16

INTERNATIONAL LAW

Manoj Kumar Sinha[*]

I INTRODUCTION

THE RATIONALE of this survey was to look at how the Supreme Court and high courts applied international law in some notable cases decided by the courts in 2021. The courts have shown through a number of landmark judgments that they are not opposed to interpreting and applying international law, if the terms of international treaties are compatible with the Indian Constitution. The cases discussed below reflect the courts' use of relevant international treaties in delivering judgements has expanded dramatically over time. The trend is discernible from these judgments delivered in the year 2021 and the same may be expected to continue in the coming years. It is important to note that the Indian judiciary's attitude to the implementation of international law might be characterised as constructive and proactive. The decisions clearly demonstrate that courts are not shy of applying international law to matters where it is essential.

II APPROACH OF THE SUPREME COURT OF INDIA

In January 2021, a three-judge bench of the court in *Rajeev Suri* v. *Union of India*[1] cleared the Central Vista Redevelopment Project. This politically significant project involved redeveloping Delhi's Central Vista area and constructing a new building for Parliament. A group of individuals had challenged the project in late 2019, claiming that the Union Government had rushed in obtaining regulatory clearances, circumvented scrutiny in monetary and environmental matters and failed to consult the public. They called for heightened judicial scrutiny of the permissibility of the project. They argued that the challenge was premised not just on statutory provisions but on the principles of participatory democracy.

Authoring the majority judgment, Khanwilkar J., said that the court cannot step into the shoes of policymakers. The role of the court is well defined, and it is the government alone that may decide the merits of a policy. The court cannot examine the validity of a policy decision, and can only intervene when there is a violation of constitutional principles. In this case, the government had sought the necessary

* Director Indian Law Institute

1 *Rajeev Suri* v. *Union of India* decided on Jan. 5, 2021, Transferred Case (CIVIL) No. 229 of 2020.

approvals and no constitutional principles had been violated. In this regard, the court opined that the principle of sustainable development and precautionary principle need to be understood in a proper context. The expression "sustainable development" incorporates a wide meaning within its fold. It contemplates that development ought to be sustainable with the idea of preservation of natural environment for present and future generations. It would not be without significance to note that sustainable development is indeed a principle of development – it posits controlled development. The primary requirement underlying this principle is to ensure that every development work is sustainable; and this requirement of sustainability demands that the first attempt of every agency enforcing environmental rule of law in the country ought to be to alleviate environmental concerns by proper mitigating measures. The future generations have an equal stake in the environment and development. They are as much entitled to a developed society as they are to an environmentally secure society. Through the United Nations Declaration on the Right to Development, 1986, the United Nations has given express recognition to a right to development as an important human right. Article 1 of the Declaration defines this right as, "the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."

The right to development, thus, is intrinsically connected to the preservance of a dignified life. It is not limited to the idea of infrastructural development, rather, it entails human development as the basis of all development. The jurisprudence in environmental matters must acknowledge that there is immense inter-dependence between right to development and right to natural environment. The precautionary principle duly mandates that all agencies of the state, including courts, must make their best endeavour to ensure that precaution is instilled in the process of development. The very requirement of prior environmental clearance is born out of this need for precaution. It is a manifestation of the precautionary principle in India and if development work is carried out in furtherance of prior environmental clearance and such environmental clearance is not vitiated by illegality, it would be a case of proper adherence with the precautionary principle. In matters of balancing between competing environmental and development concerns, the court has to be project-specific. In environmental matters, even one fact here or there may have the effect of attributing a totally distinct character to the project and accordingly, the scope of judicial review may vary.

They must always look for a careful balance when two equally relevant interests compete with each other. The task may not be easy, but is the only reasonable recourse. For the proper application of these principles, the first and foremost thing to be kept in mind is the nature of the project. In the present case, the subject project is an independent building and construction project wherein one-time construction activity is to be carried out. It is not a perpetual or continuous activity like a running industry. It is absolutely incomprehensible to accept that a project of this nature would be unsustainable with the needs and aspirations of future generations. Furthermore, the

increase in footprint is not shown to be substantial and the inclusion of new members of Parliament after the delimitation exercise is anyway going to lead to an inevitable increase in footprint (floating though) that cannot be countenanced as a concern here. Therefore, upon a thorough examination, the court declined to interfere in the grant of environmental clearance. The expertise developed by the (EAC) cannot be undermined in a light manner and as noted above, due deference must be accorded to expert agencies when their decisions do not attract the taint of legal unjustness.

Crucially, from April 2021 onwards, the court began to involve itself more closely with policy matters. What marked this shift was the second wave of the pandemic, with the court exercising its *suo moto* powers more frequently to provide relief. The court took *suo moto* cognisance of the quickly escalating health crisis, examining the Centre's policies on drug pricing, vaccinations and availability of oxygen. On a few occasions, the court ordered the Union to clarify its policies on these issues. It remains to be seen in the coming year if the court shall continue to play a more proactive role regarding policy matters or revert to deferring to the executive in these matters.

