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Aparajita Bhowmick

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## **REFUGEE POLICY IN INDIA: INTERNATIONAL LAW AND DOMESTIC LAW IN INDIA – IN THE LIGHT OF THE ROHINGYA CRISIS IN MYANMAR**

Aparajita Bhowmick<sup>1</sup>

### **ABSTRACT**

Millions of people lost their homes as a result of India's division and left behind the lives they had built and lived. Twelve million individuals travelled between the partitioned countries in the months immediately after independence in search of an identity and their hometown. People were living in terrible conditions; their homes and crops were devastated, and millions of people were left to fend for themselves. Separation never results in peace. It produces chaos, trauma, and nightmares that the people and subsequent generations have to live with. These people are referred to as "refugees" or "stateless people" since they were forced to leave their country because of the atrocities brought on by war, persecution, or natural disaster. India during that time. The saga started from the Partition of India dwelling through the Afghan, Sri Lanka and Bangladesh refugee crisis and in 2015 the noted Rohingya crisis sparked up a heated debate. India has always lent a helping hand to the 'homeless', but it took an ambiguous stand in the Rohingya crisis. It was a play between international politics and a question on India's integrity as one of the largest democracies in the world. All the International treaties and Human Rights laws and the people who uphold them have a say, as this controversial move by India paves a way for its necessity to have its own refugee law.

### **KEYWORDS**

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<sup>1</sup> Law Student, 5<sup>th</sup> Year, Xavier Law School, St Xavier's University, Kolkata, W.B.

Human Rights, Domestic, Rohingya Crisis, Refugee, Policy.

## INTRODUCTION

The partition of India rendered millions homeless and as they exchanged between countries leaving behind a life they had made and lived. In the span of few months following the independence, about twelve million people moved between the divided nations searching for an identity and their homeland. In the words of Urvashi Butalia, 'the new governments of India and Pakistan were unprepared for the convulsion; they had not anticipated that the fear and uncertainty created by the drawing of borders based on headcounts of religious identity; so many Hindus versus so many Muslims, would force people to flee to what they considered 'safer' places, where they would be surrounded by their own kind.'<sup>2</sup> The 1951 Convention defined 'refugee' in Article 1, according to which a refugee is someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.<sup>3</sup>

India has its fair share of experience with refugees, the tribulations had started since the Partition of India, when people were stripped from their nationalities and were homeless. India came to the aid of the refugees by providing them the basic amenities of food, shelter and clothing. Then came the Tibetan refugee crisis in 1959 when Dalai Lama and his followers sought political asylum. The following years saw the crisis of the Bangladeshi refugees (1971), the Afghan refugees (1979), the Sri Lankan refugees (1983) all of whom sought shelter under the Indian government. However, the 2015 Rohingya crisis in Myanmar sparked a debate as the Indian government which had always selflessly helped the homeless with its limited resources had suddenly taken an ambiguous stance and had

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<sup>2</sup> Urvashi Butalia *The Other Side of Silence: Voices from the Partition of India*, (first published in 1988 by Viking Penguin India) 01.

<sup>3</sup> Convention and Protocol Relating to the Status of Refugees, UNHCR, Communication and Public Information Service, 189 UNTS 137.

refused to give shelter to the Rohingyas. This decision opened new windows of deliberations and discussions in the entire world.

## **LITERATURE REVIEW**

Refugee law in India is therefore domestic, stemming from provisions under Article 21 and Article 51 of the Constitution, the Registration of Foreigners Act 1939, the Foreigners Act 1946, the Foreigners Order 1948, the Passports Act 1967, and the Illegal Migrants (Determination by Tribunals) Act 1983. It is on the basis of these provisions that applications for asylum by refugees are determined. India follows a dualist approach to international law, and so, adheres to international law principles only insofar as they are incorporated into domestic law.<sup>4</sup> While India is not a party to the Refugee Convention and so is not bound by treaty to adhere to principle of non-refoulement, such an obligation stems from customary international law, as recognized by the UNHCR.<sup>5</sup> Broadly, two schools of thought have explained India's Rohingya approach. Though differing on most issues, both agree that the lack of a national policy framework on refugees has complicated India's handling of the Rohingya crisis.<sup>6</sup> However, the Indian legal framework has no uniform law to deal with its huge refugee population, and has not made any progress towards evolving one either; until then, it chooses to treat incoming refugees based on their national origin and political considerations, questioning the uniformity of rights and privileges granted to refugee communities.<sup>7</sup> Indeed, the National Human Rights Commission (NHRC) has submitted numerous reports urging the promulgation of a national law, or at least, making changes or amendments to the outdated Foreigners Act (1946), which is the current

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<sup>4</sup> Peter Ifeoma, 'An International Law Perspective on India's Response to Rohingya Refugee Crisis.' (2017) <<https://dnlegalandstyle.com/2017/international-law-perspective-indias-response-rohingya-refugee-crisis/>> accessed on 01 September, 2023.

