



## REVISITING THE LAW ON RETURN MIGRATION & REINTEGRATION: A PUBLIC LAW PERSPECTIVE FOR ECONOMIC RECOVERY

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### **Abstract**

Sri Lanka being a foreign remittance dependent economy, rectifying flaws in the migration law in pursuance of an approach based on legitimate expectation and international migration conventions and thereby strengthening migration process is decisive in confronting the current economic crisis. Return migration and reintegration are strikingly significant elements in migration law regime, which lacks consistent and predictable policy and positive action and the same are inevitably connected with brain drain scenario. Migration for foreign employment involves a series of positive effects such as returnee migrants bringing back their skills and work experience, expatriates abroad contributing to foreign remittances, migrant returnee employees transferring their knowledge or technology to developing countries in increasing productivity and economic development. Thus, this research paper focuses on developing a mechanism to remedy the said drastic gaps in return migration and reintegration by resorting to the widely operative doctrine of legitimate expectation, co-related notion of public trust doctrine giving effect to directive principles of state policy and International Law Migration conventions. The legal regime relating to migration in Sri Lanka comprises the Sri Lanka Bureau of Foreign Employment Act as amended by Act No. 56 of 2009 (SLBFE Act), National Labour Migration Policy (NLMP), other policy declarations like Strategic plan 2022-2026, Operational Manual, International Law conventions like Convention on the Protection of Rights of All Migrant Workers etc. However, Sri Lanka seems to have been deprived of advantages of migration considerably on account of the failure on the part of the Sri Lanka Bureau of Foreign Employment or relevant authorities to place the required focus on return migration and reintegration as well as the brain drain scenario. Research papers, handbooks, manuals policy declarations and newspaper articles are analyzed in comprehending the dilemma in the migration law regime. Even though the doctrine of legitimate expectation and international law conventions are frequently resorted to by our superior courts in the environmental protection law regime such approach is hardly utilized in the migration law context. Thus, the remedial approach for this burning social issue could be engineered by resorting to a broad form unorthodox legitimate expectation in the sphere of administrative law and fundamental rights law based on declarative undertakings contained in NLMP, Strategic Plan SLBFE, National Action Plan on Return and Reintegration etc. The persuasive effect of International Law Conventions like the Convention on the Protection of Rights of All Migrant Workers is another integral facet of the legal remedy. A series of superior court judgments in the sphere of administrative law and fundamental rights based republican features of the 1978 Constitution ranging from the landmark *Eppawala Phostpate case*, *Heather Theresa Mundy*, *recent fundamental rights application against Chunnakam ground water contamination* to writ application against *deforestation of Wilpattu Reservation* demonstrate fertile grounds for justifying such broad legitimate expectation. Said line of decisions based on public trust doctrine focusing on inalienable sovereignty of the people under Article 3 of the



Constitution, mandatory duty on all organs of state under Article 4(d), imputing pragmatic effect to directive principles of state policy and fundamental duties in conjunction with public trust doctrine and persuasive effect of international law conventions provide a conducive platform for innovative interpretation of legitimate expectation in the migration context in journey for economic recovery. Despite this form of approach based on legitimate expectation, public trust doctrine and international migration conventions being hardly resorted to in the migration law regime, a paramount duty is vested in the judges to interpret migration laws dynamically and innovatively within desirable legal limits especially in light of the pressing social necessity for remedying the drastic gap or the dilemma concerning return migration and reintegration.

**Key Words:** Return Migration and Reintegration, National Labour Migration Policy, Legitimate Expectation, Public trust doctrine, International Migration Conventions

