

An study of refugee's in India: The legal perspective

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Abstract

India has had an age old tradition of according humanitarian protection to refugees and asylum seekers. It has followed a very liberal refugee policy. However, the absence of a refugee specific legislation can be attributed to India's volatile situation in South Asian politics and the threat of terrorism faced by it. Even in such absence of a specific law, India has addressed the needs of refugees who have fled from their home country into its territory. It can be easily seen from that India notwithstanding its own legal concerns, particularly in the last couple of decades, and pressure of population and the attendant economic factors, continues to take a humanitarian view of the problem of refugees. Even though the country has not enacted a special law to govern 'refugees', it has not proved to be a serious handicap in coping satisfactorily with the enormous refugee problems besetting the country. The spirit and contents of the UN and International Conventions on the subject have been, by and large, honored through executive as well as judicial intervention. By this means, the country has evolved a practical balance between human and humanitarian obligations on the one hand and security and national interest on the other.

Keywords: refugee, non-refoulement, international convention on status of refugees, displacement, national treatment

1. Introduction

India has had an age old tradition of according humanitarian protection to refugees and asylum seekers. It has followed a very liberal refugee policy. However, the absence of a refugee specific legislation can be attributed to India's volatile situation in South Asian politics and the threat of terrorism faced by it. Even in such absence of a specific law, India has addressed the needs of refugees who have fled from their home country into its territory. India hosted around 420,400 refugees, including some 110,000 from Tibet who fled since China's 1951 annexation. Another 102,300, mostly Tamil Sri Lankans, escaped fighting between the Liberation Tigers of Tamil Eelam and the Sri Lankan armed forces. There were about 36,000 Buddhist ethnic Chakmas and Hajongs from present-day Bangladesh who fled to Arunachal Pradesh after Muslim annexation of their land in 1964. India has accorded differential treatment to refugees belonging to different countries. There were two major refugee flows from Bangladesh. The Chakmas were provided with inadequate facilities as confirmed by National Human Rights Commission (NHRC) and repatriated in 1988. Tibetan refugees received far better treatment in comparison to other refugee groups. With regard to Sri Lankan Tamil refugees, an official refugee determination process has been practiced and the principle of non-refoulement has been complied with. The International convention dealing with the issue of refugees is the 1951 Convention on Status of Refugees and the 1967 Protocol attached to it. The term 'refugee' is defined as – "...a person 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 that protection of that country;

or who, not having a nationality and being outside a country of his former habitual residence as a result of such events, is unable or, owing to such fear, unwilling to return to it." India is not a party to the 1951 Convention or the 1967 Protocol. An individual refugee is protected essentially under the Constitution of India since there has been no domestic legislation passed on the subject of refugees. But the provisions of these international treaties have now acquired the status of customary international law and maybe regarded as incorporated into the domestic law to the extent of their consistency with the existing municipal laws and also when there is a void in the municipal laws. Also, Article 51(c) of the Constitution of India advocates fostering respect for international law^[1]. The 1951 convention relating to the status of refugees and the 1967 Protocol to the convention are the modern legal embodiment of the ancient and universal tradition of providing sanctuary to those at risk and in danger. Both instruments reflect a fundamental human value on which global consensus exists and are the first and only instruments at global level which specially regulate the treatment of those who are compelled to leave their homes because of a rupture with their country of origin. For half of century, they have demonstrated. Their adaptability to changing factual circumstances beginning with the European refugees from the second world war, the convention has successfully afforded the framework for the protection of refugees from persecution whether from repressive regimes. The upheaval caused by wars of independence or the many ethnic conflicts of post cold war era^[2].

International refugee's protection is as necessary today as it was when the 1951 convention was adopted over fifty years ago. Since the end of the cold war, simmering tensions of an interethnic nature often exploited by populist politicians have

erupted into conflict and strife. Communities which lived together for generations have been separated and millions of the people displaced whether in the former Yugoslavia, the great lakes, the Caucasus, or Afghanistan. The deliberate targeting of civilians and their enforced flight have not only represented method of warfare but have become the very objectives of the conflicts. Clearly, this forced displacement is for reasons which fall squarely within the convention refugee definition. Yet states in some regions have often been relevant to acknowledge this at the outset of the crisis and have developed ad hoc discretionary responses instead.

