
CHALLENGES FACED BY REFUGEES IN INDIA AND THEIR POSITION IN INDIA

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ABSTRACT

This Article discusses Humanitarian rights and refugee laws under International Law. Further it studies on the challenges that are faced by the refugees in India. Refugees are people who seek asylum or protection in another country due to fear of persecution based on race, religion, community, etc. The UN refugee convention, through the non-refoulement principle, obligates states not to refugees to countries where they face fear of persecution. Since India is not a signatory to the 1951 refugee convention and 1967 protocol, it considers itself legally exempted to these principles. In India there are around 4 lakhs refugees and nearly 169 refugee camps. India is not having any national policy or refugee law, but India is a country which has lot of refugees seeking protection. Various countries protect their refugees by enacting refugee legislation based on international recognized principle. The countries that have signed the convention have a procedure for identifying the refugees and addressing them protection issue. Although India has not signed the convention but are providing protection to the refugees. Since India has no uniform code for determining refugee status, there is no major body that deals with the refugees. After so many years also, there are various gaps that exist in the system for dealing with refugees' policy. This is because the government has not enacted a law for refugees. Due to the several problems faced by the refugees and no proper legislation has not been passed the legal status of the refugees is disheartening.

INTRODUCTION

International Humanitarian Law is a set of rules which seeks to limit the effects of armed conflict for humanitarian reasons. It may be defined as those international rules established by treaty or custom which specifically intend to resolve humanitarian problems directly arising from international or non-international armed conflicts¹. It limits the right to parties to a conflict to use methods and means of warfare or protect persons and property that may be affected by the conflict. International humanitarian law please also known as the law of war or the law of armed conflict².

The definition of a refugee is someone 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, is unable or, owing to such fear, is unwilling to return to it"*³. "Refugee means a person who has been forced to leave his country for the reason beyond his control or personal choice. This Article discusses on the challenges faced by refugees in today's world relating to Humanitarian Law.

Origin and development of Refugee protection law:

The word "refugee" didn't exist before to World War I. Many people fled their country after World War I in search of safety in other nations because they feared for their lives. Because of this the countries were not able to decide as to how to recognise and give protection to these refugees. This is the beginning of the development of International refugee laws. Numerous conventions and treaties pertaining to refugees were ratified after the League of Nations was established. The Nansen international document was enacted in the year 1922 to issue certificate of identity to the Russian refugees which later on was made applicable to all refugees. Further in 1933 for the first time the state parties entered into convention relating to the international status of refugees⁴. This convention was an innovator one concerning the

¹ Puneet Pathak. "International Humanitarian and Refugee Law", First edition,2021

² A.Alexander, "A Short History of International Humanitarian Law",2015

³ <https://www.un.org/en/global-issues/refugees>

⁴ League of Nations, Treaty Series. Vol.CLIX, No.3663

protection of refugees and its out does the model for 1951 refugee convention. It provides number of safeguards to the refugees and recognition of the principle of non-refoulement.

When the Second World War started, millions of people were forcibly displaced and became refugees. To safeguard these refugees, the UN created the UN Relief and Reconstruction Administration (UNRRA). The United Nations Organization created the International Refugee Organization in 1946 as a temporary specialised body. The International Refugee Organisation was assigned with the legal and political protection of the refugees.

On August 8, 1949, the Economic and Social Council, one of the United Nations organisation's specialised agencies, established an ad hoc committee on refugees and stateless people to consider whether it would be beneficial to draft a consolidated and revised convention relating to the international status of refugees and stateless people. A draft convention was submitted to the General Assembly of the United nations organization and based on this recommendation of the committee a conference was held in Geneva to complete the drafting of and to sign the convention relating to the status of refugees on 14th December 1950. Further the United nation General Assembly decided in December 1949 to establish the office of the High Commissioner for refugees which will come into force from 1st January 1951⁵. The statute of the office of the United Nations High Commissioner for refugees was adopted on 14th December 1950⁶ based on the statute the responsibility of international protection of refugees has been with the UN High Commissioner for refugees since 1st January 1951. The 1951 convention related to the status of refugees has been ratified and effected by an increasing number of states.

