

# THE LAW, POLICY AND PRACTICE OF REFUGEE PROTECTION IN INDIA

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## 1. PRELIMINARY

India's diversity and stability have attracted people fleeing persecution and instability in their own countries. In South Asia, India is committed to maintaining a tolerant, democratic and secular government in a neighbourhood of unstable and volatile states. India has absorbed several population influxes in its history; the ability of these peoples to integrate into a multi-ethnic society and contribute peacefully to local cultures and economies has beckoned other refugees. India shares land and maritime borders with eleven countries, most of which are in various states of, or recently recovering from, strife; and, over the years, has hosted large refugee populations from neighbouring countries.

There are no authoritative statistics on the number of people who have fled persecution or violence in their countries of origin to seek safety in India. However, because of India's porous borders and accommodative policies, it was estimated that India hosted approximately 3,30,000 such people in 2004<sup>2</sup>. In addition, India's documented refugees are allegedly outnumbered by lakhs of unregistered persons who have entered the country from Nepal and Bhutan to escape violence and persecution in their countries. In 2004, it was estimated that over 20 lakh Nepalis fleeing from civil conflict had entered India undetected over the open border<sup>3</sup>. There are also an unknown but large number of people displaced from Bhutan because of their ethnic-Nepali origins.

Refugees and asylum seekers must be distinguished from migrants. According to the Convention Relating to the Status of Refugees, 1951 ["Refugee Convention"], a refugee is a person who flees across an international border because of a well-founded fear of being persecuted in his country of origin on account of race, religion, nationality, membership of a particular social group, or political opinion<sup>4</sup>. Therefore, refugees and asylum seekers are externally displaced people (EDPs) who have a well-

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<sup>2</sup> Florina Benoit, "India: A National Refugee Law Would Equalise Protection", Refugees International, 2004. See also, Country Operations Plan for India, United Nations High Commissioner for Refugees, 2006.

<sup>3</sup> Asian Development Bank, Nepal Country Strategy and Programme 2005-2009, September 2004.

<sup>4</sup> Article 1A(2) of the Refugee Convention defines a refugee as 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; 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."

founded fear of persecution in their countries of origin and hence cannot return. Refugees and asylum seekers share their well-founded fear of persecution with internally displaced people (IDPs) who, although they have not crossed an international border, also cannot return to their homes. Migrants, on the other hand, cross international borders in search of better socio-economic conditions and so do not possess a well-founded fear of persecution upon return. This article is only concerned with the protection of refugees and asylum seekers in India.

## **2. LEGAL FRAMEWORK FOR REFUGEE PROTECTION**

After the Second World War and the shared European experience of massive displacement, the Refugee Convention was adopted with restricted geographical and temporal conditions to apply to post-War Europe. In 1967, in an effort to give the Convention universal application, a Protocol Relating to the Status of Refugees [“1967 Protocol”] that removed the restrictions of the Convention was added. Together, these two key legal documents provide the basic framework for refugee protection across the world. As of February 2006, 146 countries were States Parties to either the Convention or its Protocol or both.

However, India has repeatedly declined to join either the Refugee Convention or its 1967 Protocol. In addition, India has resisted demands for a national legislation to govern the protection of refugees. In doing so, India has met the many refugee influxes into its territory through an *ad hoc* system of executive action which is determined by the government’s policy towards the country of origin. The relative success that India has had with this approach, which is guided by political instinct free from legal obligation, has led to an institutional complacency towards legal rights-enabling obligations to refugees. There has also been a hardening of attitudes about foreigners in recent years in light of heightened security concerns. This has resulted in genuine refugees paying an unfortunate price in a country that otherwise has an impressive history of protecting refugees.

