

Rohingya Refugee Problem- India needs formal Asylum Policy

Refugee

A **refugee** is a person who has fled their country of origin and is unable or unwilling to return because of a well-founded fear of being persecuted because of their race, religion, nationality, membership of a particular social group or political opinion.

Asylum seeker

An asylum seeker is a person who has sought protection as a refugee, but whose claim for refugee status has not yet been assessed. Every refugee has at some point been an asylum seeker. Those asylum seekers who are found to be refugees are entitled to international protection and assistance. Those who are found not to be refugees, nor to be in need of any other form of international protection, can be sent back to their country of origin.

Refugees in india:

Every nation has been witness to a number of major refugee crises in history and still continues to face them, India being no exception. The birth of the country itself occurred in the midst of one of such biggest crises the world has seen. India has one of the world's most diverse and complex migration history.

India has **not signed** the 1951 United Nation Refugee Convention on the Status of Refugees, or its 1967 Protocol that stipulates the rights and services host states must provide refugees.

Though the reason for it is not publicly known, it is speculated that since the borders of South Asia are extremely porous, any small disturbance can upset the demographics and infrastructure of a nation that is indeed poor by a global standard.

India has No Refugee Law, but has an informal refugee regime broadly in line with International Convention:

India has not enacted a national refugee law, the three principles underlying India's refugee treatment was spelt out in Parliament by Jawaharlal Nehru in 1959 with reference to Tibetan refugees

1. Refugees would be accorded a humane welcome.
2. The refugee issue is an bilateral issue
3. The refugees should return to their homeland once normalcy returns there.

Constitutional Obligation:

Though India has not signed the 1951 convention, our constitution mandates protection of rights of refugees. In India refugees are considered under the ambit of the term 'alien'. The word alien appears in the Constitution of India (Article 22, Para 3 and Entry 17, List I, Schedule 7).

The rights declared under Article 14 and 21 among other rights are applicable to "all persons" residing in India.

Constitutional Framework For Protection Of Refugees

The Constitution of India guarantees certain Fundamental Rights to refugees. Namely, right to equality (Article 14), right to life and personal liberty (Article 21), right to protection under arbitrary arrest (Article 22), right to protect in respect of conviction of offences (Article 20), freedom of religion (Article 25), right to approach Supreme Court for enforcement of Fundamental Rights (Article 32), are as much available to non-citizens, including refugees, as they are to citizens.

The constitutional rights protect the human rights of the refugee to live with dignity. The liberal interpretation that Article 21 has received now includes right against solitary confinement, right against custodial violence, right to medical assistance and shelter

The Supreme Court has taken recourse to Article 21 of the Constitution in the absence of legislation to regulate and justify the stay of refugees in India. In **NHRC v. State of Arunachal Pradesh**, the Government of Arunachal Pradesh was asked to perform the duty of safeguarding the life, health and well-being of **Chakmas** residing in the State and that their application for citizenship should be forwarded to the authorities concerned and not withheld. In various other cases it was held that refugees should not be subjected to detention or deportation and that they are entitled to approach the U.N High Commissioner for grant of refugee status. In **P.Nedumaran v. Union of India** the need for voluntary nature of repatriation was emphasized upon and the Court held that the UNHCR, being a world agency, was to ascertain the voluntariness of the refugees and, hence, it was not upon the Court to consider whether consent was voluntary.

In actuality Article 21 of the Indian Constitution does impose certain constraints: any action of the State which deprives an alien of his or her life and personal liberty without a procedure established by law would fall foul of it, and such action would certainly include the refoulement (forcible return) of refugees.

Incorporating International Law In Domestic Law

International law has accepted and defined refugees as a special class of aliens. Does this acceptance by International law import any legal consequence on the Indian Government in the absence of any legislation on the subject?

