscriminate attacks;

b. The duty to take precautions in attack to spare the civilian population;

c. The prohibition of starvation of the civilian population as a method of warfare and of the destruction of objects indispensable to its survival; and

d. The prohibition on reprisals against the civilian population and its property.

Also of relevance are the prohibitions on collective punishments which, in practice have often taken form of destruction of homes, leading to displacement; and the rules requiring parties to a conflict, as well as all other states, to allow the unhindered passage of relief supplies and assistance necessary for the survival of the civilian population.

iii. Protection during displacement

Although prohibited by IHL, displacement of civilians frequently occurs in practice and once displaced or evacuated civilians are entitled to various protections and rights. Thus we find rules regulating the manner in which evacuations must be effected and transfers must be carried out are in satisfactory conditions of hygiene, health, safety and nutrition. During displacement persons must be provided with appropriate accommodation and members of the same family must not be separated. Although these provisions relate to conditions to be ensured on situations of evacuation i.e. ‘lawful’ displacements for the safety of the persons involved, security or for imperative military necessity these conditions should be applicable a fortiori in situations of unlawful displacement\(^{11}\). In addition to these special provisions relating specifically to persons who have been displaced, such persons are civilians and, as such, entitled, even during displacement, to the whole range of protection appertaining to civilians\(^{12}\).

---


\(^{12}\) Ibid.
b. Specific protection of refugees

In addition to this general protection, IHL affords refugees further specific protection. In international armed conflicts refugees are covered by the rules applicable to aliens in the territory of a party to a conflict generally as well as by the safeguards relating specifically to refugees.

i. Protection as aliens in the territory of a party to a conflict

Refugees benefit from the protections afforded by the fourth Geneva Convention to aliens in the territory of a party to a conflict, including:

a. The entitlement to leave the territory in which they find themselves unless their departure would be contrary to the national interests of the state of asylum;

b. The continued entitlement to basic protections and rights to which aliens had been entitled before the outbreak of hostilities;

c. Guarantees with regards to mean of existence, if the measures of control applied to the aliens by the party to the conflict means that they are unable to support themselves.

While recognizing that the party to the conflict in whose control the aliens find themselves if its security makes this absolutely necessary, intern the aliens or place them in assigned residence, the convention provides that these are the strictest measures of control to which aliens may be subjected.

Finally, the fourth convention also lays down limitations on the power of a belligerent to transfer aliens. The particular relevance is the rule providing that a protected person may in no circumstances be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs; a very early expression of the principle of non refoulement\textsuperscript{13}.

ii. Additional protections for refugees

In addition to the aforementioned rules for the benefit of all aliens in the territory of a party to a conflict, the fourth Geneva Convention contains two further provisions expressly for the benefit of refugees. The first provides that refugees should not be treated as enemy aliens and thus susceptible to the measures of control—solely on the basis of their nationality. This recognizes the fact that refugees no longer

\textsuperscript{13} ibid.
have a link of allegiance with that state and are thus not automatically a potential threat to their host state.

The second specific provision deals with the precarious position in which refugees may find themselves if the state which they have fled occupies their state of asylum. In such circumstances, the refugees may only be arrested, prosecuted, convicted or deported from the occupied territory by the occupying power for offences committed after the outbreak of hostilities, or for offences unrelated to the conflict committed before the outbreak of hostilities which, according to the law of the now occupied state of asylum, would have justified extradition in time of peace. The objective of this provision is to ensure that refugees are not punished for acts—such as political offences, which may have been the cause of their departure from their state of nationality, or for the mere fact of having sought asylum.14

All of this being said, who is a refugee for the purposes of IHL? Although the fourth Geneva Convention expressly refers to refugees, it does not define this term. Instead, it focuses on their de facto lack of protection from any government. The matter was developed in Additional Protocol- I. This provides that persons who, before the beginning of hostilities, were considered refugees under the relevant international instruments accepted by the parties concerned or under the national legislation of the state of refuge or of residence are to be considered ‘protected persons’ within the meaning of the fourth convention in all circumstances and without any adverse distinction.15

The Office of the High Commissioner (OHC), monitoring bodies and the Commission on Human Rights (CHR), where the ICRC has observer status, is increasingly addressing IHL in both country and thematic work and, where appropriate, the ICRC provides informal expert advice on IHL. To give but one example, earlier this week the CHR adopted the basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of International Human Rights Law (IHRL) and serious violations of IHL. The ICRC participated in the expert meetings leading to the adoption of this instrument and provided legal input on the IHL dimension.16

14 ibid.
15 ibid.
16 ibid.
B. Non-refoulement

The practical challenge that the ICRC has faced in recent years is to find very difficult that how to ensure the respect of principle of non-refoulement. Non-refoulement is the keystone of refugee law and also forms part of IHL and HRL, notably as part of the prohibition of torture; no one must be transferred to a place where she/he risks torture or other forms of ill-treatment. While the precise contours of the principle may differ slightly in the different bodies of law, the essence of the principle is uncontroversial.17

The Geneva Conventions came into being between 1864 and 1949 as a result of efforts by Henry Duant, the founder of the International Committee of Red Cross (ICRC). The conventions safeguard the human rights of individuals involved in armed conflict, and build on the 1899 and 1907 Hague Conventions, the international community's first attempt to formalize the laws of war and war crimes in the nascent body of secular international law. The conventions were revised as a result of World War-II and readopted by the international community in 1949. The Geneva Conventions define what is today referred to as humanitarian law. The ICRC is the controlling body of the Geneva conventions.18

Human Rights

The idea of rights provides an essential tool of analysis of the relations between individual and the state. Hobbes and Bentham suggest that the rights are generally a claim of the citizens which are recognized by the state and enforced by the society. As Bosanquet opines that we have a right to the means that are necessary to the development of our lives in the direction of the highest good of the community of which we are a part. In other sense the human rights is one the most important natural rights of human kind in this universe. Human rights are those rights to which an individual is entitled by virtue of his or her status as a human being. While the civil, political and socio-economic rights are dependent on an individual’s status as a citizen of a particular state, his/her human rights are not determined by this condition. As we

17 Ibid.
know the scope of human rights is very wide. Human rights constitute the very source of all rights of human beings\(^{19}\).

Human Rights Law is a system of laws, both domestic and international, designed to promote human rights. HRL is made up of various international human rights instruments which are binding to its parties (nation-states that have ratified the treaty). An important concept within human rights law is that of universal jurisdiction. This concept, which is not widely accepted, is that any nation is authorized to prosecute and punish violations of human rights wherever and whenever they may have occurred. Some customary peremptory norms of human rights are also recognized, and these are considered binding on all nations, even those that have not ratified the relevant treaty. In principle HRL is enforced on a domestic level and nation-states that ratify human rights treaties commit themselves to enact domestic human rights legislations\(^{20}\).

