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Refugee Protection in India in the Absence of Specific Legislation: An Overview

Radhika Nair

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Since the country is not a party to the 1951 Convention on the Status of Refugees or its 1967 Protocol, it does not have any national laws and policies on refugee protection.

ABSTRACT

According to the United Nations High Commissioner for Refugees [UNHCR], a total of 208, 065 refugees and asylum seekers live in India (UNHCR 2021:1). Since the country is not a party to the 1951 Convention on the Status of Refugees or its 1967 Protocol, it does not have any national laws and policies on refugee protection. Its approach towards refugees has been largely political and administrative. Additionally, the judicial approach has been predicated on India's constitutional and international law obligations, as well as applying humanitarian law principles for refugee protection.

This paper discusses the international law approaches to refugee protection. It examines the existing framework in India with regard to refugees by studying the political-legal regime that regulates it. It also evaluates India's fulfillment of its obligations under domestic law as well as customary international law, to critically analyse the treatment of refugees. Finally, it discusses the need for a dedicated legislation pertaining to the protection of refugees in India.

INTRODUCTION

On 28th May 2021, the Central government issued a notification inviting applications for Indian citizenship from persons belonging to minority communities in Afghanistan, Bangladesh, and Pakistan residing in 13 districts in Gujarat, Rajasthan, Chhattisgarh, Haryana, and Punjab (Ministry of Home Affairs [MHA] 2021:2). This order is made under the Citizenship Act of 1955¹ and was made possible after the amendment of the Act in 2019. This recent development with regard to grant of Indian citizenship to refugees has also brought forth the peculiar situation of refugees and asylum seekers all across India, where there is inconsistency in their treatment and protection.

India has often experienced a mass influx of refugees from neighboring countries due to its unique geo-political location in South Asia. The country has also witnessed movement of refugees from Somalia, Sudan, Iran, and Iraq (Sen 2003). However, India has been reluctant to accede to the 1951 Convention in its efforts to remain neutral in the Cold War politics of that era and partially due to the Eurocentric approach to refugee protection formulated in the aftermath of World War II (Sen 2003: 399; Chimni 2003: 444). Sadly, the 1951 Convention is not comprehensive enough for the South Asian contexts. This is because it takes an individualised approach to refugee entry and does not take into account cases of mass inflow or a mixed flow of refugees from neighboring countries, something usually experienced by South Asian countries with porous borders like India (Saxena 2007). The grounds for persecution under the 1951 convention refer only to civil and political rights, which are held higher in Western societies. These grounds are not inclusive of economic, social, and cultural rights, which may be more relevant to developing countries in the Global South (Islam 2013: 23). Thus, most asylum seekers from developing countries would be ineligible to claim refugee status in Western countries which, at any rate, would be more comfortable offering asylum to persecuted minorities from the First World (Ibid).

Additionally, the Convention stays silent on the idea of international burden sharing which is extremely relevant in the case of developing countries hosting the majority of the world's refugee population (Islam: 248). The Convention fails to confer any minimum responsibility on the part of states not burdened with mass refugee inflow or those with poor asylum practices. This omission is a disconcerting fact for developing countries that already lack the capacity to accommodate incoming refugees. Lastly, the 1951 Convention also does not account for national security interests of the receiving state, which was another sore point for India (Chimni 2003: 445). Surprisingly, despite its apprehensions to accede to the 1951 Convention and no domestic refugee law of its own, India has been able to follow a refugee

¹ The Citizenship Act of 1955 is one of the legislations dealing with the regulation, treatment and status of foreigners, including refugees, in India

protection policy that is more or less in conformity with broad international law and principles.

INTERNATIONAL LEGAL FRAMEWORK WITH RESPECT TO REFUGEES

The 1951 Convention is the core international instrument outlining the treatment of refugees with respect to their welfare, travel, employment, resettlement, and asylum status. The Convention is supplemented by the 1967 Protocol relating to Status of Refugees. At present, there are 148 countries that are Parties to one or both of these instruments. The Office of the UNHCR is a humanitarian, non-political organization, which receives its mandate from the 1951 Convention and has the core responsibility to provide protection to refugees.

Who qualifies as a Refugee?

The 1951 Convention defines a refugee as a person 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 as a result of such events, is unable or, owing to such fear, is unwilling to return to it.” (Convention Relating to the Status of Refugees 1951)

It is important to make a distinction between asylum seekers and refugees. “Asylum-seekers” are persons looking for protection outside their country against persecution in their own country. But they have not yet been officially recognised as “refugees” by the country in which they seek protection (Amnesty International 2019). Under the 1951 Convention, States have an obligation to grant asylum, i.e. entry and protection, to persons fleeing from their country of origin owing to persecution.

