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Editor In chief – Assistant Professor Mr. Janmejay Singh

Publisher & Founder – Vaibhav Sangam Mishra

Frequency – Quarterly (4 Issue Per year)

ISSN: 2583-6323 (Online)

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Refugee law in India

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India, situated amidst countries plagued by civil wars, terrorism, and ethnic suppression, has witnessed significant refugee movements. While not a signatory to the 1951 Refugee Convention, India has adopted various international human rights treaties that impose legal implications for aiding refugees. This paper explores the difference between asylum seekers and refugees, the principle of non-refoulement, and the role of the United Nations High Commissioner for Refugees (UNHCR) globally and in India. It discusses India's historical context with refugees, legal frameworks, and challenges faced by refugees within the country. Despite constitutional provisions, India lacks a comprehensive domestic law for refugees, leading to ad hoc asylum management. This lack of uniformity affects India's credibility in the international arena, despite its assistance to numerous refugee groups. The paper concludes by emphasizing the importance of enacting secure provisions for refugees and asylum seekers, considering the aid of international conventions and the UNHCR. It suggests that India's compliance with such conventions could enhance its standing in the international community and ensure equal rights for all refugees within its borders.

INTRODUCTION:

The geographical location of India as a South Asian country has witnessed heaps of refugee movements. India is surrounded by countries with constant civil war like Myanmar, Sri Lanka, Afghanistan with growing terrorism and China with political and ethnic suppression have made many lives seek shelter in India. According to the United Nations Convention for Refugees 1951, "A refugee is someone who has been forced to flee its own country because of prosecution, war or violence. A refugee has a well-founded fear of persecution for reasons of race, religion, nationality, political opinion, or membership in a particular social group"¹. They are likely to never return home or are afraid to do so because of constant violence in their home country etc. The Geneva Convention of 1951, now updated to 1967 is the main instrument of

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UNHCR, <https://www.unhcr.org/refugees#:~:text=The%201951%20Refugee%20Convention%20defines,such%20fear%2C%20is%20unwilling%20to>, (Last visited Feb. 01, 2024).

Protocols for refugee laws, the convention lays down legal protection and social rights that every refugee shall receive from the countries that have signed the convention². India although not a signatory of the Refugee Convention of 1951 has adopted other International human rights treaties which has imposed legal implications to provide aid to refugees³. Some of these conventions are the Universal Declaration of Human Rights 1948, the International Convention on Civil and Political Rights, the International Convention on Economic, Social, and Cultural Rights, Universal Declaration on Territorial Asylum 1967⁴. India being a developing country with limited resources does not have amenities to provide shelter for the refugees but with growing migrant workers and poverty, India should consider adopting essential border security and refugee provisions.

What is the difference between an asylum seeker and a refugee?:

An asylum seeker is different from the refugee, although they look for the same thing which is protection from the destination country⁵. However, the status of refuge must be determined legally until the individual comes under the aspects of an asylum seeker. Until then an asylum seeker can also be subject to refoulment. A “refugee” according to the “United Nations High Commissioner for Refugees”, are people who are constantly in a state of armed conflict or persecution, for whom seeking asylum from another country has become the only option. They are not in a condition to return to their home country because of the possibility of prosecution⁶. however, it can be hard to determine if someone should be given the status of refuge as it is difficult to determine if someone can be a possible danger to the security of the country. Therefore it becomes difficult for the asylum seeker to determine its intention to seek help as they mostly travel with nothing to prove their innocence. Hence, Article 33 of the 1967 convention states the principle of non-refoulement, and the determination of refugee status was mostly done on the grounds of well-founded fear of persecution⁷.

² UNHCR, <https://www.unhcr.org/about-unhcr/who-we-are/1951-refugee-convention>, (last visited Feb. 01, 2024).

³ UNHCR, <https://www.unhcr.org/sites/default/files/legacy-pdf/4cd96e919.pdf>, (last visited Feb. 01, 2024).

⁴ Kaur, Nimrat, Protection of Refugees in India: A Critical Analysis (February 9, 2013). Available at SSRN: <https://ssrn.com/abstract=2214274> or <http://dx.doi.org/10.2139/ssrn.2214274>

⁵ Rescue, <https://www.rescue.org/article/migrants-asylum-seekers-refugees-and-immigrants-whats-difference>, (last visited Feb. 01, 2024).