Human rights refer to the 'basic rights and freedoms to which all humans are entitled'. Examples of rights and freedoms which are often thought of as human rights include civil and political rights, such as the right to life and liberty, freedom of expression, and equality before law; and social, cultural and economic rights, including the right to participate in culture, the right to food, the right to work, and the right to education\(^{21}\).

The history of human rights covers thousands of years and draws upon religious, cultural, philosophical and legal developments throughout recorded history. Several ancient documents and later religions and philosophies included a variety of concepts that may be considered to be human rights. Notable among such documents are the Cyrus calendar of 539 BC, a declaration of intentions by the Persian emperor Cyrus, the great after his conquest of the Neo-Babylonia empire; the Edits of Ashoka issued by Ashoka the Great of India between 272-231 BC; and the Constitution of Medina of 622 AD, drafted by Muhammad to mark a formal agreement between all of the significant tribes and families of Yathrib (later known as Medina), including Muslims, Jews and Pagans. The English Magna Carta of 1215 is particularly significant in the history of English law, and is hence significant in international law

\(^{19}\)B.S, Chimni (2000), International Refugee law: A Reader, Sage Publication, New Delhi, Pp. 146-152.
and constitutional law today and the declaration of the rights of man and of the citizen approved by the National Assembly of France, August 26, 1789. Much of modern HRL and the basis of most modern interpretations of human rights can be traced back to relatively recent history. The British Bill of Rights (An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown) of 1689 made illegal a range of oppressive governmental actions in the United Kingdom.

Two major revolutions occurred during the 18th century, in the United Kingdom (1776) and in France (1789), leading to the adoption of the United States Declaration of Independence and the French Declaration of the Rights of Man and of the Citizen respectively, both of which established certain rights. Additionally, the Virginia Declaration of Rights of 1776 set up a number of fundamental rights and freedoms. These were followed by developments in philosophy of human rights by philosophers such as Thomas Paine, John Stuart Mill and Hegel during the 18th and 19th centuries. The term ‘human rights’ probably came into use sometime between Paine’s ‘The Rights of Man’ and William Lloyd Garrison’s 1831 writings in The Liberator saying he was trying to enlist his readers in ‘the great cause of human rights’\(^2\). The Magna Carta or ‘Great Charter’ was one of England’s first documents containing commitments by a sovereign to his people to respect certain legal rights. All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood\(^3\).

**Universal Declaration of Human Rights**

The Universal Declaration of Human Rights (UDHR) is a non-binding declaration adopted by the UN’s General Assembly in 1948, partly in response to the atrocities of World War-II. Although the UDHR is a non-binding resolution, it is now considered to be a central component of international customary law which may be invoked under appropriate circumstances by national and other judiciaries. The UDHR urges member nations to promote a number of human, civil, economic and social rights, asserting these rights as a part of the ‘foundation of freedom, justice and peace in the world.’ The declaration was the first international legal effort to limit the

---

\(^2\) Ibid.  
\(^3\) See for detail of Article 1 of the United Nations Universal Declaration of Human Rights (UDHR)
behavior of states and press upon them duties to their citizens following the model of the rights-duty duality.

The UDHR was framed by members of the HRC, with former First Lady Eleanor Roosevelt as Chair, who began to discuss an ‘International Bill of Rights’ in 1947. The members of the commission did not immediately agree on the form of such a bill of rights, and whether, or how, it should be enforced. The commission proceeded to frame the UDHR and accompanying treaties, but the UDHR quickly became the priority. Canadian law professor John Humprey and French lawyer Rene Cassin were responsible for much of the cross-national research of the structure of the document respectively, where the articles of the declaration were interpretative of the general principle of the preamble. The document was structured by Cassin to include the basic principles of ‘dignity, liberty, equality and brotherhood’ in the first two articles, followed successively by rights pertaining to individuals; rights of individuals in relation to each other and to groups; spiritual, public and political rights; and economic, social and cultural rights. The final three articles place, according to Cassin, rights in the context of limits, duties and the social and political order in which they are to be realized. Humphrey and Cassin intended the rights in the UDHR to be legally enforceable through some means, as is reflected in the third clause of the preamble:

“Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law”

Some of the UDHR was researched and written by a committee of international experts on human rights, including representatives from all continents and all major religions, and drawing on consultation with leaders such as Mohan Das Karamchand Gandhi. The inclusion of both civil and political rights and economic, social and cultural rights was predicated on the assumption that basic human rights are indivisible and that the different types of rights listed are inextricably linked. This principle was not then opposed by any of the member states (the declaration was adopted unanimously, with the abstention of the Eastern Bloc, Apartheid South Africa and Saudi Arabia), however this principle was later subject to significant challenges.

24 See for detail on the Preamble to the Universal Declaration of Human Rights, 1948.
The universal declaration was bifurcated into two distinct and different covenants, a covenant on civil and political rights and another covenant on economic, social and cultural rights. Over the objection of the more developed states (capitalist), which questioned the relevance and propriety of such provisions in covenants on human rights, both begin with the right of people to self-determination and to sovereignty over their natural resources. Then the two covenants go different ways\(^26\).

The drafters of the covenants initially intended only one instrument. The original drafts included only political and civil rights, but economic and social rights were added early. Western states then fought for, and obtained, a division into two covenants. They insisted that economic and social rights were essential aspirations or plans, not rights, since their realization depended on availability of resources and on controversial economic theory and ideology. There was wide agreement and clear recognition that the means required to enforce or induce compliance with socio-economic undertakings were different from the means required for civil-political rights\(^27\).

Because of the divisions over which rights to include, and because some states declined to ratify any treaties including certain specific interpretations of human rights, and despite the Soviet bloc and a number of developing countries arguing strongly for the inclusion of all rights in a so-called Unity Resolution, the rights enshrined in the UDHR were split into two separate covenants, allowing states to adopt some rights and derogate others. Though this allowed the covenants to be created, one commentator has written that it denied the proposed principle that all rights are linked which was central to some interpretations of the UDHR\(^28\). The Refugee Act of 1980 created a new system for refugee admissions, dropping the seventh preference and reducing the world-wide ceiling to 270,000. The total number of immigrant visa to be distributed is currently made up of three components\(^29\).


National Human Rights Commission

India is a country of 28 states and 7 union territory of different form of culture, tradition, history and so on so forth, but only few states have a proper human rights commission body to see the basic human dignity in the states as well as to extend the human rights features to its citizens, particularly to the states like Andhra Pradesh, Jammu and Kashmir, Madhya Pradesh, Orissa, Tamil Nadu, Chattisgarh, Assam, Kerala, Maharasra, Punjab, Uttar Pradesh, Gujarat, Himachal Pradesh, Karnataka, Manipur, Rajasthan, West Bengal30.

Nationality

Nationality is a relationship between a person and their state of origin, culture, association, affiliation or loyalty. Nationality affords the state jurisdiction over the person and affords of the person, the protection of the state. Traditionally under international law and conflict of laws principles, it is the right of each state to determine who its nationals are. Today the law of nationality is increasingly coming under more international regulation by various conventions on statelessness, as well as some multilateral treaties such as the European Convention on nationality.