Also, no State may expel or deport a refugee to a place where there is fear for his life based on the grounds of persecution provided for under Article 33 of the 1951 Convention. This negative duty is known as the principle of non-refoulement which means not to “drive back or to repel” (Goodwin-Gill 2014: 14). It is also a non-derogable² fundamental norm in international law (Bhuiyan 2013: 118). However, it is important to know that there are some exceptions provided to non-refoulement within the Convention. These exceptions relate to any danger to the security of the host country or any serious crime committed by the refugee or asylum seeker (Convention Relating to the Status of Refugees 1951).

² Non-derogable rights are inalienable rights which cannot be taken away, compromised or whittled down. In human rights conventions, the right to life, the right to be free from torture and other inhumane or degrading treatment or punishment, the right to be free from slavery or servitude, and the right to be free from retroactive application of penal laws are the considered non-derogable rights. Non-refoulement is also considered a non-derogable right if the asylum seeker’s aforementioned rights are under threat of being violated in their home country upon their return.

Other International Laws Applicable To Refugees

While the 1951 Convention and the 1967 Protocol are the primary sources of reference for refugee protection internationally, other specialised instruments and international human rights norms are often invoked to provide additional protection. It is particularly so in the case of their non-ratification³ by States. International human rights law is more complex than international refugee law as there are a multiplicity of sources compared to the few refugee law instruments with straightforward provisions (Sen 2003). These standards sometimes supplement and reinforce refugee law and are useful for the protection of refugees in the absence of specific legislative provisions in place for their protection.

For instance, Article 14(1) of the Universal Declaration of Human Rights [UDHR] provides the right to seek and enjoy asylum in another country to escape persecution. Similarly, the principle of non-refoulement can also be found in Article 3 of the Convention against Torture [CAT], Article 8 of Declaration on protection of all persons from enforced disappearances, and Principles 5 of the UN Principles on Effective Prevention and Investigation of Extra-Legal, Arbitrary, and Summary Executions, where it is explicitly mentioned. On the other hand, Article 7 of the International Convention on Civil and Political Rights [ICCPR] contains the non-refoulement principle in an implicit sense.

Furthermore, rights like non-discrimination, protection of life, liberty, and security under the 1951 Convention are also preserved in other international human rights documents like the International Covenant on Civil and Political Rights [ICCPR], the International Covenant on Social, Economic and Cultural Rights [ICESCR], the Convention against Torture [CAT], and the Convention on the Rights of the Child [CRC] to name a few.

INDIA'S APPROACH TO THE REFUGEE SITUATION

Currently, refugees in India are considered as aliens or foreigners. The municipal laws directly applicable to them are the Foreigners Act of 1946, the Registration of Foreigners Act of 1939, the Passport (Entry into India) Act of 1920, the Passport Act of 1967, the Extradition Act of 1962, the Citizenship Act of 1955- amended recently in 2019, and the Illegal Migrant (Determination by Tribunals) Act of 1983 (Sen 2003; Madhani 2018: 1089). Under these laws, there is no distinction made between the broader term 'foreigner' and a refugee or foreigner requiring special protection. These laws contain penal provisions that empower State authorities to detain and forcibly deport illegal foreign nationals, even those who claim to be refugees fleeing from persecution (MHA 2020).

In 2011, the Government of India [GOI] adopted a Standard Operating Procedure [SOP] to be followed by law enforcement agencies while dealing with "foreign nationals who claim to be refugees", which was amended in 2019 (Lok Sabha 2019). It provides for Long Term Visa [LTV] to such persons and thus allows them

³ When States ratify an international instrument, they indicate their consent to be governed by that law or treaty and agree to enact necessary domestic legislation to give effect to that international law or treaty. However, in case of non-ratification, i.e. the State does not sign and accede to the instrument, that instrument does not have any binding authority on the State.

to freely work and study in India too (Singh 2018: 132-133). For the first time in the Indian context, the text of the SOP acknowledged distinct criteria for the identification of certain foreigners as refugees. In this way, it takes its cue from the definition provided under the 1951 Convention (Ibid).

Administration of Refugees within India

The manner of regulation of refugees and asylum seekers in India is on an ad-hoc basis through administrative decision-making instead of a regulatory framework specifically targeted at refugee protection. There is no official legislative or administrative framework for refugee-status determination, which is why the GOI determines the status of different groups of refugees in different ways.

