



## A COMPARATIVE ANALYSIS OF INDIA'S LEGAL FRAMEWORK FOR REFUGEES VERSUS INTERNATIONAL CONVENTIONS

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### INTRODUCTION

India has always had a long tradition of giving shelter to people who run away from violence and persecution. From Parsis who came in the 8th century, to Tibetans in the 20th century, and also many groups from nearby countries in recent times, India has mostly shown a welcoming attitude.<sup>1</sup> But this humanitarian practice never really turned into any proper legal framework.

India is also not a member of the 1951 Refugee Convention or the 1967 Protocol, which are considered the main pillars of international refugee law. Because there is no specific refugee law in India, the way refugees are treated usually depends on the political mood or administrative choice, which often creates inconsistency and no clear legal security for people who are searching for protection.<sup>2</sup>

This paper is going to look deeper into the complicated side of how India deals with refugee protection. First, it will discuss the present legal system, which mostly comes from the Foreigners Act, 1946. This law does not really make any clear difference between refugees, normal migrants for work, or other types of foreigners.<sup>3</sup> After that, the paper will also study how the Indian courts have taken an important role in protecting refugee rights, mainly by reading the Constitution in a more progressive way. A special focus is on Article 21, which talks about the right to life and personal liberty, and has been used to give some safeguards to refugees as well.<sup>4</sup>

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<sup>1</sup> B. S. Chimni, India's Refugee Policy and International Law, 10 Refugee Surv. Q. 48, 49 (1991).

<sup>2</sup> UNHCR, States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol.

<sup>3</sup> The Foreigners Act, 1946, No. 31, Acts of Parliament, 1946 (India).

<sup>4</sup> M. P. Jain, Indian Constitutional Law 1128-29 (8th cd. 2018).

The main focus of this study will be to make a comparison between India's ad-hoc ways of dealing with refugees and the more systematic, rights-based frameworks followed in countries that have signed the 1951 Refugee Convention. The analysis will mainly look at important aspects like how a "refugee" is defined, the rule of non-refoulement (not sending people back to danger), and the basic socio-economic rights given to refugees, such as chances for jobs, education, and also health care access.<sup>5</sup>

## EXISTING LITERATURE

In India, the lack of a clear legal and policy structure for refugees has long been discussed by both academics and policymakers. Many writings point out the confusion and insecurity that come because there is no proper refugee law in place.<sup>6</sup> Scholars often criticise India's dependence on the old Foreigners Act of 1946 to handle refugee issues, saying it is not fit for dealing with the special problems of people running away from persecution.<sup>7</sup> The Act mainly controls the entry, stay, and leaving of foreigners in general, but it does not reflect the humanitarian values that should be at the heart of refugee protection.

Another major point highlighted in the existing writings is the role of the Indian judiciary in the protection of refugee rights, which is praised but also seen as not enough. Many scholars have studied important judgments where the Supreme Court and some High Courts stretched the scope of Article 21 of the Constitution to also cover the principle of non-refoulement.

This basically means they stopped the forceful return of refugees to places where their life or liberty may be in danger.<sup>8</sup> The case of *National Human Rights Commission v. State of Arunachal Pradesh* (1996) is one of the often-quoted examples of the judiciary taking a strong and positive stand.<sup>9</sup> At the same time, researchers also note that this kind of judicial activism has its own limits. Court rulings usually come as a response to specific matters, but they do not really create a proper, consistent and long-term refugee law framework.

<sup>5</sup> Guy S. Goodwin-Gill & Jane McAdam, *The Refugee International Law* 321-412 (3d ed. 2007).

<sup>6</sup> V. Vijayakumar, *Absence of a Legal Regime for Refugees in India: A Critical Appraisal*, 15 INT'L J. REFUGEE L. 586, 587 (2003).

<sup>7</sup> B. S. Chimni, *The Legal Condition of Refugees in India*, 7 J. REFUGEE STUD. 378, 380 (1994).

<sup>8</sup> Saurabh S. Sinha, *Judicial Protection of Refugees in India*, 21 ECON. & POL. WKLY. 1515, 1516 (2007).

<sup>9</sup> Nat'l Hum. Ris. Comm'n v. State of Arunachal Pradesh, A.I.R. 1996 S.C. 1234 (India).

