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Principle of Non-Refoulement and Indian Judiciary: an Analysis

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Abstract

India has followed vasudhaiva kutumbakam since time immemorial. In 1959, India gave refuge to Dalai Lama with of his one lakh followers. During Pakistan-Bangladesh War approximately 1 crore refugees came to India. India has accepted refugees from various neighbouring countries like Rohingya from Myanmar, Sri Lankan Tamils from Sri Lanka, Chakma from Bangladesh etc. Till 2023, 46569 refugees were registered with UNHRC in India. India has not signed Convention Relating to Status of Refugees 1951 and its Protocol, 1967 still India follows its core principle of non-refoulement by not deporting refugees where they have fear of persecution due to religion, race, membership of a particular social group, nationality, or political opinion. Constitution of India provides various fundamental rights to both citizens and non-citizens, ranging from right to life, liberty, equality, etc. By various judicial pronouncements Indian judiciary has read principle of non-refoulement into Article 21. Recently in the case of Mohammad Salimullah vs Union of India, 2021 Supreme Court held that "the right not to be deported, is ancillary or concomitant to the right to reside or settle in any part of the territory of India guaranteed under Article 19(1)(e)". In this article the authors will dive deep into the principle of non-refoulement from perspective of Indian Judiciary.

Keywords: - Refugee, Non-refoulement, Indian Judiciary, Supreme Court.

1. Introduction

"Refugees are mothers, fathers, sisters, brothers, children, with the same hopes and ambitions as us — except that a twist of fate has bound their lives to a global refugee crisis on an unprecedented scale."

— Khaled Hosseini

There is no denying that refugee problem is a huge global problem. To handle this problem Convention Relating to Status of Refugees 1951 and its Protocol, 1967 were incorporated by United Nations, having principle of non-refoulement at its centre. India has been sheltering refugees from various countries of Asia and Africa. Sri Lankan Tamils, Tibetans, Afghans and Rohingya from Myanmar are the dominant refugee groups in India. India has not signed the Convention Relating to Status of Refugees 1951 and its Protocol, 1967, it treats refugees with utmost regard for vasudhaiva kutumbakam and commitment to prevent suffering. Even without

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signing this convention, Indian government, and Indian judiciary, in particular, has protected the rights of refugees with principle of non-refoulement at its core.

1. Literature Review

Manoj Kumar Sinha in "Basic Documents on International Human Rights & Refugees Laws", 2012, has assembled all conventions, treaties, legal instruments related to refugee law in their original form. It is a compendium of all laws relating to refugees worldwide. Niraj Nathwani in "Rethinking Refugee Law", 2003, has analyzed India's position with respect to international law regarding refugees. He has aptly described how India is accepting refugees even without being party to Refugee Convention nor to its protocol. Shuvro Prosun Sarker in "Refugee Law in India - The Road from Ambiguity to Protection," 2017, has analyzed judicial development with respect to refugee law in India. S. Irudaya Rajan in book titled "The Routledge Handbook of Refugees in India" has analyzed constitution and refugees in detail. Pooja Makhijani in article titled "Protection of refugees in India: An Analysis"., International Journal of Law, Policy and Social Review, 2024 has analyzed protection granted to refugees in India. Numerous judicial pronouncements including Louis De Raedt v. Union of India, 1991, Ktaer Abbas Habib Al Qutaifi v. Union of India & Ors.,1998, Dr. Malvika Karlekar v. Union of India,1992, Shah Ghazai & Anr. v. Union of India & Ors.1996, Ms. Lailoma Wafa v. Union of India and Ors.,1998, Sehba Meenai v. Union of India,2013, National Human Rights Commission v. State of Arunachal Pradesh,1996, Shabir Ahmed & Ors v. State,2016, Nandita Haskar v. State of Manipur,2021, Hans Muller v. Superintendent, Presidency Jail, Calcutta, 1955, Mohammad Salimullah v. Union of India, 2021, etc.

2. Objective of Study

To conduct an analysis of contribution of Indian Judiciary in upholding the principle of non-refoulement with respect to refugees.

3. Research Method

This research is based on primary and secondary sources of data to analyze the role of Indian judiciary in upholding the principle of non-refoulement.

4. Principle of non-refoulement

The principle of non-refoulement is the centre of international refugee protection. It is provided under Article 33 of the 1951 Convention.

Article 33(1) provides: *"No Contracting State shall expel or return ("refouler") 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 of a particular social group or political opinion."*

"(2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

i) Indian Legal Framework and Non-Refoulement

India does not recognize the concept of non-refoulement in any statute. However, the Constitutional of India contains some provisions for the benefit of non-citizens also. Few articles to mentions are Articles 14,19, 21 and 22 which are part of the fundamental rights. India has signed the Convention against Torture and International Covenant on Civil and Political Rights,1984 and Bangkok principles. Bangkok Principle's[1] Article III titled non-refoulement states that "No one seeking asylum in accordance with these Principles shall be subjected to measures such as rejection at the frontier, return or expulsion which would result in his life or freedom being threatened on account of his race, religion, nationality, ethnic origin, membership of a particular social group or political opinion."

