

“International Law on Refugees in the Context of the Legal Framework in India”

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Abstract

A refugee is someone who has been forced into a situation of statelessness because of persecution, war, or violence. Throughout the world and over the centuries different societies have treated this issue based on their own bias. While some have adopted a humanitarian approach while others have resisted and seen these people as a threat to their cultural identity. The 1951 refugee convention defined the rights of the displaced and obligations of the signatory members. Like most of the South Asian countries, India is not a member of the convention and has treated this issue on an ad-hoc basis. This paper aims to study the role of the Indian judiciary on refugee problems and the protections guaranteed to such individuals. Further, this paper aims to present a clear understanding of the 1951 conventions and what were the reasons that restricted India from becoming a signatory member. The rights and obligations of the Indian state are not defined relating to that of refugees, therefore, does India require to enact specific laws for the same, or is this ad-hoc approach can be continued this paper aim to analyze in respect of this aspect.

Statement of Problem

The problem of refugee status and violation of human rights is of great concern to both individual citizens of the country as well as its security. India's stance on most of the issues related to immigrants and refugees vary from case to case as the Indian state neither has any specific act to serve this purpose nor it is a signatory to the united nation refugee convention of 1951. The statelessness of an individual is a source of human insecurity and can lead to serious conflict in society.

Methodology

The research methodology adopted for this paper is a doctrinal study. The doctrinal research involves the analysis of the statutes, articles, and journals. Exploratory research has been done by the researcher to gain a deeper understanding of the protection available to the refugees in the absence of a proper legal framework.

Introduction

India is home to a large population of refugees even though there is no obligation from the world community, as India is not a signatory member of the United Nation's refugee

convention of 1951. India opened its doors for the Tibetan refugees with the arrival of the Dalai Lama and also for the Bangladeshi refugees in 1971 but both of these situations provided a political gain for India. As there is no legal framework defined the Judiciary has often Intervened to provide justice in matters relating to that of refugees. Article 21 of the Indian constitution provides the Right to Life and Personal Liberty to individuals who are in a situation of statelessness. The Principle of non- refoulement draws authority for Article 21 itself, and the court has often denied the government to perform forced repatriation of the refugees. The positive rights available to refugees are the same as that of aliens. The Foreigners Act Of 1946 applies to the person who has illegally entered into the Indian territory to take asylum. The protection available to refugees is restricted to temporary measures taken by the government of India which implies that apart from certain civil and political rights no provisions are in existence to guarantee their welfare. The Indian state has not signed the convention of 1951 as, like most of the South Asian states, India was also susceptible to the role of western powers.

This paper presents the analysis of existing refugee protection in India and what is the role of the Judiciary in protecting the same. Further the analysis of the 1951 convention by the United Nations and what factors influenced India's decision to not adopt it. Also, the customary obligations of the Indian state to follow the principle of non-refoulment because of the certain human rights instrument that requires to do so.

Refugee Problem in India

India is home to a large number of refugees from all over the world and not only from its neighboring borders. But the stance of the government on the issue is more politically motivated as in the case of Chakma refugees there were reports of forced repatriation¹. In 1971 to present Pakistan in violation of human rights the government of India permitted refugees from East Pakistan to seek asylum in its borders. This approach often leads to the violation of the human rights of the individuals who are already in a situation of crisis. Refugees have been the target of violent attacks and intimidation, largely because they were perceived as “different” from the communities in which they had temporarily settled. Tensions between refugees and local groups have erupted when refugees were seen as competitors for natural and economic resources. The government of India is under a constitutional obligation to observe international law. Article 51 of the constitution declares that it shall be the fundamental principle of governance to follow principles of international law.