The 1951 convention relating to the status of refugees was signed and ratified by 148 nations and this convention protects the rights of individuals who seeks asylum in various countries. The core principle of this convention was non- refoulement of the refugees which says that refugee should not be forced to return to their country where they faced serious threat to their life or freedom. There are totally 46 articles in this convention which makes various provisions to protect the refugees. Some of the important provisions of the conversion states that the contracting states should respect the refugees personal status(Article 12) and rights to provide free access to courts for refugees(Article 16), to provide administrative assistance for refugees(Article 25), to provide identity papers for the refugees to provide travel documents for the refugees(Article 28), to allow the refugees to transfer their assets(Article 30), to provide

⁵ UNGA Res.319(IV),3.12.1949

⁶ UNGA Res. 428(V), Statute of the Office of the UNHCR of 14.12.1950

information on any national legislation they may adopt to ensure the application of the convention (Article 36) etc. Further the contracting states shall not discriminate any refugees(Article 3), impose penalties on refugees who entered illegally in search of asylum if they present themselves without any delay(Article 31), to expel the refugees(Article 32) or non-refoulement(Article 33), etc. The refugees shall be treated at least like nations in relation to freedom to practice the religion(Article 4), to respect and protection of artistic rights and industrial property(Article 14), rationing(Article 20), giving elementary education(Article 22) giving public relief and assistance(Article 23) etc. The refugees shall be treated at least like other non nationals in relation to movable and immovable property(Article 13), the right of association of unions or other associations (Article 15), wage earning employment or self employment(Article 17 and 18) education higher than elementary (Article 22), the right free movement and free choice of residence within the country(Article 26), etc.

On 4th October 1967, Protocol relating to the Status of Refugees came into force. 1967 Protocol removed the Refugee Convention's temporal and geographical restrictions so that the Convention would apply universally⁷.

As far as the non compliance of the convention by the state parties there is no body to monitor. The UNHCR has supervisory responsibility to check the treatment of refugees but however it cannot enforce the convention and there is no formal mechanism for individuals to file complaints in case of non compliance. Complaints should be referred to the International Court of Justice but till date there is no such complaint.

POSITION OF REFUGEES IN INDIA:

A significant number of refugees from various regions of the world are still being hosted by India. There are several factors, such as India's geographic location, religious tolerance, goodwill, etc., that contribute to the massive migration of refugees there. India, however, is not a signatory to either the 1951 Convention or the 1967 Protocol There is no national law relating to the recognition and treatment of refugees in India.

The United Nations High Commissioner for Refugees (UNHCR) is functioning in India at New Delhi and Chennai. Despite the absence of official recognition by the Indian government or a legal basis for its aid program, the UNHCR in India enjoys some independence in carrying out

⁷ 1967 protocol/Kaldor centre

programmes under the mandate contained in a statute including making determinations of refugee status through its New Delhi office.

According to India, ratifying the refugee convention will increase the government's obligations to grant its refugees more rights and advantages. Due to India's existing massive population and for the sake of the nation's security, it would become challenging. However the principle of Non- refoulement is binding on India as the principle of customary international law by having acquired the status of *jus cogens*⁸. The principle of non refoulement has been described both under refugee law and human rights law. According to this principle no country shall deport, expel or forcefully return the refugee back to their country against his will or if there is reason for threat to his life liberty and freedom.

Though India is not a signatory to the 1951 refugee convention, India has ratified a number of international human rights instruments imposing obligations to protect refugees. Some of these international instruments are United Nations declaration on territorial asylum 1967, Universal Declaration of human rights 1948, International covenant on civil and political rights 1966. State recognised refugees enjoy all the human rights recognised under these international treaties. This imposes positive responsibility to India to protect refugees as long as they fear prosecution at the hands of their government. The convention on the rights of the child requires the contracting states to provide appropriate protection and humanitarian assistance to state recognised refugee children⁹. The International Convention on the Elimination of Discrimination Against Women 1979 also contains provisions relevant to the protection of state recognised refugee women¹⁰. Further the Convention against Torture and other cruel, Inhuman and degrading treatment or punishment, 1984 to which India is a signatory but is yet to ratify contains the principle of non refoulement under Article 3¹¹. Hence India is bound to the principle of non refoulement and human rights protection of refugees.