It is true that India has not ratified the 1951 Convention and the 1967 Protocol to it, however, it acceded to various Human Rights treaties and conventions that contain provisions relating to protection of refugees. As a party to these treaties India is under a legal obligation to protect the human rights of refugees by taking appropriate legislative and administrative measures under Article 51(c) and Article 253 of the Indian Constitution and also under the same laws it is under the obligation to uphold the principle of non-refoulement. India is a member of the Executive Committee of the office of United Nations High Commissioner for Refugees which puts a moral, if not legal obligation, on it to build a constructive partnership with UNHCR by following the provisions of the 1951 Refugee Convention .

With regard to adopting international conventions in domestic laws, in **Vishaka v. State of Rajasthan**, the Court observed that reliance can be placed in international laws. Therefore, the question that arises is whether India can refer to the 1951 Convention in interpreting the domestic legislation and whether it is really necessary to ratify these conventions. It is to be noted that merely ratifying the 1951 Convention does not ensure that the asylum seekers will not be kept out and also Article 42 of the same Convention permits reservations with respect to the rights of refugees which will defeat the purpose of ratifying the Convention.

The solution to treat refugees with dignity in India is to either ratify the 1951 Convention and incorporate it into domestic law or enact a uniform legislation specifically for refugees so that it is not left to the discretion of the executive and the judiciary to decide their fate.

India's approach towards refugee differs case by case basis.

For e.g. : While Sri Lankan and Tibetans have government issued IDs, the vast majority of Afghan and Burmese refugees have only the documentation given to them by the UN, which is not widely recognized in India.

Refugees are simply aftermaths of conflicts and the ensuing spirits of insecurity. In a philosophical sense, one becomes a refugee even before fleeing the society in which one lives and remains to be a refugee even after one accepts asylum in a fresh habitation. India has been a spectator to abundant migratory population, which has consequently been absorbed as one of her own. In this regard, India's stance dates back to the 16th/17th centuries when it welcomed the

Parsis. Since then, she has sustained this ritual of being a broadminded host, absorbing Tibetan refugees in 1959, the Bangladeshi refugees in 1971, the Chakma refugees in 1963, the Tamil efflux from Sri Lanka in 1983, 1989, and 1995. This trend has resumed with a stable inflow of Myanmar refugees and Bangladeshi migrants over the years. The geographic position of India in the centre of South Asia has also had its inevitable influence on the migrant condition. India's freedom in 1947 starts from accommodating refugees which means even before the adoption of 1951 UN Convention India has been managing refugees in huge numbers on its own. The partition between India and Pakistan led to the first occurrence of refugee inflow in to India in millions and India had to pass three important legislations namely Administration of Evacuee Property Act 1950, the Evacuee Property (Separation) Act 1951, and the Displaced Persons (Compensation and Rehabilitation) Act 1954 by which justice was established to the refugees from both sides.⁵ After China suppressed Tibetan Rebellion in 1959, India had to house the Tibetan religious leader, Dalai Lama and his followers in thousands and gave them a separate territory namely Dharamsala to govern themselves. Since then, there is unceasing rift between India and China over boundary disputes and India is constrained to concentrate on its security. Then tailed the civil war between East and West Pakistan that persisted over two decades as a consequence of which India had to accommodate a colossal amount of Bangladeshi refugees. Subsequently Bangladesh was born and sequent to it. India is currently facing continuous terrorist attacks from Pakistan borders. Srilankan problem is yet another key dispute wherein India had to intrude to end the 30 year long civil war between Sri Lankan Government and its militant nationalist force Liberation Tigers of Tamil Eelam (LTTE). During the combat, over 1.2 million Srilankan Tamils absconded from their country and sought refuge in India. Most of them were sheltered in Tamil Nadu, a southern state in India. However, running parallel to this history is a paradoxical legal discourse by various critics, disputing that, upon arrival, refugees in India still face a legal vacuum where the nature and degree of their rights remain ambiguous. Nonetheless, law and order is a State subject under the Indian Constitution, but international relations and international boundaries are under the elite purview of the Union government.

