

“India’s Refugee Policy: An Analytical Study”

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ABSTRACT:- India is home to many refugees. Whenever India is faced with humanitarian crises of dealing with refugees it has done as any mature democratic republic would do. It has tried to balance the national security issue with that of the need of asylum seekers. However, the lack of domestic laws makes the administrative action subject to suspicion and high handedness. The threat of terrorist attacks as seen in recent past makes the Government cautious of drafting laws which may limit its power to protect its own people. Not becoming party to the Convention on Status of Refugees, 1951 and its 1967 Protocol is not the solution to the problem. India needs to revisit its policy on refugees and have municipal laws.

Key Words: Asylum, Terrorism, Refugee, Convention, Protocol, Citizenship

Introduction

According to the Universal Declaration of Human Rights (UDHR) States have a duty to protect the inherent dignity and worth and dignity of every human being thereby including those of refugees and asylum seekers. The principle of non-refoulement also ensures that lives of asylum seekers are not put in danger by pushing them back into countries where they face persecution. These rights are further protected by the 1951 Convention on Status of Refugees and its 1967 protocol. Even States which are not signatory to the conventions are not outside the purview of the mandate to fulfill the basic rights of refugees as these rights have acquired customary nature¹. There has been development of refugee jurisprudence wherein not only the rights of political refugees are to be protected of refugees covered under Convention of 1951 but even those who are forced to leave on other grounds like economic deprivation. This is due to the development of protection of economic social and cultural rights as part of human rights first under Universal Declaration of Human Rights 1948 (UDHR) followed by enforceable conventions under International Covenant on Economic Social and Cultural Rights (ICESC). Originally ICESC was not considered binding and it was according to the capacity of the States that the provision required to be enforced. However, Human Rights interpretation tends to include Economic Social and Cultural rights along with civil and political rights. States today cannot refuse equal rights to all groups based on economic or social limitation of States.² India has followed a liberal policy of humanitarian protection of refugees and asylum seekers. It is home to several groups of people who have come here and made it their home. 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.

Problem of Forced Migration

Immanuel Kant is of the view that a peaceful world can be created if there is a federation of States having republican Governments which are bound to protect the rights of its citizens and also who are there within their territory. The problem of forced migration is a common phenomenon, while people forced to leave their homes due to persecution. South Asia with its diverse composition has seen migration of large number of refugees even very recently. India too is in the mid of this flow of refugees especially from the neighboring countries like Tibet, Bangladesh, Afghanistan, Sri Lanka Myanmar, etc. The Indian philosophy of Vasudhaiva Kutumbakam³ which means that the world is one family enshrines in itself the concepts of

¹ B.S.Chimni, Development and Migration Concepts on International Law

Accessed at <http://hei.unige.ch/conf/psco-230502/files/chimni.doc>

² Commission on Human Rights, Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, UN Doc. E/CN.4/2005/51 (2005b).

³ Hitopadesha, 1.3.71:

‘ayam nijah paroveti ganana laghuchetasam

udaracharitanam tu vasudhaiva kutumbhakam’

compassion, tolerance, solidarity and respect for Human rights. These allowed India to welcome the seekers of safety with open arms. The Jews and Polish are some old examples the other groups are from post independence. It was these principles which later took the shape of Human Rights and many countries readily became signatory to these documents collectively called Bill of Human Rights.

India has accorded differential treatment to refugees belonging to different countries. There were two major refugee flows from Bangladesh and Sri Lanka. The Chakmas were provided with inadequate facilities as confirmed by National Human Rights Commission (NHRC) and repatriated in 1988. Tibetan refugees on the other hand 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 on Status of Refugees, 1951 and the 1967 Protocol attached to it. The term 'refugee' is restricted to a political refugee and refers to a person who has well founded fear of persecution based on ground of race, religion, ethnicity or belonging to a political ideology.⁴ Today there are 146 countries who have signed the convention⁵; India is not one of them.

Status of Refugees

Article 14 of the UDHR⁶ recognizes the right of persons to seek asylum from persecution in other countries. This Article forms the basis of the United Nations Convention relating to the Status of Refugees, 1951, hereinafter referred to as the 1951 Convention (herein known as Refugee Convention). This Convention is the main international document protecting the refugees across the globe and is a post World War mechanism to protect people who are outside their country for fear of persecution. They are either not able to get or are unwilling to take the protection of their own state.

