

Rights Of Refugees In India: The Legal Perspective With Special Reference To Their Educational Rights

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Abstract

Several International Conventions, such as the United Nations Convention on Status of Refugees, 1951(hereinafter referred to as the "Refugee Convention") and its Protocol of 1967, lay down the procedure for determining the status of refugees and protection of their rights. India has a history of witnessing a mass influx of refugees but still prefers to have adhocism in its refugee policies & laws. The country is not a signatory to the Refugee Convention nor its Protocol of 1967. The well-known reasons available in the existing public literature are; security issues as borders are highly porous, the enormous strain on domestic resources, and a demographic imbalance that might come. However, the Indian Judiciary has evolved with time and treated refugees as a separate class of persons and extended the scope of protection for refugees through various Articles of The Constitution of India, specifically Articles 14, 21, 25, and 32. However, India still needs to strengthen the legal protection of refugees and their Human Rights. The need to analyse the judicial pronouncements, responses of the Indian Parliament, its role in protecting refugees, and their human rights with special reference to their Right to Education is of utmost importance.

The researcher attempts to analyse all these issues of Law, policy and judicial interpretations and implementation of rights of refugees with special reference to their Right to Education.

Key Words: Refugees Human Rights

A large category of people all around the world is unable to meet their needs due to circumstances which are beyond a person's control owing to human rights violations and other reasons such as socio-economic and political insecurity. These people are commonly referred to as refugees, a creature of circumstances. They not only need adequate state protection but protection from the international community. Though we may say that a refugee is a person towards which a state, as a member of the international community, has a moral duty to admit. Still, the states generally resist protection due to unavailability or limited resources.

Taking a note of the rights of various groups, with common features or reasons for fleeing away from their homeland, cutting across national boundaries the, international Law has recognised the rights of such groups through

various conventions such as the Refugee Convention or the various other declarations such as Organization of African Unity 1969 Convention on Specific Aspects of Refugee Problems. Also, the office of the United Nations High Commissioner for Refugees was established on December 14 1950, by the United Nations General Assembly. The agency is mandated to lead and coordinate international action to protect refugees and resolve refugee problems worldwide.

According to the Refugee Convention, refugees are those 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 to or, owing to such fear, is unwilling to avail himself of the protection of that country.*"¹

¹ 1951 Refugee Convention, Article 1(A)(2)

However, at the same time, in addition to the Refugee Convention and its 167 Protocol and the Statute of the Office of the United Nations High Commissioner for Refugees, there are several regional agreements, conventions and other instruments relating to refugees, particularly in Africa, America and Europe. Some of these regional instruments define the word Refugees and deal with matters like the grant of asylum, a list of necessary travel documents and other travel facilities. For instance, the Organization of African Unity 1969 Convention on Specific Aspects of Refugee Problems in Africa provides for a more comprehensive definition of "Refugees", according to which refugee is any person who is compelled to leave his habitual place of residence to seek refuge in another country outside his owing to who, owing to external aggression, occupation, foreign domination or events alarming public order.² Thereby extending the status of refugees to a more significant number of people than the ones covered under the definition as mentioned under the Refugee Convention.³ Therefore, such conventions highlight the need for a more comprehensive definition to cover a significant portion of people who do need help from the international community.

In India, ever since the partition, there has been a max influx of Refugees⁴; still there is no uniform legal framework. Also, India is not a party to the Refugee Convention or the 1967 Protocol⁵ raising numerous questions related to the country's security and the status of such people who enter India without any authorisation. Whether they can be treated as citizens or not, and if not, what status do they have? Are they a foreigner or enemy alien, or an illegal migrant, or they are a separate class? The most significant lacuna in India is that the word refugee is not defined anywhere consequent to which they are often covered

under the term "foreigner" as defined under Foreigner's Act (1946), placing refugees on the same footing as those immigrants or tourists and hence depriving them of the privileges as granted under the Refugee Convention. Further, in common parlance, not only those who are forced to flee their country because of the reasons mentioned above in the definition of the Refugee Convention but any person who flees to a foreign land is treated to be a refugee.

The exhaustive study of the existing public literature showcases that the lack of refugee laws in India has led to the treatment of refugees at the sole discretion of the government policies depending on socio-political reasons. For instance, refugees from countries like Iran, Iraq, Somalia, and Afghanistan were denied protection, and most of them were offered only temporary residence permits. Still, in 1959, when thousands of Tibetans fled from China, they were provided appropriate government aid by the Indian State. Similarly, many Tamils from their homeland of Sri Lanka were offered a settlement in Tamil Nadu.

As stated above, Indian Law nowhere defines the word refugees; however Judiciary has provided different interpretations of the word, and in 1997, Justice P N Bhagwati⁶, who was entrusted to construct a uniform law of refugees, defined refugee in the model law as: -

"Any person who is outside his/her Country of Origin and is unable or unwilling to return to, and is unable or unwilling to avail himself /herself of the protection of that country because of a well-founded fear of persecution on account of race, religion, sex, ethnic identity, membership of a particular social group or political opinion".

However, the bill was never tabled in Parliament. As of 2022, India still prefers to

³Bonaventure Rutinwa, 'The End of Asylum? The Changing Nature of Refugee Policies in Africa' in Helene Lambert (ed.)

