

part fourteen

refugee rights





the somewhat automatic integration of international refugee conventions in indian law

There is a common misconception that ratified international conventions are not enforceable in Indian courts unless a statute is enacted. This misconception is based on the American and English position without taking into consideration the specificities of the Indian Constitution. The clearest discussion on this issue is found in *Maganbhai Ishwalal Patel v. Union of India* [AIR 1969 SC 783].

“Making of law.... is necessary when a treaty or agreement operates to restrict the rights of citizens or others or modifies the laws of the State. If the rights of the citizens or others which are justifiable are not affected, no legislative measure is needed to give effect to the agreement or treaty.”

Justice Shah relied on Article 73 (1) of the Constitution:

“subject to the provisions of this Constitution, the executive power of the union shall extend.

[a] to the matters with respect to which Parliament has power to make laws; and

[b] to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement.”

He also relied on Article 253:

“Notwithstanding anything in the foregoing provisions of this chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement to convention with any other country or countries or any decision made at any international conference, association or other body.”

The common misconception is that Article 253 which empowers Parliament to make laws for implementing any treaty, agreement or convention necessarily implies that unless such a statute was enacted, the treaty, agreement or convention was incapable of being enforced. Justice Shah rejected this argument saying that it proceeded upon a misreading of Article 253. While the Article conferred upon Parliament a certain power, it did not seek to circumscribe the extent of the power conferred by Article 73.

“Our Constitution makes no provision making legislation as a condition of entering into an international treaty either in times of war or peace. The Executive is qua the State competent to represent the State in all matters international and may by an agreement, convention or treaties incur obligations which in international law are binding upon the State.”

The decision of the Court is therefore to the effect that if an international instrument adds to the rights of citizens it is enforceable directly, but if it restricts the existing rights of citizens, it requires, for its enforcement, the enactment of a statute.

Maganbhai's case was a case where the State had exercised its powers under Article 173 by entering into an international agreement with the Government of Pakistan. A writ petition was filed against the Government of India seeking to restrain government from acting upon those agreements and from ceding without the approval of Parliament certain areas which under the agreement were to be ceded to Pakistan.

In *Gramophone Company of India Limited v. Birendra Pandey, Chinnappa Reddy J.* speaking for the court held:

“There can be no question that nations must march with the international community and the municipal law must respect rules of international law just as nations respect international conventions. The comity of nations requires that rules of international law may be accommodated in the municipal law even without express legislative sanction provided they do not run into conflict with Acts of Parliament.”

The position is thus quite clear. If an international convention runs counter to an

1 AIR 1984 SC 667, No.2]

2 (1905) 2 KB 391

Indian statute, the convention cannot be relied upon. If however the convention does not conflict with any Indian law, then the international law must be accommodated and absorbed into Indian law. The sanction for this lies in Article 51 (c) of the Constitution.

Article 51 (c) states:

“The State shall endeavour

(c) to foster respect for international law and treaty obligations in the dealings of organised people with one another;

Chinnappa Reddy J. relied on the decision of Lord Denning in *West Rand Central Gold Mining Company v. The King*.

“It is quite true that whatever has received the common consent of civilised nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and complied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant.”

This proposition was also advanced by Lord Latham Chief Justice in *Politics v. The Commonwealth* where he held that though there was no doubt if international law conflicted with national law the former must yield to the latter, the main task however was to interpret statutes as far as the language admits not to be inconsistent with international law. The question, therefore, is not a question of the power of the Commonwealth Parliament to legislate in breach of international law, but is a question whether in fact it has done so. This was stated in almost similar language by the Supreme Court of India in *Tractor Export v. Tarapore & Co.*

What however, would be the position if the international covenant was not ratified? It is possible to argue is that even if a treaty or convention or resolution is not ratified or agreed to by India, courts are still at liberty, provided there exists no Indian law to the contrary, to incorporate these conventions, treaties and resolutions into Indian law and thereby enforce them. In *Peoples Union for Civil Liberties v. Union of India* the Supreme Court held :

- 3 70 Common Wealth LR 60
- 4 (1970) 3 SCR 53.
- 5 (1997) 3 SCC 433.
- 6 (1997) 6 SCC 241.
250 ICHLR
- 7 128 ALR 353
Bulletin on IHL & Refugee Law [Vol 3 No 2]

“The provisions of the Convention which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution can certainly be relied upon by the courts as facets of those fundamental rights and hence enforceable as such.”

This is therefore a clear enunciation of a principle that since fundamental rights are capable of an ever expanding definition international instruments may be incorporated into the fundamental rights and enforced in this manner.

This was done by the Supreme Court in the recent case of *Vishakha v. State of Rajasthan* where the court reiterated the principles that ‘in the absence of a domestic law occupying the field to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of international conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, the right to work with human dignity in Article 14, 15, 19 [1] [g] and 21 of the Constitution of India. Any international convention consistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the contents thereof.

Referring to the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) the Court held: “The international conventions and norms are to be read into them [fundamental rights] in the absence of an enacted domestic law occupying the field when there is no consistency between them.” The Court also approvingly referred to the decision of the High Court of Australia in *Minister for Immigration and Ethnic Affairs v. Teoh* where the high court recognised the concept of legitimate expectation in the context of observance of international law in the absence of a contrary legislative provision and even in the absence of a Bill of Rights in the Australian Constitution.

The right of refugees, in the absence of India’s ratification of the Refugee Convention is based on India’s claim to abide by the Universal Declaration of Human Rights, Article 14(1) of which states:

“Everyone has the right to seek and to enjoy in other countries asylum from persecution.”

Also on Article 13 of the International Covenant on Civil and Political Rights:

“Also alien unlawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be

8 (1976) 1 SCR 3.742

9 (1994) Supp (1) SCC 615.
252 ICHLR

represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.”

