Alternative legacies: Normative assumptions underlying Refugee Status in South Asia

Nasreen Chowdhory
Dept. Of Political Science
University of Delhi
Email: nchowdhory@gmail.com
Statute defines refugee as:

“Who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence”
1951 Convention:
As a result of events occurring before 1 January 1951 and owing to well-founded fear (emphasis added) of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, it outside the country of his nationality and is unable or, owing to such fear, is willing to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or; owing to such fear, is unwilling to return to it.
the 1951 Convention definition of refugee delimit the status to those who have *crossed international border than they can be termed as refugee, thus leaving a certain group of people devoid of any status even though they maybe refugee in every sense of the term.*

The 1951 Convention while determining who is a refugee engages in mostly objective definition of the phrase ‘well-founded fear of persecution’.
sole premise of refugeeness should not be based on objective criteria alone, as the concept of fear is a subjective feeling, which essentially needs to be ascertained through objective means.

The Convention’s mandate protects only those whose “civil and political rights” are violated, which leaves those with socio-political rights at risk. It extends to persons who have been disenfranchised on the basis of race, religion, nationality, membership of a particular social group, or political opinion.

Chimni 2000: 8 asserts, “third world refugee continued to remain de facto, as their flight is frequently prompted by natural disaster, war, or political and economic turmoil rather than by persecution or at least as that term is understood in the Western context” as a result of the geographical imbalance that existed within the framework of definition of “refugee”.

The 1984 Cartagena Declaration calls for consideration of the objective situation in the country of origin and the particular situations of the person or group of persons seeking protection as refugees. This definition requires that two conditions are needed to be declared for refugee status: that there exist a threat to life, security, or liberty; and the threat result from one of the five factors; generalized violence; foreign aggression; international conflicts’ massive violations of human rights etc.
Most developing countries have given explicit and implicit arguments relating to non-signing of the 1951 Convention and 1967 Protocol.

These states though part of the developing countries, have refused to recognize a right to asylum and they choose to deal with it through their own law of the land, in terms of national law etc.

Even though these states are not part of any Convention, yet they have accepted the obligation of non-refoulement in Article 33 (1) of the 1951 Convention. It prescribes that “no refugee should be returned to any country where he or she is likely to face persecution or torture”.

The principle of non-refoulement has also come to be embodied in other international instruments, for e.g., Art. 3 of the 1984 Convention against Torture states: no state party shall expel return (refouler) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture; and for the purpose of determining whether such ground prevails, competent authorities shall take into account all relevant consideration including where applicable, the nature of state etc.
the 1951 Convention laid emphasis on the political meaning or rather the lack of political rights of a group of people who at any point living within the state structure may feel insecure and may have to leave the country of habitual origin. But the overemphasis on political often leave other aspects of rights like; economic, cultural behind, and therefore subsequent Convention or Protocol attempted to fill this void. Insofar as the Convention definition of refugee is concern it lay down the broad definition in terms of year, thus year–marking those events prior to 1 January 1951 might have led to crisis, which has led to refugee or refugee like situations.
Refugee rights in India

- Does this mean that the Indian State has failed to protect basic rights of non-citizens (refugees, aliens, asylum seekers)?
- The answer to this question is quite complex. Those belonging to non-citizens category have little or no rights.
- In the past, the Indian judicial system has acted responsibly and effectively when required on case-by-case basis. One such case is related to reinstatement of refugee rights in the state of Arunachal Pradesh where he (a refugee) had sought refuge and his rights violated as a foreigner.
The National Human Rights Commission (NHRC) approached the Supreme Court under article 32 of the constitution (when article 14, 21, and 25 are violated, these rights can be remedied by the enforcement of these fundamental rights in the Supreme Court under article 32) and in the High Court under Article 226. In one such case when the certain rights of Chakma refugees were infringed upon by an activist student union, the court directed “relief on the basis of aliens under Article 14 and 21” (Chimni 2000: 492).