Laws which are used

The prime Indian laws pertinent to refugees include The Foreigners Act, 1946 (Section 3, 3A, 7, 14); The Registration of Foreigners Act, 1939 (Section 3, 6); The Passport (Entry into India) Act, 1920; The Passport Act, 1967; and The Extradition Act, 1962. Jurisdiction over issues of citizenship, naturalisation and aliens rest with the Union Legislature.

AMENDMENTS TO EXISTING LEGISLATIONS INDIA:

No doubt, India has genuinely attempted to regulate the status and protection of refugees by executive measures, but an iota of hesitation remains with regard to the efficacy of such measures. In the absence of a stringent legislative skeleton, the likelihood of bias and prejudiced management by the government to refugees cannot be disqualified. On July 19, 2016, the government initiated a Bill to amend certain provisions of the Citizenship Act, 1955. The Bill has now been referred to the joint select committee of Parliament. The purpose of the proposed Bill is to facilitate Hindus, Sikhs, Buddhists, Jains, Parsis and Christians who have fled to India from Pakistan, Afghanistan and Bangladesh devoid of legitimate travel credentials, or those whose legal documents have expired in recent years, to acquire Indian citizenship by the process of naturalisation. The Bill rules that such persons shall not be deemed as illegal immigrants for the rationale of the Citizenship Act. In another amendment, the cumulative period of residential qualification for the process of citizenship by naturalisation of such persons is proposed to be reduced from 11 years to six years. A large number of people who would otherwise be illegal immigrants can now heave a sigh of relief if the Bill goes through as they would be qualified to become citizens of the country. The Citizenship (Amendment) Bill, 2016, owes its genesis to the declaration given by the Prime Minister that Hindus from these three countries who have sought asylum in India would be conferred Indian citizenship. However, since including Hindus alone could be inequitable, the Bill has made absolute the right to obtain citizenship to other religious minorities residing in the three countries. Though India has not enacted a national refugee law, the three principles underlying India's treatment of refugees was spelled out in Parliament by Jawaharlal Nehru in 1959 with reference to Tibetan refugees. They include: refugees will be accorded a humane welcome; The refugee issue is a bilateral issue; And the refugees should return to their homeland once normalcy returns there. The recommended Bill recognises the rights of refugees and represents a welcome change in India's refugee policy. But it would have been appropriate if the Bill had used the term "persecuted minorities" instead of listing out non-Muslim minorities in three countries. Such a gesture would also have been in conformity with the spirit of religious and linguistic rights of minorities guaranteed under our Constitution.

Unfortunately the Bill does not take note of the refugees in India from among the Muslim community who have fled due to persecution and singles them out on the basis of religion, thereby being discriminatory. However, the model law incorporates 'ethnic identity' in its categorisation of people who would qualify to gain refugee status and in a note establishes that membership of a particular social group will also include gender-based persecution. In that respect, the model law provides a comprehensive definition suiting the needs of the region.

WAY FORWARD:

1) Open doors for Refugees : India, a country with a democratic ethos should keep its door open for people in distress. The security interest of India should remain paramount, taking care of the refugees is a moral duty for state.

2) Bring a law : India should come out with a Refugee Policy/Law so that all refugees can be treated on par and the allegation of discrimination on the basis of religion/race doesn't occur.

This will help manage refugees with greater transparency and accountability, replacing one that offers arbitrary decision making to a vulnerable, victimized, population.

3) Data Collection: We have not even properly collected the data on refugees, preventing the analysis on refugee flow and their parlous existence.

India should conduct a proper survey of refugees in different parts of the country and provide them with proper ID cards. This will not only be good for India's internal security but will also go a long way in protecting rights of refugees in the country.

4) Social sensitization: Simply announcing policies alone will not do. Social sensitisation remains key — institutions, private and public, should be encouraged to recognise UNHCR-issued refugee cards, in addition to foreign degrees or diplomas. Local municipal corporations should be asked to sensitise neighbourhood associations to accept refugees who can pay, along with conducting integration workshops for youth and women empowerment initiatives

India's Asylum Policy

India doesn't have a formal asylum policy, the government decides on granting asylum on an ad hoc and case to case basis.

