



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed Edition :

www.ijlra.com

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume 2 Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsoever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis

IJLRA

EDITORIAL TEAM

EDITORS

Megha Middha



Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshargarh, Sikar

Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshargarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

Dr. Samrat Datta

Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board



Dr. Namita Jain



Head & Associate Professor

School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC -NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.

Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India. India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020). Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019

Mrs.S.Kalpana

Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8Articles in various reputed Law Journals. Conducted 1Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

ABOUT US

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS

ISSN

2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

REFUGEE RIGHTS UNDER THE INDIAN CONSTITUTION: PART III'S PROGRESSIVE TRAJECTORY

AUTHORED BY: PRERNA MANOCHA

LLM Candidate, Constitutional and Administrative Law,
CHRIST UNIVERSITY, BANGALORE

When a newly born nation stood against an almost unanimously agreed Convention in the 1950s, perhaps most United Nations members didn't understand the move's significance outrightly. But India vehemently opposed the Convention Relating to the Status of Refugees, also known as the 1951 Refugee Convention. India called the Convention 'euro-centric', stating that its principles were embedded in Cold War politics¹. Stating similar reasons, India would soon refuse to sign the 1967 Protocol to the Convention as well.

However, this approach was met with criticism. India's approach to Refugee Convention was contradictory to its Constitution, which it had adopted a year before it refused to sign the Convention and multiple instruments that it was a party to, including the United Nations Declaration of Territorial Asylum, 1967², the Universal Declaration of Human Rights, 1948³, and the International Covenant on Civil and Political Rights, 1966⁴. Despite its reluctance to the Convention, in another contradictory move, India, in 1995, became a member of the Executive Committee of the United High Commissioner for Refugees (UNHCR).

It would be erroneous to presume that by not signing the 1951 Convention, India has washed its hands away from its international obligations and responsibilities. As a formidable economy and

¹ Boutier, I. (2021) 'The non-ratification of the 1951 Convention on Refugees: An Indian paradoxical approach to human rights', *Revue québécoise de droit international*, CanLIIDocs (1690), pp. 115–135. doi:10.7202/1079425ar.

² United Nations Declaration of Territorial Asylum, GA Res 2312, UNGAOR, 22nd Sess, Supp No 16, UN Doc A/6716 (1967) 81.

³ Universal Declaration of Human Rights, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.

⁴ International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171 (entered into force 19 May 1976).

a prominent sub-continent nation, India has never shied away from accepting refugees. Its Constitution has assisted in strengthening the rights of these refugees, evolving their protection from existing provisions. There isn't a single piece of legislation supporting the rights of refugees in India. While that is a challenge for the 46,903 refugees and asylum-seekers who hold UNHCR-issued documents as of June 2023⁵, the Indian Judiciary and Part III of the Constitution have created rights for these individuals. This voyage has been elucidated ahead.

Today, the international community understands several terminologies, such as refugees, climate change refugees, asylum seekers, internally displaced persons (IDPs) and stateless persons. However, the need for defining refugees and their rights only existed internationally in World War I and the Russian Revolution in 1917, when 1.5 million Kulaks from Russia, Armenia, and Assyrian nationals were displaced. Then, the League of Nations appointed Fridtjof Wedel-Jarlsberg Nansen as the High Commissioner for Russian Refugees in 1921. Before the setting up of such an office, matters of 'refugees' were a state subject, not an international obligation. However, the World War and Civil Wars in Europe changed the perception and brought the threat to state security if the refugee crisis were not dealt with. This prompted urgent dialogues and actions on the part of the entire European community.

The discussions culminated after World War II, reaffirming the urgent need for international law to guide nations during such a crisis. The 1951 Convention was signed in Geneva, Switzerland, in 1951, and as of 2010, there are 146 signatories to this Convention⁶, which successfully solidified the right of non-refoulement for refugees.

India's Refugee Crisis: A Summary

In the background of the United Nations members undertaking to secure the rights of refugees through the Convention to resolve the emergency that World War II had triggered for Europe, India, a newly independent nation with a shambled economy and brewing war, faced its refugee crisis in the form of Partition. The true extent and statistics of the atrocities and forced migration remain unknown.

⁵ 'India Factsheet | Global Focus' (2023) *Global Focus* [Preprint]. UNHCR. Available at: <https://reporting.unhcr.org/india-factsheet-5283> (Accessed: 13 August 2023).

⁶ Archives, U. (2010) *The 1951 refugee convention, UNHCR*. Available at: <https://www.unhcr.org/about-unhcr/who-we-are/1951-refugee-convention> (Accessed: 14 August 2023).

