

PROTECTION OF REFUGEE'S RIGHTS IN INDIA: LEGAL PERSPECTIVE

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ABSTRACT

This research article conducts a critical analysis of the mechanisms in place for the protection of refugees in India. With a focus on the legal, policy, and practical dimensions, the study aims to unravel the complexities and effectiveness of the existing refugee protection framework. Despite India's non-party status to the 1951 Convention on the Status of Refugees and its 1967 Protocol, the nation hosts a substantial number of refugees and asylum seekers. The analysis delves into the intricacies of India's legal framework, evaluating its alignment with international standards and the practical implications for safeguarding the rights and well-being of displaced individuals. The findings contribute to the discourse on refugee protection in India, offering recommendations for legal reforms, policy modifications, and awareness campaigns to enhance the overall effectiveness of the existing framework.

Keywords: Refugee, Protection, India, Legislation, displaced persons

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1.0 INTRODUCTION

In a world where individuals are forced to flee their homes owing to threats such as violence, persecution, or natural catastrophes, protecting refugees' rights has become an essential component of international law and human rights. The phrase "Sensitizing Refugee Rights" emphasizes the need of recognizing and comprehending refugees' special rights within the larger framework of universal human rights. When people are compelled to seek asylum in other countries, they bring with them the basic human rights that everyone is entitled to.¹ This approach is consistent with the core principles established by international human rights laws, which emphasize that individuals' rights should be respected regardless of nationality or circumstance. The focus here is not just on recognizing these rights but on deepening the understanding and commitment to addressing the unique challenges faced by refugees. Understanding refugee rights in the context of human rights means recognizing that these rights are interconnected. It involves acknowledging that the protection of refugees is not a separate issue but an essential aspect of the larger human rights framework. This perspective underscores the need for comprehensive policies, legal instruments, and global cooperation to address the various challenges faced by refugees while upholding their inherent human rights.

Denying refugees their fundamental rights continues to be one of the most destructive kinds of discrimination in the world.² Large-scale migrations of refugees have occurred, and their numbers are growing as they escape both internal and foreign war. The main causes of increased migration and the refugee crisis are liberation wars (domestic or international), political, religious, ethnic, and economic discrimination and persecution, economic stagnation, depression, and overall poverty, famine, and environmental factors.³ The number of refugees worldwide has been steadily increasing as a result of these circumstances.⁴ Even after gaining independence, the situation in India has remained consistent, with the country continuing to provide refuge to a considerable population of individuals fleeing neighboring nations. This

¹ UNHCR - The UN Refugee Agency. (2017). Protecting Refugees. In UNHCR Office in Cyprus. https://www.unhcr.org/cy/wp-content/uploads/sites/41/2018/05/UNHCR_Brochure_EN.pdf

² United Nations. (n.d.). [Fact Sheet No.20, Human Rights and Refugees]. In *Fact Sheet*. <https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet20en.pdf>

³ Swain, A. (2019). Increasing Migration Pressure and Rising Nationalism: Implications for Multilateralism and SDG Implementation. In United Nations, Development Policy Analysis Division of the United Nations, Department of Economics and Social Affairs. https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/SDO_BP_Swain.pdf

⁴ Global Refugee Crisis Growing Worse, with Aid Workers near Breaking Point, Little Respect for Basic Rules of War, High Commissioner Warns Security Council | Meetings Coverage and Press Releases. (2024, May 30). <https://press.un.org/en/2024/sc15713.doc.htm>

includes Tibetans escaping Chinese persecution, refugees from Pakistan, as well as Afghans, Bangladesh, Burmese, Tamils from Sri Lanka, and others, despite facing economic constraints.⁵

This paper endeavours to bring attention to these aspects, examining the legal status of refugees in India and proposing measures aimed at ensuring equality and enhanced protection and promotion of human rights of refugees in India. Additionally, it proposes measures aimed at ensuring equality and enhanced protection for this population.