The displacement resulting from such situations can pose particular problems to host states, especially if they provide asylum to large refugee communities, sometimes for decades. There is thus a real challenge as to how best to share responsibilities so as to ease the burden on any one state unable to shoulder it entirely. There is also a need to put in place burden sharing not burden shifting mechanisms, which can trigger timely responsibility sharing in any given situations.

Xenophobia and intolerance towards foreigners and in particular towards refugees and asylum seekers have also increased in recent years and present a major problem. Certain media and politicians appear increasingly ready to exploit the situation for their own ends. In addition, security concerns since the attacks in the United States on 11 September 2001 dominate the debate, including in the migration areas, and have at times over shadowed the legitimate protection interests of individuals. A number of countries have, for instance, revisited their asylum system from a security angle and have in the process tightened procedures and introduced substantial modifications, for example by broadening grounds for detention or reviewing claims for the purpose of detecting potential security risks. In some situations, it has been noticeable that the post September 11 context has been used to broaden the scope of provisions of the 1951 convention allowing refugees to be excluded from refugees status and /or to be expelled. The degree of collaboration between immigration and asylum authorities and the branches has also been stepped up.

The growth of irregular migration, including the smuggling and trafficking of people, presents a further challenge. These developments are in part a consequence of globalization, which has facilitated ^[3].

2. Methodology

It is theoretical study based on books, journals (International National), other International and National instruments, reports, articles and internet.

3. Protection granted to the Asylum in India

Treatment given to the asylum is divided into three categories-

3.1 National Treatment

The treatment to the asylum people is same as the citizens of India. There are certain Articles in the constitution of India, which takes care of the fundamental rights of all people in India. The rights such as equal protection of law ^[4], religious freedom ^[5], the right to life and personal liberty ^[6], right to social security and educational rights are guaranteed in part III

of the Indian Constitution.

3.2 Treatment that is accorded to Foreigners

There are rights which are related to the housing problems, movements etc. the rights which are provided under this treatment are; right to employment or profession under article 17 of Indian constitution, freedom of residence and movement under article 26 of Indian Constitution, right to housing under article 21, right to form association and the right to property under article 13 of the Refugee Convention.

3.3 Special Treatment

This treatment includes the identity and travel document under article 28, exemption from penalties under article 3(1) of the 1951 Refugee Convention.

4. Legal Framework in India

Law for Refugee 's and displaced people

India has been the home for several refugees. For these refugees, numerous legislative measures were passed and issued under seventh schedule of the Indian constitution. But some of the measures have lost their importance in the current context. "There were certain legislation" that was enacted following the partition of India and before the Indian Constitution came into effect which are given below ^[7].

- East Punjab Evacuees(administration of property)Act, 1947
- U.P. Land Acquisition (rehabilitation of refugees) Act, 1948
- East Punjab Refugees(registration of land claims)Act, 1948
- Mysore Administration of Evacuee Property (Emergency) Act, 1949.
- Mysore Administration of Evacuee Property (second emergency) Act, 1949.

Once the Constitution of India came into operation, the following acts passed relating to refugees, evacuees and displaced persons

- Immigrants (expulsion from Assam) Act, 1950
- Administration of Evacuee Property Act,1950
- Evacuee Interest (separation)Act,1951
- Displaced Persons (debts adjustment)Act,1951
- Influx from Pakistan (control)Repelling Act,1952
- Displaced Persons(claims) Supplementary Act, 1954
- Displaced Persons (compensation & rehabilitation) Act,1954
- Transfer of Evacuee Deposits Act,1954
- Foreigners Law (application & amendment) Act,1962
- Goa, Daman & Diu Administration of Evacuee Property Act,1969
- Refugee Relief Taxes (abolition)Act,1973 ^[8]