Laws governing the refugees

The Indian state has not enacted any specific legislation to solve the issues concerning refugees. But India has ratified several international human rights treaties which oblige India to protect refugees on humanitarian grounds. In India, refugees are considered under the

¹ Chimni, B. (1994). Symposium of the Human Rights of Refugees. *Journal Of Refugee Studies*, 7(4).

ambit of the term “alien” which appears in the constitution of India in Article 22, Para 3 and Entry 17, List I, schedule 7, in section 83 of the Indian civil procedure code and section 3(2)(b) of the citizenship act, 1955. Enactments governing the “aliens” in India are the Foreigners Act, 1946² under which the central government is empowered to regulate entry, presence, and departure of aliens. The act has given the power to the central government to remove foreigners from the territory of India. The registration Act, 1939 deals with the registration of foreigners entering being present, and departing from India. Apart from the legislation mentioned above the constitutional principles are referred to such that of article 21 which guarantees the right to life and liberty to “all” individuals and not only to citizens. In addition to article 21 foreigners in India are also entitled to the protection of some of the rights recognized in Article 20 like:

- I. Right against prosecution under retrospective penal law,
- II. The right against double jeopardy, and,
- III. The right against self-incrimination;

and Article 22 which assigns rights upon arrest or detention; further Articles 25 to 28 which talks about the right of the individual to profess practices of his religion and Article 32 which talks about the right to move the Supreme Court for enforcement of the rights listed above.

The courts in India have conceived a creative and innovative way to deal with setting down what might be alluded to as a “shadow of refugee” law in India. They have done as such by presenting globally perceived measures in civil law and by reforming the parameters of the lawfulness of government laws and systems. India has more often followed the principle of non-refoulement, which implies that the individual can’t be sent back to his country where he or she is facing a threat to their life. For a country like India where the resources are scarce to feed its population, this is an achievement that is by no scale of small magnitude.

Judicial approach

The administration of India is under a constitutional commitment to observe the principles of international law. This is declared in Article 51 under the Chapter of Directive Principles of State Policy. Article 51A casts a fundamental duty on every citizen to have a feeling of compassion. Even though these arrangements are not enforceable, the courts have attracted vigorously from them to bring human rights measures into situations. This is a takeoff from the moderate view that global commitments are just perceived to the extent that they are converted into explicit metropolitan resolutions. The Supreme Court clarified this new measurement on account of Vishaka and Others v. Province of Rajasthan and Others³:

² Foreigners Act (1946)

³ Vishaka and Others v. Province of Rajasthan and Others | Air 1997 Sc 3011.

“Any international convention not inconsistent with fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of constitutional guarantee”

Initially, the constitution of India was interpreted narrowly and denied refugees to enter the territories, the freedom to settle down, and the freedom to practice a profession on the basis that the rights under the ambit of article 19 were only for the citizens. At that time the judiciary was satisfied that the law and the procedure have been followed consistently. Later the courts relying on the dynamic environment of the society begin to insist that the “law” and the procedure defined should be just, fair and reasonable. As there can’t be any arbitrary law if it is to meet the requirement of Article 14 of the Indian constitution. The Indian law has permitted refugees to claim that the action against him is not just, fair and reasonable through article 21⁴. In addition to article 21, article 14 forbids discrimination on account of any arbitrary action. In *Hans Muller v. superintendent, presidency jails*, the court held that the foreigners’ Act gives the right to the central government to expel. In another case, *Louis de Raedt v. Union of India*⁵, the Supreme Court held that the Indian government has a general power of deportation, albeit subject to be heard, which may not necessarily be a personal hearing in all the cases in front of the court. The much-needed changes in the law have been observed by the judiciary over a period of time on the issue of refugees. Basic amenities provided to the refugees have been in question over a period of time and the court has also used its power to guarantee the same. In *Majid Ahmed, Abdul Majid Mohd., Jad Al-Hak v. Union of India*⁶ the court held that food and medical care should be provided to the individuals who are being detained by the government as these are the minimum essentials for survival⁷. India’s government for Tibetan refugees set up educational institutions out of consolidated funds. Coming to the principle of “non-refoulement” courts have on very rare occasions, accorded to refugees their right against forced repatriation. The courts have also insured the socio-economic protection of the refugees in certain special circumstances. Though the court has not given much recognition to the role of UNHCR. The courts have issued injected deportation proceedings and often ordered the release of the individual so that he can approach the office of UNHCR to either determine the refugee status or to allow resettlement to take place. But these judgments of the court should be seen in isolation as on many occasions the courts have followed a stringent judicial approach to foreigners. India has signed several international conventions that oblige the state to provide certain rights to refugees. These include the universal declaration of human rights, 1948; International Convention on Civil and Political Rights; the International Convention on Economic, Social and Cultural Rights; the International Convention on the Elimination of all Forms of Racial Discrimination; Convention Against Torture and Cruel, Inhuman or Degrading Treatment; and, Convention for the Elimination of all Forms of Discrimination Against Women. The view of the Indian courts on the application of these conventions and the international law

