

PREFACE

India is not a party to the 1951 Convention Relating to the Status of Refugees 1951 (hereinafter 1951 Refugee Convention) or the 1967 Protocol on the Status of Refugees (hereinafter 1967 Protocol).¹ However, prior to the drafting of the 1951 Refugee Convention, during the time of partition, India faced a massive inflow of refugees. The newly formed Indian State provided relief and rehabilitation to these refugees in spite of its limited emergency response capacity.²

In 1959, only a decade after gaining independence, India again faced an influx of refugees, this time from Tibet.³ These refugees came with their religious leader, the Dalai Lama, for political and religious reasons as China began to wield its influence in Tibet. While it is true that these refugees came to India with the hope of returning to Tibet as soon as conditions there were normalized, at the time of writing it had been nearly fifty-seven years since their arrival in India. There was another steep rise in the number of refugees in 1965, this time from East Pakistan, as a result of the Indo-Pakistani War. People from minority communities fled East Pakistan for India due to fear of persecution by the Pakistani Army. In the period from 1964 to 1968 a large number of Chakmas migrated to India due to the ethnic disturbances in the Chittagong Hill Tracts area.⁴ The largest wave of refugees, however, was admitted in 1971 when the Liberation War in Bangladesh began. Another wave of refugees arrived from the Chittagong Hill Tracts in Tripura, Bangladesh in 1986, when the Government of Tripura arranged for rehabilitation packages for these people.⁵ Minority populations in

Bangladesh continue to cross the international border to escape religious persecution, and the Government of India has taken several steps to regularize the entry, stay and citizenship process for these persecuted minorities.⁶

India has attempted to regulate the status and protection of refugees by administrative means, but some doubt remains with regard to the effectiveness of such measures. In the absence of a legislative framework, the possibility of bias and discriminatory treatment of refugees cannot be ignored. Owing to the absence of specific legislation, the laws relating to the regulation of foreigners are applied to refugees in India with no difference made between foreigners and refugees as a separate class. The primary Indian law relevant to foreigners is the Foreigners Act, 1946 which empowers the Central Government to regulate the entry, presence and departure of foreigners in India. The administrative policies under the Act relating to aliens “are very skeleton and leave very wide discretion to the executive.”⁷ Owing to such broad governmental plenary power, bias is sure to creep in. That disturbs the basic tenet of the rule of law. There is no doubt that the “skeleton legislation with wide delegation of rule making power as well as conferment of very discretion on the administrative authorities are violation of the rule of law and can be challenged respectively on the grounds of unconstitutional delegation of legislative functions and the violation of right to equality.”⁸ As a result, refugees who have fled persecution are subject to the same rules and regulations as other foreigners entering India for any other purpose, and thus no legislative framework has been developed for identifying and determining refugee status.

Though India is not a signatory to the 1951 Refugee Convention, it has entered into various international human rights law agreements which put some constraints on unequal treatment of non-citizens and refugees. There is a significant body of international law that has elaborated the principle of non-discrimination as a non-derogable norm prohibiting discrimination on the basis of race, ethnicity or other related criteria. India’s accession to the International Covenant on Civil and Political Rights (ICCPR),⁹ the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁰ and the Convention on the Rights of the Child (CRC),¹¹ and ratification of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)¹² and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),¹³ have excelled the quantum

of protection from the idea of compassion to rights. This development of a body of international law that prohibits discrimination based on nationality has been further encouraged by the advocacy efforts of international organizations, non-governmental actors and so forth. At the same time, it is true that these international human rights law instruments do not address the rights of refugees or asylum seekers directly. However, the rights emphasized under these conventions are not limited only to the nationals of state parties, nor is their operation limited to citizens of one state in another state. Rather, they guarantee non-discrimination for all individuals within the state's territory and subject to its jurisdiction without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁴

The way the Supreme Court of India has interpreted the Constitution in its decisions to highlight the duty of the state to accord refugee protection is phenomenal. In its two major decisions on the issue, the Supreme Court employed Article 14 of the Universal Declaration of Human Rights and Article 13 of the International Covenant on Civil and Political Rights to uphold the obligation of refugee protection.¹⁵ The first instance was the case of *Khudiram Chakma v. State of Arunachal Pradesh*,¹⁶ where the Supreme Court of India referred to the Universal Declaration of Human Rights in the context of refugees in India.¹⁷ The pro refugee protection approach was further reflected in the case of *National Human Rights Commission v. State of Arunachal Pradesh*.¹⁸ The Supreme Court of India held that Chakma refugees who had come from Bangladesh to escape persecution cannot be forcibly sent back to Bangladesh, as they might be killed, tortured or discriminated against, and as a result they would be deprived of their right to life under Article 21 of the Constitution of India.¹⁹ The Supreme Court in the same case made a number of observations relating to the protection of Chakma refugees in India:

We are a country governed by Rule of Law. Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of his life or personal liberty except according to the procedure established by law. Thus the State is bound to protect the life and personal liberty of every human being, be he a citizen or otherwise, and it cannot permit anybody or group of persons

... to threaten the chakmas to leave the State, failing which they would be forced to do so ... the State government must act impartially and carry out its legal obligations to safeguard the life, health and well being of chakmas residing in the state without being inhibited by local politics. Besides, by refusing to forward their applications, the chakmas are denied rights, constitutional and statutory, to be considered for being registered citizens of India.²⁰