⁴ B. S. Chimni (ed), International Refugee Law: A Reader (Sage Publications, New Delhi 2000) 462

⁵ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 United Nations Treaty Series 137 (1951 Convention); Protocol Relating to the Status of

Refugees (entered into force 4 October 1967) 606 United Nations Treaty Series 267 (1967 Protocol)

⁶ Drafted under the auspices of the Regional Consultations on Refugees and Migratory Movements in South Asia initiative in 1995, with Justice P N Bhagwati as the Chairperson of the Drafting Committee of the India-specific version of the national law on refugee protection.

treat the people who flee from their home country to India based on their origin and other political considerations, putting a big question mark on the uniformity of the rights and privileges granted to different communities. To provide a uniform law, various reports have been filed by the National Human Rights Commission stating the importance of promulgating uniform National Refugee Law or making specific changes or amendments to the Foreigners Act of 1946, which is the current Law referred concerning refugees and asylum seekers.

According to the Part-II of the Constitution of India, any person who is not an Indian Citizen is treated as a "foreigner" in the country. Therefore, treating refugees under laws applicable currently to foreigners. There are three sets of laws that deal with foreigners in India. The following are: -

- the Registration of Foreigners Act, 1939, dealing with all the foreigners,
- the Foreigners Act, 1946 empowers the state of regulates the entry, the presence and departure of aliens in India and
- the Foreigner's Order 1948.

Further, the National Human Rights Commission (NHRC), established under the Protection of Human Rights Act (PHRA), 1993, as amended by the Protection of Human Rights (Amendment) Act, 2006, is responsible for protecting the refugees and their rights.

The Constitution of India is the fundamental Law of the country, which incorporates the principle of the Rule of Law. It further includes and reflects the international norms as set out in the Universal Declaration of Human Rights and affirms the principles of non-discrimination. Chapter 3 of The Constitution of India deals with fundamental rights. The rights under the Constitution of India are categorised as follows:

- - i. Available to every person
 - ii. Available only to the citizens of India

The rights under the first category are available to every person irrespective of the fact that whether a person is a citizen of India or not, such as certain Fundamental Rights like Equality before Law, i.e., Article 14⁷ of the Article 21⁸, i.e. No person shall be deprived of his life and liberty except according to the procedure established by Law.

Almost all the written Constitutions of the world recognise and incorporate the principle of "Equality before the law". Similarly, the Constitution of India in Article 14 envisages the principle and states that both in privileges and liabilities, all people who are equally circumstanced shall be treated alike. Article 14 states: *"The state shall not deny to any person equality before the law or equal protection of laws within the territory of India"*. The article incorporates the fundamental principle that "like should be treated alike" and strictly prohibits discrimination between people who are placed under similar circumstances. As the article mentions, "any person"; therefore, it is just not limited to citizens alone but covers within its scope "any person within the territory of India".

Therefore, even a foreigner within the territory of India has the right to invoke Article 14 and claim equal protection of laws. As discussed above, a refugee in India is covered under the same laws as a foreigner. So, a state cannot discriminate against a refugee against other refugees belonging to the same class for any benefits or rights they are subjected to. Hence, in India refugees are entitled to almost all the fundamental rights.

Talking about the Right to Education, the Right plays a crucial role in fostering international peace, a just and societies free from fear and violence. In India, Article 21, the right to education, is considered part of basic fundamental rights flowing directly from the right to life. However, the same is not an absolute right and needs to be determined in

⁷ Equality before law: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India

⁸ Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law

accordance with Article 41⁹ and Article 45¹⁰ of the Constitution of India. Further, the 86th Constitutional amendment of 2002 declared the Right to Education as an independent fundamental right and a separate article was added, i.e., Article 21-A¹¹.

According to the Council of Europe Strategy for the Rights of Child (2016-2021) 12, children and migrated groups are one of the most vulnerable groups. The refugees often face limited access to justice, education, social and health services. Today, more than half of the population of refugees are children under 18 years of age. These children need to be treated specially and shall have access to the fundamental right to education. The right to education, which is considered a necessary right for gaining access to other rights, will undoubtedly give refugees an intellectual tool enabling them to shape their future and their countries or contribute to the countries sheltering them.

In India, the major problem faced is that when they flee from their home country, they leave behind a lot more than just their homeland, including children who abandon their schools. Some get displaced while they have just entered their schools, while others might be persecuted as they pursue their tertiary education. When they are at the primary level finding out a school and getting basic education is much easier than others. At the secondary stage, it gets difficult to switch to the new curriculum and refugees at this stage experience more difficulties. Also, in refugee schools, often because of the pressure on the capacity, the maximum age for attending schools is capped, disrupting the education of refugees whose secondary education was limited at the secondary stage. The only option they are left with is to get some vocational training or work for some low-paid jobs. It is very easy for a kid to lose hope and all ambitions in such difficulties.

Further, refugee students are generally treated in the same class as other students. However, they should be treated as a different class with particular needs because their origin has diverse national, cultural, linguistic, ethnic and backgrounds. Sometimes, even if they belong to the same host country, individuals from different areas may have diverse educational needs. Based upon factors like origin, race, religion, culture, socioeconomic and educational background before migration, the refugees tend to respond to schools and their environment differently. As the refugees are a heterogeneous group with different skills and experiences, the question that arises here is how are the countries currently integrating the needs of refugees and what further steps should the government take to integrate them effectively? Though, for effective integration, it is just not the countries that are responsible. However, it is for the refugee as well to adapt to it.

It is time that both the National Human Rights Commission and the United Nations High Commissioner for Refugees start working together and develop a substantial legal framework codifying the procedure with norms to determine the status of refugees in India and their educational rights.

⁹ The State shall within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

¹⁰ The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for

all children until they complete the age of fourteen years.

¹¹ To provide free and compulsory education of all children in the age group of six to fourteen years as a Fundamental Right in such a manner as the State may, by law, determine.