### **(a) The Foreigners Act and its Application to Refugees**

In the absence of a specialised statutory framework, India relies on the Foreigners Act, 1946 to govern the entry, stay and exit of foreigners in India. However, the Foreigners Act is an archaic legislation that was enacted by a colonial government in response to the needs of the Second World War<sup>5</sup>. Its continued application in independent India for more than sixty years after the end of the war can only be seen as an indication of the government’s desire to retain almost absolute powers to deal with foreigners. Section 2(a) of the Act defines a ‘foreigner’ as “a person who is not a citizen of India”, thus covering all refugees within its ambit as well. Without a specialised governance regime for refugees they are usually treated on par with foreigners and illegal migrants, without any special protection being accorded to them. However, it is necessary to draw a distinction between foreigners as a general class and refugees as a special subset of that class.

Section 3 of the Foreigners Act vests the Central Government with the power to issue orders to control foreigners in India. There are a number of such Orders in force that

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<sup>5</sup> See the Statement of Objects and Reasons of the Foreigners Act, 1946.

restrict the movement, activity and residence of foreigners; and, require their proof of identity and regular appearance before the police<sup>6</sup>. In addition, Section 5 of this Act prevents foreigners from changing their name while in India; Section 6 requires masters of ships and pilots of aircraft to maintain records of travelling foreigners; Section 7 obliges hotel-keepers to maintain records of the stay of foreigners; Section 9 places the burden of proving that a person is not a foreigner on that person; Section 12 provides for the delegation of these powers; and, Sections 14, 14A and 14B penalise foreigners and abettors found in contravention of the Act or any Order made thereunder.

The Foreigners Act gives the executive wide powers to remove foreigners from India that have generally been exercised free from judicial review. This power is given to the Central Government by Section 3(2)(c) of the Foreigners Act, 1946<sup>7</sup>. This is in addition to the power to refuse entry for non-fulfilment of entry conditions that invites instant deportation. The unrestricted power of the executive to remove foreigners was first confirmed by the Supreme Court in 1955<sup>8</sup>, where it held that:

*“The Foreigners Act confers the power to expel foreigners from India. It vests the Central Government with absolute and unfettered discretion and, as there is no provision fettering this discretion in the Constitution, an unrestricted right to expel remains.”*

The untrammelled right of the executive to remove foreigners from India has been upheld by the Supreme Court in a number of subsequent decisions<sup>9</sup>. Furthermore, while exercising this vast executive discretion, any foreigner may be deported without the executive being burdened to give a reason for the deportation. Thus, there is no need for the executive to comply with any form of extended due process or for giving a hearing to the person to be deported<sup>10</sup>.

### **(b) Limited Constitutional Protection**

However, foreigners are entitled to some degree of constitutional protection while in India. These include the protection of the equality clause [Article 14] and the life, liberty and due process provisions [Article 21] of the Indian Constitution.

While Article 14 guarantees equality before the law and the equal treatment of the law, classifications of persons into separate and distinct classes based on intelligible differentia with a nexus to the object of the classification are allowed. Thus, the

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<sup>6</sup> See, for instance, the Foreigners (Restriction on Movements) Order, 1960; Foreigners (Restriction on Activities) Order, 1962; Foreigners (Restrictions on Residence) Order, 1968; Foreigners (Proof on Identity) Order, 1986; and, Foreigners (Report to Police) Order, 1971.

<sup>7</sup> Section 3(2)(c) of the Foreigners Act reads, *“In particular and without prejudice to the generality of the foregoing power, orders made under this section may provide that the foreigner...shall not remain in India, or in any prescribed area therein.”*

<sup>8</sup> *Hans Muller of Nuremberg* AIR 1955 SC 367 at pr. 36.

<sup>9</sup> See, *Louis De Raedt* (1991) 3 SCC 554 at pr. 13 and *Sarbananda Sonowal* (2005) 5 SCC 665 at prs. 74-79.

<sup>10</sup> See generally, *Hans Muller* AIR 1955 SC 367 at para 37; *Abdul Sattar Haji Ibrahim Patel* AIR 1965 SC 810 at pr. 10; *Ibrahim* AIR 1965 SC 618 at pr. 8; *Louis De Raedt* (1991) 3 SCC 554 at pr. 13; and, *Sarbananda Sonowal* (2005) 5 SCC 665 at prs. 49-52.

executive may distinguish between classes or descriptions of foreigners and deal with them differently. It follows that a foreigner discriminated by state action as against another foreigner of the same class or description has a valid constitutional cause of action<sup>11</sup>.