<sup>5</sup> Ibid

<sup>6</sup> K. Yhome, 'Examining India's stance on the Rohingya crisis' (2018), <<https://www.orfonline.org/research/examining-indias-stance-on-the-rohingya-crisis>> accessed on 01 September, 2023.

<sup>7</sup> Dr. Vivek Kumar, 'An study of refugee's in India: The legal perspective' (2017) 3 IJL 96.

law consulted by authorities with regard to refugees and asylum seekers.<sup>8</sup> India's refugee policy must also strike a balance with its environmental and security related concerns in harbouring persons on its lands, especially via the seas. A refugee policy is only successful if India has the ability to control its borders, which in turn enables it in deciding whom it provides asylum to. As India's coastline is vast and vulnerable, the need is felt now more than ever to create a robust and centralised coastal border patrolling and securing system.<sup>9</sup>

### **RECOLLECTIONS OF THE PAST**

India is neither a signatory to the 1951 Refugees' Convention nor the 1967 protocol, which has 140 signatories; the country has still served as a home to the largest refugee population in South Asia. However, over the decades India has lent a steady hand to the people who have fled from their countries, in the 1959 Tibetan refugee crisis led to the Sino-Indian relations taking a major hit. The 1962 war with China, in particular, proved very costly to India. There were many reasons that led to the war, but the granting of political asylum to Tibetans was certainly one of the triggers. In The next major refugee crisis happened during Bangladesh's war of independence in 1971, then in 1979 a number of Afghans also took shelter in India after the Soviet invasion of Afghanistan.

This brings me to my questions that what was the 'Reason behind India taking an ambiguous stand in the Rohingya crisis in 2015.' India has categorized the Rohingya as illegal immigrants and a security threat, siding with the Burmese government. The Indian government has stated that the principle of non-refoulement, or of not forcing refugees to return

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<sup>8</sup> Rajeev Dhavan, 'The Model Law for Refugees: A Response to the National Human Rights Commission (NHRC)', NHRC Annual Reports (New Delhi: PILSARC, 1997 -1998 - 1999 -2000 -2003).

<sup>9</sup> Manasa Venkataraman, 'India needs a new refugee policy' (*Logos*, 13 October, 2016), <<http://logos.nationalinterest.in/2016/10/india-needs-new-refugee-policy/>> accessed on 01 September, 2023.

to their country of origin, does not apply to India principally as it is not a signatory to the 1951 refugee's convention.

The problem that what was the reason behind India's hostile stance towards the refugee crisis in Rohingya crisis in Myanmar has sparked a lot of interest giving rise to debates, discussions and deliberations. There had been one article that has stated that, the Modi government even changed its long-term visa rules to help minorities fleeing violence from neighbouring Afghanistan, Bangladesh and Pakistan. If India now says it cannot help Rohingya, who are a minority in Myanmar, it is either saying that Rohingya are not Myanmarese or that Myanmar is not a neighbour, both of which contradict previous positions.<sup>10</sup> The actions had garnered eyes globally where the international law is coming into the focus; and the other countries feel that if not on legal grounds but on humanitarian grounds and India distancing itself from its obligation is a gross violation of human rights protection; especially when the Rohingyas are the most persecuted. On these grounds the research has a lot to look into, to bring answers to the table when the image of the country is getting tainted at all international platforms.

### **OBJECTIVE OF THE ARTICLE**

The objectives for the article are as follows;

- To study the reasons that led to India taking such a stance.
- To examine the refugee crisis faced by India prior to Rohingya crisis.
- To know the importance of having a refugee law.

### **QUESTIONS**

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<sup>10</sup> Suhasini Haider, 'Such a strange silence: India's stand on the Rohingya crisis', *The Hindu* (Mumbai, 15<sup>th</sup> December 2017).

There are two questions that are entwined with the problem:

- 1) Did the Indian government take the stance of not giving shelter to the Rohingyas due to international politics?
- 2) If it is an affirmative answer, then is it time for India to have its own refugee law?

