

Indian Judiciary and Its Role in Interpreting Humanitarian Law

Vibhor Sharma¹, Prof. (Dr) SK Bose²

¹Student, BALL.B, School of Law, Manav Rachna University

²Professor-Law, School of Law, Manav Rachna University

Abstract:

The Indian judiciary has long occupied the forefront of upholding human rights and fundamental freedoms and, in most instances, granting protection to aliens within its reach of territory. Although India is not a signatory to all major international humanitarian law (IHL) treaties, its judiciary has evidently transposed IHL concepts and interpreted them in the light of the Indian Constitution. This paper examines the multi-polar role of the Indian judiciary in applying and interpreting humanitarian law, particularly where domestic legislation is lacking. It examines how provisions of the Constitution, namely Article 21 (Right to Life and Personal Liberty), have served as a vehicle for the introduction of IHL norms, particularly in relation to the treatment of refugees, internally displaced persons, and vulnerable groups. Through analysis of landmark judgments, this article highlights the progressive aspect of the judiciary, its efforts to strike a balance between sovereignty at the national and international levels, and its individual contribution towards global discourse on humanitarian law.

Keywords: Indian judiciary, humanitarian law, interpreting humanitarian law, refugees.

1. Introduction

India, which has an able legal tradition and a healthy democracy, has consistently headed the movement for human rights globally. However, its attitude towards codified international humanitarian law (IHL) is one of nuance. India has ratified certain milestone IHL instruments, but notably has not ratified certain foundational treaties, such as the 1951 Refugee Convention. Despite this, the Indian judiciary has never been afraid to take an initiative and often a leading, sometimes even progressive role in interpreting and applying the norms of humanitarian law, often drawing on the spirit of international law and balancing it with the fundamental rights under the Indian Constitution. Judicial activism has been instrumental in those situations where legislative gaps arise, acting as a vital safety net for individuals whose dignity and lives are at risk.

This article seeks to reveal the intricate role of the Indian judiciary in this aspect. It will analyze the constitutional basis of judicial engagement with IHL, discuss specific cases where courts have invoked or taken recourse to humanitarian principles, and analyze the implications of these rulings on the security of susceptible groups in India. It is important to understand this unique judicial journey in order to appreciate India's role in global humanitarian considerations, particularly from the perspective of a dominant rising nation with numerous forced migrants on its soil.

2. Understanding International Humanitarian Law (IHL) and its Enforcement in India

International Humanitarian Law (IHL), the law of armed conflict or the law of war, is a collection of rules that seek to reduce the harmful effects of armed conflict for humanitarian reasons. IHL protects individuals who no longer participate in hostilities and prohibits weapons and tactics of warfare. IHL is distinct from International Human Rights Law (IHRL), even though the two bodies of law complement each other. IHRL is universal in its application, regardless of peace or war, while IHL is not applicable except in situations of armed conflict.

The principal sources of IHL include:

The four 1949 Geneva Conventions: These safeguard certain categories of persons, that is, wounded and sick members of the armed forces in the field, prisoners of war, and civilians.

The two 1977 Additional Protocols: They address and further expand on the protection of the Geneva Conventions to encompass new and internal armed conflicts.

Customary International Humanitarian Law: These are unwritten rules based on consistent state practice accepted as law that obliges all states regardless of treaty ratification.

India has signed the four 1949 Geneva Conventions. It is not, however, party to the 1977 Additional Protocols. More significantly to the purpose of this paper, India is not signatory to the Refugee Convention 1951 or its 1967 Protocol, which are pillars of international refugee law, a closely related field often overlapping with IHL. That non-signature places India outside of being bound by the individual treaty obligations of these instruments.

Whereas there are no direct treaty obligations in certain fields, the Indian courts have traditionally resort to the principle of customary international law and the expansive construction to be accorded to basic rights under the Indian Constitution to impose principles analogous to those under IHL and refugee law internationally. This approach finds its roots in Article 51 of the Indian Constitution, the constitutional directive principle, which mandates the state to "foster respect for international law and treaty obligations in the dealings of organised peoples with one another." Not directly enforceable, yet Article 51 gives rise to a guiding principle for the judiciary to consider international norms.