Article 21 protects any person from the deprivation of his life or personal liberty except according to procedure established by law. From a rather staid interpretation of this provision, the Supreme Court has radically reinterpreted Article 21 to include a substantive due process of law to be followed for any state action impinging on life and personal liberty. Foreigners enjoy the protection of Article 21 in two ways: (a) they are equally entitled to the right against deprivation of life or bodily integrity and dignity<sup>12</sup>, and (b) to a certain extent, the right against executive action sans procedural due process accrues to them<sup>13</sup>. However, cases which suggest a due process for deportation have to be confined to their own facts. Indian courts have generally upheld deportation orders passed in contravention of the *audi alteram partem* principle<sup>14</sup>.

In addition, foreigners are also entitled to the protection of some of the rights recognised in Article 20 [the right against prosecution under retrospective penal law; the right against double jeopardy; and, the right against self-incrimination]; Article 22 [rights upon arrest or detention]; Articles 25 – 28 [the right to freedom of conscience and the free practice and propagation of religion]; and, Article 32 [the right to move the Supreme Court for enforcement of the rights listed above].

### **3. INDIAN PRACTICE REGARDING REFUGEE PROTECTION**

Even though Indian law does not treat refugees as a special class distinct from foreigners, there have been a number of special legislative measures to deal with refugee influxes. Special laws to deal with refugees have been used primarily by the various State Governments<sup>15</sup>. Through a series of executive and administrative orders, both the Central and State Governments have distinguished refugees from foreigners while responding to various refugee-related crises. This approach, however, is an *ad hoc* one and recognises refugees as special class only when faced with mass influxes of people into India.

The practice of the Indian Government has been to deal with refugees in three main ways: (a) refugees in mass influx situations are received in camps and accorded temporary protection by the Indian Government including, sometimes, a certain

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<sup>11</sup> See, *Vincent Ferrer* AIR 1974 AP 313 at pr. 2; *Basheshar Nath* AIR 1959 SC 149 at pr. 14; and, *Hans Muller* AIR 1955 SC 367 at prs. 23-24

<sup>12</sup> See, *Louis De Raedt* (1991) 3 SCC 554 at pr. 13; *Chandrima Das* (2000) 2 SCC 465 at prs. 28, 32 and 34; *Anwar* (1971) 3 SCC 104 at pr. 4; and, *National Human Rights Commission* (1996) 1 SCC 742 at pr. 20.

<sup>13</sup> See, *P. Mohammad Khan* (1978) II APWR 408.

<sup>14</sup> *Supra* note 10.

<sup>15</sup> Special measures to respond to refugee influxes were most extensive in the aftermath of the Partition of India in 1947, the Tibetan influx in 1959 and the Bangladeshi mass influx in 1971. See, *Rajeev Dhavan*, *Refugee Law and Policy in India* (New Delhi: PILSARC, 2004).

measure of socio-economic protection<sup>16</sup>; (b) asylum seekers from South Asian countries, or any other country with which the government has a sensitive relationship, apply to the government for political asylum which is usually granted without an extensive refugee status determination subject, of course, to political exigencies<sup>17</sup>; and (c) citizens of other countries apply to the Office of the United Nations High Commissioner for Refugees (UNHCR) for individual refugee status determination in accordance with the terms of the UNHCR Statute and the Refugee Convention<sup>18</sup>.