In addition Article 22 of the Convention on the Rights of the Child states:

“1. State Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, State Parties shall provide, as they consider appropriate, cooperation in any efforts by the United Nations and other competent intergovernmental organisations or non-governmental organisations cooperating with the United Nations to protect and assist such child and to trace the parents or other members of the family or any refugee child in order to obtain information necessary for reunification with his or her family. In case where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reasons, as set forth in the present convention.”

Are these Articles incorporated into Article 21 of the Constitution of India and can they be enforced in Indian courts? The first question to answer is whether there exists any Indian law which deals with the issue of refugees and if there is, does this law run counter to international law? The answer is simple. Neither the Citizens Act, 1955 nor the Foreigners Act, 1946 deal with the issue of refugees. Refugees as compared to other persons who either enter the country illegally or reside in the country illegally are distinguishable because they are persons governed by the ‘doctrine of necessity’ as they have been compelled to either enter the country or are compelled to reside in the country because of a reasonable fear of persecution. If there exists a ‘reasonable apprehension’ or a ‘well grounded fear of persecution’ or ‘a clear and present danger’ as in the case *National Human Rights Commission v. State of Arunachal Pradesh*, foreigners would be entitled to the protection of Article 21 of the Constitution and the state government would be required to act impartially and carry out its legal

- 10 Writ petition (criminal) 583 of 1992 on 25.9.1992.
- 11 Civil Rule No.1981 of 1989 & No.515 of 1990 on 11.9.1990.
- 12 Civil Rule No.516 of 1991.
- 13 Criminal writ petition No.658 of 1997 on 11.9.1997.
Bulletin on IHL & Refugee Law [Vol.3, No.2]
- 14 Civil Rule No.1847/89
254 ICHLR

obligations to safeguard the life, health and well being of foreigners.

In *Khudiram Chakma v. State of Arunachal Pradesh*, the Supreme Court approvingly referred to the Universal Declaration of Human Rights in the context of a refugee:

“Article 14 of the Universal Declaration of Human Rights, which speaks of the right to enjoy asylum, has to 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 shall not later return him to the country whence he came. Moreover, the Article carries considerable moral authority and embodies the legal prerequisite of regional declarations and instruments.”

An unreported judgement of the Supreme Court in *Dr. Malavika Karlekar v. Union of India*, directed the authorities to check whether refugee status ought to be granted and until the question is decided not to deport the petitioner. Similar orders were made by the Gauhati High Court.

Various high courts have also granted relief to refugees. In exercise of power under Article 226 of the Constitution read with Article 21, the Gauhati High Court in the case of *U. Myat Kayew and another v. State of Manipur and another* on 26.11.1991 allowed the petitioners who had entered India without valid travel documents and who were lodged in Manipur Central jail to be released on interim bail on personal bond to enable them to approach the UNHCR, Delhi to seek refugee status. The petitioners had taken part in the Movement for Democracy in Myanmar and had taken shelter in India. They voluntarily surrendered to the authorities and were taken into custody. Cases were registered against them under Section 14 of the Foreigners Act for illegal entry. The Court did not insist on local sureties as the petitioners were taken into custody. Cases were registered against them under Section 14 of the Foreigners Act for illegal entry. The Court did not insist on local sureties as the petitioners were foreigners and local sureties would not be easily available. Similar orders were passed by the High Court of Punjab & Haryana.

Therefore, though India is not a party to either the 1951 Convention on the Status of Refugees or the 1967 Protocol, the general principles of international law relating to refugees must be taken as incorporated directly into the Indian Constitutional Law via Article 21 particularly in view of the fact that India has acceded to the 1966 International Covenant on Civil and Political Rights, the 1966 International Covenant on Economics, Social & Cultural Rights, the 1989 Convention on the Rights of the Child, and the 1979 Convention on the Elimination of All Forms of Discriminations Against Women. No provision either in the Foreigners Act, 1946, nor the Registration of Foreigners Act, 1939 nor the Passport

[Entry into India] Act, 1920, nor the Passport Act, 1967 deal in any manner with refugees law. There is, therefore, no domestic law in conflict with international conventions, treaties and resolutions related to refugees. Section 3(1) of the Foreigners Act, 1946 does grant an absolute right to the Indian government to expel foreigners from Indian territory. It is not the right but the exercise of that right that is in question. This right has to be exercised in a reasonable manner. The reasonableness in the context of refugees is to be determined by international refugee law. That is how the various courts have granted relief to refugees in certain circumstances. That is how the Gauhati High Court in the case of *Bogyi v. Union of India* ordered the temporary release of a Burmese in order that the petitioner could apply for refugee status to the UNCHR.

In a special address by Dr Najma Heptulla, deputy chairperson of the Rajya Sabha (Upper House of Parliament) at a seminar on Refugees in the SAARC Region held in New Delhi in May 1997 the stand taken was that India had not acceded to the 1951 UN Convention on Refugees as well as the 1967 Protocol because the instruments called for refugees to be given certain facilities in respect of housing and education. A similar excuse was given by Justice Dr Nasim Hassan Shah, former Chief Justice of Pakistan when he said that Pakistan could ill afford the guarantee of the rights stipulated in the convention. The economic implications appear to be the main excuse. What both speakers did not understand was that the refugee convention was first of all a political issue where the States had to agree in principle to uphold the fundamental rights of foreigners fleeing persecution. Whether after the grant of asylum they are housed in slums or five star hotels was a secondary issue. In any case, Indian courts have achieved by judge made law what the government was unable or unwilling to do.

Today, therefore, it is a possible view, that international refugee law stands fully integrated into Indian law via Article 21 of the Constitution irrespective of the government's decision not to accede to the convention and protocol.