⁶ Rescue, *supra* note 5, at 1378.

⁷ Unhcr, <https://www.unhcr.org/sites/default/files/legacy-pdf/4ec262df9.pdf>, (Last visited Feb. 01, 2024).

Standards used to determine the status of the refugee:

In the case of **INS v. Stevic**, the Supreme Court of the US quantified the entitlement of deportation of an alien, by giving them the chance to demonstrate on the basis of if “it is more likely for an individual to face persecution” to the country they may return to. if it is established that the persecution is “more likely” to happen then such an individual must be given the status of refuge⁸.

In the case of **INS vs Cardoza Fonseca**, the interpretation of “well-founded fear” was observed and given an explanation based on evidence. if an objective situation of a well-founded fear is established through evidence then it proves that a “possible situation can arise”, but this alone does not evaluate whether persecution is a reasonable possibility⁹. This same standards of observation were used in the case **R vs secretary for the home department**, the judgment defined it as a “test” to consider evidence of “real and substantial danger of persecution”¹⁰. However, the Canadian House of Court disapproved the above standard in the case of **Joseph Ayei vs Ministry of Employment and Immigration**. they considered the “well-founded fear” in a “reasonable chance” standard i.e. if there’s evidence of a reasonable chance of persecution to arise then that alone is enough to come under the purview of the definition of “well-founded fear”¹¹. Such conditions were also applied for Sri Lankan Tamils for seeking refugee status in the country United Kingdom, and so were granted ¹².

What is the principle of non-refoulement?:

The principle of non-refoulment is recognized under international human rights. it guarantees that one cannot be forced to return to their home, where they could possibly face persecution on the grounds of religion, race, or any form of generalized violation. the scope of this principle extends up to all the countries whether signatory to the convention or not, as human rights violations is a serious threat to humanitarian grounds¹³.

⁸ “INS v. Stevic, 467 U.S. 407 (1984)

⁹ INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)

¹⁰ R v. Secretary of State for the Home Department,

¹¹ ANANTHACHARI, Refugees In India: Legal Framework, Law Enforcement And Security, worldlii, (Feb. 01, 2024, 4:19 PM), <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/7.html>

¹² ANANTHACHARI, *supra* note 11, at 1379.

¹³

Ohchr, <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>, (Last visited Feb. 01, 2024).

Role of UNHCR globally:

The United Nations General Assembly on December 17, 2018, approved the global compact of refugees, a framework for sustainable solutions for the crises faced by refugees which cannot be achieved without international cooperation¹⁴.

The UNHCR aims to provide a map for foreign nations international organizations and other stakeholders to ensure that the hosting communities get the support they need and that every refugee can live a secure and well life¹⁵. It encourages the opportunity to transform the way the world responds to refugee crises in a way that benefits both refugees and the host communities.

The four main objectives of UNHCR are:

- To ease the pressure on the countries that host
- To expand the help of third-country solutions
- Enhance self-reliance for refugees.
- Help in conditions of the country of origin for safe return¹⁶.

The United Nations High Commissioner for Refugees is headquartered in Geneva Switzerland with over 17,000 staff and 135 countries aiming for the welfare of refugees. UNHCR was created to address the refugee crisis after World War II¹⁷. Soon after the 1951 convention relating to the status of refugees, its impact expanded globally, UNHCR was involved in providing basic amenities to the refugees in Hungary, and a year later it dealt with the Chinese refugees in Hong Kong¹⁸. Simultaneously in the wake of the Algerian war, UNHCR aided the safety of Algerian refugees who fled from Morocco to Tunisia¹⁹. These events made a wider impact and were mandated globally for protection and humanitarian assistance. In recognition of its commendable work, the UNHCR won two Nobel Peace Prizes in 1954 and 1981²⁰.

UNHCR and India:

¹⁴*United**Nations,*

<https://www.un.org/en/globalissues/refugees#:~:text=On%2017%20December%202018%2C%20the,be%20achieved%20without%20international%20cooperation>, (Last visited Feb. 01, 2024).

¹⁵ UNHCR, <https://www.unhcr.org/us/about-unhcr/who-we-are/global-compact-refugees>, (Last visited Feb. 01, 2024).