The petitioners in *Mohammad Salimullah* v. *Union of India,*[2] Rohingya refugees, sought the release of detained Rohingya refugees in Jammu who were facing deportation. The Supreme Court allowed deportation of the refugees, holding that the right against deportation is concomitant to rights under article 19(1)(e).

In March 2021, several newspaper reports indicated that about 150--170 Rohingya refugees, ¬detained in a jail in Jammu were facing deportation back to Myanmar. This was done in line with a 2017 circular issued by the Home Ministry to all state governments/Union Territories, which advised them to initiate deportation processes against refugees housed in various camps across the country. The petitioners, who were themselves Rohingya refugees, sought, through an interlocutory application, release of the detained Rohingya refugees and a direction to the government to not deport them. The petitioners argued that despite India not being a signatory to the 1951 Refugee Convention, the principle of *non-refoulement* is a part of the right guaranteed under article 21 of the Constitution.

The Supreme Court dismissed the plea and ordered that the detained refugees be deported, following proper procedure. The court stated that, *"the right not to be deported is ancillary or concomitant to the right to reside or settle in any part of the territory of India guaranteed under article 19(1)(e)."* (paragraph 13), implying that India is not bound by the principle of *non-refoulement*. It also acknowledged the government's concerns that refugees posed threats to internal security and would lead to increase in illegal immigration.

While the Supreme Court's decision can be understood as implying that the principle of *non-refoulement* is not a part of article 21, this was not explicitly stated in the court's order. So, it would be incorrect to say that the present case lays down an authoritative position of law with respect to *non-refoulement* and article 21. The court's decision is only an interlocutory order, and therefore should not be considered as

2 *Mohammad Salimullah* v. *Union of India*, W.P. No. 793 of 2017.

laying down a ratio, as was also correctly noted by the High Court of Manipur in *Nandita Haksar* v. *State of Manipur.*[3] The issue of non-refoulement is a substantial question of law, and should be decided by a proper Constitution Bench. The petitioners' arguments of article 21 and *non-refoulement* amounted to a substantial question of law, which should have been referred to a Constitution Bench in line with article 145(3). Instead, it was determined by a division bench in a mere interlocutory order. The court locates the right to not be deported within article 19(1)(e), a misinterpretation of the petitioners' arguments. The petitioners did not argue for a total right against deportation, they argued that that the refugees had a right not to be deported to a country accused of genocide against them. Deporting them would violate their right to life under Article 21, which is guaranteed to all persons.

Further, the court acknowledged that, *"National Courts can draw inspiration from International Conventions/Treaties, so long as they are not in conflict with the municipal law."* but in its order, it referred to no such sources of law. Nothing in Indian law contravenes the principle of *non-refoulement*, and therefore, by the court's own reasoning, it had the leeway to read *non-refoulement* into Indian law which it did not do. The court disregarded the fact that other international treaties that India is a party to, such as the International Covenant on Civil and Political Rights (ICCPR), encapsulate the principle of *non-refoulement* and will stand breached if the refugees are deported. Such a breach would also violate article 51 of the Constitution, which calls for honouring international treaty obligations.

By disregarding international conventions, the Supreme Court also contradicted its own judgement in *Vishakha* v. *State of Rajasthan,*[4] wherein it had held that international conventions that are consistent with fundamental rights must be read into the Constitution. The decision also represents a break from several high court judgements that have read *non-refoulement* into article 21. The High Court of Gujarat in *Ktaer Abbas Habib Al Qutaifi* v. *Union of India*[5] and the High Court of Delhi in *Dongh Lian Kham* v. *Union of India,*[6] have both held *non-refoulement* to be a part of article 21. Both cases involved refugees from different nations seeking protection against deportation.

The court's acceptance of the national security argument is also flawed and stands in contrast to the High Court of Manipur treatment of a similar argument advanced before it in *Nandita Haksar.*[7] Unlike the present case, in Nandita Haksar, the High Court of Manipur concluded that the petitioners, Myanmarese refugees seeking safe passage to UNHCR, represented no threat to national security. In order to reach this conclusion, the court examined several documents of the petitioners, noting the circumstances under which they had sought refuge in India. However, in

3 W.P.(Cr.) No.6 of 2021,decided on May 30, 2021.

4 AIR 1997 SC 3011.

5 1999 Cri LJ 919.

6 WP(CRL) No.1884/2015, In the High Court of Delhi, Decision of 21December 2015.

7 Haksar, *supra*, note 3.

the present case, the Supreme Court undertook no such examination and seems to have relied on the government's unsubstantiated arguments.

The case *Latorre* v. *Union of India*,[8] arose out of an incident in 2012 in which two fishers, Valantine Jelestine and Ajeesh Pink, fishing off the coast of Kerala on the Indian-registered boat *St Antony*, were fired on from a passing Italian ship, the *MV Enrica Lexie*, and killed the two Italian mariners identified as the shooters were indicted for murder and other offences. The petitioners filed writ petition under article 32 of the Constitution of India before this court seeking directions to the Union of India to take all steps to secure the interests of the two mariners. The Republic of Italy made an *ex gratia* payment of compensation to the legal heirs of the deceased persons in April 2012. This court also passed an order in May 2012 allowing the vessel to sail away, subject to certain terms and conditions, along with all 24 crew members.