⁴ Kaur, N. (2013). Protection of Refugees in India: A Critical Analysis. *SSRN, I.*

⁵ Mr. Louis De Raedt & Ors vs Union Of India And Ors, AIR 1991 SC 1886.

⁶ Abdul Hamid Shamsi vs Abdul Majid And Others, AIR 1988 SC 1150.

⁷ Gochhayat, S. (2011). Protection of Refugees in India. *SSRN, I.*

was that they do not have any binding force unless the Indian state does not create any municipal laws that are incorporated and defined specifically. However, the courts evolving the Indian jurisprudence on treaties now require the general norms of international law to be incorporated into chapter III of the constitution which is fundamental rights and should be respected by every individual even if such ratification has not taken place by India. The court over a period hearing the cases related to the refugees has settled a principle that if the treaty obligations are related to right-enhancing then they should read as a part of the right to life and personal liberty and the due process provision of the constitution. The analysis of the text above gives us a broad understanding of the role which the Indian judiciary has played in determining what are the rights and obligations of the Indian state while dealing with the issue of refugees though the court has tried to keep a balance between the objective of the state and basic human rights still the uniform application is missing. The situation will not change to a huge extent if the principles are not applied unanimously. The overruling nature of the judgments provides a scope within which the infringement of rights can take place of the refugees.

Why India is not a part of the Refugee Convention of 1951 or its protocol of 1967

India has faced a lot of criticism for not ratifying the convention of 1951 or its protocol in 1967. Despite the pressure from the international community, India has continued to deal with refugee problems on an ad-hoc basis. But the Indian state is not alone who has been reluctant to the convention other south Asian states have also restricted themselves from becoming a signatory members. India has regarded the 1951 convention for refugees as only a partial regime for protection drafted in the “euro” centric context⁸. The convention is not designed to deal with the situations faced by developing countries, apart from this the structure of the conventions is designed primarily to deal with individual cases and not cases of mass influx. In India’s view, the principles of the convention do not provide a balance between the obligations and rights of the source and the receiving state. The convention fails to follow the concept of international burden-sharing. Also, there is a self-congratulatory belief that India has been both responsive and generous to the problem of refugees without signing the convention, on a crises-to-crisis basis. Also, there is “fear of the unknown” that the Indian state does not want to face. India over a period of time realized that a stable and secure guarantee of refugee protection is needed in India, which led to the establishment of an Eminent person group chaired by former chief P.N. Bhagwati, to suggest a law for refugee protection. Other possible reasons can be the incapacity of the Indian state to control population, lack of administrative and military power to regulate convention. The domestic labor market of India does not want to face any more pressure on its system. The ethnicity, cultural and economic- based conflict between the local people and refugees raises concern⁹. The skepticism of the Indian state has already been discussed in the paper moreover India

⁸ Saxena, P. (2007). Creating Legal Space for Refugees in India: the Milestones Crossed and the Roadmap for the Future. *Heinonline*

⁹ Singha, K. (2018). Migration, Ethnicity-based Movements and State’s Response: A Study of Assam. *Sage Publication*.

was not at all happy with the visit of UNHCR high commissioner, Sadruddin Agha Khan to Esat Pakistan on the invitation of Pakistani president Yahya Khan. This was seen by India as an endorsement of propaganda by the authorities of the United Nations.