¹⁶ UNHCR, <https://www.unhcr.org/neu/about/our-work-gcr-and-grf>, (Last visited Feb. 01, 2024).

¹⁷ UNHCR, <https://www.unhcr.org/us/about-unhcr/overview/history-unhcr>, (Last visited Feb. 01, 2024).

¹⁸ UNHCR, <https://www.unhcr.org/us/publications/report-united-nations-high-commissioner-refugees-13>, (Last visited Feb. 01, 2024).

¹⁹ UNHCR, <https://www.unhcr.org/us/publications/refugees-algeria-morocco-and-tunisia-0>, (Last visited Feb. 01, 2024).

²⁰ United Nations. www.un.org, (Last visited Feb. 01, 2024).

The government of India has followed a policy of bilateralism to establish refugee status. The decision to treat a person or group as refugees was not mostly considered based on circumstances²¹. In, the case of Afghan refugees who crossed the India-Pakistan border without any travel documents were allowed entry till 1993 which subsequently changed. Most refugees entered through the Atari border in Amritsar Punjab²². Although the circumstances under which these Afghan refugees had to flee from their home country cover them under the definition of refugee were apparently not presumed by the government of India. however, the United Nations High Commissioner of Refuge had to step in with the consent of the government of India to recognize them as refugees and also mandate their concern regarding administering and assisting them²³. There are instances where the government of India has extended its hands of help like in the case of refugees who fled from Myanmar or the Sri Lankan Tamils. this does not necessarily cover the fact that there were also instances where such refugees in spite of refugee identity documents were later not exposed to violation²⁴. however, such instances are held accountable to the National Human Rights Commission.

Status of refugees in India:

Illegal Immigrants and refugees are the subject of debate in India, as both are treated as foreigners and are protected by the Foreigners Act of 1946, the statute provides a definition for a foreigner as someone who is not a citizen of India²⁵. Although there is a clear distinction between a refugee and an illegal immigrant. India lacks the necessary legal provisions to address the issue of the status of refugees and migrants in India. India has consistently been a receiving nation, it has always welcomed refugees from neighboring as well as far-off nations like Sudan, Somalia, Afghanistan, etc²⁶.

History of India regarding refugees:

²¹ ANANTHACHARI, *supra* note 11. at 1381.

²² *Id*, at 4.

²³ ANANTHACHARI, *supra* note 11, at 1381.

²⁴ *Id*, at 1381.

²⁵ *Geeks for Geeks*, <https://www.geeksforgeeks.org/refugee-crisis-in-india/>, (last visited Feb. 01, 2024).

²⁶ G C, The Geopolitics of India's Refugee Policy, *Stimson Center*, (Feb. 01, 2024, 4:19 PM), <https://www.stimson.org/2022/the-geopolitics-of-indias-refugee-policy/>

Partition: In the year of independence many Pakistani refugees moved to India for shelter as India witnessed a newly elected government year 1947²⁷.

Refugees from Tibet: In the year 1956, Dalai lama and his followers were being prosecuted by the Chinese authorities therefore they were provided shelter in India²⁸.

Chakma and Hajong: In the year 1960 the Indian government relocated the Chakma and Hajong to Arunachal Pradesh²⁹.

Bangladeshi: In the years between 1965 and 1971 many Bangladeshis fled from their country because of this most Bengali refugees sought shelter in Kolkata and other Bengali cities in search of work and basic amenities³⁰.

Tamil refugees: several Tamil refugees from Sri Lankan society were persecuted by the country's political and economic unrest. Tamil groups are constantly discriminated against in the ethnic group of Sri Lanka³¹.

Rohingya refugees: the Rohingya Muslims are addressed as illegal migrants from Bangladesh in Myanmar, fleeing from persecution, they began seeking shelter in India in the 1970s³².

Legal framework followed by India regarding refugees:

The constitution of India: according to Article 51 of the constitution of India. the state must encourage adherence to treaty obligations and international law.