In the absence of national legislation, India states that there is no legal binding for the determination of refugee status in India. Therefore, refugees are treated as foreigners under the municipal law and are governed by the provisions of the Foreign Act, 1939, The passports entry into India Act 1920, The Passport act 1967 and the Extradition act 1962. Hence the refugees are also entitled to the fundamental rights available to a person who is a foreigner under the

⁸ Guy S.Goodwiin Gill, "The Refugee in International Law", 2nd Edition,Clarendon Press, 1996

⁹ Article 22, Convention on the Rights of the Child, 1989

¹⁰ United Nations, Treaty Series, Vol.1249, p.13

¹¹ United Nations, Treaty Series, Vol.1465, p.85

Indian constitution. As far as the constitution of India is concerned there is no legal framework for the protection of refugees and the fundamental rights of the Indian Constitution are not available to them. However Article 14 and 21 makes the right enumerated to citizens as well as non citizens and therefore the refugees are also bound by article 14 and 21. This has been held by the Supreme Court in the Chakma Refugees case¹². Article 14 provides for equality before law and equal protection of the laws and Article 21 states that no person shall be deprived of his life and personal liberty. Hence it bounds refugees too. In Louis De Raedt vs Union of India¹³ the Supreme court held that even non citizens have the fundamental right to life, liberty and to live with dignity. This right to life also provides for the right against arrest and detention.

Further more by the 86th Amendment of the Constitution of India has inserted Article 21 A which provides for free and compulsory education to all children till the age of 14 years. It is applicable to both citizens and non citizens. Hence India being a land of many refugees is bound to protect the refugees under Article 14, 21 and 21A of the Indian constitution.

The Passport (Entry into India) Act of 1920 and The Passport Act of 1967 do not distinguish between legitimate refugees and other types of immigrants in the absence of explicit legislation. Due to the lack of a valid passport, refugees run the risk of being detained by immigration authorities and being illegally deputised. In the absence of a valid passport the penalty should not be imposed on refugees¹⁴ because they might have left their own country due to civil war or other chaos and it would not have been possible to get passport. As per the passport at 1967 once the refugee arrives the Indian territory they may get valid passports and identity cards only when the criteria of public interest is fulfilled¹⁵ . But under this act valid passports have been issued only to the Tibetan refugees and not to any other refugees. The central government is authorised to make rules for foreigners under the Registration of Foreigners Act, 1939 regarding where and to whom they must report for proof of identity and registration certificate. However this act should not be applied to refugees as they have already been suffered at the hands of their government and various technical formalities enhance the suffering of the refugees. Additionally in the absence of the checks and balances on the powers of the central government it can be used in arbitrary manner to harass genuine refugees.

¹² NHRC vs State of Arunachal Pradesh, (1996) 1 SCC 742, para.20

¹³ 1991 3 SCC 554, para 13

¹⁴ 1951 Refugee convention, Article 31

¹⁵ Section 20, Passports Act, 1967.

One of the major issues they encounter is that the authorities have unrestricted authority to detain and/or arrest any foreigner on the mere suspicion of violating the act's provisions. However, certain judicial rulings limit the exercise of power by declaring that the requirements of the 1946 Foreign statute must actually have been violated in order to subject a person to punishment under the statute. In India, the federal government has the authority to expel foreigners and has broad discretion to control the terms of their stay. Additionally, it has limitations on work licences as well as a registration process for foreigners living in India. Because he is not considered to have entered India's land legally, the refugee there can only seek administrative remedies. The handling of refugees by bureaucrats or customs personnel, who frequently lack legal expertise and experience, poses a serious risk of deputation and, eventually, persecution of refugees coming in India. Additionally, it results in a breach of the non-refoulement principle. According to the Indian Penal Code, a refugee may face punishment for fraud, document fabrication, and cheating.

