

REFUGEE PROTECTION IN INDIA: AN ANALYSIS

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ABSTRACT

The largest democracy, India has not either signed the 1951 Refugee Convention or it has specific domestic legislation for the protection of refugees. India claims of abiding by the well-established and thoroughly accepted principle of non-refoulement and conveying refugee protection under the inclusive Article 21 of the Constitution. Regardless of this, India continues to be a host to the largest number of refugees across South East Asia. India has implemented an ad-hoc administrative policy to harmonize protection to refugees ever since 1947. Problems of human right abuses of refugees, lack of basic amenities, discrimination between refugees have resulted in the bad impact of the nation on world stages. Therefore, the researcher looks into the role of Courts, Union Legislature and UNHCR in protecting the rights of the refugees and also suggests ideas to improve the condition by way of enacting definite legislation.

Keywords: Refugee Convention, UNHCR, NHRC, Article 21, refugee law, non-refoulement

INTRODUCTION

“Refugees, overpopulation, environmental degradation, terrorism, world crime movements, and organized crimes are worldwide problems that don’t stop at a nation’s borders.” Warren Christopher, the 63rd Secretary of States in the U.S.A. has very well stated how the issue of refugees is one of the major problems that is affecting the whole world and it is not something limited to a specific country or part of the earth. To understand the issues relating to refugees, it is desirable to know the background of the phenomena. Who is a refugee? A refugee is a person who has been forced to flee his/her country because of the feeling of persecution, war, or violence in their own country. The definition of the term is governed by the 1951 Convention¹ which says “A person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

HISTORY OF REFUGEE

People seeking asylum are existing from many earliest of stages. The primitive men used to migrate for finding food, shelter, and other resources., the right to seek asylum in a holy place or a church was codified in law by King Ethelbert of Kent, Around AD 600 in the medieval period, around Europe, many such laws were implemented. But the breakout of such type of regulations started in 18th century, people were asked to show their identity to cross borders in many countries. The main reason for people to leave their places was wars between neighboring countries and civil wars. In Greece- Balkan Wars nearly 80,000 people were displaced and forced to take refuge. Civil wars in countries like the USA, Spain, Russia caused the big displacement of people in the 19th-20th century. In the First and Second World Wars, the world saw the biggest refugee crisis. People across Europe were left with no other option than to take refuge at safe places to save their lives. Almost a billion refugees went to the Netherlands from Belgium and dispersed across Europe later. During World War II, the crisis was at its worst. Till 1959, nearly 900,000 refugees were spread out in different European countries, 461,000 were accepted by the United States, and more than half a million by various other countries.²

REFUGEES IN INDIA

‘*Atithi Devo Bhava*, Sanskrit: अतिथिदेवो भव’ is the age-old Indian tradition of welcoming guests as God. And by following the maxim, the country has always welcomed and accepted migrants and refugees. The major influx in India started around its independence. Nearly 20 million people were displaced by crossing Indo-Pak borders at the time of Indian independence. India passed legislation named Rehabilitation Financial Administration Act 1948 to administer the refugee issue at that time. Around 1,000,000 refugees came to India from East Pakistan during 1971 war. Dalai Lama with his 80,000 Tibetan people took refuge in

¹ Article 1A(2), Convention Relating to the Status of Refugees, 1951.

² Peter Gatrell, “Refugees and Forced Migrants during the First World War”, *Immigrants & Minorities*, 2008.

the Country after 1959 and India provided them political asylum when they stayed in different parts of the country. Tibetan population has become a part of Indian society now. Chakmas have been settled in Tripura, Arunachal Pradesh, Assam, and the other North Eastern states, Nepalese, Afghans, Bhutanese, Sri Lankan Tamils and people from small islands like the Maldives have also been given refugee status in India. India is now the home for more than 200,000 refugees coming from across the world. But the most controversial issue relating to migrants and displaced persons have now been the Rohingyas from Myanmar. Their influx has created a kind of unrest among the people and the political groups.