The petitioners argued that India and Italy, having signed and ratified the 1982 United Nations Convention on the Law of the Sea (UNCLOS), had agreed to settle the dispute concerning the incident in question in terms of the binding dispute resolution mechanism provided under Annex VII of UNCLOS. In consequence of the Provisional Measures order dated August 24, 2015 passed by the International Tribunal for the Law of the Sea (ITLOS) requiring both Italy and India to suspend all court proceedings, this Court stayed all pending matters. The arbitral tribunal constituted under Annex VII of the UNCLOS and the tribunal delivered its award on May 21, 2020, which recorded the Republic of Italy's commitment to resume its criminal investigation into the incident, and that both India and Italy will co-operate with each other in pursuit of that investigation. Under the award, the Republic of Italy agreed to the amount of Rupees 100 million to be paid by Italy as total compensation under all the four heads of compensable loss identified by the arbitral tribunal's award, excluding the amount of Rupees 21.7 million already paid by Italy to the families of the victims.

The Union of India filed for an appropriate direction to dispose of the proceedings in conformity with the arbitral award and to quash the criminal proceedings in exercise of the powers under article 142 of the Constitution of India.

The court declared through this order that all Indian criminal proceedings emanating from the incident would stand quashed. The bail bonds provided by Chief Master Sergeant Massimiliano Latorre and Sergeant Major Salvatore Girone and their sureties stood discharged. All pending matters before this Court were disposed of with no order as to costs. The court also declared that the Republic of Italy shall resume its criminal investigation and the Union of India, the Republic of Italy, and the State of Kerala shall co-operate with each other in pursuit of that investigation. Further, it ordered that the amount paid to the registry of the court shall be transferred to the High Court of Kerala for disbursement/investment of the amount to be paid to the heirs of each deceased so as to protect the interest of the heirs and ensure that the

8 *Latorre* v. *Union of India*, Supreme Court of India, Civil Appellate Division, special leave petition (civil) no 20370 of 2012 (IA No 58644/2020 – for directions), June 15, 2021, MANU/SCOR/16588/2021.

compensation was duly received by the heirs and not diverted/misappropriated. The remaining amount was to be paid to the owner of the fishing boat, the *St Antony*.

The recent judgment of the Supreme Court in *Vikash Kumar* v. *UPSC,*[9] is a significant judgment from the perspective of the issues of disability and equality and reasonable accommodation. This was a case where a person with writer's cramp needed a scribe for writing the UPSC examination. The candidate was unable to receive the facility of a scribe, because initially he was not able to get a disability certificate and he did not come under the definition of a person with benchmark disability. Therefore, this case ultimately went up to the Supreme Court. The court directed a medical examination of the petitioner and this examination found that he did indeed have writer's cramp, but that this would not come within the definition of benchmark disability and the disability was assessed at only 6%.

Further, the legal issues arose because of the government guidelines of 2018(Guidelines), which mandated how scribes could be provided for persons with disabilities. The guidelines allowed for scribes for persons first, with benchmark disabilities and even within those disabilities and other situations, persons with blindness, locomotor disability, or cerebral palsy. In all other conditions, a person had to get special permission.

So now, with this background of facts, the court then went into the decision making process. The first issue that the court went into were the provisions of the Rights of Persons with Disabilities Act, 2016. This new legislation enacted in India, had replaced the old 1995 Act. The new legislation provides two separate definitions of a person with disability. There is a definition, which is a broad definition of person with disability under section 2 (s) which is defined as a person with long-term physical, mental, intellectual, or sensory impairment, which in interaction with barriers hinders his full and effective participation in society equally with others. This definition to a large extent has been borrowed from the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and it follows the social model of disability and not a medical model. The second definition under section 2 (r) of the Disability Act, 2016, refers to a person with benchmark disability.

The court clarified that benchmark disability only refers to a person with not less than 40% of a specified disability. The benchmark disability is limited to certain provisions of the legislation, which referred to reservation in public employment and a few other provisions of the law. The court held that limiting the access of a scribe to only a person who falls under section 2 (r), which is a person with benchmark disability, would violate the overall framework of the law. The court held that the candidate should be given the provision of a scribe. The real impact of the judgment is on the issue of equality for persons with disabilities at a larger level. The court refers to reasonable accommodation as a key component of equality and non-discrimination; it highlights that reasonable accommodation is really the obligation of providing positive duties and obligations on the state and private parties to provide additional support to persons with disabilities to facilitate their full participation. The court

9 *Vikash Kumar* v. *UPSC* (2021) 5 SCC 370.

reiterated that denial of reasonable accommodation would amount to discrimination and that these obligations of reasonable accommodations are not only there on the public sector, but on private sector as well. Finally, most importantly, the judgment makes the link between equality and dignity. The court holds that equality means recognizing the equal worth of every individual, irrespective of their disability. This would mean that the individual dignity of all has to be respected. The principle of reasonable accommodation is a means of recognizing the equal worth and dignity of all by removing the barriers of our full participation and therefore reasonable accommodation would be an integral component of equality. This judgment takes forward the debates on equality, especially the principles of reasonable accommodation, positive obligations and the link of equality and dignity.

