

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed Edition :

www.ijlra.com

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ISSN

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REFUGEE LEGISLATION IN INDIA: NEED OF THE HOUR.

AUTHORED BY - SHRISTI SHIKHA

The year 2023 was a crucial year for India with its opportunity to showcase its leadership and diplomatic skills on the world forum as it took over the presidency of G20. No wonder the theme of this year's summit was Vasudhaiva Kutumbkam or "One Earth. One Family. One Future" which affirms the value of all life and their interconnectedness on the planet Earth. Be it, Jawaharlal Nehru or Narendra Modi, numerous leaders have reiterated the principle of "The World is One Family" on the world stage and endorsed India as the brand ambassador of the ideology.

However, the past couple of years has been dotted with numerous instances that set forth a different reality. Indian Government's attitude towards Rohingya Muslims, the victims of ethnic cleansing in Myanmar, has been criticized unequivocally by the International Community. The Government's adamance in deporting the Rohingyas who were facing repressive measures back home was questioned by human rights enthusiasts who saw it as a failure of moral leadership. Another prominent development in this regard was the passing of the Citizenship Amendment Act of 2019 under which religion was made a formal criterion for state protection and all non-Muslim refugees from Afghanistan, Pakistan, and Bangladesh were made eligible for Indian citizenship. India also failed to grant the promised number of e-visas to people in Afghanistan subsequent to the Taliban takeover. There was a global outcry at this failure and India's credibility was once again maligned on the global platform.

Juxtaposing India's ideological stance to its actions on the ground, one would wonder as to what allows India to circumvent its highly endorsed policy and act antithetically to human rights obligations. The answer to this essentially lies in the fact that there is an absence of a formal law or a refugee policy to govern the refugee problem. The lack of a systematic mechanism allows the government to deal with the refugee groups on an ad-hoc and arbitrary basis and not according to humanitarian, constitutional or international mandates. This strategic ambiguity in refugee

policy gives way to geopolitical and diplomatic incentives, electoral mandates and socio-cultural dynamics to take the front seat while determining government's attitude towards the issue.¹

WHO IS A REFUGEE

The Merriam-Webster dictionary defines a refugee as "one that flees; especially: a person who flees to a foreign country or power to escape danger or persecution." The Convention relating to the Status of Refugees defines refugee as "a person who is outside his or her country of nationality or habitual residence; has a well-founded fear of being persecuted because of his or her race, religion, nationality, membership of a particular social group or political opinion; and is unable or unwilling to avail him— or herself of the protection of that country, or to return there, for fear of persecution." Thus, refugees form a special class of people distinct from such people who voluntarily leave their home country for a variety of reasons. The term, however, is defined rather narrowly in the convention than in common parlance. For instance, to be qualified as a refugee to avail the protection under the convention, one must flee to a foreign country to escape persecution that should be on account only of the grounds enumerated i.e., "race, religion, nationality, membership of a particular social group or political opinion" leaving little room for victims of natural disasters to seek protection under the convention.

INDIA'S HISTORY OF REFUGEE PROTECTION

While India has produced its fair share of refugees, it has mostly been in the receiving end of the refugee conundrum.

India had acted as a home for refugee communities like Parsees and Jews, even before any international law or convention was put in place for regulating the problem of refugees. As nationhood for India was materializing into reality, she witnessed extreme cruelty to her people in the face of a barbarous partition. Among other things, partition had led to the influx of an enormous number of refugees i.e., Hindus and Sikhs from Pakistan and erstwhile East Pakistan (now Bangladesh). A decade later in 1959 Dalai Lama along with a host of Tibetan refugees fled Tibet in the wake of Chinese aggression and took refuge in India. In 1971, a wave of Bengali refugees had entered India in the aftermath of a genocide and a war with Pakistan. The civil war in Sri Lanka had induced many Tamils to seek refuge in India. Other refugees who have sought refuge in India include Afghans who first fled the Soviet invasion, the Taliban regime and then

¹ Mahika Khosla, The Geopolitics of India's Refugee Policy, Stimson.org, September 22, 2022, <https://www.stimson.org/2022/the-geopolitics-of-indias-refugee-policy/>

the U.S. “War on Terror”, the Rohingyas who fled the military’s repression back in Myanmar, Chakmas, and Hajongs, etc.