India has a federal set up and is described as a Union of States. This union is considered as a State in international law. The Union legislature, i.e., the Parliament alone is given the right to deal with the subject of citizenship, naturalization and aliens. India has not passed a refugee specific legislation which regulates the entry and status of refugees. It has handled the refugees under political and administrative levels. The result is that refugees are treated under the law applicable to aliens in India, unless a special provision is made as in the

case of Ugandan refugees (of Indian origin) when it passed the Foreigners from Uganda Order, 1972. In India refugees are considered under the ambit of the term 'alien'. The word alien appears in the Constitution of India (Article 22, Para 3 and Entry 17, List I, Schedule 7), in Section 83 of the Indian Civil Procedure Code, and in Section 3(2)(b) of the Indian Citizenship Act, 1955, as well as some other statutes. Enactments governing aliens in India are the Foreigners Act, 1946 under which the Central Government is empowered to regulate the entry of aliens into India, their presence and departure there from; it defines a 'foreigner' to mean 'a person who is not a citizen of India'. The Registration Act, 1939 deals with the registration of foreigners entering, being present in, and departing from India. Also, the Passport Act, 1920 and the Passport Act, 1967 deals with the powers of the government to impose conditions of passport for entry into India and to issue passport and travel documents to regulate departure from India of citizens of India.

Since these enactments do not make any distinction between genuine refugees and other categories of aliens, refugees run a risk of arrest by the immigration authorities and of their prosecution if they enter India without a valid passport/travel documents. When a refugee is detained by customs, immigration or police authorities for commission of any of the offences under the earlier mentioned enactments, he is generally handed over to the police and a First Information Report is lodged against him. According to the provisions of these statutes the refugee may face forced deportation at the established sea ports, airports or the entry points at the international border, if he is detected without valid travel documents. He may also be detained and interrogated pending decision by the administrative authorities regarding his plea for refugee/asylum. A refugee also faces the prospects of prosecution for violation of the Registration of Foreigners Act, 1939 and Rules made there under and if he is found guilty of any offence under this Act he may be punished with imprisonment which may extend to one year or with a fine up to one thousand rupees or with both.

However, in many cases the courts have taken a lenient view in the matter of punishment for their illegal entry or illegal activities in India and also, by releasing detainees pending determination of refugee status, staying deportation and giving them an opportunity to approach the United Nations High Commissioner of Refugees (hereinafter referred to as UNHCR), refugees continue to run the risk of apprehension, detention and prosecution for the violation of the Foreigner's Act, 1946 and the Foreigners Order, 1948. The Indian Supreme Court has also held that the government's right to deport is absolute:

'... the power of the Government in India to expel foreigners is absolute and unlimited and there is no provision in the Constitution fettering this discretion... the executive Government has unrestricted right to expel a foreigner.'

5. Constitutional Framework for Protection of Refugees

The Constitution of India guarantees certain Fundamental Rights to refugees. Namely, right to equality (Article 14), right to life and personal liberty (Article 21), right to protection under arbitrary arrest (Article 22), right to protect in respect of conviction of offences (Article 20), freedom of

religion (Article 25), right to approach Supreme Court for enforcement of Fundamental Rights (Article 32), are as much available to non-citizens, including refugees, as they are to citizens. The constitutional rights protect the human rights of the refugee to live with dignity. The liberal interpretation that Article 21 has received now includes right against solitary confinement right against custodial violence, right to medical assistance and shelter. The Supreme Court has taken recourse to Article 21 of the Constitution in the absence of legislation to regulate and justify the stay of refugees in India. In *NHRC v. State of Arunachal Pradesh* ^[9], the Government of Arunachal Pradesh was asked to perform the duty of safeguarding the life, health and well-being of Chakmas residing in the State and that their application for citizenship should be forwarded to the authorities concerned and not withheld. In various other cases [16] it was held that refugees should not be subjected to detention or deportation and that they are entitled to approach the U.N High Commissioner for grant of refugee status. In *P. Nedumaran v. Union of India* ^[10] the need for voluntary nature of repatriation was emphasized upon and the Court held that the UNHCR, being a world agency, was to ascertain the voluntariness of the refugees and, hence, it was not upon the Court to consider whether consent was voluntary. Similarly, according to B. S. Chimni, the Supreme Court has erred in concluding in *Louis de Raedt v Union of India* that there is no provision in the Constitution fettering the absolute and unlimited power of the government to expel foreigners under the Foreigners Act of 1946. In actuality Article 21 of the Indian Constitution does impose certain constraints: any action of the State which deprives an alien of his or her life and personal liberty without a procedure established by law would fall foul of it, and such action would certainly include the refoulement of refugees. Therefore, the author opined that the Court should have proceeded to test the validity of Foreigners Act as against Article 21.