In the case of *Bharati Rathore* v. *Union of India*,[10] the High Court of Delhi made some strong observations on the procedure followed by the Government in the selection of Examiner of Patents and Designs. The petitioner in this case had applied for the post of Examiner of Patents and Designs in the stream of Bio-Medical Engineering. Although the petitioner did clear both the preliminary as well as the mains exam required for the post, despite clearing both examinations she could not make it to the merit list. The reason for non inclusion of her name in the list of shortlisted candidates was that that the dual degree of B.Tech. and M._Tech. in Cognitive and Neuroscience of the petitioner was not equivalent to B.Tech. in Bio-Medical Engineering which was the eligibility criteria in the first place. The court after considering the available expert reports, the affidavits submitted by the committee appointed and the assistance given by the *amicus curiae*, came to the conclusion that the petitioner's degree was equivalent to B.Tech. in Bio-Medical Engineering and thus directed the government to appoint the petitioner.

There are also some other observations made *suo moto* by the court. The court observed that the selection of Examiners in India was not in line with practices adopted by the patent offices of some strong IP regimes such as European Patent Office (EPO) or the United States Patent & Trade Marks Office (USPTO). The court referred to the recommendations given by the Justice Allah Raham Committee, especially with regard to the necessity of having an interview in the whole selection process. The committee had mentioned that as the Examiners are required to come face to face with lawyers, professionals and various types of stakeholders, their communication and demonstration skills should be tested through an interview.

> Thus, a competitive examination not having an interview as a part thereof would be clearly arbitrary and any such decision by the respondents would fall foul of article 14 of the Constitution of India. The court finally found it fit to pass on the matter to a PIL bench as the questions raised by them in the case were of the nature of a PIL and were of great public importance. The court sought reasons from the government as to why interviews are not conducted as per the Justice Allah Raham Committee Report. The court very rightly passed the

10 *Bharati Rathore* v. *Union of India*, W.P.(C) 5229/2019 and CM Appl.23128/2019.

matter to the PIL bench for further adjudication. Selecting the well reputed post of examiner of patents through a written exam alone is not appreciable.

The Supreme Court in *Achhar Singh* v. *State of H.P*.,[11] after hearing the contentions inferred, that the issue was whether the high court had the power to interfere in the acquittal by the trial court under section 378 Cr Pc. The court held that, while it is a rule that when two perspectives are conceivable, the high court should not meddle with the trial court's judgment, this principle is not applicable for section 378 Cr PC. The Supreme Court in accordance with the earlier passed judgements[12] observed that in some cases, if majority evidence is deficient and the remanent evidence affirms the accused to be guilty then it is sufficient. Thereafter, the bench highlighted that any homicidal death cannot be left to "*judicium dei*" *i.e.,* hands of god. Apex court, on the basis of the order given in *Basalingappa* v. *Mudibasappa*[13] held that, "an order which is contrary to evidence is perverse." Thus, the high court's intervention was done correctly. Supreme Court while dismissing the appeal, convicted the accused Achhar Singh under section 452, 326, and 323 IPC.

However, before answering the main issue and the moot question, the Supreme Court went into detail about criminal jurisprudence. It is a fundamental principle of criminal jurisprudence that everyone is presumed innocent unless proven guilty because criminal accusations can be levied against anyone who is not a criminal. In the gap between the accusation and the verdict, the suspect is presumed to be innocent. The presumption of innocence is mandated by article 11 of the Universal Declaration of Human Rights, 1948 (UDHR) article 14 of the ICCPR, and article 6 of the European Convention on Human Rights. An essential feature of Indian Common Law Criminal Jurisprudence is that a person must be presumed innocent unless proven guilty, except where the presumption of innocence has been statutorily waived, such as under section 113B of the Evidence Act, 1872, the prosecutor is required to prove the accused's guilt. Regardless, one of the aspects of presumed innocence is the "Right of Silence" provided by the Constitution of India under article 20(3). The presumption of innocence, until the accused is proven guilty, is an important part of the Indian criminal justice system, as per the constitutional mandate and the scheme of the Code of Criminal Procedure, 1973. When a competent court reviews the material facts, examines witnesses and acquits the accused, the presumption of innocence is doubled. Thereafter, the Supreme Court responded affirmatively to the main issue and said "there is no gainsaid that homicidal deaths cannot be left to *judicium dei* (The judgment of God)". In the search for the reality, the court should make serious efforts to extract gold from the heap of black sand. The solemn responsibility is to ascertain the authenticity. The benefit of the doubt is only granted when the court, through its best efforts, is unable to draw a definite conclusion.

11 *Achhar Singh* v. *State of H.P.* (2021) 5 SCC 543.

