

INDIAN POSITION ON LEGAL STATUS OF REFUGEES

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Abstract

As Prof. M.P. Singh observed (M. Katju, "India's Perception of Refugee Law" 251-253, ISIL year book of International Humanitarian and Refugee Law, 2001.): "From the times immemorial, people from different parts of the world have been coming to India in various categories such as travellers, invaders, settlers, refugees etc., and have made, this land their home with or without separate identity". An intricate legal question arose as to the legal status of displaced persons as the definition of displaced person provided by the Rehabilitation Finance Administration Act of 1948, is at variance from the definition of the term refugee provided by the 1951 convention relating to the status of refugees. In this case, the situation creating the refugees was the result of an agreement between the two governments. Prof. Khan aptly observed that the plight of the people who had migrated was the same as that of refugees. They were displaced from one country to another, had undergone harrowing experiences and had sought refuge in a country not of their origin. (J.N. Sexana "Legal Status of Refugees: Indian Position" 501-515, Indian journal of International law 1986.)

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Introduction

Refugee : Generally speaking, A refugee is a person who is displaced or who has been forced to cross his national boundaries and also cannot return his home safely. The Legal Definition: "owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular 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. A. Some definitions by eminent judges and defines in the conventions:

a) A refugee is a person who has left his or her native country and is unable or unwilling to return there only because of a threat to his or her life or freedom.

b) Asylum seeker:-It is a legal term referring to a person who has applied for refugee status and not yet received a final decision on his or her claim.

c) A refugee is someone who (According to the 1951 Convention relating to the status of Refugees and its protocol 1967.)

Is outside his or her country of origin or habitual residence;

Has a well- founded fear of being persecuted because of his or her Race, Religion, Nationality, Membership of a particular social group ; or political opinion.

Is unable or unwilling to avail him- or herself of the protection of that country, or to return there, because of fear of persecution; and

Is not explicitly excluded from refugee protection or whose refugee status has not ceased because of a change of circumstances. From the above mentioned definition it is evident

that a person is not a refugee until and unless he has not fulfilled the criteria contained in this definition.

d) A regional refugee definition also including(According to the Organisation of African Unity (OAU) 1969 Convention Governing the specific Aspects of Refugee Problems in Africa)

Any person compelled to leave his or her country “owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his (or her) country of origin or nationality “.e) A refugee definition to include (According to the Cartagena Declaration, 1984)

Person who flee their countries “ because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturb public order”.

Content

In other words Refugee is a name given by the circumstances or by fate and the circumstances are such which are beyond that person’s control. There are some specific grounds to be recognised as a ‘Refugee’ and these grounds are fear of persecution and consideration of a number of factors which may be responsible individually or collectively.

f) Other foreigners who are not come in the definition of refugees(T. Ananthachari”,2001.)

Who are foreigners: All the persons who are not Indian citizens are ‘foreigners’ which also includes categories. But there are some categories who are different from ‘refugees’. And these categories are:-

(i) Temporary Residents, Tourists and Travellers:These are the specific Category of persons who come to India for a specific purpose and duration with the prior permission of the Government of India. In some cases persons fall in this category could become eligible for being a Refugee.

(ii) Illegal Economic migrants: Any foreigner who left his or her country of origin without any permission from the authorities. For the purpose of improving his or her economic prospects is not a Refugee. Bangladeshis who are the illegal migrants are the best examples of this category.

(iii) Criminals, Spices, infiltrators, militants (etc.): persons Falls in this category can never become eligible to be Refugee. But on the other hand they have to be dealt with many provisions of the Indian criminal laws or any other special laws.

(iv) Internally displaced persons (IDP): a person falls in this category or those persons who have not crossed any International border. But those persons who are fleeing persecution and violation of human rights from one region of the country and then take shelter/refuge in another region of the same country. For not crossing the International border they are not termed as refugees. But categorized as ‘internally displaced person’. Best example of this categories or Kashmiris in Indian origin who have been forced to flee from Jammu and Kashmir and then settled in other parts of India.