6. Incorporating international law in domestic law

International law has accepted and defined refugees as a special class of aliens. Does this acceptance by International law import any legal consequence on the Indian Government in the absence of any legislation on the subject? It is true that India has not ratified the 1951 Convention and the 1967 Protocol to it, however, it acceded to various Human Rights treaties and conventions that contain provisions relating to protection of refugees. As a party to these treaties India is under a legal obligation to protect the human rights of refugees by taking appropriate legislative and administrative measures under Article 51 states that the state shall endeavor to foster respect for International law and Treaty obligations in the dealings of organized people with one another. Article 51 of the constitution is the Directive Principles of State policy demonstrating the spirit in which India approaches her International relations and obligations. Article 253 of the Indian Constitution states that "parliament has the power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement, or, convention with any country or countries or any decision made at any International conference, association or other body" and also under the same laws it is under the obligation to uphold the principle of non-refoulement. Further entry 14 of the union list

of seventh schedule states that “entering into treaties and agreements with foreign countries and implementing of treaties and agreements and conventions with foreign countries”. Article 253 read with entry 14 makes it clear that the power conferred by parliament to enter into treaties carries the right to encroach on the state list to enable the union to implement a treaty with it. Therefore, any law made in accordance with this article that gives effect to an international convention shall not be invalidated on the ground that it contains provisions relating to state subjects ^[11]. India is a member of the Executive Committee of the office of United Nations High Commissioner for Refugees which puts a moral, if not legal obligation, on it to build a constructive partnership with UNHCR by following the provisions of the 1951 Refugee Convention.

India’s status as a preferred refugee haven is confirmed by the steady flow of refugees from many of its sub continental neighbors as also from elsewhere. India continues to receive them despite its own over-a-billion population with at least six hundred million living in poverty with limited access to basic amenities. However, the Indian legal framework has no uniform law to deal with its huge refugee population, and has not made any progress towards evolving one either; until then, it chooses to treat incoming refugees based on their national origin and political considerations, questioning the uniformity of rights and privileges granted to refugee communities. Indeed, the National Human Rights Commission (NHRC) has submitted numerous reports ^[12] urging the promulgation of a national law, or at least, making changes or amendments to the outdated Foreigners Act (1946), which is the current law consulted by authorities with regard to refugees and asylum seekers. The primary and most significant lacuna in this law is that it does not contain the term ‘refugee’; consequently under Indian Law, the term ‘foreigner’ is used to cover aliens temporarily or permanently residing in the country. This places refugees, along with immigrants, and tourists in this broad category ^[13], depriving them of privileges available under the Geneva Convention ^[14]. Despite these factors, the current number of refugees and asylum seekers in India stands at approximately 435,900 according to the World Refugee Survey 2007 conducted by the United States Committee for Refugees and Immigrants (USCRI) ^[15], and supported by the latest figures from the United Nations High Commissioner of Refugees (UNHCR). According to these sources, new asylum seekers for 2007 numbered about 17,900, in contrast to the mere 600 recorded departures from the country. India mostly plays host to refugees from its neighboring countries who are either forced to leave their countries of origin due to internal or external conflict, political persecution or human rights infringements. India has offered refugee status to asylum seekers from countries like: a. China: Refugees and asylum seekers from Tibet number around 110,000. b. Nepal: Excluding migrant workers, the population stands at 100,000 refugees. However this number is not usually considered because of the Indo-Nepal Friendship Treaty ^[16]. c. Sri Lanka: Total strength of conflict induced refugees of Tamil origin stands at 99,600. d. Myanmar: Currently 50,000 refugees and asylum seekers. e. Bangladesh: The mass exodus following the 1971 war has come down to 35,000, following repatriation of refugees. f. Afghanistan: 30,400 refugees and asylum

seekers comprised mainly of Hindus and Sikhs.

g. Bhutan: The ethnic Nepalese population settled in India amounts to 10,000 refugees and asylum seekers ^[17].