5. Indian judiciary and non-refoulement

All three organs of Indian government are working hard to live by the Constitution and international commitments. Indian judiciary, through various judgments have tried to uphold and enforce these liberties of refugees. By power vested under the fundamental rights enshrined under Article 14, 19 and Article 21 of the Constitution of India, 1950, courts have tried to beneficially interpret the right to life and equality. In this section we will discuss and analyse role of Indian judiciary vis a vis principle of non-refoulement.

In landmark case of *Louis De Raedt v. Union of India*[2], the Hon'ble Supreme Court held that "the fundamental right of the foreigner is confined to Article 21 for life and liberty and does not include the right to reside and settle in this country, as mentioned in Article 19(1)(e), which is applicable only to the citizens of this country. The power of the Indian Government to expel foreigners is absolute and unlimited and there is no provision in the Constitution fettering this discretion".

In case of *Ktaer Abbas Habib Al Qutaifi v. Union of India & Ors.*[3], the Hon'ble High Court held that "forceful return, expulsion or torture of persons is clearly prohibited under international law while relying on Article 3 of the Universal Declaration of the Human Rights, Article 33 of the Convention on Status of Refugees, 1951 and Article 3 of the Convention against Torture. Based on the principle of non- refoulement and on humanitarian grounds, the Court ordered in favour of the petitioners stating that they were not to be deported from India until a decision is taken.

Further, in case of *State of Arunachal Pradesh vs Khudiram Chakma*[4], many Chakma families, migrated from then East Pakistan to Assam where they were given shelter as refugees in 1964. Later, the Government drew up the Chakma resettlement Schemes whereunder Chakma families were allotted lands within the-North East Frontier Agency, which later became State of Arunachal Pradesh. Government received complaint that the appellant with other 56 Chakma families were making encroachment on the land of local people beyond original settlement area. The government found it necessary to shift them to the original settlement area where other Chakma families were already residing. The Hon'ble Supreme Court upheld the order of government and emphasized upon the Article 14 of the UDHR, 1948. "Article 14 of the Universal. Declaration of Human Rights, which speaks of the right to enjoy asylum must be interpreted in the light of the instrument as a whole; and must be taken to mean something.

It implies that although an asylum seeker has no right to be granted admission to a foreign state, equally a state which has granted him asylum must not later return him to the country whence he came." This principle contains core principle of non refoulement incorporated under refugee law and Hon'ble Supreme Court has struck a balance between right of refugees' vis a vis right of nationals.

In case of *Dr. Malvika Karlekar v. Union of India*[5], Hon'ble Supreme Court stayed the deportation of the Burmese refugees and asked government to verify their refugee status. In this case court followed the principle of non refoulement in substance. In the case of *P. Nedumaran vs. Union of India*[6], Sri Lankan refugees had prayed before the Hon'ble Madras High Court that government may be directed to permit UNHCR officials to check the willingness of the refugees in going back to Sri Lanka and to permit stay in camps in India of those who did not wish to return to Sri Lanka. The Hon'ble Madras High Court held that "since the UNHCR was involved in ascertaining the voluntariness of the refugees' return to Sri Lanka, hence being a World Agency, which is competent and impartial, it is not for the Court to consider whether the consent is voluntary or not."

In the case of *Gurunathan and others vs. Government of India*[7], petitioners, Sri Lankan refugees, approached Hon'ble Madras High Court on the apprehension that they will be forced to go back against their will where there is fear of persecution. The Madras High Court put on record an undertaking given by Central Government of India, that Sri Lanka refugees will not be sent back to their native place where there is fear of persecution, against their will and no force will be used in that process. In this case also court followed principle of non refoulement in substance.

In the case of *Shah Ghazai & Anr. v. Union of India & Ors.*[8] petitioners requested the Hon'ble Court for quashing the deportation order passed by government and handing the petitioners into the custody of the UNHCR, New Delhi. The Court gave direction to the respondents to give custody of the petitioners to the UNHCR. In this case also court followed principle of non-refoulement.

In the case of *Ms. Lailoma Wafa v. Union of India and Ors.,*[9] the deportation of the petitioner was stayed by Delhi High Court. The Court was informed that the request of the Petitioner for resettlement in Finland was accepted and the Assistant Foreigners Regional Registration Officer has granted the Petitioner permission to leave India on or before 05.08.1998. The Court disposed of all the pending applications and petitioner's deportation was extended. In the case of *Sehba Meenai v. Union of India,*[10] the Court issued release order in favour of an Afghan refugee who was housed at Nirmal Chhaya Jail Road, New Delhi. Further, held that it would be inhuman to deport the refugee if there is fear of persecution. In all these cases also, court applied non refoulement principle to extend or stay deportation of the petitioner.