Article 32 of the Constitution of India embodies the Right to Constitutional Remedies. The Supreme Court has the power to issue direction, order writs, etc., for the enforcement of any rights as enshrined in Part III (Fundamental Rights) of the Constitution of India.
In terms of legislation, India has not passed any refugee-specific laws to regulate the entry and status of refugees; rather, it handles the influx of refugees at the political and administrative levels. The result is that, refugees are treated under the law applicable to aliens.

The term aliens and foreigners’ are used interchangeably. Both denote a category of people who do not belong legally within the territory of India, and means “a person who is not a citizen of India”.
The word ‘aliens’ remains undefined, in the Constitution of India. But it appears in various part of the constitutions, (Art. 22 part 3, and Entry 17, List I, Schedule 7) in Section 83 of the Indian Civil Procedure Code, and in section 3 (2) (b) of the Indian Citizenship Act, 1955, as well as some other statutes. Several of these acts have relevance to the regulation of aliens-like people (refugees etc) in India including the Foreigners’ Act of 1946 (under which the central / federal government has the authority to regulate entry and presence of aliens in India), the Registration Act, 1939 (deals with foreigners’ entry/exit into the dominion of India), Passport (Entry into India) Acts of 1920 and 1967 accord government of India the power to impose conditions upon entry to India and also regulate departure.
Refugees in India do not have any official-legal status to determine their rights and duties.

The Union Legislature (Parliament) has sole jurisdiction over the subject of citizenship, naturalization, and aliens.

Refugees in India do not have any official-legal status to determine their rights and duties.

Refugees are treated under the law applicable to aliens.

In the case of India the decision of refugee determination is not based on either individual or group, rather it is viewed as bilateral issue between the country of origin and asylum.
refugees or foreigners who lack official / legal status in India appear to have some of their rights protected by the Constitution of India.

Articles stipulated within the constitution which are equally applicable to refugees (article 14 – right to equality, art. 21 – right to personal life and liberty and art. 25 – the freedom to practice and propagate one’s own religion of the constitution are guaranteed to citizens and non-citizens alike).

The Indian Supreme Court has also taken the view that the rights of foreigners are not to be limited to Article 21 i.e., “protection of life and personal liberty – no persons shall be deprived of his life or personal liberty except by procedure established by law.”
the Constitution of India entails essential provisions to safeguard and protect (in spirit) the principle of non-refoulement.

Article 21 of the Constitution requires that the State shall not expel or return a refugee ‘in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion’.
There have been cases when the Supreme Court in India has stayed orders of deportation of refugees, e.g., Maiwand’s Trust of Afghan Human Freedom vs. State of Punjab; N.D. Pancholi vs. State of Punjab and others. In the matter of Malavika Karlekar vs. Union of India the Supreme Court directed stay on deportation order of the Andaman Burmese refugees since “their claims for refugee status was pending determination and a *prima facie* is made out for grant of refugee status”. Crl WP No. 125 and 126 of 1986.

N. D. Pancholi vs. State of Punjab and others [WP (civil) No. 1294 of 1987, unreported)].
In an earlier judgment of the Supreme Court in Luis De Raedt vs. Union of India and State of Arunachal Pradesh vs. Khudiram Chakma stresses the point that no one shall be deprived of his or her life and liberty without due process of law. The judiciary has played a constructive role in protecting the rights of the refugees. In terms of legislation, India has not passed any refugee-specific laws to regulate the entry and status of refugees; rather, it handles the influx of refugees at the political and administrative levels.
Since the Constitution of India does not contain specific provisions related to refugee rights, refugees are left in a precarious situation. Despite adequate provisions (in the spirit of intent) stipulated within the international refugee law, India, has taken a position that international treaties, covenants conventions and agreements can become part of the domestic law in India only if they are specifically incorporated in the law of the land. The Supreme Court opined through a number of decisions on the subject that international conventional law must go through the process of transformation into municipal law before the international treaty becomes internal law.
Also courts may apply international law only if there is no conflict between the international law and domestic law, and also if the provisions of international law sought to be applied are not contravention of the spirit of the Constitution and national legislation. In cases where there appears to be conflict, the domestic law is to prevail. The strict interpretation and reiteration of domestic law over international law (more specifically related to refugee rights) have compromised the issue of refugee rights in India.