The circumstances underlying the exodus of refugees from their countries of origin vary from political persecution in the case of the Chin refugees of Myanmar to civil war with the community of Sri Lankan Tamils caught between the Tamil nationalists and the Sinhalese government. However, it is clear that all these refugee populations deserve their basic human rights and the assistance that can be afforded by the Government of India. To define the word ‘refugee’ in Indian legal terms is theoretically not possible since neither the Foreigner’s Act (1946) nor its amendments or additions, contains or defines the term. However, this study shall consider the definition propounded by a commission chaired by Justice P N Bhagwati in 1997, whose task was to construct a uniform national law on refugees. Although the bill was never tabled in Parliament, the term ‘refugee’ was adequately defined in the ‘Model Law’ as either Any person who is outside his/her Country of Origin and is unable or unwilling to return to, and is unable or unwilling to avail himself /herself of the protection of that country because of a well founded fear of persecution on account of race, religion, sex, ethnic identity, membership of a particular social group or political opinion Drafted under the auspices of the Regional Consultations on Refugees and Migratory Movements in South Asia initiative in 1995, with Justice P N Bhagwati as the Chairperson of the Drafting Committee of the India-specific version of the national law on refugee protection. or ... owing to external aggression, occupation, foreign domination, serious violation of human rights or events seriously disrupting public order in either part or whole of his/her Country.⁸ It is important to note that India is not a signatory to the 1951 Convention relating to the status of refugees or the 1967 Protocol. This makes India’s international position in terms of treatment of refugees, disputable. However, it is equally important to note that India is a signatory to various other international and regional treaties and conventions relating to universal human rights and refugees such as the UN Deceleration on Territorial Asylum (1967), the Universal Declaration of Human Rights, and the International Convention on Civil and Political Rights ^[18]. India is also a member of Executive Committee (ExCom) of the UNHCR which approves and supervises the material assistance programmes of the UNHCR; all this without actually supporting or acknowledging the role of the UNHCR on its own territory. Taking this into account, it is clear that India respects international treaties on the treatment of people residing within its territory; but, it chooses to maintain its own administrative arrangements for dealing with temporarily or permanently settled refugee communities, while providing the UNHCR little room to assist except in emergency situations like the displacement of Chakma tribals from Bangladesh or rehabilitation of refugees from Afghanistan or the Autonomous Region of Tibet.

7. Role of Indian judiciary for the protection of Refugee

When any of the Refugees are detained or arrested by the Indian authorities, there would always be a danger of reoulment, repatriate or deportation. Those refugees who are