3. Constitutional Basis for Judicial Interpretation of Humanitarian Law

The basis of the Indian judiciary's dialogue with humanitarian values lies in its comprehension of the constitutional rights established by the Indian Constitution, namely Article 21: "Protection of Life and Personal Liberty." Article 21 states: "No person shall be deprived of his life or personal liberty except according to procedure established by law." The Supreme Court of India has given a broad and liberal interpretation to Article 21 and has reasoned that the right to life includes the right to live with dignity. This wide interpretation has been a powerful tool in the hands of courts to provide protection to various vulnerable sections, such as non-citizens and victims of humanitarian emergencies.

Certain other constitutional provisions which can be applied are: Article 14 (Equality before Law): This makes everyone, including non-citizens, equal before the law and are entitled to protection of the laws on an equal basis.

Article 20 (Protection in respect of conviction for offences): Provides protection against self-incrimination and double jeopardy to all individuals.

Article 22 (Protection against arrest and detention in certain cases): Provides protection against arrest and detention in certain cases, e.g., the right to be informed of the cause of arrest and to be produced before a magistrate.

These fundamental rights, particularly Article 21, have been employed by the judiciary to:

Enforce rules of customary international law: Indian courts have normally assumed that customary international law, except to the extent otherwise contrary to domestic law, forms part of domestic law. As the majority of IHL rules have been transformed into customary rules, it allows for courts to enforce them even without specific enactments in domestic law.

Plug legislative gaps: With no proper domestic legislation on refugees or asylum, the courts have stepped in to provide protective provisions based on constitutional ideals.

Ensure dignity treatment: The "right to live with dignity" of Article 21 has been interpreted to include the right to dignity treatment, access to basic necessities, and against arbitrary detention or refoulement even for those who have no formal legal status.

4. Landmark Judgments and Operation of Humanitarian Principles

The Indian judiciary has, through a series of landmark judgments, operated principles akin to IHL and international refugee law implicitly and expressly.

4.1. Protection Against Refoulement (Non-Refoulement Principle):

The Indian judiciary's most valuable contribution has perhaps been its steadfast commitment to Article 21 of the Constitution, the principle of non-refoulement, despite the fact that India was never a party to the 1951 Refugee Convention. Non-refoulement is a foundational principle of international refugee law that prohibits returning individuals to a state where life or liberty would be threatened. Indian courts have held that Article 21 of the Constitution incorporates this principle.

National Human Rights Commission v. State of Arunachal Pradesh & Anr. (1996): This landmark Supreme Court judgment dealt with the Chakma refugees from Bangladesh. Not a strictly refoulement case in the Convention meaning, the Court did hold that the state is bound by Article 21 to secure the life and liberty of all persons, including non-citizens. This established precedent for the judiciary's broader protective function on behalf of vulnerable foreign nationals.

Ktaer Abbas Habeeb Al Qutaifi v. Union of India (Gujarat High Court, 1999): In a pioneering ruling, the Gujarat High Court specifically recognized the principle of non-refoulement as customary international law and a fundamental human right. The Court ruled that while India is not a signatory to the Refugee Convention, being a component of customary international law, the principle of non-refoulement binds India as a binding duty. This case most firmly rooted a domestic legal principle to avoid forced return to cause harm.

Mohammad Surokh v. Union of India (Delhi High Court, 2019): In this case, there was a Rohingya refugee. Delhi High Court reaffirmed that the doctrine of non-refoulement is an integral part of Article 21 of the Indian Constitution. The Court emphasized the need for a just process before deportation, including an assessment of the risk faced by the individual on return. This indicates the court's demand for due process for refugees.