Still, the Partition of India and Pakistan was an entirely different issue than what Europe faced in the aftermath of the war. Firstly, Partition was not the product of war fought over a couple of years; it immediately tore the countries within a few days. Secondly, the psychological trauma of the refugees was fuelled further by the communal violence and economic instability of both nations. The mass exodus of the Sindhi community in Pakistan and the aftermath for those who escaped was another challenge an ill-equipped government faced within a few weeks of achieving independence⁷.

Conforming to European ideologies, therefore, was not an option for India. Those principles would also not sustain in the light of the further refugee crisis in 1959 when Dalai Lama and the Tibetan community were seeking refuge in India, 1971 when after the Bangladeshi War of Independence, ten million refugees crossed borders, seeking asylum in India, and between 1983 and 1987, when 1.34 lakh Sri Lankan Tamils fled during Sri Lankan Civil War⁸⁹. While these were significant incidents from the past, India has been providing asylum to many more refugees from Afghanistan, Pakistan, Chakma Refugees from Chittagong hills, and most recently, Rohingyas from Myanmar. India has also played a proactive role in the region by signing Principle on the Status and Treatment of Refugees, also known as the Bangkok Principles, India's regional initiative for refugee rights.

The United Nations High Commissioner of Refugees' Office, set up in Delhi and Chennai, provided limited administrative assistance upon its establishment. However, it is now the sole body for determining refugee status for asylum seekers in India, without any legal framework governing it. Nevertheless, it is imperative to note here that the efforts of the UNHCR were only possible if the judiciary played a proactive role in securing the rights of individuals during the numerous refugee crisis that India faced.

⁷ Anand, S. (1996) 'Migration and Socio-Cultural Identity Crisis - A Case Study of Sindhis in Post-Partition India', *Proceedings of the Indian History Congress*, 57, pp. 633–640.

⁸ Das, P. (2016) *Illegal migration from Bangladesh: Deportation, Border Fences and work permits, Illegal Migration from Bangladesh: Deportation, Border Fences and Work Permits*. Available at: https://idsa.in/monograph/illegal-migration-from-bangladesh_pdas (Accessed: 14 August 2023).

⁹George, M. (2012) 'Sri Lankan Tamil refugee experiences: A qualitative analysis', *International Journal of Culture and Mental Health*, 6(3), pp. 170–182. doi:10.1080/17542863.2012.681669.

The Role of the Indian Judiciary

India follows the specific adoption theory to integrate international instruments into its municipal law through legislative enactments, as observed in the case of *Maganbhai Ishwarbhai Patel v. Union of India*¹⁰. Article 253 of the Indian Constitution, however, empowers the legislature to implement the provision of an international treaty. The judiciary, therefore, in the absence of a legislative framework, relied on rights contained in the Constitution itself and associated them with the principles enshrined in the international instruments to which India is a signatory and *jus cogens* principles of international law.

The judiciary's interpretation, especially of Part III of the Indian Constitution, which enshrines Fundamental Rights, is significant for developing refugee protection in India. While the legislature wishes to maintain a flexible policy for refugee protection, the judiciary has played its role in finding protection in many scenarios within the Constitution, further elucidated below

A 'jus cogens' rule: Gujarat High Court's Interpretation of Article 21

It is undisputed that the principle of non-refoulment has acquired the status of *jus cogens*. Therefore, it binds India as well¹¹. According to this principle, as stated in the 1951 Convention, no country shall deport, expel, or forcefully return the refugee to his original territory against his will or if there is a reasonable threat to his life, liberty and freedom¹².

The Supreme Court of India has not authoritatively determined whether the right to determine refugee status and the principle of non-refoulment exists in Part III's framework. Nevertheless, Gujarat High Court's decision in the *Ktaer Abbas*¹³ case is a monumental precedent. In this case, two Iraqi minors had crossed the Bhuj border and were detained at Joint Interrogation Centre in Bhuj. Their petition to the Gujarat High Court pleaded for their transfer to UNHCR Office in Delhi, based on the non-refoulment principle. The High Court, keeping in mind that the lives of the minors were under threat if they were returned to the Iraqi Government, allowed them to apply for asylum with the UNHCR Office. In addition, the judgement stated that the principle of non-refoulment is encompassed in Article 21 for a non-citizen seeking asylum.

¹⁰ (1970) 3 SCC 400

¹¹ Goodwin-Gill, G.S., McAdam, J. and Dunlop, E. (2021) *The Refugee in International Law*. Oxford: Oxford University Press.

¹² See, Art. 33, 1951 Refugee Convention.

¹³ *Ktaer Abbas Habib Al Qutaifi & Anr. v. Union of India*, (1998) Cri LJ 919

The nexus of relating Article 21's guarantees and 'refugee' is in the definition of refugee itself. A refugee is "someone unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion"¹⁴. There existed a severe threat to the lives of the minors in the present case. Article 21 has also been interpreted to assure the life and liberty of non-citizens. In its decision, the Court vehemently supported the need to protect the minor boys from being returned and assured them of assistance with the asylum-seeking process.