CONVENTIONS AND OBLIGATIONS

The primary international document that deals with refugee protection is the Convention Relating to the Status of Refugees (1951) which among other things defines the term refugee, their rights and the protections accorded to them. Further, the Protocol Relating to the Status of Refugees (1967) adopted by 147 nations brought under its ambit all the communities who were forcibly displaced due to conflict and persecution over and the World War 2 refugees of Europe. The Convention and its protocol grant several rights to the refugees which can be broadly classified into two categories. The category includes the most basic and significant right of all i.e., the right of non-refoulement. This right prevents nations from returning a refugee to persecution in his or her home country. Secondly, it grants those rights to the refugees that, after seeking refuge in a different country, are necessary to sustain a living. These rights include right to education, right to occupation, right to property etc. Overall, the Convention and the Protocol together establish a comprehensive framework of rights of the refugees that the participating states must honour to provide protection to the refugees that enter their territories.

India, however, is not a party either to the convention or the protocol for several reasons as cited by experts and government from time to time. It is argued by several observers that India abstained from signing the Convention as it was very Eurocentric and India viewed it and UNHCR as products of Cold War.² India also had a fear of “indefinite legal responsibility for the vast number of people seeking shelter” because of its geopolitical location. Another argument was that it was not possible for a poor and developing country like India to provide basic amenities to its own people and it could hardly afford to host another set of people in such a scenario. It also slammed the Western nations for failing to acknowledge the problem of infiltration and terrorism that India had been facing ever since partition. The signing of the Convention has ever since been a “subject of review” for India.

HOW IS THE REFUGEE PROBLEM ADDRESSED IN INDIA

As discussed above, the refugee crisis has been one of the oldest crises for India since the day of its independence. As per the data of Refugee International India hosts a total of 3,30,000

² Saurabh Bhattacharjee, India needs a Refugee Law, 43, no. 9 Economic and Political Weekly, pg. 71-75

refugees with a whopping 1,43,000 Sri Lankans many of whom fled Sri Lanka following the 1983 anti-Tamil riots, 1,10,000 Tibetans who are currently living in settlements in Dharamshala and other parts of the country, 52,000 Chin from Burma an estimated 11,400 refugees from Afghanistan, a massive number of minorities from Bangladesh most of whom sought refuge in India during the Bangladesh Liberation War, and more than 500 from other countries including Nepal, Bhutan, Myanmar, Somalia, Sudan and Uganda.

Judging by the numbers we can conclude that India has been a graceful host and has followed international norms of refugee protection although it is not formally bound by any of the major international agreements in this regard. Many scholars also argue that the principle of non-refoulement so enshrined in the Convention is alive in India even without having signed any major agreement. Nonetheless, India has in numerous instances deviated from its commitment of traditional hospitality under the garb of national security as in the instances discussed above. A critical analysis in this regard would reveal important facts and figures that would unravel India stand on the question of refugees.

DOMESTIC LAWS GOVERNING REFUGEES

The modern refugee regime in India is governed not by one comprehensive framework but from a number of scattered sources and authorities which lack intrinsic coherence. Firstly, the Constitution of India itself contains several articles that extend important rights to the refugees. Secondly, refugees in India are primarily governed by certain legislation which, though do not specifically talk about them, are taken to govern them along with other “foreigners.” Finally, we have institutions like the United Nations High Commissioners for refugees and National Human Rights Commission that look into the human rights aspect of this problem.

CONSTITUTIONAL PROVISIONS

The Constitution makers while drafting a new Constitution for India did not fail to incorporate the spirit of the Universal Declaration of Human Rights into the Constitution³.

Article 14 of the Constitution grants the Right to equality not only to citizens but also to non-citizens. It states that the state shall not deny to any person equality before law or equal protection of the laws within the territory of India. The right prevents any kind of discrimination between

³ United Nations, Universal Declaration Of Human Rights, 1948.

people or classes of people without any reasonable classification. In the case of *The State of West Bengal v Anwar Ali Sarkar* the Court had held that discrimination will be permitted between different individuals only where there is reasonable classification and the basis of the discrimination should have a nexus with the objective of classification.