The interpretation of the term "Persecution" under Article 1 of the 1951 Refugee Convention should not be restrictive nor influenced by the cultural sensitivity of the judges and should extend beyond national interest. These rights are further supported including it as an inalienable right under Article 6 of ICCPR. The Vienna Convention on Law of Treaties can be used to interpret the refugee convention as a customary law. This is especially important for countries like India which are not signatories to the refugee conventions but are home to refugees from various countries. The question of dealing with refugees is complicated by the fact that India does not have refugee specific national laws. It is important to examine how India deals with the refugee issue as it has a long and porous border. The various groups of refugees in India include the refugees from Tibet, Sri Lanka, Bangladesh, and Myanmar. 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.

Laws on Refugees in India

India with its federal structure 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. India takes care of its refugee population without any assistance from the international community. So

'This is my own and that a stranger' – is the calculation of the narrow-minded

For the magnanimous-hearts however, the entire earth is but a family'

Accessed at <https://vasudaikakutumbam.wordpress.com/2015/03/05/vasudhaiva-kutumbakam>

⁴ Article 1 of Convention on Status of Refugees, 1951

⁵ https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en Accessed on 30th April 2019.

⁶ Article 14 of UDHR

(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

the need to sign the international convention does not weave protection to refugees because of its Human Rights obligations. The Constitution of India is very liberal. Even though India does not have any domestic law for refugees, Constitution of India grants right to equality (Article 14) and right to life and liberty (Article 21) to its non-citizens also. However, the administrative discrimination depending on public policy can be arbitrary and at times influenced by foreign policy objective.⁷ In *A.S.Iyerv. Baiaasubramaniam* 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.

Refugees and other categories of Aliens

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'. The refugees as a special class of aliens do not possess any better rights than aliens in general.

Protection of Refugees & Constitutional Framework

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 Supreme Court of India in a five bench decision in the case *Col. A. S. Iyer & Ors. Etc vs. V. Balasubramanyam & Ors*⁸ has clearly directed that there must not be any discrimination between people on the basis of status. *"The constitutional goal is to break down inequalities steadily between man and man, whether based on status or talent."*

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. 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

⁷ Mahendra P.Lama, "World Refugee Problem", World Focus (New Delhi), January 1999, pp. 3-6.

⁸ AIR 452, 1980 SCR (1)1036

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.

Supreme Court on Refugees

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*, 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, 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* 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. Chimni⁹, the Supreme Court has erred in concluding in *Louis de Raedt v Union of India*¹⁰ 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. With regard to adopting international conventions in domestic laws, in *Vishaka v. State of Rajasthan*¹¹, 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. In the recent case where around 40,000 Refugees have come to India from Myanmar the Government on the basis of National security and treat of terrorist elements entering through this rout refused to give refugee status. The Supreme Court in *Mohammad Salimullah and others V. Union of India and Ors* while deciding whether the Government could deport the Rohingya refugees, as minority.

Domestic Law & International Law on Refugees

It is clear that India not having ratified the 1951 Convention and the 1967 Protocol to it even then it is bound as it has 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(c) and Article 253 and also under the same laws it is under the obligation to uphold the principle of non-refoulement. 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. The solution to treat refugees with dignity in India is to either to 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.

Conclusion

The absence of a specific domestic law and ad hoc asylum status management might takes away its soft power robbing it of the credibility in International arena in spite of accommodating so many groups of refugees even before the International rules for refugees were developed. Lack of a strong political will is also among the chief concerns. The issue of illegal migrations becomes important during elections when political parties can take advantage of these groups. India being one of developing countries and a deserving candidate for a permanent member of the UN needs to make its laws in compliance with the International regime. This is because even without the municipal laws India is inundated with refugee influx from different countries and it has more than often dealt with the refugee issues very humanely Tibetan and Srilankan refugees being good examples. Migration is continuing to grow and the reasons are varied it is time India adopted laws to deal with the issues so that there is transparency in administrative action. The process of deciding who is a refugee is also unclear. While the Indian

⁹ B. S. Chimni, *The Law and Politics of Regional Solution of the Refugee Problem: The Case of South Asia* (RCSS Policy Studies 4), (Colombo, 1997), p.7.

¹⁰ (1991) 3 Supreme Court Cases 554

¹¹ AIR 1997 SC 3011

government deals with asylum-seekers from Tibet and Sri Lanka, the office of UNHCR in New Delhi deals with asylum-seekers from other countries. There is need for greater coordination between Indian Government and UNHCR.

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