Many writers have compared India's refugee policy with global standards. Most of them point out that, even though India has often shown generosity in practice, the real problem is the absence of a proper legal framework. Because of this, the security of refugees mostly relies on the political mood of the government at that time. Another issue often raised is the unequal treatment of different refugee groups. For example, Tibetan refugees and Sri Lankan Tamils were provided with considerable government support, while communities like the Rohingya are left in a far more uncertain and vulnerable condition.<sup>10</sup>

Many experts and policy writers have often suggested that India should bring a proper refugee law of its own. They believe that such a law will add more clarity in the legal process, create uniform rules for different refugee groups, and also show India's respect towards global human rights values. The draft of the Model National Law on Refugees, prepared by the National Human Rights Commission way back in 1997, is still pointed out as a useful base for making such a law.<sup>11</sup>

## RESEARCH GAP

While the current literature gives a good overview of the legal and political aspects of India's refugee policy, there are still some gaps that this research tries to fill. First, there is a need for a more detailed comparison of how refugees actually live under India's ad-hoc system versus countries with more structured refugee laws, especially other developing nations that are parties to the Convention. Most comparative studies focus on Western countries, which may not really fit the socio-economic and political reality of India.<sup>12</sup>

Second, there is a lack of thorough and empirical research on the long-term social and economic effects of not having a formal legal framework, both on refugees and the local communities hosting them. Though there are some stories and small studies, a wider analysis is missing on how non-legal recognition has affected refugees' access to schooling, healthcare, and formal jobs, and what ripple effects this has on the local economy and society.<sup>13</sup>

Finally, the current discussion often frames the choice as either joining the 1951 Convention or keeping things as they are. This paper will look at a third, more practical option: creating a

<sup>10</sup> Human Rights Watch, India: Protect All Refugees, HRW.org (Dec. 20, 2019)

<sup>11</sup> P. N. Bhagwati et al., The Refugee and Asylum Seekers Protection Bill 2006.

<sup>12</sup> Meenakshi Ganguly, India's Refugee Roulette, FOREIGN POL'Y (June 20, 2018)

<sup>13</sup> Niraja Gopal Jayal, Citizenship and Its Discontents: An Indian History, 289-91 (2013)

unique domestic refugee law, designed specifically for India, that can balance humanitarian responsibilities with concerns of national security.

## **A COMPARATIVE ANALYSIS: INDIA'S AD-HOC FRAMEWORK VS. INTERNATIONAL CONVENTIONS**

The main foundation of international refugee protection is the 1951 Refugee Convention along with its 1967 Protocol. In this part, we will look at how India's approach compares with the main principles of refugee protection outlined in these international agreements.

### **Definition of a Refugee**

The 1951 Convention gives a clear and internationally accepted definition of a refugee in Article 1(A)(2), describing them as a person who, "owing to 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 or, because of such fear, is unwilling to seek protection from that country."<sup>14</sup>

India, however, does not have any such clear legal definition for a 'refugee'. The Foreigners Act, 1946, which deals with the entry and stay of all non-citizens, makes no difference between refugees, asylum seekers or other types of foreigners.<sup>15</sup> This absence of a proper legal category creates serious issues. Who is to be called a refugee is decided only on the government's ad hoc choice.<sup>16</sup> Because of this, some groups like Tibetans and Sri Lankan Tamils were given a kind of partial refugee recognition with some assistance, while others, such as Rohingyas from Myanmar, are mostly tagged as "illegal migrants", making them exposed to arrest or deportation action.

In states that signed the Convention, there are already set procedures for Refugee Status Determination (RSD). Such a process aims to be fair and systematic, giving asylum seekers a real chance to present their case and get it tested with Convention rules.<sup>17</sup> But in India, without a regular RSD system, getting refugee status is not a legal right but more like a matter of chance.

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<sup>14</sup> Convention relating to the Status of Refugees art. 1(A)(2). July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Convention].

<sup>15</sup> The Foreigners Act, 1946, S 2(a), No. 31, Acts of Parliament, 1946 (India) (defining a "foreigner" as a person who is not a citizen of India)

<sup>16</sup> K. C. Saha, *The Law Of Refugees In India* 78 (2006).

<sup>17</sup> UNHCR, *Procedural Standards For Refugee Status Determination Under UNHCR's Mandate* 5-8 (2005).

## The Principle of Non-Refoulement

The rule of non-refoulement, which is written in Article 33 of the 1951 Refugee Convention, is seen as the most core idea of refugee law on the global level. It stops states from pushing back or sending back a refugee to any land where his life or liberty can come under real danger.<sup>18</sup> Today, this principle has even reached the level of customary international law, which means it applies to all states, even to those who are not parties, like India.<sup>19</sup>

In India, the courts, mainly the Supreme Court, have played a very active role in bringing this idea into the domestic legal framework. For example, in *Ktaer Abbas Habib Al Qutaifi v. Union of India* (1999),<sup>20</sup> the Supreme Court recognised that non-refoulement actually forms a part of Article 21 of the Constitution, which secures life and liberty. Such a move by the judiciary has worked as a safeguard against the sudden or arbitrary deportation of refugees.<sup>21</sup>

Still, over-dependence on the judiciary to enforce such rights has obvious limits.