In the case of *National Human Rights Commission v. State of Arunachal Pradesh,*[11] Hon'ble Supreme Court held that "we are unable to accept the contention of the first respondent that no threat exists to the life and liberty of the Chakmas guaranteed by Article 21 of the Constitution, and that it has taken adequate steps to ensure the protection of the Chakmas". The right to life and equality to citizens as well as non-citizens is enshrined under Constitution. The court

directed the "State of Arunachal Pradesh to ensure that the life and personal liberty of each and every Chakma residing within the State shall be protected and any attempt to forcibly evict or drive them out of the State by organised groups, such as the AAPSU, shall be repelled, if necessary by requisitioning the service of para-military or police force, and if additional forces are considered necessary to carry out this direction, the first respondent will request the second respondent, the Union of India, to provide such additional force, and the second respondent shall provide such additional force as is necessary to protect the lives and liberty of the Chakmas". This case clearly shows that court upheld constitutional right to life and principle of non-refoulement.

In the case of *Dongh Lian Kham v. Union of India*[12] the petitioners' UNHCR-recognised refugees, approached Hon'ble Guwahati High Court for resettlement to third country. Court directed the FRRO to coordinate with UNHCR to explore resettlement in other country, while restraining deportation to Myanmar where there is fear of persecution. In this case also count followed the principle of non-refoulement in substance. In the case of *N. D. Pancholi v. State of Punjab*[13], Hon'ble Supreme Court stayed the deportation of the Iranian national till further notice.

In the case of *Shabir Ahmed & Ors v. State,*[14] the Court ordered that Petitioners would not be forcibly repatriated to Myanmar except in accordance with law while considering the refugee status granted by UNHCR. In the case of *Nandita Haskar v. State of Manipur*[15], Manipur High Court made the following observation that "The principle against refoulement, i.e., the forcible return of refugees to a country where they are liable to be subjected to persecution, can prima facie be read into Article 21 of the Indian Constitution". In the case of *Abdur Sukur v. The State of West Bengal & Ors,*[16] the Court granted relief to a "Rohingya" couple facing deportation to Myanmar. It issued an order of injunction against deportation during the pendency of the writ petition. Hon'ble Calcutta High Court observed that "the petitioners have basic human rights and a minimum protection ought to be given to the petitioners till the writ petition is decided, to uphold the spirit of humanity."

In the case of *Mohammad Salimullah v. Union of India*[17], the petitioners pleaded against deportation order of the government. It was contended on behalf of the petitioners that "(i) the principle of non-refoulement is part of the right guaranteed under Article 21 of the Constitution; (ii) that the rights guaranteed under Articles 14 and 21 are available even to non-citizens". The Hon'ble Supreme Court held that "the rights guaranteed under Articles 14 and 21 are available to all persons who may or may not be citizens. But the right not to be deported, is ancillary or concomitant to the right to reside or settle in any part of the territory of India guaranteed under Article 19(1)(e)". Court made it clear that the petitioners shall not be deported unless the procedure prescribed for such deportation is followed.

Indian Judiciary has always balanced principle of non-refoulement and its exceptions. In the case of *Hans Muller v. Superintendent, Presidency Jail, Calcutta*[18], while dealing with the detention of foreigner in this case, Hon'ble Supreme Court held that "The foreigners act confers the power to expel foreigners from India. It vests the Central Gvoernment with absolute and unfettered discretion and, as there is no provision fettering this discretion in the Constitution, an unrestricted right to expel remains. A foreigner has no such right and he can be expelled

without any formality beyond the making of an order by the Central government." In the case of *Ananda v. Union of India*[19], the Hon'ble Madras High Court, while decided case related to deportation order of petitioners held that "Considering the policy behind and the object of the Act, very many exigencies would arise, which we cannot enumerate and glossaries and which would impel quick and lighting action to be taken under the act, failing which, the very security of the nations may be jeopardised." This case at hand clearly shows that exception to principle of non-refoulement will be followed where there is threat to national security.

6. Conclusion

After analyzing the above-mentioned cases Indian judiciary has protected the principle of non-refoulement by interpreting various constitutional provisions. Supreme Court has recently held that "right not to be deported, is ancillary or concomitant to the right to reside or settle in any part of the territory of India guaranteed under Article 19(1)(e)", while earlier courts have held that right to non-refoulement is enshrined under Article 21 of the Constitution. This interpretation has made non-refoulement principle subject to reasonable restriction. The non-refoulement principle was already subject to exceptions like threat to security of nation as per Article 33 of the Convention Relating to Status of Refugees. This interpretation contains at its core the national security of the nation which is already at risk of infiltration due to its long-shared boundary line. India is already fulfilling various international principles enshrined under Universal Declaration of Human Rights, core principle of non-refoulement of Refugee Convention ,1951, Convention against Torture and International Covenant on Civil and Political Rights,1984, etc which are incorporated in constitution and interpreted by Indian Judiciary. Last but not the least a codified enactment will ensure efficiency and fairness in dealing with refugees.

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