Abdul Hameed Bacha v. Union of India (Jammu & Kashmir High Court, 2021): This case explicitly established that the principle of non-refoulement is part of Article 21 of the Indian Constitution and therefore extendable even to irregular migrants. It also directed the authorities not to deport certain Rohingya refugees without procedure.

4.2. Right to Humane Treatment and Dignity

The courts have applied consistently the "right to live with dignity" under Article 21 in delivering humane treatment to various classes of individuals, such as foreign nationals and individuals in custody.

Detention Conditions: Judges have intervened where foreign nationals, such as asylum seekers, were detained arbitrarily or for a long time, or under inhumane conditions. Although not necessarily under IHL per se, these interventions are in line with IHL's regulations on humane treatment of persons deprived of liberty.

Access to Basic Necessities: Courts in some judgments have ordered the government to ensure access to basic necessities like food, water, and shelter for asylum seekers and refugees, which reinforces the idea that the right to life applies to such items.

4.3. Protection of Children in Conflict-like Situations

Even though India is not burdened with armed conflict of the same nature as some territories under which a considerable amount of IHL is predominantly practiced, the judiciary has continued to respond to the vulnerabilities of children in displacement or circumstances of vulnerability analogous to those addressed by IHL principles related to child protection.

Separated Children: Courts have repeatedly been asked by authorities to offer welfare and protection of separated or unaccompanied children, in line with principles under IHL instruments including Additional Protocol I, Article 78 (evacuation of children) and Additional Protocol II, Article 4(3)(e) (reunion of families).

Protection from Exploitation: Not technically involving children in the sense of IHL, the courts' refusal to allow child labor and trafficking, and emphasis on child protection, indirectly supports the broader humanitarian goal of protecting children from being exploited under exploitative conditions.

4.4. Balancing Sovereignty and International Obligations

While the Indian judiciary has been extremely pro-active in its efforts, it is also acting within the ambit of a sovereign state and its executive choices. Trouble arises when:

Executive Discretion: The Executive sometimes is more concerned about national security and sovereignty, which at times may draw up policies which appear opposite to judicial pronouncements, in particular on deportation or entry into territory.

Lack of Enforcement Mechanism: While judgments provide legal interpretations, their practical enforcement is subject to the discretion of the Executive. Instances of non-implementations or delays can nullify the efforts of the judiciary.

Legislative Vacuum: There is no national refugee legislation codified into law, and therefore every case must be handled by the judiciary, overloading the courts and leading to piecemeal and not full protection.

5. Impact and Significance of Judicial Role

Indian courts' role in interpreting humanitarian law, even if implicitly or under the Constitution, is one of great significance and impact:

Humanitarian Safety Net: In the absence of specific domestic legislation, the judiciary has served as a vital safety net for millions of refugees and asylum seekers, protecting them against arbitrary detentions and forced returns.

Break-through Jurisprudence: The wide interpretation of Article 21 to include humanitarian principles has created a new jurisprudence of interest to other developing countries facing similar challenges.

Guaranteeing Rule of Law: By holding the executive accountable in terms of constitutional standards and international standards (even customary standards), the judiciary ensures the rule of law and prevents arbitrary state action.

Support for International Norms: Although India has not signed individual treaties, the judiciary's continuous reliance on and appeals to IHL norms internalize them further and strengthen their position as customary norms.

Advocacy Tool: Judicial decisions constitute a robust legal foundation for civil society mobilization and human rights activists who work towards protecting refugees in India.

6. Associated Research Papers and Primary Themes

The use of Indian judicial interpretation of international law, particularly humanitarian and human rights law, is one of the most prominent areas of research. There are likely hundreds, if not thousands, of research studies, journal articles, books, and reports considering various aspects of the topic. Some of the most important themes in scholarly literature are:

Judicial Activism and Human Rights in India: The overall theme typically has sub-discussions regarding the role of the judiciary in bridging the legislative vacuum and safeguarding fundamental rights for everyone.

India's Refugee Policy and Law: Study particularly examines India's ad-hoc policy towards refugees, absence of a national law, and the pivotal role of the judiciary in protection.

