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## The Indian Judiciary In Promoting Refugee Right In India

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### Abstract

The judiciary acts as a safeguard against the arbitrary detention of refugees. In instances where refugees are held in detention facilities, the courts intervene to ensure that such detention is lawful, just, and complies with constitutional principles. India has long had a sizable and varied refugee population, even though it is not a signatory to the 1951 Refugee Convention or its 1967 Protocol. The Indian judiciary has been instrumental in protecting the rights of refugees in the absence of a formal domestic legal framework that governs refugee protection. This study analyzes landmark rulings, constitutional clauses, and the application of international human rights principles to investigate the changing role of the Indian judiciary in defending the rights of refugees. Courts have given refugees protection from arbitrary detention, deportation, and refoulement by interpreting Article 21 of the Indian Constitution, which protects the right to life and personal liberty. The study also looks at how the courts strike a balance between humanitarian duties and national security considerations. The study emphasizes the successes and drawbacks of judicial intervention in the absence of codified refugee law through a critical examination of case law and judicial activism. In the end, the study emphasizes the necessity of a thorough national refugee policy while acknowledging the critical role that the judiciary plays in protecting basic human rights.

**Keywords:** *Refugee Rights, Indian Judiciary, Constitutional Protection Right to Life and Liberty, Non-Refoulement, Human Rights*

## 1: Introduction

### Definition of Refugee

A refugee is generally defined as a person who is forced to leave their country due to a well-founded fear of persecution, conflict, violence, or serious human rights violations, and who, as a result, cannot safely return home.

### 1951 UN Refugee Convention of the UN Refugee convention 1951 define Refugees as follow

A refugee is 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, owing to such fear, is unwilling to avail himself of the protection of that country.<sup>1</sup>

### HISTORY OF REFUGEE LAW IN INDIA

The history of refugee law in India is marked by a combination of constitutional provisions, judicial decisions, and pragmatic responses to the evolving refugee situations. India, while not a signatory to the Refugee Convention, 1951 or its 1967 Protocol, has grappled with the influx of refugees over the years, necessitating legal considerations to address their status and protection.

1. Post-Independence Period: Following India's independence in 1947, the country was divided, which led to significant population movements. The displacement of millions created a serious humanitarian crisis. There was no particular legal framework addressing the rights and protection of refugees, even as the recently

established Indian government dealt with the effects of this mass migration.<sup>2</sup>

2. Constitutional Provisions: The Indian Constitution, adopted in 1950, includes provisions that indirectly touch upon the rights of refugees. Fundamental rights, such as the right to life and personal liberty (Article 21), have been interpreted by the judiciary to encompass the protection of refugees, emphasizing India's commitment to humanitarian principles.<sup>3</sup> Articles 14, 20, 21, 21A, 22, 23, 24, 25, 26, 27, 28 in the Indian Constitution are also gives rights to foreigners.
3. Judicial Pronouncements: Over the years, the Indian judiciary has played a crucial role in shaping refugee law through its interpretations of constitutional provisions and adherence to international humanitarian principles. Landmark judgments, such as the case of National Human Rights Commission (NHRC) v. State of Arunachal Pradesh (1996)<sup>9</sup>, underscored the importance of protecting the rights and dignity of refugees, setting a precedent for judicial activism in this domain.
4. The Foreigners Act, 1946: While not exclusively designed for refugees, the Foreigners Act, 1946, provides the legal basis for regulating the entry, presence, and departure of foreigners in India. The Act has been applied to refugees, and the issuance of Long-Term Visas (LTVs) has been a crucial aspect of accommodating those seeking refuge in the country.
5. Policy Measures: India's approach to refugees has been largely influenced by political and administrative considerations rather than a dedicated legal framework.

1 <https://www.unhcr.org>

2 Gatrell, P. (2013). Midnight's Refugees? Partition and its Aftermath in India and Pakistan. In Oxford University Press eBooks (pp. 148–177).

3 Purohit, M., Purohit, M., GS Goodwin-Gill, Robert L. Newmark, & James C. Hathaway. (2017).

The government has adopted policies, such as the LTV scheme, to address the stay of refugees in the absence of specific legislation.

6. United Nations High Commissioner for Refugees (UNHCR): India has collaborated with the UNHCR to provide documentation and support for refugees.