Generally, nationality is established at birth by a child’s place of birth (jus soil) or bloodline (jus sanguinis). Nationality may also be acquired later in life through naturalization. Corporations, ships, and other legal persons also have a nationality, generally in the state under whose laws the legal person was formed. The legal sense of nationality, particularly in the English speaking world, may often mean citizenship, although they do not mean the same thing everywhere in the world; for instance, in the United Kingdom (UK), citizenship is a branch of nationality which in turn ramifies to include other subcategories31. Citizens have rights to participate in the political life of the state of which they are a citizen, such as by voting or standing for election. Nationals need not immediately have these rights; they may often acquire them in due time. Nationality can also mean membership in a cultural/historical group related to political or national identity, even if it currently lacks a formal state. This

30 See website, http://nhrc.nic.in.
31 See for detail British Nationality Law.
meaning is said by some authorities to cover many groups, including Kurds, Basques, Catalans, English, Welsh, Scots, Palestinians, Tamils, Quebecers and many others\textsuperscript{32}.

**Citizenship**

The very common understanding of citizenship denotes the status of an individual as a full and most responsible member of a political community. Citizenship is a central concept through which the duties of a state are determined. It is therefore 'a powerful instrument of social closure\textsuperscript{33}'. So far the subaltern concept of citizenship is concerned, largely they believed that the 'Dalits' in India are, so to speak, exiled citizens. They do not enjoy the sort of citizenship that can give them a sense of inclusion on a more permanent basis\textsuperscript{34}. Citizen is a person who owes allegiance to a state and in turn receives protection from the state. He or she must fulfill his or her duties and obligations toward the state as state grants him civil, political, and social rights. Thus, citizenship implies the two way relationship between the state and the individuals. There is a distinction between the 'subject' and 'citizen'. A subject is usually subversive to the state where the right to rule is reserved for privileged classes but citizen themselves constitutes the state\textsuperscript{35}. Citizenship is the product of a community where the right to rule is decided by a prescribed producer which expresses the will of the general body of its members while ascertaining their will, no body is discriminated on the ground of race, religion, gender, caste, place of birth, etc\textsuperscript{36}. Anoski and Bottmore rightly points that the citizenship may be defined as a passive and active membership of individuals in a nation-state with universalistic rights and obligations at a specified level of equality\textsuperscript{37}.

There are four main definitions, first citizenship determining membership in a nation-state, which means establishing 'personhood' or who out of the totality of denizens, natives, and subjects of a territory are recognized as being citizens with


\textsuperscript{35} O.P.Gauba (2005), An Introduction to Political Theory, Macmillan India Ltd., Delhi, p. 269.

\textsuperscript{36} Ibid.

specific rights. Secondly, citizenship involves active capacities to influence politics and passive rights of existence under a legal system. Thirdly, citizenship rights are universalistic rights enacted into laws and implemented for all citizens, and not informal, un-enacted or special rights. Fourthly and lastly citizenship is a statement of equality; with rights and obligations being balanced within certain limits. In ancient citizenship, the citizenry is its own political master. Modern historians have made much of Aristotle’s famous phrase that in democracies the citizen is both ruler and ruled in turn.

Citizenship is something that one talks about the legal rights. There is a difference between legal and political rights. Legal right on one hand is largely related to the access to justice, and freedom of conscience. Kriegel rightly points that the rights to personal security include freedoms from government torture, the imposition of the death penalty and freedom to control your own body through contraception. The right to personal security ‘consist’ in a person’s legal and uninterrupted enjoyment of his life, his/her limbs, body, health and his/her reputation. Legal rights allow individuals to conduct their lives without interference from the state, other groups, and individuals. It obligates the state to protect the individual’s rights to personal security. The right to control one’s body is the ability to decide how one takes care of one’s body and mind and one’s health. Legal rights largely support or facilitate access to justice and rights that provide access to gain justice.

On the other hand the political rights focus on the four types of rights: personal political rights, organizational political rights, membership rights and the group self-determination rights. Firstly, personal political rights consist of voting in election for a multiplicity of competing candidates chosen through a democratic political process. Secondly, organizational political rights refer to the rights to the political parties, interest groups, and social movements to forms and take action in legislative forums, the courts and in the media. Thirdly, countries differ according to their propensity to grant membership to citizens within and outside of their borders. Naturalization refers to the procedures that an immigrant must go through in order to

40 See for detail in Aristotle’s Politics, 1283b.
41 See for detail in Kriegel, 1995 P. 40.
become a citizen. And fourthly, the right of a group to self-determination is not an individual right since one person cannot form a government. This is a group's right afforded to regional, ethnic, or racial groups who claim that they are a nation and should stand independently with some form of sovereignty. On the whole the liberal democracies score high on measures of legal and political rights but across categories differences exist with social democracies scoring highest and liberal democracies tending to score lowest. Norton argued that the citizenship varies most across different levels of government in federal system but much less so is more centralized countries.

Citizenship is membership in a society, community, (originally that of a city or town but now usually for a country) and carries with it rights to political participation; a person having such membership is a citizen. Citizenship status often implies some responsibilities and duties under social contract theory. It is largely co-terminus with nationality, although it is possible to have a nationality without being a citizen (i.e., be legally subject to a state and entitled to its protection without having rights of political participation in it); it is also possible to have political rights without being a national of a state. In most nations, a non-citizen is a non-national and called either a 'foreigner or an alien'. Citizenship, which is explained above, is the political right of an individual within a society. Thus, you can have a citizenship from one country and be a national of another country. One example might be as follows: A Cuban-American might be considered a national of Cuba due to his being born there, but he could also become an American citizen through naturalization. Nationality often derives either from place of birth (Currently used in few countries other than the United States) (i.e. jus soli) or parentage (i.e. jus sanguinis common in European Union member states such as the United Kingdom, Republic of Ireland, Germany, Italy etc.), or ethnicity (as in Israel). Citizenship derives from a legal relationship with a state. Citizenship can be lost, as in denaturalization, and gained, as in naturalization, or by marriage. The term Active Citizenship implies working towards the betterment of one's community through economic participation, public service, volunteer work,

---

and other such efforts to improve life for all citizens. In this vein, schools in England provide lessons in citizenship. In Wales the model used is personal and social. In the Republic of Ireland it is known as Civil, Social and Political Education (CSPE).

Discrimination and exclusion of certain groups due to their identity based on social origin, ethnic and religious background, race, colour, gender and nationality is common to several societies. It is well illustrated that the nature and forms of discrimination and social exclusion have undergone changes over time and space. While it has changed to fluid forms, practices of discrimination overwhelmingly exist in the social, economic, political and cultural spheres of every society, irrespective of the existence of legal safeguards and equal opportunity policies. This seeks to extend discussions to the changing nature and forms of discrimination and social exclusion, both in specific and comparative contexts.