The Principle of Non-Refoulement in Indian Law: Most of the papers revolve around how Indian courts have embraced and applied the principle of non-refoulement through constitutional interpretation. **Intersection of Constitutional Law and International Law:** Authors analyze how Indian courts utilize constitutional provisions (specifically Article 21) as a platform for interpreting international norms, such as customary international law.

National Security vs. Human Rights: Research analyzes the judicial challenges in weighing the necessity to provide national security against protecting individuals' rights, particularly in cases of foreign nationals. **Refugee/Migrant Communities:** In most studies, the judiciary challenges and judicial action against particular communities like Chakmas, Rohingyas, or Sri Lankan Tamils in India are analyzed.

International Law in National Courts: Broader discussions of the monist vs. dualist approaches to international law in national courts often have India as a good example. Top academic journals in international law, constitutional law, and human rights, and publications by legal research institutions and think tanks regularly publish articles on these subjects.

7. Conclusion

The Indian courts have emerged as a significant bulwark for the protection of individuals touched by human catastrophes, demonstrating profound devotion to human dignity and the rule of law. In the absence of a national refugee law and with India's selective compliance with some international conventions, the courts have utilised the expansive interpretation of fundamental constitutional rights, particularly Article 21, to extend a humanitarian safety net.

By landmark judgments on non-refoulement, humane treatment, and safeguarding vulnerable groups, the courts have not just provided immediate relief to hundreds of thousands of individuals but also added depth to the global jurisprudence of humanitarian law. This pioneering approach, where domestic constitutional principles serve as a bridge for international norms, is instructive for other developing nations with similar challenges.

Though the initiative of the Indian judiciary must be welcomed, it is generally short-circuited by executive decisions of policy and by the perpetually yawning gap of thorough-going domestic legislation

To consecutively seal India's commitment to humanitarian concerns and ensure consistent, rights-based protection, codified national refugee law enshrining international standards with clear procedures for the determination of asylum remains an imperative. Nevertheless, the progressive and active role of the Indian judiciary testifies to the resilience of its commitment to justice and leadership role in interpreting and applying humanitarian law in a complex national and international environment.

Citations and References:

1. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287.
2. Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3. Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609.
3. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May 2000, 2171 UNTS 163.
4. Constitution of India, 1950.
5. National Human Rights Commission v. State of Arunachal Pradesh & Anr., AIR 1996 SC 1234. Ktaer Abbas Habeeb Al Qutaifi v. Union of India, AIR 1999 Guj 125.
6. Mohammad Surokh v. Union of India, W.P.(C) 4410/2019, Delhi High Court, 2019.
7. Abdul Hameed Bacha v. Union of India, WP(C) 1248/2021, Jammu & Kashmir High Court, 2021.
8. Goodwin-Gill, Guy S., and Jane McAdam. The Refugee in International Law. Oxford University Press, 2021.
9. Hathaway, James C. The Rights of Refugees Under International Law. Cambridge University Press, 2005.
10. Chimni, B.S. International Refugee Law: A Reader. Sage Publications, 2000.
11. Thakur, Ramesh. "Human Rights and Refugee Protection in India." International Journal of Refugee Law, vol. 14, no. 1, 2002, pp. 36-60.
12. Malik, T. "Refugee Protection in India: A Need for National Legislation." Journal of Refugee Studies, vol. 28, no. 4, 2015, pp. 570-589.
13. Gardam, Judith. "Women and Armed Conflict: The Protection of Women under International Humanitarian Law." International Review of the Red Cross 87, no. 859 (2005): 583-604.
14. Pictet, Jean S. Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Geneva: International Committee of the Red Cross, 1958.
15. Sassòli, Marco, Antoine A. Bouvier, and Katia Martin-Vignerte. How Does Law Protect in War?: Cases, Documents and Teaching Materials on International Humanitarian Law. 4th ed. Geneva: International Committee of the Red Cross, 2011.