Article 21 grants the Right to Life and Personal Liberty and any breach in this regard should be according to procedure established by law. This protection available to aliens and not only to citizens. In *Louis De Raedt vs Union of India*⁴, the Court had reiterated the stance confirming the availability of the right to foreigner as well thereby expanding the scope of this right.

Article 51 of the Constitution is a directive principle that underlines the dual importance of national as well as international law by directing the government to respect international laws. It reads as follows: “The State shall endeavor to ... foster respect for international law and treaty obligations in the dealings of organized people with one another.” The courts, time and again, have interpreted Article 51 to demand adherence to international law when there is no clear conflict with domestic law.

JUDICIAL DECISIONS

The role of the Judiciary in upholding the rights of the refugees has been of utmost significance. The Indian Courts have decided in a number of cases that the constitutional right of life and liberty must be extended to the refugees.

In the landmark case of the *National Human Rights Commission vs the State of Arunachal Pradesh*⁵, the Supreme Court prevented the Chakma refugees from being deported. It had directed the State Government to ensure that the Chakmas are forcibly ousted in contravention to the procedure established by law. It upheld the constitutional right of life and liberty of the Chakma refugees. This decision was hailed by many and was read as envisaging the right of non-refoulment under article 21 of the Constitution.

In *Visakha vs state of Rajasthan*⁶, the Court upheld the harmonious construction of international law and domestic law when it is consistent with fundamental rights.

⁴ 1991 AIR 1886, 1991 SCR (3) 149

⁵ 1996 AIR 1234, 1996 SCC (1) 742

⁶ AIR 1997 [SC](#) 3011

The Supreme Court has, among other things, acknowledged the plight of deported refugees and has reiterated the importance of following the process of law while dealing with the refugees and granting them the protection of life and liberty. In the case of Abdul Majid Mohd. Jad Al-Hak v Union of India⁷ the Court had held that food and medical care should be provided to refugees as the bare minimum essentials for survival.

The Court has also passed various judgements restraining the deportation of refugees as in the case of Maiwand's Trust of Afghan Human Freedom vs. the State of Punjab⁸ and ND Pancholi vs. State of Punjab and Others.

Even the High Courts have actively sought to protect the rights of refugees through various decisions and judgments. In Zothansangpuri vs State of Manipur, the court ruled that the refugees shall not be deported if their life was in danger. In Bogyi vs Union of India, the court had ordered the temporary release of a Burmese man from detention allowing him to apply to the UNHCR for the refugee status. In Ktaer Abbas Habib Al Qutaifi v Union of India, the Gujarat High Court gave a progressive ruling by bringing the principle of non-refoulment under the ambit of article 21 of the Constitution while deciding not to deport two Iraqi nationals and handing them over to the UNHCR.

Thus, it is evident from the numerous case laws above the Indian Judiciary has proactively worked towards protecting the rights of the refugees and upholding the spirit of human rights obligations.

STATUTES

There exist in India a number of statutes that have been passed by the Legislature to govern immigration. These laws include the Passport (Entry into India) Act of 1920, the Registration of Foreigners Act of 1939, the Foreigners Act of 1946, the Foreigners Order of 1948, and the Citizenship Act of 1957.

The Foreigners Act as well as The Foreigners Order empower the Indian Government to restrict and regulate the movement of aliens inside India. Article 3(1) of the Foreigners Act allows India to block entry of any and all foreigners, which stands in direct opposition to the right of non-

⁷ Criminal Writ Petition No. 60 of 1997; Crl. W. 60/97

⁸ (1991) 3 SCC 544.

refoulment as all refugees are clubbed with other categories of non-citizens under the term “Foreigners” in disregard of their special circumstances.

PROBLEMS OR GAPS IN ADMINISTRATION

India, owing to its location in south Asia, surrounded by countries either facing ethnic or political violence as in Myanmar and Sri Lanka or any other sort of conflict as in Afghanistan or China, has often been in the center of refugee movements. However, India’s handling of the problem explains that the Indian mechanism does not consider the human rights paradigm of refugees. The topic of refugee law has been a victim of the State’s neglect. The confusion between a refugee and an illegal migrant has led to legislative gaps in the Indian refugee law as a whole.