However, the Court did give exceptions as to granting this principle – the asylum seeker's presence shall not be prejudicial to India's law, order and security. This judgement has served as a vital precedent in current times. It has been argued that the verdict proves that the principle of non-refoulment can exist in Part III of the Constitution. This decision is currently serving as the basis of criticism for deporting and denying admittance of Rohingya refugees.

Articles 14 and 21: Joint Interpretations

While interpreting Articles 14 and 21 and the application of the same for refugees, the Supreme Court of India, in the *Chakma Refugee*¹⁵ case, stated that the language of the makers of the Constitution had clarified the application of the provisions to non-citizens as well. The Court further noted that the combined effect of the conditions had assured protection to the numerous Chakma refugees who have settled in Arunachal Pradesh. While this decision did not analyse the scope of the non-refoulment principle under Part III, it did play a significant role in guiding the Gujarat High Court's interpretation of Article 21 in the *Ktaer Abbas* case.

Extension of Article 21 to protections under Article 22

In the case of *Louis De Raedt v. Union of India*¹⁶, the Supreme Court held that even non-citizens have the fundamental right to life, liberty and dignity. The right against arrest and detention follows this right of life. This judgement is a testament to the judiciary's liberal interpretation of detention cases of refugees. The rationale is noble. It is crucial for the executive arm, which deals with refugees, to understand that the term 'refugee' is not to be viewed with the term 'prisoner', especially while detaining them at borders. Detention cases of the refugees have to be dealt with

¹⁴ See, Art. 1, 1951 Refugee Convention.

¹⁵ NHRC v. State of Arunachal Pradesh, (1996) I SCC 742, para 20

¹⁶ (1991) 3 SCC 554

sensitively and liberally to ensure that the UNHCR Office can be allowed to determine their status.

The Indian Judiciary has been widely acclaimed for its proactive role in upholding the rights of refugees by strengthening their protections within the Fundamental Rights. Over the years, the judiciary's interpretation of Part III has ensured that fundamental human rights are guaranteed to refugees, giving many organizations a basis to advocate for their protection against ill-treatment in camps and at borders.

Despite the efforts of the Indian judiciary, refugees in the country are still not receiving adequate protection under the current statutory regulations, especially in the Foreigner's Act and Indian Passport Act. These loopholes in the legal system signify the need for dedicated municipal laws that specifically address the needs and challenges of refugees, guaranteeing their safety and security under Part III of the Constitution. By creating and enforcing such laws, the Indian government can ensure that refugees are granted the legal protections they are entitled to and can live a dignified life free from fear and persecution. This is crucial for the well-being and protection of refugees who have fled their homes due to war, conflict, or persecution and have taken refuge in India. Therefore, it is imperative that the government take the necessary actions to address these gaps in the legal system and provide refugees with the protection and support they need to rebuild their lives.

Significance of Protection under Part III in Light of Statutory Laws

India is home to many refugees who have fled persecution and violence in their home countries. However, several domestic legislations in the country pose a serious threat to refugee protection. One of the main reasons for this is the lack of distinction between a 'foreigner' and a genuine 'refugee'. This can lead to situations where refugees are not provided with the protection and assistance they need and are instead treated like any other foreigner.

One example of such legislation is the Passport (Entry into India) Act of 1920. This Act does not differentiate between a tourist, an economic migrant, and a refugee escaping persecution from their home state. As a result, immigration authorities may arrest and illegally deport refugees who

do not have passports, even if they are fleeing violence and persecution in their home countries. This lack of distinction between different types of migrants puts refugees at risk of being denied their basic human rights and protections.

Similarly, according to the Passports Act, passports and refugee cards can be issued only when a refugee fulfils 'public criteria', which has been vaguely defined in the Act. This vagueness has led to only Tibetan Refugees being given valid passports under the Passports Act.

Asylum seekers and refugees face unique challenges and legal complexities that can sometimes leave them vulnerable to human rights abuses. In India, there are certain laws in place to protect the rights of these individuals, but there are still loopholes and uncertainties that can put their safety and well-being at risk. To address this, the judiciary has taken an active role in interpreting the law to ensure that the rights of asylum seekers and refugees are protected. Specifically, if a refugee is arrested, detained, or threatened with refoulment (deportation), they are entitled to appeal to the courts in India if their rights under Articles 14, 21, and 22 of the Constitution have been violated.

These articles of the Constitution guarantee fundamental rights such as equality before the law, protection of life and personal liberty, and protection against arbitrary arrest and detention. By invoking these provisions, refugees can challenge any violations of their basic human rights and seek redress through the legal system.