1951 CONVENTION AND INDIA

The instrument governing the Refugee issues is the 1951 Refugee Convention adopted in 1951 and came into force on 22nd April 1954. It is ratified by 145 Countries and it defines the term 'refugee', rights of the displaced people, and the obligations of States to protect them.³

India is not the signatory of the convention. India did not state any official reason for not signing the convention. The scholars put forward various reasons like a threat on sovereignty, narrow meaning of the term 'refugee' under the Convention, the prevailing social, economic and political conditions in the country, etc. India, the largest democracy in the world has a multi-party system, with various diverse culture and traditions. Therefore, the Statesmen never want any outer influence in its internal matters. Refugees affect the political stability of the nation and they are treated as vote banks by the political parties. Every country has the right to maintain its sovereignty and that's why no State questions the unwillingness of a State to accept the International Policies regarding the internal matters.

India being a developing nation, it would put a burden if it complies with the convention and becomes a signatory, and affect the security of India. India believes that even if it's not a signatory, it provides minimum needs to refugees. Should India be a signatory to the Refugee Convention or its Protocol still remains a disputed question that has both positive and negative aspects.

PROTECTION UNDER CONSTITUTION

India has ratified various International human right treaties and convention which obliges it to provide protection to refugees on humanitarian grounds. Some of the principles like the "right to seek asylum from persecution"⁴ are an important part of Customary International Law and which is binding on all states including India and specific laws ensuring the same can be enforced⁵ by the government. In *Visakha v. State of Rajasthan*⁶, the court upheld harmonious construction of international law and domestic law when it is consistent with fundamental rights given in Part III of the Constitution. The Government gives temporary protection to refugees. Some fundamental rights are guaranteed to non-citizens under the Constitution as well. The foremost provision is the right to approach courts⁷ for the issuance of writs in case of infringement of fundamental rights which is usually done by filing PILs to ensure enforcement of refugee rights. Some of the rights are given in Art. 14, 21, 22, 25-28, 32 and 226 of the Constitution. The most important of them all is the equality of law and equal protection under the law which guarantees fair and just treatment for all refugees. This is however subjected to reasonable classification and intelligible differentia which differentiates between citizens and refugees⁸. Refugees also have the right to life⁹ and dignity and this does not connote toil or mere animal existence.

LEGISLATIVE PROTECTION

³ <https://www.unhcr.org/1951-refugee-convention.html> visited on 27/03/2019

⁴ Article 14 of UDHR.

⁵ Article 51(c) of the Indian Constitution

⁶ 1997(6) SCC 241, paras. 14-24

⁷ Article 32 and 226 of the Indian Constitution

⁸ Article 14 and 253 of the Indian Constitution

⁹ Article 21 of the Indian Constitution

India, being a Union of States, has a federal structure. The Union legislature, i.e., the Parliament deals with the subject of citizenship, naturalization, aliens, migrants, and refugees. India has not specific legislation dealing with the issues of refugees regulating their entry and status of refugees. The political class has handled the issue for their benefit.

There is no definite legislation regarding Refugees in India. The main dealing the issue is the Foreigners Act of 1946 (No.31 of 1946) which differentiate Alien and Refugee and create further persecution of the Refugee. The refugees are treated under the law applicable to aliens in India unless a special provision is made.

The other enactments related to refugees are:

- India Penal Code Act, 1860 (No.45 of 1860)
- Passport (Entry into India) Act, 1920 (No.34 of 1920)
- Citizenship Act, 1955 (No.57 of 1955)
- Extradition Act, 1962 (No. 34 of 1962)
- Passport Act, 1967 (No.15 of 1967)
- Illegal Migrant (Determination by Tribunals) Act, 1983 (No.39 of 1983)
- Protection of Human Rights Act, 1993 (No.10 of 1994)

The term 'alien' includes 'refugee' in Indian laws. Mainly the Article 22 of Constitution of India (Article 22, Para 3 and Entry 17, List I, Schedule 7), Section 83 of Code of Civil Procedure, Section 3(2)(b) of the Indian Citizenship Act, 1955 deals with the term alien. The more the laws the more the complications. The Foreigners Act, 1946 provides for the power of officials to arrest or detain any foreigner on mere suspicion for non-compliance of the law.