2.0 WHO IS REFUGEE?

A refugee is defined by various international conventions and treaties, reflecting a consensus on the legal status and protection afforded to individuals forced to flee their home countries due to well-founded fears of persecution. The cornerstone of the international legal framework for refugees is the Convention relating to the Status of Refugees, 1951 and its 1967 Protocol. According to Article 1(A)(2) of the Refugee Convention, 1951, 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."⁶ The definition provided in the Convention is widely recognized and has become a customary rule of international law. It has been supplemented by regional agreements such as the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration on Refugees in Latin America.

Furthermore, dictionaries, such as the Oxford English Dictionary, generally align with the legal definition, emphasizing the involuntary nature of displacement and the underlying fear of persecution. Refugees, as commonly understood, are individuals who have crossed international borders and are unable or unwilling to return to their home countries due to a well-founded fear of persecution.

3.0 HISTORY OF REFUGEE LAW IN INDIA

The history of refugee law in India is marked by a combination of constitutional provisions, judicial decisions, and pragmatic responses to the evolving refugee situations. India, while not a signatory to the Refugee Convention, 1951 or its 1967 Protocol, has grappled with

⁵ Jha, M. (2018, January 9). India's refugee saga, from 1947 to 2017. Mint. <https://www.livemint.com/Sundayapp/clQnX60MIR2LhCtpMmMWO/Indias-refugee-saga-from-1947-to-2017.html>

⁶ <https://www.unhcr.org/about-unhcr/who-we-are/1951-refugee-convention>

the influx of refugees over the years, necessitating legal considerations to address their status and protection.

1. **Post-Independence Period:** In the aftermath of India's independence in 1947, large-scale population movements occurred due to the partition of the country. Millions were displaced, leading to a significant humanitarian challenge. While the newly formed Indian government dealt with the consequences of this mass migration, there was no specific legal framework addressing the rights and protection of refugees.⁷
2. **Constitutional Provisions:** The Indian Constitution, adopted in 1950, includes provisions that indirectly touch upon the rights of refugees. Fundamental rights, such as the right to life and personal liberty (Article 21), have been interpreted by the judiciary to encompass the protection of refugees, emphasizing India's commitment to humanitarian principles.⁸
3. **Judicial Pronouncements:** Over the years, the Indian judiciary has played a crucial role in shaping refugee law through its interpretations of constitutional provisions and adherence to international humanitarian principles. Landmark judgments, such as the case of National Human Rights Commission (NHRC) v. State of Arunachal Pradesh (1996)⁹, underscored the importance of protecting the rights and dignity of refugees, setting a precedent for judicial activism in this domain.
4. **The Foreigners Act, 1946:** While not exclusively designed for refugees, the Foreigners Act, 1946, provides the legal basis for regulating the entry, presence, and departure of foreigners in India. The Act has been applied to refugees, and the issuance of Long-Term Visas (LTVs) has been a crucial aspect of accommodating those seeking refuge in the country.
5. **Policy Measures:** India's approach to refugees has been largely influenced by political and administrative considerations rather than a dedicated legal framework. The government has adopted policies, such as the LTV scheme, to address the stay of refugees in the absence of specific legislation.
6. **United Nations High Commissioner for Refugees (UNHCR):** India has collaborated with the UNHCR to provide documentation and support for refugees. While UNHCR's

⁷ Gatrell, P. (2013). Midnight's Refugees? Partition and its Aftermath in India and Pakistan. In Oxford University Press eBooks (pp. 148–177). <https://doi.org/10.1093/acprof:oso/9780199674169.003.0006>

⁸ Purohit, M., Purohit, M., GS Goodwin-Gill, Ranabir Samaddar, Robert L. Newmark, & James C. Hathaway. (2017). AN ANALYSIS OF NON-REFOULEMENT IN INDIAN LEGAL FRAMEWORK. In Vol. 2 Jamia Law Journal (pp. 167–169). https://docs.manupatra.in/newsline/articles/Upload/45325657-78F6-45C2-90B5-BB0D35BA56BC.%20Megha%20Purohit%20&%20Mayank%20Purohit_Civil.pdf

⁹ AIR 1996 SC 1234.

presence indicates international cooperation, it also highlights the absence of a standalone national legal framework for refugees.