Historical Background

The Declaration of Independence in 1947 resulting in the creation of India and Pakistan, caused the world’s largest uprooting and movement of population in recent history in the Indian sub-continent estimated at 15 million, nearly 8.5 million immigration from India to Pakistan and 6.5 million the other way round.(Cornellis D. jong de (1998),pp.688-99)

At the initial stage, 160 relief camps were organized and the total expenditure incurred on relief up to the end of 1950 was Rs. 60 crores. Various schemes were prepared for the rehabilitation of the refugees. The Government of India took necessary legislative and administrative measures to meet the situation. (Supra 5)

The Rehabilitation Finance Administration Act, 1948 was passed in this direction. The two Governments (India and Pakistan) entered into a special treaty on April 8, 1950, regulating the flow of refugees and evolving modalities for settlement of claims of refugees over property, and payments. (Tim Dunne and Nicholas J. Wheeler, (ed) 1999)

The Chinese takeover of Tibet in 1950, India had faced another refugee influx in 1959 when Dalai Lama along with his 13,000 followers fled the country and reached India as refugees. The Government of India granted political asylum to the Dalai Lama and his followers. The institution of Dalai Lama was dealt a severe blow.

India faced another massive refugee influx in 1971 when 10 million people fled from the erstwhile East Pakistan, now Bangladesh and reached India as refugees.

India is not a party to the 1951 UN Convention on Refugees or its 1967 Protocol, nor is there any Indian law establishing asylum or refugee status. The Government of India handles refugee matters administratively, according to internal domestic and bilateral political and humanitarian considerations. UNHCR has no formal status in India and it is usually permitted to deal only with nationals from countries not bordering India. (B.S. Chimni, 2000)

The following discussion examines the general law relating to refugees focusing mainly on the status of refugees and protecting under international law. It also highlights elaborately on the legal aspects of the current refugee situations in India keeping in view the question of bindingness of international refugee law on India and its relations with India municipal law.

Refugees and Legal Provisions: India being a sovereign nation, has the absolute right either to grant asylum or to refuse to admit an alien. But, at the same time India, like any member of the international society, has to respect the international obligations. At least, India is bound by customary international law to provide certain minimum standards of treatment which should respect the fundamental human rights of the refugees. In spite of the fact that India faced many times in the past and is still facing acute refugee problems there is no specific legislation to deal with the problem. It has handled the issue at the political and administrative levels, with the single exception at the time of partition in 1947. The Rehabilitation Finance Administration Act was passed in the year 1948 to cope with the massive migration of people from Pakistan. The other relevant documents and legislations are:

- 1) The Constitution of India
- 2) The Foreigners Act of 1946
- 3) The Registration of Foreigners Act of 1939
- 4) Tize Extradition Act of 1962
- 5) Passport Act of 1967
- 6) Etc.

These are various constitutional and legal provisions with the refugees may be concerned under varying circumstances¹⁶:

B. Constitutional Provisions: There are few articles of the Indian Constitution which are equally applicable to refugees on the Indian soil in the same way as they are applicable to the Indian Citizens. (Article 14, 20 and 21 of the Indian constitution.)

1. "The state (India) shall endeavour to foster respect for international law and treaty obligations in the dealings of organized peoples with one another". (Article 51 c of the Indian constitution law.) These are mentioned in the directive principles of state policy in the part of IV of the constitution which are not enforceable in the court.

2. The constitution lays down that “Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body”.(Article 253 of the constitution of India)

3. Right to life and personal liberty, applies to all irrespective of the fact whether they are citizens of India or aliens.(Article 21 of the constitution of India)

4. The various High courts in India have liberally adopted the rules of natural justice to refugee issues, along with recognition of the United Nations High commissioner of refugees as playing an important role in the protection of refugees.

5. The Hon’ble High Court of Guwahati has in various judgements, recognised the refugee issue and permitted refugee to approach the UNHCR for determination of their refugee status, while staying the deportation orders issued by the district court or the administration.

