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# The Need for a Separate Refugee Law in India

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SAAMRAGYI GUPTA<sup>1</sup>

## ABSTRACT

*The refugee issue has been prevailing in India for a very long time as people seeking protection view it as an attractive destination because of it being a stable democracy. Even though this issue has been around for a while, there have been few attempts to create a special law for refugees that would set them apart from other foreigners who visit India for tourism or to look for employment. This article sheds light on the consequences of a separate refugee law that will impact both citizens and refugees as well as a critique of the present Indian law. The article contains case laws, and a special focus is made on the Rohingya issue to bring to light the severe conditions and an urgent need for better-structured refugee law. Before discussing India's case-by-case approach and criticizing it, specific tests under international law that determine whether a person is a refugee are also highlighted.*

**Keywords:** status determination, humanitarian crisis, protection for refugees.

## I. INTRODUCTION

There has been a constant influx of refugees. People from all over the world flee to India to protect themselves from persecution, harassment, and threats to their life in their own countries, and India has always been very friendly and has adhered to its mantra "Atithi devo bhava". However, there are numerous gaps in Indian law that make it challenging to give refugees the necessary protection. In Indian law, the term "refugee" is not defined, which often gives rise to issues with people mistaking them for "illegal migrants" and hence painting all foreigners with the same brush. In my paper, I aim to distinguish between refugees, migrants, and illegal migrants and how the Constitution of India mandates that Articles 14 and 21 are applied irrespective of whether a person is a citizen of India or not. In this article, I will focus on the Rohingya issue and discuss how India could preserve its reputation as a stable democracy in the eyes of other countries by creating a separate refugee law. This will contribute to changing the lives of both its citizens and the refugees.

## II. HISTORY OF REFUGEE INFLUX IN INDIA

India has always been the home to all major religions in the world. The most quoted reference

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<sup>1</sup> Author is a student at O.P. Jindal Global University, India.

is the arrival of the Parsis in India, fearing persecution from the Muslims in Persia. The Parsi community has contributed economically, culturally, and educationally in the advancement of India and stands as a small community even today.<sup>2</sup> India has long been a shelter for refugees because of its tolerance and goodwill. Athithi is the term used in Indian culture to describe a stranger who is invited as a guest, and the host is required to treat him like God. However, the flow of refugees in recent times seriously affected Indian security e.g., Security issues have arisen in the host nations because of the presence of armed militants among the refugees and the violence that has been committed by them. For instance, the prevalence of weaponry available to Afghan refugees and their involvement in the drug trade has altered Pakistan's socioeconomic security profile. Since there is no separate law for refugees, they are often confused with illegal immigrants who cause havoc under the title of 'refugee' tarnishing its image.

Two routes had been used for migration: via the Patkoi Range in the East and the Hindukush Mountains in the West. The partition of India and Pakistan placed responsibility for providing shelter to at least twenty million refugees. Another influx of refugees was when in 1959, Dalai Lama along with his followers fled from Tibet and reached India. India hosted refugees in 1971, 1983 and 1986 as well. As per the World Refugee Report published every year by the UNHCR, India hosted approximately 4,00,000 refugees along with at least two million refugees and 2,37,000 internally displaced persons.<sup>3</sup> India's economic resurgence and status as the only stable democracy in the region make it an attractive destination for asylum seekers. However, this has put a financial strain on India, and the lack of a national refugee law specifying the rights and regulating the treatment of refugees leads to ill-treatment.

### **III. THE CONCEPTS OF MIGRANT, IMMIGRANT, INTERNALLY DISPLACED AND REFUGEE IN THE INTERNATIONAL LAW**

Most refugees in India are not subject to a single set of laws, therefore the country decides to treat them according to their country of origin and political concerns. Indians refer to the Foreigners Act (1964) whose primary lacuna is that it does not contain the term 'refugee'. Indian Law uses the term 'foreigner' to cover aliens temporarily or permanently residing in the country. This places refugees, along with immigrants, and tourists in this broad category, depriving them of privileges available under the Geneva Convention.

The term "Migrant" denotes a person who moves from one place to another within the same

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<sup>2</sup> V. Suryanarayan, *'Need for National Refugee Law'* 1 ISIL YB Int'l Human & Refugee L. 254 (2001).