Roadmap for future refugee protection

The ultimate goal of the state should be to find durable solutions, which will enable individuals to live in safety and rebuild their lives. There can be three kinds of durable solutions.

- I. Local integration
- II. Resettlement
- III. Voluntary repatriation

The durable solution to deal with the refugee problem was associated with the permanent settlement, whether in a country of origin, host country, or a third country. However, with the increasing interrelationship between international migration and refugee protection, some refugees started temporary or permanent alternatives offered by migration schemes, either in the third country or in the host country. Such possibilities should be considered particularly where the individual refugee is not able to sustain himself in the host country or in a country where refugee protection is no longer necessary but where the reintegration of the refugee remains limited in the country of origin.

- I. Local integration: for peace in the society where there is already a fear of cultural identity to the local people because of the refugees who belong to a different country with different beliefs, local integration is indispensable. Local integration will advocate for the advantages of integrating the refugee population into the communities of the host nation. Advice on law and policies related to asylum and migration of refugees should be discussed to facilitate integration. Different countries should come together to share a dialogue on practices essential for local integration. To achieve this objective help of NGOs can also be taken for vocational training, microfinance schemes, and community mobilization projects.
- II. Resettlement: the relevant actors should coordinate among themselves to ensure the resettlement of refugees in a country of origin or a host country or the third country. The resettlement should be based on fixed criteria and for this purpose identification of the candidate should be done. Emergency resettlement centers should be established.
- III. Voluntary repatriation: to ensure voluntary repatriation the information and advice on the situation in the country of origin should be provided to the individual refugee. The “go and see” approach should be facilitated in the repatriation process so that transparency can be brought into the process. A tripartite agreement should be entered by the country of asylum, country of origin, and UNHCR. The key actors should monitor the process of both reintegration and repatriation. Promote and development of sustainable reintegration should take place.

Apart from the above measures, there is a need for a domestic law that should include Internally displaced people due to internal violence, or because of natural calamities. For instance, the Kashmiris pandits flee because of militant activities. Domestic legislation will help to achieve fairness and transparency in the procedure of refugee determination¹⁰. Apart from the refugee status employment opportunities should also be insured so that the individual can achieve economic stability. Special provisions in domestic law should be made to ensure the rights of women and children are protected within the refugee camps. Indian society is deeply complex and women are often subjected to violence and harassment. As refugees follow different beliefs from the local communities, therefore, they are subjected to harassment especially women.

As South Asian countries are reluctant to UNHCR they can draft their own set of common laws to deal with the problems existing within territories. For the same purpose, the experts can be appointed to decide the ambit of the uniform laws governing the refugees. This convention will punish the individuals who are in violation of human rights and crimes against humanity. A tribunal can be set up to deal with issues of refugees as these people are not able to seek legal help in normal courts and even if they reach courts the process of justice dispense takes enormous time.

Conclusion

Every individual should have certain human rights and the nation-state should work to achieve this objective. Refugees are individuals who are forced to leave their country of origin because of the perpetual fear of persecution or violence. India over some time has dealt with the issue on an ad-hoc basis and has not enacted any separate legislation for governance. India did not sign the refugee convention of 1951 because of the reasons which are already discussed in this paper. But this does not imply that the need for specific legislation can be ignored, the judiciary over some time has evolved certain principles to protect the individuals in situations of statelessness. The paper highlights the role of the constitution which assigns certain rights to refugees. Throughout the world, societies have dealt with this issue based on their political gain and not on the principles of fairness and reasonableness. The paper proposes the measures which can be adopted by the countries more specifically India to protect the rights of the refugees such that of resettlement, repatriation, and local integration. However, the intervention of the government on the issue is indispensable as it involves security concerns and pressure on economic resources which are already in scarcity to feed such a large population of India. The government should realize the importance of specific refugee law which should be based on the principles of international humanitarian law. Acceptability for such laws is the responsibility of the state as individual bias cannot be a ground for discrimination.

¹⁰ Bhattacharjee, S. (2008). India Needs a Refugee Law. *Economic And Political Weekly*, 43(9).