The primary legislation that the authorities rely on is the Foreigners Act, of 1946. This Act, however, is not without its share of shortcomings. It fails to give any separate definition of refugee clubbing them under the broad definition of a foreigner which is defined under section 2 (a) of the act as anyone who is not a citizen of India. The Act fails to recognize the refugees as a class and thus grants the government discretion to deport any foreign citizen at any point in time.

Other acts that deal with refugees in India are the Passport Act of 1967, the Extradition Act of 1962, and the Illegal Migrant (Determination by Tribunals) Act of 1983. Even under these laws the refugees are not treated as a separate class but as foreigners who enter India voluntarily without any fear of persecution.

The lack of distinction between the term “refugee” and “foreigner” has worked to aggravate the plight of the refugees in India who in such a case are not viewed as a part of human rights violations where the acts of the refugees are completely involuntary.

Further, the Foreigners Act, of 1946 deals with the matters of "entry of foreigners in India, their presence therein and their departure therefrom". Paragraph 3(1) of the Foreigners Order, 1948²⁵ lays down the power to grant or refuse permission to a foreigner to enter India.

A complete reliance on the constitutional provisions too fails to provide any relief. It has often been observed that the article fails to provide the protection of life and liberty when it is in conflict

with “national security.” In the case, *Railway Board vs Das*⁹ the right of the refugee could be upheld only when it was found that the State had no interest in the matter.

The failure to provide protection when violation comes at the hands of a non-state actor is another roadblock in this regard. Article 21 thus fails to guarantee the right of non-refoulement to each and every refugee. Finally, the Supreme Court has confirmed in many instances that a nation’s interest in national security outweighs refugees’ right to life and personal liberty¹⁰. Hence, article 21 does not provide the right of non-refoulement as a fundamental right. Article 51 of the Constitution too fails to make any difference on the ground for it merely being a directive principle and unenforceable.

The Indian Judiciary has given numerous progressive judgments but every case can be said to be matched by parallel tales of non-interference. There have been no set or defining standards for implementing judicial decisions which adds insult to injury for the refugee community. The Courts have actively tried to uphold the rights enshrined in the Constitution. However, the enjoyment of these rights has remained a pipe dream for the refugee community due to inconsistent and arbitrary government policies directed more by political exigencies than legal imperatives.¹¹

The United Nation High Commissioner for Refugees, a committed body for the protection of the rights of refugees has failed to realize its full potential or do justice to the refugees in India due to its limited presence in India. Wherever there is a mass influx of refugees UNHCR seeks help of to provide information on the crisis. This makes UNHCR’S function tough in India where NGOs with their limited manpower and finances are not updated with the true information on refugees. Moreover, UNHCR can work efficiently only when it has the full support of the government of the country in question, which in the case of India is very little or almost absent. The NHRC has till now not played any substantive role in refugee protection apart from filing PILs on behalf of the aggrieved and making suggestion for the modification of the existing refugee policy. Its suggestions and directions are non-binding in nature which allows the government to continue to act in an arbitrary manner.

⁹ Chairman, *Railway Board vs Chandrima Das*, (2000) 2 SCC 465; MANU/SC/0046/2000

¹⁰ *Mohammad Sadiq vs Government of India*, 2004

¹¹ Saurabh Bhattacharjee, *India needs a Refugee Law*, 43, no. 9 *Economic and Political Weekly*, pg. 71-75

It is clear that alternative approaches to governing refugees have proven unsustainable substitutes for a coherent and comprehensive domestic legislation for governing refugees. The state has ignored its obligations by virtue of it being a party to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

The absence of a well-defined refugee mechanism has also led to the transmission of half-baked knowledge on the matter of refugees to the local population. Such lack of knowledge can lead to local populations turning hostile to the refugee community. The increase in the number of people fleeing persecution from Afghanistan and Myanmar during the last few years has placed an undue burden on the Indian economy, leading to a rise in racism and xenophobia. Overemphasis on national security and the adoption of populism has also had serious averment for the conflict-ridden refugees.

AD-HOCISM IN POLICY

By maintaining deliberate ambiguity around its refugee policy, India attempts to retain control over which refugees it protects and to what extent, evading legal responsibility and heightened international scrutiny.¹²

The Indian Government has many a time been accused of adopting an ad-hoc and arbitrary policy in the treatment of different groups of refugees. For instance, in 1959 the Tibetan refugees were welcomed with open arms and allowed to settle in India with complete state support and protection. This stance of India was associated with the government's desire to capitalize on the anti-China sentiment. Even the Sri Lankan refugees were allowed to seek refuge in India. Whereas the Rohingyas witnessed the worst fate of all and were neither granted state protection nor any support in the face of life-threatening situations back home. This has been attributed to the anti-Muslim stance of the government in power. The government's response to the Rohingya crisis has been accused of having communal undertones.