### **LEGAL MECHANISM FOR THE PROTECTION OF REFUGEES RIGHTS IN INDIA**

Facilitating humanitarian aid to refugees globally has been made feasible through institutional arrangements with the UNHCR (United Nations High Commissioner for Refugees) and other organizations, thanks to the adoption of the Refugee Convention of 1951 and its 1967 Protocol outlining the status of refugees.

India has not ratified the 1951 Refugee Convention or its 1967 Protocol concerning the Status of Refugees, and it lacks specific national legislation addressing refugees. In the absence of a dedicated legal framework, refugees in India fall under the purview of The Foreigners Act, 1946, and The Registration of Foreigners Act, 1939. Additionally, the entry and departure regulations outlined in The Passport (Entry into India) Act, 1920, and The Passport Act, 1967, are extended to refugees, thereby adding complexity to their situation.<sup>4</sup>

Moreover, refugees are subject to the applicability of various overarching laws, including BNS, BNSS, and BSA, among others. While India has provided shelter to refugees from neighboring nations, the lack of transparency in administrative policies related to granting asylum, facilities, grants,

etc., coupled with instances of discriminatory treatment toward specific refugee individuals or groups under similar circumstances without clear justification, is a prevalent issue. Currently, refugees in India are considered as foreigners. The municipal laws directly applicable to them are the Foreigners Act, 1946, the Registration of Foreigners Act, 1939, the Passport (Entry into India) Act, 1920, the Passport Act of 1967, the Extradition Act of 1962, the Citizenship Act, 1955- amended recently in 2019, and the Illegal Migrant (Determination by Tribunals) Act, 1983. Under these laws, there is no distinction made between the broader term 'foreigner' and a refugee or foreigner requiring special protection.

### **ROLE OF JUDICIARY IN PROTECTING REFUGEE'S RIGHTS IN INDIA**

The Indian judiciary has played an instrumental role in ensuring protection to these refugees by recognizing refugees and refugee law to a certain extent and has introduced refugee law into our legal system through the back door, as it were, since the front door has been shut by the executive. The role of the judiciary in protecting refugee rights in India is pivotal, as it plays a crucial part in upholding constitutional principles and ensuring justice for individuals who have sought refuge within the country's borders. While India lacks specific legislation exclusively addressing refugee rights, the judiciary has interpreted constitutional provisions and international commitments to safeguard the rights and dignity of refugees.

**Interpretation of Constitutional Rights:** The Indian Constitution, in its fundamental rights provisions, provides a foundation for the protection of human rights, which are interpreted these constitutional provisions,

<sup>4</sup> UNHCR. (2011). Refugees and Asylum-Seekers in India [Report].

particularly Article 21 (Right to Life and Personal Liberty) and Article 14 (Right to Equality), to ensure that the rights of refugees are not arbitrarily violated. Courts have emphasized the broad and inclusive interpretation of these rights to encompass the protection of refugees' lives, personal liberty, and dignity. In the case of *State of Arunachal Pradesh v. Khudiram Chakma*<sup>5</sup> the Apex Court held that Article 21 of the Constitution of India, which guarantees the fundamental right to life and personal liberty of Indian citizens is extended to all including non citizens. However, does not include the right to settle and reside in the country, which is a right available only to citizens of India.

**Non-Refoulement Principle:** While India is not a signatory to the 1951 Refugee Convention, the judiciary has recognized the principle of non-refoulement, which prohibits the expulsion or return of individuals to countries where their lives or freedom would be threatened. Courts have invoked this principle to prevent the deportation of refugees who might face persecution or harm in their home countries. In the case of *K. A. Habib v. Union of India 1999*<sup>6</sup> the Court prohibited the expulsion of two UNHCR certified Iraqi refugees after observing that the principle of non-refoulement is encompassed in Article 21. It held that the refugees must be protected from persecution in their home country, as long as their presence in India is not prejudicial to national security. The Court also stressed that although India is not party to the 1951 Refugee Convention, international norms (and the UNHCR's role) can inform humanitarian and constitutional interpretation.