Shashi Tharoor's Private Bill:

In Dec 2015, Lok Sabha member Shashi Tharoor introduced a Private Member's Bill called the Asylum Bill, 2015, to provide for the establishment of a legal framework to consolidate and harmonize India's refugee policies. The bill is yet to be taken up for consideration.

Should India have a Uniform Asylum Bill?

Recent request for Asylum by Baloch leader Brahumdagh Bugti in India has prompted calls for a uniform and apolitical asylum law.



Some experts argue that a uniform Asylum Bill will make things transparent and simple for asylum seekers.

This would also ensure that their basic human rights are protected

It would allow for codification of India's best practices with respect to asylum.

It would eliminate the need to revisit the policy each time.

Reduce the need for parallel mechanism

It would put in place structured system for asylum management in the future.

Arguments against Uniform Asylum Bill: Others argue that, because asylum is undefined, it has been widely interpreted by states to result in multiple forms of protection.

Law needn't be uniform. Indeed it should vary so that victims of targeted persecution are individually protected, large groups fleeing war are protected as a group, and people displaced by natural disasters are given transient protection.

Asylum vs Extradition

Extradition is the formal surrender of a person by one State (the "requested State") to the authorities of another (the "requesting State") for the purpose of criminal prosecution or the

enforcement of a sentence. It is a form of legal assistance between States, granted on the basis of a bilateral or multilateral treaty, or by ad hoc agreement. Asylum means offering sanctuary to those at risk and in danger, in compliance with States' obligations under international refugee law, human rights law and customary international law.

Extradition and asylum are not mutually exclusive. The institution of asylum is not intended to shield fugitives from legitimate criminal prosecution. However, where the extradition of a refugee or an asylum-seeker is sought, or where an asylum application is filed after the individual concerned learns that a request for his or her extradition has been made, the special protection needs of the wanted person must be taken into consideration. From the point of view of international refugee protection, the principal concern in such situations is to ensure that those fleeing persecution rather than prosecution are adequately protected against refoulement – that is, removal to a country where their life, freedom or physical integrity would be at risk.

Extradition law exempts a country from handing over a criminal if the offence for which she is wanted is of a political nature. This is known as the 'political offence exception'. It enables political asylum. It is recognized in the Extradition Act, 1962 and earlier laws too -perhaps an indicator of the legislature's intent to allow people like Mr. Bugti to shelter in India at the government's discretion.

Recent Developments:

[Sep 2016] : Baloch leader Brahumdagh Bugti has sought asylum from India

Brahumdagh Bugti is the son of slain Baloch leader Akbar Bugti, and fled to Afghanistan in 2006, and, in 2010, moved to Switzerland. He has been in Geneva ever since, with his asylum for political asylum pending with the Swiss authorities.

Why does he want a political asylum in India: He wants a political asylum in India, as he hopes, it will enable him to get documents to travel and lobby for the Baloch cause at international forums.

Future: Once, he applies for asylum, the Ministry of External Affairs will refer the matter to the Ministry of Home Affairs, which will process the request. In case the government takes a favorable decision, Bugti could be granted a long-term visa that would have to be renewed every year.

[June 2017] : 20th June World Refugee Day

UN had declared 20th June as World Refugee Day, to honour "the courage, strength and determination of women, men and children who are forced to flee their homeland under the threat of persecution, conflict and violence"

Having lost their homes, their work, and sometimes their families -they don't give up - they find a way to start again. Striving to belong, and to contribute, they reach out to their new neighbours, building connections, and creating new opportunities. Given the right environment, our experience is that refugees bring solutions, not problems

Turkey feels strain as World's largest host of Refugees

For the third consecutive year Turkey has been designated as the country that hosts the most refugees.

There are 3 million Syrians in Turkey.