<sup>3</sup> Sahoo, Niranjan. *'India's Rohingya Realpolitik'* CEIP (2017).

country in search of better living conditions. An “immigrant” migrates from one country to another for better job opportunities etc. An “internally displaced” person is defined as someone who is displaced from his original shelter due to war and any human-caused or natural disaster. “Refugee” however, as defined in the United Nations Convention Relating to the Status of Refugees, 1951 as a person who has been staying outside the country of his nationality or that of habitual residence due to fear of persecution and cannot return to his country of origin due to that fear. Refugees are also known as “asylum seekers”.<sup>4</sup> Our efforts to sensitize individuals at the various tiers of our society will continue to fall short unless the distinction between “refugees” and all other types of “foreigners” is made clear.

#### IV. INDIA’S INTERNATIONAL COMMITMENTS

India, as stated before, does not have a separate law to govern refugees and hence apply the Criminal Procedure Code, The Indian Penal Code and the Evidence Act to the refugees as well. India is not signatory to the 1951 Convention on refugees and to the 1967 Protocol, since it was not convinced about the necessity of an elaborate international organization whose sole responsibility would be to give refugees legal protection. Also, India’s refusal to sign the convention comes from the viewpoint that it was very Eurocentric and India saw it and the UNHCR as instruments of cold war.<sup>5</sup> India is, however, signatory to the International Convention on Civil and Political Rights and the International Convention on Economic, Social and Cultural Rights. It is also a signatory to the Convention on the Elimination of all forms of Racial Discrimination and the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. An alien who is lawfully present in the territory of a state party to the covenant may only be expelled by a decision made in accordance with the law and after having his case reviewed by a component authority, according to Articles 13 of the ICCPR-1996 and Article 3 of the Torture Convention 1984, lays down that if there is a risk that the alien will be tortured in another state, no state may expel him to that particular state.<sup>6</sup> The Imphal bench of the Gauhati High Court held in *Zothansangpuri v. State of Manipur* that refugees have the right to avoid deportation if their lives are in danger. In *Dr Malvika Karlekar vs Union of India*, the Supreme Court held that authorities should consider whether refugee status should be granted; and until this decision was made, the petitioner should not be deported. Hence India is obligated to provide the refugees with a due process of status of determination.

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<sup>4</sup> Pritam Ghosh, *The " Illegal Migrant " and " Refugee " Status Dilemma: A critical analysis with special reference to the Rohingya Muslims in India*, ACADEMIA.

<sup>5</sup> Saurabh Bhattacharjee, ‘*India Needs a Refugee Law*,’ Vol. 43 No. 9 EPW 71 (2008).

<sup>6</sup> *Supra* note 5.

## V. CONSTITUTIONAL RIGHTS OF REFUGEES IN INDIA

The Indian Constitution guarantees certain fundamental freedoms to all persons and not just to Indian citizens. The fundamental rights that all persons, including asylum-seekers and refugees, enjoy under the Constitution include, Right to Equality before Law (Article 14), the Protection of Life and Liberty (Article 21), the Right to Fair Trial, the Freedom to Practice and Propagate Own Religion (Article 25).

Article 14: The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. There shall be no discrimination without reasonable classification and must have a nexus with objective classification.

Article 21: No person shall be deprived of his life or personal liberty except according to due procedure established by law. In the case of *State of Arunachal Pradesh vs Khudiram Chakma*, the Supreme Court has held that foreigners are also entitled to the protection of Article 21 of the Constitution. In the case of *National Human Right Commission vs State of Arunachal Pradesh*, the Supreme Court restrained the forcible expulsion of Chakma refugees from the state and directed the government to ensure that every Chakma residing within the state should be protected. The court also decided that the Chakmas shall not be evicted from their homes except in accordance with the law. In the case of *U Myat Kayew and Nayzan vs State of Manipur*, which involved eight Burmese detained in the Manipur central jail in Imphal for illegal entry, voluntarily surrendered to the Indian authorities. The Gauhati High Court, under Article 21, ruled that asylum seekers who enter India, even if illegally, should be permitted to approach the office of the UN high commissioner to seek refugee status.

*Maneka Gandhi vs Union of India* imposed a limitation that law and the procedure established under Article 21 must be just, fair, and reasonable. The change that came along with the Maneka Gandhi case was that earlier the courts had to consider whether the decision to deport complied with the procedure in the Foreigners Act but now it must see whether the procedure was fair and just.