<sup>5</sup> AIR 1994 SC 1461

### **Judicial Review of Administrative Actions:**

The judiciary actively engages in reviewing administrative decisions related to refugees. In cases where refugees face deportation or denial of rights, the courts provide a forum for judicial review, ensuring that administrative actions adhere to constitutional principles and international commitments. In the landmark case *National Human Rights Commission v. State of Arunachal Pradesh*, the Supreme Court safeguarded the fundamental constitutional rights of the Chakma refugees who had taken refuge in large number from erstwhile East Pakistan (now Bangladesh) in parts of Assam and Tripura. However, the respective governments of Assam and Tripura expressed their inability to rehabilitate them; therefore, some of them were moved to the state of Arunachal Pradesh and were settled agitation to expel them out of the state and threatened to resort to violence against them in response to which the National Human Rights Commission approached the Supreme Court. In its decision, the Apex Court directed the state of Arunachal Pradesh to take all measures necessary for ensuring the life and personal liberty of Chakmas as a constitutional obligation.

**Extension of Fundamental Rights:** The judiciary has extended the protection of fundamental rights to refugees. While refugees may not be explicitly mentioned in the Constitution, the courts have recognized that the term 'person' in the constitutional provisions encompasses refugees. This inclusive interpretation ensures that refugees enjoy the same fundamental rights as Indian citizens. The High Courts and the Supreme Court in their several judgements have ensured protection to the refugees by

<sup>6</sup> Ktaer Abbas Habib Al Qutaifi & Anr. v. Union of India & Ors. (1999 CRI.L.J. 919

creatively interpreting Article 21 of the Constitution that guarantees right to life and liberty to all persons irrespective of their status. Also, the right to equality for the non-citizen under Article 14 of our Constitution has been reaffirmed by our High Courts and the Supreme Court in several judgments.

**Protection against Arbitrary Detention:**

The judiciary acts as a safeguard against the arbitrary detention of refugees. In instances where refugees are held in detention facilities, the courts intervene to ensure that such detention is lawful, just, and complies with constitutional principles. This is particularly significant given the potential vulnerability of refugees in detention. From time to time, Indian Courts have stepped in to safeguard refugees from deportation, expulsion, and forced repatriation. Knowing that refugees are not always able to provide legal documentation or other such proof, the Court even waived off the requirement to provide surety in one such case so the refugees could be released and be free to approach the UNHCR for protection (*U. Myat Kayew and another v. State of Manipur 1991*)

**Enforcement of Humanitarian Principles:**

The judiciary has played a significant role in enforcing humanitarian principles in the absence of specific legislation. By considering India's commitment to international human rights treaties and conventions, the courts have emphasized the importance of treating refugees with dignity, ensuring their access to education, healthcare, and basic amenities. India, nonetheless, has ratified various international human rights treaties such as the UDHR, Genocide Convention, these agreements are not directly enforceable in Indian courts, they can be incorporated into existing domestic laws or

enacted through separate legislation. Indian courts have the authority to apply principles of international law, treaties, or conventions, and Article 253 of the Indian Constitution grants Parliament the power to implement international treaties or conventions through legislation. The Supreme Court, in the case of *Gramophone Company of India v. Birendra Bahadur Pandey and Others (1984)* further clarified and expanded the Parliament's authority in this regard. The Court emphasized that international law can be integrated into domestic laws as long as such incorporation does not conflict with other legislations enacted by the Parliament. Moreover, a deeper understanding of this concept can be gained by referring to the case of *Maganbhai Ishwarlal Patel v. Union of India and another (1969)*<sup>7</sup> wherein the Supreme Court asserted that the Parliament is not obligated to pass statutes specifically for the enforcement of international treaties, agreements, or conventions. As long as there is no violation of domestic laws, courts have the authority to incorporate provisions from international conventions and norms into municipal law, even in the absence of formal ratification by India.

**Conclusion**

The Courts have upheld fundamental rights such as the right to life and personal liberty under Article 21 of the Constitution, ensuring that refugees are not subjected to arbitrary detention or forcible repatriation in violation of the principle of *non-refoulement*. Judicial interventions have also emphasized equality before law under Article 14, thereby protecting refugees against discrimination. However, the judiciary's role, though commendable, remains limited by the lack of a statutory framework. Judicial activism has provided temporary relief and moral

<sup>7</sup> Air 1969 SCR (3)254

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authority, but the absence of codified refugee law continues to leave refugees vulnerable to inconsistent executive policies and political pressures. Thus, while the judiciary has emerged as a guardian of refugee rights in India, its contributions underline the urgent need for a clear, uniform, and rights-based refugee protection regime. Only through a combination of legislative reform and continued judicial vigilance can India balance its sovereign concerns with its constitutional and humanitarian obligations.

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