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# India: Refugees and the U.N. Refugee Convention, 1951

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## ABSTRACT

*This paper critically analyses the most general, sceptic and imprecise issues of the position of the refugees in India and the inside outs of the reasons why India has not ratified the 1951 U.N. Refugee Convention nor its 1967 Protocol, which has 140 signatories, an overwhelming majority of the world's 190-odd nations. The reasons for it are geopolitical concerns which are both intramural and extramural to the Republic of India. However, India continued to host a large population of refugees who were treated well. What is the requirement of ratifying a law when you are already fulfilling your duty was the question behind India's objection, whereas some experts in the field of South Asian Relations are of the opinion that India, in any case, is bound by this principle because it is contained in the 1984 Convention against torture, to which India is a signatory. India is home to diverse groups of refugees, ranging from Buddhist-Chakmas from the Chittagong Hill Tracts of Bangladesh to Bhutanese from Nepal, Muslim-Rohingyas from Myanmar, large populations of Tibetans and Sri Lankan Tamils and small populations from Afghanistan, Somalia, Sudan and other Sub Saharan-African countries. According to the UNHCR factsheet, there were 209,234 refugees, asylum seekers and "others of concern" in India in 2016. The UNHCR financially assisted only 31,600 of them. But there is a sudden shift in the situations with the upcoming implementation of the NRC Bill. The paper also explains the impacts of the NRC Bill and after-effects of the same in the context of the lives of the refugees after the NRC Bill. Internal security, change in demographic status, overpopulation and its direct impacts on the GDP are some of the minor areas briefed by the paper.*

**Keywords:** *Refugees, UNHCR, NRC Bill, Internal Security*

## I. INTRODUCTION

The exact definition of a refugee is any person who "owing to a 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 unwilling to avail

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protection of that country.<sup>2</sup>What is the requirement of ratifying a law when you are already fulfilling your duty was the question behind India's objection, whereas some experts in the field of South Asian Relations are of the opinion that India, in any case, is bound by this principle because it is contained in the 1984 Convention against torture, to which India is a signatory. India continues to host a large number of refugees from neighbouring countries, despite the fact that it is not a signatory of the 1951 Refugee convention, but it has ratified a number of other human rights treaties which imposes obligations to provide protection to refugees. Some of the conventions enlisted are U.N. Declaration on Territorial Asylum 1967, Universal Declaration of Human Right 1948(Art. 14), International Convention on Civil and Political Rights (ICCPR Art.13), Convention on the Elimination of Discrimination against Women (CEDAW), International Convention on Economic Social and Cultural Rights (ICESCR) and Convention against Torture and Cruel Inhuman or degrading Treatment or Punishment (CAT).

These treaties impose a positive duty on India to provide protection to refugees as long as they fear persecution at the hands of their govt. No treaty, Convention or law can be compartmentalized and excluded to respect the human rights of refugees. There is no law to regulate the status, entry, rights and rehabilitation of refugees. The government deals with it on an ad-hoc basis. Humanitarian law deals with conflicts, and Refugee law deals with people fleeing from conflicts. In other words, refugee law comes into the picture to protect the distressed during armed conflicts because of the indiscriminate killing and destruction of property of civilians.<sup>3</sup> These people have no choice but to flee out of fear of persecution because they no longer enjoy protection from the parent govt. Therefore, both IHL and refugee law work hand in hand. It can be reasonably concluded that all three laws there are applicable inter-dependently, and there are no watertight compartments. Article 21 of the Indian Constitution focuses on the protection of the human rights of all individuals, including non-citizens. The importance given to human rights by India determines the quality of life of its refugees because we have not ratified the Convention. The Principle of non-refoulment, which prohibits forceful repatriation, is described under both refugee and human rights law.

## **II. REASONS CITED BY INDIA FOR NON-RATIFICATION OF THE REFUGEE CONVENTION,1951**

There is no doubt about the fact that India was under severe pressure and has faced immense

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<sup>2</sup> Article 1(A) (2) of the 1951 Refugee Convention. Also see Article 1, 1967 Protocol.