12 *Gangadhar Behra* v. *State of Orissa* (2002 8 SCC 381); *Hari Chand* v. *State of Delhi* (1996 9 SCC 112).

13 (2019)5SCC418.

III APPROACH OF THE HIGH COURTS

In *Mula Maheswara Rao* v. *The State of A.P.,*[14] a writ petition was filed under article 226 of the Constitution challenging the conversion of land belonging to Korlakota village in Andhra Pradesh into Poramboku Government building complex. Petitioners claimed that their right to draw water from tank was seriously prejudiced, besides the same causing dent to environment and ecology. The real controversy which emerged in the matter was whether the tank Poramboka could be converted into government offices building complex. The high court concluded that the alienation is in violation of articles 48A and 51A(g) of the Constitution of India, as well as the doctrine of sustainable development and observed as follows.

The high court has held that the precautionary principle and the polluter pays principle are a part of the environmental law of India. Remediation of damaged environment is part of 'sustainable development' and as such polluter is liable to pay cost to individual sufferers as well as cost of reversing the damaged ecology. Article 12 of the International Covenant on Economic, Social and Cultural rights (ICESCR) deals with right to health and it includes under its ambit human right to enjoy pollution free environment. All persons have the right to adequate housing, land tenure and living conditions in a secure, healthy and ecologically sound environment. The right not to be evicted from their homes or land for the purpose of decisions or actions affecting the environment is also guaranteed. States and all other parties shall avoid using the environment as a means of war or inflicting significant, long-term or widespread harm on the environment. To ensure the implementation of human rights guaranteed under article 12 (2)(b) of the ICESCR, State Parties must take effective measures for its implementation. The court reaffirming the universality, indivisibility and interdependence of all human rights expressed its deep concern by highlighting the severe human rights consequences of environmental harm caused by poverty, structural adjustment and debt programmes and by international trade and intellectual property regimes. All persons have the right to freedom from pollution, environmental degradation and activities that adversely affect the environment, threaten life, health, livelihood, well-being or sustainable development within, across or outside national boundaries. All persons have a right to adequate housing, land tenure and living conditions in a secure, healthy and ecologically sound environment. All States shall respect and ensure the right to a secure, healthy and ecologically sound environment. State shall adopt the administrative, legislative and other measures necessary to effectively implement the rights in ICESCR and other relevant instruments.

Conversion of farmland, tank beds and forests to urban development reduces the amount of land available for food and timber production. Soil erosion, salinization, desertification, and other soil degradations associated with agricultural production and deforestation reduce land quality and agricultural productivity. The court ruled that no building activity shall be allowed in the bed of water bodies like river or nala and in the Full Tank Level (FTL) of any lake, pond, cheruvu or kunta / shikam lands.

14 *Mula Maheswara Rao* v. *The State of A.P.* decided on Aug. 18, 2021, writ petition no.16274 of 2021.

The buffer zone to be left may be utilised for road of minimum 12m width, wherever feasible.

The High Court of Calcutta in *Ganesh Das* v. *Rabiul* [15] ruled that victim is not a necessary party to a criminal appeal from conviction for offences against woman or child, punishable under provisions of the Indian Penal Code, 1860 (IPC) or Protection of Children- from Sexual Offence Act (POCSO) Act, 2012 or any other penal provision.

India has ratified the United Nations Convention on the Rights of the Children (UNCRC). The UNCRC requires all State Parties to undertake all appropriate measures to secure the best interest of the child, even when the child is alleged as, or accused of, violating any penal law. Such measures require the treatment of the child in a manner consistent with the promotion of the child's sense of dignity and worth, reinforcing the child's respect for the human rights and fundamental freedoms of others and taking into account the child's age and desirability of promoting the child's reintegration and the child's assuming a constructive role in society. The thrust in those principles were to ensure proper care, protection, development, treatment and social re-integration of every child in difficult circumstances, by adopting a child-friendly approach, keeping in mind the best interest of the child. In the aforesaid conspectus, the 2015 JJ Act, emerged out of the need to re-enact the Juvenile Justice (Care and Protection of Children) Act, 2015 to make comprehensive provisions for children alleged and found to be in conflict with law and children in need of care and protection, taking into consideration the standards prescribed in the UNCRC, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing Rules), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990), the Hague Convention on Protection of Children and Co-operation in Respect of Inter- country Adoption (1993) and other related international instruments. It was therefore that the 2015 JJ Act was brought into being as an Act to consolidate and amend the laws relating to children alleged or found to be in conflict with law and children in need of care and protection, by catering to their basic needs through proper care, protection, development, treatment, social reintegration, by adopting a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies to be established under the 2015 JJ Act.

The court, thus in light of the principles mentioned above to safeguard the interests of the children and promote their welfare, clarified that it would suffice that the cause-title of such an appeal would show that the appellant is the victim in the criminal case identified by its number, the court below and/or the police station. This will insulate the victim from being subjected to disclosure of the identity of that person.