Indian refugee policy is often guided by political compulsions, not rights-enabling legal obligations. The first mass influx following the Partition of the country in 1947 was met with a number of legal, executive and administrative mechanisms designed to assist and eventually integrate the incoming Hindus and Sikhs into the national mainstream<sup>19</sup>. The first 'foreign' influx of refugees occurred in 1959 from Tibet when the government, politically uncomfortable with China, set up transit camps, provided food and medical supplies, issued identity documents and even transferred land for exclusive Tibetan enclaves across the country for cultivation and occupation along with government-provided housing, healthcare and educational facilities. The Sri Lankan Tamil refugees, having arrived in India in three waves beginning in 1983, have also been relatively well received in the geographically and ethnically contiguous State of Tamil Nadu where a large degree of local integration has occurred. In comparison, the Chakma influxes of 1964 and 1968 saw a subdued and reluctant government response<sup>20</sup>.

Perhaps the largest mass influx in post-Partition history occurred in 1971 when approximately 16 million refugees from erstwhile East Pakistan sought safety in India. Enormous amounts of socio-economic and other resources were expended by the both the Central Government and the governments of the neighbouring States to deal with the crisis. Although most of the refugees returned within a year, the

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<sup>16</sup> India has received and accommodated mass influx refugees from Tibet and Sri Lanka in special camps with varying facilities for health, education and employment.

<sup>17</sup> Asylum seekers who enter India individually after a mass influx has taken place are granted asylum after a preliminary screening mechanism. This process continues in the case of Tibetans and Sri Lankans who enter India in small numbers and must fulfil certain criteria before they are registered by the Indian Government.

<sup>18</sup> In 2003, the UNHCR handled, *inter alia*, 10,283 refugees from Afghanistan and 940 refugees from Myanmar. The UNHCR also handles refugees from Iran, Somalia, Sudan and other countries. See, the UNHCR Statistical Yearbook – India, 2003, UNHCR Geneva.

<sup>19</sup> See generally, the East Punjab Evacuees (Administration of Property) Act, 1947; Patiala Refugees (Registration of Land Claims) Ordinance, 1948; East Punjab Refugees (Registration of Land Claims) Act, 1948; Refugees (Registration of Land Claims) Act, 1948; Administration of Evacuee Property Act, 1950; Displaced Persons (Claims) Act, 1950; Evacuee Interest (Separation) Act, 1951; Transfer of Evacuee Deposits Act, 1954; Displaced Persons (Compensation and Rehabilitation) Act, 1954; and, Displaced Persons (Claims) Supplementary Act, 1954.

<sup>20</sup> See, *National Human Rights Commission* (1996) 1 SCC 742 at pr. 15 where the Supreme Court observes, “*The threat posed [to the Chakma refugees] was grave enough to warrant the placing of two additional battalions of [police]. It is reported that...economic blockades on the refugee camps adversely affected the supply of rations, medical and essential facilities etc. to the Chakmas. The fact that the Chakmas were dying on account of the blockade for want of medicines is an established fact.*”

experience left the Indian government both bitter at the non-responsiveness of international organisations and complacent in the confidence of being able to deal with future mass influxes.

Refugees who are not extended direct assistance by the Indian Government are free to apply to the UNHCR for recognition of their asylum claims and other assistance. To this end, the UNHCR is mandated by its parent Statute to conduct individual refugee status determination tests and issue certificates of refugee status to those who fulfil the criteria of the Refugee Convention. The Refugee Certificates issued by the UNHCR are not formally recognised by the Indian Government, making them legally unenforceable in India. However, the authorities have, in general practice, taken cognisance of the UNHCR's Refugee Certificates to allow most refugees an extended stay in India in the absence of political opposition. Therefore, while a *de jure* system of refugee protection in India does not exist, there is a system of procedures and practices that serve to create a *de facto* refugee protection regime in India.

The ambivalence of India's refugee policy is sharply brought out in relation to its treatment of the UNHCR. While no formal arrangement exists between the Indian government and the UNHCR, India continues to sit on the UNHCR's Executive Committee in Geneva. Furthermore, India has not signed or ratified the Refugee Convention. This creates a paradoxical and rather baffling situation regarding the UNHCR where India sits on its Executive Committee and allows the UNHCR to operate on its territory, but refuses to sign the legal instrument that brought the organisation into existence.