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²⁷ Kulik RM, Partition of India | Summary, Cause, Effects, & Significance, *Encyclopedia Britannica*, (Feb. 01, 2024, 4:19 PM), <https://www.britannica.com/event/Partition-of-India>

²⁸ Verma A, "Dalai Lama's Asylum in India, iPLEaders, (Feb. 01, 2024, 4:19 PM), <https://blog.ipleaders.in/dalai-law-asylum-india-legal-issue/>

²⁹ Iasparliament, <https://www.iasparliament.com/article/chakmas-and-hajongs>, (last visited Feb. 01, 2024).

³⁰ Wikipedia, https://en.wikipedia.org/wiki/East_Bengali_refugees, (last visited Feb. 01, 2024).

³¹ VELAMATI, MANOHARI. "Sri Lankan Tamil Migration and Settlement: Time for Reconsideration." *India Quarterly* 65, no. 3 (2009): 271–94. <http://www.jstor.org/stable/45072946>.

³² *Al Jazeera*, <https://www.aljazeera.com/features/2018/4/18/who-are-the-rohingya>, (last visited Feb. 01, 2024).

The Foreigners Act 1946: according to section 3 of the Foreigners Act 1946, the central authority has the power to find arrest, and also deport an unauthorized foreign national from the country.

Indian Passport Entry Act 1920: section 5 of the Indian Passport Act of 1920 and the Indian Constitution article 258 clause 1 allows forceful removal of an illegitimate national.

The Registration of Foreigners Act 1939: all foreign nationals except Indians living abroad are expected to register their arrival at the registration office within 14 days of their arrival in India.

The Citizenship Act 1955: The Citizenship Act includes clauses regarding renunciation, termination, and citizenship deprivation.

The Citizenship Amendment Act 2019 (CAA): the new amendment aims to provide citizenship to illegal immigrants who have suffered prosecution in Bangladesh, Pakistan, or Afghanistan on the basis of religion.

Problems faced by refugees in India:

lack of legal and medical support: as the migrants keep moving across borders, they frequently lack resources that are necessary for legal representation therefore making it hard for mainly legal and medical assistance ³³.

Women and children: they face discrimination and violence, and children are often exploited for child labor ³⁴.

Detained under the Foreigners Act: the security agency often files a case under the Foreigners Act which allows an individual to be detained before delivering them to a court with local jurisdiction ³⁵.

³³ Who, <https://www.who.int/news-room/fact-sheets/detail/refugee-and-migrant-health>, (last visited Feb. 01, 2024).

³⁴ Refugee and Migrant Health, *supra* note 33, at 1383.

³⁵ *Id.*, at 1383.

Inability to work: the refugees are not legally permitted to work, they look for jobs in an unregulated and open labor market, which often leads to migrant workers with no security of job and living ³⁶.

The contradictory status of refuge in Indian courts:

Article 21 has consistently been the tool to regulate the right to life and liberty of the people who are citizens as well who are not. Supreme Court has constantly made sure not to violate the fundamental promised by the constitution of India. High courts of India have also embraced natural justice recognized by the UNHRC for refugee issues in India. The principle of nonrefoulement was observed in the case **Gurunathan and others vs government of India** and also in matters of **AC Mohd Siddique Vs government of India and others**, where the Madras High Court made sure that the Sri Lankan refugees were not forced to return back to their home countries against their will³⁷. Article 21 of the constitution of India also regulates and justifies the stay of refugees in India in the absence of proper legislation in India. Therefore, in the case of **NHRC VS state of Arunachal Pradesh**, the government of Arunachal Pradesh appealed to give shelter and hospitality for the well-being of Chakma's residing in the state. They shall not be withheld from seeking citizenship from the authorities concerned³⁸.

In the case of **P Nedumaan vs Union of India**, Sri Lankan refugees pleaded the writ of mandamus requesting the Union of India as well as the state government to involve UNHRC the matters concerning refugees who want to return back to their home countries and also for the people who don't want to. Hence, Madras High Court held the direction from UNHRC as a command rather than a voluntary consent³⁹. In the Bombay High Court in the case **Syed Ata Muhammadi vs. Union of India**, there shall be no question of deportation when the UNHRC has recognized such group or individual to be a refugee.⁴⁰ This question was raised for the matters regarding Iranian refugees. The Supreme Court in the case **Malavika Karlekar vs**

³⁶ *Id*, at 1384.

³⁷ ANANTHACHARI, *supra* note 11, 1384.