Simply put, the GOI has an inconsistent policy regarding recognition of refugees as it differentiates between refugees who have fled from certain countries that share borders with India and refugees who have fled from other countries in the world. The former are viewed more favourably since they are seen as central to India's foreign policy. They are dealt with on a case by case basis depending on India's bilateral relations with neighbouring countries. However, the other kinds of refugees are not even officially recognised as refugees. It is up to the UNHCR to ensure their protection (Sen 2003: 438). Additionally, those who come to India from neighbouring countries are mixed population flows i.e. a combination of refugees, asylum seekers, economic migrants, environmental migrants, unaccompanied minors, and sometimes even trafficked persons. They might remain in the border states, but can still avail refugee status from UNHCR if they wish to do so.

The GOI recognizes Tibetans and Sri Lankan refugees on a *prima facie* basis⁴. They are provided protection and assistance directly by the GOI through specific policies and rules, and the residence permits are administered on a case by case basis (UNHCR 2021). For other refugees, the UNHCR carries out refugee status determination and issues its own document of registration, but it does not do so for refugees in border areas as it does not have access to the potential asylum seekers there (Sen 2003: 412). These refugee certificates issued by the UNHCR are recognised by the Indian authorities to a somewhat limited extent (ibid: 405).

This could be because the UNHCR was not viewed favourably by the Indian government due to concerns about outside intrusion into its domestic affairs. But after many years of diplomatic negotiations and the need for assistance in dealing with Tibetan refugees, the UNHCR Office was established in New Delhi in 1969 (Chimni 2003: 444; Sen 2003). However, as India is not a signatory to the 1951 Convention or the 1967 Protocol, the UNHCR does not exercise any supervisory power over India's refugee protection mechanism and works purely under its mandate enshrined in the Statute (Sen 2003: 422). For these reasons, there is no formal status of the UNHCR in India. Hence, UNHCR registered refugees only have a somewhat partial recognition by the government.

⁴ Recognition on a *prima facie* basis is a common practice that UNHCR or the State use to look at the readily apparent and objective circumstances of the asylum seekers' country of origin or country of former habitual residence. This is to acknowledge the harm that the person may be fleeing from and bring them under the applicable refugee definition.

With respect to shelter and basic human needs, Government recognised refugees are housed in camps and have access to local schools, hospitals and the job market, but UNHCR registered refugees face difficulties finding accommodation and are subject to intense scrutiny. But both types of refugees do not possess guaranteed political rights, like the right to vote or the right to demonstration. With regard to economic, social, and cultural rights, there are no restrictions on practicing social and cultural norms. While there is no official obstacle in the access to the job market for UNHCR recognised refugees, there is no assistance from the government like there is for government recognised refugees in terms of facilitating documentation (Ibid). The right to education is guaranteed to both kinds of refugees by law.

Judicial Approach to Refugee Issues

India, however, is a signatory of other international human rights instruments like the UDHR, Genocide Convention, ICERD, ICCPR, ICESCR, CEDAW, CAT, CRC, and Bangkok Principles. Although these instruments are not enforceable by the courts of law in India, they can be read into existing municipal laws or be given effect through separate legislation. Courts in India are free to apply principles of international law, treaty, or convention and Article 253 of the Indian Constitution empowers the Parliament to implement international treaties or conventions by making laws. The Supreme Court has interpreted this power of the Parliament further in *Gramophone Company of India v Birendra Bahadur Pandey and Others* (1984). The Court clarified that international law can be incorporated within municipal laws as long as they are not in conflict with other laws enacted by the Parliament. Additionally, *Maganbhai Ishwarlal Patel v Union of India and another* (1969) can be looked into to further expand on this matter where the Supreme Court states that the Parliament does not necessarily need to enact statutes for the enforcement of any international treaties, agreements, or conventions. So long as municipal laws are not contravened, Courts can read provisions of international conventions and norms into municipal law even in the absence of ratification by India.

Unlike under international law, refugees are not protected by any specific national level legislation in India. Nevertheless, the Constitution of India safeguards the rights of all persons within its territorial jurisdiction- citizen or non-citizen. While citizens enjoy a broader scope of fundamental rights compared to non-citizens, creative judicial interpretation of Articles 14 and 21 have provided non-citizens, including refugees, some constitutionally protected rights. While Article 14 provides protection to refugees from discrimination and arbitrary action, the Supreme Court has held in *Louis De Raedt v Union of India* (1991) that their right to life and liberty is also likewise protected under Article 21. Yet, in a case involving the Chakma refugees settled in Arunachal Pradesh, the Supreme Court went on to hold that the right to life and liberty does not include the right to settle and reside in the country, which is a right available only to citizens of India (*State of Arunachal Pradesh v Khudiram Chakma* 1994)⁵.