Right to a Fair Trial: this right entails the right to be produced before a magistrate within 24 hours of arrest.

Article 25: provides that subject to public order, morality and health and other fundamental rights, all persons are equally entitled to freedom of conscience and the right freely to profess, practice, and propagate their religion.

## VI. THE FIRST STEP OF REFUGEE INFLUX

Asylum is granted only when there is a “well-founded” fear of persecution and in furtherance of the principle of “Non-Refoulement” in International Refugee Law.<sup>7</sup> The majority of the time, a refugee's arrival into the country will be considered "illegal" since he lacks a valid travel document. The individual in question would have to deal with the possibility of being detained and prosecuted in accordance with local laws because India has not yet included the principle of non-refoulement in its legal legislation. Since this should not be held against the refugees the concerned authority comes in contact with the refugees wanting to know about their intentions. The issue with this approach is that the refugee in such circumstances may be unable to explain his or her background during initial interrogation, leading local authorities to have doubts about the validity of the refugee claim made later.<sup>8</sup> He/she may have undergone severe trauma of the loss of family on their way to India and hence may not be in a state of mind to answer all the questions of the authorities with sincerity.

Various tests have been developed that concern the standard of proof that is required to satisfy what constitutes being genuinely at risk or having a genuine well-founded fear of persecution. Some of these tests have been articulated by courts in several countries. In the case of *INS vs Cardoza Fouseca* interpretation of the “well-founded fear” standard would indicate that “so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is not enough that persecution is a reasonable possibility...” The above standard was considered in *R vs Secretary for the Home Department*. The judgment suggested that the ‘test’ should consider whether there is evidence of a “real and substantial danger of persecution.” The Canadian Federal Court of Appeal considered the above and disapproved the House of Lords formulation in *Joseph Ayei vs Ministry of Employment & Immigration*. They considered the “reasonable chance” standard. Therefore, in sum, what can be gleaned is a liberal standard which requires that if, “... there is objective evidence to show that there is a reasonable possibility or chance of relevant prosecution in the claimant’s state of origin,” the claim should be adjudged well founded.<sup>9</sup>

India, on the other hand, makes its decisions regarding whether to treat an individual or a group of individuals as refugees based on the specific facts of each case that is brought before it. For instance, up until 1993, Afghan refugees of Indian descent and others who entered India through

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<sup>7</sup> Omar Chaudhary, ‘Turning Back: An Assessment of non-refoulement under Indian Law’ Vol. 39, No. 29 EPW 3257 (2004).

<sup>8</sup> T. Ananthachari, ‘Refugees in India: Legal Framework, Law Enforcement and Security,’ ISILYBIHRL 7 (2001).

<sup>9</sup> *Supra* note 3.

Pakistan without travel documents were permitted access. The UNHCR assumed responsibility for their care and made sure that such refugees did not infringe in any way their guiding code of conduct. In 1989, when the Myanmar authorities started suppressing the pro-democracy movement in that country and about 3,000 nationals of that country sought refuge in India. The GOI declared that no genuine refugee would be turned back.<sup>10</sup>

## **VII. ROHINGYA ISSUE**

The Rohingya are one of the most persecuted minorities in the world. Their status in Myanmar is fragile; at 1.1 million, they constitute about 2 percent of the population. Currently, the Myanmar government allows Rohingya civilians to register as temporary residents with identification cards. While the Rohingya had been allowed to vote and stand for parliamentary elections in 2012, the Myanmar state chose to disenfranchise the Rohingya community in the 2015 national election, after heavy pressure from hardline Buddhists. The Rohingyas had no takers after being abandoned by their own nation. India has been strongly urged to take the initiative in the crisis due to its noteworthy influence in Bangladesh and Myanmar. India, meanwhile, has not shown the support that had been expected of it. The Indian Supreme Court declared the Rohingya to be both illegal migrants and a threat to national security. Moreover, Myanmar is India's gateway to South Asia, so its cooperation is crucial for New Delhi's broader regional objectives, and it did not want to make things difficult for itself. India was thus guided by a cold cost-benefit calculation concerning trade with Myanmar, maintaining its leverage vis-à-vis China, and safeguarding cooperation on counterinsurgency operations in its northeast.<sup>11</sup> It is crucial for India to maintain a balance between interest and values. India has always let religion play a huge role and Rohingyas being a Muslim minority are more persecuted than any other. Under the guise of security and geopolitics, India's weak response to the Rohingya issue runs counter to its own aspirations for a global presence. The government should at the very least permit them to remain in India until Myanmar's situation improves.