#### **4. JUDICIAL TREATMENT OF REFUGEES**

Indian courts, while generally strictly interpreting the stringent legislation on foreigners by refusing to interfere with the powers of the executive, have, on occasion, evolved a wider and more humane approach to protect the rights of refugees in India. However, since this approach is unsystematic and dependent upon the exigencies of the situation, it must be seen as an exception to the normal rule.

In 1996, the Supreme Court in *National Human Rights Commission v. State of Arunachal Pradesh*<sup>21</sup> intervened with a liberal interpretation of the law to suggest that refugees are a class apart from foreigners deserving of the protection of Article 21 of the Constitution. The Court held at pr. 20,

*“We are a country governed by the Rule of Law. Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of his life or personal liberty except according to procedure established by law. Thus the State is bound to protect the life and liberty of every human being, be he a citizen or otherwise, and it cannot permit anybody or group of persons, e.g., the AAPSU, to threaten the Chakmas to leave the State, failing which they would be forced to do so.”*

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<sup>21</sup> (1996) 1 SCC 742.

While there is no real and specific recognition of the right against *non refoulement*, courts have, on rare occasions, accorded to individual refugees the right against forced repatriation<sup>22</sup>. Courts have also provided a certain measure of socio-economic protection in special circumstances<sup>23</sup>. The role of the UNHCR in India has also been given a limited recognition by the judiciary. Courts have enjoined deportation proceedings and ordered the release of individual refugees in order to provide an opportunity to approach the UNHCR for refugee status determination or to allow resettlement to take place<sup>24</sup>. However, it is not possible to reconcile these rare instances of judicial liberalism with the traditionally stringent judicial approach to foreigners. Therefore, such cases must be confined to their special facts.

## 5. INDIA'S INTERNATIONAL COMMITMENTS

India refuses to join the Refugee Convention, which it first found too 'Euro-centric' and then saw as a Cold War tool to criticise communist countries by accepting refugees from the eastern bloc into what was declared to be the 'free world'. Together with the obligations of non-alignment, these reasons led India to abstain from voting on United Nations General Assembly Resolution 319(IV) of 1949 that resulted in the creation of the Refugee Convention and the UNHCR. In fact, in the early 1950s, the UNHCR's representative was summoned by New Delhi and told of India's specific unease with the Refugee Convention and the UNHCR<sup>25</sup>.

With the addition of the 1967 Protocol giving the Refugee Convention a global appeal and with the collapse of the Cold War's eastern bloc, India's real and current reasons for not joining the Convention are more apparent. Bound by the compulsions of realpolitik and the constant fear for national security, India does not want to be tied down by an international legal obligation that impinges upon its discretion to regulate the entry of foreigners into its territory. This concern must be understood in the context of South Asia's unstable geopolitics, not to mention its volatile ethnicities.

Indian and other commentators from developing countries also call attention to the current state of flux in international refugee law<sup>26</sup>. In a statement to the Executive

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<sup>22</sup> See, *P. Nedumaran* (unreported) WPs 12298 & 12313/1992, Madras High Court; and, *Gurunathan* (unreported) WPs 6708 & 79168/1992, Madras High Court.

<sup>23</sup> See, *Digvijay Mote* (unreported) WA 354/1994, Karnataka High Court.

<sup>24</sup> See *Malvika Karlekar* (unreported) WP 583/1992, Supreme Court; *Bogyi* (unreported) WP 1847/1989; *Khy Toon* (unreported) WP 525/1990, (both Guwahati High Court); *Shah Gazai* (unreported) WP 499/1996, Punjab & Haryana High Court; *Ktaer Abbas Habib Al Qutaifi* 1999 Cri LJ 919 (Gujarat High Court) at paras 18 – 20; *Lailoma Wafa* (unreported) WP 312/1998 (Delhi High Court).

<sup>25</sup> Foreign Secretary R. K. Nehru met UNHCR representative Amir Ali in 1953-1954 and conveyed India's displeasure with the politics of the Refugee Convention. See, *Rajeev Dhavan*, *Refugee Law and Policy in India*, (New Delhi: PILSARC, 2004); and, B. S. Chimni, "The Legal Condition of Refugees in India", *Journal of Refugee Studies*, Vol. 7, No. 4, 1994, pp. 394-398.