Discrimination has multiple ramifications related to exclusion from economic entitlements, basic services and opportunities on one hand and humiliation, subordination, exploitation and denial of citizenship rights on the other. It is well entrenched that discrimination and social exclusion leads to widening of income inequalities, degree of poverty and deprivation by denying equal opportunities and access to resources and services.

Citizenship in India

Legal provisions relating to acquisition and termination of citizenship of India are contained in the Citizenship Act, 1955. Citizenship of India can be acquired by Birth, Decent, Registration, Naturalization, and Incorporation of territory, Termination, Renunciation, Acquisition of another country and by Deprivation.46

Citizenship by Birth

Every person born in India on or after the 26th January, 1950, is a citizen of India by birth except if at the time of his birth-

a. His father possesses such immunity from suits and legal process as is accorded to an envoy of a foreign sovereign power accredited to the President of India and is not a citizen of India; or

b. His father is an enemy alien and the birth occurs in a place other than under occupation by the enemy.

46 D.D, Basu (2004), The Introduction to the Constitution of India, Particularly the articles related to the Citizenship rights, Pp. 54-58.
Citizenship by Descent

A person born outside India on or after 26th January, 1950, but before the commencement of the Citizenship (Amendment) act, 1992, shall be a citizen of India by descent if his father is a citizen of India at the time of his birth; or (b) On or after such commencement, shall be a citizen of India by descent if either of his parents is a citizen of India at the time of his birth; Provided further if either of the parents of such a person referred to in clause (b) was a citizen of India by descent only, that person is not be a citizen of India by virtue of this section unless his birth is registered at an Indian Consulate within one year of its occurrence or the commencement of the Citizenship (amendment) act, 1992, whichever is later, or, with the permission of the Central Government, after the expiry of the said period; or Either of his parents is at the time of his birth, in service under a Government of India 47.

Citizenship by Registration

Subject to certain conditions and restrictions, the Central Government, in the Ministry of Home Affairs may, on application made in this behalf, register as a citizen of India any person who is not already such citizen and belongs to any of the following categories:

a. Persons of Indian origin who are ordinarily resident in India and have been so resident for five years immediately before making an application for registration. Prior to the coming into force of the Citizenship (amendment) Act, 1986 i.e. 1st July 1987, this period was six months.

b. Persons of Indian origin who are ordinarily resident in any country or place outside undivided India;

c. Persons who are or have been married to citizens of India and are ordinarily resident in India and have been so resident for five years immediately before making an application for registration. Prior to the citizenship (amendment) act, 1986 the clause read ‘women who are or have been married to citizens of India’.

d. Minor children of persons who are citizens of India and persons of full age and capacity who are citizens of a country specified in the first schedule of the citizenship Act, 1955

Citizenship by Naturalization

Where an application is made in the prescribed manner by any person of full age and capacity who is not a citizen of a country specified in the First Schedule- I for the grant of a certificate of a naturalization to him, the Central Government may, if satisfied that the applicant is qualified for naturalization under the provisions of the third schedule, grant to him a certificate of naturalization. Provided that, if in the opinion of the Central Government, the applicant is a person who has rendered distinguished services to the cause of science, philosophy, art, literature, world peace or human progress generally, it may waive all or any of the conditions specified in the third schedule of Citizenship Act 1955. The person to whom a certificate of naturalization is granted shall, on taking oath of allegiance in the form specified in the second schedule, be a citizen of India by naturalization as from the date on which that certificate is granted 48.

Citizenship by Incorporation of Territory

If any territory becomes a part of India, the Central Government, may by order notified in the official gazette, specify the persons who shall be citizens of India by reasons of their connection with that territory, and those persons shall be citizens of India as from the date to be specified in the order.

Termination

Citizenship is terminated either by renunciation or acquisition of citizenship of another country. For the purpose a person, who is also a citizen or national of another country of full age and capacity, can make a declaration renouncing his/her Indian citizenship before the prescribed authority in the prescribed manner. Once such a declaration is registered, a person ceases to be a citizen. If such a declaration was made during wartime, a war in which India is engaged, the registration of such a declaration can be withheld until the central government directs otherwise 49.

Renunciation of Citizenship

If any citizen of India of full age and capacity, who is also a citizen or national of another country, makes in the prescribed manner a declaration renouncing his Indian citizenship; the declaration shall be registered by the prescribed authority, and

upon such registration, that person shall cease to be a citizen of Indian. Provided that if any such declaration is made during any war in which India may be engaged, registration thereof shall be withheld until the Central Government otherwise directs. Where a person ceases to be a citizen of India every minor child of that person shall thereupon cease to be a citizen of India, provided that any such child may, within one year after attaining full age, make a declaration that he wishes to resume Indian citizenship and shall thereupon again become a citizen of India. For the purpose of this section any woman who is, or has been, married shall be deemed to be of full age acquisition of citizenship of another country. However, this does not apply to a citizen of India, during any war in which India may be engaged, voluntarily acquires the citizenship of another country, until the Central Government otherwise directs. If any question arises as to whether, when or how any person has acquired the citizenship of another country, it shall be determined by such authority, in such manner, and having regard to such rules of evidence, as may be prescribed in this behalf.

Deprivation

The Central Government under section 10 of the Indian Citizenship Act, 1955 deprives any citizen of Indian citizenship if it is satisfied that:

a. The registration or certificate of naturalization was obtained by means of fraud, false representation or concealment of any material fact; or

b. That citizen has shown himself by act or speech to be disloyal or disaffected towards the Constitution of India as by law established; or

c. That citizen has, during the war in which India may be engaged, unlawfully traded or communicated with an enemy or been engaged in or associated with, any business that was to his knowledge carried on in such manner as to assist any enemy in that war; or

d. That citizen has, within five years after registration or naturalization, been sentenced in any country to imprisonment for a term of not less than two years; or

e. That citizen has been ordinarily resident out of India for a continuous period of seven years, and during that period, has neither been at any time a student of any educational institution in a country outside India or in the service of a Government of India or of an International Organization of which India is a

50 D.D, Basu (2004), The Introduction to the Constitution of India, Particularly the articles related to the Citizenship rights, Pp. 54-58.
member, nor registered annually in the prescribed manner at an Indian consulate his intention to retain his citizenship of India.