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### INTRODUCTION

Sri Lankan Economy could be defined a remittance dependent economy with huge trade deficits offset by remittances abroad (Sadaratne, 2011) and 71 percent significant contribution of migration remittances surpassing tea, rubber and garments exports as well as the same forming 8 percent of Gross Domestic Product (GDP) in 2020 (SLBFE Corporate Strategic Plan 2022-2026, 2021). Therefore, strengthening foreign employment process and rectifying flaws in the legal regime governing migration is a vital factor in confronting the current economic crisis. Multiple facets in migration and foreign employment are regulated by explicit laws ranging from the Sri Lanka Bureau of Foreign Employment Act No. 21 of 1985, Act No. 4 of 1994, SLBFE Amendment Act No. 56 of 2009 (SLBFE Act), International Law Conventions such as the Convention on the Protection of Rights of All Migrant Workers, National Labour Migration Policy (NLMP, 2008), Strategic Plan SLBFE 2022-2026 to sub-policies, Operational Manuals etc. Despite some progressive steps like sub-policy and the National Action Plan on Return and Re-integration of Migrant Workers, return migration and re-integration are crucial aspects lacking focus. However, return migration is one of the key pillars of migration and development nexus, along with diaspora engagement (Wickramasekera, 2019). Return and re-integration are inevitably linked with brain drain scenario. According to Lovell skilled emigration triggers multiple impacts inclusive of skilled migration reducing the number of educated workers critical to a developing country's productivity, returnee migrants bringing back their skills and work experience, expatriates abroad contributing to foreign remittances, returnee migrant employees transferring their knowledge or technology to developing countries in increasing productivity and economic developments. The indirect effects of migration reflect the increase of workforce skill stimulating economic growth to the optimum level and brain exchange between the countries (Gunewardena & Nawaratne, 2017). Although migration or foreign employment legal regime is covered by explicitly detailed legal provisions Sri Lanka seemed to have been deprived of benefits of migration on account of the failure to attribute due recognition to return migration and reintegration that are decisive elements in the migration cycle. Inconsistent and unpredictable policies that fail to comprehend the importance of balancing conflicting interests concerning brain drain are criticized as lopsided, shortsighted and unsuitable (Samath, 2022).

The remedy for said complications could be ascertained from the eyes of Sri Lankan migrants (skilled, semi-skilled or unskilled) who are deprived of prospects of return owing to the absence of effective implementation of return and reintegration. A broad form of legitimate expectation in the sphere of administrative law and fundamental rights law in the view of the SLBFE Act, NLMP, Strategic Plan, sub-policies on the National Action Plan on Return and Reintegration etc., in pursuance of innovative interpretations on constitutional articles focusing on public trust doctrine, imputing pragmatic effect to Directive Principles of State policy etc., collectively operate as an effective remedy. Thus, the approach of the superior courts in the sphere of public law demonstrable in a series of cases extending from landmark judgments (*Bulankulama vs. Minister of Industrial Development*, 2000), *Heather Theresa Mundy case*, 2004), *Fundamental Rights case against Chunnakam water contamination case*) (*Ravindra Gunewardena vs. Central Environmental Authority et. al*, 2020), *recent Writ application concerning deforestation of Wilpattu Forest Reservation*, 2020) etc. based on



republican features of our Constitution focusing on judicial incorporation of international conventions and public trust doctrine demonstrate the capacity of the judiciary to function as dynamic guardians of peoples' rights even in the migration law regime especially in the context of pressing social need. Thus, the objectives of this research paper focus on comprehending the socio-economic significance of return migration and reintegration, analyzing the existing legal framework in relation to return migration and reintegration, identifying the dilemma in the migration law regime, ascertaining remedial measures for said dilemma, ascertaining influential developments in the public law regime in order to develop a remedy, considering the possibility of unorthodox form of general legitimate expectation over inconsistent and unpredictable policy especially in the light of recent dynamic developments in public law such as public trust doctrine, impact of directive principles of state policy, effect of republican features of the Constitution like inalienable peoples' sovereignty etc., and ascertaining the possibility of resorting to International Law Conventions in the Migration context in the said remedial process.

## **METHODOLOGY**

This research adopts a doctrinal research methodology, which consists of a review of primary sources like the SLBFE Act, Constitution etc. and secondary sources such as research papers, handbooks, newspapers articles etc. Research papers, handbooks, manuals, policy declarations and newspaper articles have been analyzed in comprehending the dilemma in the migration context. Having identified the key problematic area blatantly disregarded in the migration law regime including declarative policy, which lacks positive action as return migration and reintegration, a remedial approach is being ascertained in terms of administrative law and fundamental rights law. In interpreting the unorthodox broad form of substantive legitimate expectation and persuasive effect of international law migration conventions, a series of judgments in the public law sphere, which are based on novel republican features of the 1978 Constitution have been focused on as fundamental inspiration for the said approach. Nevertheless, caution is exercised to ensure that legitimate expectation for consistent and predictable policy with positive action does not encroach upon the province of policy makers.