4.0 LEGAL MECHANISM FOR THE PROTECTION OF REFUGEES RIGHTS IN INDIA

Facilitating humanitarian aid to refugees globally has been made feasible through institutional arrangements with the UNHCR (United Nations High Commissioner for Refugees) and other organizations, thanks to the adoption of the Refugee Convention of 1951 and its 1967 Protocol outlining the status of refugees.

India has not ratified the 1951 Refugee Convention or its 1967 Protocol concerning the Status of Refugees, and it lacks specific national legislation addressing refugees. In the absence of a dedicated legal framework, refugees in India fall under the purview of The Foreigners Act, 1946, and The Registration of Foreigners Act, 1939. Additionally, the entry and departure regulations outlined in The Passport (Entry into India) Act, 1920, and The Passport Act, 1967, are extended to refugees, thereby adding complexity to their situation.¹⁰

Moreover, refugees are subject to the applicability of various overarching laws, including The Criminal Procedure Code, 1973; The Indian Penal Code, 1860; The Evidence Act, 1872, among others. While India has provided shelter to refugees from neighbouring nations, the lack of transparency in administrative policies related to granting asylum, facilities, grants, etc., coupled with instances of discriminatory treatment toward specific refugee individuals or groups under similar circumstances without clear justification, is a prevalent issue.

Currently, refugees in India are considered as foreigners. The municipal laws directly applicable to them are the Foreigners Act, 1946, the Registration of Foreigners Act, 1939, the Passport (Entry into India) Act, 1920, the Passport Act of 1967, the Extradition Act of 1962, the Citizenship Act, 1955- amended recently in 2019, and the Illegal Migrant (Determination by Tribunals) Act, 1983. Under these laws, there is no distinction made between the broader term ‘foreigner’ and a refugee or foreigner requiring special protection.¹¹

In 2011, the Government of India adopted a Standard Operating Procedure (SOP) to be followed by law enforcement agencies while dealing with “foreign nationals who claim to be

¹⁰ UNHCR. (2011). Refugees and Asylum-Seekers in India [Report]. <https://www.unhcr.org/sites/default/files/legacy-pdf/4cd96e919.pdf>

¹¹ Pragma Agrahari, Human Rights of Refugees and Asylum Seekers in India: Issues and Challenges. <https://nhrc.nic.in/sites/default/files/Group%204%20June.pdf>

refugees”, which was amended in 2019 by Lok Sabha. It provides for Long Term Visa (LTV) to such persons and thus allows them to freely work and study in India too. For the first time in the Indian context, the text of the SOP acknowledged distinct criteria for the identification of certain foreigners as refugees.¹²

5.0 REFUGEE’S RIGHTS UNDER INDIAN CONSTITUTION

As the refugees in India are considered as foreigners, they are also entitled to rights enjoyed by foreigners under Indian Constitution. They are as follows:

Article 14: Right to Equality Before Law & Equal Protection of Law

Article 20: Protection in Respect of Conviction for Offences

Article 21: Protection of Life and Personal Liberty

Article 21A: Right to Education

Article 22: Protection against Arrest and Detention

Article 23: Prohibition of Forced Labor

Article 24: Prohibition of Child Labor

Article 25: Freedom of Religion

Article 26: Freedom to Manage Religious Affairs

Article 27: Freedom from Paying Taxes for Religious Purposes

Article 28: Freedom from Religious Instruction in Educational Institutions

6.0 ROLE OF JUDICIARY IN PROTECTING REFUGEE’S RIGHTS IN INDIA

The Indian judiciary has played an instrumental role in ensuring protection to these refugees by recognizing refugees and refugee law to a certain extent and has introduced refugee law into our legal system through the back door, as it were, since the front door has been shut by the executive. The role of the judiciary in protecting refugee rights in India is pivotal, as it plays a crucial part in upholding constitutional principles and ensuring justice for individuals who have sought refuge within the country's borders. While India lacks specific legislation exclusively addressing refugee rights, the judiciary has interpreted constitutional provisions and international commitments to safeguard the rights and dignity of refugees.