<sup>26</sup> See, B. S. Chimni, "From Resettlement to Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems", UNHCR, 1999; Penelope Mathew, "Retreating from the Refugee Convention" in *Treaty-Making and Australia: Globalisation versus Sovereignty?* (Alston & Chiam eds., Annandale, Australia: Federation Press, 1995); *James Hathaway*, *Reconceiving International Refugee Law*, (The Hague: Martinus Nijhoff, 1997);

Committee of the UNHCR in October 2003, the Indian Permanent Representative pointed out that the situation of refugee and migratory movements in the world today are vastly different from what they were when the UNHCR was created and this had to be reflected in practice to enhance the UNHCR's ability to play a meaningful role<sup>27</sup>.

However, India has signed a number of international conventions that impinge upon its obligations towards refugees. These include the Universal Declaration of Human Rights, 1948<sup>28</sup>; the International Convention on Civil and Political Rights, 1966<sup>29</sup>; the International Convention on Economic, Social and Cultural Rights, 1966; the International Convention on the Elimination of all Forms of Racial Discrimination, 1966; the Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment, 1984<sup>30</sup>; and, the Convention for the Elimination of all Forms of Discrimination Against Women, 1979. India's international law obligations must be considered in the light of these commitments.

The traditional view of the Indian judiciary on the application of general norms of international law as well as India's treaty obligations on the Fundamental Rights chapter of the Indian Constitution was that treaties do not create rights in municipal law unless they are specifically incorporated<sup>31</sup>. However, India's jurisprudence on treaties has evolved to now require the general norms of international law be respected and incorporated into the Fundamental Rights chapter of the Indian Constitution even if not ratified by India, where the principles or norms are such that they are deserving of universal application; especially in relation to human rights-enhancing provisions of international conventions even where they have not been specifically incorporated into Indian law by legislation. It is now generally well settled that treaty obligations which are rights-enhancing are to be read as part of the life, liberty and due process provision<sup>32</sup>.

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and, James Hathaway, "The Emerging Politics of Non-Entrée", *Refugees*, Vol. 91, December, pp. 40-41.

<sup>27</sup> Mr. H. S. Puri, the Indian Permanent Representative at the Executive Committee of the UNHCR said that, "...the international legal framework [of refugee protection] still falls short of dealing with massive flows and mixed migration. In the absence of appropriate adjustments to match these realities, countries such as India will find it difficult to accede to this framework, their commitment to hosting refugees notwithstanding... For example, in some instances in the past, the UNHCR has closed its offices at the peak of crisis situations, leaving countries to single-handedly bear the burden of hosting millions of refugees."

<sup>28</sup> Article 14(1) of the UDHR states that, "everyone has the right to seek and to enjoy in other countries asylum from persecution".

<sup>29</sup> Article 13 of the ICCPR states that, "an alien lawfully 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 represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

<sup>30</sup> Article 3(1) of the CAT states that, "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."

<sup>31</sup> See, *Maganbhai Patel* AIR 1969 SC 783 at pr. 81.

<sup>32</sup> See generally, *Nilabati Behera* (1993) 2 SCC 746 at pr. 21; *Vishaka* (1997) 6 SCC 241 at pr. 7; *People's Union for Civil Liberties* (1997) 3 SCC 433 at pr. 13; *People's Union for Civil*



Significant pressure to accede to the Refugee Convention and enact refugee protection legislation for the country is exerted on the Indian Government by the National Human Rights Commission (NHRC). The NHRC is a statutory body established under the Protection of Human Rights Act, 1993, and is mandated by Section 12(f) of that Act to “*study treaties and other international instruments on human rights and make recommendations for their effective implementation*”. The NHRC was instrumental in ensuring that the Indian Government signed the CAT on 14<sup>th</sup> October 1997. In its Fifth, Seventh, Eighth, Ninth and Tenth Annual Reports, the NHRC consistently highlights the need for an effective Indian refugee protection regime, by joining the Refugee Convention and enacting protective national legislation. Within the NHRC, a committee of experts examines matters of Indian refugee law and policy. In its Seventh Report, the NHRC addressed the need for domestic refugee protection law<sup>33</sup>, which was repeated in its Eighth and Ninth Reports<sup>34</sup>. The NHRC’s Tenth Report, its latest, continues to push the Indian Government and chastises it for failing to meet its international law responsibilities<sup>35</sup>.

