

Where does India stand on the Refugee Question? A Critical Analysis

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Abstract

As per the United Nations High Commissioner for Refugees [UNHCR], more than two lakh asylum seekers and refugees stay in India (UNHCR 2021:1). India is not a party to the 1951 Convention on the Status of Refugees and its 1967 Protocol and has not enacted any national law/s or policies specific to the consequential issue of refugee protection. This paper tries to examine the existing framework in India, the administrative, political, and judicial approaches, with regard to the refugees. Essentially, it tries to understand the standing of India on the refugee question vis-a-vis domestic and international laws? Finally, it discusses why there is a need for dedicated legislation pertaining to the protection of refugees in India.

Keywords: Asylum, Pertaining, Policy, Protocol, Refugee.

1. INTRODUCTION

Owing to its porous borders, political and economic stability, and unique geopolitical location in South Asia, India has often experienced a mass influx of refugees from neighboring countries. As per the United Nations High Commissioner for Refugees [UNHCR], a total of 208 065 refugees and asylum seekers live in India (UNHCR 2021:1). The recent development, the enactment of the Citizenship Amendment Act 2019 (CAA), and the associated socio-political scenario have shaped the refugee issue in the subcontinent in a very different way. The same, along with fundamental questions, will be discussed in the article below.

As suggested by Marina Carter and Khal Torabully, we can look at the refugee issue in its two spheres, i.e. in the country of origin and the host country. First, the circumstances leading to the moving out of the populations,

the alienation and hatred they faced, the ghettoization; and the other aspect being the complex dynamics of the host country upon the arrival of the refugees, the impact on its domestic politics and the socio-economic repercussions of their arrival. In the current scenario, with Europe grappling with war and China on the offensive, the crisis in Myanmar and so on, India needs to have its refugee law and policy in place if India's leadership wants to make a mark in the international scenario.

2. India and the UNHCR Convention

As per the UNHCR Convention of 1951 and the 1967 Protocol, the internationally accepted definition of a refugee is someone who has a well-founded fear of persecution by reasons of race, religion, nationality, or political opinion and who cannot return to his country or has become 'stateless'. Whereas "asylum seekers" are those people who are looking for protection

outside their country as against persecution in their home country. However, as per Amnesty International, they have not yet been officially recognized as "refugees" by the country in which they seek protection. The states have an obligation to grant asylum i.e. protection and entry to people fleeing from their country of origin owing to persecution under the 1951 Convention.

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 the Status of Refugees. At present, 148 countries are parties to one or both of these instruments. The Office of the UNHCR is a humanitarian, non-political organization that receives its mandate from the 1951 Convention and has the core responsibility to provide protection to refugees. Radhika Nair says that due to the Eurocentric bias present in the 1951 Convention on the Status of Refugees and its 1967 Protocol, India did not become a party to it. India does not have any national laws and policies on refugee protection either. Thus, its approach toward refugees has been largely political and administrative.

3. A historical view of India's Refugee Policy

Presently, refugees in India are considered foreigners or aliens. 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; Madnani 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).

An amendment proposal was addressed to a Parliamentary Select Committee and the Law Commission in 1998. Its 175th report made little progress in providing 'illegal migrants' the benefits of "status" determination while pushing the case to curb the evil of migration. Fali Nariman and Eduardo Faleiro, when the Bill went to the Rajya Sabha on May 7, 2003, made a case for a more comprehensive refugee policy with due process and even adopted the Model Bill. When the matter went to the Standing Committee on Home Affairs, its report of December 12, 2003, suggested: "all humanitarian assistance" to those who had fled due to civil unrest or religious persecution while also talking to the persecuting countries for safe return. But, refugees were not mentioned, and the new amendment to Section 6 made it almost impossible for "illegal migrants" to acquire naturalized citizenship. It can be said that a significant opportunity was lost then.

Retrospectively, India's response to the refugee crisis may be termed as both friendly and hostile. India had welcomed the Tibetans who continued to run a government-in-exile in Dharamshala, Himachal Pradesh. As a new nation, it tried hard to deal with the bloodiest and one of the largest migrations and refugee crises of human history in 1947. In fact, India also continued to offer citizenship to people who went to Pakistan and came back before July 19, 1948. It has also given shelter to Indian-origin refugees who had British passports from Kenya and Uganda. It has also absorbed Tamil refugees from Sri Lanka and Bangladeshi refugees without any prejudice earlier. Bhutanese and Nepalis have also been allowed in India. Apart from this, people being persecuted in Somalia, Afghanistan, and Sudan have also been given shelter here.

But, India has also played diplomatically while considering its bilateral relations with other countries. For instance, India refused shelter for Nepali refugees expelled from Bhutan. It has also denied Muslim Uighur refugees and softened its stance on Tibet due to fear of

aggression from China. The Rohingyas of Myanmar have been accepted quite inadequately by India. In Pakistan, the persecuted persons belonging to communities such as Ahmadiyas and Balochis are not being offered any refuge assistance. The Tamils in Sri Lanka are not included in the CAA.