The laws for Refugees in India are not at par with International standards and insufficient to protect them. The Country needs greater laws for their protection. The Principle of Non-Refoulment, i.e. '*no country shall deport, expel or forcefully return the refugee back to his original territory against his will or if there is a reasonable threat to his life, liberty and freedom*', which is a settled International principle now, must be incorporated in the legislative structure of the nation and be followed adequately.

JUDICIAL PROTECTION

Judiciary, unlike the Legislature, has played a vital role in protecting refugees. Through a plethora of cases, it has given landmark judgments regarding refugee protection. The judiciary has provided relief by implementing the concepts of Social Action Litigation and Public Interest Litigation.

In *Digbijay Mote v. Union of India*,¹⁰ a school for the Sri Lankan refugees was run by an NGO and a PIL was made when the condition to run the school was difficult. Ministry of Women and Social Welfare was ordered to provide financial assistance to the school for the benefit of refugees. In *Majid Ahmed Abdul Majid Mohd Jad Al Hak v. Union of India*¹¹, the High Court upheld that food and medical care should be provided to detainees (refugees) as they are the bare minimum essentials for survival

In *Malvika Karlekar v. Union of India*, the deportation order issued against 21 Burmese refugees were stayed by the SC and it allowed them to seek refugee status under UNHCR on the basis of the principle of non-refoulment.

In *Louis De Raedt v. Union of India*, the court held that even non-citizens have the fundamental right to life, liberty, and dignity. This right of life is followed by the right against arrest and detention (Article 22). In a case¹², the Guwahati High Court ordered for interim bail for Burmese refugees who were detained and the court was considerate in not insisting on local sureties. Similarly, the courts have given a liberal interpretation in detention cases so that the UNHCR can determine the status of the refugee.

However, in a number of cases the courts have chosen a lenient view in the matter of punishment for illegal entry or illegal activities by refugees in India and also, by releasing detained persons pending determination of refugee status, staying deportation and giving them a chance to approach the United Nations High Commissioner of Refugees (hereinafter referred to as UNHCR)¹³, refugees

¹⁰ 1993 (4) SCC 175

¹¹ Delhi High Court 1997, Criminal Writ Petition No 60 of 1997.

¹² U Myat Kayew and another v. State of Manipur and another, Guwahati High Court 1991, (Civil Rule No. 516 of 1991)

¹³ Mr Boghy v. Union of India (Civil Rule No 1847 of 1989)

remain at the risk of apprehension, detention, and prosecution for the violation of the Foreigner's Act, 1946 and the Foreigners Order, 1948.