<sup>3</sup> Part IV of the Geneva Convention, 1949 give protection to civilians during conflict. Common Article 3 of the Geneva Convention is jus cogens norm which means that civilians have to be protected at all times.

criticism for the non-ratification of the Convention. But India has been seen as very sensitive to this issue and always played the game of diplomacy and tackled the pressure for the ratification of the Convention.

One of the main reasons for the non-ratification by India is the fact that the ratification will mean greater obligations imposed on India to provide more rights and privileges to its refugees. This is not possible for a poor and developing country like India, which struggles to provide basic amenities to its own population. We have been facing the problem of infiltration and terrorism from our neighbour's ever since partition, which the Western nations fail to acknowledge or even consider as a problem.

The policymakers believe that if India ratifies the Convention, this problem will increase manifold, and there will be no legal mechanism to distinguish between an infiltrator and a genuine refugee. This argument stems from the assassination of P.M Rajiv Gandhi by a Sri Lankan national who came to India as a refugee. Such peculiar and complex issues are not discussed anywhere in the Convention, which threatens our national security and sovereignty. It is also contended that the Convention was drafted way back in 1951 and the protocol in 1967; most of the provisions are outdated as they fail to accommodate the contemporary challenges. A large number of people migrate to India in search of opportunities which increase the burden on the economy.

Geopolitical issues are also a major concern as India's history with its neighbour's is part of the dark era, which began with the partition of 1947, so as a result, the ratification may make it difficult for India to take any stern action to prevent infiltration and terrorism. So, India is adamant regarding the Convention, and the talks regarding the same are leading nowhere.

### **III. LAWS GOVERNING REFUGEES**

We have a number of domestic legislation in force to deal with refugees. India draws no distinction between a "foreigner" and a "refugee". And this gives rise to a plethora of problems which will be highlighted subsequently.

The laws are:

- Passport (Entry into India) Act, 1920.
- Passport Act, 1967.
- Registration of Foreigners Act, 1939.
- Foreigners Act, 1946.
- Foreigners Order, 1948.

The Passport (Entry into India) Act, 1920 and The Passport Act 1967 makes no distinction between genuine refugees and other categories of foreigners like economic migrants, tourists and students. As a result, the refugees run a big risk of arrest by immigration authorities and illegal deportation in the absence of a valid passport.<sup>4</sup>

The penalty should not be imposed on refugees because they may leave in turmoil not have the time to get a passport issued. In most countries, access to passport offices may not be possible due to distance and lack of infrastructure.<sup>5</sup> Once the refugee enters the Indian territory, they may get valid passports and identity cards if the public interest criteria are fulfilled.<sup>6</sup> But so far, only Tibetan refugees have been issued valid passports. The reason for their “privileged treatment” is that their political and spiritual leader resides in India, and they have their parliament on Indian soil. Some scholars criticize it because it hampers the sovereignty of India. The reasoning may be that in order to protect the national interest, no refugee is given the fundamental right to freedom of movement or issued an identity card. Also, it causes trouble for refugees to open bank accounts, obtain ration cards or rent accommodation because they have no identity. This is contradictory in nature because the constitution does not guarantee freedom of movement, but the administration may give this right based on a case-to-case analysis imposing reasonable restrictions. This clearly violates the equality principle as all refugees should be treated alike on Indian soil.

The Registration of Foreigners Act, 1939 empowers the Central Government to make rules for foreigners. Where and whom to report, provide proof of identity and registration certificate.<sup>7</sup> This law should not be applicable to refugees as they have already suffered at the hands of their government, and these burdensome technicalities add to their agony. Furthermore, the power of the Central government is used in an arbitrary manner to harass genuine refugees, and there are no checks to curb this power.

The Foreigners Act 1946 places some more restrictions on refugees, like defining whom to meet and the routes only through which they can enter the country.<sup>8</sup> One of the biggest criticisms of this act is that the authorities have “unlimited power” to arrest and detain any foreigner on mere suspicion for non-compliance under this act. However, the court tried to restrict this power by stating that in order to penalize, there should be actual contravention of

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<sup>4</sup> Bimal N Patel, *India and International Law*, (2005 edn), Martinus Nijhoff Publishers, 2005.

<sup>5</sup> See Article 31 of the Refugee Convention.