## **RESULTS AND DISCUSSION**

### **Existing Law on Return Migration and Re-integration**

In terms of Section 15(s) of the SLBFE Act, the bureau is bound by the object of undertaking programs for the rehabilitation of Sri Lankans who return after employment outside Sri Lanka and the SLBFE is empowered to do anything necessary for or conducive or incidental to the objects under Section 16. NLMP declares that return migration and circulation are key opportunities for skills transfer, productive employment and conflict-free social integration. Commencing at the point of departure the SLBFE will design and implement a mechanism for returnee migrant workers to promote local employment and tap into their potential for national and personal development. However, NLMP itself recognized that there were no specific programs that target returnee migrant workers to ensure their successful integration into societies that they left behind (NLMP, 2008). In pursuance of the directions of NLMP, sub-policy and National Action Plan on Return and Re-integration of migrant workers was adopted by the Ministry of Foreign Employment in December 2015 covering social reintegration of returnees, physical and psychological wellbeing of returnees and their family members, civil and political empowerment of migrant returnees and effective management of return and reintegration process (Wickramasekara, 2019).

### **Inconsistent and Unpredictable Migration Policy with no positive steps**



Although SLBFE has established a separate reintegration unit as indicated in the sub-policy lack of co-ordination among ministries, agencies responsible and divisional level actors a gap analysis in 2018 recommended that SLBFE reintegration unit must be strengthened to co-ordinate with sectorial ministries and departments and enter into agreements with other relevant institutions. The lack of coherence and co-ordination in migration issues is another concern with different ministries handling different responsibilities (Wickramasekera, 2019). This lack of coordination ultimately reduces the effect of policy to a nullity in a manner defeating the very purpose of the same. The current situation concerning return migration and reintegration could be observed in a recent Sunday Times Business news article, which analyzes public perception on brain drain and migration scenario. A bigger problem that has not been addressed so far by policy makers and even the think-tankers like the Institute of Policy Studies and other likeminded organizations in Colombo is the need for consistent policy on migration *vis-a-vis* the brain drain and what happens to the country's labour force if professionals and unskilled persons are going abroad. There is no clear policy: on one side Sri Lanka is encouraging outbound migration for work and training personal like in the case of Korea, which is offering fantastic salaries and other categories like engineers, doctors etc. but what happens when economic crisis ceases and Sri Lanka is on an upward growth path (Samath, 2022). Thus, there is an urgent social need for consistent and predictable policy on return migration and reintegration with positive actions on the same, which comprehend the importance of balancing the interest of brain drain scenario.

Simultaneously, Sri Lanka participates in multilateral bodies such as ILO and UN and has ratified all core ILO Conventions except Convention 97 Migration for Employment Convention (Revised) 1949 (Gunewardena, 2014). While SLBFE is the primary body overseeing migrant workers, the SLBFE Act includes lack of protectiveness provisions for the workers, lack of gender sensitivity provisions and inconsistency with the ratified 1996 International Convention on the Protection of All Migrant Workers and their Families (Gunewardena, Samanthi J citing Wickremasekera, 2014). Said International migration law conventions provide a conducive legal platform for remedying the complications in terms of return migration and re-integration.

## **Legitimate Expectation as a Remedial Approach in the Migration Context**

### **Definition of Legitimate Expectation**

The development of legitimate expectation under multiple facets seems a potent tool to be utilized in confronting drastic gaps in migration law regime like return and reintegration. As the American realist Oliver Wendell Holmes defines the history of common law and states that the law embodies the story of a nation's development that reflects the felt necessities of the time, the prevalent moral and political theories, and institutions of public policy (*Wendell Holmes, O, 1881*). Although in Sri Lanka, influential developments of the notion of legitimate expectation in the environmental law seem a judicial endeavour to upgrade with social necessity in relation to complications in the migration law context, the same have so far been hardly utilized. Thus, it is the duty of the judge to utilize the developments dynamically and innovatively in the concept of legitimate expectation based on policy declarations like NLMP in order to remedy drastic gaps in migration law concerning return migration and reintegration.