⁵ This case concerned the Chakmas refugees who fled to Arunachal Pradesh from the Chittagong Hill tract of East Pakistan (now Bangladesh). The Supreme Court was faced with the issue of their protection from local state and non-state actors in Arunachal Pradesh protesting against their settlement and demanding their deportation, as well as the issue of their citizenship.

Remarkably, the Court took a more protective stance towards the Chakma refugees, from what is now Bangladesh, in a subsequent decision (NHRC v State of Arunachal Pradesh and Another 1996). Here the Supreme Court noted that the 'rule of law' reigns supreme in India and the state must protect everyone, including non-citizens, from any threats to their life and liberty. Thus, the Court held that the state must ensure that the life, health, and well-being of the Chakma refugees living in the refugee camps in Arunachal Pradesh is protected from threats of eviction from the state and non-state actors. The Court additionally also directed the State to look into the citizenship applications filed by these refugees which were still pending before it (Ibid).

From time to time, Indian Courts have stepped in to safeguard refugees from deportation, expulsion, and forced repatriation⁶. 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). In another case, 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 (K. A. Habib v Union of India 1999).

In a nutshell, the approach of the Indian judiciary in cases pertaining to refugees has made it clear that there are certain procedural and substantive rights that are central to their protection. Judicial decisions indicate that the Courts recognise an individual's right to be recognized as a refugee and not be expelled or deported while they are in the process of seeking protection as a refugee (Dhavan 2019). Therefore, the Indian judiciary has gone progressively further than the legislature and executive to acknowledge and protect the rights of refugees by freshly interpreting constitutionally guaranteed rights and adopting international law principles into its judicial reasoning.

CRITICAL ANALYSIS OF THE INDIAN APPROACH

To begin with, the Indian government's differential approach to different groups of refugees creates a discriminatory system of protection. It has officially recognised certain refugee groups like the Tibetans and Sri Lankans and extended the stay of certain groups of UNHCR mandate refugees like the Afghans and Burmese. On the other hand, the Indian state tried to forcibly repatriate others like the Chakmas of Chittagong (Sen 2003). Also the standard of treatment varies according to the nationality of the refugees with the government-recognized refugees getting a greater level of protection and freedom than UNHCR recognised refugees (Ibid). The government-recognised refugees get relevant documents giving them residence rights, whereas other refugees, without proper residence rights, can be arrested as

⁶ In the cases of N.D. Pancholi v State of Punjab (1988), Bogyi v Union of India (1989) and Khy Htoon v State of Manipur (1990) deportation orders against Burmese refugees were stayed by the Supreme Court as well as High Courts and the petitioners were given the opportunity to seek protection from the UNHCR as per its mandate. In P Nedumaran and Dr. Ramdoss v Government of India and Others (1992), the High Court directed the Centre and State to provide undertakings stating that they would not forcibly repatriate Sri Lankan Refugees residing in Tamil Nadu back to Sri Lanka.

illegal immigrants under the prevailing domestic laws applicable to foreigners. Secondly, foreigners and refugees are dealt with in the same way without paying attention to the specific requirements of refugees, who need to be afforded special protection owing to such status. Since many refugees enter illegally, they do not possess documents like other foreigners. Existing domestic policies, which are used for regulating entry, citizenship and rights of foreigners, require them to possess relevant documents, which they cannot always produce. In case of failure to comply with the strict standards set under these laws, penal action like detention or deportation is resorted to without any application of mind to their special status under international law.

Finally, there needs to be a rights-based approach on the part of the GOI instead of the charity based approach as it leaves room for arbitrary action to go unchecked and does not address issues relating to detention, deportation, and border push-backs by authorities (Naik 2018; Gupta 2017; Chimni 2003: 447).

WAY FORWARD: NEED FOR SPECIFIC LEGISLATION

A systematic and consistent policy towards refugees can come about if India accedes to the 1951 refugee convention or alternatively, adopts a national legislation of its own on refugee protection. There are many gaps in refugee protection in India because of its differential treatment of refugees in the absence of any specific legislation. As it has already been discussed how the 1951 Convention is not entirely suitable to the South Asian context where refugees arrive en masse, a national refugee law emerges as a stronger choice for India.

A specific legislation with uniform regulations will help streamline refugee status determination procedures for all types of refugees seeking protection in India. It will also ensure that the rights and duties of foreigners and refugees will be distinguishable and will guarantee that refugees have access to all the relevant protections afforded to them under international law. The national law would also be able to address India's security concerns, while at the same time ensure that there is no unlawful detention or refoulement carried out under the garb of national security. Finally, the national law can place greater emphasis on the special problems faced by refugee women and children who require additional protection.