The High Court of Manipur in *Nandita Haksar,*[16] held that the principle of non-refoulement was part of article 21, thereby protecting Myanmarese nationals who entered India illegally under the threat of persecution by declaring them to be 'refugees'

15 *Ganesh Das* v. *Rabiul* SK CRA 228 of 2020.

16 Haksar, *Supra* note 3.

and not 'migrants'. The case arose out of a writ petition filed by the petitioner on behalf of seven Myanmarese citizens before the High Court of Manipur. After the military coup in Myanmar during February 2021, the military junta banned Mizzima, an established Myanmarese media and news service, and arrested/detained several of its journalists. Of the seven individuals represented in the petition, 3 were journalists, the others being the wife and three minor children of one journalist. They entered India and took shelter at Moreh in Tengnoupal district, Manipur, and sought the help of the petitioner as they feared that they would be sent back to Myanmar due to lack of proper travel documents.

The writ petition was filed on behalf of the seven Myanmarese nationals, requesting passage for them to travel to New Delhi to seek protection from the United Nations High Commissioner for Refugees (UNHCR). The Home Ministry, Government of India, *vide* its letter dated March 10, 2021, had directed the authorities of the border states in North-East India to check the flow of illegal migrants coming into India from Myanmar. However, a letter dated March 29, 2021 was issued by the Government of Manipur stating that it would come to the aid of Myanmarese nationals who had illegally entered the State.

By its order dated April 17, 2021, the Manipur HC adjourned the case to enable the State and the Central Governments to put forth their stands. In its order dated April 20, 2021, the Court directed the State authorities to arrange for the safe transport and passage of these seven persons from Moreh to Imphal, where they resided in the petitioner's local residence. The petitioner argued that the Home Ministry's letter did not draw a distinction between a 'migrant' and a 'refugee' and that the seven Myanmarese citizens were refugees, and sought their safe passage to approach the UNHCR at New Delhi for protection. The High Court of Manipur held that the Myanmarese citizens could not be categorized as migrants. According to the court, *"The word 'migrant' is ordinarily understood to refer to a person who moves from one place to another, especially in order to find work or better living conditions. The word 'refugee', on the other hand, refers to a person who is forced to leave his/her country in order to escape war, persecution or natural disaster"*.[17] As per the court, the 7 persons were compelled to flee Myanmar under threat of persecution, and were therefore asylum seekers, and not migrants. The high court also granted them safe passage to New Delhi to enable them to avail suitable protection from the UNHCR. This decision of the court was based upon its finding that article 21 of the Constitution of India encompasses within its scope the principle of '*non-refoulement'*.

The High Court of Manipur read *non-refoulement* within article 21 of the Constitution and concluded that *"The far-reaching and myriad protections afforded by Article 21 of our Constitution, as interpreted and adumbrated by our Supreme Court time and again, would indubitably encompass the right of non-refoulement…"*.[18] The High Court of Manipur reading of *non-refoulement* into Indian law conflicts with India's official position, and the court also takes a step that the Supreme Court

17 *Ibid.*

18 *Id*., para.10.

was reluctant to take in its interlocutory order in the case of *Mohammad Salimullah.*[19] The Central Government's position is that since it is not a signatory to the Refugee Convention or the Protocol Relating to the Status of Refugees, it does not have any obligation to follow the principle of *non-refoulement*. It has even argued before the Supreme Court that it does not consider *non-refoulement* a part of customary international law.

Unlike the Supreme Court in *Salimullah*, the High Court of Manipur drew the principle of non-refoulement from article 21, which extends to all persons regardless of nationality. Thus, despite India not being a signatory to the Refugee Convention, it has to follow the principle of *non-refoulement* since it is enshrined in article 21 of the Constitution. This case also distinguishes itself from *Salimullah* on the argument of national security. The High Court of Manipur concluded that the petitioners presented no threat to national security, reaching this conclusion on the basis of various documents such as a certification of refugee status by UNHCR, and a sanction of 'Visa Gratis' by the Indian government to one of the petitioners. In *Salimullah,* on the other hand, the Supreme Court took note of 'serious allegations of threat to internal security' which was partly the reason it allowed the refugees' deportation. Whereas the High Court of Manipur referred to several documents in order to assess whether the petitioners would be a threat to national security, the Supreme Court did no such analysis.

While the High Court of Manipur decision is appreciable in that it protects the petitioners from persecution, its approach of distinguishing between migrants and refugees and privileging the latter over the former warrants criticism. The migrant/refugee distinction has been criticized for ignoring the fact that economic violence can be a key driver of migration and is no less insidious than religious, political, or ethnic persecution, and it presents the danger of reinforcing a false distinction, namely that migrants, who are moving for economic reasons, may be less deserving of asylum and aid than refugees, who are escaping war or persecution. This could, in turn, lead to blurring or even legitimization of the injustice faced by migrants. Some scholars have even argued that the distinction should be done away with. The court, by merely defining the categories of refugees and migrants, falls short of engaging with the issue in the depth and nuance that it deserves.