Overall, the Indian response to the refugee problem has been ad-hoc, as we will see more in the following sections.

4. The present Institutional Arrangements for Refugees in India

4.1. The Administrative Response

The Government of India is responsible for determining the status of refugees in India. The government deals with the refugee question by considering factors such as its bilateral relationships, foreign policies, and so on. Refugees from neighboring countries are dealt with on a case-by-case basis depending on India's bilateral relations with them. However, the rest of the refugees are not even officially recognized as refugees and it is up to the UNHCR to ensure their safety and protection (Sen 2003: 438). The foreigners and the refugees in India are dealt with in the same way. It perhaps needs to pay attention to the specific requirements of refugees, who need to be accorded special protection owing to their special conditions. For instance, some refugees may not possess the required documents.

The Government of India (GOI) recognizes the Tibetans and Sri Lankan refugees on a *prima facie* basis. They are provided assistance and protection by the GOI directly through specific rules and policies, and the residence permits are usually administered on a case-by-case basis (UNHCR 2021). For other refugees, the UNHCR determines the status of the refugees and issues the registration documents. Still, it does not do so for refugees in border areas as it does not have access to the potential asylum seekers (Sen 2003: 412). 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 the above reasons, there is no formal status of the UNHCR in India and hence the UNHCR registered refugees only have partial recognition by the government of India. This could be because the UNHCR was not viewed favorably 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 the Tibetan refugees, the UNHCR office was established in New Delhi in 1969. 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, the UNHCR registered refugees only have partial recognition by the government. However, the government recognized refugees are housed in camps with access to local schools, hospitals, and job markets, but the UNHCR refugees have difficulty accessing the basic amenities. More, both types of refugees do not possess the right to vote or the right to demonstrate along with other guaranteed political rights. With regard to social, economic, and cultural rights, there are no restrictions on practicing social and cultural norms. While there are no official obstacles to accessing the job market for the UNHCR-recognized refugees, there is no assistance provided from the government, for instance, there is assistance provided to government-recognized refugees in facilitating documentation (Sen 2003: 422). However, the right to education is guaranteed to both kinds of refugees by the law of the land.

4.2. The Judicial Approach

Courts in India can take the liberty of applying principles of international law, conventions, or treaties. Also, Article 253 of the Indian Constitution empowers the Parliament to implement international treaties or conventions by making laws. India is a signatory of various other international human rights instruments such as the UDHR, ICERD, Genocide

Convention, ICCPR, ICESCR, CEDAW, CAT, CRC, and Bangkok Principles. But, all these instruments are not enforceable in a court of law in India.

The Supreme Court has time and again interpreted the legislative power of the Parliament through its various judgments. For instance, in the *Gramophone Company of India v Birendra Bahadur Pandey and Others* (1984), the Court clarified that as long as international laws are not in conflict with other laws enacted by the Parliament, they could be incorporated within municipal laws. Additionally, in *Maganbhai Ishwarlal Patel v Union of India* (1969), the Supreme Court further expanded on the above matter, stating that it is not necessary for the Parliament to enact statutes for the enforcement of any international treaties, conventions, or agreements. Courts can read provisions of international norms and conventions into municipal law even in the absence of ratification by India as long as municipal laws are not contravened.

Despite the fact that the refugees are not protected under any national-level legislation here, the Indian constitution has guaranteed various rights to the people (both citizens and non-citizens) residing in its territories. Constitution Articles like Article 14 (equality before law) and 21 (right to life and liberty) are available to non-citizens in India. However, the Supreme Court has made sure that the right to life and liberty does not coincide with the right to settlement and residence in any part of the country, it is reserved only for the citizen of India. In the *State of Arunachal Pradesh v Khudiram Chakma* 1994, the Supreme Court of India stated the above with regards to the Chakma refugee settlement in Arunachal Pradesh. 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 and well-being of the Chakma refugees living in the refugee camps in

Arunachal Pradesh are protected from threats of eviction from the state and non-state actors. The Court also directed the state to look into the pending citizenship applications filed by these refugees.

Time and again, the refugees have been safeguarded from deportation, expulsion, and forced repatriation by the Indian Courts. Knowing that refugees are not always able to produce legal documentation and other such proof, the Court even waived off the requirement to provide surety in the case of *U. Myat Kayew and another v State of Manipur* 1991, so that the refugees could be released and be free to approach the UNHCR for protection. In another case *K. A. Habib v Union of India* 1999, the Indian Court prohibited the expulsion of UNHCR certified Iraqi refugees after observing that the principle of nonrefoulement is encompassed in Article 21. It stated that the refugees must be safeguarded from persecution in their home country as long as their presence in the Indian subcontinent is not a threat to national security. The judicial decisions signify that the Courts recognize an individual's right to be recognized as a refugee and not be deported or expelled while they are in the process of seeking protection as a refugee (Dhavan 2019).