### **THE REFUGEE TALES IN INDIA**

India's birth as a nation was followed by a large-scale and violent mass movement of people to and from Pakistan during the Partition. New Delhi's refusal to sign the 1951 Convention, like that of some other developing countries, lies in the fear of the economic and political strain that the rehabilitation and resettlement of refugees holds and the obligations under the global refugee regime. The word 'refugee', is synonymous to several words like— 'human rights', 'mass exodus', 'violence', 'national security', etc. India's trial with refugees started since the dawn of Partition. Refugee camps across north India served as homes for those who had borne the brunt of Partition. Since these refugees were automatically the citizens of newly independent India, the question of a threat to national security due to their presence was out of the question. But at this juncture, when the fledgling state was just trying to stand on its feet and struggling to provide these refugees with basic amenities like food, clothing and shelter, the 1948 war with Pakistan broke out. The national capital of Delhi in particular saw a huge influx of refugees.

The next major movement of refugees towards India happened almost a decade after Partition, in 1959, when the Dalai Lama, along with more than 100,000 followers, fled Tibet and came to India seeking political asylum, with India granting them so. As a result, Sino- Indian relations took a major hit. Border issues between the two countries, and Chinese encroachment on Indian territory, began to crop up with greater frequency in the wake of New Delhi's decision to provide a haven to these fleeing

Tibetans. The 1962 war with China, in particular, proved very costly to India. The Tibetan refugees settled across northern and north-eastern Indian states, and the seat of the Dalai Lama, the spiritual as well as the political leader of the Tibetan community, was established in Dharamshala, Himachal Pradesh. The Tibetan government in exile operates from there to this day. The Tibetan refugees continue to live harmoniously, largely, with other local Indian groups and as a community they are perceived as 'peaceful'.

### **BANGLADESH REFUGEE**

In 1971 East Pakistan, now Bangladesh, seceded from Pakistan. Brutal repression was unleashed by Pakistan in present day Bangladesh in March 1971 with the result that nearly ten million refugees entered India between March and December 1971. Most of the refugees were Bengali Hindus who were especially open to attack by the armed forces. Of the ten million refugees, nearly seven million were put up in camps while the other three million stayed with friends and relatives. There was no question of turning any refugee back. Even Zolberg et al., who note that 'the refugees were an important part of the conflict', concede that 'India's ability to derive political mileage from the refugee situation does not deny its objective reality'.<sup>11</sup> Even today, the issue of illegal Bangladeshi immigrants is used by political parties to garner votes in every election cycle. Unlike the Tibetan refugees, they are seen as a security threat.

### **THE AFGHAN REFUGEES**

While not one of the larger refugee groups in the country, a number of Afghans also took shelter in India after the Soviet invasion of Afghanistan in 1979. Small groups of Afghan refugees kept coming to India in subsequent years. These refugees are mostly concentrated in and around

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<sup>11</sup> B. S. Chimni, 'The Legal Condition of Refugees in India' (1994) 7 J. Refugee Stud. 378.

Delhi, and have largely established spaces for themselves. As per the UN High Commissioner for Refugees (UNHCR), many of the Hindu and Sikh Afghans who came to India after fleeing fighting in their home country in the early 1990s have been granted citizenship over the past decade. Both the World Bank and UNHCR reports suggest that currently India has more than 200,000 Afghan refugees living in its territory.

The debate over refugees gained national prominence after 40,000 Rohingya Muslims escaped Myanmar to take shelter in India. The office of the UNHCR has issued identity cards to about 16,500 Rohingya in India, which it says helps "prevent harassment, arbitrary arrests, detention and deportation" of refugees. However, India has categorized the Rohingya as illegal immigrants and a security threat, siding with the Burmese government. The Indian government has stated that the principle of non-refoulement, or of not forcing refugees to return to their country of origin, does not apply to India principally as it is not a signatory to the 1951 refugee's convention. The Indian government has, in fact, appealed to Myanmar to take back the Rohingya refugees. This stance taken by the Indian government opened new doors of discussion and questioned India's decision as a democratic nation who had always lend a helping hand to the refugees.

### **THE ROHINGYA CRY FOR HELP**

The 2015 Rohingya refugee crisis refers to the forcible displacement of Hindu & Muslim Myanmar nationals from the Arrakkan & Rakhine state of Myanmar to neighbouring Bangladesh, Malaysia, Indonesia, Cambodia, Laos and Thailand in 2015, collectively dubbed "boat people" by international media. The United Nations High Commissioner for Refugees estimated that 50,000 people have been taken to boats from January to March in 2015 by migrant smugglers. There are claims that, while on their journey, around 100 people died in Indonesia, 200 in Malaysia, and 10 in Thailand, after the traffickers abandoned them at sea. India refused to let

the refugees enter their country because it posed national security threats. However, it was found that around 40,000 Rohingya's illegal immigrants have taken shelter in Assam, West Bengal and Jammu & Kashmir. The news created a dissatisfaction among the general public that Rohingya Muslim settlements in Jammu (city) will change the demography of Hindu majority and may lead to violence in the future by giving reference to the exodus of Kashmiri Hindus by Kashmiri Muslims earlier. The presence of Rohingya Muslims in Jammu is thus considered as a sensitive issue for Indian security. On 7 September 2017 Kiren Rijiju, Minister of State Home Minister of India have said "*all the Rohingya refugees are illegal immigrants and will be deported back*". He, however, refused to mention when, where and how they will be deported back. The statement invited criticism from United Nations on which Rijiju responded by saying "*India has the highest number of refugees in the entire world*".