The Central Government shall not deprive a person of citizenship unless it is satisfied that it is not conducive to the public good that person should continue to be a citizen of India.\textsuperscript{51}

**Constitutional Rights for Indian Citizens**

Fundamental rights are given only to the Indian citizens like Article 15, 16, 19. Some important posts are only for Indian citizens like President, Vice-President, Chief Justice and Judges of Supreme Court and High Court, Attorney General, Governor etc. and right for constituency and assembly elections. In that the Indian citizens are only allowed to be parliamentarian or member of legislative assemblies.\textsuperscript{52}

When it comes to the part of law, it is said that the law is a set of understanding rules and practices controlling the function and power of the government and its subsidiary machineries. Law can be distinguished from other social rules on four grounds. Firstly, as law is made by the government and thus reflects the will of the states, it takes precedence over all other norms and social rules. Secondly, law is compulsory, citizens are not allowed to choose which laws to obey and which to ignore because law is backed up by a system of coercion and punishment. Thirdly, law consists in published and recognized rules that have been enacted through a formal and usually public legislative process. Fourthly, law is generally recognized as binding upon those to whom it applies, law thus embodies moral claims, implying that legal rules should be obeyed.\textsuperscript{53}

However, it must be acknowledged that in the absence of laws, the court of India has played a commendable role in protecting the rights of the migrants. One of the most predominant court precedents is the 1995 Supreme Court ruling in the Chakmas vs. the State of Arunachal Pradesh. The Supreme Court ruled that Article 21 of the constitution- Right to life and liberty is available to all the persons living in


\textsuperscript{52} D.D. Basu (2004), The Introduction to the Constitution of India, Particularly the articles related to the Citizenship rights, Pp. 54-58.

\textsuperscript{53} Ibid.
India and that definition to refugees as well as several refugee lawyers in the country
land laud the role of the courts that have interpreted Article 14 and 19\textsuperscript{54}.

**Citizenship after Amendments**

The Constitution of India provides for a single citizenship for the entire
country. The provisions relating to citizenship at the commencement of the
Constitution are contained in Articles 5 to 11 in Part II of the Constitution of India.
Relevant Indian Legislation (RIL) is the Citizenship Act 1955, which has been
amended by the Citizenship (amendment) Act 1986, the Citizenship (amendment) Act
1992, the Citizenship (amendment) Act 2003, and the Citizenship (amendment)
Ordinance 2005. The Citizenship (amendment) Act 2003 received the assent of the
President of India on 7 January 2004 and came into force on 3 December 2004. The
Citizenship (amendment) Ordinance 2005 was promulgated by the President of India
and came into force on 28 June 2005. Any person born in India on or after 26 January
1950 but prior to the commencement of the 1986 Act on 1 July 1987 was a citizen of
India by birth. A person born in India on or after 1 July 1987 was a citizen of India if
either parent was a citizen of India at the time of the birth. Those born in India on or
after 3 December 2004 are considered citizens of India only if both of their parents
are citizens of India or if one parent is a citizen of India and the other is not an illegal
migrant at the time of their birth. Persons born outside India on or after 26 January
1950 but before 10 December 1992 are citizens of India by descent if their father was
a citizen of India at the time of their birth. Person born outside India on or after 10
December 1992 are considered as citizens of India if either of their parents is a citizen
of India at the time of their birth. From 3 December 2004 onwards, persons born
outside of India shall not be considered citizens of India unless their birth is registered
at an Indian consulate within one year of the date of birth. In certain circumstances it
is possible to register after 1 year with the permission of the Central Government. The
application for registration of the birth of a minor child must be made to an Indian
consulate and must be accompanied by an undertaking in writing from the parents of
such minor child that he or she does not hold the passport of another country\textsuperscript{55}.

\textsuperscript{54} Judgment of Supreme Court of India (1996), Original Civil Jurisdiction, Writ Petition (Civil) No. 720 of
1995, Between NHRC versus State of Arunachal Pradesh, 9\textsuperscript{th} January, New Delhi.

\textsuperscript{55} Valerian, Rodrigues (2008), Citizenship and the Indian Constitution in edited book by Rajiv Bhargava
Citizenship (Amendment) Act 1955

The position which has to be focused on the provisions of the Constitution on citizenship follows like this⁵⁶:

**Article- 5(1)** Suggest that those who migrated to India before the commencement of the Constitution (1950) are liable to get citizenship rights.

**Article- 5(a)** A person born as well as domicile in the territory of India irrespective of the nationality of his parents.

**Article- 5(b)** A person domicile in the 'territory of India', either of whose parents was born in the territory of India irrespective of the nationality of his parents or the place of birth of such person.

**Article- 5(c)** A person who or whose father or mother was not born in India, but who migrated before the commencement of Indian constitution.

**Article- 6 Migrants from Pakistan:** Provides for citizenship rights of migrants from Pakistan before the commencement of the constitution.

**Article- 7** Makes special provisions regarding the citizenship rights of persons who migrated to Pakistan after March, 1, 1947 but return to India subsequently⁵⁷.

**Article- 8** Provides that any person who or either whose parents or grand parents were born in India as defined in the Government of India Act 1955 and who is ordinarily residing in any country outside India shall be deemed to be a citizen of India if he has been registered as an Indian citizen by diplomatic or consular representative of India in that country on an application made by him in the prescribed form to such diplomatic or consular representative, whether before or after the commencement of the constitution (26 January, 1950, Act of 1955).

As already said constitution makers did not give complete code of nationality and left modification and regulation of citizenship rights to the parliament. In accordance with this provision of the constitution that in 1955 Indian Citizenship Act (ICA) was passed which extended citizenship rights to certain categories of persons and the way it could be renounced⁵⁸.

---

⁵⁶ D.D, Basu (2004), The Introduction to the Constitution of India, Particularly the articles related to the Citizenship rights, Pp. 54-58.
⁵⁸ D.D, Basu (2004), The Introduction to the Constitution of India, Particularly the articles related to the Citizenship rights, Pp. 54-58.
i. Every person who was born in India on or before 26th January 1950 shall be Indian citizen by birth but children born to foreign diplomats posted in India are not entitled to Indian citizenship. By an Act passed in 1986 it has been provided that a person born in India can become its citizen provided if at the time of his birth either of his parents was a citizen of India.

ii. If a person is born outside undivided India if either of his/her parents is a citizen of India or deemed to be citizen of India on 26th January, 1950 shall be Indian citizen by descent only.

iii. Following categories of person can become Indian citizen provided they get themselves registered with the competent authority appointed by the government for purpose:

   a) A person of Indian origin but not an Indian citizen and residing outside India.
   b) Women married to an Indian husband.
   c) Minor children of Indian citizen parents.
   d) Persons belonging to common wealth countries.

_Citizenship Amendment Act of 1986_

Accordingly the provision under amended act is given below.

i. Every person in India, if wants to be registered as an Indian citizen that they have to show their domicile certificate of five years. Earlier it was six months duration only.

ii. No one can acquire citizenship through birth only. Only those people can have citizenship of India either of whose parents was citizen of India at the time of his birth.

iii. On the basis of naturalization for foreigners they may become an Indian citizen after continuously residing in India for ten years. Earlier it was five years duration.

iv. After the 1986 citizenship Amendment Act there is a provision for acquisition of citizenship for an Indian man.