Individuals may not have strictly enforceable rights but have legitimate expectations. Thus, decisions subjected legitimate expectations are subjected to judicial review (*Multinational Property Development vs. UDA, 1996*). A promise, regular procedure or undertaking could give rise to a legitimate expectation (*Perera vs. National Police Commission 2007*). There are two types of legitimate expectation called substantive legitimate expectation and procedural legitimate expectation. The doctrine of substantive legitimate expectation is based on the



principle of ‘legal certainty’, which requires that a person should be able to plan an action based on representations made to him by public authority and which he has reasonably relied on (*Ariyaratne & 93 others vs. Illangakoon, 2019*). A recent series of administrative law and fundamental rights judgments based on republican features of the 1978 Constitution such as inalienable peoples’ sovereignty, public trust doctrine, extensive scope of *mandamus*, distinction between *prerogative writs* and orders in the nature of writs under article 140 etc. demonstrate the capacity to ascertain a novel form legitimate expectation. This form of legitimate expectation involves consistent and predictable policy and positive action on declared policy. However controversial or unorthodox this notion may be, especially on account of the problematic policy scenario concerning return migration and reintegration, it is a worthwhile endeavour to ascertain all possible remedial legal interpretations within desirable legal limits.

In *Zamrath vs. Sri Lanka Medical Council* (2020) His Lordship Dehideniya referring *Kathuriarchchi vs. Sri Lanka Medical Council* (2019) elaborating the purview of powers granted to SLMC under the law and the notion of administrative authorities being bound to meet the challenging needs of the society, examined the rationale underlying legitimate expectation as follows:

*“This doctrine ensures legal certainty which is imperative as people ought to plan their lives, secure in knowledge of the consequences of their action. The perception of legal certainty deserves protection as a basic tenant of rule of law, which court attempt to uphold as the apex court of the country. The perception of legal certainty becomes negative when authorities by their own undertakings and assurances have generated legitimate expectations of the people and subsequently by their own conduct infringe so generated legitimate expectations.*

The doctrine of legal certainty reflects fertile basis for legitimate expectation in the migration context.

In *Perera W.K.C vs. Prof. Daya Edirisinghe* (1995) His Lordship Mark Fernando analyzing a form of legitimate expectation concerning Constitutional provisions of equality, inalienable sovereignty and duty cast on all organs of state discerned that Article 12(1) of the Constitution ensures equality and equal treatment even where a right is not granted by common law statute or regulation and confirmed by the provisions of Article 3 and 4(d). Thus, whether rules of examination criteria have statutory force or not, the rules and examination criteria read with Article 12 confer a right on duly qualified candidate to the award of degree without discrimination.

His Lordship Priyantha Jaywardene PCJ in *Ratnakumara vs. PGIM*, 2016 observed that legitimate expectation may arise from subordinate legislation. On the question of legality of legitimate expectation for consistent and predictable policy, in *Dayaratne vs. Minister of Health and Indigenous Medicine* (1999) it was held that while policy is for the policy maker alone, the fairness of his or her decision not to accommodate reasonable expectations which the policy will thwart remains the court’s concern (as of course does the lawfulness of policy). Thus, legitimate expectation in migration context does not mean stepping into the shoes of the policy maker but simply interfering with unfairness of inconsistent and unpredictable policy in pursuance of the principle of legal certainty. The Lord Carnwath in *United Policy Holders Group vs. AG of Trinidad Tobacco* quoting Wade stated that the proportionality court will take into account in resiling from legitimate expectation are any conflict with wider policy issues, particularly those of macro-economic or macro-political kind (Privy Council decision quoted *United Policy Holders Group vs. AG of Trinidad Tobacco, (Ariyaratne & 92 others vs. Illangakoon IGP 2019)*).



## **Fundamental Rights, Constitutional Features, SLBFE Act and Migration Policy Declarations Creating basis for such Unorthodox Legitimate Expectation**

The fundamental right of freedom to return to Sri Lanka under the Constitution is a broad notion of which returning and reintegration prospects of migrants workers is an integral element and state organizational structure including the SLBFE is bound by the duty to respect, advance and secure fundamental rights (Article, 14(1) (i) and 4(d) of the Constitution of the Democratic, Socialist Republic of Sri Lanka).

In the migration context, NLMP, Strategic Plan 2022-2026 declaring the empathy on return migration and reintegration even from the point of departure and Section 15(f) of SLBFE Act read with equal protection provisions of Article 12 of the Constitution, inalienable people's sovereignty under Article 3, article 4(d) duty cast on all organs of the state as well Article 14(1)(h) and 14(1)(i) freedom of movement and freedom to return ensures legitimate expectation to effective return to migrant workers.