During the time of the COVID-19 pandemic, the condition of patients suffering from Thalassemia in the State of Bihar had become increasingly critical, with an apparent rise in fatalities with each passing day. This could be attributed to a shortage of blood and a lack of arrangements for proper treatment. Numerous reports published in National Dailies and online portals reported on the sad state of affairs. The petitioners in the case of *Amit Kumar Agarwal* v. *Union of India***,**[20] cited seven real-life instances where an apparent lack of proper medication and blood resulted in five fatalities. One common contention of all was the lack of medical resources and other essential equipment for treating Thalassemia patients. Some patients and their relatives further contended that blood was being sold on the black market. The petitioners contended

19 Salimullah, *supra* 2.

20 2021 SCC OnLine Pat 2777.

that each of these instances brought forth a chilling realization for the need to introspect. Prevention of Thalassemia is very hard since the disease is passed on from parents to children. Treatment consists of vitamins and transmission of blood. In fact for the purpose of medication, vitamin, blood transmission and iron reducers are required to be taken note of. A significant equipment requirement for treating Thalassemia patients is filters used to ensure that the iron level in the bloodstream of patients does not increase beyond the acceptable threshold. If it does so, it may result in potentially fatal iron poisoning. However, one issue that all patients face is the non-availability of filters in hospitals which is considered indispensable during the treatment of Thalassemia. In addition to the lack of filters in hospitals, there is also a dearth of medicines that are neither available in hospitals nor in medical stores and can only be acquired through Thalassemia Societies. The Petitioners have suggested to the Court that the State undertake the establishment of Thalassemia Day Care Centres (TDCC) to ensure that patients don't suffer the brunt of Iron overdose, which is one common side effect of Blood Transfusion. They have requested the Court to take the required steps.

The court also cited certain international instruments in the judgment. The Constitution-its values, rights, duties, and responsibilities are the guiding light that is applied in all cases. However, it is equally important to recognise the relevance of international instruments that put a positive obligation on the State to ensure the Right to Health to its citizens. Primarily, the Universal Declaration of Human Rights (1948) deals with the issue. Article 25 of UDHR reads as under: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." Article 12 of the ICESCR states that " the States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health". The -State Parties to the ICESCR must take steps to ensure to achieve the full realization of this right, which shall include those necessary for: (a) the prevention, treatment and control of epidemic, endemic, occupational and other diseases; (b) the creation of conditions which would assure to all medical service and medical attention in the event of sickness." In addition to above mentioned Conventions, similar obligations can be derived from the other international instruments.

The court opined, if treatment is scarcely available or, in an even worse scenario, denied, it puts the patient of Thalassemia squarely in the path of danger to their life, infringing their dignity. Equally, the State is under an obligation to compensate the family who died solely on account of non-availability of adequate medical facilities. The State additionally is to take all conceivable steps to ensure that such misfortunes do not befall any child in the future.

In the case of *M. Sameeha Barvin* v. *Govt. of India* [21] the Court held that para-athlete Sameeha Barvin had been discriminated against by the state on grounds of her

21 *M. Sameeha Barvin* v. *Govt. of India*, 2021 SCC OnLine Mad 6456

being disabled and a woman. The court directed Central and State government to prevent unfair discrimination of differently abled women athletes on one or more grounds and issued a set of 12 guidelines on the same. Sameeha Barvin, a Chennai-based athlete living with hearing difficulties, contended she was subjected to discrimination when she was not allowed to participate in the fourth World Deaf Athletics Championship held in Poland this year. Barvin alleged that she was not allowed to travel with her male counter parts citing 'safety' issues. Barvin was a three-time national gold medalist in deaf athletic championships and was also a world record-holder in the 100-meter track after breaking a 1986-record.

The Court passed an order which talked about intersectionality, women in sports and the culture of 'protectionism' adopted by people. The orders were passed to streamline the policy on allowing participation of such athletes in State, national and international events. On the point of intersectionality, the Court noted that due to gender and disability, the women with disabilities confront various disadvantages which include not only social divisions, but also poverty, race, class or sexuality. Intersectionality lends itself to such type of analysis, protecting one from taking a narrow approach. "Therefore, where the axis of discrimination intersect, it is essential to view such cases from the lens of intersectionality in order to understand that the barriers, the challenges, the stigma as well as the practical difficulties faced by such persons are not only more intense, but also different and unique which call for a more in-depth and all-encompassing approach for addressing their grievances and ensuring substantive equality to them," the Court observed.