Thus, we see that the judiciary has made efforts in dealing with matters concerning the refugees by continuously reinterpreting the Constitution and the laws. It is but natural that the Indian courts and the Indian government keep having divergent views on refugees, persecution, and deportation time and again.

5. Citizenship Amendment Act 2019 (CAA) and the Refugee Question

In December 2019, the Parliament of India passed a much talked about law, the Citizenship Amendment Act (CAA). This law aimed to address the “religious persecution or fear of religious persecution” among the minorities (excluding Muslims) of the neighboring Muslim majority countries viz. Bangladesh, Pakistan, and Afghanistan by granting them citizenship in India. It also

relaxed the residence requirement for naturalization for these migrants from eleven to five years.

This could have been a great opportunity for India to contribute to easing the refugee situation in the neighboring countries and inside India. But, the caveat of religious criteria for a refugee and its association with the National Register of Citizens (NRC) led to massive socio-political action in the country. This was the first time that India added religious criteria to India's citizenship laws. However, India has repeatedly been pointing out that the law is to provide shelter to the persecuted minorities in the neighboring countries but it has kept its ambit closed to communities, among others, such as Sri Lankan Tamils and Rohingyas of Myanmar. This led to a countrywide protest, and massive demonstrations mainly by the Muslim community.

The CAA contravenes the spirit of democratic constitutionalism founded on the basis of the rule of law. Moreover, India needs to make sure that CAA does not create problems for non-Muslim minorities (whom it claims it tries to protect) living in the neighboring countries of Pakistan, Bangladesh, and Afghanistan. In an interview, two Hindu Pakistani pointed out how CAA could worsen their lives instead of helping them, creating a feeling of animosity in their home and country. 5.1. Who is a refugee then?: The Persecuted or the Particular Religious Community/ies? For the first time in the history of India, there is a law that differentiates between particular religious communities. One naturally gets inquisitive: whether the criteria of accepting a refugee should be her identity or her state of being persecuted in her home country? To make matters complicated, there is no clarity on the law and its link with the NRC. The then union minister, Mr. Ravi Shankar Prasad said that the two were not linked and the Home Minister Mr. Shah has said on several occasions affirming the link between the two in his popular appeals to understand the chronology. There is clearly a lack of clarity and thus a state of confusion and thus the hysteria among the masses. According to Radhika Nair, who has been

studying refugee laws and policies, the CAA and its aftermath highlights “the inconsistency in the treatment and protection of refugees and asylum seekers in India” as it extends “protection to selective communities”.

Thus, what India genuinely lacks is a specific and robust law on refugees. It should be a permanent rights-based solution to the refugee question instead of making ad-hoc adjustments. It will also ensure that the rights and duties of foreigners and refugees will be distinguishable. It will also guarantee that refugees have access to all the relevant protections accorded to them under international laws. With the growing population, it is crucial for India to make sure that it can provide for all its people and take care of its internal security. At the same time, it also needs to make sure that no unlawful detention or refoulement is carried out without any firm basis. India needs to make sure that its secular, federal, and democratic structure remains intact. Proper legislation on refugees, in black and white, might actually make matters and the procedure more transparent. It is also crucial for India to give space to the persecuted refugees and make sure that their cultural identity is not perceived as a threat to the rest of the population. As Rajeev Dhavan said in his recent article, “what India needs is a proper refugee law and not a CAA suffused with discriminatory intent”.

6. Conclusion: The Way Forward

As noted, there is a gap in refugee protection in India because of the lack of dedicated legislation. A systematic and consistent policy toward refugees can come about if India accedes to the 1951 refugee convention or adopts national legislation of its own on refugee protection. However, as mentioned earlier, the 1951 Convention is not entirely suitable for the South Asian context where refugees arrive in huge numbers. A national refugee law emerges as a more substantial choice for India. The Indian government's differential approach to different groups of refugees creates a discriminatory protection system. It has officially recognized certain

refugee groups like the Tibetans and the Sri Lankans. It has also extended the stay of certain groups of UNHCR-mandated refugees like the Afghans and the 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 recognized refugees (Ibid). There needs to be a rights-based approach on the part of the Government of India 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 pushbacks by the authorities.

More, adding religious criteria makes the law problematic. The government, in order to restore the faith of the people, should do away with the religious criteria and should welcome the refugees for they are persecuted and not have exclusionary criteria such as religious or ethnic identity in accepting refugees.

By way of conclusion, India needs a proper law in place than the present ad hoc arrangements for the refugees. And, a law that places the refugees on an equal pedestal and does not differentiate them on their ascribed identities. India has done fairly good for the refugees, but much more needs to be done to address the burning question of the refugee crisis.

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