The dangers of this ad-hoc treatment have been exacerbated in recent times in face of a growing number of Afghan refugees and people fleeing Sri Lanka's dire economic crisis. India's failure to grant the promised number of e-visas to the Afghan refugees and its suggestion to prioritise Hindus and Sikhs had once again raised eyebrows in the international community. The

¹² Shivangi Seth, Why India needs a Refugee Law, 25th July, 2022, The Lowy Institute, <https://www.lowyinstitute.org/the-interpreter/why-india-needs-refugee-law>

discriminatory CAA policy of the government had fuelled concerns that India's selective asylum policies are based on geopolitics and religion.

SOLUTION

Signing the Refugee Convention may not be a practical possibility as, in the face of India's neighbours not adhering to the Convention, India will have to bear the disproportionate burden on this issue. Greater commitment from its neighbors would likely push India to consider its position on joining the Convention.

Although refusal to join the Convention does not absolve the country from honouring human rights commitments. The right of refugees to non-refoulement has been recognised, even if with some reservations, as a part of customary international law.¹³

Even though India is not a signatory of the Convention on the Status of Refugees India is party to the Universal Declaration on Human Rights (UDHR) 1948 and has joined the International Convention on Civil and Political Rights (ICCPR-1966) and the International Convention on Economic, Social and Cultural Rights (ICESCR-1966) since 1979. It is also a signatory to the Convention on the Elimination of all forms of Racial Discrimination (CERD-1965) and the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Torture Convention-1984) which puts an obligation on the country to act in accordance with the principles of humanitarian laws.

However, going by the current scenario, it is no doubt that the formulation of a refugee law through the perspective of judicial decisions, constitutional provisions and international obligations is of paramount importance.

WAY FORWARD

The Indian legal framework needs to be upgraded under the paradigm of human rights law at par with internationally accepted norms and in the spirit of the Constitution. A domestic law would protect the refugees from becoming victims of the whims and fancies of parties and politicians. Reliance on vague acts such as the Foreigners Act of 1946 will place India in a precarious situation on the global stage. Therefore, this act and all other acts discussed in this article should

¹³Saurabh Bhattacharjee, India needs a Refugee Law, 43, no. 9 Economic and Political Weekly, pg. 71-75

not be used to govern the refugee issue. With judicial oversight, cooperation with civil and international organizations, and attention to the international status quo, a standard refugee policy would provide legal pathways to asylum and prevent unjust administrative actions.

The first step in the process of formulating a refugee law is to draw a distinction between a foreigner, an illegal migrant, and a refugee. Refugees are people who have faced persecution in their home country or have a well-founded fear of persecution. They are not bereft of the ideas of social and economic development, unlike other migrants who come to India voluntarily seeking a better life¹⁴.

The domestic legislation should clearly define refugees as a distinct class and defines their rights of education, housing, food, security, and dignified life. Civil societies and NGOs should cooperate with the government and Institutions like the UNHCR AND NHRC to identify and rehabilitate refugees. Refugees should be granted refugee status via a simple fair and transparent process as per the law. Special provisions relating to women and children should be formulated to protect the most vulnerable group of people.

CONCLUSION

With growing economic crises, climate crises, and the advent of new and deadly diseases, even the international framework on the refugee convention needs an overhaul to effectively deal with the emerging problems of the world. The definition of who is a refugee needed to be broadened and the responsibility to house the refugees should be equally distributed across different countries with adequate support from the world organizations in terms of resources to deal with the crisis. India, on the other hand, should redeem its reputation as a tolerant and secular state. A domestic refugee legislation would not only be beneficial to the refugees but also to India, who through its inclusive policy can strengthen its leadership in the world.

¹⁴ Omar Chaudhary. "Turning Back: An Assessment of Non-Refoulement under Indian Law, vol. 39, no. 29 Economic and Political Weekly, 2004, pp. 3257–64.