On the point of intersectionality i.e., the rights of women with disabilities, the court also referred to several international conventions. In 2006, the United Nations adopted the Convention on the Rights of Persons with Disabilities (CRPD), the first international human rights treaty, intending to protect the rights and dignity of the persons with disabilities. Its purpose is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. The Convention adopts a comprehensive and holistic approach to raise awareness and to ensure the persons with disabilities rights to accessibility, independent living and participation in all aspects of society. Discrimination on the basis of gender and disability is a fact officially recognised by CRPD. Its article 3 focuses specifically on non-discrimination and equality between men and women. Article 6 recognizes that women and girls with disabilities are subject to multiple discrimination, and that State parties shall take all appropriate measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms and to ensure the full development, advancement and empowerment of women with disabilities. Article 16 is about Freedom from exploitation, violence and abuse; and focuses specially on the obligation for state parties to put in place effective legislation. In article 30, the CRPD perceptively addresses these issues using sports and rights to participation in cultural life, recreation, leisure, and sport as an influential tool for inclusion and article 30(5) provides for the right of persons with disabilities to participate "on an equal basis" in sports, recreation, and leisure activities. Thus, the CRPD brings to the forefront the right of people with

disabilities to engage in sports. Besides that, it calls for state measures, which will safeguard women's full enjoyment of all their rights and freedoms, such as, equal rights in accessing services, education, employment, health and personal life. The Committee on Convention on the Rights of Persons with Disabilities observed in its General Comment No. 6 that the "intersectional discrimination can be direct, indirect, denial of reasonable accommodation, or harassment". This approach has also been reiterated by the Supreme Court in *Vikash Kumar* v. *UPSC* wherein, the Supreme Court has held that "disability-based discrimination is intersectional in nature and policy of reasonable accommodation thus cannot be unidimensional". The Convention on the Elimination of Discrimination against Women Committee (CEDAW), which promotes action in order to support persons with disabilities and their families and caregivers, also recognises that the categories of discrimination cannot be reduced to watertight compartments. In General Recommendation No. 25, the CEDAW committee suggests "the adoption of special measures for women to eliminate multiple rounds of discrimination". Article 25 of the Universal Declaration of Human Rights, grants to each person the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond their control and its prohibition of discriminations. The concept of human rights for persons with disabilities is now accepted internationally. The UNESCO International Charter on Physical Education and Sport states, "one of the essential conditions for the effective exercise of human rights is that everyone should be free to develop and preserve his or her physical, intellectual and moral powers and that access to physical education and sport should consequently be assured and guaranteed for all human beings".

On the particular point of women with Disability, the court noted that women are more vulnerable when it comes to disability. "Women with disabilities are always at the receiving end and they are neglected even by their husbands, besides being abused or deserted by citing their disability. Therefore, women with disability are vulnerable in terms of discrimination by reason of their gender, age, minority status, convergence and intersect in areas relating to gender-based violence, traditional practices, trafficking etc," the Court said.[22] The court further stated that the discrimination caused to women is often couched in 'protectionism' citing traditional concepts of stereotyped roles for women and the purported concern for their safety and security. This is also known as "romantic paternalism" of American jurisprudence. The court further said that by not letting her travel, the State has enumerated her as a 'object of sexual desire'. It is the duty of the court to ensure safety for women. "Not permitting the petitioner to travel along with her male competitors, smacks of blatant discrimination cloaked in protectionism, which is anathema to the substantive equality as envisaged under the Constitution of India. Rather than citing the reason of unsafe travel, it is incumbent on the State to ensure safety and security of its women, disabled or otherwise," the court stated. The court further pointed out that this behaviour is equivalent to systemic indirect discrimination "couched in neutrality and seemingly innocent reasons perpetuated by social conditioning but which cannot stand scrutiny before law in the teeth of the expansive substantive equality as envisioned and

22 *Ibid.*

envisaged in our Constitution, and to discard them just as stark instances of discrimination." The court stated that such instances of indirect discrimination perpetuate inequality and cripple the salient personal freedom and autonomy available to every citizen of this country, irrespective of their personal attributes and differences and based on variables of gender, disability, caste, sexual orientation, religion, or any other identified site of discrimination.

The court thus found that Barvin had been discriminated against, just not because she was disabled but also because she was a woman. In light of the same, the court issued guidelines for the purpose of streamlining the policy qua woman athletes with disabilities, so as to enable them to participate in all the events at State, National and International levels, with equality and dignity.

IV CONCLUSION

The preceding decisions have shed light on how international treaties and conventions are used in domestic matters and the universality of the concept of *jus cogens*. International treaties have been found to be compatible with our constitutional requirements in many of the previous instances. Our Indian Constitution enshrines the fundamental basis for India's domestic legal system to carry out its international treaty responsibilities. According to this, the Indian government has exclusive authority to negotiate and implement various international treaties and accords. In India, international treaties do not form part of the national law by default. They must be integrated into the legal system by an act of Parliament, which has been given the legislative power to enact laws to carry out India's international treaty responsibilities. The preceding cases were construed by the judges in terms of both municipal and international legislation. They used a liberal interpretation of the laws and expanded the terms in order to create a new and broader meaning. Some high court decisions have resulted in significant new rulings in areas like human rights, intellectual property rights, environmental protection, international taxation, social activism, and others. Thus, the Indian judiciary has filled in the gaps between Indian municipal law and international law through judicial activism, thus playing a critical role in the implementation of international law in India. A sustained growth of reconciliation between national laws and international legal duties is considered necessary. There may come a time when international law and domestic law are completely in sync, and the ideal of effective global law and institutions around the world is reached.