Until now, the application of human rights principles through the judicial interpretation served as an alternative to the creation of sound domestic legislation on refugee protection, but that is not the way a democracy should be operating. Even though the liberal interpretations of the judiciary try to balance the rights of the refugees with national interests, India's present mechanism for dealing with its refugee problem is not a long-term practical solution in an era marked by forced displacement world-over. Therefore, India must prioritize the refugee issue and introduce a rights-based protection regime in the country by enacting a national refugee law.

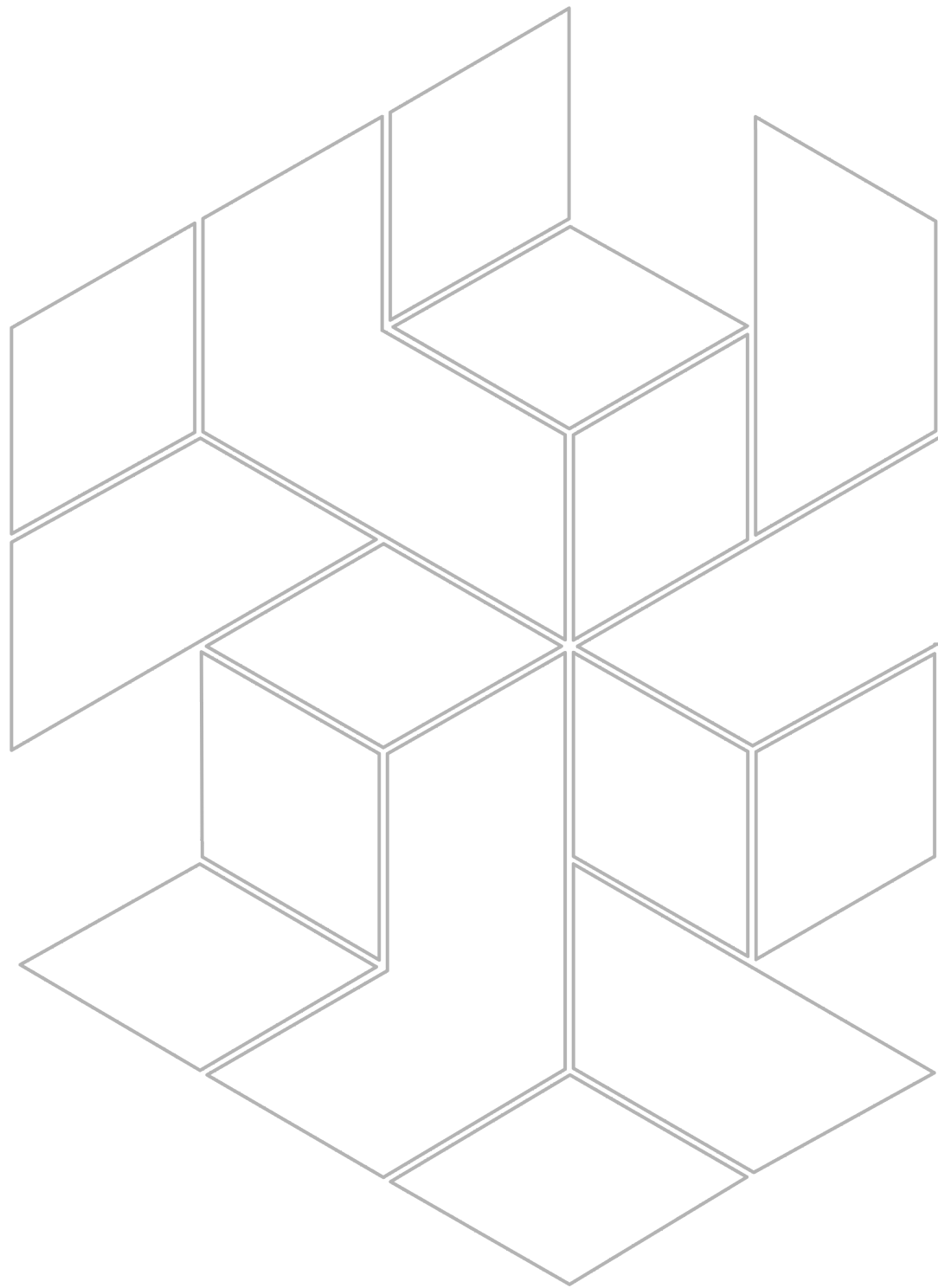
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