India is not a party to the Refugee Convention, 1951 ('the Convention') and its Additional Protocol, 1967. India also does not have any ascertainable legal regime governing the status of refugees. There is neither any domestic law, nor the Government of India ('Gol') has framed any policy to govern the status of refugees on its territory.<sup>12</sup>With the development of the Rohingya crisis, India is caught between its two eastern neighbours, Bangladesh and Myanmar. Apart from balancing diplomacy between these two countries, the Indian Government is also seized with the matter of security implications arising out of the influx of Rohingya in the region. This presents a unique dilemma of prioritising national security and fulfilling diplomatic obligations towards Bangladesh and Myanmar. There is a considerable concern within the Indian establishment that Rohingyas, being poor and illiterate, could be easily vulnerable to terrorist mechanisation, to be used against Indian interest in parts the of north-

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<sup>12</sup> Dabiru Sridhar Patnaik and Nizamuddin Ahmad Siddiqui, 'Problems of Refugee Protection in International Law: An Assessment through the Rohingya Refugee Crisis in India' (2018) 14 SLR 1-29.

east and in the Kashmir valley. India's stance has been heavily criticized by the United Nations High Commissioner for Refugees (UNHCR) for taking a decision to deport an estimated 40,000 Rohingyas living in different parts of the country.

### **INDIA IS IN DIRE NEED OF A REFUGEE LAW**

The vast majority of refugees are, by contrast, unprotected under customary international law. They are "humanitarian" refugees who seek shelter from conditions of general armed violence or natural disasters. The Indian Constitution envisages a democracy which ensures freedom under the law and the dignity of the individual. Part III of the Indian Constitution enumerates the fundamental rights and Part IV sets out the Directive Principle of State Policy. In this backdrop, considering the case study of Rohingya refugees, highlights the domestic legal framework for refugees in India, especially focusing on the fact that there is no law on refugee protection in India. Moreover, India is a member neither of the Refugee Convention, 1951 nor of its Additional Protocol of 1967. Therefore, the response of India to refugees is dependent mostly upon the policies of the Government.<sup>13</sup> There is no official definition of refugee as applicable in India, though there are a number of legislations that regulate the conditions of migrants. For instance, Passport Act, 1967; the Foreigners Act, 1946; and, the Foreigners Order, 1948. In the absence of a national law on refugees, it is often asserted that the question of granting refugee status does not arise.<sup>14</sup> The scenario that emerges is paradoxical. The government does not recognize refugees as a class, but the judiciary does recognize them. The Indian judiciary has introduced refugee law into the legal system through the back door, as it were, since the executive has shut the front door.<sup>15</sup> The Supreme Court of India has in a number of cases stayed deportation of refugees such as *Maiwand's Trust of Afghan Human*

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<sup>13</sup> Ibid

<sup>14</sup> Lok Sabha, Un-starred Question No. 334, Answered on 19.07.2016.

<sup>15</sup> Markandey Katju, 'India's Perception of Refugee Law' (2001) ISIL YBIHRL 14.

*Freedom vs. State of Punjab*<sup>16</sup>; and, *N.D.Pancholi vs. State of Punjab & Others*. In the matter of *Malavika Karlekar vs. Union of India*, the Supreme Court directed stay of deportation of the Andaman Island Burmese refugees, since “*their claim for refugee status was pending determination and a prima facie case is made out for grant of refugee status.*”<sup>17</sup> So far, the Indian approach towards the Rohingya crisis has been viewed as contradicting its traditional position on refugees. As the Rohingya crisis unfolds, there is still a lot that India can do to facilitate the finding of long-term solutions. These actions will be key in determining India’s regional and global standing.

Therefore, the saga of refugees has been a part of India’s history and its time that India comes up with its own ‘Refugee Law’ to provide answers to the refugees on its own accord.

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<sup>16</sup> *The Mailwand’s Trust of Afghan Human Freedom v. State of Punjab and Others* (1986), Writ Petition (Crl.) No.125 and 126 of 1986.

<sup>17</sup> *Malavika Karlekar v. Union of India and Another* Writ Petition (Criminal No) 583 of 1992.