_Citizenship Amendment Act of 1992_

According to the amendment bill the child who is born outside of India and if his mother belongs to Indian citizenship. Before this any child born outside of India could acquire citizenship only if his father was a citizen of India.
Dual Citizenship Amendment Bill of 2005

The parliament has passed a bill on dual citizenship for Persons of Indian Origin (PIO) living abroad. This was promised at the Pravasi Bhartiya Diwas (PBD). The citizenship (amendment) bill 2005 will help India to expand its horizon and approach person of Indian origin to contribute to India’s growth and development. The legislation would simplify the procedure for acquiring Indian citizenship by PIO’s especially grown-up children of former Indian citizens who where living abroad and had required citizenship of other countries. It would help such persons to contribute to India’s development. The bill provides for overseas citizenship of India to PIO’s in sixteen countries who have acquired citizenship of those countries. It would also enable Indians who intend to acquire citizenship of other countries to retain the overseas Indian citizenship. This was not possible earlier and has been a long standing demand of PIO’s.

Citizenship (Amendment) Ordinance 2005

The Citizenship (Amendment) Act 2003 received the assent of the President of India on 7 January 2004 and came into force on 3 December 2004. The Citizenship (Amendment) Ordinance 2005 was promulgated by the President of India and came into force on 28 June 2005. Apart from this the Indira-Mujib Agreement between India and Bangladesh follows like that, Bangladeshis those who migrated to India before 1971 and got the refugee status are liable to get the citizenship rights according to the agreement. From 1st July, 1987 i.e. the date of enforcement of the Citizenship (amendment) Act, 1986, except as provided at 9a & 9b above, every person born in India on or after 26th January, 1950 but before the commencement of the act and on or after such commencement and either of whose parents a citizen in India at the time of his birth, shall be citizen of India by birth.

Chakmas and the Question of Citizenship

Citizenship commission received representations from the Peoples Union for Civil Liberties (PUCL) and Amnesty International regarding the plight of Chakma refugees living in Arunachal Pradesh. It was stated that these groups, comprising respectively Buddhists, fed for fear of persecution on grounds of their religion from the CHT, in what was formerly East Pakistan, between the years 1964-1971.

59 Ibid.
Originally, welcomed to India and to parts of NEFA, which today form Arunachal Pradesh, they were now increasingly being harassed and threatened in that State. When some of them tried to flee to Assam, it was alleged that the Government of Assam threatened to shoot them if they did so. Allegations regarding threats to the life and property of Chakmas were also conveyed directly to the Chairperson of the Commission through representatives of their communities who had traveled to Delhi from Arunachal Pradesh. The Commission, in a communication to the State Government on 29 September 1994 stated that it was the obligation of that government to accord protection to the person and property of the members of the two communities and to ensure that their human rights were not violated. In addition, the commission called upon the State Government to take prompt action to restore normalcy. It also urged the MHA to ensure prompt and necessary action by the State Government.

The 'Committee for Citizenship' of the Chakmas in Arunachal Pradesh also sent a representation to the commission asserting that while the Chakma communities settled in other Northeastern states of India were enjoying the full fledged rights of Indian Citizenship, those settled in Arunachal Pradesh were not being granted such citizenship because of the State Government's adamant opposition to the Central Government's policies in this respect. In consequence, the committee stated, human rights abuses were being constantly perpetrated against the Chakmas in Arunachal Pradesh. In respect of this complaint, too, the commission called for reports from the State Government and the Home Ministry. The State Government stated that there is no threat to the life and property of members of the two communities in question and that an adequate police force has been deployed to protect them. The Home Ministry reported that the State Government had been advised to ensure normalcy in the law and order situation as also to supply needed essential commodities and medical facilities to the Chakma. As regards the granting of citizenship to them, the Home Ministry reported that the matter was under consideration, in consultation with the State Government.

62 Ibid.
The chairperson addressed a further letter on 7 December 1994 to the Union Home Minister (UHM) and also to the Chief Minister (CM), Arunachal Pradesh, stressing the need to provide adequate protection to the Chakmas with a view not only towards instilling a sense of safety and security in their minds but also in order to ensure that their human rights were fully respected\textsuperscript{63}.

The committee noted that the Chakmas have demanded citizenship, stoppage of their harassment, lifting of ban on their employment, allowing admission to schools, providing medical facilities, trade and business facilities, restoration of ration cards and compensation to the victims of atrocities\textsuperscript{64}. Contention of the representatives of non-Chakmas and the State Government of Arunachal Pradesh that the presence of Chakmas in Arunachal Pradesh is a threat to their survival, their culture, tradition and peace and that the Chakmas should be evicted from Arunachal Pradesh\textsuperscript{65}.

The committee noted the following observations of the Supreme Court in the case of National Human Right Commission vs. State of Arunachal Pradesh and Union of India (Judgment delivered on 9.1.1996). There is no doubt that Chakmas who migrated from East Pakistan (now Bangladesh) in 1964 first settled down in the State of Assam and other states and shifted to areas which now fall within the State of Arunachal Pradesh\textsuperscript{66}. They have settled there for the last five decades and raised their families in the said state. Their children have married and they too have had children. Thus, a large number of them were born in the State itself. If a person satisfies the requirements of Section 5 of the Citizenship Act, he/she can be registered as a citizen of India\textsuperscript{67}. The procedure to be followed in processing such requests has been outlined in part II of the Rules. According to these Rules, application for registration has to be made in the prescribed form, duly affirmed, to the collector within whose jurisdiction he resides. Under Rule 9, the collector is expected to transmit every application under Section 5 (1) (a) of the Act to the Central Government. The collector has merely to receive the application and forward it to the Central Government.

\textsuperscript{64} Ibid.
\textsuperscript{65} Ibid.
\textsuperscript{67} See full detail on the provisions of Citizenship Rights in the Constitution of India, Government of India.
The Deputy Commissioner or Collector, who receives the application, should be directed to forward the same to the Central Government to enable it to decide the request on merit. The Supreme Court of India has further added that no person can be deprived of his life or personal liberty except according to procedure established by law. Thus, the State is bound to protect the life and liberty of every human being, he a citizen or otherwise. The state is duty bound to protect the threatened group and if it fails to do so, it will fail to perform its Constitutional as well as statutory obligations. The State Government must act impartially and carry out its legal obligations to safeguard the life, health and well-being of Chakmas residing in the state without being inhibited by local politics. The Supreme Court of India, accordingly, directed that:

i. The State of Arunachal Pradesh shall ensure that the life and personal liberty of each and every Chakma residing within the state shall be protected and any attempt to forcibly evict or drive them out of the state by organized groups shall be repelled.

ii. The Chakmas shall not be evicted from their homes and shall not be denied domestic life and comfort therein except in accordance with law.

iii. The quit notices and ultimatums issued by the AAPSU activists and any other group which tantamount to threats to the life and liberty of each and every Chakma should be dealt with by the State of Arunachal Pradesh in accordance with law.

iv. The application made for registration as citizen of India by the Chakma shall be forwarded by the Collector or the Deputy Commissioner who receives then under the relevant rules with or without enquiry, as the case may be to the Central Government for its consideration in accordance with law.