1. **Interpretation of Constitutional Rights:** The Indian Constitution, in its fundamental rights provisions, provides a foundation for the protection of human rights, which are

¹² RAJYA SABHA SECRETARIAT. (2019). *PARLIAMENTARY DEBATES RAJYA SABHA OFFICIAL REPORT*. <https://cms.rajyasabha.nic.in/UploadedFiles/Debates/OfficialDebatesDatewise/Floor/250/F20.11.2019.pdf>

applicable to all individuals within the country, including refugees. The judiciary interprets these constitutional provisions, particularly Article 21 (Right to Life and Personal Liberty) and Article 14 (Right to Equality), to ensure that the rights of refugees are not arbitrarily violated. Courts have emphasized the broad and inclusive interpretation of these rights to encompass the protection of refugees' lives, personal liberty, and dignity. In the case of *State of Arunachal Pradesh v. Khudiram Chakma*¹³, the Apex Court held that Article 21 of the Constitution of India, which guarantees the fundamental right to life and personal liberty of Indian citizens is extended to all including non-citizens. However, does not include the right to settle and reside in the country, which is a right available only to citizens of India.

2. **Non-Refoulement Principle:** While India is not a signatory to the 1951 Refugee Convention, the judiciary has recognized the principle of non-refoulement, which prohibits the expulsion or return of individuals to countries where their lives or freedom would be threatened. Courts have invoked this principle to prevent the deportation of refugees who might face persecution or harm in their home countries. In the case of *K. A. Habib v. Union of India 1999*¹⁴, the Court prohibited the expulsion of two UNHCR certified Iraqi refugees after observing that the principle of non-refoulement is encompassed in Article 21. It held that the refugees must be protected from persecution in their home country, as long as their presence in India is not prejudicial to national security.
3. **Judicial Review of Administrative Actions:** The judiciary actively engages in reviewing administrative decisions related to refugees. In cases where refugees face deportation or denial of rights, the courts provide a forum for judicial review, ensuring that administrative actions adhere to constitutional principles and international commitments. In the landmark case *National Human Rights Commission v. State of Arunachal Pradesh*¹⁵, the Supreme Court safeguarded the fundamental constitutional rights of the Chakma refugees who had taken refuge in large number from erstwhile East Pakistan (now Bangladesh) in parts of Assam and Tripura. However, the respective governments of Assam and Tripura expressed their inability to rehabilitate them; therefore, some of them were moved to the state of Arunachal Pradesh and were settled

¹³ AIR 1994 SC 1461

¹⁴ K. A. Habib v. Union of India, 1999, CriLJ 919, Gujarat High Court.

¹⁵ AIR 1996 SC 1234.

there. Consequently, the All Arunachal Pradesh Students Union (AAPSU) launched an agitation to expel them out of the state and threatened to resort to violence against them in response to which the National Human Rights Commission approached the Supreme Court. In its decision, the Apex Court directed the state of Arunachal Pradesh to take all measures necessary for ensuring the life and personal liberty of Chakmas as a constitutional obligation.

4. **Extension of Fundamental Rights:** The judiciary has extended the protection of fundamental rights to refugees. While refugees may not be explicitly mentioned in the Constitution, the courts have recognized that the term 'person' in the constitutional provisions encompasses refugees. This inclusive interpretation ensures that refugees enjoy the same fundamental rights as Indian citizens. The High Courts and the Supreme Court in their several judgements have ensured protection to the refugees by creatively interpreting Article 21 of the Constitution that guarantees right to life and liberty to all persons irrespective of their status. Also, the right to equality for the non-citizen under Article 14 of our Constitution has been reaffirmed by our High Courts and the Supreme Court in several judgments.
5. **Protection against Arbitrary Detention:** The judiciary acts as a safeguard against the arbitrary detention of refugees. In instances where refugees are held in detention facilities, the courts intervene to ensure that such detention is lawful, just, and complies with constitutional principles. This is particularly significant given the potential vulnerability of refugees in detention. From time to time, Indian Courts have stepped in to safeguard refugees from deportation, expulsion, and forced repatriation. Knowing that refugees are not always able to provide legal documentation or other such proof, the Court even waived off the requirement to provide surety in one such case so the refugees could be released and be free to approach the UNHCR for protection (*U. Myat Kayew and another v. State of Manipur 1991*)¹⁶.
6. **Enforcement of Humanitarian Principles:** The judiciary has played a significant role in enforcing humanitarian principles in the absence of specific legislation. By considering India's commitment to international human rights treaties and conventions, the courts have emphasized the importance of treating refugees with dignity, ensuring their access to education, healthcare, and basic amenities. India, nonetheless, has ratified various international human rights treaties such as the UDHR, Genocide Convention,

¹⁶ U. Myat Kayew and another v State of Manipur, 1991, C.R. No. 516/91, Gauhati High Court.