The safeguard is not always absolute because grounds of national security or public order may be taken as exceptions.<sup>22</sup> Also, many refugees may find court procedures difficult, lengthy and costly, which makes access to justice much harder. In contrast, in countries that are parties to the Convention, non-refoulement works as a statutory duty. There is usually an existing structure of administrative checks and appeals, which gives a more steady and accessible protection compared to the case-by-case and sometimes unpredictable safeguard in India.<sup>23</sup>

## Socio-Economic Rights

The 1951 Refugee Convention give a wide set of socio-economic rights for refugees, with a focus on helping them adjust within the host country. These rights include the right to work (Article 17), right to housing (Article 21), right to education (Article 22), and the right to social security (Article 24). Mostly, the Convention says refugees should get treatment like other foreigners in that country, and in some situations, the same treatment as is given to citizens.

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<sup>18</sup> 1951 Convention, *supra* note 23, art. 33(1).

<sup>19</sup> Jean Allain, *The Jus Cogens Nature of Non-Refoulement*, 13 INT'L.J. REFUGEE L. 533, 538 (2001).

<sup>20</sup> *Ktaer Abbas Habib Al Qutaifi v. Union of India*, (1999) 2 S.C.C. 200 (India).

<sup>21</sup> Upendra Baxi, *The 'Reasonable' Right to Life: Some Indian Juridical Trajectories*, in *LAW AND POVERTY: CRITICAL ESSAYS* 124, 135 (Upendra Baxi ed., 1988).

<sup>22</sup> *Salimullah v. Union of India*. (2021) 16 S.C.C. 740 (India) (allowing the deportation of Rohingya refugees on national security grounds).

<sup>23</sup> James C. Hathaway, *The Right's Of Refugees Under INTERNATIONAL LAW* 363-70 (2005).

But in India, how far refugees actually enjoy these rights depends mostly on the government's policy toward that specific refugee group. Like for example, Tibetan refugees who came before 2017 got Registration Certificates that allow them to live and work legally in India. Same way, Sri Lankan Tamil refugees staying in government camps get small monthly cash assistance, subsidised ration items, and their children can attend state schools.

On the other side, though, for many other refugee communities, no proper legal status makes accessing basic services very hard. Without legal papers, finding regular jobs is near impossible, so they end up in the informal work sector, where they easily face underpayment and exploitation. Accessing higher studies and professional courses also creates too many barriers.<sup>24</sup>

While sometimes the Indian government show flexibility and support, still in the absence of a clear refugee law, these facilities are not really enforceable rights—rather benefits which can be withdrawn anytime.<sup>25</sup> In contrast, in countries that signed the Refugee Convention, refugee rights are clearer and legally fixed. While real-life access may differ, the legal structure at least gives a strong base for refugees to demand their entitlements and to go to court if they are denied.

### **Suggestions for a Domestic Refugee Law in India**

The above analysis highlights how important it is for India to shift from its present ad-hoc handling of refugees and introduce a proper domestic refugee law. Having such a law would not only give refugees a stable and reliable solution but also benefit India by creating a more organised and predictable way to manage incoming refugee populations. A strong refugee law for the country should include some important features.

The first step is to have a clear and wide definition of who counts as a refugee. The law must include a definition that is at least as broad as the one given in the 1951 Convention. It should also think about covering people who are running away from general violence, wars, and natural disasters, since these are major causes of displacement in South Asia and are already recognized in regional agreements like the OAU Convention and the Cartagena Declaration.

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<sup>24</sup> Refugee Solidarity Network, *Shadows of Opportunity: A Study on Livelihoods of Refugees in India*, 15 12 lias Bantekas & Opi Outbwaie, *INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE* 87 (2021).

<sup>25</sup> European Council on Refugees and Exiles, *Comparative Report on the Integration of Refugees in Europe*, ECRE (2022).

Secondly, the law also needs to set up a fair and open Refugee Status Determination (RSD) process. For this, there should be a special quasi-judicial body made for handling RSD cases, free from political pressure. The procedure must stay fair, quick and transparent, with fixed timelines, right to have legal help and also an appeal system, so that decisions come on legal grounds and not only on political reasons.<sup>26</sup>

Thirdly, the law should clearly write down and protect the principle of non-refoulement.