This legal protection is essential to safeguard the rights and dignity of asylum seekers and refugees in India. It ensures that they are not subjected to arbitrary detention or deportation without due process, and that they have access to justice if their rights are violated. By upholding these fundamental rights, India can demonstrate its commitment to human rights and providing a safe haven for those who have fled persecution and violence in their own countries.

An ever-present challenge for the upcoming decade is that of climate change refugees. At the same time, the Chakma refugees have been seeking asylum due to tensions and environmental challenges of the Chittagong hills; the aspect of 'climate change refugees' remains unresolved even in the international community. The grounds under the 1951 Convention definition are socio-political and do not cover the ambit of such refugees but their struggles to seek asylum on

the grounds of inability to return to their homeland due to climate change-related disasters. The issue of climate refugees is becoming increasingly pressing around the world, and New Zealand has already faced this challenge with Kiribati refugees. These individuals are fleeing their home country due to the imminent threat of the Kiribati Islands drowning as a result of climate change.

The issue of climate refugees has become increasingly pressing in recent times, as more and more people are forced to flee their homes due to the effects of climate change. Despite the urgency of the situation, some countries have been reluctant to grant asylum to these refugees, citing the lack of an immediate physical threat. This is the case with a group of refugees who have sought asylum in New Zealand, due to the threat of rising sea levels in their home countries. Although the danger they face is clear and present, the courts in New Zealand have refused to grant them asylum because the threat has not yet materialised. This stance raises essential questions about how countries should approach the issue of climate refugees in the future. With the potential for more and more people to be displaced by the effects of climate change, it is essential that countries develop a clear and comprehensive strategy for dealing with this issue. India, for example, may soon face a similar danger with island nations like Maldives, Mauritius, and Seychelles, which are also vulnerable to rising sea levels.

While there may not be an immediate threat to the lives of these refugees, it will be critical for the judiciary and legislature to revisit the refugee policy. One key consideration will be whether these refugees are protected under Article 21's guarantees, which provide for the protection of life and personal liberty. This raises important ethical and legal questions about the responsibility of nations to protect the rights of individuals who are facing displacement as a result of climate change, even if they are not yet facing an immediate physical threat. As the issue of climate change continues to worsen, policymakers need to grapple with these complex questions and develop policies that prioritize the safety and well-being of all people, including those who are most vulnerable to the impacts of climate change.

REFERENCES

I. Acts, Rules and Legislations

- a) The Constitution of India, 1950
- b) Passport (Entry into India) Act of 1920
- c) Indian Passport Rules, 190
- d) Passports Act, 1967

II. Books

- a) Goodwin-Gill, G.S., McAdam, J. and Dunlop, E. (2021) *The Refugee in International Law*. Oxford: Oxford University Press.
- b) Pathak, P. (2021) *International Humanitarian and Refugee Law*. 1st ed. Lucknow, UP: Eastern Book Company.

III. Case Laws

- a) Maganbhai Ishwarbhai Patel v. Union of India, (1970) 3 SCC 400
- b) Ktaer Abbas Habib Al Qutaifi & Anr. v. Union of India, (1998) Cri LJ 919
- c) NHRC v. State of Arunachal Pradesh, (1996) I SCC 742
- d) Louis De Raedt v. Union of India, (1991) 3 SCC 554

IV. Conventions, Declarations and Principles

- a) Convention Relating to the Status of Refugees, 1951
- b) The International Covenant on Civil and Political Rights, 1976
- c) United Nations Declaration of Territorial Asylum, 1967
- d) Universal Declaration of Human Rights, 1948
- e) The Principles on the Status and Treatment of Refugees, 2001

V. Journal Articles

- a) Anand, S. (1996) 'Migration and Socio-Cultural Identity Crisis - A Case Study of Sindhis in Post-Partition India', *Proceedings of the Indian History Congress*, 57, pp. 633–640.
- b) Boutier, I. (2021) 'The non-ratification of the 1951 Convention on Refugees: An Indian paradoxical approach to human rights', *Revue québécoise de droit international*, CanLIIDocs (1690), pp. 115–135. doi:10.7202/1079425ar.
- c) Das, P. (2016) *Illegal migration from Bangladesh: Deportation, Border Fences and work*

permits, Illegal Migration from Bangladesh: Deportation, Border Fences and Work Permits. Available at: https://idsa.in/monograph/illegal-migration-from-bangladesh_pdas (Accessed: 14 August 2023).

- d) George, M. (2012) 'Sri Lankan Tamil refugee experiences: A qualitative analysis', *International Journal of Culture and Mental Health*, 6(3), pp. 170– 182. doi:10.1080/17542863.2012.681669.

VI. Reports

- a) 'India Factsheet | Global Focus' (2023) *Global Focus* [Preprint]. UNHCR. Available at: <https://reporting.unhcr.org/india-factsheet-5283> (Accessed: 13 August 2023).