arrested for the illegal stay can be detained illegally under administrative order without charges ^[19]. With regard to adopting international conventions in domestic laws, in *Vishaka v. State of Rajasthan*, the Court observed that reliance can be placed in international laws. Therefore, the question that arises is whether India can refer to the 1951 Convention in interpreting the domestic legislation and whether it is really necessary to ratify these conventions. It is to be noted that merely ratifying the 1951 Convention does not ensure that the asylum seekers will not be kept out and also Article 42 of the same Convention permits reservations with respect to the rights of refugees which will defeat the purpose of ratifying the Convention. The solution to treat refugees with dignity in India is to either ratify the 1951 Convention and incorporate it into domestic law or enact a uniform legislation specifically for refugees so that it is not left to the discretion of the executive and the judiciary to decide their fate. The Foreigners Act vests an absolute and unfettered discretion in the central government to expel foreigners from India. The Supreme Court of India in “*Hans Muller of Nuremburg V. Superintendent, Presidency* ^[20]” gave “absolute and unfettered” power to the government to throw out foreigners: The said judgement was again upheld by the Supreme court in *Mr. Louis De Raedt & ors V. Union Of India* ^[21] in the same judgement, Supreme Court also held that foreigners have the right to be heard. In the judgement of “*Ktaer Abbas Habib Al Qutaifi V. Union of India* ^[22], the HC of Gujrat held that the principle of non – refolement avoids ejection of a displaced person where his life or freedom would be under mined by virtue of his race, religion, nationality, enrolment of a specific social gathering or political conclusion. Its application ensures life and freedom of a person irrespectively of his nationality ^[23]. *Gurinder Singh and Karamjit Singh* ^[24], two Afghan Sikhs of Indian origin, who had fled persecution from Afghanistan were registered as refugees with UNHCR in New Delhi. They were issued Leave India Notices by the FRRO to leave India within 7 days of receipt of the notice. The only remedy under such circumstances is through legal action in the appropriate court. In this instance, a criminal writ petition was filed in the Punjab & Haryana High Court at Chandigarh and interim stay of the Leave India Notice was obtained. In the matter of *Gurunathan and others vs. Government of India* ^[25] and others and in the matter of *A.C. Mohd. Siddique vs. Government of India and others* ^[26], the High Court of Madras expressed its unwillingness to let any Sri Lankan refugees to be forced to return to Sri Lanka against their will. In the case of *P. Nedumaran vs. Union Of India*, before the Madras High Court, Sri Lankan refugees had prayed for a writ of mandamus directing the Union of India and the State of Tamil Nadu to permit UNHCR officials to check the voluntariness of the refugees in going back to Sri Lanka, and to permit those refugees who did not want to return to continue to stay in the camps in India. The Hon’ble Court was pleased to hold that “since the UNHCR was involved in ascertaining the voluntariness of the refugees’ return to Sri Lanka, hence being a World Agency, it is not for the Court to consider whether the consent is voluntary or not.” Further, the Court acknowledged the competence and impartiality of the representatives of UNHCR. The Bombay High Court in the matter of *Syed Ata Mohammadi vs. Union of India* ^[27], was pleased to direct that

“there is no question of deporting the Iranian refugee to Iran, since he has been recognised as a refugee by the UNHCR.” The Hon’ble Court further permitted the refugee to travel to whichever country he desired. Such an order is in line with the internationally accepted principles of ‘non-refoulement’ of refugees to their country of origin. The Supreme Court of India has in a number of cases stayed deportation of refugees such as *Maiwand’s Trust of Afghan Human Freedom vs. State of Punjab* ^[28]; and, *N.D.Pancholi vs. State of Punjab & Others*: In the matter of *Malavika Karlekar vs. Union of India* the Supreme Court directed stay of deportation of the Andaman Island Burmese refugees, since “their claim for refugee status was pending determination and a *prima facie* case is made out for grant of refugee status.” The Supreme Court judgement in the Chakma refugee case clearly declared that no one shall be deprived of his or her life or liberty without the due process of law. Earlier judgements of the Supreme Court in *Luis De Raedt vs. Union of India* ^[29] and also *State of Arunachal Pradesh vs. Khudiram Chakma* ^[30], had also stressed the same point.

8. Conclusion

It can be easily seen from the foregoing paragraphs that India notwithstanding its own security concerns, particularly in the last couple of decades, and pressure of population and the attendant economic factors, continues to take a humanitarian view of the problem of refugees. Even though the country has not enacted a special law to govern ‘refugees’, it has not proved to be a serious handicap in coping satisfactorily with the enormous refugee problems besetting the country. The spirit and contents of the UN and International Conventions on the subject have been, by and large, honored through executive as well as judicial intervention. By this means, the country has evolved a practical balance between human and humanitarian obligations on the one hand and security and national interest on the other. It is in balancing these interests, which may sometimes appear to be competing with each other, that the security and law enforcement agencies face day-to-day challenges. If and when a separate ‘Refugee Law’ for the country is enacted, it is important that this aspect is given due consideration.

9. Reference

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