6. Case laws:

a) Gurunathan and others Vs. Government of India and others (WP No.S6708 and 7916 of 1992) and in A.C. Mohd. Siddique Vs. Government of India and others (9 9 8 (47)DRJ(DB)p.74.) in both cases, the High court of Madras expressed its unwillingness to let any sri Lankan refugees to be forced to return to Sri Lankan against their will.

b) In P.Nedumaran Vs. Union of India(This case is pending before the National Human right Commission of India,13 August 1997.18), before the Madras court Sri Lankan refugees had prayed for a writ of mandamus directing the union of india and the state of Tamil Nadu to permit UNHCR officials to check the voluntariness of the refugees in going to back to Sri Lankan, and to permit those refugees who did not want to return to continue to stay in the camps in India. The Hon’ble court was pleased to hold that since the UNHCR was involved in ascertaining the voluntariness of the refugees return to sri Lankan, hence being a world Agency, it is not for the court to consider whether the consent is voluntary or not. Further, the court acknowledge the competence and impartiality of the representatives of UNHCR.

c) The Bombay High Court in the matter of Syed Ata Mohammadi Vs. Union of India(Criminal writ petition no.7504/1994 at the Bombay High Court.) was pleased to direct that “there is no question of deporting the Iranian refugee to Iran, since he has been recognised as a refugee by the UNHCR”. The Hon’ble court further permitted the refugee to travel to whichever country he desired. Such an order is in line with the internationally accepted principles of ‘non-refoulement’ of refugees to their country of origin.

d) The Supreme court of India has in a number of cases stayed deportation of refugees such as Maiwand’s trust of Afghan Human Freedom Vs. State of Punjab(Crl.WP No.125 &126 of 1986) and in the case N.D .Pancholi Vs. State of Punjab & ors(WP civil no.1294 of 1987,unreported) & Malavika karlekar Vs. Union of India(Crl.WP no.243 of 1988) the supreme court directed to stay of deportation of the Andaman Island Burmese refugees, since “their claim for refugee status was pending determination and a prima facie case is made out for grant of refugee status.” The Supreme court judgement in the Chakma refugee case clearly declared that no one shall be deprived of his or her life or liberty without the due process of law. And other case –State of Arunachal Pardesh Vs. Khudiram Chakma(1 9 9 4 supp.(1)SCC615)and Luis De Raedt Vs. Union of India (1991) 3 SCC544)had also stressed the same point.

Treatment of Persons Granted Asylum in India: This may be discussed under these heads:

- (a) National treatment
- (b) Treatment that is accorded to foreigners
- (c) Special Treatment

(a) National Treatment(B.S. Chimni}1994):

1. Equal Protection of Law: Article 14 of the Indian Constitution guarantees the right that state shall not deny to any person equality before the law or the equal protection of the law within the territory of India. This right is available to all persons including non-citizens. So, as per the provision of this Article, State would not discriminate a refugee against other refugees of same class regarding any benefits or rights they enjoy by virtue of their refugee status.

2. Religion Freedom: Article 25 of the Indian Constitution provides that subject to public order, morality and health and to the other provisions of the constitution, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

3. Right to Liberty, etc.:- Article 21 of the Indian constitution guarantees the right to life and personal liberty of all persons. A person is further guaranteed protection against arbitrary arrest and detention and free access to the courts. That the right to life, personal liberty and free access to the courts (under article 21 and 22) have been extended to every person irrespective of the fact whether the person concerned is an alien, refugee or a citizen of India. His free access to the courts is assured under articles 32 and 226 of the Constitution equality and protection of law, right to practice his own religion, the right to life and personal liberty. So as desired in Art.16 of the 1951 Refugee Convention, a refugee has free access to the courts of law in India as permitted under the Constitution.

4. Right to Social Security: Regarding right to Social Security, there is no special provision on social security in any Indian legislation, but non-citizens in India enjoy social security- equally with citizens.

5. Educational Rights: India has been providing free primary education to all recognised refugees, although there is no legal guarantee for the enjoyment of that facility as a matter of right. As for higher education, only Tibetan refugees enjoy that privilege.

(b) Treatment that is accorded to Foreigners (J. Garvey ,1985):

1. Right to employment or profession: Among the main rights of concern to the refugee is that of free access to employment, which in practice means the right to an independent existence. In the case of wage earning employment, Article 17 of the 1951 Convention provides that the contracting state shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to aliens. Article 17 further invites contracting states to give sympathetic consideration to assimilating the rights of all refugees with regard to wage – earning employment to those of nationals. The provisions of Articles 18 and 19 concerning self employment and the liberty of profession do not go so far.