THE ROLE OF UNHCR IN INDIA

UNHCR plays a very comprehensive part for protection of relocated and expatriated people. India has been an executive member of the UNHCR since 1995 and has been availing the aids since then. Their work starts when a refugee comes into the territory of India. Such a person may apply for refugee status and registration at the UNHCR office. A legal officer is appointed to interview such refugees and obtain all the pertinent data. If there exist any inconsistencies in the interview, they should be handled with care and caution as the background and the mental state of the refugee should be considered¹⁴. At times, there are language barriers and all the information is hard to gain. This reason is not final for declining the refugee status by the UNHCR. The deciding factor for the status is the fear of persecution or threat to life. The UNHCR helps in protecting refugees against wrongful arrest and detention and rescues them if they are already under arrest. But a UNHCR mandate is issued in India only to refugees from outside South Asian region. This leaves plenty of room for discrimination and exploitation of refugees south Asian nationals. The UNHCR offers a number of facilities which the Indian government fails to do in cases. UNHCR provides free legal aid to the recognized refugees through their legal officers. It has formal agreements with other NGOs to run financial assistance to the poor and needy refugees across the globe including India. Furthermore, they provide free medical treatment to the sick refugees in government hospitals with a special emphasis on women and child health care¹⁵. The UNHCR has a large number of volunteers and interns who assist in providing vocational training which makes them self-reliant, primary education and counseling to the distressed refugees with the assistance of other NGOs who have an expertise in these fields. Most of the work is centered around discovering durable solutions for mitigating the suffering of refugees at the hands of the host nation. UNHCR works hand in hand with the Central government. This evidently proves that a refugee having the UNHCR certificate is better protected in the host country. Whenever there is a mass influx of refugees, UNHCR depends on NGOs to provide information about the crisis. This causes problems because many NGOs in India are not updated with the exact number of refugees and they have limited manpower, finances and they lack technology access as well. India, the largest receiver of refugees in Asia, it is next to impossible for the government to regulate movement and update information of every person going in and out of the country. Moreover, in India, State politics plays a vital role in determining the protection of refugees which leaves very little ground for UNHCR to provide protection. As a result, only a limited number of refugees who are not from South Asia get UNHCR recognition and protection. The process of deciding the status claim has been criticized because it is arbitrary at occasions and there is no higher official to regulate this practice. The very existence of UNHCR depends on the whim of the Central Government as India which has not ratified the refugee convention at first. Its fate and scope of work are solely determined by the Indian government. In most cases, the officials of UNHCR are denied access to refugee camps which makes it impossible to determine and grant their refugee status. The office of UNHCR receives most of its funds through donations by international organizations and NGOs¹⁶. In hard circumstances, it may face a financial crunch and may not be able to give protection to the refugees. In 1992, the UNHCR denied subsistence allowance in an arbitrary manner to Afghan refugees which proved burdensome for a number of families¹⁷. Hence, the Government should give more authority to UNHCR so that the characters of all refugees coming to India can be recorded. This will lessen cases of false documents and ultimately diminish refugee arrests regarding the same.

SUGGESTIONS AND CONCLUSION

Though there are a number of conventions and laws governing refugees, the refugees still keep facing problems. A country as big as India doesn't have a Refugee Law of its own and that is the root cause of the ineffective protection to the refugees. If UNHCR and government agencies work together, there will be much more development in the field of Refugee Law. There is certainly a need for India to set up a Law regarding Refugees, as in the coming years there may be many more issues due to various reasons. Domestic law may help India to ensure that all refugees are given basic protection. Without that, refugee rights are not rights in the real sense, they are simply privileges at the hands of the administrative authorities. A proper residence and employment can be ensured to refugees for their self-reliance. The civil society organizations should work in collaboration with the Government and the UNHCR to improve their living conditions. Special provisions assuring protection to women and children should be made.

Whenever UNHCR attempts to do something about refugees NGO's must step up action to help them. Though protection to refugees is given under various provisions of the Constitution, there needs to be a uniform that gives equal right to all the refugees. Seeing the security issues due to which India is not a signatory to the 1951 Convention, it should also consider that the refugee law is not abused and mis-utilized by persons who come to seek help. Many judgements of various courts in India support the refugees. India has done a remarkable work regarding refugees, but needs to do much more. Many Rohingya refugees in India are receiving support,

¹⁴ R. J. S. Tahir (eds.) Ragini Trakroo Zutshi, Jayashree Satpute, Md. Saood Tahir: Refugees and the Law, 2edn, HRLN, 2011, pp. 183

¹⁵ Ibid, pp 185-188

¹⁶ <http://www.unhcr.org/pages/49c3646c119.html> (visited on 29th November, 2012)

¹⁷ Ranabir Samaddar(ed.), Refugees and the State. Practices of Asylum and care in India 1947-2000, (2003 edn.) SAGE publications, UK, 2003. BS Chimni, "Status of Refugees in India, pp. 460.

but the government is planning to deport them to their territory. In the past, NHRC submitted a report for the necessity of a Refugee law but the government did not respond. If UNHCR and NHRC comes together to do the same, there may be an answer. The Refugee Convention and the Protocol of 1951 and 1967 are the Conventions that received the global response

0 with many countries signing the convention. They consider most of the reasons of refugees and tell us the rights and other provisions that they should be given. But India has not yet accepted them or incorporated in its local legislations. India as a democratic republic, desperately needs a refugee legislation of its own for governing refugees coming into its territory.