## **Directive Principles of State Policy and Fundamental Duties Strengthening Legitimate Expectation**

As declared in terms of Article 27(1) of the Constitution Directive Principles of state policy shall guide Parliament, President, and the cabinet of ministers in the enactment of laws and in governance. State is pledged under Article 27(1) (d) to directing and coordinating public and private economic activity towards social objectives and public welfare and in Article 27(7) the state is bound to ensure that operation of the economic system does not result in concentration of wealth and means of production to the common detriment. Especially in the context where these constitute guidelines for policy from a migration point of view, said principles are vital in developing legitimate expectations for progressive action on declared policy and positive action on the same.

## **The Facet of Public Trust Doctrine Effecting Directive Principles as a Strong Basis for Legitimate Expectation**

Despite the non-justiciable nature of directive principles in terms of Article 29 of the Constitution, our Courts have frequently given life to these in the interests of people. His Lordship Shrawananda held in *In re the 13<sup>th</sup> Amendment to the Constitution* (1987) "*True the principles of state policy is not enforceable in a court of law but that short coming does not detract them from their value as projecting as aims and aspirations of a democratic government.* The significance of directive principles developed so heavily when the same was given effect in conjunction with public trust doctrine. In Writ application in relation to controversial deforestation of Wilpattu Reservation His Lordship Janak de Silva quoting *Heather Mundy* case defined public trust doctrine as follows:

*..... this court recognized itself has long recognized and applied public trust doctrine: that powers vested in public authorities is neither absolute nor unfettered but held in trust for public, to be exercised for the purposes for which they have been conferred and their exercise is subjected to judicial review by reference to those purposes"* (*Centre for Environmental Justice (Guarantee) Limited vs. Anurasatharasinghe, Conservator General of Forestry, Rihad Badiuddeen, Ministry of Industry 7 Commerce et al.*, 2020)

The public trust doctrine is a strong rationale as to why the authorities who develop NLMP, Corporate Strategic Plan and Sub-policy on Return and Reintegration are bound by legitimate expectation for consistent and predictable policy with positive action. Therefore, the authorities like SLBFE, officers etc. who hold powers in trust people cannot simply declare



statements of said nature without creating legitimate expectations in favour of prospective returnee migrants.

In *Environmental Foundation Limited vs. Mahaweli Authority* (2010) His Lordship Ratnayake observed that although it is expressly declared in the constitution that directive principles do not confer any legal obligations and are not enforceable in any court or tribunal courts have linked directive principles to public trust doctrine and have stated that these principles should guide state functionaries in the exercise of their powers.

His Lordship Prasanna Jayawardena PCJ in fundamental rights application against *ground water pollution consequent to Chunnakam Power Station (Ravindra Kariyawasam, Chairman Centre for Environment and Nature studies vs. Central Environmental Authority, Sri Lanka Electricity Board, Board of Investment et al.*, 2015) stated “CEA and BOI, which are state agencies, are to be guided by directive principles and fundamental duties when carrying statutory and regulatory duties. The Directive Principles of State Policy are not wasted ink on the pages of the Constitution. They are living guidelines which state and state agencies should give effect to.

These cases, where directive principles are made effective combined with the public trust doctrine, enlarge the scope of legitimate expectation and the said approach could be used to resort to directive principles in the migration context.

The directive principles preventing operation of economic system resulting in concentration of wealth and means of production to common detriment, as well as state being pledged to economic activity planning towards social objectives, reflect fertile basis for strengthening legitimate expectation in view of NLMP, Strategic Plan and objectives of the SLBFE Act to effective return and reintegration ensured by the SLBFE. Thus, the public trust doctrine in pursuance of peoples’ inalienable sovereignty under Article 3 of the Constitution along with the effect of directive principles will undoubtedly facilitate legitimate expectation for effective return in favour of the prospective returnee migrants who are deprived of the same on account of inconsistent and unpredictable policy with no positive steps. Nevertheless, structural arguments invoking such legitimate expectation will depend on factual circumstances concerning each of the different individuals.