The Committee after carefully considering all the facts and the whole issue has come to the conclusion that Arunachal Pradesh is the only state in the north east which has three International boundaries (with Bhutan, China and Myanmar), which is strategically very important and which is also relatively calm and insurgency free. It is the sincere desire of the committee that a reasonable solution is found out to the problems and justice is done to all. The committee feels that the spirit of the Indira-Mujib Accord as well as the judgment of the Supreme Court of India in the matter may be made applicable to all the affected states for the solution to the problem. As
per the Accord, all those Chakmas who came to India prior to 25.3.1971 are to be granted Indian citizenship.

The committee, therefore, recommends that the Chakmas of Arunachal Pradesh who came there prior to 25.3.1971 be granted Indian citizenship. The committee also recommended that those Chakmas who have been born in India should also be considered for Indian citizenship. The committee further recommended that the fate of those Chakmas who came to the State after 25.3.1971 be discussed and decided by the Central Government and State Government Jointly. The committee also recommends that all the old applications of Chakmas for citizenship which have either been rejected or withheld by Deputy Commissioners or the State Deputy Commissioner or the State Government continue to block the forwarding of such applications to Central Government, the Central Government may consider to incorporate necessary provision in the Rules (or the Act if so required) whereby it could directly receive, consider and decide the application for citizenship in the case of Chakmas of Arunachal Pradesh. The committee also recommended that Chakmas be also considered for granting them the status of Scheduled Tribes at the time of granting the citizenship. The committee would like to earnestly urge upon the Central Government and State Government to ensure that until amicable solution is arrived at, the Chakmas are allowed to stay in Arunachal Pradesh with full protection and safety, honour and dignity.

In light of the previous discussion of non-refoulement under Article 21 of the Constitution, it makes sense to re-examine the arguments of Saxena and Vijayakumar. Their analyses rely heavily upon a 1996 court case, NHRC vs. State of Arunachal Pradesh, which they claim establishes definitively the right of non-refoulement for refugees. The insights from the foregoing discussion, however, illustrate that non-refoulement retains a dubious status under Indian law. The case involved a dispute between Chakma refugees residing in Arunachal Pradesh and a group of hostile locals (AAPSU). The Chakma people applied for citizenship but local officials prevented their applications from reaching the federal government; despite living in India for over 45 years, some of the Chakmas remained, officially speaking, non-citizens. As the Chakma population skyrocketed, the AAPSU issued ‘quit orders’, demanding that

---


69 Ibid.
the Chakma leave or suffer severe harm. Arunachal Pradesh formulated plans to move the Chakmas to another state, even though some neighboring states threatened to kill the Chakmas upon entry. Meanwhile the Ministry of Home Affairs was attempting to confer blanket citizenship and demanded that the state provide security at their present location. Finally, the NHRC filed a petition in court demanding that Arunachal Pradesh halt the Chakmas forced migration and protect them from harm.

Fortunately for the Chakmas, the Supreme Court ruled that they could not be moved until the federal government had ruled on their citizenship, and that, in the meanwhile, the state had an obligation to protect them from violence. Saxena and Vijayakumar described the case as a "landmark decision by the Supreme Court with regard to refugee protection" and read into the court's decision a right of non-refoulement under Article 21 of the Constitution. However, a closer analysis reveals that the court never reached such a monumental decision. First, non-refoulement was not guaranteed by any institutional structure. Due to its limited funding, the UNHCR could not possibly provide assistance to the 60,000 Chakma refugees residing in Arunachal Pradesh. UNHCR would have to quadruple its current capacity in order to serve those Chakmas. And while the NHRC truly proved its enormous worth in the case, they did not expand the rights of the Chakmas, but merely assisted them in taking their case to court and petitioning the state and federal governments. As this case reveals, non-refoulement is not guaranteed by India's institutional structures for dealing with refugees. Second, the opinion does not reveal whether the rights involved were procedural or substantive. At first glance, it appears that the court is preserving

---

71 It has been reported that it was continually foiled by the state and refused to forward the naturalization of citizenship applications.
72 NHRC Vs State of Arunachal Pradesh & Anr (720/1995) and the present plight of the Chakmas of Arunachal Pradesh 16th December 2002, Committee for Citizenship Rights of the Chakmas of Arunachal Pradesh.
73 D.D, Basu (2004), The Introduction to the Constitution of India, Particularly the articles related to the Citizenship rights, Pp. 54-58.
substantive rights. Namely, the court seems to protect freedom from involuntary movement and the right to life (in defending the Chakmas from the AAPSU)\(^75\).

However, the court is certainly not preserving freedom from involuntary movement (a right provided only to citizens under Article 19); since they expressly permit non-citizen Chakmas to be moved by the state after they are given a valid opportunity to apply for citizenship. As for the right to life, the ministry of home affairs demanded that the state government provide protection. Therefore, any contrary policy pursued by the state government would not be ‘according to a procedure established by law’ since that state policy would violate federal law. If the state does not follow a proper procedure in carrying out its policy, then it violates the procedural aspect of Article 21, not the substantive aspect\(^76\). Furthermore, the court examined in-depth the procedural violations of state officials in refusing to forward citizenship applications to the federal government. In essence, if the Chakmas were being forced to migrate and threatened due to the state’s procedural violations of immigration law, that would amount to a ‘deprivation of life or personal liberty’ that resulted from a procedure not established by law. Third, NHRC vs. State of Arunachal Pradesh may have really been concerned with protecting citizens rather than non-citizens. The court recognized that many of the Chakmas had lived inside India for decades, and had only been denied citizenship because a state official (illegally) refused to forward their naturalization applications to the federal government\(^77\).

Therefore, the Supreme Court of India may have been protecting those who were, for all practical purposes, citizens of India, but who had not been officially recognized as citizens yet. As discussed earlier, the rights of citizens are vastly different from the rights of refugees. If the court’s holding was actually based on the rights of ‘equitable’ citizens, then the case itself reveals nothing about the rights of non-citizens or refugees. Fourth, by its holding, the court was asserting the ‘primacy of the interest of the nation and the security of the state’\(^78\) not denying it. The national government stood firmly behind the rights of the Chakmas and attempted to prevent

\(^{75}\) NHRC Vs State of Arunachal Pradesh & Anr (720/1995) and the present plight of the Chakmas of Arunachal Pradesh16th December 2002 Committee for Citizenship Rights of the Chakmas of Arunachal Pradesh.


\(^{77}\) Committee for Citizenship Rights of the Arunachal Pradesh (CCRAP), A Report Submitted by Subimal Bikash Chakma (President, CCRCP) to the NHRC on 12th December, 1997.