India's Stance on Rohingya Issue

India's plan to deport around 40,000 Rohingya Refugees

India's move to dissociate itself from Bali declaration

i. **Bali Declaration** was adopted at the World Forum on sustainable development in Indonesia, and called on all parties to contribute to the restoration of stability and security, respect for human rights of all people in Rakhine state regardless of their faith and ethnicity, as well as facilitate safe access for humanitarian assistance.

India's stand puts into question its respect for human rights and the treatment of minorities. It weakens India's moral authority to speak for minorities in other parts of its neighbourhood.

PM Modi didn't raise the issue during his visit to Myanmar in Sep 2017

Possible reasons for India's stand

Any criticism of Myanmar may impact India's Ocean diplomacy and India Act East Policy of which Myanmar forms a special lynch pin.

Criticism on India's stand:

- 1) **Violates Customary International Law** : India's stand of deporting the Rohingya Refugees is violating the principle of non-Refoulement. Though India has not signed the Refugee convention of UN of 1951, but the principle of non-refoulement is part of customary International law. This

means that it is applicable to all the states regardless of whether they have signed the 1951 convention or not. Moreover India has ratified the Universal Declaration of Human Rights which also notes the principle of non-refoulement.

- 2) **Violates Indian Constitution:** Indian Constitution grants refugees the Right to Equality under Article 14 and the Right to Life and Liberty under article 21. So by deporting Rohingyas, some claim that India will be violating not just international law but also its own constitution.
- 3) **SC Judgment - National Human Rights Commission v. State of Arunachal Pradesh, 1996:** The court held that state governments are under constitutional obligation to protect the threatened groups of foreign nationals. The case related to the demands of Chakma tribe who had been living in the north-eastern states since 1964.
- 4) India's recent stand has been disappointing and it goes against the value of hospitality and inclusiveness that India stands for.
- 5) India has traditionally offered shelter to Tibetans, Afghans, Pakistanis, Bangladeshis, Sri Lankans etc.
- 6) As upholder of democratic value, India has a unique opportunity to demonstrate statesmanship and regional leadership by mediating a solution to Rohingya crisis.
- 7) India's stand on Rohingya issue reflects inadequate moral leadership and an inability to rise to the occasion as expected from regional power vying to enhance its influence in the neighbourhood.
- 8) This stand may alienate Bangladesh which since 2009 has been an excellent partner to India on almost all the important issues such as dealing with infiltration, black money etc

Recent News:

[Aug 2017] : Deputy Interior Minister Kiren Rijiju said that the government plans to deport at least 40,000 Rohingyas who are living in India without proper documentation

He said, "As far as we are concerned, they are all illegal immigrants. They have no basis to live here. Anybody who is an illegal migrant will be deported".

In Aug, the home ministry also asked all states to begin the process of identifying and deporting Rohingyas. The reasons given by the governments are that they are likely to be recruited by terrorist organization and pose a likely threat to national security.

[Aug 2017] : Human Rights Body urges MHA to Withdraw Advisory on Deportation of Rohingya Muslims

The Commonwealth Human Rights initiative (CHRI) pointed a 1996 Supreme Court Verdict on Chakma refugees to back its plea.

[Sep 2017] : Supreme court deferred a plea made by two Rohingya refugees, who had challenged the government's decision to deport them back to Myanmar

The court's decision further threatens the extremely vulnerable situation of the refugees.

[Sep 2017] : Public Anger brews in Bangladesh over India's stand on Rohingyas

[Oct 5, 2017] India, Bangladesh discuss Rohingya crisis



India and Bangladesh discussed the Rohingya refugee crisis in a meeting that took place between Bangladesh Foreign Secretary Shahidul Haque and his Indian counterpart S Jaishankar in New Delhi.

Foreign Secretary Haque is in the capital to attend the World Economic Forum and also met Secretary Jaishankar to discuss various aspects of India-Bangladesh relations.

Bangladesh Foreign Secretary Shahidul Haque said that this matter needs to be dealt bilaterally and that his country has been engaging the state of Myanmar but it also requires immediate international attention and assistance. He said, "We look forward to resolving the issue peacefully and expect that international community will support that, especially our close friend India."