### **International Migration Law Conventions**

Sri Lanka ratified the Convention on the Protection of Rights of All Migrant Workers in 1996 and in terms of Article 67(2) of the said Convention, inter-state cooperation as a means to promote adequate economic conditions for migrants’ resettlement, orderly return of migrant workers to their state of origin and durable social and cultural re-integration in the state of origin is a state obligation. The agenda 2030 for sustainable development calls for underlining the right of migrants to return to their country of citizenship and states must ensure that their returning nationals are duly received (Wicramasekera, 2019)

In the landmark judgment of *Bulankulama vs. Ministry of Industrial Development* analyzing the concept of judicial incorporation of international law His Lordship A.R.B Amarasinghe applied the principles of Rio Declaration: “*Admittedly the principles set out in the Stockholm and Rio de Janeiro Declarations are not legally binding in the way an act of parliament would be. It may be regarded merely as soft law. Nevertheless as a member of United Nations they could hardly be ignored by Sri Lanka. Moreover, they would in my view be binding if they have either been expressly enacted or become a part of domestic law by adoption by the superior courts of record and by the Supreme Court ( Bulankulama vs. Ministry of Industrial Development, 2000).* With reference to said *Eppawala Phosphate case*, her ladyship Thilakawardene observed in *Wijebanda vs. Conservator General of Forestry, 2009*) although





international instruments and constitutional provisions are not legally binding, they constitute an important part of our environmental protection regime.

This judicial activism moving towards monism was criticized for trespassing into the legislative sphere in the *Sinharasa case (Nallaratnam Sinharasa vs. Attorney General, 2013)*. However, the Indian Supreme Court justified its activism that it was merely ensuring that the advantage of treaty reaches citizens and it is not thwarted by executive lethargy in not incorporating into domestic law (Sonarajah, 2016). Thus, judicial incorporation of international conventions on migration is an ideal tool to be resorted to in ensuring effective return and reintegration in remedying drastic gaps in Sri Lankan migration law regime.

## CONCLUSIONS/ RECOMMENDATIONS

Return migration and reintegration, which are integral elements of the nexus between migration and economic development is a drastic gap in the legal regime governing migration and foreign employment. This legal regime includes declarative statements formulated by ministers and SLBFE contained in NLMP, Strategic Plan 2022-2026, sub-policies National Action Plan on Return and Reintegration etc. emphasizing the significance of return migration and reintegration from the point of departure as well as Section 15(f) of the SLBFE Act. The existence of said declared policy under SLBFE Act in conjunction with republican features of the Constitution, public trust doctrine giving effect to even non-justiciable directive principles collectively justify such unorthodox legitimate expectation for consistent and predictable policy and positive action ensuring effective return. In other words, said legitimate expectation is based on inalienable sovereignty of people under Article 3 of the Constitution, mandatory duty on all organs of state including SLBFE to advance and secure fundamental rights under Article 4(d) along with the freedom of movement and return under Article 14(1) (i). Moreover, Article 27(2) (d) and 27(8) in the chapter of Directive Principles of State Policy and Fundamental Duties strengthen such legitimate expectation. Effective return and re-integration could also be implemented in pursuance of judicial incorporation of International Law Conventions like Convention on the Rights of All Migrant Workers. *Bulankulama vs. Ministry of Industrial Development (Eppawela Phosphate)* for judicial incorporation of International law as soft law, public trust doctrine, distinction between prerogative writs and orders in the nature of writs under article 140 in *Heather Theresa Mundy*, giving effect to Directive Principles combined with public doctrine in *Wattegedara Wijebanda vs. AG* culminated in recent fundamental rights application over *ground water contamination by Chunnamkam power station* and *Wilpattu deforestation cases* provide a conducive legal platform for creation of legitimate expectation in the migration context. Even though the broad form of substantive legitimate expectation ensuring effective return and reintegration seems unorthodox and conflicts with macro-economic and macro-political policy at first sight it will undoubtedly be worthwhile pragmatic legal effort to be attempted especially in the paramount interests of peoples' sovereignty. Even though the approaches ascertained in this paper are frequently resorted in our environmental protection law regime the same is hardly utilized in the migration law context. Thus, a paramount duty is placed on the judges to interpret law dynamically within desirable legal limits to ensure optimum utility of such novel legitimate expectation and international migration conventions in pursuance of desperate social need for remedying the dilemma concerning return migration and reintegration concerning migration law.

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