<sup>6</sup> See Section 20 of the Passport Act, 1967

<sup>7</sup> R. J .S. Tahir (eds.) *Ragini Trakroo Zutshi, Jayashree Satpute, Md. Saood Tahir: Refugees and the Law*, 2edn, HRLN, 2011, pp 78.

<sup>8</sup> *Ibid*, pp 79.

provisions.<sup>9</sup> Unfortunately, more and more refugees continue to be detained on frivolous grounds, and they are not released for long durations.

Lastly, the Foreigners Order, 1948 authorizes the State government to “grant or refuse” a foreigner entry into the Indian territory on grounds like invalid passport, unsound mind, public safety or is detected suffering from a “loathsome” disease.<sup>10</sup> The civil authority can refuse permission if the formalities are not fulfilled under the Foreigner Act. This rule is malefic and arbitrary because the condition of a refugee is different, and he deserves to be treated on compassionate grounds having the human rights perspective.

Common parlance is that most of the refugees are detained in transit areas prior to their entry into India. These transit areas are main airports, sea coasts, or land specifically earmarked for this purpose, and they are treated as “International Zones” where the domestic law does not apply. In this scenario, a refugee can only seek administrative remedies and not legal remedies as he is deemed to not have entered the territory of India officially.<sup>11</sup>

When such a case is handled by bureaucrats or customs officials, they lack legal knowledge and competence, which poses a great danger of deportation and, ultimately, persecution of the refugees. This leads to a violation of principles of nonrefoulement. The Indian Penal Code makes no distinction between nationals, refugees or foreigners.<sup>12</sup> A refugee may be penalized for cheating, fabricating documents and forgery.<sup>13</sup> Often, the concerned authorities are inconsiderate to the compelling factors of refugees and the genuine reasons why they don't possess valid documents. According to the researcher, IPC should not be applicable to refugees at all.

#### **IV. PRINCIPLE OF NON-REFOULEMENT**

According to this principle, 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.<sup>14</sup> This definition is not absolute; it is subjected to the scrutiny of “national security” and “public order”. There is enough evidence and State practice to conclude that the principle of non-refoulement binds all states as it is a part of customary international law, and no opposition to the same has been found.

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<sup>9</sup> Kallan Khan v. State 1961 (1) Cr. LJ 584, para 13.

<sup>10</sup> Nowhere in the act, loathsome is defined. There should be specific names of disease else this provision is arbitrary.

<sup>11</sup> R. J .S. Tahir (eds.) Ragini Trakroo Zutshi, Jayashree Satpute, Md. Saood Tahir: Refugees and the Law, 2edn, HRLN, 2011, pp. 137.

<sup>12</sup> Ibid, pp. 85.

<sup>13</sup> See Section 416, 420, 463, 464 of IPC, 1860.

<sup>14</sup> See Article 33 of the 1951 Refugee Convention.

India abides by this rule explicitly through various case laws. In the landmark case of *Ktaer Abbas Habib Al Qutaifi v Union of India*,<sup>15</sup> the Gujarat High Court upheld the principle of non-refoulement under the wide umbrella of Article 21 of the Indian Constitution and decided not to deport the two Iraqi nationals to their original country as long as they had a fear for their life and liberty. Instead, they were handed over to UNHCR in India. In another case, a stay order was passed on the deportation of Burmese refugees on similar grounds.<sup>16</sup>

We can easily comprehend that the non-refoulement principle is a peremptory norm and is not dependent on the ratification of any treaty or Convention for its application. This principle comes into force as soon as the refugee is unwilling to go back to the parent country because he fears a “threat to life”. Yet there have been mass violations of this principle, where despite the threat, the State passes an erroneous order for deportation citing unjustifiable and frivolous reasons.

In most cases, it is up to the whims and fancies of the govt whether to keep a refugee to throw him back into his country where he cannot escape death and torture. In these cases, individual criminal responsibility should be imposed, and the persons should be impeached. One of the criticisms is that despite being a customary international law and of utmost importance, the non-refoulement principle is frequently violated by the western countries and still manages to escape with clean hands. When a refugee is forcefully sent back, factors like the diplomatic relations between the host country and the original country, economic dependency and international pressure are responsible for it. Lastly, this principle has lesser legal implications and is more moral in nature. Proper “enforcement” and “implementation” is the need of the hour.