Further, the Foreigners act 1946 imposes some more restrictions on the refugees like whom to meet and the routes only through which they can enter the country. One of the significant problems they face is that the authorities have unlimited power to arrest and detain any foreigner on mere suspicion for non compliance of the provisions of the act. However some decisions of the judiciary restrict the power of authority by stating that to penalise under the act there should be actual violation of the provisions of Foreign act 1946. The central government is empowered to expel foreigners in India and as wide discretion to regulate conditions of his stay. It also contains a registration regime for foreigners in India and restrictions on work permits. The refugee in India can only seek administrative remedies and no legal remedies as he is not deemed to have entered the territory of India officially. Refugees are handled by bureaucrats or custom officials who in most of the cases lack legal knowledge and competence to deal with, which posts a significant danger of deputation and ultimately persecution of refugees arriving in India. It also leads to violation of principle of non refoulement. A refugee may be penalised for cheating, fabricating documents and forgery under the Indian Penal Code.

After independence India had refugees from various countries like Nepal, China, Sri Lanka, Bangladesh, Afghanistan, Bhutan, etc. During the partition of India people who crossed over the newly formed boundaries between India and Pakistan did not lose their nationality. They were still forced to live as refugees across north India, refugee camps served as homes for those who have been displaced due to partition. First these refugees automatically become citizens

of newly independent India. The newly formed government faced an unprecedented challenge with the rehabilitation of the partition refugees and that was elevated due to the 1948 war with Pakistan. The next significant movement of refugees to India occurred almost decade after partition in 1959 when the Dalai Lama spiritual leader of the Tibetan community fled and entered into India seeking political asylum along with more than 1,00,000 followers. After that various refugees from Bangladesh, Afghanistan, Chakma communities entered India. In 1983 group of refugees from Sri Lanka who are abandoned in their nation due to the Sri Lankan civil war entered India seeking refugee protection. The Sri Lankan Tamil over 1,000,000 entered and settled in the state of Tamil Nadu.

The situation of refugees in India is always changing. The Supreme Court ordered the central government to grant citizenship to Hajong and Chakma refugees in 2015. Regarding 16,500 Rohingya living in India, the UNHCR office is taking steps to provide them with identity cards. This will serve to shield them from harassment and arbitrary arrests, incarceration, and deportation. However, India has viewed the Rohingya as both illegal immigrants and a security risk to the country. The Indian government has said that the 1951 Refugee Convention does not apply to India, hence the concept of non-refoulement does not apply to India. The Indian government appealed to Myanmar to take back the Rohingya refugees.

The 2019 Citizenship Amendment Act was another significant move made by the Indian government in reference to refugees. The Citizenship Act of 1955 and Part II of the Indian Constitution both contain laws governing citizenship. To grant citizenship to Hindus, Parsis, Buddhists, Sikhs, Jains, and Christians from Bangladesh, Afghanistan, and Pakistan who are regarded as the minority in the major Muslim neighbouring countries, the Citizenship Amendment Act 2019 made some changes to the Citizenship Act 1955. The amendment also applies to those who are forced or compelled to seek shelter in India due to persecution based on religion. It protects such people from proceedings of illegal migration. The government relaxes the requirements of naturalization from 11 years to 6 years as a specific condition for applicants belonging to these 6 religions from the 3 neighbouring countries. By acquiring citizenship to be citizens of India from the date of their entry into India and all legal proceedings against them in respect of their illegal migration of citizenship will be closed.

A recent modification to the Citizenship Act has drawn criticism from a number of nations and academics. The Sri Lankan refugees in India have been there for almost three decades, yet they haven't been given citizenship status. The office of the High Commissioner for human rights

was also criticised that the recent amendment in the citizenship act discriminates on the basis of religion. It further weakens the commitment of equality before law enshrined under the constitution and international obligations under various human rights instruments to which India is a State party.

Considering the above facts it is predominant that India though not a party to any of the refugee conventions, it is bound by the Humanitarian law and Human rights. Moreover it is clear from the Citizenship act that a refugee residing for more than 11 years will be given citizenship. If that is so the refugees who are residing for more than three decades like the Srilankan refugees should be given citizenship and their basic rights should be protected.

Conclusion and Suggestions:

Hence it is evident that India not being a signatory to the Refugee convention but having huge population of refugee seeking protection in India every year, should treat the refugees like other foreigners, give them proper travel documents and their rights should be protected. Those refugees residing permanently for more than 11 years and who are genuine refugees and still face threat to their life can be considered for citizenship and provide all fundamental rights available in the constitution.