## **VIII. CRITICS OF THE PRESENT INDIAN REFUGEE LAW**

Under all the refugee laws in India, refugees are treated as foreigners who shall enter India voluntarily, without any external force such as war. The recent amendment to the Citizenship Act, 2019 provides a broader aspect to the issue but deals with it based on religion only. India does not have any special legal framework that deals with refugees separately. As mentioned above, the confusion between the terms "illegal migrant," "refugee" and "foreigner" further

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<sup>10</sup> *Supra* note 8.

<sup>11</sup> *Supra* note 3.

complicates the entire process. Indian law considers refugees as an individual rather than a class of people who are forced to take shelter in another country due to reasons such as war. India as a nation must therefore understand that depending on the Foreigners Act or the Citizenship Amendment Act will not do the refugees justice and will only continue to deprive them of an adequate standard of living, especially for those who were victims of war or genocide in their own country.<sup>12</sup> The adoption of refugee protection law will make it possible to establish a framework for determining refugee status based on established standards for determining, protecting, and treating refugees.

V Suryanarayan focused on instances such as the Rajiv Gandhi assassination, where half a dozen was registered as refugees.<sup>13</sup> He clearly states that “the absence of a well-defined national refugee law has created a number of anomalous situations.” Another reason for a separate refugee law being an absolute necessity is the question of India’s bilateral relations with its neighboring countries and the countries of origin of its refugee communities. The act of granting asylum being governed by law, rather than an ad hoc policy, will be better understood by other governments who will see it as a peaceful, humanitarian and legal action under a judicial system, rather than a hostile political gesture.<sup>14</sup> It is deeply saddening to see how minority politics play a huge role in the reluctance of Indian lawmakers to resolve this issue of the refugees. Vote-seeking political parties use illegal immigrants to secure a majority in the central and the state legislatures. In the case of the illegal immigrants from Bangladesh in Assam, the repeal of the Illegal Migrants (Determination by Tribunals) Act of 1983 has been continuously vetoed by the ruling Congress Party to secure the steadily growing ‘vote bank’ of immigrants they are obtaining although they are not registered as citizens of India.<sup>15</sup> As long as they remain undocumented immigrants, the trend in India is that their presence is seen as advantageous to the country's interests, and the government is exempt from international oversight of how they are treated. Moreover, a uniform law would allow the government to maintain its huge non-citizen population with more accountability and order, apart from allowing them to enjoy uniform rights and privileges. The critics of the Indian refugee law point out that because of this, discriminatory activities and arbitrary executive actions cannot be easily stopped, and it leaves the refugees to be dependent on the state rather than on a rights regime to reconstruct their lives with dignity.

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<sup>12</sup> Aarohi Bhalla, ‘*Refugees and Manipur High Court*’ BAR&BENCH( 16th March 2022, 8:59 am)<The need for refugee law in India (barandbench.com)>.

<sup>13</sup> *Supra* note 2.

<sup>14</sup> Arjun Nair, ‘*National Refugee Law for India: Benefits and Roadblocks*’ IPCS (2007) <Microsoft Word - IPCS-ResearchPaper11-ArjunNair.doc (mcrg.ac.in)>.

<sup>15</sup> *Supra* note 10.

## **IX. CONCLUSION**

India has always welcomed the refugees seeking protection from the threat they face in their countries even after facing security concerns itself. However, the paragraphs emphasize how crucial it is for India to strike a balance between its own interests and the necessity to take a humanitarian approach in situations like these. The essay discusses how important it is for the nation to establish a separate refugee law since it will benefit both refugees and Indian citizens and further safeguard it from illegal migrants who occasionally use violence in the guise of the term 'refugee.' A separate refugee law will also save the refugees from the dependency they have on the State and will help them define their rights in the country they are living. It is time that India takes the refugee situation more seriously and works to establish a more suitable standard for determining who qualifies as a refugee. Only then will it be able to proudly declare "Atithi devo bhava".

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