ICERD, ICCPR, ICESCR, CEDAW, CAT, CRC, and Bangkok Principles. Although these agreements are not directly enforceable in Indian courts, they can be incorporated into existing domestic laws or enacted through separate legislation. Indian courts have the authority to apply principles of international law, treaties, or conventions, and Article 253 of the Indian Constitution grants Parliament the power to implement international treaties or conventions through legislation. The Supreme Court, in the case of *Gramophone Company of India v. Birendra Bahadur Pandey and Others (1984)*¹⁷, further clarified and expanded the Parliament's authority in this regard. The Court emphasized that international law can be integrated into domestic laws as long as such incorporation does not conflict with other legislations enacted by the Parliament. Moreover, a deeper understanding of this concept can be gained by referring to the case of *Maganbhai Ishwarlal Patel v. Union of India and another (1969)*¹⁸, wherein the Supreme Court asserted that the Parliament is not obligated to pass statutes specifically for the enforcement of international treaties, agreements, or conventions. As long as there is no violation of domestic laws, courts have the authority to incorporate provisions from international conventions and norms into municipal law, even in the absence of formal ratification by India.

7.0 RECOMMENDATIONS

1. **Comprehensive Refugee Legislation:** India should enact dedicated and comprehensive legislation specifically addressing the rights and protection of refugees. This legislation should incorporate international human rights standards to ensure that refugees have clear legal status and entitlements.
2. **Ratification of International Treaties:** India should consider ratifying relevant international treaties related to refugees, such as the 1951 Refugee Convention and its 1967 Protocol. This would demonstrate a commitment to upholding global standards for refugee protection and ensure a consistent legal framework.
3. **Employment Opportunities:** Create pathways for refugees to access legal employment opportunities. This could involve easing work permit restrictions, recognizing foreign qualifications, and promoting vocational training programs to enhance refugees' self-reliance.

¹⁷ *Gramophone Company of India v Birendra Bahadur Pandey and Others*, 1984, AIR 667.

¹⁸ *Maganbhai Ishwarlal Patel v Union of India and another*, 1969, AIR 783.

4. **Non-Refoulement Principle:** Explicitly adopt the principle of non-refoulement into domestic law, ensuring that refugees are not forcibly returned to a country where they face persecution or danger.
5. **Legal Aid and Access to Justice:** Facilitate access to legal aid and ensure that refugees have the right to a fair and impartial hearing in legal proceedings. This includes providing interpreters and culturally sensitive legal assistance.
6. **Public Awareness and Sensitization:** The Govt. of India must conduct awareness campaigns to foster understanding and acceptance of refugees within local communities. Promoting a culture of empathy and inclusion can help reduce discrimination and improve the overall integration of refugees.
7. **Monitoring Mechanisms:** Establish robust monitoring mechanisms to assess the implementation of refugee rights and address any violations promptly. Regular reporting and evaluation will help identify gaps and improve the effectiveness of protection measures.

Implementing these recommendations would contribute significantly to safeguarding the basic human rights of refugees in India and ensure a more compassionate and rights-respecting approach to their protection and well-being.

CONCLUSION

India's approach to refugee law, shaped by constitutional provisions, judicial decisions, and policies, lacks a dedicated legal framework. Despite refugees being classified as foreigners, they enjoy fundamental rights under the Indian Constitution. The absence of a comprehensive legal structure highlights the need for specialized legislation. The judiciary emphasizes specific rights crucial for refugee protection, recognizing an individual's entitlement to refugee status and opposing expulsion or deportation during asylum seeking. This judicial stance surpasses legislative and executive efforts, actively integrating international law principles.

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