A subtle derivation from the above trend could claim that the obligation to protect refugees is paramount. The importance of Article 21 of the Constitution can be clearly inferred from the decisions rendered by the Supreme Court. Article 21 is a non-derogable right. It would therefore not be incorrect to claim that refugee protection is mandated by Article 21 of the Constitution of India. However, in reality, only those people who are able to go before the High Court or the Supreme Court to argue for their rights as refugees actually benefit. Thus it can be said that the protection of refugees through Article 21 is case-specific and lacks widespread respect among the administration. If we look through the various orders of the lower courts in this regard, we find that the lower courts have usually prosecuted those persons as illegal immigrants, at which point the High Court or the Supreme Court entered the scene. In several cases, the person sentenced by the lower judiciary was then ordered temporarily released by the High Court or the Supreme Court to be allowed to apply for refugee status from the United Nations High Commissioner for Refugees (UNHCR). Therefore trial court decisions generally do not seem to apply a standard practice of law of asylum or refuge. Thus it is clear that the Indian position, be it administrative or judicial, towards refugees' protection varies. Previously there has been no effort to discover why this is the case in a country like India which is governed by the rule of law. The reasons behind not acceding to the Refugee Convention have been discussed in Parliament, but there is hardly any study emphasizing the lack of government policy to frame a consistent protection standard. At the same time, four draft laws on refugee protection in the Lok Sabha, namely the Model National Law for the Refugees drafted by the Eminent Persons Group; the Asylum Bill, 2015 by Dr. Sashi Tharoor, MP; the National Asylum Bill, 2015 by Feroze Varun Gandhi, MP; and the Protection of Refugees and Asylum Seekers Bill, 2015 by Rabindra Kumar Jena, MP, have not yet received any recognition. Thus this book.

Notes

1. Convention Relating to the Status of Refugees (adopted July 28, 1951, entered into force April 22, 1954) 189 United Nations Treaty Series 137 (1951 Convention); Protocol Relating to the Status of Refugees (entered into force October 4, 1967) 606 United Nations Treaty Series 267 (1967 Protocol).
2. Prafulla K. Chakraborty, *The Marginal Men* (Naya Udyog, Calcutta, 1999) 1, Hiranmay Banerjee, *Utvastu* (In Bengali, Sishu Shahitya Samsad, Calcutta, 1970) 195.
3. Eileen Kaufman, 'Shelter from the Storm: An Analysis of U.S. Refugee Law as Applied to Tibetans Formerly Residing in India' [2008–2009] 23 Georgetown Immigration Law Journal 497, 530.
4. An indigenous tribal community generally resides at the Chittagong Hill Tracts of Bangladesh.
5. Malabika Das Gupta, 'Refugee Influx' [1986] 2(38/39) Economic and Political Weekly 1665.
6. The Gazette of India, Extraordinary, Part II, Section 3, Subsection I, No. 553, September 7, 2015. See also Shuvro Prosun Sarker, 'How Humanitarian is this?' *The Statesman* (October 8, 2015) 18; Shuvro Prosun Sarker, 'Bangladeshi Undocumented Migrants (Refugees) in India: A Humanitarian Problem Requiring A Humanitarian Solution' [2014] 26 Journal of Immigration, Asylum and Nationality Law 165, 174.
7. M.P. Singh, 'Positions of Aliens in India' (Legal Position of Aliens in National and International Law, Heidelberg Colloquium, 1985).
8. J.N. Saxena, 'Proposal for a Refugee Legislation in India' [1997] 2(2A) Bulletin on IHL & Refugee Law 391, 393.
9. International Covenant on Civil and Political Rights (adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of December 16, 1966, entry into force March 23, 1976, in accordance with Article 49). India acceded to the Convention on April 10, 1979.
10. International Covenant on Economic, Social and Cultural Rights (adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of December

- 16, 1966, entry into force January 3, 1976, in accordance with Article 27). India acceded to the convention on April 10, 1979.
11. Convention on the Rights of the Child (adopted and opened for signature, ratification and accession by General Assembly Resolution 44 (XXV) of November 20, 1989, entry into force September 2, 1990, in accordance with Article 49). India acceded to the convention on December 11, 1992.
 12. International Convention on the Elimination of All Forms of Racial Discrimination (adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of December 21, 1965.
 13. entry into force January 4, 1969, in accordance with Article 19). India signed the convention on March 2, 1967 and ratified the convention on December 3, 1968.
 14. Convention on the Elimination of All Forms of Discrimination against Women (adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180 of December 18, 1979, entry into force September 3, 1981, in accordance with Article 27(1)). India signed the convention on July 30, 1980 and ratified it on July 9, 1993 with reservations.
 15. See International Covenant on Civil and Political Rights, 1966, Article 2(1); International Covenant on Economic, Social and Cultural Rights, 1966, Article 2(1); Convention on the Rights of the Child, 1989, Article 2(1); Convention on the Elimination of All Forms of Discrimination Against Women, 1979, Article 2; International Convention on the Elimination of All Forms of Racial Discrimination, 1965, Article 2.
 16. Article 14(1) of the Universal Declaration of Human Rights, 1948, Article 14(1): "Everyone has the right to seek and to enjoy in other countries asylum from persecution." International Covenant on Civil and Political Rights, 1966, Article 13: "An alien lawfully in the territory of a State party to the present Covenant may be expelled there from only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority." The Supreme Court of India used

these international mechanisms to hold that it is the duty of the state to protect refugees.

17. *Khudiram Chakma v. State of Arunachal Pradesh*, (1994) Supp (1) SCC 615.
18. Ibid. 665
19. *National Human Rights Commission v. State of Arunachal Pradesh*, (1996) 1 SCC 742.
20. Constitution of India, 1950, Article 21: “No person shall be deprived of his life and personal liberty except according to the procedure established by law.”
21. National Human Rights Commission (n 18) 756.

Refugee Law in India

The Road from Ambiguity to Protection

Shuvro Prosun, S.

2017, XXVIII, 213 p. 33 illus., Hardcover

ISBN: 978-981-10-4806-7