#### **(A) National Human Rights Commission, State Human Rights Commissions and Human Rights**

Courts have been established in India under the Protection of Human rights Act, 1993. As per this act, they have the powers of a civil court and can suo moto inquire into any petition, interfere in the judicial proceedings protecting the party from human right abuse, study treaties and prepare reports.<sup>17</sup> They have been actively involved in the protection of refugees since inception.

In 1994, the NHRC gave directions to the Govt. of Tamil Nadu to provide immediate medical treatment to Sri Lankan refugees who were put in camps. But how far did the refugees receive

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<sup>15</sup> 1999 Cri LJ 919, para- 3.

<sup>16</sup> *Malvika Karlekar v. Union of India* Supreme Court Case 1992, Cri. WP No. 243 of 1992.

<sup>17</sup> See Article 12 and 13 of the Protection of Human Rights Act, 1993.

medical aid is a debatable issue as most of it is just on paper. In the year 1995, a PIL was filed by the NHRC on behalf of the “Chakma” refugees who hailed from Bangladesh way back in 1965 and were residing in Arunachal Pradesh. The NHRC found that the State Government is acting in accordance with the AAPSU (All Arunachal Pradesh Students Union) and threatening Chakmas.

The Supreme Court intervened with the liberal interpretation of the law to suggest that refugees are the “class apart” from foreigners, and they are to be protected under Article 21 of the Indian Constitution, and they cannot be evicted from their domestic households. The court emphasized that the State is under an obligation to protect the life and personal liberty of every human being, thus abiding by the principle of non-refoulement.<sup>18</sup> This case also highlights the issue of local agitation.

India has been a witness to many clashes between the refugees and the locals. The main contention of the local population is that refugees have more facilities despite being outsiders. They have better access to amenities like medical facilities, food, water, education, financial assistance and protection than the local population of that particular State. After the Rajiv Gandhi assassination, India became hostile to Sri Lankan refugees, and atrocities were committed against them despite their protected status. The government was also responsible for forceful repatriations, thus violating the principles of nonrefoulement.

NHRC proposed a model law for refugees under the guidance of Justice PN Bhagwati in 2000, but unfortunately, that has not seen the light to this date. It also proposed changes in the outdated Foreigners Act, 1946, which deprives refugees’ rights as guaranteed under the Geneva convention, refugee convention and additional protocol of 1967/44. Currently, we only have the Refugee and Asylum (Protection) Bill, 2009/45. The model law clearly defined the rights and duties of refugees and protection to be given to them by the State.

India can thus be considered in a paradoxical state- on the one hand, it refuses to ratify the already existing Refugee Convention, and on the other hand, it does not pass its own independent legislation. To top it all, it continues to allow a large influx of refugees from all across the globe to enter India.

## **V. CONCLUSION**

The recent trends with the upcoming NRC and Citizenship Amendment Bill have brought several controversies to the light as the refugee status was questioned, especially when some

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<sup>18</sup> National Human Right Commission v State of Arunachal Pradesh , Supreme Court of India 1996, AIR 1996 SCC 1234



of the citizens protected by the Indian Constitution became refugees overnight. Also, the discrimination by the Government of India on the basis of religion was a daring act and will always remain a dark spot in the history of the world's largest democracy.

Domestic law is needed in India to ensure that all refugees are given basic protection. Without that, refugee rights are not rights in the real sense; they are simply privileging at the hands of the administration. Domestic law should also define refugees to include "internally displaced people" due to natural calamities terrorist activities. For instance, the Kashmiris were forced to flee Kashmir due to militant activities. Special provisions guaranteeing protection to women and children should be made because, in Indian society, crimes against women (rape) and children (child trafficking) is at their peak. This will also be in consonance with India's obligations under CEDAW and UNCRC.

India is a superpower in Asia, so it has a tendency to "dominate" over other nations. In such a case drafting a South Asian Refugee convention will be of great significance to ensure refugee protection. The Convention can be drafted by experts from all countries highlighting their specific issues relating to the refugees based on the understanding of each nation. In this way, the Convention will reflect the background of every country.

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