2. Freedom of movement and residence: Article 26 of the 1951 convention proclaims the right of refugees to choose their place of residence and to move freely within the territory of the country concerned. (J.L.Goldenziel 2013.) In India this freedom of movement and residence is available to all refugees, subject to the restrictions necessary for the safety of India or its international relations. The refugees who could afford to live on their own are allowed to live wherever they want and they are given freedom to move within India subject to conditions such as national security or public order.(Supra no.8) In case of large number of refugees such as Chakmas in Tripura and Sri Lankan Tamils in Tamil Nadu, their right to freedom of movement and residence is hampered by the fact that they are totally dependent on the Government. They are therefore, confined to camps. When they need to go out from the camps they need to take permission of the camp authorities. (G. Ghosh,1998.)

3. Right To Housing: The requirement of Art.21 of the 1951 Refugee Convention in connection with housing is fulfilled and while the refugees are free to live in refugee camps, there is no rule to prohibit them from residing in private houses if they can afford. Many Afghan

and Sri Lankan refugees are residing in private houses in Delhi and Madras respectively. (Supra no.25)

4. Right To Form Association: Article 15 of the 1951 Convention Relating to the status of Refugees lays down that as regards non-political and non-profit making associations and trade union the contracting states shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country (Supra no.24). In India, like foreigners, refugees too enjoy the right to form peaceful associations. Burmese and Chakma refugee communities have formed student and welfare refugee associations.

5. Right To Property: Article 13 of the 1951 Convention states that the contracting states shall accord to a refugee treatment as favourable as possible and in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto and to leases and other contracts relating to movable and immovable property.

However, in India this right has not been accorded to the refugees. Even after three decades of their rehabilitation, Tibetans do not enjoy any property rights over the agricultural land and houses which they were allowed to use on lease.

Special Treatment

1. Exemption from Penalties (J.C. Hathway 1991.): Art.3

(1) of the 1951 Refugee Convention provides that “the contracting state shall not impose penalties, on account of their illegal entry or presence on refugees who coming directly from a territory. Where their life or freedom was threatened...enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. This is one area where India is very apathetic towards refugees. Under Section 14 of the Foreigners Act, 1946 a foreigner is liable- to the punishment with imprisonment for a term which may extend to five years and is also liable to fine. Due to lack of a procedure for considering asylum claims, all individual asylum-seekers who entered illegally or stayed in India without authorization were persecuted and punished under this section. However, in case of large-scale influx, India has always acted according to the principle laid down in the Refugee Convention and has not imposed penalties on the refugees.

2. Identity And Travel Documents: Since refugees do not enjoy the protecting of the government of their country of origin, they cannot claim a national passport. Only the authorities of the country of residence can make good this deficiency by issuing them a suitable travel documents. Since, however, this document is of no value unless it is recognised internationally, each of the agreements concluded after the First World War to assist various group of refugees make explicit reference to it. The 1951 Convention was no exception to this rule. Article 28 of the Convention provided that: “The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory unless compelling reason of national security or public order otherwise require (Supra no.29)”. In India, all refugees who are recognized so were given identification certificates showing their refugee status. But, as regards travel documents, no refugee has so far had a privilege of getting travel documents except Tibetan refugees. Tibetan refugees can even travel to foreign countries and come back to India on the basis of the such identification paper.

Conclusion

Lastly, I want to discuss that India for the first time established its former relationship with the United Nations High Commissioner for refugees in 1969 download for rehabilitating

Tibetan refugees in India. When the high commissioner visited India in July 1963, India expressed its interest in receiving assistance from the office of the United Nations high Commissioner for refugees for Tibetan refugees.

UNHCR made available some funds from the proceedings of the sale of “All Star Festival” record. Since a pre-requisite for such assistance was the proper supervision of UNHCR funds and careful coordination of international efforts, Indian government agreed that the presence of an on-the-spot UNHCR representative was desirable. A branch office of UNHCR was officially opened in Delhi on February 1, 1969. In-corporation with India UNHCR undertook new projects and consolidated old ones in the fields of agriculture settlement, housing for the aged lamas, and medical facilities. Thus a close working relationship between UNHCR and India was established by the time India government involved in providing emergency Delhi to Bangladesh refugees

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