Right now, this principle is mostly safeguarded through court rulings, but it needs to be properly mentioned in the law itself as a right that cannot be taken away. This would also bring it in line with international customary law. If done, it would give a stronger and more direct legal ground against sending someone back by force, instead of only depending on constitutional interpretations.<sup>27</sup>

Fourthly, the law should make sure that refugees and asylum seekers are given some basic rights and entitlements. Any domestic legislation must properly mention what rights a recognised refugee will have, like the right to legal status, proper papers such as an identity card and travel permit, as well as access to work, education, medical care and even the justice system. These rights need to be consistent with the standards set under the 1951 Refugee Convention and also other human rights agreements that India has agreed to, for example, the International Covenant on Civil and Political Rights.<sup>28</sup>

In the end, the new law should put in place proper rules for finding durable solutions. It must give a clear framework that helps refugees not just in the short term, but also in the long run. This includes safe and voluntary return to their own country, chances of local integration for those who cannot go back, and even resettlement in a third country, wherever it is needed. Such steps would shift the approach from only providing temporary shelter to actually securing a long-term resolution.<sup>29</sup>

## POTENTIAL OUTCOMES OF ENACTING A REFUGEE LAW

<sup>26</sup> B.S. Chimni, Reforming the International Refugee Regime: A Dialogic Model, 14 J. REFUGEE STUD, 151, 162 (2001).

<sup>27</sup> Veerabhadran Vijayakumar, Non-Refoulement Principle: Its Emergence and Development, 25 COCHIN U. L. REV. 101, 115 (2001).

<sup>28</sup> International Covenant on Civil and Political Rights art. 2(1), Dec. 16, 1966, 999 U.N.T.S. 1.

<sup>29</sup> JHCR. A Framework For Durable Solutions For Refugees And Persons.

The introduction of a proper refugee law in India would bring many benefits, not just for the refugees but also for society as a whole.

For refugees, the first and most important outcome would be having some kind of legal security and stability. If there were a proper legal framework in place, it would stop them from living under the constant fear of being detained or deported under the Foreigners Act. Such a framework would also give them a legal ground to get basic things like healthcare and education, apply for work permits, and slowly rebuild their lives with dignity, instead of living in the insecure and fragile condition they are in right now.

For the Indian State, having a proper refugee law would help the government deal with refugee inflows in a clearer, organised, and predictable way. It would also improve India's image globally and add to its soft power by showing a genuine commitment towards human rights and the rule of law. A well-defined legal system would make it easier to separate real refugees from regular migrants, which in turn can handle national security issues more carefully and consistently, instead of depending on sudden or, at times, unfair measures.<sup>30</sup>

In Indian society, having a rights-based approach towards refugee protection, written into law, would help in creating a more caring and inclusive environment. When refugees are given space to integrate properly, they can share their skills and talents, adding value to both the Indian economy and society, instead of being seen only as a burden. Such a refugee law would also bring our domestic system closer to the constitutional promises of equality and liberty, and in turn, make the rule of law stronger for everyone.

## CONCLUSION

India has always had a long tradition of giving shelter to people in need, which reflects its deep humanitarian values. But in today's world, this goodwill must be supported with a clear and strong legal system based on rights. The way things are handled now is more on an ad-hoc basis, and though sometimes done with good intentions, it often comes with many gaps and problems. Because of this, refugees are left in continuous uncertainty about their future. The absence of a proper legal and policy framework not only takes away many basic rights from refugees but also makes it difficult for the Indian state to manage refugee groups in a fair and humane manner.

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<sup>30</sup> Shashi Tharoor, India's Refugee Policy: The Need for a Legal Framework, THE WIRE (June 20, 2017).

A look at India's refugee laws in comparison with the global standards under the 1951 Refugee Convention shows clear gaps. Though the Indian courts have done well to extend protection by interpreting the idea of non-refoulement into Article 21 of the Constitution, this kind of judicial effort is only a short-term fix and cannot cover everything. What India really needs is a proper, long-lasting solution through the passing of a full-fledged refugee law.

A law like this, which brings in the main ideas of international refugee law, should not just be seen as an act of kindness. It is more about India meeting its duty under both the Constitution and global commitments. Such a step would give refugees the protection they rightly deserve and help them live with real dignity. For India, this would be a big move towards a fair and humane way of dealing with refugee issues, one that matches its image as the world's biggest democracy. The time has really come for India to turn its long tradition of giving shelter into a strong and lasting legal framework.<sup>31</sup>

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