\(^{78}\) Ibid.
an interstate feud (or quite possibly an international feud) over which state should house the refugees. There could not have been a stronger example of the nation asserting its interest and protecting its own internal and external security.\(^{79}\)

In a typical case of refugee non-refoulement, one would expect to weigh the interest of the immigration authority (i.e., the federal government) against the rights of the individual (i.e., the refugee), but that did not take place. In this case, those two interests were aligned. Therefore, this case did not prove that the individual, non-citizen’s right to life outweighs the interest of the nation. Saxena and Vijayakumar relied heavily on NHRC vs. State of Arunachal Pradesh to overcome doubts about non-refoulement under the Indian Constitution. Unfortunately, that case does not overturn the wealth of evidence to the contrary. India’s lack of non-refoulement rights, however, might be solved by accepting one of many international agreements.\(^{80}\)

India was born alongside the modern regime of international law at the inception of the post-war era. As a result, many of the basic tenets of international law are mirrored in the Indian Constitution, leading to one of the most progressive outlooks on constitutional rights among the world’s major nations. Many of the basic principles of the UN and its UDHR can likewise be found in the Fundamental Rights of the Constitution of India. While India’s Constitution was founded with a progressive set of human rights, however, its ongoing relationship with international law falls in line with more traditional approaches.\(^{81}\)

Relying on Article 51, the basic argument is that the principle of non-refoulement has been incorporated into domestic law via the Constitution. Their arguments fall short in several ways. First, non-refoulement has a very weak basis in custom. Second, India has not signed any agreement that requires non-refoulement and therefore is not bound by any treaty-based international obligation. Third, customary international law has never been incorporated into Indian law under Article 51. Finally, even if the courts accepted customary international law as domestic law, it would not do so in the context of non-refoulement.

---


\(^{80}\) NHRC Vs State of Arunachal Pradesh & Anr (720/1995) and the present plight of the Chakmas of Arunachal Pradesh16th December 2002 Committee for Citizenship Rights of the Chakmas of Arunachal Pradesh.

\(^{81}\) Ibid.
Rights extended to Chakmas

The Chakmas who are born between 1964 and 1st July, 1986 and are citizens by birth under the Citizenship Act 1955, allow them to reiterate that Citizenship Act of 1955 is absolutely clear that those who are born prior to 1 July 1986 are eligible for citizenship unless;

(a) His father possesses such immunity from suits or legal process as is accorded to an envoy of a foreign sovereign power accredited to the President of India and is not a citizen of India; or

(b) His father is an enemy alien and the birth occurs in a place then under occupation of the enemy” as provided under Section 3.2 of the Citizenship Act, 1955.82

As per my study is concerned I do not see Chakmas as an illegal migrants. Indian is a country which has a completely ad hoc system of refugee determination, deportation and protection. Though India plays host to approximately 332,300 refugees83 and is the second largest refugee-receiving country in South Asia, after Pakistan. India’s multi-ethnic, multi-lingual society has made it an attractive destination for a lot of asylum-seekers.

But the enormity of the situation is discussed only with regard to the political rhetoric on ‘illegal migrants’ who, the government claims, have become an economic burden on the country and need to be deported. This claim works as a strategy for playing the ethnicity card, to create vote-banks before the elections. At other times, people rejoice when census figures show that the number of ‘illegal migrants’ has actually gone down. How the government deals with the ‘illegal migrants’ and the process of their determination and deportation is seldom questioned. Not by the media, not even by civil society84.

The government officially recognizes only Tibetan and Sri Lankan Tamil refugees and provides them state protection. For all other refugee populations the Burmese Chin, Chakmas and Rohingyas from Bangladesh, Sudanese and Afghans, etc it’s left to the UNHCR in New Delhi to administer operations to provide refugee identity certificates to those belonging to communities/nationalities not recognized by the government. So, people fleeing persecution and ending up in India are left at the mercy of the government’s ad hoc policies and the limited operations of the UNHCR.

82 D.D, Basu (2004), The Introduction to the Constitution of India, Particularly the articles related to the Citizenship rights, Pp. 54-58.
84 Sircar, Oishik (2006), Refugees are not illegal migrants, Info Change News & Features, May.
All this, despite a Supreme Court judgment (NHRC vs. State of Arunachal Pradesh) that categorically states that all 'refugees' within Indian territory are guaranteed the right to life and personal liberty enshrined under Article 21 of the Constitution. This judgment, passed in the year 1996, has not yet prompted the Indian government to accede to the 1951 UN Refugees Convention. According to the government, the convention is Eurocentric in nature and does not reflect the special needs of the countries of the Global South. This, however, has not prompted India to take proactive steps towards a national law on refugee protection or to initiate a dialogue to develop a regional refugee protection regime. In fact, the country's fears of an economic burden created by illegal migrants, and also the security threat posed by 'terrorists' could actually be allayed by the setting up of a national or regional refugee protection regime.

Although the UNHCR has done some commendable work in the country, in the absence of any national law, India's ad hoc refugee policy curtails a lot of its work. In India, the UNHCR provides only de facto protection to its mandate refugees and relies on the tolerance and goodwill of the Indian government. The government only partially recognizes the UNHCR mandate; mandate refugees therefore have no formal recognition and are subject to the same municipal laws as foreigners. This lack of formal status weakens the UNHCR's role in advocacy and intervention for refugee rights. This situation is mirrored in other South Asian countries that have not acceded to the 1951 convention or the 1967 protocol, thus undermining the international legal regime for the protection of refugees. Though the Indian Government proceeds on the assumption that India has a strong humanitarian tradition of hosting refugees, which was present even before the drafting of the convention, lack of accession or the development of a national or regional refugee legal regime is cause for concern. The absence of national laws has meant that refugees are dependent on the benevolence of the state rather than on a regime of rights to reconstruct their lives in dignity. A consistent legal framework is vital for the

86 Ibid.
88 Ibid.
prevention of political *ad hocism*, which often translates into forcible repatriation for refugees.89

The process of developing an *asylum law* regime in South Asia must include governments, NGOs and protection agencies alike because it is important to take a holistic view of this phenomenon. Governments must be more concerned about the protection of people facing persecution, rather than thinking about how a refugee regime might open the floodgates to illegal immigrants.90 Along with advocating and campaigning for the establishment of a national/regional *asylum law* regime, civil society institutions must urge states that are not signatories to other international human rights law instruments to accede to them and also press those states that have acceded but have not made enabling legislation to do so.

The condition of Chakmas in the Indian state of Arunachal Pradesh is worse than rest of the community as a whole. A stay in India about more than five decades, a bilateral agreement and the revised citizenship act of the country have not been enough to secure the life, liberty and livelihood. The intervention of Supreme Court of India, NHRC and some NGO’s could not rescue them from their statelessness. The political calculations of the elite settlers, coalition defection politics, strategic choices in security policies and the rising xenophobia have marginalized humanitarian considerations. Due to the lack and absence of proper policy, laws and well defined refugee protection regime in India in particular and South Asia in general continue to make shelter seeking people as vulnerable.

---


90 Ibid.