## **6. FUTURE PROTECTION**

The need for a stable and secure guarantee of refugee protection in India led to the establishment of an Eminent Persons Group (EPG), chaired by former Chief Justice P. N. Bhagwati, to suggest a model law for refugee protection. However, the process of drafting appropriate refugee protection legislation began earlier at the Third South

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*Liberties* (1997) 1 SCC 301 at prs. 23-25; *Apparel Export Promotion Council* (1999) 1 SCC 759 at prs. 26-27; *Githa Hariharan* (1999) 2 SCC 228 at pr. 14; and, *Chandrima Das* (2000) 2 SCC 465 at prs. 24-27. Mention may be made of the judgement in *Vishaka* (1997) 6 SCC 241 where the Supreme Court held at pr. 7 that “*any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, [and] to promote the object of the constitutional guarantee.*” See further, Rajeev Dhavan, “Treaties and People: Indian Reflections”, 44 JILI 1996, pp. 362-376.

<sup>33</sup> See, the Seventh Annual Report of the National Human Rights Commission, 1999-2000 at pr. 4.9: “*It is the opinion of the Commission that the drafting and adoption of such a law is essential. ...[T]he Commission resolved to pursue the general issue relating to the enactment of a national legislation relating to the status of refugees. In response to questions by the Commission, the Government of India indicated that the possibility of enacting relevant legislation was being examined, as also the possibility of signing the 1951 Convention on the Status of Refugees and the 1967 Protocol on this subject.*”

<sup>34</sup> See, the Eighth Annual Report of the National Human Rights Commission, 2000-2001 at prs. 4.23-4.24 and the Ninth Annual Report of the National Human Rights Commission, 2001-2002 at prs. 5.20-5.23.

<sup>35</sup> Tenth Annual Report of the National Human Rights Commission, 2002-2003 at prs. 5.20-5.21: “*The Commission has stressed the need for a comprehensive national legislation to deal with refugee situations facing our country and to distinguish bona fide refugees from economic migrants, illegal immigrants and other foreigners. The Commission expressed the hope that the action initiated by the Central Government in this respect would be completed within a clearly defined time frame and that it would be consonant with the decisions of the Supreme Court, as well as with the principal international instruments on this subject, notably the 1951 Convention relating to the Status of Refugees and the 1967 Protocol. It remains the view of the Commission that greater priority should be given to this matter by the Government of India...*”

Asian Informal Regional Consultation on Refugee Migratory Movements, where a five-member working group was constituted to draft a model refugee protection law for the South Asian region. The first draft of this proposed law was presented at the 1997 SAARCLAW Seminar in New Delhi, modified and then adopted by the Fourth Annual Meeting of the Regional Consultation at Dhaka in 1997. The India-specific model law was born out of this regional consultative process to provide statutory protection to refugees in the diverse South Asian region.

There have been intermittent attempts in Parliament to highlight the special needs of refugees, but no member has yet demanded a specific law for identifying and protecting refugees, and no legislative attempts have been made – not even a private member's bill – to create such a law. Viewed in the light of the millions of refugees India has hosted, it would not be amiss to conclude that there has been and continues to remain an unspoken political consensus to maintain a stringent and flexible legal regime for foreigners to allow executive action unfettered by law. This legal rigidity is at odds with India's porous borders and fluid ethnicities, and with the very idea of a diverse and multicultural nation. In the years ahead, a concerted effort to reform Indian immigration law and introduce refugee-specific protective legislation must be made.

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