³⁸ "National Human Rights Commission vs State Of Arunachal Pradesh & Anr on 9 January, 1996"

³⁹ National Human Rights, *supra* note 38, at 1384.

⁴⁰ Syed Ata Muhammadi vs. Union of India

Union of India,⁴¹ stayed the deportation of Andaman Island Burmese, since their status as refugees was pending and was only allowed to grant until a prima facie grant was made⁴².

However, the Supreme Court had a contradictory belief to the decision of following non-reformat, and the application of the principle of non-refoulement has become a topic of debate. In the case of **Mohammad Sali mullah vs Union of India**, many Rohingya refugees were detained in a sub-jail in Jammu.⁴³ They were being deported back to Myanmar; the petitioner appealed before the court upon the principle of non-refoulement being part of the constitution under Article 21. However, the plea was dismissed by the Supreme Court, which directed the deportation under proper legal provisions, the court was concerned that the right not to be deported can be an easy disadvantage to Article 19(1)(e) this is to reside and do business anywhere in India⁴⁴. The court acknowledged the concern of the Indian government regarding the increase in internal threat to security as well as increasing illegal immigration. However, such a decision can also imply resistance to the principle of non-refoulement. Therefore the principle of nonrefoulement and Article 21 was held to be a substantial question of law that should for the time being be treated as an interlocutory order. Such a question of law is still open to debate. Several cases such as the Gujarat **High Court in Ktaer Abbas Habib al Qutaifi vs Union of India** and the **Delhi High Court in Dough Lain Khan vs Union of India** accepted the principle of refoulement to be part of Article 21. Both cases had similar issues regarding refugees seeking protection from deportation⁴⁵. While the Indian government still struggles with the management of the flood of refugees and illegal immigration, it can certainly sometimes lose sight of the people who would actually need help. therefore such problems cannot be solved with mere provisions that India follows regarding asylum seekers, a steady growth of illegal immigration in the country stands as witness to that very fact.

The underlying issue:

India being a sovereign secular country has witnessed a flood of refugees from the neighbouring countries because of growing terrorism and civil war. hence, India must enact

⁴¹ Malavika Karlekar vs Union of India

⁴² ANANTHACHARI, *supra* note 11, at 1385.

⁴³ Mohammad Sali mullah vs Union of India

⁴⁴ Singh A, "Mohammad Salimullah and Anr. v Union Of India and Ors. - The Amikus Qriae" (*The Amikus Qriae*, July 24, 2023), Writ Petition (Civil) No. 793 of 2017.

⁴⁵ Mohammad Salimullah and Anr. v Union Of India and Ors, *supra* note 41, at 1385.

secure provisions regarding refugees and asylum seekers. it's necessary that the courts have a broader perspective regarding refugees and asylum seekers. illegal immigration regarding economic aspects does not necessarily come under the purview of refugee status, therefore such illegal immigration is the lack of strong border security. for example, the illegal migration of people from Bangladesh for better job opportunities. Such a loophole in border security has become a big threat to internal security. This has made it even harder to distinguish between people who pose a serious threat to internal security and people who genuinely seek refuge. Provisions have to be enacted where such steady growth of illegal migrants can be stopped. Such a situation can either be eradicated by bringing in a border perspective to the definition of refugee or by simply deporting. Keeping an open mind and solving the issues of illegal migration is much needed. the problems faced by the Indian government regarding the liability of displacement of migrant workers during the pandemic are the witness to the possible problems that can emerge out of a lack of adequate provisions to address refugees.

CONCLUSION:

The lack of domestic law for refugees and ad hoc asylum management can take away the credibility of the status of India in the International arena despite accommodation and helping many groups of refugees. Although there are many constitutional provisions regarding refugees it is necessary to have a uniform law that gives equal rights to all the refugees. Considering the issues faced by India because of limited resources and internal security. Such issues can be addressed with the help of the convention and UNHCR. The convention promises several rights such as the right to not be expelled, the right not to be punished because of illegal entry, the right to work with security, the right to shelter, the right to education, the right to public relief, and assistance, freedom to choose and follow the religion, access to court, freedom of movement within the country and mainly the right to be issued an identity and travel documents. India being a developing sovereign nation can in future become a permanent member of the UN, therefore it shall make laws in compliance with International conventions.